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BY

JOHN BOUVIER.

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Je sais que chaque science et chaque art a ses termes propres, inconnus au common des hommes.—Fleury.

A New Edition

THOROUGHLY REVISED AND BROUGHT UP TO DATE

BY

FRANCIS RAWLE

OF THE PHILADELPHIA BAR.

IN TWO VOLUMES.

Vol. I.

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PREFACE.

THIS work as originally prepared by its learned author, Judge Bouvier, in 1839, was more strictly a dictionary of the law. The edition of 1867 was prepared by many hands, and was somewhat of a legal encyclopedia as well as a law dictionary. The edition of 1883, which was the work of the present Editor, added a large amount of new matter along both lines, but more particularly in the way of an encyclopedia. In the present edition it has been the Editor's aim to make the work a complete dictionary of the law, and also to develop still more fully its encyclopedic side, extending very largely the lines on which the editions of 1867 and 1883 were based, and he has endeavored, by rearranging titles and by cross-references, to unify and harmonize the whole.

So far as the prescribed limits permit, the important topics of the law have been treated fully, especially those in which the law has shown marked development in the last fifteen years. The new topics other than mere defined words, and those which have received substantially new treatment, number several hundred.

The recent investigations in the early history of the English law and its relation to the Roman law have been used by the Editor in the various titles which relate thereto.

The present edition contains over four thousand new words and titles.

Constant references will be found to learned monographs, chiefly in the legal periodicals, upon subjects which cannot be fully treated here. In this way material of great interest and value is brought to the attention of the lawyer and the student.

A large part of the work has been rewritten, and every title has been carefully revised and corrected. The new matter is more than one-half of the whole, although the actual increase in size is only about one-third. In order to save space, some of the earlier and redundant citations have been omitted. Related titles have in many cases been treated together, but it is believed that, by the complete system of cross-references which has been adopted, this will not interfere with the utility of the book as a work of reference. The list of Reports has been omitted, as belonging rather to a law catalogue, and titles which are based chiefly upon constantly changing legislation have been shortened.

The Editor expresses his great obligations to George H. Bates, Esq., who has collaborated with him throughout the entire preparation of the work.

Edwin C. Brandenburg, Esq., of the Washington Bar, has rendered valuable assistance in the collection of cases which have been incorporated into many titles, and has prepared several titles on matters connected with the general government, such as Public Lands, Mining Laws, &c. J. Douglass Brown, Jr., Esq., of the Philadelphia Bar, has prepared the titles on Mortgages and Pledges. Walter Chrystie, M. D., of Bryn Mawr, Pennsylvania, has revised most of the titles relating to Medical Jurisprudence.

Obviously the field to be covered is the entire body of the law, and this must be brought within two volumes of ordinary size. It is therefore upon the successful choosing of what is most necessary and suitable that the value of the work must largely depend. Great care has been taken in this respect in order that this edition may be useful, not only to the bench and to the bar, but also as a general book of reference. In so broad a field the Editor cannot believe that omissions and even errors will not be found, but he submits the result of his labors in the hope that both in the selection of material and in the accuracy of treatment it may merit approval.

FRANCIS RAWLE.

December 1, 1897.

PREFACE

TO THE FIRST EDITION.

To the difficulties which the author experienced on his admission to the bar, the present publication is to be attributed. His endeavors to get forward in his profession were constantly obstructed, and his efforts for a long time frustrated, for want of that knowledge which his elder brethren of the bar seemed to possess. To find among the reports and the various treatises on the law the object of his inquiry, was a difficult task: he was in a labyrinth without a guide; and much of the time which was spent in finding his way out might, with the friendly assistance of one who was acquainted with the construction of the edifice, have been saved, and more profitably employed. He applied to law dictionaries and digests within his reach, in the hope of being directed to the source whence they derived their learning; but he was too often disappointed: they seldom pointed out the authorities where the object of his inquiry might be found. It is true such works contain a great mass of information, but, from the manner in which they have been compiled, they sometimes embarrassed him more than if he had not consulted them. They were written for another country, possessing laws different from our own, and it became a question how far they were or were not applicable here. Besides, most of the matter in the English law dictionaries will be found to have been written while the feudal law was in its full vigor, and not fitted to the present times, nor calculated for present use, even in England. And there is a great portion which, though useful to an English lawyer, is almost useless to the American student. What, for example, have we to do with those laws of Great Britain which relate to the person of their king, their nobility, their clergy, their navy, their army; with their game laws; their local statutes, such as regulate their banks, their canals, their exchequer, their marriages, their

births, their burials, their beer and ale houses, and a variety of similar subjects?

The most modern law dictionaries are compilations from the more ancient, with some modifications and alterations; and, in many instances, they are servile copies, without the slightest alteration. In the mean time the law has undergone a great change. Formerly the principal object of the law seemed to be to regulate real property, in all its various artificial modifications, while little or no attention was bestowed upon the rules which govern personal property and rights. The mercantile law has since arisen, like a bright pyramid, amid the gloom of the feudal law, and is now far more important in practice than that which refers to real estate. The law of real property, too, has changed, particularly in this country.

The English law dictionaries would be very unsatisfactory guides, even in pointing out where the laws relating to the acquisition and transfer of real estate, or the laws of descent in the United States, are to be found. And the student who seeks to find in the Dictionaries of Cowel, Manly, Jacobs, Tomlins, Cunningham, Burn, Montefiore, Pott, Whishaw, Williams, the Termes de la Ley, or any similar compilation, any satisfactory account in relation to international law, to trade and commerce, to maritime law, to medical jurisprudence, or to natural law, will probably not be fully gratified. He cannot, of course, expect to find in them any thing in relation to our government, our constitutions, or our political or civil institutions.

It occurred to the author that a law dictionary, written entirely anew, and calculated to remedy those defects, would be useful to the profession. Probably overrating his strength, he resolved to undertake the task; and, if he should not fully succeed, he will have the consolation to know that his effort may induce some more gifted individual, and better qualified by his learning, to undertake such a task, and to render the American bar an important service. Upon an examination of the constitution and laws of the United States, and of the several states of the American Union, he perceived many technical expressions and much valuable information which he would be able to incorporate in his work. Many of these laws, although

local in their nature, will be found useful to every lawyer, particularly those engaged in mercantile practice. As instances of such laws the reader is referred to the articles *Acknowledgment*, *Descent*, *Divorce*, *Letters of Administration*, and *Limitation*. It is within the plan of this work to explain such technical expressions as relate to the legislative, executive, or judicial departments of the government; the political and the civil rights and duties of the citizens; the rights and duties of persons, particularly such as are peculiar to our institutions, as, the rights of descent and administration; of the mode of acquiring and transferring property; to the criminal law, and its administration. It has also been an object with the author to embody in his work such decisions of the courts as appeared to him to be important, either because they differed from former judgments, or because they related to some point which was before either obscure or unsettled. He does not profess to have examined or even referred to all the American cases: it is a part of the plan, however, to refer to authorities, generally, which will lead the student to nearly all the cases.

The author was induced to believe that an occasional comparison of the civil, canon, and other systems of foreign law, with our own, would be useful to the profession, and illustrate many articles which, without such aid, would not appear very clear; and also to introduce many terms from foreign laws, which may supply a deficiency in ours. The articles *Condonation*, *Extradition*, and *Novation* are of this sort. He was induced to adopt this course because the civil law has been considered, perhaps not without justice, the best system of written reason; and as all laws are, or ought to be, founded in reason, it seemed peculiarly proper to have recourse to this fountain of wisdom: but another motive influenced this decision; one of the states of the Union derives most of its civil regulations from the civil law; and there seemed a peculiar propriety, therefore, in introducing it into an American law dictionary. He also had the example of a Story, a Kent, Mr. Angell, and others, who have ornamented their works from the same source. And he here takes the opportunity to acknowledge the benefits which he has derived from the learned labors of these gentlemen, and of those of Judge Sergeant, Judge Swift, Judge Gould, Mr. Rawle, and other writers on American law and jurisprudence.

In the execution of his plan, the author has, in the first place, defined and explained the various words and phrases, by giving their most enlarged meaning, and then all the shades of signification of which they are susceptible; secondly, he has divided the subject in the manner which to him appeared the most natural, and laid down such principles and rules as belong to it; in these cases he has generally been careful to give an illustration, by citing a case whenever the subject seemed to require it, and referring to others supporting the same point; thirdly, whenever the article admitted of it, he has compared it with the laws of other countries within his reach, and pointed out their concord or disagreement; and, fourthly, he has referred to the authorities, the abridgments, digests, and the ancient and modern treatises, where the subject is to be found, in order to facilitate the researches of the student. He desires not to be understood as professing to cite cases always exactly in point; on the contrary, in many instances the authorities will probably be found to be but distantly connected with the subject under examination, but still connected with it, and they have been added in order to lead the student to matter of which he may possibly be in pursuit.

To those who are aware of the difficulties of the task, the author deems it unnecessary to make any apology for the imperfections which may be found in the work. His object has been to be useful: if that has been accomplished in any degree, he will be amply rewarded for his labor; and he relies upon the generous liberality of the members of the profession to overlook the errors which may have been committed in his endeavors to serve them.

PHILADELPHIA, September, 1839

REVIEW

OF

BOUVIER'S LAW DICTIONARY

AND

"INSTITUTES OF AMERICAN LAW."

BY S. AUSTIN ALLIBONE, LL.D.,

AUTHOR OF "THE DICTIONARY OF AUTHORS."

From the North American Review for July, 1861.

THE author of these volumes taught lawyers by his books, but he taught all men by his example, and we should therefore greatly err if we failed to hold up, for the imitation of all, his successful warfare against early obstacles, his unconquerable zeal for the acquisition of knowledge, and his unsparing efforts to distribute the knowledge thus acquired for the benefit of his professional brethren. Born in the village of Codognan, in the department Du Gard, in the south of France, in the year 1787, at the age of fifteen he accompanied his father and mother—the last a member of the distinguished family of Benezet—to Philadelphia, where he immediately applied himself to those exertions for his own support which the rapid diminution of his father's large property had rendered necessary. In 1812 he became a citizen of the United States, and about the same time removed to West Philadelphia, where he built a printing-office, which still exists as an honorable monument of his enterprise. Two years later we find him settled at Brownsville, in the western part of Pennsylvania, where, in 1814, he commenced the publication of a weekly newspaper, entitled "The American Telegraph." In 1818, on Mr. Bouvier's removal to Uniontown, he united with it "The Genius of Liberty," and thenceforth issued the two journals in one sheet, under the title of "The Genius of Liberty and American Telegraph." He retained his connection with this periodical until July 18, 1820.

It was while busily engaged as editor and publisher that Mr. Bouvier resolved to commence the study of the law. He attacked Coke and Blackstone with the determination and energy which he carried into every department of action or speculation, and in 1818 he was admitted to practice in the Court of Common Pleas of Fayette county, Pennsylvania. During the September term of 1822 he was admitted as an attorney of the Supreme Court of Pennsylvania, and in the following year he removed to Philadelphia, where he resided until his death. In 1836 he was appointed by Governor Ritner Recorder of the City of Philadelphia, and in 1838 was commissioned by the same chief magistrate as an Associate Judge of the Court of Criminal Sessions. But the heavy draughts upon time and strength to which he was continually subjected had not been permitted to divert his mind from the cherished design of bestowing upon his profession a manual of which it had long stood in urgent need. While laboring as a student of law, and even after his admission to the bar, he had found his efforts for advance-

ment constantly obstructed, and often frustrated, by the want of a conveniently-arranged digest of that legal information which every student should have, and which every practising lawyer must have, always ready for immediate use. The English Law Dictionaries — based upon the jurisprudence of another country, incorporating peculiarities of the feudal law, that are to a great extent obsolete even in England, only partially brought up to the revised code of Great Britain, and totally omitting the distinctive features of our own codes—were manifestly insufficient for the wants of the American lawyer. A Law Dictionary for the profession on this side of the Atlantic should present a faithful incorporation of the old with the new,—of the spirit and the principles of the earlier codes, and the "newness of the letter" of modern statutes. The Mercantile Law, with the large body of exposition by which it has been recently illustrated; the Law of Real Property in the new shape which, especially in America, it has latterly assumed; the technical expressions scattered here and there throughout the Constitution of the United States, and the constitutions and laws of the several States of the American Union,—all these, and more than these, must be within the lawyer's easy reach if he would be spared embarrassment, mortification, and decadence.

A work which should come up to this standard would indeed be an invaluable aid to the profession; but what hope could be reasonably entertained that the requisites essential to its preparation — the learning, the zeal, the acumen to analyze, the judgment to synthesize, the necessary leisure, the persevering industry, and the bodily strength to carry to successful execution—would ever be combined in one man? Mr. Bouvier determined that it should not be his fault if such a work was not at least honestly attempted. Bravely he wrought, month in and out, year in and out, rewarded for his self-denying toil by each well-executed article, and rejoicing, at rare and prized intervals, over a completed letter of the alphabet.

In 1839 the author had the satisfaction of presenting in two octavo volumes the results of his anxious toils to his brethren and the world at large; and the approving verdict of the most eminent judges—Judge Story and Chancellor Kent, for example—assured him that he had "not labored in vain," nor "spent his strength for naught." This was well; but the author himself was the most rigid and unsparing of his critics. Contrary to the practice of many writers, considering the success of the first and second editions as a proper stimulus to additional accuracy, fulness, and completeness in every part, in 1848, when the third edition was called for, the second having been published in 1843, he was able to announce that he had not only "remodelled very many of the articles contained in the former editions," but also had "added upwards of twelve hundred new ones." He also presented the reader with "a very copious index to the whole, which, at the same time that it will assist the inquirer, will exhibit the great number of subjects treated of in these volumes."

He still made collections on all sides for the benefit of future issues, and it was found after the death of the author, in 1851, that he had accumulated a large mass of valuable materials. These, with much new matter, were, by competent editorial care, incorporated into the text of the third edition, and the whole was issued as the fourth edition in 1852. The work had been subjected to a thorough revision,—inaccuracies were eliminated, the various changes in the constitutions of several of the United States were noticed in their appropriate places, and under the head of "Maxims" alone thirteen hundred new articles were added.

That in the ensuing eight years six more editions were called for by the profession, is a tribute of so conclusive a character to the merits of the work that eulogy seems superfluous. Let us, then, briefly examine those features to which the great professional popularity of the Law Dictionary is to be attributed. Some of these, specified as *desiderata*, have been already referred to with sufficient particularity. But it has been the aim of the author to cover a wider field than the one thus designated. He has included in his plan technical expressions relating to the legislative, executive, and judicial departments of the government; the political and the civil rights and duties of citizens; the rights and duties of persons, especially such as are peculiar to the institutions of the United States,—for instance, the rights of descent and administration, the mode of acquiring and transferring property, and the criminal law and its administration.

He was persuaded—and here as elsewhere he has correctly interpreted the wants of the profession—that an occasional comparison of the civil, canon, and other systems of foreign law with our own would be eminently useful by way of illustration, as well as for other purposes too obvious to require recital. We will barely suggest the advantage to the student of civil law or canon law of having at hand a guide of this character. And we would express our hope that the student of civil or of canon law is not hereafter to be that *rara avis* in the United States which, little to our credit, he has long been. He who would be thoroughly furnished for his high vocation will not be satisfied to slake his thirst for knowledge even at the streams (to which, alas! few aspire) of Bracton, Britton, or Fleta; he will ascend rather to the fountains from which these drew their fertilizing supplies.

To suppose that he who draws up many thousands of definitions, and cites whole libraries of authorities, shall never err in the accuracy of statement or the relevancy of quotation, is to suppose such a combination of the best qualities of a Littleton, a Fearne, a Butler, and a Hargrave, as the world is not likely to behold while law-books are made and lawyers are needed. If Chancellor Kent, after "running over almost every article in" the first edition (we quote his own language), was "deeply impressed with the evidence of the industry, skill, learning, and judgment with which the work was completed," and Judge Story expressed a like favorable verdict, the rest of us, legal and lay, may, without any unbecoming humiliation, accept their *dicta* as conclusive. We say *legal and lay;* for the lay reader will make a sad mistake if he supposes that a Law Dictionary, especially *this* Law Dictionary, is out of "his line and measure." On the contrary, the Law Dictionary should stand on the same shelf with Sismondi's Italian Republics, Robertson's Charles the Fifth, Russell's Modern Europe, Guizot's Lectures, Hallam's Histories, Prescott's Ferdinand and Isabella, and the records of every country in which the influences of the canon law, the civil law, and the feudal law, separately or jointly, moulded society, and made men, manners, and customs what they were, and, to no small extent, what they still are.

In common with the profession on both sides of the water, Judge Bouvier had doubtless often experienced inconvenience from the absence of an Index to Matthew Bacon's New Abridgment of the Law. Not only was this defect an objection to that valuable compendium, but since the publication of the last edition there had been an accumulation of new matter which it was most desirable should be at the command of the law student, the practising lawyer, and the bench. In 1841 Judge Bouvier was solicited to prepare a new edition, and undertook the arduous task. The revised work was presented to the public in ten royal octavo volumes, dating from 1842 to 1846. With the exception of one volume, edited

by Judge Randall, and a part of another, edited by Mr. Robert E. Peterson, Judge Bouvier's son-in-law, the whole of the labor, including the copious Index, fell upon the broad shoulders of Judge Bouvier. This, the second American, was based upon the seventh English edition, prepared by Sir Henry Gwillim and Messrs. C. E. Dodd and William Blanshard, and published in eight royal octavos in 1832. In the first three volumes Bouvier confines his annotations to late American decisions; but in the remaining volumes he refers to recent English as well as to American Reports.

But this industrious scholar was to increase still further the obligations under which he had already laid the profession and the public. The preparation of a comprehensive yet systematic digest of American law had been for years a favorite object of contemplation to a mind which had long admired the analytical system of Pothier. Unwearied by the daily returning duties of his office and the bench, and by the unceasing vigilance necessary to the incorporation into the text of his Law Dictionary of the results of recent trials and annual legislation, he laid the foundations of his "Institutes of American Law," and perseveringly added block upon block, until, in the summer of 1851, he had the satisfaction of looking upon a completed edifice. Lawyers who had hailed with satisfaction the success of his earlier labors, and those who had grown into reputation since the results of those labors were first given to the world, united their verdict in favor of this last work.

It is hardly necessary to remark that it was only by a carefully adjusted apportionment of his hours that Judge Bouvier was enabled to accomplish so large an amount of intellectual labor, in addition to that "which came upon him daily,"—the still beginning, never ending, often vexatious duties connected with private legal practice and judicial deliberation. He rose every morning at from four to five o'clock, and worked in his library until seven or eight; then left his home for his office (where, in the intervals of business, he was employed on his "Law Dictionary" or "The Institutes") or his seat on the bench, and after the labor of the day wrought in his library from five o'clock until an hour before midnight.

PARTIAL LIST OF WRITERS

WHO ASSISTED IN EDITING THE EDITION OF 1867.

Affidavit; Codes; Ex Post Facto; Falcidian Law; Feudal Law; Fiction; Foreign Law, &c.	Austin Abbott, Esq., of the New York Bar. Author of a "Collection of Forms and Pleadings in Actions;" "Reports of Cases in Admiralty;" "Practice Reports;" "Digest of Reports," &c.
Bankrupt Laws; Damages; Indorsement; Receipt, &c.	Benjamin Vaughan Abbott, Esq., of the New York Bar. Author of a "Collection of Forms and Pleadings in Actions;" "Reports of Cases in Admiralty;" "Practice Reports;" "Digest of Reports," &c.
Corporations	Hon. Samuel Ames, LL.D, Chief Justice of Rhode Island. Author of "Treatise on the Law of Private Corporations," &c. Editor of Ames's "Reports."
Parties, &c.	Hon. Oliver Lorenzo Barbour, Vice-Chancellor of New York. Author of a "Treatise on Chancery Practice;" "Set-Off;" "Criminal Law;" &c. Editor of Barbour's "Reports."
Articles upon Maritime Law	E. C. Benedict, Esq., New York City.
Rescission of Contracts; Specific Performance, &c.	Hon. William H. Battle, LL. D., of the Supreme Court of North Carolina; Professor of Law in the University of North Carolina.
Letters Testamentary; Probate of a Will, &c.	Hon. Alex. W. Bradford, LL.D., Ex-Surrogate of New York. Editor of Bradford's "Surrogate Reports," &c.

Abbreviations; Construction; Costs, &c.	F. C. Brightly, Esq., of the Philadelphia Bar. Author of an "Analytical Digest of the Laws of the United States;" "Treatise on the Law of Costs;" "Equity Jurisdiction of the Courts of Pennsylvania," &c.
Statute of Frauds, &c.	Causten Browne, Esq., of the Boston Bar. Author of a "Treatise on the Construction of the Statute of Frauds."
Ejectment, &c.	Hon. T. W. Clerke, LL.D., of the Supreme Court of New York. Author of a "Digest of Cases determined in Supreme Court of New York;" Editor of "Adams on Ejectment."
Slave; Slavery; Slave-Trade, &c. . .	Hon. T. R. R. Cobb, of Georgia. Author of the "Law of Negro Slavery, &c. in the United States;" Editor of "Cobb's Reports," Digests, &c.
Abortion; Birth; Gestation; Infanticide; Medical Jurisprudence; Pregnancy, &c.	Amos Dean, LL.D., President of the Law Department of the Albany University. Author of Dean's "Medical Jurisprudence," &c.
Abatement; Attachment, &c.	Hon. Charles D. Drake, of the St. Louis Bar, United States Senator. Author of "Drake on Attachments."
Ancient Rights; Backwater; Bridge; Canal; Child; Chose in Action; Creek; Dam; Dedication; Father; Ferry; Fishery; Highway; Inundation; Master; River; Roads; Street; Thoroughfare; Tide; Tidewater; Turnpike; Water-way; Wharf; Wharfinger, &c.	Thomas Durfee, Esq., of Rhode Island. Author of a "Treatise on the Law of Highways," &c.
Crime; Deed; Deposition; Descent; Distribution; Husband; Marriage; Wife; Will, &c.	Hon. Henry Dutton, LL.D., of the Supreme Court of Connecticut, Kent Professor of Law in Yale College. Author of a "Digest of Connecticut Reports," &c.
Reports; Reporters, &c.	Hon. Theodore W. Dwight, LL.D., Professor of Law in Columbia College, New York.
Trusts; Trustees; Presumptive Trusts, &c.	Dorman B. Eaton, Esq., of the New York Bar.

Accessary; Bargain and Sale; Bidder; Conspiracy; Court-Martial; Escape; Fee; Foreign Laws; Gift; Habitual Drunkard; Hue and Cry; Labor; Letter of Attorney; Letters Rogatory; Misadventure; Misprision; Misrecital; Mistrial; Monument; Mute; Negative Pregnant; Nudum Pactum; Offer; Pamphlets; Party-Wall; Per Capita; Per Stirpes; Perpetuating Testimony; Poison; Provisions; Public Stores; Quack; Receiver	CHARLES EDWARDS, Esq., of the New York Bar. Author of a "Treatise on Receivers in Equity," &c.
Bailee; Bailments, &c.	ISAAC EDWARDS, Esq., of the Albany Bar. Author of a "Treatise on the Law of Bailments, Bills," &c.
Experts; Malpractice of Medical Men; Medical Evidence; Physicians; Surgeons, &c.	J. J. ELWELL, M.D., of Cleveland, Ohio. Author of "Medico-Legal Treatise on Malpractice," and "Medical Evidence."
Computation; Fraction of a Day; Glossators; Jus; Negligence; Time, &c.	A. I. FISH, Esq., of the Philadelphia Bar. Editor of the "American Law Register;" "Williams on Executors;" "Digest of Exchequer Reports," &c.
Bar; Plea; Pleading, &c.	Hon. GEORGE GOULD, LL.D., of the Supreme Court of New York. Editor of "Gould on Pleading," &c.
Chancellor; Chancery, &c.	Hon. HENRY W. GREEN, LL.D., Chancellor of New Jersey.
Bottomry; Captain; Collision; Freight; Master; Mate; Respondentia; and many other articles relating to Admiralty and Maritime Law . . .	Hon. NATHAN K. HALL, LL.D., Judge of the United States District Court for the Northern District of New York.
Articles relating to Criminal Law . . .	F. F. HEARD, Esq., of the Middlesex Bar. Author of a "Treatise on Slander and Libel;" Editor of "Leading Criminal Cases;" "Precedents of Indictments," &c.
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DEDICATION OF FIRST EDITION.

TO THE HONORABLE

JOSEPH STORY, LL.D.,

ONE OF THE JUDGES OF THE SUPREME COURT OF THE UNITED STATES,

THIS WORK

IS,

WITH HIS PERMISSION,

MOST RESPECTFULLY DEDICATED,

AS A TOKEN OF THE

GREAT REGARD ENTERTAINED FOR HIS TALENTS, LEARNING, AND CHARACTER,

BY

THE AUTHOR.

LAW DICTIONARY.

A TABLE OF ABREVIATIONS WILL BE FOUND UNDER THE TITLE ABBREVIATION.

A.

A. The first letter of the alphabet.

It is used to distinguish the first page of a folio, the second being marked "*b*," thus: Coke, Litt. 114 *a*, 114 *b*. It is also used as an abbreviation for many words of which it is the initial letter. See ABBREVIATION.

In *Latin phrases* it is a preposition, denoting *from, by, in, on, of, at,* and is of common use as a part of a title.

In *French phrases* it is also a preposition, denoting *of, at, to, for, in, with.*

The article "a" is not necessarily a singular term, it is often used in the sense of "any," and is then applied to more than one individual object; 141 Mass. 266; 101 N. Y. 453; 60 Ia. 225; sometimes as *the*; 23 Ch. Div. 595.

Among the Romans this letter was used in criminal trials. The judges were furnished with small tables covered with wax, and each one inscribed on it the initial letter of his vote: A (*absolvo*) when he voted to acquit the accused; C (*condemno*) when he was for condemnation; and N L (*non liquet*), when the matter did not appear clearly, and he desired a new argument.

The letter A (i. e. *antiquo*, "for the old law") was inscribed upon Roman ballots under the *Lex Tabellaria*, to indicate a negative vote; Tayl. Civ. Law, 191, 192.

A CONSILIIS (Lat. *consilium*, advice). A counsellor. The term is used in the civil law by some writers instead of *a responsis*. Spelm. Gloss. *Apocrisarius.*

A FORTIORI (Lat.). With stronger reason; much more.

A LATERE (Lat. *latus*, side). Collateral. Used in this sense in speaking of the succession to property. Bract. 20 *b*, 62 *b*.

Without right. Bract. 42 *b*.

Apostolic; having full powers to represent the Pope as if he were present. Du Cange, *Legati a latere;* 4 Bla. Com. 306.

A ME (Lat. *ego*, I). A term denoting direct tenure of the superior lord. 2 Bell, H. L. Sc. 133.

Unjustly detaining from me. He is said to withhold *a me* (from me) who has obtained possession of my property unjustly. Calvinus, Lex.

To pay *a me*, is to pay from my money.

A MENSA ET THORO (Lat. from table and bed, but more commonly translated, from bed and board). A kind of divorce, which is rather a separation of the parties by law, than a dissolution of the marriage. This species of divorce is practically abolished in Massachusetts, by statute 1870, c. 404. See 2 Bish. M. & D. § 1693; 1 *id.* §§ 67-70, 1496, 1497; Lloyd on Div. 12. See DIVORCE.

A POSTERIORI (Lat.). From the effect to the cause; from what comes after.

A PRENDRE (Fr. to take, to seize). Rightfully taken from the soil. 5 Ad. & E. 764; 1 N. & P. 172; 4 Pick. 145.

Used in the phrase *profit à prendre*, which differs from a right of way or other easement which confers no interest in the land itself. 5 B. & C. 221; 2 Washb. R. P. 25.

A PRIORI (Lat.). From the cause to the effect; from what goes before.

A QUO (Lat.). From which.

A court *a quo* is a court from which a cause has been removed. The judge *a quo* is the judge in such court. 6 Mart. La. 520. Its correlative is *ad quem.*

A RENDRE (Fr. to render, to yield). Which are to be paid or yielded. *Profits à rendre* comprehend rents and services; Hammond, Nisi P. 192.

A RETRO (Lat.). In arrear.

A RUBRO AD NIGRUM (Lat. from red to black). From the (red) title or rubric to the (black) body of the statute. It was anciently the custom to print statutes in this manner; Erskine, Inst. 1, 1, 49.

A VINCULO MATRIMONII (Lat. from the bond of matrimony). A kind of divorce which effects a complete destruction of the marriage contract. See DIVORCE.

AB ACTIS (Lat. *actus*, an act). A notary; one who takes down words as they are spoken. Du Cange, *Acta;* Spelm. Gloss. *Cancellarius.*

A reporter who took down the decisions or *acta* of the court as they were given.

AB ANTE (Lat. *ante*, before). In advance.

A legislature cannot agree *ab ante* to any modification or amendment to a law which a third person may make; 1 Sumn. 308.

AB ANTECEDENTE (Lat. *antecedens*). Beforehand. 5 M. & S. 110.

AB EXTRA (Lat. *extra*, beyond, without). From without. 14 Mass. 151.

AB INCONVENIENTI (Lat. *inconveniens*). From hardship; from what is inconvenient. An argument *ab inconvenienti* is an argument drawn from the hardship of the case.

AB INITIO (Lat. *initium*, beginning). From the beginning; entirely; as to all the acts done; in the inception.

An estate may be said to be good, an agreement to be void, an act to be unlawful, a trespass to have existed, *ab initio;* Plowd. 6 *a*: 11 East 395; 10 Johns. 253, 369; 1 Bla. Com. 440. See Ad, Eq. 186. Webb's Poll. (Torts) Wald's ed. 477. See TRESPASS; TRESPASSER.

Before. Contrasted in this sense with *ex post facto*, 2 Shars. Bla. Com. 308; or with *postea*, Calvinus, Lex., *Initium.*

AB INTESTAT. Intestate. 2 Low. Can. 219. Merlin, Repert.

AB INTESTATO (Lat. *testatus*, having made a will). From an intestate. Used both in the common and civil law to denote an inheritance derived from an ancestor who died without making a will; 2 Shars. Bla. Com. 490; Story, Confl. L. 480.

AB INVITO (Lat. *invitum*). Unwillingly. See INVITUM.

AB IRATO (Lat. *iratus*, an angry man). By one who is angry. A devise or gift made by a man adversely to the interest of his heirs, on account of anger or hatred against them, is said to be made *ab irato.* A suit to set aside such a will is called an action *ab irato;* Merlin, Repert. *Ab irato.*

ABACTOR (Lat. *ab* and *agere*, to lead away). One who stole cattle in numbers. Jacob, Law Dict. One who stole one horse, two mares, two oxen, two she-goats, or five rams. *Abigeus* was the term more commonly used to denote such an offender.

ABADENGO. Spanish Law. Lands, town, and villages belonging to an abbot and under his jurisdiction. All lands belonging to ecclesiastical corporations, and as such exempt from taxation; Escriche, Dicc. Raz.

Lands of this kind were usually held in mortmain, and hence a law was enacted declaring that no land liable to taxation could be given to ecclesiastical institutions ("*ningun Realengo non pase a abadengo*"), which is repeatedly insisted on.

ABALIENATIO (Lat. *alienatio*). The most complete method used among the Romans of transferring lands. It could take place only between Roman citizens. Calvinus, Lex., *Abalienatio;* Burr. Law. Dic.

ABAMITA (Lat.). The sister of a great-great-grandfather; Calvinus, Lex.

ABANDONMENT. The relinquishment or surrender of rights or property by one person to another.

In Civil Law. The act by which a debtor surrenders his property for the benefit of his creditors; Merlin, Repert.

In Maritime Law. The act by which the owner of a ship surrenders the ship and freight to a creditor who has become such by contracts made by the master.

The effect of such abandonment is to release the owner from any further responsibility. The privilege in case of contracts is limited to those of a maritime nature; Pothier, Chart. Part. sec. 2, art. 2, § 51; Code de Commerce, lib. 2. tit. 2, art. 216. Similar provisions exist in England and the United States to some extent; 1 Par. Mar. Law, 395; 5 Sto. 465; 5 Mich. 368. Under the Act of Congress of 1851, March 3 (Rev. Stat. U. S. § 4285), the liability of the shipowners for a collision may be discharged by surrendering and assigning the vessel and freight to a trustee for the benefit of the parties injured, though these have been diminished in value by the collision; when they are totally destroyed, it would seem that the owners are discharged; 13 Wall. 104; 8 Blatchf. 14; overruling 14 Gray 288; 6 Phila. 479. This is not the case under the English statutes. 2 My. & Cr. 489; 15 M. & W. 391; 2 B. & Ad. 2. Insurers notified that vessel is abandoned to them, after which owner and master take no steps to save vessel, does not relieve the insurers of liability on policy of insurance; 42 Fed. Rep. 169. See ABANDONMENT FOR TORTS. A schooner was stranded and crew taken off by life-saving crew, the master expecting to return on board, and with no intention of abandoning her; a tug took schooner in tow to New York, and it was held that salvage service should be allowed; 39 Fed. Rep. 331.

Of Homestead. A person occupying homestead lets the premises to tenant at will, naming price at which he would sell, and then leaves to earn a livelihood, but with intention to return, held there was no proof of abandonment; 75 Ia. 631. One whose dwelling was destroyed by fire applied to another for material to rebuild, saying if aid was refused he must abandon his homestead right, held that this was insufficient to justify a finding that the homestead had been abandoned; 39 Minn. 193. Temporary absence, but with intention to reoccupy, will not forfeit homestead; 56 Ark. 621. In California to constitute abandonment of homestead, required declaration to that effect, signed, acknowledged and recorded. Mere removal with or without intention of returning does not constitute abandonment; 71 Cal. 325; 100 U. S. 104; 29 Minn. 20.

Removal from state permanently and residence elsewhere, terminates right of homestead, although laid off and allowed before such removal; 91 Ga. 367.

By Husband or Wife. The act of a husband or wife who leaves his or her consort wilfully, and with an intention of causing perpetual separation. See DESERTION.

In Insurance. The transfer by an assured to his underwriters of his interest in the insured subject, or the proceeds of it, or claims arising from it, so far as the subject is insured by the policy, in order to recover as for a total loss; Tyser, Mar. Ins. § 20.

The term is used only in reference to risks in navigation; but the principle is applicable in fire insurance, where there are remnants, and sometimes also under stipulations in life policies in favor of creditors; 2 Phil. Ins. §§ 1490, 1514, 1515; 3 Kent 265; 16 Ohio St. 200; 6 East 72.

The doctrines which have obtained in marine insurance of constructive total loss and abandonment, salvage and general average, are not applicable in fire insurance; May, Ins. § 421 a; 39 Ark. 264.

The object of abandonment being to recover the whole value of the subject of the insurance, it can occur only where the subject itself, or remains of it, or claims on account of it, survive the peril which is the occasion of the loss; 2 Phil. Ins. §§ 1507, 1516; 2 Pars. Mar. Ins. 120; 36 Eng. L. & Eq. 198; 3 Kent 321; 3 Bing. N. C. 266. In such case the assured must elect, immediately on receiving intelligence of a loss, whether to abandon, and not delay for the purpose of speculating on the state of the markets; 2 Phil. Ins. § 1667. He may have a reasonable time to inspect the cargo, but for no other purpose; 3 Kent 320. He must give notice promptly to the insurer of his intention; five days held too late; 5 M. & S. 47: see L. R. 5 C. P. 341. Notice of the abandonment of a vessel need not be given to insurers or reinsurers where there is a constructive total loss; 2 Beach. Ins. §§ 955, 956; 15 Q. B. D. 11; and delay in giving notice, if it does not prejudice the insurer, will not affect the rights of the insured; 24 Fed. Rep. 279. In cases of actual total loss, notice of abandonment is unnecessary; Tyser, Mar. Ins. § 33.

In America, it appears that the right of abandonment is to be judged by the facts of each particular case as they existed at the time of abandonment; 3 Mas. 27; 2 Phil. Ins. § 1536; 12 Pet. 378. In England, the abandonment may be effected by subsequent occurrences, and the facts at the time of action brought determine the right to recover; 4 M. & S. 394; 2 Burr. 1198. But this rule has been doubted in England; 2 Dow 474; 3 Kent 324.

By the doctrine of constructive total loss, a loss of over one-half of the property insured, or damage to the extent of over one-half its value, by a peril insured against, may be turned into a total loss by abandonment; 2 Beach, Ins. § 948; 3 Johns. Cas. 182; 1 Gray 154. This does not appear to be the English rule; 9 C. B. 94; 1 H. of L. 513. See 4 Am. L. Reg. 481; 1 Gray 371.

The right is waived by commencing repairs; 2 Pars. Mar. Ins. 140; Tyser, Mar. Ins. § 26; 3 Mas. 429; 3 Wend. 658; 5 Cow. 63; 4 App. Cas. 755; but not by temporary repairs; 2 Phil. Ins. §§ 1540; but is not lost by reason of the enhancement of the loss through the mere negligence or mistakes of the master or crew. It is too late to abandon after the arrival *in specie* at the port of destination; 2 Pars. Mar. Ins. 128; 4 H. of L. 24; 15 Wend. 453. See 3 S. & R. 25. An inexpedient or unnecessary sale of the subject by the master does not strengthen the right; 2 Phil. Ins. §§ 1547, 1555, 1570. But the fact that the master only takes steps for the safety or recovery of the thing insured, will not deprive the owners of the right to abandon; Tyser, Mar. Ins. § 28. See SALVAGE; TOTAL LOSS.

No notice of abandonment is necessary where owner loses his rights in a vessel by sale under decree of court of competent jurisdiction, in consequence of peril insured against; 13 App. Cas. 160.

Abandonment may be made upon information entitled to credit, but if made speculatively upon conjecture, it is null.

In the absence of any stipulation on the subject, no particular form of abandonment is required; it may be in writing or oral, in express terms or by obvious implication (but see 1 Campb. 541); but it must be absolute and unconditional, and the ground for it must be stated; 2 Phil. Ins. §§ 1678, 1679 *et seq.*; 1 Curt. C. C. 148; 4 Dall. 272; 18 Pick. 83; see 9 Metc. 354; 9 Mo. 406. Acceptance may cure a defect in abandonment, but is not necessary to its validity; 2 Phil. Ins. § 1689. Nor is the underwriter obliged to accept or decline. He may, however, waive it; 2 Phil. Ins. § 1698. But it is not subject to be defeated by subsequent events: 2 Phil. Ins. § 1704; 3 Mas. 27, 61, 429; 4 Cran. 29; 9 Johns. 21. See *supra*. And the subject must be transferred free of incumbrance except expense for salvage; 1 Gray 154; 5 Cow. 63. See TOTAL LOSS.

Of Public Highway. Non-user of public alley for over 40 years in connection with affirmative acts of abandonment, justifies a finding that it cease to be a public highway; 130 N. Y. 618; 56 Hun 288. Encroachment on public highway outside of travelled track and use thereof by a private party for 10 years did not necessarily show abandonment of the highway; 84 Mich. 54.

Of Public Lands. Failure to pay interest on school lands for 15 years with no assertion of ownership will prevent assertion of title as against subsequent purchaser from the state who has been in possession of property for 10 years; 25 Neb. 420.

Of Rights. The relinquishment of a right. It implies some act of relinquishment done by the owner without regard to any future possession by himself, or by any other person, but with an intention to abandon; 14 M. & W. 789; 9 Metc. 395; 2 Flip. 309. Mere non-user does not necessarily or usually constitute an abandonment; 10 Pick. 310; 3 Strobh. 224; 5 Rich. 405; 16 Barb. 150; see Tud. Lead. Cas. 130; 2 Washb. R. P. 83.

Abandonment is properly confined to incorporeal hereditaments, as legal rights once vested must be divested according to

law, though equitable rights may be abandoned; 2 Wash. C. C. 106; 25 Pa. 259; 32 *id.* 401; 15 N. H. 412; see 1 Hen. & M. 429; and an abandonment combined with sufficiently long possession by another party destroys the right of the original owner; 10 Watts 192; 2 Metc. Mass. 32; 31 Me. 381; see also 8 Wend. 480; 3 Ohio 107; 3 Pa. 141.

There may be an abandonment of an easement; 5 Gray 409; 6 Conn. 298; 10 Humphr. 165; 16 Wend. 531; 16 Barb. 184; 3 B. & C. 332; of a mill site; 23 Pick. 216; 34 Me. 394; 4 M'Cord 96; 7 Bingh. 682; an application for land; 2 S. & R. 378; of an improvement; 3 S. & R. 319; of a trust fund; 3 Yerg. Tenn. 258; of an invention or discovery; 1 Stor. 280; 4 Mas. 111; property sunk in a steamboat and unclaimed; 12 La. An. 745; a mining claim; 6 Cal. 510; a right under a land warrant; 23 Pa. 271. An easement acquired by grant is not lost by non-user; 160 Mass. 361.

The burden of proof rests on the party claiming abandonment of an easement; 137 N. Y. 317.

The question of abandonment is one of fact for the jury; 2 Washb. R. P. 82; 49 N. Y. 346; 77 N. C. 186; 16 Pa. 320.

The effect of abandonment when acted upon by another party is to divest all the owner's rights; 6 Cal. 510; 11 Ill. 588. Consult 2 Washb. R. P. 56, 82, 85, 253. See also Curtis, Pat. § 381; Walk. Patents § 87; Ewell, Fixt.; Thomp. Homest.; Dicey, Dom. 90.

ABANDONMENT FOR TORTS. **In Civil Law.** The relinquishment of a slave or animal who had committed a trespass to the person injured, in discharge of the owner's liability for such trespass or injury. If this were done, the owner could not be held to any further responsibility. Just. Inst. 4, 8, 9.

A similar right exists in Louisiana; 11 La. An. 396.

ABARNARE (Lat.). To discover and disclose to a magistrate any secret crime. *Leges Canuti*, cap. 10.

ABATAMENTUM (Lat. *abatare*). An entry by interposition. Co. Litt. 277. An abatement. Yelv. 151.

ABATARE. To abate. Yelv. 151.

ABATE. See ABATEMENT.

ABATEMENT (Fr. *abattre*, L. Fr. *abater*), to throw down, to beat down, destroy, quash. 3 Shars. Bla. Com. 168; 6 Conn. 140.

In Chancery Practice. A suspension of all proceedings in a suit, from the want of proper parties capable of proceeding therein.

It differs from an abatement at law in this; that in the latter the action is entirely dead and cannot be revived; but in the former the right to proceed is merely suspended, and may be revived by a supplemental bill in the nature of a bill of revivor; 3 Bla. Com. 301; 21 N. H. 246; Sto. Eq. Pl. § 20 n. § 354; Ad. Eq. 403; Mitf. Eq. Pl., by Jeremy 57; Edw. Receiv. 19; 5 Lea 244; where interest is transmitted by act of law, as to personal representative or heir a simple bill of revivor may be used; Story, Eq. Pl. § 364; 2 J. J. Mar. 303; 4 Pick. 139; but where by virtue of act of party, as to devisee, an original bill in the nature of a bill of revivor must be used; 3 Bibb 377; 3 Mas. 308.

Generally speaking, if any property or right in litigation is transmitted to another, he is entitled to continue the suit, or at least have the benefit of it, if he be plaintiff; Edw. Receiv. 19; 9 Paige, Ch. 410; or it may be continued against him, or at least perfected, if he be defendant; Story, Eq. Pl. §§ 332, 442; 7 Paige, Ch. 290. See PARTIES.

Death of a trustee does not abate a suit, but it must be suspended till a new one is appointed; 5 Gray 162; 64 Hun 635.

The death of the owner of the equity of redemption abates a foreclosure suit; 58 Fed. Rep. 552.

There are some cases, however, in which a court of equity will entertain application notwithstanding the suit is suspended: thus, proceedings may be had to preserve property in dispute; 2 Paige, Ch. 368; to pay money out of court where the right is clear; 6 Ves. 250; or upon consent of parties; 2 Ves. 399; to punish a party for breach of an injunction; 4 Paige, Ch. 163; to enroll a decree; 2 Dick. 612; or to make an order for the delivery of deeds and writings; 1 Ves. 185.

Although abatement in chancery suspends proceedings, it does not put an end to them; a party therefore imprisoned for contempt is not discharged, but must move that the complaint be revived in a specified time or the bill be dismissed and himself discharged; Barb. Ch. Pr. 527; Dan. Ch. Pr. 6th Am. ed. *1543. Nor will a receiver be discharged without special order of court; 1 Barb. 329; Edw. Rec. 19.

All declinatory and dilatory pleas in equity are said to be pleas in abatement, or in the nature thereof; see Story, Eq. Pl. § 708; Bea. Eq. 55; Coop. Eq. Pl. 236. And such pleas must be pleaded before a plea in bar, if at all; Story, Eq. Pl. § 708; see 7 Johns. Ch. 214; 20 Ga. 379. See PLEA.

In Contracts. A reduction made by the creditor, for the prompt payment of a debt due by the payer or debtor. Weskett, Ins. 7.

Of Freehold. The unlawful entry upon and keeping possession of an estate by a stranger, after the death of the ancestor and before the heir or devisee takes possession. It is a species of ouster by intervention between the ancestor or devisor and the heir or devisee, thus defeating the rightful possession of the latter; 3 Bla. Com. 167; Co. Litt. 277 *a.*; Fin. Law 195; Cruise, Dig. B. 1, 60.

By the ancient laws of Normandy, this term was used to signify the act of one who, having an apparent right of possession to an estate, took possession of it immediately after the death of the actual possessor, before the heir entered. Howard, *Anciennes Lois des Français*, tome 1, p. 539.

Of Legacies. The reduction of a legacy, general or specific, on account of the insufficiency of the estate of the testator to pay his debts and legacies.

When the estate of a testator is insufficient to pay both debts and legacies, it is the rule that the general legacies must abate proportionally to an amount sufficient to pay the debts; 8 Pick. 478; 106 Mass. 100; 97 Pa. 187.

If the general legacies are exhausted before the debts are paid, then, and not till then, the specific legacies abate, and proportionally; 2 Bla. Com. 513 and note; Bacon, Abr. Leg. H; Rop. Leg. 253, 284; 2 Brown, Ch. 19; 2 P. Wms. 383; 1 Ves. Sen. 564; 40 Mo. 280; 63 Pa. 312.

In Revenue Law. The deduction from, or the refunding of, duties sometimes made at the custom house, on account of damages received by goods during importation or while in store. See Act of Congress, Mar. 2, 1799, § 52, R. S. § 2894.

Of Nuisances. The removal of a nuisance. 3 Bla. Com. 5; Poll. Torts 210. See NUISANCE.

In Pleading at Law. The overthrow of an action caused by the defendant pleading some matter of fact tending to impeach the correctness of the writ or declaration, which defeats the action for the present, but does not debar the plaintiff from recommencing it in a better way. Stephen, Pl. 47; Pepper, Pl. 15; Webb, Poll. Torts; 3 Bla. Com. 301; 1 Chit. Pl. (6th Lond. ed.) 446; Gould, Pl. ch. 5, § 65.

It has been applied rather inappropriately as a generic term to all pleas of a dilatory nature; whereas the word dilatory would seem to be the more proper generic term, and the word abatement applicable to a certain portion of dilatory pleas; Com. Dig. Abt. B; 1 Chit. Pl. 440 (6th Lond. ed.); Gould, Pl. ch. 5, § 65. In this general sense it has been used to include pleas to the jurisdiction of the court. See JURISDICTION.

AS TO THE PERSON OF THE PLAINTIFF AND DEFENDANT. It may be pleaded, as to the plaintiff, that there never was such a person *in rerum natura;* 1 Chit. Pl. (6th Lond. ed.) 448; 6 Pick. 370; 5 Watts 423; 19 Johns. 308; 14 Ark. 27; 5 Vt. 93 (except in ejectment; 19 Johns. 308); and by one of two or more defendants as to one or more of his co-defendants; Archb. C. P. 312. That one of the plaintiffs is a flictitious person, to defeat the action as to all; Com. Dig. Abt. E, 16; 1 Chit. Pl. 448; Archb. C. P. 304. This would also be a good plea in bar; 1 B. & P. 44. That the nominal plaintiff in the action of ejectment is fictitious, is not pleadable in any manner; 4 M. & S. 301; 10 Johns. 269. A defendant cannot plead matter which affects his co-defendant alone; 40 Me. 336; 4 Zabr. 333; 34 N. H. 243; 21 Wend. 457.

Certain legal disabilities are pleadable in abatement, such as *outlawry;* Bac. Abr. Abt. B; Co. Litt. 128 *a*; *attainder* of treason or felony; 3 Bla. Com. 301; Com. Dig. Abt. E. 3; also *præmunire* and *excommunication;* 3 Bla. Com. 301; Com. Dig. Abt. E. 5. The law in reference to these disabilities can be of no practical importance in the United States; Gould, Pl. ch. 5, § 32.

Alienage. That the plaintiff is an alien friend is pleadable only in some cases, where, for instance, he sues for property which he is incapacitated from holding or acquiring; Co. Litt. 129 *b;* Busb. N. C. 250. By the common law, although he could not inherit, yet he might acquire by purchase, and hold as against all but the sovereign. Accordingly he has been allowed in this country to sue upon a title by grant or devise; 1 Mass. 256; 7 Cra. 603; but see 6 Cal. 250; 26 Mo. 426. The early English authority upon this point was otherwise; Bac. Abr. Abt. B, 3, Aliens D; Co. Litt. 129 *b*. He is in general able to maintain all actions relating to personal chattels or personal injuries; 3 Bla. Com. 384; Cowp. 161; Bac. Abr. Aliens D; 2 Kent 34; Co. Litt. 129 *b*. But an alien enemy can maintain no action except by licence or permission of the government; Bac. Abr. Abt. B, 3, Aliens D; 46; 1 Ld. Raym. 282; 2 Stra. 1082; 6 Term 53, 49; 6 Binn. 241; 9 Mass. 363, 377; 3 M. & S. 533; 2 Johns. Ch. 508; 1 S. & R. 315. This will be implied from the alien being suffered to remain, or to come to the country, after the commencement of hostilities without being ordered away by the executive; 10 Johns. 69. See 28 Eng. L. & Eq. 319. The better opinion seems to be that an alien enemy cannot sue as administrator; Gould, Pl. ch. 5, § 44.

Corporations. A plea in abatement is the proper manner of contesting the existence of an alleged corporation plaintiff; Wright, Ohio 12; 1 Mass. 485; 1 Md. 502; 33 Pa. 356; 28 N. H. 93; 1 Pet. 450; 5 *id.* 231. To a suit brought in the name of the "Judges of the County Court," after such court has been abolished, the defendant may plead in abatement that there are no such judges; 2 Bay, S. C. 519; Beach, Priv. Corp. 783.

Coverture of the plaintiff is pleadable in abatement; Com. Dig. Abt. E, 6; Bac. Abr. Abt. G; Co. Litt. 132; 3 Term 631; 1 Chit. Pl. 439; 7 Gray 338; though occurring after suit brought; 3 Bla. Com. 316; Bac. Abr. Abt. 9; 4 S. & R. 238; 17 Mass. 342; 6 Term 265; and see 1 E. D. Sm. 273; but not after plea in bar, unless the marriage arose after the plea in bar; 15 Conn. 569; but in that case the defendant must not suffer a continuance to intervene between the happening of this new matter, or its coming to his knowledge, and his pleading it; 4 S. & R. 238; 1 Bailey 369; 2 Wheat. 111; 14 Mass. 295; 1 Blackf. 288; 10 S. & R. 208; 7 Vt. 508; 3 Bibb 246. And it cannot be otherwise objected to if she sues for a cause of action that would survive to her on the death of her husband; 12 M. & W. 97; 3 C. B. 153; 10 S. & R. 208. Where she sues, not having any interest, the defence is one of substance, and may be pleaded in bar, by demurrer, or on the general issue; 4 Term 361; 1 Salk. 114; 1 H. Bla. 108; Cro. Jac. 644, whether she sues jointly or alone. So also where coverture avoids the contract or instrument, it is matter in bar; 14 S. & R. 379.

Where a *feme covert* is sued without her husband for a cause of action that would survive against her, as upon a contract made before, or a tort committed after, marriage, the coverture is pleadable in abatement; 3 Term 626; and not otherwise; 9 M. & W. 299; Com. Dig. Abt. F, 2. If the marriage takes place pending the action, it cannot be pleaded; 2 Ld. Raym. 1525; 5 Me. 445; 2 M'Cord 469. It must be pleaded by the *feme* in person; 2 Saund. 209 *b*. Any thing which suspends the coverture suspends also the right to plead it; Com. Dig. Abt. F, 2, § 3; Co. Litt. 132 *b*; 1 B. & P. 358, n. (f); 15 Mass. 31; 6 Pick. 29. Marriage of female defendant in error after writ has been duly served, will not abate suit, but it will proceed as if she were still unmarried; 30 Fla. 210.

Death of the plaintiff before purchase of the writ may be pleaded in abatement; 1 Archb. C. P. 304; Com. Dig. Abt. E, 17: 3 Ill. 507; 1 W. & S. 438; 14 Miss. 205; 2 M'Mull. 49. So may the death of a sole plaintiff who dies pending his suit at common law; Bac. Abr. Abt. F; 4 Hen. & M. 410; 3 Mass. 296; 2 Root 57; 9 Mass. 422; 2 Rand. Va. 454; 2 Me. 127. Otherwise now by statute, in most cases, in most if not all the states of the United States, and in England since 1852. The personal representatives are usually authorized to act in such cases. If the cause of action is such that the right dies with the person, the suit still abates. By statute 8 & 9 Wm. IV. ch. 2, sect. 7., which is understood to enact the common-law rule, where the form of action is such that the death of one of several plaintiffs will not change the plea, the action does not abate by the death of any of the plaintiffs pending the suit. The death of the lessor in ejectment never abates the suit; 8 Johns. 495; 23 Ala. N. S. 193; 13 Ired. 43, 489; 1 Blatchf. 393. On death of plaintiff in ejectment his heirs are properly substituted on defendant's petition; 158 Pa. 497.

On death of administrator bringing suit it may be revived by his administrator or by administrator *de bonis non;* 92 Tenn. 514. In Missouri an action for personal injuries cannot be revived by the administrator after plaintiff's death; 97 Mo. 79. In Maryland an action by husband to recover damages for the killing of his wife, abates on his death; 70 Md. 319.

On the death of one of three partners plaintiff the remaining two may prosecute to final judgment in their own names; 93 Ala. 173.

The death of sole defendant pending an action abates it; Bac. Abr. Abt. F; Hayw. 500; 2 Binn. 1; Gilm. 145; 4 M'Cord 160; 7 Wheat. 530; 1 Watts 229; 4 Mass. 480; 8 Me. 129; 11 Ga. 151. But where one of several co-defendants dies pending the action, his death is in general no cause of abatement, even by common law: Cro. Car. 426; Bac. Abr. Abt. F; Gould, Pl. ch. 5, § 93. If cause of action is such as would survive against the survivor or survivors, the plaintiff may proceed by suggesting the death upon the record; 24 Miss. 192; Gould, Pl. ch. 5, § 93. Where one of several plaintiffs or defendants in error dies, the suit does not abate or require a revival in the Supreme Court; 96 Mo. 316. The inconvenience of abatement by death of parties was remedied by 17 Car. II. ch. 8, and 8 & 9 Wm. III. ch. 2, ss. 6, 7. In the United States, on the death of a sole defendant, his personal representatives may be substituted if the action could have been originally prosecuted against them; Gould, Pl. ch. 5, § 95. The right of action against a tort-feaser dies with him; and such death should be pleaded in abatement; 3 Cal. 370. Many exceptions to this rule exists by statute.

Infancy is pleadable in abatement to the person of the plaintiff, unless the infant appear by guardian or *prochein ami;* Co. Litt. 135 *b*; 2 Saund. 117; 3 Bla. Com. 301; Bac. Abr. Infancy, K, 2; 7 Johns. 379; 2 Conn. 357; 3 E. D. Sm. 296; 8 Pick. 552. He cannot appear by attorney, since he cannot make a power of attorney; 3 Saund. 212; 3 N. H. 345; 8 Pick. 552; 4 Halst. 381; 2 N. H. 487; 7 Johns. 373. The death of the next friend bringing suit for minors does not abate suit, nor does the attainment of majority by minors; 68 Miss. 693. Where an infant sues as co-executor with an adult, both may appear by attorney, for, the suit being brought *in autre droit*, the personal rights of the infant are not affected, and therefore the adult is permitted to appoint an attorney for both; 3 Saund. 212; 1 Rolle, Abr. 288; Cro. Eliz. 542. At common law, judgment obtained for or against an infant plaintiff who appears by attorney, no plea being interposed, may be reversed by writ of error; 1 Rolle, Abr. 287; Cro. Jac. 441. By statute, however, such judgment is valid, if for the infant; 3 Saund. 212 (n. 5).

Imprisonment. A sentence to imprisonment in New York, either of plaintiff or defendant, abates the action by statute; 2 Johns. Cas. 408; 1 Duer 664; but see 8 Bosw. 617.

Lunacy. A lunatic may appear by attorney, and the court will on motion appoint an attorney for him; 18 Johns. 135. But a suit brought by a lunatic under guardianship shall abate; Brayt. 18.

Misjoinder. The joinder of improper plaintiffs may be pleaded in abatement; Com. Dig. Abt. E, 15; Archb. C. Pl. 304; 1 Chit. Pl. 8. Advantage may also be taken, if the misjoinder appear on record, by demurrer in arrest of judgment, or by writ of error. If it does not appear in the pleadings, it would be ground of non-suit on the trial; 1 Chit. Pl. 66. Misjoinder of defendants in a personal action is not subject of a plea in abatement; 18 Ga. 509; Archb. C. Pl. 68, 310. When an action is thus brought against two upon a contract made by one, it is a good ground of defence under the general issue; Clayt. 114; 2 Day 272; 11 Johns. 104; 1 Esp. 363; for in such case the proof disproves the declaration. If several are sued for a tort committed by

one, such misjoinder is no ground of objection in any manner, as of co-defendants in actions *ex delicto*, some may be convicted and others acquitted; 1 Saund. 291. In a real action, if brought against several persons, they may plead several tenancy; that is, that they hold in severalty, not jointly; Com. Dig. Abt. F, 12; or one of them may take the entire tenancy on himself, and pray judgment of the writ; Com. Dig. Abt. F, 13. Misjoinder of action is waived unless taken before defence; 51 Ark. 235.

Misnomer of plaintiff, where the misnomer appears in the declaration, must be pleaded in abatement; 1 Mass. 76; 15 *id.* 469; 10 S. & R. 257; 10 Humphr. 513; 9 Barb. 202; 32 N. H. 470. It is a good plea in abatement that the party sues by his surname only; Harp. 49; 1 Tayl. No. C. 148; Coxe 138. A mistake in the Christian name is ground for abatement; 13 Ill. 570. In England the effect of pleas in abatement of misnomer has been diminished by statute 3 & 4 Wm. IV. ch. 42, s. 11, which allows an amendment at the cost of the plaintiff. The rule embodied in the English statute prevails in this country.

If the defendant is sued or declared against by a wrong name, he may plead the mistake in abatement; 3 Bla. Com. 302; 3 East 167; Bac. Abr. D; and in abatement only, 5 Mo. 118; 3 Ill. 290; 14 Ala. 256; 8 Mo. 291; 1 Metc. Mass. 151; but one defendant cannot plead the misnomer of another, Com. Dig. Abt. F, 18; Archb. C. P. 312; 1 Nev. & P. 26.

The omission of the initial letter between the Christian and surname of the party is not a misnomer or variance; 5 Johns. 84. As to *idem sonans*, see 18 East 83; 16 *id.* 110; 2 Taunt. 400. Since oyer of the writ has been prohibited, the misnomer must appear in the declaration; 1 Cow. 37. Misnomer of defendant was never pleadable in any other manner than in abatement; 5 Mo. 118; 3 Ill. 290; 14 Ala. 256; 8 Mo. 291; 1 Metc. Mass. 151. In England this plea has been abolished; 3 & 4 Wm. IV. ch. 42, s. 11. And in the States, generally, the plaintiff is allowed to amend a misnomer. The misnomer of one of two defendants, as to his Christian name, if material at all when sued as a firm, must be taken advantage of by plea in abatement; 8 Watts 485.

In criminal practice the usual pleas in abatement are for misnomer. If the indictment assigns to the defendant no Christian name, or a wrong one, no surname, or a wrong one, he can only object to this matter by a plea in abatement; 2 Gabb. Cr. L. 327. As to the evidence necessary in such case, see 1 M. & S. 453; 1 Campb. 479; 3 Greenl. Ev. § 221.

Non-joinder. If one of several joint tenants sue, Co. Litt. 180 *b*; Bacon, Abr. *Joint Tenants*, K; 1 B. & P. 73; one of several joint contractors, in an action *ex contractu*, Archb. C. P. 48, 53; one of several partners, 16 Ill. 340; 19 Pa. 273; Gow, Partn. 150; Coll. Partn. § 649; one of several joint executors who have proved the will, or even if they have not proved the will 10; Ark. 166; 1 Chit. Pl. 12, 13; one of several joint administrators, *id.* 13; the defendant may plead the non-joinder in abatement; Com. Dig. Abt. E; 1 Chit. Pl. 12. The omission of one or more of the owners of the property in an action *ex delicto* is pleaded in abatement; 22 Vt. 388; 10 Ired. 169; 2 Cush. 130; 13 Pa. 497; 11 Ill. 22. Dormant partners may be omitted in suits on contracts to which they are not privy; 4 Wend. 628; 8 S. & R. 55; 6 Pick. 352; 3 Cow. 85. A non-joinder may also be taken advantage of in actions *ex contractu*, at the trial, under the general issue, by demurrer, or in arrest of judgment, if it appears on the face of the pleadings; 4 Wend. 496.

Non-joinder of a person as defendant who is jointly interested in the contract upon which the action is brought can only be taken advantage of by plea in abatement; 5 Term 651; Tr. & H. Pr. 215; 1 East 20; 3 Campb. 50; 18 Johns. 459; 2 Iowa 161; 24 Conn. 531; 26 Pa. 458; 24 N. H. 128; 8 Gill 59; 19 Ala. N. S. 340; 2 Zabr. 372; 9 B. Monr. 30; 23 Ga. 600; unless the mistake appear from the plaintiff's own pleadings, when it may be taken advantage of by demurrer or in arrest of judgment; 1 Saund. 271; 18 Johns. 459; 1 B. & P. 72. Non-joinder of a co-tenant may be pleaded when the suit respects the land held in common; 44 Me. 92. When the contract is several as well as joint, the plaintiff is at liberty to proceed against the parties separately or jointly. 1 Chit. Pl. 43; 1 Saund. 153, n. 1; Brayt. 22. In actions of tort the plaintiff may join the parties concerned in the tort, or not, at his election; 1 Saund. 291; 7 Price, Exch. 408; 3 B. & P. 54; Gould, Pl. ch. 2, § 118. The non-joinder of any of the wrong-doers is no defence in any form of action.

When husband and wife should be sued jointly, and one is sued alone, the non-joinder may be pleaded in abatement; Archb. C. P. 309. Non-joinder of co-executors or co-administrators may be pleaded in abatement; Com. Dig. Abt. F. The form of action is of no account where the action is substantially founded in contract; 6 Term 369; 5 *id.* 651. The law under this head has in a great measure become obsolete in many of the States, by statutory provisions making contracts which by the common law were joint, both joint and several.

Pendency of another action must be pleaded in abatement and not in bar; 156 Mass. 418; 88 Ga. 294; 93 Ala. 614. Prior pendency of an action unless both are in same jurisdiction is not cause for abatement; 16 R. I. 388. Pendency of suit in state court is no ground for plea in abatement to suit upon same cause in the Federal court; 61 Fed. Rep. 199; 16 How. 104. Pendency of prior suit in one state cannot be pleaded in abatement of suit for same cause and same parties in another state; 48 Minn. 408. Pendency of a suit in a foreign country between the same parties and for same cause would not bar or abate an action; 60 N. Y. Super. Ct. 68; 50 Minn.

405 ; 3 Tex. Civ. App. 293. A good answer to plea in abatement of pendency of prior suit, is that such action has been dismissed since trial of second action began ; 83 Cal. 270 ; 45 Minn. 102 ; 117 Mo. 530 ; 45 La. Ann. 502.

Privilege of defendant from being sued may be pleaded in abatement ; 9 Yerg. 1 ; Bac. Abr. Abt. C. See PRIVILEGE. A peer of England cannot, as formerly, plead his peerage in abatement of a writ of summons ; 2 Wm. IV. ch. 39. It is a good cause of abatement that the defendant was arrested at a time when he was privileged from arrest ; 2 N. H. 468 ; 4 T. B. Monr. 539 ; or that he was served with process when privileged from suits ; 2 Wend. 586 ; 1 South. N. J. 366 ; 1 Ala. 276. The privilege of defendant as member of the legislature has been pleaded in abatement ; 4 Day 129.

For cases where the defendant may plead non-tenure, see Archb. C. P. 310 ; Cro. Eliz. 559 ; 33 Me. 343.

Where he may plead a disclaimer, see Archb. C. P. ; Com. Dig. Abt. F, 15 ; 2 N. H. 10.

PLEAS IN ABATEMENT TO THE COUNT required oyer of the original writ ; and, as this cannot now be had, these pleas are, it seems, abolished ; 1 Chit. Pl. 405 (6th Lond. ed.) ; Saund. Pl. *Abatement.*

PLEAS IN ABATEMENT OF THE WRIT.— In general, any irregularity, defect, or informality in the terms, form, or structure of the writ, or mode of issuing it, is a ground of abatement ; Gould, Pl. ch. 5, s. 133. Among them may be enumerated want of date, or impossible date ; want of venue, or, in local actions, a wrong venue ; a defective return ; Gould, Pl. ch. 5, s. 133. Oyer of the writ being prohibited, these errors cannot be objected to unless they appear in the declaration, which is presumed to correspond with the writ ; 6 Fla. 724 ; 3 B. & P. 399 ; 14 M. & W. 161. The objection then is to the writ through the declaration ; 1 B. & P. 648 ; there being no plea to the declaration alone, but in bar ; 2 Saund. 209 ; 10 Mod. 210. A variance between writ and declaration may properly be pleaded is abatement ; 11 Ill. 573 ; 23 Miss. 193.

Such pleas are either to the form of the writ, or to the action thereof.

Those of the first description were formerly either for matter apparent on the face of the writ, or for matter *dehors ;* Com. Dig. Abt. H, 17.

Pleas in abatement to the form of the writ were formerly allowed for very trifling errors apparent on the face of the writ ; 1 Stra. 556 ; Ld. Raym. 1541 ; 2 B. & P. 395, but since oyer has been prohibited have fallen into disuse ; Tidd, Pr. 636.

Pleas in abatement of the form of the writ are now principally for matters *dehors,* Com. Dig. Abt. H, 17 ; Gilbert, C. P. 51, existing at the time of suing out the writ, or arising afterwards ; such as misnomer of the plaintiff or defendant in Christian name or surname ; Tidd, Pr. 637.

Pleas in Abatement to the Action of the Writ are that the action is misconceived, as if assumpsit is brought instead of *account,* or trespass when case is the proper action ; 1 Show. 71 ; Tidd, Pr. 579 ; or that the right of action had not accrued at the commencement of the suit ; 2 Lev. 197 ; Cro. Eliz. 325 ; Hob. 199 ; Com. Dig. *Action,* E, 1. But these pleas are unusual, since advantage may be taken for the same reasons on demurrer or under the general issue ; Gould, Pl. ch. 5, s. 137 ; 1 C. & M. 492, 768. It may also be pleaded in abatement that there is another action pending ; Com. Dig. Abt. H, 24 ; Bac. Abr. Abt. M ; 1 Chit. Pl. 443.

Variance. Where the count varies from the writ, or the writ varies from the record or instrument on which the action is brought, it is pleadable in abatement ; 2 Wils. 85, 395 ; Cro. Eliz. 722 ; 1 H. Bla. 249 ; 17 Ark. 254 ; 17 Ill. 529 ; 25 N. H. 521. If the variance is only in matter of mere form, as in time or place, when that circumstance is immaterial, advantage can be taken only by plea in abatement ; 8 Ind. 354 ; 10 Ill. 75 ; Yelv. 120 ; Latch 173 ; Gould, Pl. ch. 5, s. 97. But if the variance is in matter of substance, as if the writ sounds in contract and the declaration in tort, advantage may also be taken by motion in arrest of judgment ; 28 N. H. 90 ; Hob. 279 ; Cro. Eliz. 722. Pleas under this head have been virtually abolished by the rule refusing oyer of the writ ; and the operation of this rule extends to all pleas in abatement that cannot be proved without examination of the writ ; Gould, Pl. ch. 5, s. 101. It seems that oyer of the writ is allowed in some of the states which retain the old system of pleading, as well as in those which have adopted new systems. In such states these rules as to variance are of force ; 28 N. H. 90 ; 17 Ill. 529 ; 22 Ala. N. S. 588 ; 23 Miss. 193 ; 8 Ind. 354 ; 35 N. H. 172 ; 17 Ark. 154 ; 1 Harr. & G. 164 ; 1 T. B. Monr. 35 ; 11 Wheat. 280 ; 12 Johns. 430 ; 4 Halst. 284.

QUALITIES OF PLEAS IN ABATEMENT. The defendant may plead in abatement to part, and demur or plead in bar to the residue, of the declaration ; 1 Chit. Pl. 458 (6th Lond. ed.) ; 2 Saund. 210. The general rule is that whatever proves the writ false at the time of suing it out shall abate the writ entirely ; Gilb. C. P. 247 ; 1 Saund. 286 (n. 7).

As this plea delays the ascertainment of the merits of the action, it is not favored by the courts ; the greatest accuracy and precision are therefore required ; and it cannot be amended ; 2 Saund. 298 ; Co. Litt. 392 ; 13 M. & W. 474 ; 2 Johns. Cas. 412 ; 8 Bingh. 416 ; 44 Me. 482 ; 18 Ark. 236 ; 1 Hemp. 215 ; 27 Ala. N. S. 678. It must contain a direct, full, and positive averment of all the material facts ; 30 Vt. 76 ; 35 N. H. 172 ; 4 R. I. 110 ; 37 Me. 49 ; 28 N. H. 18 ; 24 Ala. N. S. 329 ; 1 Mich. 254. It must give enough so as to enable the plaintiff by amendment completely to supply the defect or avoid the mistake on which the plea is founded ; 4 Term 224 ; 1 Saund. 274 (n. 4) ; 1 Day 28 ; 3 Mass. 24 ; 1 Hayw. 501 ; 2 Ld. Raym. 1178 ; 1 East 634.

It must not be double or repugnant ; 5

Term 487 ; 3 M. & W. 607. It must have an apt and proper beginning and conclusion ; 3 Term 186 ; 2 Johns. Cas. 312 ; 10 Johns. 49 ; 2 Saund. 209. The whole matter of complaint must be covered by the plea ; 2 B. & P. 420. It cannot be pleaded after making full defence ; 1 Chit. Pl. 441 (6th Lond. ed.).

As to the form of pleas in abatement, see 22 Vt. 211 ; 1 Chit. Pl. (6th Lond. ed.) 454 ; Com. Dig. Abt. I, 19 ; 2 Saund. 1 (n. 2).

As to the time of pleading matter in abatement, it must be pleaded before any plea to the merits, both in civil and criminal cases, except in cases where it arises or comes to the knowledge of the party subsequently ; 6 Metc. 224 ; 21 Vt. 52 ; 40 Me. 218 ; 22 Barb. 244 ; 14 Ark. 445 ; 35 Me. 121 ; 15 Ala. 675 ; 13 Mo. 547 ; 28 Ill. App. 32 ; and the right is waived by a subsequent plea to the merits ; 14 How. 505 ; 15 Ala. 675 ; 19 Conn. 493 ; 1 Ia. 165 ; 4 Gill 166 ; 11 Wall. 659. See PLEA PUIS DARREIN CONTINUANCE.

Demurrer to complaint for insufficiency of facts, waives all matter in abatement ; 17 Oreg. 393.

Of the Affidavit of Truth. Every dilatory plea must be proven to be true, either by affidavit, by matter apparent upon the record, or probable matter shown to the court to induce them to believe it ; 3 & 4 Anne, ch. 16, s. 11 ; 3 B. & P. 397 ; 3 Nev. & M. 260 ; 30 Vt. 177 ; 1 Curt. 494 ; 17 Ala. 30 ; 1 Chand. 16 ; 1 Swan 391 ; 1 Ia. 165. It is not necessary that the affidavit should be made by the party himself ; his attorney, or even a third person, will do ; 1 Saund. Pl. & Ev. 3 (5th Am. ed.). The plaintiff may waive an affidavit ; 5 Dowl. & L. 737 ; 16 Johns. 307. The affidavit must be coextensive with the plea ; 3 Nev. & M. 260, and leave nothing to be collected by inference ; Say. 293. It should state that the plea is true in substance and fact, and not merely that the plea is a true plea ; 3 Stra. 705 ; 1 Browne 77 ; 2 Dall. 184.

Plea in abatement on account of nonjoinder of joint promissors need not be verified by oath in Rhode Island ; 16 R. I. 343.

JUDGMENT ON PLEAS IN ABATEMENT. If issue be joined on a plea in abatement, a judgment for the plaintiff upon a verdict is final ; Tidd, Pr. 641 ; 1 Str. 532 ; 1 Bibb 234 ; 6 Wend. 649 ; 8 Cush. 301 ; 3 N. H. 232 ; 2 Pa. 361 ; 3 Wend. 258 ; but judgment for plaintiff upon a demurrer to a plea in abatement is not final, but merely *respondeat ouster ;* Ld. Raym. 699 ; 16 Mass. 147 ; 14 N. H. 371 ; 1 Blackf. 388. After judgment of *respondeat ouster,* the defendant has four days' time to plead, commencing after the judgment has been signed ; 8 Bingh. 177. He may plead again in abatement, provided the subject-matter pleaded be not of the same degree, or of any preceding degree or class with that before pleaded ; Com. Dig. Abt. I, 3 ; 1 Saund. Pl. & Ev. 4 (5th Am. ed.) ; Tidd, Pr. 641.

If the plea is determined in favor of the defendant either upon an issue of law or fact, the judgment is that the writ or bill be quashed ; Yelv. 112 ; Bac. Abr. Abt. P ; Gould, Pl. ch. 5, § 159 ; 2 Saund. 211 (n. 3).

See further on the subject of abatement of actions, Com. Dig. Abt. ; Bac. Abr. Abt. ; 1 Saund. Pl. & Ev. 1 (5th Am. ed.) ; Grah. Pr. 224 ; Tidd, Pr. 636 ; Gould, Pl. ch. 5 ; 1 Chit. Pl. 446 (6th Lond. ed.) ; Story, Eq. Pl. 1–70 ; 1 Am. & Eng. Enc. 9 ; Shipman, Common Law Pl. § 160.

Of Taxes. A diminution or decrease in the amount of tax imposed upon any person. The provisions for securing this abatement are entirely matters of statute regulation ; 5 Gray 365 ; 4 R. I. 313 ; 30 Pa. 227 ; 18 Ark. 380 ; 18 Ill. 312, and vary in the different States.

ABATOR. One who abates or destroys a nuisance. One who, having no right of entry, gets possession of the freehold to the prejudice of an heir or devisee, after the time when the ancestor died, and before the heir or devisee enters. Litt. § 397 ; Perk. Conv. § 383 ; 2 Prest. Abs. 296, 300. See Ad. Ej. 43 ; 1 Washb. R. P. 225.

ABATUDA. Anything diminished ; as *moneta abatuda ;* which is money clipped or diminished in value. Cowel.

ABAVIA. A great-great-grandmother.

ABAVITA. Used for *abamita,* which see.

ABAVUNCULUS. A great-great-grandmother's brother. Calvinus, Lex.

ABAVUS. A great-great-grandfather, or fourth male ascendant.

ABBEY. A society of religious persons, having an abbot or abbess to preside over them.

ABBREVIATION. A shortened form of a word, obtained by the omission of one or more letters or syllables from the middle or end of the word.

The abbreviations in common use in modern times consist of the initial letter or letters, syllable or syllables, of the word. Anciently, also, contracted forms of words, obtained by the omission of letters intermediate between the initial and final letters were much in use. These latter forms are now more commonly designated by the term *contraction.*

Abbreviations are of frequent use in referring to text-books, reports, etc., and in indicating dates, but should be very sparingly employed, if at all, in formal and important legal documents. See 4 C. & P. 51 ; 9 Co. 48. No part of an indictment should contain any abbreviations except in cases where a *facsimile* of a written instrument is necessary to be set out. 1 East 180, n. The variety and number of abbreviations are as nearly illimitable as the ingenuity of man can make them ; and the advantages arising from their use are, to a great extent, counterbalanced by the ambiguity and uncertainty resulting from the usually inconsiderate selection which is made.

The following list is believed to contain all abbreviations in common use. Where a shorter and a longer abbreviation are in common use, both are given.

A. American, see *Am.* ; anonymous
A, a, B, b. "A" front, "B" back of a leaf.
A. B. Anonymous Reports at end of Benloe's Reports, commonly called New Benloe.
A. C. Appeal Cases, English Chancery ; Law Reports Appeal Cases.

A. C.
[1891] *A. C.* English Appeal Cases; Law Reports, 3d Series, 1891.
[1892] *A. C.* Same for 1892, etc.
A. D. Anno Domini; in the year of our Lord.
A. G. Attorney General.
A. K. Marsh. A. K. Marshall's Reports, Kentucky.
A. L. J. Albany Law Journal.
A. Moo. A. Moore's Reports, in Bosanquet & Puller.
A. P. B. or *Ashurst MSS. L. I. L.* Ashurst's Paper-books; the manuscript paper-books of Ashurst, J., Buller, J., Lawrence, J.,and Dampier, J., in Lincoln's Inn Library.
A. R. Anno Regni; in the year of the reign.
A. S. Acts of Sederunt, Ordinances of the Court of Session, Scotland.
A. & A. Corp. Angell & Ames on Corporations.
A. & E. Adolphus & Ellis's Reports, English King's Bench.
A. & E. Encyc. American and English Encyclopædia of Law.
A. & E. N. S. Adolphus & Ellis's Reports, New Series, English Queen's Bench, commonly cited *Q. B.*
A. & F. Fixt. Amos & Ferrard on Fixtures.
Ab. Abridgment.
Ab. Adm. Abbott's Admiralty Reports, U. S. Dist. Court, South. Dist. N. Y.
Ab. App. Dec. Ab. Ct. App. or *Ab. N. Y. Ct. App.* Abbott's New York Court of Appeals Decisions.
Ab. Eq. Cas. Equity Cases Abridged, English Chancery.
Ab. N. Y. Dig. Abbott's Digest of New York Reports and Statutes.
Ab. N. Y. Pr. or *Ab. Pr.* Abbott's Practice Reports, various New York courts.
Ab. N. Y. Pr. N. S. or *Ab. Pr. N. S.* Abbott's Practice Reports, New Series, various New York courts.
Ab. Nat. Dig. Abbott's National Digest.
Ab. New Cas. Abbott's New Cases, various New York courts.
Ab. Pl. Abbott's Pleadings under the Code.
Ab. Pr. Abbott's Practice Reports, New York.
Ab. Sh. Abbott (Lord Tenterden) on Shipping.
Ab. U. S. Abbott's Reports, United States District and Circuit Courts.
Ab. U. S. Pr. Abbott's United States Courts Practice.
Abdy's R. C. P. Abdy's Roman Civil Procedure.
Abr. Abridgement.
Abr. Cas. Eq. or *Abr. Eq. Cas.* Equity Cases Abridged, English Chancery.
Abs. Absolute.
Acc. Accord or Agrees.
Act. Acton's Reports, Prize Causes, English Privy Council.
Act. Can. Monro's Acta Cancellariæ.
Act. Pr. C. Acton's Reports, Prize Causes, English Privy Council.
Act. Reg. Acta Regia.
Ad. Cas. Sales. Adams' Cases on the Law of Sales.
Ad. Con. Addison on Contracts.
Ad. E. Adams on Ejectment.
Ad. & Ell. Adolphus & Ellis's Reports, English King's Bench.
Ad. & Ell. N. S. Adolphus & Ellis's Reports, New Series, English Queen's Bench, commonly cited *Q. B.*
Ad. Eq. Adams's Equity.
Ad fin. Ad finem, at or near the end.
Ad. Torts. Addison on Torts.
Ad. Rom. Ant. Adams's Roman Antiquities.
Add. Addison's Reports, Pennsylvania.
Add. Abr. Addington's Abridgment of the Penal Statutes.
Add. Con. Addison on Contracts.
Add, Eccl. Addams's Ecclesiastical Reports, English.
Add. Pa. Addison's Reports, Pennsylvania.
Add. Torts. Addison on Torts.
Addams. Addams's Ecclesiastical Reports, English.
Adj. Adjudged, Adjourned.
Adjournal, Books of. The Records of the Court of Justiciary, Scotland.
Adm. Admiralty.
Admr. & Ecc. English Law Reports, Admiralty and Ecclesiastical.
Admr. Administrator.
Admx. Administratrix.
Adolph. & E. Adolphus & Ellis's Reports, English King's Bench.
Adolph. & E. N. S. Adolphus & Ellis's Reports, New Series, English Queen's Bench, commonly cited *Q. B.*
Ads. Ad sectam, at suit of.
Adv. Advocate,
Adye C. M. Adye on Courts-Martial.
Aelf. C. Canons of Aelfric.
Agn. Pat. Agnew on Patents.
Agn. St. of Fr. Agnew on the Statute of Frauds.
Agra H. C. Agra High Court Reports, India.
Al. Aleyn's Select Cases, English King's Bench.
Al. Tel. Cas. Allen's Telegraph Cases, American and English.
Al. & Nap. Alcock & Napier's Reports, Irish King's Bench and Exchequer.
Ala. Alabama Reports.
Ala. N. S. Alabama Reports, New Series.
Ala. Sel. Cas. Alabama Select Cases, by Shepherd.
Alb. Arb. Albert Arbitration, Lord Cairns's Decisions.
Alb. L. J. or *Alb. Law Jour.* Albany Law Journal.
Alc. Alcock's Registry Cases, Irish.
Alc. & N. Alcock & Napier's Reports, Irish King's Bench and Exchequer.
Ald. Alden's Condensed Pennsylvania Reports.
Aldr. Cas. Cont. Aldred's Cases on Contracts.
Ald. Hist. Aldridge's History of the Courts of law.
Ald. Ind. Alden's Index of U. S. Reports.
Ald. & Van Hoes. Dig. Alden & Van Hoesen's Digest, Laws of Mississippi.
Alex. Cas. Report of "Alexandra" case, by Dudley.
Alex. Ch. Pr. Alexander's Chancery Practice.
Aleyn. Aleyn's Select Cases, English King's Bench.
Allison Prac. Allison's Practice of the Criminal Law of Scotland.
Allison Princ. Allison's Principles of ditto.
All. & Mor. Tr. Allen & Morris's Trial.
All. (N. B.) or *Allen (N. B.)* Allen's Reports, New Brunswick Supreme Court.
All. Ser. Allahabad Series. Indian Law Reports.
All. Sher. Allen on Sheriffs.
Allen. Allen's Reports, Massachusetts,
Allen (N. B.) Allen's Reports, New Brunswick.
Allen Tel. Cas. Allen's Telegraph Cases.
Alleyne L. D. of Mar. Alleyne's Legal Degrees of Marriage Considered.
Alln. Part. Allnat on Partition,
Am. America, American, or Americana.
Am. Bar Asso. American Bar Association.
Am. C. L. J. American Civil Law Journal, New York.
Am. Ch. Dig. American Chancery Digest.
Am. Corp. Cas. Withrow's American Corporation Cases.
Am. Crim. Rep. American Criminal Reports, by Hawley.
Am. Dec. American Decisions.
Am. Dig. American Digest.
Am. Insolv. Rep. American Insolvency Reports.
Am. Jur. American Jurist, Boston.
Am. L. Cas. or *Am. Lead. Cas.* American Leading Cases (Hare & Wallace's).
Am. L. Elect. American Law of Elections.
Am. L. J. or *Am. Law Jour.* American Law Journal (Hall's), Philadelphia
Am. L. J. N. S. or *Am. Law Jour. N. S.* American Law Journal, New Series, Philadelphia.
Am. L. J. (O.) American Law Journal, Ohio.
Am. L. M. or *Am. Law Mag.* American Law Magazine, Philadelphia.
Am. L. Rec. or *Am. Law Rec.* American Law Record, Cincinnati.
Am. L. R. or *Am. Law Reg.* American Law Register, Philadelphia.
Am. L. Reg. & Rev. American Law Register and Review, Philadelphia.
Am. L. Rep. or *Am. Law Rep.* American Law Reporter, Davenport, Iowa.
Am. L. Rev. or *Am. Law Rev.* American Law Review, St. Louis.
Am. L. T. or *Am. Law Times.* American Law Times, Washington, D. C.
Am. L. T. Bank. American Law Times Bankruptcy Reports.
Am. L. T. R. American Law Times Reports.
Am. Lawy. American Lawyer, New York City.
Am. Lead. Cas. Hare & Wallace's American Leading Cases.
Am. Pl. Ass. American Pleader's Assistant.
Am. Prob. American Probate Reports.
Am. R. or *Am. Rep.* American Reports.
Am. Rail. Cas. Smith and Bates's American Railway Cases.

Am. Rail. R. American Railway Reports.
Am. Rep. American Reports (selected cases), Albany.
Am. St. Rep. American State Reports.
Am. St. P. American State Papers.
Am. Them. American Themis, New York.
Am. Tr. M. Cas. Cox's American Trade Mark Cases.
Amb. Ambler's Reports, English Chancery.
Am. & Eng. Corp. Cas. American and English Corporation Cases.
Am. & Eng. Encyc. Law. American and English Encyclopædia of Law.
Am. & Eng. Pat. Cas. American and English Patent Cases.
Am. & Eng. R. Cas. American and English Railroad Cases.
Ames, K. & B. Ames, Knowles, and Bradley's Reports, Rhode Island Reports vol. 8.
Ames Cas. B. & N. Ames's Cases on Bills and Notes.
Ames Cas. Part. Ames's Cases on Partnership.
Ames Cas. Pl. Ames's Cases on Pleading.
Ames Cas. Trusts. Ames's Cases on Trusts.
Ames & Sm. Cas. Torts. Ames & Smith's Cases on Torts.
Amos. & F. Amos and Ferrard on Fixtures.
Amos Jur. Amos's Science of Jurisprudence.
An. Anonymous.
And. Anderson's Reports, English Common Pleas and Court of Wards.
And. Ch. Ward. Anderson on Church Wardens.
And. Com. Anderson's History of Commerce.
Andr. Andrews' Reports, English King's Bench.
Andr. Pr. Andrews' Precedents of Leases.
Ang. Angell's Reports, Rhode Island Reports.
Ang. Adv. Enj. Angell on Adverse Enjoyment.
Ang. Ass. Angell on Assignments.
Ang. B. T. Angell on Bank Tax.
Ang. Carr. Angell on Carriers.
Ang. Corp. Angell and Ames on Corporations.
Ang. High. Angell on Highways.
Ang. Ins. Angell on Insurance.
Ang. Lim. Angell on Limitations.
Ang. Tide Wat. Angell on Tide Waters.
Ang. Water C. Angell on Water Courses.
Ang. & A. Corp. Angell and Ames on Corporations.
Ang. & Dur. (R. I.) Angell & Durfee's Rhode Island Reports.
Ang. & D. High. Angell and Durfree on Highways.
Ann. Queen Ann; as 1 Ann. c. 7.
Ann. C. Annals of Congress.
Ann. de la Pro. Annales de la Propriété Industrielle.
Ann. de Leg. Annuaire de Legislation Etrangere, Paris.
Ann. Jud. Annuaire Judiciaire, Paris.
Ann. Reg. Annual Register, London.
Ann. Reg. N. S. Annual Register, New Series, London.
Annaly. Annaly's Reports, English. Commonly cited *Cas. temp. Hardw.*, but sometimes as *Ridgway's Reports.*
Annes. Ins. Annesly on Insurance.
Anon. Anonymous.
Ans. Contr. Anson on Contracts.
Anst. Anstruther's Reports, English Exchequer.
Anth. Abr. Anthon's Abridgment of Blackstone's Commentaries.
Anth. Ill. Dig. Anthony's Illinois Digest.
Anth. L. S. Anthon's Law Student.
Anth. N. P. Anthon's Nisi Prius Cases, New York.
Anth. Prec. Anthon's Precedents.
Anth. Shep. Anthon's edition of Sheppard's Touchstone.
Ap. Justin. Apud Justinium, or Justinian's Institutes.
App. Appeal. Apposition. Appendix.
App. Appleton's Reports, Maine.
App. Cas. English Law Reports, Appeal Cases.
App. Cas. (D. C.). Appeal Cases District of Columbia, vol. 1.
App. Cas. (Beng.). Sevestre & Marshall's Bengal Reports, India.
App. Cas. Rep. Bradwell's Illinois Appeal Court Reports.
App. N. Z. Appeal Reports, New Zealand.
App. Rep. Ont. Appeal Reports, Ontario.
App. Ev. Appleton on Evidence.
Appx. Appendix.
Ar. Arrêté.
Arbuth. Arbuthnot's Select Criminal Cases, Madras.
Arch. Court of Arches.
Archb. B. L. Archbold's Bankrupt Law.
Archb. C. P. Archbold's Civil Pleading.
Archb. Cr. L. Archbold's Criminal Law.
Archb. Cr. P. Archbold's Criminal Pleading.
Archb. Cr. P. by Pom. Archbold's Criminal Pleading, by Pomeroy.
Archb. F. Archbold's Forms.
Archb. F. I. Archbold's Forms of Indictment.
Archb. J. P. Archbold's Justice of the Peace.
Archb. L. & T. Archbold's Landlord and Tenant.
Archb. N. P. Archbold's Nisi Prius Law.
Archb. Pr. Archbold's Practice.
Archb. Pr. by Ch. Archbold's Practice, by Chitty.
Archb. Pr. C. P. Archbold's Practice, Common Pleas.
Archb. Pr. K. B. Archbold's Practice, King's Bench.
Archb. Sum. Archbold's Summary of the Laws of England.
Archer. Archer's Reports, Florida Reports, vol. 2.
Ariz. Arizona Territory Supreme Court.
Arg. Arguendo, in arguing, in the course of reasoning.
Arg. Inst. Institution au Droit Français, par M. Argou.
Ark. Arkansas Reports.
Ark. L. J. Arkansas Law Journal, Fort Smith.
Ark. Rev. Sts. Arkansas Revised Statutes.
Arkl. Arkley's Scotch Reports.
Arms. Elect. Cas. Armstrong's Cases of Contested Elections, New York.
Arms. M. & O. Armstrong, Macartney, and Ogle's Reports, Irish Nisi Prius Cases.
Arms. Tr. Armstrong's Limerick Trials, Ireland.
Arn. Arnold's Reports, English Common Pleas.
Arn. El. Cas. Arnold's Election Cases, English.
Arn. Ins. Arnould on Marine Insurance.
Arn. & H. Arnold and Hodges's Reports, English Queen's Bench.
Arn. & H. B. C. Arnold and Hodges's English Bail Court Reports.
Arnot. Arnot's Criminal Cases, Scotland.
Art. Article.
Ashl. Cas. Cont. Ashley's Cases on Contracts.
Ashton. Ashton's Opinions of the United States Attorneys General,
Ashe. Ashe's Tables.
Ashm. Ashmead's Reports, Pennsylvania.
Aso & Man. Inst. Aso and Manuel's Institutes of the Laws of Spain.
Asp. Mar. L. Cas. Aspinall's Maritime Law Cases.
Ass. Liber Assisarum, Part 5 of the Year Books.
Ass. de Jerus. Assizes of Jerusalem.
Ast. Ent. Aston's Entries.
Atch. Atcheson's Reports, Navigation and Trade, English.
Ath. Mar. Set. Atherly on Marriage Settlements.
Atk. Atkyn's Reports, English Chancery.
Atk. Ch. Pr. Atkinson's Chancery Practice.
Atk. Con. Atkinson on Conveyancing.
Atk. P. T. Atkyn's Parliamentary Tracts.
Atk. Tit. or *Atk. M. T.* Atkinson on Marketable Titles.
Atl. Rep. Atlantic Reporter.
Ats. At suit of.
Atw. Atwater's Reports, Minnesota.
Atty. Attorney.
Atty. Gen. Attorney-General.
Aus. Jur. Australian Jurist, Melbourne.
Aust. Juris. Austin's Province of Jurisprudence.
Austin C. C. R. Austin's County Court Reports, English.
Austr. Jur. Australian Jurist, Melbourne.
Austr. L. T. Australian Law Times, Melbourne.
Auth. Authentica, in the authentic; that is, the Summary of some of the Novels in the Civil Law inserted in the Code under such a title.
Av. & H. B. Law. Avery and Hobb's Bankrupt Law of the United States.
Ayck. Ch. F. Ayckbourn's Chancery Forms.
Ayck. Ch. Pr. Ayckbourn's Chancery Practice.
Ayl. Pan. Ayliffe's Pandects.
Ayl. Par. Ayliffe's *Parergon Juris Canonici Anglicani.*
Azuni Mar. Law. Azuni on Maritime Law.
B. Bancus; the Common Bench; the back of a leaf; Book.
Bann. & A. Banning and Arden's Patent Cases, United States Circuit Court.
B. B. Bail Bond; Bayley on Bills.
B. Bar. Bench and Bar, Chicago.
B. C. Bail Court.
B. C. Bell's Commentaries on the Laws of Scotland.

B. C. C. Lowndes and Maxwell's Bail Court Cases, English; Brown's Chancery Cases, English.
B. C. R. Saunders and Cole's Bail Court Reports, English.
B. Ecc. Law. Burns's Ecclesiastical Law.
B. Just. Burns's Justice.
B. L. T. Baltimore Law Transcript.
B. Mon. B. Monroe's Reports, Kentucky.
B. M. or *B. Moore.* Moore's Reports, English.
B. N. C. Bingham's New Cases, English.
B. N. C. Brooke's New Cases, English.
B. N. P. Buller's Nisi Prius.
B. P. B. Buller's Paper Books. See *A. P. B.*
B. P. C. Brown's Parliamentary Cases.
B. P. L. Cas. Bott's Poor Law Cases.
B. R. Bancus Regis; the King's Bench.
B. R. American Law Times Bankruptcy Reports.
B. Reg. Bankruptcy Register, New York.
B. R. Act. Booth's Real Action.
B. R. H. Cases in King's Bench, *temp. Hardwicke.*
Brun. Brunner's Collected Cases, United States Circuit Court.
B. S. Upper Bench.
B. Tr. Bishop's Trial.
B. & A. or *B. & Ald.* Barnewall and Alderson's Reports, English.
B. & Ad. Barnewall and Adolphus's Reports, English.
B. & Aust. Barron and Austin's Election Cases, English.
B. & B. Ball and Beatty's Reports, Irish Chancery.
B. & B. Broderip and Bingham's Reports, English.
B. & Bar. The Bench and Bar, Chicago.
B. & C. Barnewall & Cresswell's Reports, English.
B. & H. Dig. Bennett & Heard's Massachusetts Digest.
B. & H. Lead. Cas. Bennett & Heard's Leading Cases on Criminal Law.
B. & L. Browning & Lushington's Reports, English Admiralty.
B. & L. Prec. Bullen & Leake's Precedents of Pleading.
B. & P. Bosanquet & Puller's Reports, English.
B. & P. N. R. Bosanquet & Puller's New Reports, English.
B. & S. Best & Smith's Reports, English.
Bab. Auc. Babington on Auctions.
Bab. Set-off. Babington on Set-off.
Bac. Abr. Bacon's Abridgment.
Bac. Comp. Arb. Bacon's Complete Arbitration.
Bac. El. Bacon's Elements of the Common Law.
Bac. Gov. Bacon on Government.
Bac. Law Tr. Bacon's Law Tracts.
Bac. Lease. Bacon on Leases and Terms of Years.
Bac. Lib. Reg. Bacon's *Liber Regis, vel Thesaurus Rerum Ecclesiasticarum.*
Bac. M. Bacon's Maxims.
Bac. U. Bacon on Uses.
Bach. Man. Bache's Manual of a Pennsylvania Justice of the Peace.
Bag. C. Pr. Bagley's Chamber Practice.
Bage. Const. Bagehot on the English Constitution.
Bagl. Bagley's Reports, California Reports, vol. 16.
Bagl. & H. Bagley & Harmen's Reports, California.
Bail Ct. Cas. Lowdes & Maxwell's Bail Court Cases, English.
Bail Ct. Rep. Saunders & Cole's Bail Court Reports.
Bailey. Bailey's Law Reports, South Carolina.
Bailey Eq. or *Bailey Ch.* Bailey's Chancery Reports, South Carolina.
Bain. M. & M. Bainbridge on Mines and Minerals.
Bak. Bur. Baker's Law Relating to Burials.
Bak. Corp. Baker on Corporations.
Bak. Quar. Baker's Law of Quarantine.
Bald. Baldwin's Reports, U. S. 3d Circuit.
Bald. Con. Bald. C. V. Baldwin on the Constitution.
Balf. Balfour's Practice of the Law of Scotland.
Ball. & B. Ball & Beatty's Reports, Irish Chancery.
Ball Cas. Tort. Ball's Cases on Torts.
Ball. Lim. Ballantine on Limitations.
Balt. L. Tr. Baltimore Law Transcript.
Banc. Sup. Bancus Superior, or Upper Bench.
Bank. Ct. R. Bankrupt Court Reporter, New York.
Bank. Inst. Banker's Institutes of Scottish Law.
Bank. Reg. National Bankruptcy Register, New York.
Bank. Rep. American Law Times Bankruptcy Reports.
Bank. & Ins. R. Bankruptcy and Insolvency Reports, English.
Banker's Law. J. Banker's Law Journal.
Banker's Mag. Banker's Magazine, New York.
Banker's Mag. (Lon.). Banker's Magazine, London.
Banks. Banks's Reports, Kansas.
Bann. Bannister's Reports, English Common Pleas.
Bann. Lim. Banning on Limitation of Action.
Bar. Bar Reports, in all the courts, English.
Bar. Ex. Jour. Bar Examination Journal, London.
Barb. or *Barb. S. C.* Barbour's Reports, Supreme Court, New York.
Barb. (Ark.). Barber's Reports, Arkansas.
Barb. Ch. Barbour's Chancery Reports, New York.
Barb. Ch. Pr. Barbour's Chancery Practice.
Barb. Cr. P. Barbour's Criminal Pleadings.
Barb. on Set-off. Barbour on Set-off.
Barb. Grot. Grotius on War and Peace, Notes by Barbeyrac.
Barb. Puff. Puffendorf's Law of Nature and Nations, Notes by Barbeyrac.
Barber. Barber's Reports, Arkansas.
Barn. Barnardiston's Reports, English King's Bench.
Barn. Ch. Barnardiston's Chancery Reports, English.
Barn. Sh. Barnes's Sheriff.
Barn. & A. or *Barn. & Ald.* Barnewall & Alderson's Reports, English.
Barn. & Ad. Barnewall & Adolphus's Reports, English King's Bench.
Barn. & Cress. Barnewall & Cresswell's Reports, English.
Barnes. Barnes's Practice Cases, English.
Barnet. Barnet's Reports, Central Criminal Courts Reports, vols. 27–92.
Barr. Barr's Reports, Pennsylvania.
Barr. Ob. St. Barrington's Observations on the Statutes.
Barr. Ten. Barry on Tenures.
Barr. & Arn. Barron & Arnold's Election Cases, English.
Barr. & Aus. Barron & Austin's Election Cases, English.
Barron Mir. Barron's Mirror of Parliament.
Barry Ch. Jur. Barry's Chancery Jurisdiction.
Barry Conv. Barry on Conveyancing.
Bart. Conv. Barton's Elements of Conveyancing.
Bart. Elect. Cas. Bartlett's Congressional Election Cases.
Bart. Eq. Barton's Suit in Equity.
Bart. Prec. Barton's Precedents of Conveyancing.
Bat. Sp. Per. Batten on Specific Performance.
Batem. Ag. Bateman on Agency.
Batem. Ex. L. Bateman's Excise Laws.
Batem. Auct. Bateman on the Law of Auctions.
Batem. Comm. L. Bateman's Commercial Law.
Batem. Const L. Bateman's Constitutional Law.
Bates Ch. Bates's Chancery Reports, Delaware.
Batty. Batty's Reports, Irish, King's Bench.
Baum. Baum on Rectors, Church Wardens, and Vestrymen.
Baxt. Baxter's Reports, Tennessee.
Bay. Bay's Reports, South Carolina.
Bay. (Mo.). Bay's Reports, Missouri.
Bayl. Bill. Bayley on Bills.
Bayl. Ch. Pr. Bayley's Chancery Practice.
Bea. C. E. Beame's Costs in Equity.
Bea. Eq. Pl. Beame's Equity Pleading.
Bea. Ne Exeat. Beame on the Writ of *Ne Exeat.*
Bea. Ord. Beame's Orders in Chancery.
Bea. Pl. Eq. Beame's Pleas in Equity.
Beas. Beasley's Reports, New Jersey Equity.
Beatt. Beatty's Reports, Irish Chancery.
Beaum. B. of S. Beaumont on Bills of Sale.
Beaum. Ins. Beaumont on Insurance.
Beav. Beavan's Reports, English.
Beav. R. & C. Cas. Beavan's Railway and Canal Cases.
Beawes. Beawes's *Lex Mercatoria.*
Becc. Cr. Beccaria on Crimes and Punishments.
Beck's Med. Jur. Beck's Medical Jurisprudence.
Bee. or *Bee Adm.* Bee's Admiralty Reports, U. S. Dist. Court, South Carolina.
Bee C. C. R. Bee's Crown Cases Reserved, English.

Bel. Bellewe's Reports, English King's Bench *temp.* Richard II.
Beling & Van. (*Ceylon*). Beling & Vander Straalen's Ceylon Reports.
Bell. (*Or.*) Bellinger's Reports, Oregon.
Bell Ap. Cas. Bell's House of Lords Cases, Scotch Appeal.
Bell C. C. Bell's Crown Cases Reserved.
Bell. C. Cas. Bellais' Civil Cases, Bombay; Bellais' Criminal Cases, Bombay.
Bell C. T. Bell on Completing Titles.
Bell Cas. Bell's Cases, Scotch Court of Session.
Bell Com. Bell's Commentaries on the Laws of Scotland.
Bell. Cr. Cas. Beller's Criminal Cases, Bombay.
Bell. Dell. U. L. Beller's Delineation of Universal Law.
Bell Dict. Bell's Dictionary of the Law of Scotland.
Bell Dict. Dec. Bell's Dictionary of Decisions, Court of Session, Scotland.
Bell El. L. Bell's Election Law of Scotland.
Bell H. C. Cal. Bell's Reports High Court of Calcutta.
Bell H. L. Bell's House of Lords Cases, Scotch Appeal.
Bell H. & W. Bell on Husband and Wife.
Bell Illus. Bell's Illustration of Principles.
Bell (*In.*). Bell's Reports, India.
Bell L. Bell on Leases.
Bell Notes. Bell's Supplemental Notes to Hume on Crimes.
Bell P. C. Bell's Cases in Parliament.
Bell Prin. Bell's Principles of the Law of Scotland.
Bell Put. Mar. Bell's Putative Marriage Cases, Scotland.
Bell S. Bell on Sales.
Bell Sess. Cas. Bell's Cases in the Court of Session.
Bell Styles. Bell's System of the Forms of Deeds.
Bell T. D. Bell on the Testing of Deeds.
Bellais. Bellais's Criminal Cases, Bombay.
Bellewe. Bellewe's Reports, English King's Bench, *temp.* Richard II.
Bellewe Cas. Bellewe's Cases, *temp.* Henry VIII.; Brooke's New Cases; Petit Brooke.
Bellingh. Tr. Report of the Bellingham Trial.
Belt Sup. Ves. Belt's Supplement to Vesey Senior's Reports.
Belt Ves. Sen. Belt's Edition of Vesey Senior's Reports.
Ben. or *Bt.* Benedict's Reports, U. S. Dist. Court, 2d Circuit.
Ben. Adm. Benedict's Admiralty Practice.
Ben. Av. Benecke on Average.
Ben. Just. Benedict on Justices of the Peace.
Ben. F. I. Cas. Bennett's Fire Insurance Cases.
Ben. Ins. Cas. Bennett's Insurance Cases.
Bench & Bar. The Bench and Bar, Chicago.
Bendl. Bendloe's or New Benloe's Reports, English Common Pleas, Ed. of 1661.
Benet Ct. M. Benet on Military Law and Courts Martial.
Beng. L. R. Bengal Law Reports, India.
Beng. S. D. Bengal Sudder Dewany Reports, India.
Benj. Sales. Benjamin on Sales.
Benl. Benloe's Reports, English Common Pleas.
Benl. in Ashe. Benloe's Reports, at the end of Ashe's Tables.
Benl. in Keil. Benloe's Report at the end of Keilway's Reports.
Benl. New. Benloe's Reports, English Common Pleas, Ed. of 1661.
Benl. Old. Benloe's Reports, English Common Pleas, of Benloe & Dalison, Ed. of 1689.
Benl. & Dal. Benloe & Dalison's Reports, English Common Pleas.
Benn. (*Cal.*). Bennett's Reports, California.
Benn. (*Mo.*). Bennett's Reports, Missouri.
Benn. (*Dak.*). Bennett's Dakota Reports.
Benn. Diss. Bennett's Dissertation on the Proceedings in the Master's Office in the Court of Chancery of England, sometimes cited *Benn. Prac.*
Benn. Fire. Ins. Cas. Bennett's Fire Insurance Cases.
Benn. Prac. See *Benn. Diss.*
Benn. & H. Cr. Cas. Bennett & Heard's Criminal Cases.
Benn. & H. Dig. Bennett & Heard's Massachusetts Digest.
Bennett M. See *Benn. Diss.*
Bent. Bentley's Reports, Irish Chancery.
Benth. Ev. or *Benth. Jud. Ev.* Bentham on Rationale of Judicial Evidence.
Benth. Leg. Bentham on Theory of Legislation.
Bentl. Atty. Gen. Bentley's U. S. Attorney-General's Opinions.
Berry. Berry's Reports, Missouri.
Bert. Berton's Reports, New Brunswick.
Besson Prec. Besson's New Jersey Precedents.
Best Ev. Best on Evidence.
Best Pres. Best on Presumptions.
Best & S. Best & Smith's Reports, English Queen's Bench.
Betts Adm. Pr. Betts's Admiralty Practice.
Betts Dec. Blatchford & Howland's U. S. District Court Reports.
Bev. Hom. Bevill on Homicide.
Bev. (*Ceylon*). Beven's Ceylon Reports.
Bibb. Bibb's Reports, Kentucky.
Bick. Bicknell's Reports, Nevada.
Bick. & H. (*Nev.*). Bicknell & Hawley's Nevada Reports.
Bick. (*In.*). Bicknell's Reports, India.
Biddle Retro. Leg. Biddle on Retrospective Legislation.
Big. Bignall's Reports, India.
Big. Bills & N. Bigelow on Bills and Notes.
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Blount Tr. Blount's Impeachment Trial.
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Boh. Dec. Bohun's Declarations.
Boh. Eng. L. Bohun's English Lawyer.
Boh. Priv. Lon. Bohun's Privilegia Londini.
Boil. Code N. Boileux's Code Napoléon.
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Bomb. Sel. Cas. Bombay Select Cases.
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Bond. Bond's Report's, U. S. Courts, Southern Dist. of Ohio.
Bone Prec. Bone's Precedents on Conveyancing.
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Books S. Books of Saderunt.
Boor. Booraem's Reports, California.
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Br. British. Brooke. Brown. Brownlow. See *Bro.*
Br. Bracton de Legibus et Consuetudinibus Angliæ.
Br. Abr. Brooke's Abridgment.
Br. Brev. Jud. Brownlow's Brevia Judicalia.
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Br. Reg. Braithwaite's Register.
Br. Syn. Brown's Synopsis of Decisions, Scotch Court of Session.
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C. Com. Code de Commerce.
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C. C. A. County Court Appeals.
C. C. C. Choice Cases in Chancery, English.
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C. C. R. Crown Cases Reserved.
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C. C. R. County Court Reports, Pa.
C. Cr. P. Code of Criminal Procedure.
C. C. & B. B. Cepi Corpus and Bail Bond.
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C. Instr. Cr. Code Instruction Criminelle.
C. J. Chief Justice.
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C. P. Code of Procedure. Common Pleas. Code Penal.
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Ca. resp. Capias and respondendum.
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Cal. Ser. Calcutta Series Indian Law Reports.
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Can. L. J. Canada Law Journal, Toronto.
Can. L. J. (*L. C.*). Lower Canada Law Journal, Montreal.
Can. L. T. Canadian Law Times, Toronto, Canada.
Can. Mun. J. Canadian Municipal Journal.
Canad. Mo. Canadian Monthly.
Cane & L. Cane & Leigh's Crown Cases Reserved.
Can. S. C. Rep. Canada Supreme Court Reports.
Cap. Capitulum. Chapter.
Cape Law J. Cape Law Journal, Grahamstown, Cape of Good Hope.
Car. Carolus; thus 13 Car. II., signifies the thirteenth year of the reign of King Charles II.
Car. Cr. L. Carrington's Criminal Law.
Car. H. & A. Carrow, Hamerton, & Allen's Reports, English Session Cases.
Car. L. Jour. Carolina Law Journal, Charleston, S. C.
Car. L. Rep. Carolina Law Repository, Raleigh, N. C.
Car. O. & B. Carrow, Oliver & Bevan's Railway and Canal Cases.
Car. & Kir. Carrington & Kirwan's Reports, English Nisi Prius.
Car. & Mar. Carrington & Marshman's Reports, English Nisi Prius.
Car. & O. Carrow & Oliver's Railway and Canal Cases.
Car. & P. Carrington & Payne's Reports, English Nisi Prius.
Carp. Carpenter's Reports, California.
Carp. P. C. Carpmael's Patent Cases.
Carr. Cas. Carran's Summary Cases, India.
Cart. Carter's Reports, English Common Pleas.
Cart. (*Ind.*). Carter's Reports, Indiana.
Carta de For. Carta de Foresta.
Carth. Carthew's Reports, English King's Bench.
Cartm. Trade M. Cas. Cartmell's Trademark Cases.
Cartw. Const. Cas. Cartwright's Constitutional Cases.
Cary. Cary's Reports, English Chancery.
Cary Part. Cary on Partnership.
Cas. Casey's Reports, Pennsylvania.
Cas. App. Cases on Appeal to the House of Lords.
Cas. Arg. & Dec. Ch. Cases Argued and Decreed in Chancery, English.
Cas. B. R. Cases Banco Regis. Modern Reports, vol. 12.
Cas. B. R. Holt. Cases and Resolutions (of settlements; *not* Holt's K. B. Reports).
Cas. C. L. Cases in Crown Law.
Cas. Ch. Select Cases in Chancery.
Cas. Ch. 1, 2, 3. Cases in Chancery *temp.* Car II.
Cas. Eq. Cases in Equity, Gilbert's Reports, English.
Cas. Eq. Abr. Cases in Equity Abridged, English.
Cas. H. of L. Cases in the English House of Lords, 1814–1819.

Cas. K. B. Cases in King's Bench (8 Modern Reports).
Cas. K. B. t. Hardw. Cases *temp.* Hardwicke, W. Kelynge's Reports, English King's Bench.
Cas. L. & Eq. Cases in Law and Equity, Modern Reports, vol. 10.
Cas. in P. or *Cas. Parl.* Cases in Parliament.
Cas. Pr. Cases of Practice in the Court of the King's Bench, from Eliz. to 14 Geo. III.
Cas. Pr. (*Cooke*). Cooke's Practice Cases, English Common Pleas.
Cas. Pr. C. P. Cases of Practice, English Common Pleas.
Cas. Pr. K. B. Cases of Practice, English King's Bench.
Cas. R. Casey's Reports, Pennsylvania State Reports, vols. 25–36.
Cas. S. C. (*Cape of G. H.*). Cases in the Supreme Court, Cape of Good Hope.
Cas. Self Def. Cases on Self Defence, Horrigan & Thompson's.
Cas. Sett. Cases of Settlement, King's Bench.
Cas. Six Cir. Cases in the Six Circuits, Ireland.
Cas. t. Ch. II. Cases *temp.* Charles II., in vol. 3 of Reports in Chancery.
Cas. t. F. Cases *tempore* Finch, English Chancery.
Cas. t. Geo. I. Cases *tempore* George I., English Chancery, Modern Reports, vols. 8 and 9.
Cas. t. H. Cases *tempore* Hardwicke, English King's Bench, Ridgway's Reports, Annaly's Reports.
Cas. t. Holt. Cases *tempore* Holt, English King's Bench, Holt's Reports.
Cas. t. Lee (*Phillimore's*). Cases *temp.* Lee, English Ecclesiastical.
Cas. t. King. Cases *tempore* King, English Chancery, Mosely's Reports.
Cas. t. Mac. Cases *tempore* Macclesfield, Modern Reports, vol. 10, Lucas's Reports.
Cas. t. Nap. Cases *tempore* Napier, Irish.
Cas. t. North. Cases *temp.*, Northington (Eden's English Chancery Reports).
Cas. t. Plunk. Cases *tempore* plunkett, Irish Chancery.
Cas. t. Q. A. Cases *tempore* Queen Anne, Modern Reports, vol. 11.
Cas. t. Sugd. Cases *tempore* Sugden, Irish Chancery.
Cas. t. Tal. Cases *tempore* Talbot, English Chancery, Forrester's Reports.
Cas. t. Wm. III. Cases *tempore* William III., Modern Reports, vol. 12.
Cas. Tak. & Adj. Cases Taken and Adjudged, English Chancery.
Cas. Wm. I. Bigelow's Cases, William I. to Richard I.
Cas. w. Op. or *Cas. & Op.* Cases with Opinions of Eminent Counsel.
Casey. Casey's Reports, Pennsylvania State Reports, vols. 25–36.
Castle Com. Castle on Law of Commerce.
Cav. Money Sec. Cavanaugh's Law of Money Securities.
Cav. Deb. Cavendish's Debates, House of Commons.
Cane & L. Cane & Leigh's Crown Cases Reserved.
Cawl. Cawley's Laws against Recusants.
Cay Abr. Cay's Abridgment of the Statutes.
Centr. Cr. C. R. Central Criminal Court Reports, English.
Centr. L. J. Central Law Journals, St. Louis, Mo.
Ceyl. Leg. Misc. Ceylon Legal Miscellany.
Ch.
[1891] *Ch.* English Chancery Cases; Law Reports, 1st Series, 1891.
[1892] *Ch.* Same for 1892, etc.
Ch. App. Cas. Chancery Appeal Cases Law Reports.
Ch. Burn. J. Chitty Burn's Justice.
Ch. Cal. Chancery Calendar.
Ch. Cas. Cases in Chancery.
Ch. Cas. Ch. Choice Cases in Chancery.
Ch. Cham. (*Ont.*). Chancery Chambers' Reports, Ontario.
Ch. Div. Chancery Division Law Reports.
Ch. J. Chief Justice. Chief Judge.
Ch. Pr. Chancery Practice.
Ch. Pre. Precedents in Chancery.
Ch. R. or *Ch. Repts.* Reports in Chancery.
Ch. Sent. Chancery Sentinel, Saratoga, New York.
Ch. & Cl. Cas. Cripp's Church and Clergy Cases.
Chal. Op. Chalmer's Colonial Opinions.
Chamb. Chamber's Reports, Upper Canada.

Chamb. Ch. Jur. Chambers' Chancery Jurisdiction.
Chamb. L. & T. Chambers on Landlord and Tenant.
Chan. Chancey's Reports, Michigan.
Chance Chance on Powers.
Chand. N. H. Chandler's Reports, New Hampshire, vols. 20 and 38–44.
Chand. (Wis.). Chandler's Reports, Wisconsin.
Chand. Cr. Tr. Chandler's American Criminal Trials.
Chapl. Cas. Crim. L. Chaplin's Cases on Criminal Law.
Char. Merc. Charta Mercatoria.
Charl. Pr. Cas. Charley's Practice Cases (Judicature Act).
Charl. R. P. Stat. Charley's Real Property Statutes.
Charlt. T. U. P. Charlton's Reports, Georgia.
Charlt. R. M. R. M. Charlton's Reports, Georgia.
Chase. Chase's Decisions by Johnson, U. S. 4th Circuit.
Chase Tr. Chase's Trial by the U. S. Senate.
Cher. Cas. Cherokee Case.
Chest. Cas. Case of the City of Chester, on Quo Warranto.
Chev. Cheves's Law Reports, South Carolina.
Chev. Ch. or *Chev. Eq.* Cheves's Chancery Reports, South Carolina.
Chic. L. B. Chicago Law Bulletin, Illinois.
Chic. L. J. Chicago Law Journal.
Chic. L. Rec. Chicago Law Record.
Chic. L. T. Chicago Law Times.
Chic. Leg. News. Chicago Legal News.
Chip. Contr. Chipman on Contracts.
Chip. D. D. Chipman's Reports, Vermont.
Chip. N. N. Chipman's Reports, Vermont.
Chit. App. Chitty on Apprentices and Journeymen.
Chit. Arch. Pr. Chitty's Archbold's Practice.
Chit. B. C. Chitty's Bail Court Reports, English.
Chit. Bills. Chitty on Bills.
Chit. Bla. Com. Chitty's Blackstone's Commentaries.
Chit. Burn's J. Chitty Burn's Justice.
Chit. Car. Chitty on Carriers.
Chit. Com. L. Chitty on Commercial Law.
Chit. Contr. Chitty on Contracts.
Chit. Cr. L. Chitty on Criminal Law.
Chit. Des. Chitty on the Law of Descent.
Chit. Eq. Dig. Chitty's Equity Digest.
Chit. F. Chitty's Forms.
Chit. G. P. Chitty's General Practice.
Chit. Jr. Bills. Chitty, Junior, on Bills.
Chit. L. of N. Chitty's Law of Nations.
Chit. Med. Jur. Chitty on Medical Jurisprudence.
Chit. Pl. Chitty on Pleading.
Chit. Prac. Chitty's General Practice.
Chit. Prec. Chitty's Precedents in Pleading.
Chit. Prer. Chitty's Prerogatives of the Crown.
Chit. Rep. Chitty's Reports, English Bail Court.
Chit. Stat. Chitty's Statutes of Practical Utility.
Chitt. Chitty's Reports, English Bail Court.
Cho. Cas. Ch. Choice Cases in Chancery.
Chr. Pr. W. Christie's Precedents of Wills.
Chr. Rep. Chamber Reports, Upper Canada.
Christ. B. L. Christian's Bankrupt Laws.
Churchill & Br. Sh. Churchill and Bruck on Sheriffs.
Cin. Law Bul. Cincinnati Law Bulletin, Cincinnati, Ohio.
Cin. Mun. Dec. Cincinnati Municipal Decisions.
Cin. Rep. or *Cinc. (Ohio).* Cincinnati Superior Court Reports.
C. C. A. Circuit Court of Appeals, United States.
Circ. Ct. in Eq. Circuit Court in Equity.
City C. Rep. City Courts Reports, New York City.
City Hall Rec. Rogers's City Hall Recorder, New York.
City Hall Rep. Lumas's City Hall Reporter, New York.
City Rec. City Record, New York.
Civ. Code. Civil Code.
Civ. Pro. (N. Y.). Civil Procedure Reports, New York.
Cl. App. Clark's Appeal Cases, English House of Lords.
Civ. Proc. R. New York Civil Procedure Reports.
Cl. Ass. Clerk's Assistant.
Cl. Ch. Clarke's Chancery Reports, N. Y.
Cl. Col. Clark's Colonial Law.
Cl. Cr. L. Clarke, Criminal Law.
Cl. Elec. Clark on Elections.
Cl. Extr. Clarke on Extradition.
Cl. Home R. Clerk Home Scotch Reports.
Cl. Ins. Clarke on Insurance.
Cl. R. L. Clarke's Early Roman Law.
Cl. & Fin. Clark & Finnelly's Reports, English House of Lords.
Cl. & H. Clarke & Hall's Congressional Election Cases.
Clan. H. & W. Clancy on Husband and Wife.
Clan. Mar. Wom. Clancy on Married Women.
Clar. Parl. Chr. Clarendon's Parliamentary Chronicle.
Clark. Clark's Appeal Cases, English House of Lords.
Clark (Ala.). Clark's Reports, Alabama Reports, vol. 58.
Clark Lease. Clark's Inquiry into the Nature of Leases.
Clark (Pa.). Clark's Pennsylvania Law Journal Reports.
Clark & Fin. Clark & Finnelly's Reports, English House of Lords.
Clark & Fin. N. S. Clark & Finnelly's Reports, New Series, English House of Lords.
Clarke. Clarke's Notes of Cases, Bengal.
Clarke (Iowa). Clarke's Reports, Iowa.
Clarke (Mich.). Clarke's Reports, Michigan.
Clarke (N. Y.). Clarke's New York Chancery Reports.
Clarke Adm. Pr. Clarke's Admiralty Practice.
Clarke Bills. Clarke on Bills, Notes, and Checks.
Clarke Ch. R. Clarke's Chancery Reports, New York.
Clarke Cr. L. Clark on Criminal Law, Canada.
Clarke Ins. Clarke on Insurance, Canada.
Clarke Not., or *R. & O.* Clarke's Notes of Cases, in his Rules and Orders, Bengal.
Clarke Prax. Clarke's Praxis.
Clarke & H. Elec. Cas. Clarke & Hall's Cases of Contested Elections in Congress.
Clayt. Clayton's Reports, English York Assize.
Clay. Conv. Clayton's Conveyancing.
Clem. Corp. Sec. Clemens on Corporate Securities.
Cleir. Us et Cout. Cleirac, *Us et Coutumes de la Mer.*
Clerk Home. Clerk Home's Decisions, Scotch Court of Session.
Clerke Dig. Clerke's Digest, New York.
Clerke Pr. Clerke's Praxis Admiralitatis.
Clerke Rud. Clerke's Rudiments of American Law and Practice.
Clev. Bank. Cleveland on the Banking System.
Clev. L. Rec. Cleveland (Ohio) Law Record.
Clev. L. Rep'r. Cleveland Law Reporter.
Clif. & R. Clifford & Richard's English Locus Standi Reports.
Clif. & St. Clifford & Stephens' English Locus Standi Reports.
Cliff. Clifford's Reports, U. S. 1st Circuit.
Cliff. El. Cas. Clifford's Election Cases.
Clift Ent. Clift's Entries.
Clin. Dig. Clinton's Digest, New York Reports.
Clin. & Sp. Dig. Clinton & Spencer's Digest.
Clode. Clode's Martial Law.
Clow L. C. on Torts. Clow's Leading Cases on Torts.
Clusk. P. T. Cluskey's Political Text Book.
Co. County. Company.
Co Coke's Reports, English King's Bench.
Co. B. L. Cooke's Bankrupt Law.
Co. Cop. Coke's Copyholder.
Co. Ct. Cas. County Court Cases, English.
Co. Ct. Ch. County Court Chronicle, English.
Co. Ct. Rep. County Court Reports, Pa.
Co. Cts. Coke on Courts (4th Inst.).
Co. Ent. Coke's Entries.
Co. Inst. Coke's Institutes.
Co. Litt. Coke on Littleton (1st Inst.).
Co. M. C. Coke's Magna Charta (2d Inst.).
Co. P. C. Coke's Pleas of the Crown (3d Inst.).
Co. Pal. County Palatine.
Co. Pl. Coke's Pleadings (sometimes published separately).
Co. Rep. Coke's Reports, English King's Bench.
Cobb. Cas. Int. L. Cobbett's Cases on International Law.
Cobb. Cobb's Reports, Georgia.
Cobb. Parl. Hist. Cobbett's Parliamentary History.
Cobb. Pol. Reg. Cobbett's Political Register.
Cobb Slav. Cobb on Slavery.
Cochr. Cochran's Reports, Nova Scotia.
Cock. Nat. Cockburn on Nationality.
Cock. & Rowe. Cockburn and Rowe's English Election Cases.

Cocke (Ala.). Cocke's Reports, Alabama Reports, N. S., vols. 16–18.
Cocke (Fla.). Cocke's Reports, Florida Reports, vols. 14–16.
Cocke Const. His. Cocke's Constitutional History.
Cocke Pr. Cocke's Practice in the U. S. Courts.
Cod. Codex Justiniani.
Cod. Jur. Civ. Codex Juris Civilis; Justinian's Code.
Code Civ. Code Civil, or Civil Code of France.
Code Comm. Code de Commerce.
Code F. Code Forestier.
Code I. Code d'Instruction Criminelle.
Code La. Civil Code of Louisiana.
Code Nap. Code Napoléon; Civil Code.
Code P. Code Pénal.
Code Pro. Code de Procédure Civile.
Code Rep. Code Reporter, New York.
Code Rep. N. S. Code Reports, various New York courts.
Coke. Coke's Reports, English King's Bench.
Coke Inst. Coke's Institutes.
Coke Lit. Coke on Littleton.
Col. L. J. Colonial Law Journal, New Zealand.
Col. Column.
Col. Colorado Reports.
Col. Cas. Coleman's Cases, New York.
Col. & Cai. Cas. Coleman & Caines's Cases, New York.
Colb. Pr. Colby's Practice.
Coldw. Coldwell's Reports, Tennessee.
Cole. Cole's Reports, Iowa.
Cole. Cas. Pr. Coleman's Cases, New York.
Cole. Dig. Colebrooke's Digest of Hindoo Law.
Cole Eject. Cole's Law and Practice in Ejectment.
Cole Inf. Cole on Criminal Information.
Cole. & C. Coleman & Caines's Cases, New York.
Coll. Collyer's Reports, English Chancery.
Coll. Caus. Cel. Collection des Causes Célèbres, Paris.
Coll. Contrib. Collier's Law of Contributories.
Coll. Id. Collinson on the Law concerning Idiots.
Coll. Jur. Collectanea Juridica.
Coll. Min. Collier on Mines.
Coll. Part. Collyer on Partnership.
Coll. Parl. Cas. Colles's Parliamentary Cases.
Coll. Pat. Collier on the Law of Patents.
Colles. Colles's Parliamentary Cases.
Collin. Lun. Collinson on Lunacy.
Colq. Colquit's Reports (1 Modern Reports).
Colq. C. L. Colquhoun's Civil Law.
Colq. R. Colquit's Reports (1 Modern).
Colt. Coltman, Reg. App. Cas.
Colt. Reg. Cas. Coltman, Registration Cases.
Colum. Law T. Columbia Law Times.
Com. Communes, or Extravagantes Communes.
Com. Commissioner; Commentary.
Com. Comyn's Reports, English King's Bench and Common Pleas.
Com. B. English Common Bench Reports, by Manning, Granger & Scott.
Com. B. N. S. English Common Bench Reports, New Series, by Manning, Granger & Scott.
Com. Cont. Comyn on Contracts.
Com. Dig. Comyn's Digest.
Com. Jour. Journals of the House of Commons.
Com. Law. Commercial Law. Common Law.
Com. Law. R. Common Law Reports, English Common Law Courts.
Com. Law. Rep. Common Law Reports (Spottiswoode's). All the Courts.
Com. L. & T. Comyn on Landlord and Tenant.
Com. P. Div. Common Pleas Division, Law Reports.
Com. P. Reptr. Common Pleas Reporter, Scranton, Penna.
Com. U. Comyn on Usury.
Com. & Leg. Rep. Commercial and Legal Reporter, Nashville, Tenn.
Comb. Comberbach's Reports, English King's Bench.
Com. Blackstone's Commentaries.
Coms. Comstock's Reports, New York Ct. of Appeals Reports, vols. 1–4.
Coms. Ex. Comstock on Executors.
Comyn. Comyn's Reports, English King's Bench and Common Pleas.
Con. Conover's Reports, Wisconsin Reports, vols. 16–88.
Con. Dig. Connor's Digest.
Con. Par. Connell on Parishes.
Con. & Law. Connor & Lawson's Reports, Irish Chancery.
Con. & Sim. Connor & Simonton's Equity Digest.
Cond. Condensed.
Cond. Ch. R. Condensed Chancery Reports.
Cond. Ecc. R. Condensed Ecclesiastical Reports.
Cond. Exch. R. Condensed Exchequer Reports.
Cond. Rep. U. S. Peter's Condensed United States Reports.
Condy Mar. Marshall's Insurance, by Condy.
Conf. Cameron & Norwood's Conference Reports, North Carolina.
Conf. Chart. Confirmatio Chartarum.
Cong. Elect. Cas. Congressional Election Cases.
Congr. Globe. Congressional Globe, Washington.
Congr. Rec. Congressional Record, Washington.
Conk. Adm. Conkling's Admiralty.
Conk. Jur. & Pr. or *Conk. Pr.* Conkling's Jurisdiction and Practice, U. S. Courts.
Conn. Connecticut Reports.
Connolly. Connolly, New York Surrogate.
Conr. Conroy's Custodian Reports, Irish.
Cons. del Mare. Consolato del Mare.
Cons. Ord. in Ch. Consolidated General Orders in Chancery.
Consist. Haggard's Consistory Court Reports, English.
Const. Constitution.
Const. Oth. Constitutions Othoni.
Const. S. C. Treadway's Constitutional Reports, South Carolina.
Const (N. S.) S. C. Mill's Constitutional Reports, New Series, South Carolina.
Const. U. S. Constitution of the United States.
Consuet. Feud. Consuetudines Feudorum, or the Book of Forms.
Cont. Contra.
Cooke. Cooke's Practice Cases, English Common Pleas.
Cooke (Tenn.). Cooke's Reports, Tennessee.
Cooke Agr. T. Cooke on Agricultural Tenancies.
Cooke B. L. Cooke's Bankrupt Law.
Cooke Cop. Cooke's Law of Copyhold Enfranchisements.
Cooke Def. Cooke's Law of Defamation.
Cooke I. A. Cooke's Inclosure Act.
Cooke Pr. Cas. Cooke's Practice Reports, English Common Pleas.
Cooke & Al. Cooke & Alcock's Reports, Irish King's Bench.
Cooke & H. Cooke & Harwood's Charitable Trust Acts.
Cooley. Cooley's Reports, Michigan.
Cooley Const. L. Cooley on Constitutional Law.
Cooley Const. Lim. Cooley on Constitutional Limitations.
Cooley Tax. Cooley on Taxation.
Cooley Torts. Cooley on Torts.
Coop. Cooper's Reports, English Chancery *temp.* Eldon.
Coop. (Tenn.). Cooper's Reports, Tennessee.
Coop C. & P. R. Cooper's Chancery and Practice Reporter, Upper Canada.
Coop. C. C. or *Coop. Cas.* Cooper's Chancery Cases *temp.* Cottenham.
Coop. Eq. Pl. Cooper's Equity Pleading.
Coop. Inst. or *Coop. Jus.* Cooper's Institutes of Justinian.
Coop. Pr. Cas. Cooper's Practice Cases, English Chancery.
Coop. Med. Jur. Cooper's Medical Jurisprudence.
Coop. t. Brough. Cooper's Reports *temp.* Brougham, English Chancery.
Coop. t. Cotten. Cooper's Cases, *temp.* Cottenham, English Chancery.
Coop. t. Eld. Cooper's Reports *temp.* Eldon, English Chancery.
Cooper. Cooper's Reports, English Chancery *temp.* Eldon.
Coote Adm. Coote's Admiralty Practice.
Coote L. & T. Coote's Landlord and Tenant.
Coote Mort. Coote on Mortgages.
Coote Pro. Pr. Coote's Probate Practice.
Coote & Tr. Coote & Tristram's Probate Court Practice.
Cop. Cop. Copinger on Copyright.
Cop. Ind. Pr. Copinger's Index to Precedents.
Copp Land Off. Bull. Copp's Land Office Bulletin.
Copp U. S. Min. Dec. Copp's U. S. Mining Decisions.
Copp U. S. Min. L. Copp's U. S. Mineral Land Laws.
Corb. & Dan. Corbett & Daniel's Parliamentary Election Cases.
Cord Mar. Wom. Cord on Married Women.
Corn. D. Cornish on Purchase Deeds.
Corn. Dig. Cornwell's Digest.

Corn. Uses. Cornish on Uses.
Corn. Rem. Cornish on Remainders.
Cornw. Tab. Cornwall's Table of Precedents.
Corp. Jur. Can. Corpus Juris Canonici.
Corp. Jur. Civ. Corpus Juris Civilis.
Corry. Corryton's Reports, Calcutta.
Corvin. Corvinus's Elementa Juris Civilis.
Cory. Cop. Coryton on Copyright.
Cory. Pat. Coryton on Patents.
Cot. Abr. Cotton's Abridgment of the Records.
Coul. & F. Waters. Coulston & Forbes on Waters.
Counsellor. The Counsellor, New York City.
County Ct. Rep. County Court Reports, English.
County Ct. Rep. N. S. County Court Reports, New Series, English.
County Cts. & Bankr. Cas. County Courts and Bankruptcy Cases.
County Cts. Ch. County Courts Chronicle, London.
Coup. Couper's Justiciary Reports, Scotland.
Court Cl. U. S. Court of Claims Report .
Court J. & Dist. Ct. Rec. Court Journal and District Court Record.
Court Sess. Cas. Court of Session Cases, Scotland.
Court. & Macl. Courteney and Maclean's Scotch Appeals (6-7 Wilson and Shaw).
Cov. Ev. Coventry on Evidence.
Cow. Cowen's Reports, New York.
Cow. Dig. Cowell's (East) Indian Digest.
Cow. Inst. Cowell's Institutes of Law.
Cow. Cr. Cowen's Criminal Reports, New York.
Cowell, Cow. Dic., or *Cow. Int.* Cowell's Law Dictionary; Cowell's Interpreter.
Cowp. Cowper's Reports, English King's Bench.
Cox, Cox Ch., or *Cox Eq.* Cox's Reports, English Chancery.
Cox (Ark.). Cox's Reports, Arkansas.
Cox Am. Tr. M. Cas. Cox's American Trademark Cases.
Cox C. C. or *Cox Cr. Cas.* Cox's Criminal Cases, English.
Cox Elect. Cox on Ancient Parliamentary Elections.
Cox Gov. Cox's Institutions of the English Government.
Cox J. S. Cox on Joint Stock Companies.
Cox J. S. Cas. Cox's Joint Stock Cases.
Cox M. C. Cox's Magistrate Cases.
Cox, McC. & H. Cox, McCrae and Hertslett's County Court Reports, English.
Cox & Atk. Cox and Atkinson's Registration Appeals.
Coxe. Coxe's Reports, New Jersey Law Reports, vol. 1.
Coxe & Melm. Coxe & Melmoth MSS. Cases on Fraud, in May on Fraudulent Conveyances.
Cr. Craig's Jus Feudale, Scotland.
Cr. or *Cra.* Cranch's Reports, Supreme Court U. S.
Cr. or *Cra. C. C.* Cranch's Reports U. S. Circuit Court, Dist. of Columbia.
Cr. Cas. Res. Crown Cases Reserved, Law Reports.
Cr. Pat. Dec. Cranch's Patent Decisions.
Cr. & St. Craigie and Stewart, House of Lords (Sc.) Reports.
Cra. Cranch's Reports, U. S. Supreme Court.
Cra. C. C. Cranch's Reports, U. S. Circ. Court, Dist. of Col.
Crabb Conv. Crabb's Conveyancing.
Crabb Com. L. Crabb on the Common Law.
Crabb Dig. Crabb's Digest of Statutes from Magna Charta to 9 & 10 Victoria.
Crabb Hist. Crabb's History of the English Law.
Crabb R. P. Crabb on the Law of Real Property.
Crabbe. Crabbe's Reports, District Court of U. S., Eastern District of Penna.
Craig Pr. Craig's Practice.
Craig & P. Craig and Phillip's English Chancery.
Craig. & St. Craigie, Stewart and Paton's English House of Lords, Appeals from Scotland.
Craik. Craik's English Causes Célèbres.
Cranch. Cranch's Reports, U. S. Supreme Court.
Cranch C. C. Cranch's Reports, U. S. Circuit Ct., District of Columbia.
Cranch Pat. Dec. Cranch's Patent Decisions.
Craw. & D. Crawford and Dix's Reports, Irish Circuit Cases.
Craw. & D. Abr. C. Crawford and Dix's Abridged Cases, Ireland.
Creasy (Ceylon). Creasy's Ceylon Reports.
Creasy Col. C. Creasy's Colonial Constitutions.
Creasy Int. L. Creasy on International Law.
Cresswe. Ins. Cas. Cresswell's Insolvency Cases, English.
Crim. Con. Criminal Conversation, Adultery.
Crim. Law Mag. Criminal Law Magazine, Jersey City, N. J.
Crim. L. Rec. Criminal Law Recorder.
Crim. Rec. Criminal Recorder, Philadelphia.
Crim. Rec. (Eng.). Criminal Recorder, London.
Cripp Ch. Cas. Cripp's Church Cases.
Cripp Ecc. L. Cripp's Ecclesiastical Law.
Critch. Critchfield's Reports, Ohio.
Cro. Croke's Reports, English King's Bench.
Cro. Sometimes refers to Keilway's Reports, published by Serj. Croke.
Cro. Car. Croke's Reports *temp.* Charles I. (3 Cro.).
Cro. Eliz. Croke's Reports *temp.* Elizabeth (1 Cro.).
Cro. Jac. Croke's Reports *temp.* James I. (2 Cro.).
Crockford. English Maritime Law Reports, published by Crockford.
Crock. Notes. Crocker's Notes on Common Forms.
Crock. Sher. Crocker on Sheriffs.
Cromp. Star Chamber Cases by Crompton.
Cromp. Cts. Crompton on Courts.
Cromp. Exch. R. Crompton's Exchequer Reports, English.
Cromp. J. C. Crompton's Jurisdiction of Courts.
Cromp. M. & R. Crompton, Meeson and Roscoe's Reports, English Exchequer.
Cromp. & J. Crompton and Jervis's Reports, English Exchequer.
Cromp. & M. Crompton & Meeson's Reports, English Exchequer.
Crosw. Pat. Cas. Croswell's Patent Cases.
Cross Lien. Cross on Liens.
Crown C. C. Crown Circuit Companion.
Crowth. (Ceylon). Crowther's Ceylon Reports.
Cruise Dig. or *Cruise R. P.* Cruise's Digest of the Law of Real Property.
Cruise Titles. Cruise on Titles of Honor.
Cruise Uses. Cruise on Uses.
Crump Mar. Ins. Crump on Marine Insurance.
Ct. of App. Court of Appeals.
Ct. of Cl. Court of Claims Reports, U. S.
Ct. of Err. Court of Error.
Ct. of Gen. Sess. Court of General Sessions.
Ct. of Sess. Court of Session.
Ct. of Spec. Sess. Court of Special Sessions.
Cul. Culpabilis, Guilty.
Cull. B. L. Cullen's Bankrupt Law.
Cum. C. L. Cumin's Civil Law.
Cummins. Cummins' Reports, Idaho.
Cun. Cunningham's Reports, English King's Bench.
Cun. Bills of Ex. Cunningham on Bills of Exchange.
Cun. Dict. Cunningham's Dictionary.
Cur. Adv. Vult. Curia Advisare Vult.
Cur. Phil. Curia Philippica.
Cur. Scacc. Currus Scaccarii.
Cur. Can. Cursus Cancellariæ.
Current Com. Current Comment and Legal Miscellany.
Curry. Curry's Reports, Louisana Reports, vols. 6-19.
Curt. Curteis's Ecclesiastical Reports, English.
Curt. Ad. Dig. Curtis's Admiralty Digest.
Curt. C. C. Curtis's Reports, U. S. Circuit Court, 1st Circuit.
Curt. Com. Curtis's Commentaries.
Curt. Cond. Curtis's Condensed Reports, U. S. Supreme Court.
Curt. Cop. Curtis on Copyrights.
Curt. Dec. Curtis's U. S. Courts Decisions, Condensed.
Curt. Dig. Curtis's Digest.
Curt. Ecc. Curtis's Ecclesiastical Reports, English.
Curt. Eq. Prec. Curtis's Equity Precedents.
Curt. Jur. Curtis on the Jurisdiction of the U. S. Courts.
Curt. Mer. S. Curtis on Merchant Seamen.
Curt. Pat. Curtis on Patents.
Curw. Curwen's Overruled Cases, Ohio.
Curw. Abs. Tit. Curwen on Abstracts of Title.
Cush. Cushing's Reports, Massachusetts.
Cush. El. Cas. Cushing's Election Cases, Massachusetts.
Cush. Parl. L. Cushing's Parliamentary Law.
Cush. Trust. Pr. Cushing on Trustee Process, or Foreign Attachment.
Cushm. Cushman's Reports, Mississippi Reports, vols. 23-29.
Cust. de Norm. Custome de Normandie.
Cutl. Cutler on Naturalization.

Cutl. Ins. L. Cutler's Insolvent Laws of Massachusetts.
Cut. Pat. Cas. Cutler's Trademark and Patent Cases, 11 vols.
D. Decree. Décret. Dictum.
D. Digest, particularly the Digest of Justinian.
D. Dictionary, particularly Morison's Dictionary of the Law of Scotland.
D. B. Domesday Book.
D. C. District Court. District of Columbia.
D. C. L. Doctor of the Civil Law.
D. Chip. D. Chipman's Reports, Vermont.
D. Dec. Dix's School Decisions, New York.
D. F. & J. De Gex, Fisher, and Jones's Reports, English Chancery.
D. J. & S. De Gex, Jones, and Smith's Reports, English Chancery.
D. M. & G. De Gex, Macnaghten, and Gordon's Reports, English Chancery.
D. N. S. Dowling's Reports, New Series, English Bail Court Reports.
D. P. *Domus Procerum*, House of Lords.
D. P. B. Dampier Paper Book. See *A. P. B.*
D. Pr. Darling's Practice, Court of Session.
D. P. C. Dowling's Practice Cases, Old Series.
D. S. Deputy Sheriff.
D. S. B. Debit sans breve.
D. & B. C. C. Dearsley and Bell's Crown Cases Reserved, English.
D. & C. Dow and Clark's English House of Lords.
D. & C. Dow and Clark's English House of Lords (Parliamentary Cases).
D. & C. or *D. & Chit.* Deacon and Chitty's Bankruptcy Cases, English.
D. & E. Durnford and East, English King's Bench. Term Reports.
D. & J. De Gex and Jones's Reports, English Chancery.
D. & J. B. De Gex and Jones's English Bankruptcy Reports.
D. & L. Dowling and Lowndes's English Bail Court Reports.
D. & M. Davison and Merivale's Reports, English Queen's Bench.
D. & P. Dennison and Pearce's Crown Cases.
D. & R. Dowling and Ryland's Reports, English King's Bench.
D. & R. M. C. Dowling and Ryland's Magistrate Cases.
D. & R. N. P. C. Dowling and Ryland's Nisi Prius Cases.
D. & S. Doctor and Student.
D. & Sm. Drew and Smales' English V. C. Reports.
D. & Sw. Deane and Swabey, English Ecclesiastical Reports.
D. & W. Drury and Walsh's Reports, Irish Chancery.
D. & War. Drury and Warren's Reports, Irish Chancery.
Dag. Cr. L. Dagge's Criminal Law.
Dak. Dakota Reports.
Dal. Dalison's Reports, English Common Pleas (Benloe & Dalison).
Dale Ecc. Dale's Ecclesiastical Reports, English.
Dall. Dallas's Reports, U. S. Supreme Court and Pennsylvania Courts.
Dall. L. Dallas's Laws of Pennsylvania.
Dall. Sty. Dallas's Styles, Scotland.
Dall. (Tex.). Dallam's Texas Reports.
Dall. Tex. Dig. Dallam's Texas Digest.
Dallam. Dallam's Decisions, Texas Supreme Court.
Dalr. Dalrymple's Cases, Scotch Court of Session.
Dalr. Ent. Dalrymple on the Polity of Entails.
Dalr. F. L. or *Dalr. Feud. Pr.* Dalrymple on Feudal Property.
Dalr. Ten. Dalrymple on Tenures.
Dalt. Just. Dalton's Justice.
Dalt. Sh. Dalton's Sheriff.
Daly. Daly's reports, New York Common Pleas.
D'An. D'Anvers' Abridgment.
Dan. Daniel's Reports, English Exchequer.
Dan. Ch. Pr. Daniel's Chancery Practice.
Dan. Neg. Inst. Daniel's Negotiable Instruments.
Dan. Ord. Danish Ordinance.
Dan. T. M. Daniels on Trademarks.
Dan. & Lld. Danson & Lloyd's Mercantile Cases.
Dana. Dana's Reports, Kentucky.
Dane Abr. Dane's Abridgment.
Danner. Danner's Reports, Alabama Reports, vol. 42.
Dans. & Lld. Danson & Lloyd's Mercantile Cases.
D'Anv. Abr. D'Anvers' Abridgment.
Darb. & B. Darby & Bosanquet on Limitations.
Dart Vend. Dart on Vendors and Purchasers.
Dart. Col. Cas. Report of Dartmouth College Case.
Das. Dasent's Reports, Common Law Reports, vol. 3.
Dass. Dig. Dassler's Digest Kansas Reports.
Dav. Davies's Reports, Irish King's Bench.
Dav. (U. S.). Daveis's Reports, U. S. Dist. of Maine (2d Ware).
Dav. Con. Davidson's Conveyancing,
Dav. Jus. Davis's Justice of the Peace.
Dav. Pat. Cas. Davies's Patent Cases, English Courts.
Dav. Prec. Davidson's Precedents in Conveyancing.
Dav. & M. Davison & Merivale's Reports, English Queen's Bench.
Daveis. Daveis's Reports, U. S. Dist. of Maine.
Davis Build. Davis's Law of Building.
Dav. Eng. Ch. Can. Davis's English Church Canon.
Davis Rep. Davis's Reports, Sandwich Island.
Daw. Arr. Dawe on the Law of Arrest in Civil Cases.
Daw. Land. Pr. Dawe's Epitome of the Law of Landed Property.
Daw. Real Pr. Dawe's Introduction to the Knowledge of the Law on Real Estates.
Day. Day's Reports, Connecticut.
Day Elect. Cas. Day's Election Cases.
Day Pr. Day's Common Law Practice.
Dayt. Surr. Dayton on Surrogates.
De Bois. Halluc. De Boismont on Hallucinations.
De Burgh Mar. Int. L. De Burgh on Maritime International Law.
De Colyar's Quar. De Colyar's Law of Quarantine.
D'Ewes. D'Ewes's Journal and Parliamentary Collection.
De G. De Gex's Reports, English Bankruptcy.
De G. F. & J. De Gex, Fisher, & Jones's Reports, English Chancery.
De G. F. & J. B. App. De Gex, Fisher, & Jones's Bankruptcy Appeals, English.
De G. J. & S. De Gex, Jones, & Smith's Reports, English Chancery.
De G. J. & S. Bankr. De Gex, Jones, & Smith's Bankruptcy Appeals, English.
De G. M. & G. De Gex, Macnaghten, & Gordon's Reports, English Chancery.
De G. M. & G. Bankr. De Gex, Macnaghten, & Gordon's Bankruptcy Appeals, English.
De G. & J. De Gex & Jones's Reports, English Chancery.
De G. & J. Bankr. De Gex & Jones's Bankruptcy Appeals.
De G. & Sm. De Gex & Smale's Reports, English Chancery.
De H. M. L. De Hart on Military Law.
De L. Const. De Lolme on the English Constitution.
Dea. & Sw. Deane & Swabey's Reports, English Ecclesiastical Courts.
Deac. Deacon's Reports, English Bankruptcy.
Deac. Bankr. Deacon on Bankruptcy.
Deac. & Chit. Deacon & Chitty's English Bankruptcy Cases.
Deady. Deady's Reports, U. S. Dist. of Oregon.
Dean Med. Jur. Dean's Medical Jurisprudence.
Deane. Deane's Reports, Vermont.
Deane Conv. Deane's Conveyancing.
Deane Ecc. Deane's Ecclesiastical Reports, English.
Deane N. Deane on Neutrals.
Dears. Dearsly's Crown Cases Reserved.
Dears. & B. Dearsly & Bell's Crown Cases Reserved.
Deas & And. Deas & Anderson's Scotch Court of Session Cases.
Deb. Jud. Debates on the Judiciary.
Dec. Com. Pat. Decisions of the Commissioner of Patents.
Dec. Joint Com. Decisions of the Joint Commission.
Dec. t. H. & M. Decisions in Admiralty *tempore* Hay & Marriott.
Deft. Defendant.
Degge. Degge's Parson's Companion.
Del. Delaware Reports.
Del. Ch. Delaware Chancery Reports.
Del. Cr. Cas. Delaware Criminal Cases, by Houston.
Del. El. Cas. Delane's Election Decisions.
Deleg. Court of Delegates.

Delehanty. Delehanty's New York Miscellaneous Reports.
Dem. Demarest's New York Surrogate Reports.
Demol. C. N. Demolombe's Code Napoléon.
Den. or *Denio.* Denio's Reports, New York.
Den. C. C. Denison's Crown Cases.
Dens. Denslow Michigan Reports.
Denver L. J. Denver Law Journal.
Denver L. N. Denver Legal News.
Des., Dess., or *Dessaus.* Dessaussure's Reports, South Carolina.
Dest. Cal. Dig. Desty's California Digest.
Desty Com. & Nav. Desty on Commerce and Navigation.
Desty Fed. Const. Desty on the Federal Constitution.
Desty Fed. Proc. Desty's Federal Procedure.
Desty Sh. & Adm. Desty on Shipping and Admiralty.
Dev. or *Dev. Ct. Cl.* Devereux's Reports, U. S. Court of Claims.
Dev. Eq. Devereux's Equity Reports, North Carolina, vols. 16–17.
Dev. L. Devereux's Law Reports, North Carolina, vols. 12–15.
Dev. (N. C.). Devereux' Law Reports, North Carolina, 1826–1834, 4 vols
Dev. & B. Eq. Devereux & Battle's Equity Reports, North Carolina, vols. 21–22.
Dev. & B. L. Devereux & Battle's Law Reports, North Carolina, vols. 18–20.
Dewitt. Dewitt's Reports, Ohio.
Di. (or *Dy.*). Dyer's Reports, English King's Bench.
Dial. de Scac. Dialogus de Scaccario.
Dibb F. Dibb's Forms of Memorials.
Dice (Ind). Dice's Indiana Reports.
Dicey Dom. Dicey on Domicil.
Dicey Part. Dicey on Parties to Actions.
Dick. Dickens's Reports, English Chancery.
Dick. Ch. Prec. Dickinson's Chancery Precedents.
Dick. Pr. or *Dick. Qr. Sess.* Dickinson's Practice of the Quarter and other Sessions.
Dickson Ev. Dickson's Law of Evidence.
Dict. Dictionary.
Dig. Digest of Writs.
Dig. Digest, particularly the Digest of Justinian.
Digby R. P. Digby on Real Property.
Dill. Dillon's Report, U. S. 8th Circuit.
Dill. Mun. Corp. Dillon on Municipal Corporations.
Dirl. Dirleton's Decisions, Scotch Court of Session.
Disn. Disney's Reports, Superior Court of Cincinnati, Ohio.
Disn. Gam. Disney's Law of Gaming.
Div. Division, Courts of the High Court of Justice.
Div. & Matr. C. Divorce and Matrimonial Causes Court.
Doct. Pl. Doctrina Placitanda.
Doct. & Stud. Doctor and Student.
Dods. Dodson's Reports, English Admiralty Courts.
Dom. or *Domat.* Domat on Civil Law.
Dom. Proc. Domus Procerum, In the House of Lords.
Domesd. Domesday Book.
Donn. Donnelly's Reports, English Chancery.
Dor. (Quebec). Dorion's Quebec Queen's Bench Reports.
Doug. Douglas's Reports, English King's Bench.
Doug. (Mich.). Douglass's Reports, Michigan.
Doug. El. Cas. Douglas's Election Cases, English.
Dow or *Dow P. C.* Dow's Cases, English House of Lords.
Dow & C. or *Dow N. S.* Dow & Clark's Cases, English House of Lords.
Dowl. Dowling's English Bail Court Reports.
Dowl. N. S. Dowling's English Bail Court Reports, New Series.
Dowl. Pr. C. Dowling's Reports, English Practice Cases.
Dowl. Pr. C. N. S. Dowling's Reports, New Series, English Practice Cases.
Dowl. & L. Dowling & Lowndes's English Bail Court and Practice Cases.
Dowl. & Ry. Dowling & Ryland's Reports, English King's Bench.
Dowl. & Ry. M. C. Dowling & Ryland's Magistrate Cases, English.
Dowl. & Ry. N. P. Dowling & Ryland's Nisi Prius Cases, English.
Down. & Lud. Downton & Luder's Election Cases, English.
Drake Att. Drake on Attachments.
Draper. Draper's Reports, Upper Canada King's Bench.
Drew. or *Drewry.* Drewry's Reports, English Chancery.
Drew (Fla.). Drew's Reports, Florida.
Drew. Inj. Drewry on Injunctions.
Drewry T. M. Drewry on Trademarks.
Drew. & S. or *Drewry & Sm.* Drewry & Smale's Reports, English Chancery.
Drinkw. Drinkwater's Reports, English Common Pleas.
Drone Copyr. Drone on Copyrights.
Dru. or *Drury.* Drury's Reports, Irish Chancery.
Dru. t. Nap. Drury's Reports in the time of Napier, Irish Chancery.
Dru. & Wal. Drury & Walsh's Reports, Irish Chancery.
Dru. & War. Drury & Warren's Reports, Irish Chancery.
Du C. Du Cange's Glossarium.
Duane Road L. Duane on Road Laws.
Dub. Dubitatur. Dubitante.
Dud. or *Dud. Ga.* Dudley's Reports, Georgia.
Dud. Ch. or *Dud. Eq.* Dudley's Equity Reports, South Carolina.
Dud. L. or *Dud. S. C.* Dudley's Law Reports, South Carolina.
Duer. Duer's Reports, New York Superior Court, vols. 8–13.
Duer Const. Duer's Constitutional Jurisprudence.
Duer Ins. Duer on Insurance.
Duer Mar. Ins. Duer on Marine Insurance.
Duer Repr. Duer on Representation.
Dugd. Orig. Dugdale's Originales Juridiciales.
Dugd. Sum. Dugdale's Summons.
Duke or *Duke Uses.* Duke on Charitable Uses.
Duncan's Man. Duncan's Manual of Entail Procedure.
Dunl. Dunlop, Bell, & Murray's Reports, Scotch Court of Session (Second Series, 1838–62).
Dunl. Adm. Pr. Dunlop's Admiralty Practice.
Dunl. B. & M. Dunlop, Bell, & Murray's Reports, Scotch Court of Session (Second Series, 1838–62).
Dunl. F. Dunlop's Forms.
Dunl. L. Penn. Dunlop's Laws of Pennsylvania.
Dunl. L. U. S. Dunlop's Laws of the United States.
Dunl. Paley Ag. Dunlop's Paley on Agency.
Dunl. Pr. Dunlop's Practice.
Duponc. Const. Duponceau on the Constitution.
Duponc. Jur. Duponceau on Jurisdiction.
Dur. Dr. Fr. Duranton's Droit Français.
Durf. (R. I.). Durfee's Reports, Rhode Island.
Durie Sc. Durie's Reports, Scotch Court of Session.
Durnf. & E. Durnford & East's Reports, English King's Bench; Term Reports.
Dutch. Dutcher's Reports, New Jersey Law.
Duv. (Can.). Duvall's Canada Supreme Court Reports.
Duv. Duvall's Reports, Kentucky.
Dwar. Dwarris on Statutes.
Dwight. Dwight's Charity Cases, English.
Dyer. Dyer's Reports, English King's Bench.
E. Easter Term. King Edward.
E. East's Reports, English King's Bench.
E. B. Ecclesiastical Compensations *or* "Bots."
E. B. & E. Ellis, Blackburn, and Ellis's Reports, English Queen's Bench.
E. B. & S. Best & Smith's Reports, sometimes so cited.
E. C. L. English Common Law Reports.
E. D. S. E. D. Smith's Reports, New York Common Pleas.
E. E. English Exchequer.
E. E. R. English Ecclesiastical Reports.
E. I. Ecclesiastical Institutes.
E. I. C. East India Company.
E. L. & Eq. English Law and Equity Reports.
E. of Cov. Earl of Coventry's Case.
E. P. C. East's Pleas of the Crown.
E. R. East's Reports, English King's Bench.
E. T. Easter Term.
E. & A. Spink's Ecclesiastical and Admiralty Reports.
E. & A. R. Error and Appeal Reports, Ontario.
E. & B. Ellis & Blackburn's Reports, English Queen's Bench.
E. & E. Ellis & Ellis's Reports, English Queen's Bench.
Eag. T. Eagle's Commutation of Tithes.

Eag. & Yo. Eagle & Younge's Tithe Cases.
Ea. or *East.* East's Reports, English King's Bench.
East P. C. East's Pleas of the Crown.
East. Rep. Eastern Reporter.
East's N. of C. East's Notes of Cases, India.
Ec. & Ad. Spink's Ecclesiastical and Admiralty Reports.
Eccl. Ecclesiastical.
Eccl. Law. Ecclesiastical Law.
Eccl. Rep. Ecclesiastical Reports.
Eccl. Stat. Ecclesiastical Statutes.
Ed. Edition. Edited. King Edward.
Eden. Eden's Reports, English Chancery.
Eden B. L. Eden's Bankrupt Law.
Eden Inj. Eden on Injunctions.
Eden Pen. L. Eden's Penal Law.
Edg. Edgar's Reports, Scotch Court of Session.
Edg. C. Canons enacted under King Edgar.
Edict. Edicts of Justinian.
Edin. L. J. Edinburgh Law Journal.
Edinb. L. J. Edinburgh Law Journal.
Edm. Exch. Pr. Edmund's Exchequer Practice.
Edm. Sel. Cas. Edmonds's Select Cases, New York.
Edw. King Edward; thus 1 Edw. I. signifies the first year of the reign of King Edward I.
Edw. (Mo.). Edwards's Reports, Missouri.
Edw. Abr. Edwards's Abridgment of Cases in Privy Council.
Edw. Adm. Edwards's Admiralty Reports, English.
Edw. Bail. Edwards on Bailments.
Edw. Bill. Edwards on Bills.
Edw. Ch. Edwards's Chancery Reports, New York.
Edw. Jur. Edwards's Juryman's Guide.
Edw. Lead. Dec. Edwards's Leading Decisions in Admiralty; Edwards's Adm. Reports.
Edw. Part. Edwards on Parties to Bills in Chancery.
Edw. Pr. Cas. Edwards's Prize Cases.
Edw. Rec. Edwards on Receivers in Chancery.
Edw. St. Act. Edwards on the Stamp Act.
Eir. Lambert's Eirenarcha.
El. B. & E. Ellis, Blackburn, & Ellis's Reports, English Queen's Bench.
El. B. & S. Ellis, Best, & Smith's Reports, English Queen's Bench.
El. & B. Ellis & Blackburn's Reports, English Queen's Bench.
El. & El. Ellis & Ellis's Reports, English Queen's Bench.
Elchie. Elchies's Dictionary of Decisions, Scotch Court of Session.
Eliz. Queen Elizabeth.
Ell. Deb. Ellis's Debates.
Ell. D. & Cr. Ellis on Debtor and Creditor.
Ell. Ins. Ellis on Insurance.
Ell. Dig. Minn. Eller's Digest, Minnesota Reports.
Elm. Dig. Elmer's Digest, N. J.
Elm. Dilap. Elmes on Ecclesiastical and Civil Dilapidation.
Elsyn. Parl. Elsynge on Parliaments.
Elt. Ten. of Kent. Elton's Tenures of Kent.
Elw. Med. Jur. Elwell's Medical Jurisprudence.
Emer. Ins. Emerigon on Insurance.
Emer. Mar. Loans. Emerigon on Maritime Loans.
Encyc. Pl. & Pr. Encyclopædia of Pleading & Practice.
Encycl. Encyclopædia.
Eng. English's Reports, Arkansas.
Eng. Adm. R. English Admiralty Reports.
Eng. C. C., or *Cr. Cas.* English Crown Cases (American reprint).
Eng. Ch. English Chancery Reports.
Eng. C. L. or *Eng. Com. L. R.* English Common-Law Reports.
Eng. Eccl. English Ecclesiastical Reports.
Eng. Exch. English Exchequer Reports.
Eng. Ir. App. English Law Reports, English and Irish Appeal Cases.
Eng. Jud. Cases in the Court of Session by English Judges.
Eng. L. & Eq. R. English Law and Equity Reports.
Eng. Plead. English Pleader.
Eng. R. & C. Cas. English Railroad and Canal Cases.
Eng. Rep. English Reports, Notes by Moak.
Eng. Sc. Ecc. English and Scotch Ecclesiastical Reports.
Entries, Antient. Rastell's Entries.
Entries, New Book of. Sometimes refers to Rastell's Entries, and sometimes to Coke's Entries.
Entries, Old Book of. Liber Intrationum.
Eod. Eodem.
Eq. Equity.
Eq. Ab. or *Eq. Ca. Abr.* Equity Cases Abridged.
Eq. Cas. Equity Cases, vol. 9, Modern Reports.
Eq. Draft. Equity Draftsman (Hughes's).
Eq. Rep. Equity Reports, English Chancery and Appeals from Colonial Courts, printed by Spottiswoode.
Err. & App. Error and Appeals Reports, Upper Canada.
Ersk. Inst. Erskine's Institutes of the Law of Scotland.
Ersk. Prin. Erskine's Principles of the Law of Scotland.
Esp. Espinasse's Reports, English Nisi Prius.
Esp. Ev. Espinasse on Evidence.
Esp. N. P. Espinasse's Nisi Prius Law.
Esp. Pen. Ev. Espinasse on Penal Evidence.
Esq. Esquire.
Et al. Et alii, and others.
Euer. Euer's Doctrina Placitandi.
Eunom. Wynne's Eunomus.
Europ. Arb. European Arbitration, Lord Westbury's Decisions.
Ev. Evidence.
Evans. Evans's Reports, Washington Territory.
Evans Ag. Evans on Agency.
Evans Pl. Evans on Pleading.
Evans Pothier. Evans's Pothier on Obligations.
Evans R. L. Evans's Road Laws of South Carolina.
Evans Stat. Evans's Collection of Statutes.
Evans Tr. Evans's Trial.
Ewell's Evans Ag. Ewell's Evans on Agency.
Ewell Fixt. Ewell on Fixtures.
Ewell Lead. Cas. Ewell's Leading Cases on Infancy, etc.
Ew. & H. Dig. (Minn.). Ewell and Hamilton's Digest, Minnesota Reports.
Ex. Exchequer Reports, English.
Ex. or *Exr.* Executor.
Ex. Com. Extravagantes Communes.
Ex. D. English Law Reports, Exchequer Division.
Exam. The Examiner.
Ex rel. Ex relatione.
Exch. Exchequer Reports, English (Welsby, Hurlstone & Gordon's Reports).
Exch. Cas. Exchequer Cases, Scotland.
Exch. Chamb. Exchequer Chamber.
Exch. Div. Exchequer Division, English Law Reports.
Exec. Execution. Executor.
Exp. Ex parte. Expired.
Expl. Explained.
Ext. Extended.
Exton Mar. Dicael. Exton's Maritime Dicaelogie.
Eyre. Eyre's Reports, English King's Bench, *temp.* William III.
F. Finalls.
F. Consuetudines Feudorum.
F. Fitzherbert's Abridgment.
F. B. C. Fonblanque's Bankruptcy Cases.
F. B. R. Full Bench Rulings, Bengal.
F. B. R. N. W. P. Full Bench Rulings, Northwest Provinces, India.
F. C. Faculty of Advocates Collection, Scotch Court of Session Cases.
F. C. R. Fearne on Contingent Remainders.
F. Dict. Kames and Woodhouselee's Dictionary, Scotch Court of Session Cases.
F. N. B. Fitzherbert's Natura Brevium.
F. R. Forum Romanorum.
F. & F. Foster and Finlason's Reports, English Nisi Prius.
F. & Fitz. Falconer and Fitzherbert's Election Cases.
F. & S. Fox and Smith's Reports, Irish King's Bench.
F. & W. Pr. Freud and Ward's Precedents.
Fac. Col. Faculty of Advocates Collection, Scotch Court of Session Cases.
Fairf. Fairfield's Reports, Maine.
Falc. Falconer's Reports, Scotch Court of Session.
Falc. & Fitz. Falconer and Fitzherbert Election Cases.
Fam. Cas. Cr. Ev. Famous Cases of Criminal Evidence, by Phillips.
Far. Farresley's Reports, English King's Bench, Modern Reports, vol. 7.
Farr Med. Jur. Farr's Elements of Medical Jurisprudence.

Farw. Pow. Farwell on Powers.
Faw. L. & T. Fawcett's Landlord and Tenant.
Fearne Rem. Fearne on Contingent Remainders.
Fed. The Federalist.
Fed. Rep. The Federal Reporter, all U. S. C. C. & D. C. and C. C. A. Cases, St Paul, Minn. District, Circuit and Circuit Court of Appeals Reports.
Fell Guar. Fell on Mercantile Guarantees.
Fent. (New Zealand). Fenton's New Zealand Reports.
Fer. Fixt. Amos and Ferard on Fixtures.
Ferg. Fergusson's Reports, Scotch Consistorial Court.
Ferg. M. & D. Fergusson on Marriage and Divorce.
Ferg. Proc. Ferguson's Common Law Procedure Acts, Ireland.
Ferg. Ry. Cas. Ferguson's Five Years' Railway Cases.
Fern. Dec. Decretos del Fernando, Mexico.
Ferr. Hist. Civ. L. Ferriere's History of the Civil Law.
Ferr. Mod. Ferriere's *Dictionnaire de Droit et de Pratique.*
Fess. Pat. Fessenden on Patents.
Ff. Pandects of Justinian.
Fi. fa. Fieri facias.
Field Com. Law. Field on the Common Law of England.
Field Corp. Field on Corporations.
Field Ev. Field's Law of Evidence, India.
Field Int. Code. Field's International Code.
Field Pen. L. Field's Penal Law.
Fil. Filiger's Writs.
Fin. Finch's Reports, English Chancery.
Fin. Law. Finch's Law.
Fin. Pr. Finch's Precedents in Chancery.
Fin. Ren. Finlay on Renewals.
Finch Cas. Cont. Finch's Cases on Contract.
Finl. Dig. Finlay's Digest and Cases, Ireland.
Finl. L. C. Finlason's Leading Cases on Pleading, etc.
Finl. Mart. L. Finlason on Martial Law.
Finl. Rep. Finlason's Report of the Gurney Case.
Finl. Ten. Finlason on Land Tenures.
Fish. Fisher's Patent Cases.
Fish. Cop. Fisher on Copyrights.
Fish. Dig. Fisher's Digest, English Reports.
Fish. Mort. Fisher on Mortgages.
Fish. Pat. Cas. Fisher's Patent Cases, U. S. Circuit Courts.
Fish. Pat. Rep. Fisher's Patent Reports, U. S. Supreme and Circuit Courts.
Fish Pr. Cas. Fisher's Prize Cases, U. S. Courts, Penna.
Fitz. Abr. Fitzherbert's Abridgment.
Fitz-G. Fitz-Gibbon's Reports, English.
Fitz. N. B. Fitzherbert's Natura Brevium.
Fl. Fleta, *Commentarius Juris Anglicani.*
Fla. Florida Reports.
Flan. & K. Flanagan and Kelly's Reports, Irish Rolls Court.
Fland. Ch. J. Flanders's Lives of the Chief Justices.
Fland. Const. Flanders on the Constitution.
Fland. Fire Ins. Flanders on Fire Insurance.
Fland. Mar. L. Flanders on Maritime Law.
Fland. Ship. Flanders on Shipping.
Flipp. Flippin's Reports, U. S. Circ. Cts.
Foelix Dr. Int. Foelix's Droit International Privé.
Fogg. Fogg's Reports, New Hampshire.
Fol. Folio.
Fol. Foley's Poor Laws and Decisions, English.
Fol. Dict. Kames and Woodhouslee's Dictionary, Scotch Court of Session Cases.
Foley Poor L. Foley's Poor Laws and Decisions, English.
Folw. Laws. Folwell's Laws of the United States.
Fonb. Eq. Fonblanque's Equity.
Fonb. Med. Jur. Fonblanque on Medical Jurisprudence.
Fonb. N. R. Fonblanque's New Reports, English Bankruptcy.
Foote Int. Jur. Foote on Private International Jurisprudence.
For. Forrest's Reports, English Exchequer.
For. Pla. Brown's Formulæ Placitandi.
Foran C. C. P. Q. Foran's Code of Civil Procedure, Quebec.
Forb. Forbes's Decisions, Scotch Court of Session.
Forb. Inst. Forbes's Institutes of the Law of Scotland.
Form. Forman's Reports, Illinois.
Form. Pla. Brown's Formulæ Placitandi.
Forr. Forrester's Reports, English Chancery, Cases *temp.* Talbot.
Forrest. Forrest's Reports, English Exchequer.
For. Cas. & Op. Forsyth's Cases and Opinions on Constitutional Law.
Fors. Comp. Forsyth's Composition with Creditors.
Fors. His. Forsyth's History of Trial by Jury.
Fors. Trial by Jury. Forsyth's History of Trial by Jury.
Fortes. Fortescue's Reports, English Courts.
Fortes. de Laud. Fortescue de Laudibus Legum Angliæ.
Forum. The Forum, by David Paul Brown.
Forum L. R. Forum Law Review, Baltimore.
Fost. Foster's Legal Chronicle Reports, Pennsylvania.
Fost. Foster's Reports and Crown Law, English.
Fost. (N. H.). Foster's Reports, New Hampshire, vols. 19 and 21–31.
Fost. Elem. or *Fost. Jur.* Foster's Elements of Jurisprudence.
Fost. S. F. Foster on the Writ of *Scire Facias.*
Fost. & Fin. Foster and Finlason's Reports, English Nisi Prius Cases.
Fount. Fountainhall's Reports, Scotch Court of Session.
Fowl. L. Cas. Fowler's Leading Cases on Collieries.
Fox. Fox's Decisions, Circuit and District Court, Maine (Haskell's Reports).
Fox Reg. Cas. Fox's Registration Cases.
Fox & Sm. Fox & Smith's Reports, Irish King's Bench.
Fr. Fragment, or Excerpt, or Laws in Titles of Pandects.
Fr. Ch. Freeman's English Chancery Reports; Freeman's Mississippi Chancery Reports.
Fr. E. C. Fraser's Election Cases.
Fr. Ord. French Ordinances.
Fra. Max. Francis's Maxims of Equity.
Fran. Char. Francis's Law of Charities.
Franc. Francillon's Judgments, County Courts.
France. France's Reports, Colorado.
Fras. Dom. Rel. Fraser on Personal and Domestic Relations.
Fras. El. Cas. Fraser's Election Cases.
Fraz. or *Fraz. Adm.* Frazer's Admiralty Cases, Scotland.
Fred. Code. Frederician Code, Prussia.
Freem. Ch. Freeman's Reports, English Chancery. (2d Freeman.)
Freem. Coten. & Par. Freeman on Cotenancy and Partition.
Freem. Ex. Freeman on Executions.
Freem. Judg. Freeman on Judgments.
Freem. K. B. Freeman's Reports, English King's Bench. (1st Freeman.)
Freem. (Ill.). Freeman's Reports, Illinois.
Freem. (Miss.). Freeman's Chancery Reports, Mississippi.
French. French's Reports, New Hampshire.
Fry Cont. Fry on the Specific Performance of Contracts.
Full B. R. Full Bench Rulings, Bengal (or Northwest Provinces).
Fult. Fulton's Reports, Bengal.
G. King George; thus 1 G. I. signifies the first year of the reign of King George I.
G. Gale's Reports, English Exchequer.
G. B. Great Britain.
G. Gr. George Greene's Reports, Iowa.
G. M. Dud. G. M. Dudley's Reports, Georgia.
G. S. General Statutes.
G. & D. Gale & Davison's Reports, English Exchequer.
G. & J. Glyn & Jameson's Reports, English Courts. Gill & Johnson's Maryland Reports.
Ga. Georgia Reports.
Ga. Dec. Georgia Decisions, Superior Courts.
Ga. L. J. Georgia Law Journal.
Ga. L. Rep. Georgia Law Reporter.
Ga. Sup. Supplement to 33 Georgia Reports.
Gab. Cr. L. Gabbett's Criminal Law.
Gaii. Gaii Institutionum Commentarii.
Gaius. Gaius's Institutes.
Galb. Galbraith's Reports, Florida Reports, vols. 9–11.
Galb. & M. Galbraith & Meek's Reports, Florida Reports, vol. 12.
Gale. Gale's Reports, English Exchequer.
Gale E. Gale on Easements.

Gale Stat. Gale's Statutes of Illinois.
Gale & Dav. Gale and Davison's English King's Bench.
Gale & W. Gale and Whatley on Easements.
Gall. or *Gallis.* Gallison's Reports, Circuit Ct. U. S. 1st Circuit.
Gall. Cr. Cas. Gallick's Reports of French Criminal Cases.
Gall. Hist. Col. Gallick's Historical Collection of French Criminal Cases.
Gall. Int. L. Gallaudet on International Law.
Gard. N. Y. Rept. Gardenier's New York Reporter, New York.
Garden. Gardenhire's Reports, Missouri.
Gardn. P. Cas. Report of the Gardner Peerage Case.
Gay. (*La.*). Gayarre's Louisiana Reports.
Gaz. B. Gazette of Bankruptcy, London.
Gaz. & Bank. Ct. Rep. Gazette and Bankrupt Court Reporter, New York.
Gazz. Bank. Gazzam on Bankruptcy.
Geld. & M. Geldart and Maddock's Reports.
Geld. & O. (*Nova Scotia*). Geldert and Oxley's Decisions, Nova Scotia.
Gen. Arb. Geneva Arbitration.
Gen. Ord. General Orders.
Gen. Ord. in Ch. General Order of the High Court of Chancery.
Gen. Sess. General Sessions.
Gen. Term. General Term.
Geo. King George. See *G.*
Geo. Georgia Reports.
Geo. Coop. George Cooper's English Chancery Cases, *temp.* Eldon.
Geo. Dec. Georgia Decisions.
Geo. Dig. George's Mississippi Digest.
Geo. Lib. George on Libel.
George. George's Reports, Mississippi.
Ger. Real. Est. Gerard on Titles to Real Estate.
Gib. Cod. Gibson's *Codex Juris Ecclesiastici Anglicani.*
Gibb. D. & N. Gibbons on Dilapidations and Nuisances.
Gibbs Jud. Chr. Gibbs's Judicial Chronicle.
Gibbs. Gibbs's Reports, Michigan.
Gibs. Gibson's Decisions, Scotland.
Giff. Giffard's Reports, English Chancery.
Giff. & H. Giffard and Hemming's Reports, English Chancery.
Gil. (*Minn.*). Gilfillan's Minnesota Reports.
Gilb. Gilbert's Reports, English Chancery.
Gilb. Cas. Gilbert's Cases in Law and Equity, English Chancery and Exchequer.
Gilb. Ch. Gilbert's Reports, English Chancery.
Gilb. Ch. Pr. Gilbert's Chancery Practice.
Gilb. C. P. Gilbert's Common Pleas.
Gilb. Dev. Gilbert on Devices.
Gilb. Dist. Gilbert on Distress.
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Gilb. Exch. Gilbert's Exchequer.
Gilb. Ev. Gilbert's Evidence.
Gilb. For. Rom. Gilbert's Forum Romanum.
Gilb. K. B. Gilbert's King's Bench.
Gilb. Lex. Præ. Gilbert's Lex Prætoria.
Gilb. Railw. L. Gilbert's Railway Law.
Gilb. Rep. Gilbert's Reports, English Chancery.
Gilb. Rem. Gilbert on Remainders.
Gilb. Rents. Gilbert on Rents.
Gilb. Repl. Gilbert on Replevin.
Gilb. Ten. Gilbert on Tenures.
Gilb. U. Gilbert on Uses and Trusts.
Gild. (*N. M.*). Gildersleeve's New Mexico Reports.
Gill. Gill's Reports, Maryland.
Gill Pol. Rep. Gill's Police Court Reports, Boston, Mass.
Gill & J. Gill & Johnson's Reports, Maryland.
Gilm. Gilmour's Reports, Scotch Court of Session.
Gilm. (*Ill.*). Gilman's Reports, Illinois.
Gilm. (*Va.*). Gilmer's Reports, Virginia.
Gilm. & Fal. Gilmour and Falconer's Reports, Scotch Court of Session.
Gilp. Gilpin's Reports, U. S. Dist. Court, East. Dist. of Penna.
Gir. W. C. Girard Will Case.
Gl. Glossa; a gloss or interpretation.
Glanv. Glanvili *de Legibus.*
Glanv. El. Ca. Glanville's Election Cases.
Glasc. Glascock's Reports, Irish.
Glassf. Glassford on Evidence.
Glenn. Glenn's Reports, Louisiana Annual.
Glyn & Jam. Glyn and Jameson's Bankruptcy Cases, English.
Godb. Godbolt's Reports, English King's Bench.
Godd. Eas. Goddard on Easements.
Godef. & S. Godefroi and Shortt on Law of Railway Companies.
Godolph. Abr. Godolphin's Abridgment of Ecclesiastical Law.
Godolph. Adm. Jur. Godolphin on Admiralty Jurisdiction.
Godolph. Leg. Godolphin's Orphan's Legacy.
Godolph. Rep. Can. Godolphin's Repertorium Canonicum.
Gods. Pat. Godson on Patents.
Goeb. Proc. Ct. Cas. Goebel's Probate Court Cases.
Gog. Or. Goguet's Origin of Laws.
Goirand. Goirand's French Code of Commerce.
Goldes. Goldesborough's Reports, English King's Bench.
Golds. Eq. Goldsmith's Equity Practice.
Gord. Dig. Gordon's Digest of the Laws of the U. S.
Gord. Tr. Gordon's Treason Trials.
Gosf. Gosford's Reports, Scotch Court of Session.
Goud. R. L. Goudsmit's Roman Law.
Gould Pl. Gould on Pleading.
Gouldsb. Gouldsborough's Reports, English King's Bench.
Gour. Wash. Dig. Gourick's Washington Digest.
Gow or *Gow N. P.* Gow's Nisi Prius Cases, English.
Gow Part. Gow on Partnership.
Gr. Cas. Grant's Cases, Pennsylvania.
Grah. Pr. Graham's Practice.
Grah. & Wat. N. T. Graham & Waterman on New Trials.
Grain Hip. Grain's Ley Hipotecaria, of Spain.
Grand Cout. Grand *Coutumier de Normandie.*
Grang. Granger's Reports, Ohio.
Grant. Grant's Chancery Reports, Ontario.
Grant Bank. Grant on Banking.
Grant Cas. or *Grant* (*Pa.*). Grant's Cases, Pennsylvania Supreme Court.
Grant Ch. Pr. Grant's Chancery Practice.
Grant Corp. Grant on Corporations.
Grant (*Jamaica*). Grant's Jamaica Reports.
Grant U. C. Grant's Upper Canada Chancery Reports.
Gratt. Grattan's Reports, Virginia.
Gray. Gray's Reports, Massachusetts.
Gray Cas. Prop. Gray's Cases on Property.
Gray Perp. Gray on Perpetuities.
Gray's Inn J. Gray's Inn Journal.
Grayd. F. Graydon's Forms.
Greav. R. C. or *Greav. Russ.* Greave's Edition of Russell on Crimes.
Green Bag. A legal Journal, Boston.
Green's Brice's U. V. Green's Edition of Brice's Ultra Vires.
Green Cr. L. Rep. Green's Criminal Law Reports, U. S.
Green C. E. C. E. Green's Reports, New Jersey Equity, vols. 16–27.
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Green L. or *Green N. J.* Green's Law Reports, New Jersey Law, vols. 13–15.
Green (*R. I.*). Green's Reports, Rhode Island, vol. 11.
Green Sc. Cr. Cas. Green's Criminal Cases, Scotland.
Greene (*Iowa*). Greene's Iowa Reports.
Green. & H. Greenwood & Horwood's Conveyancing.
Greenh. Sh. Greenhow's Shipping Law Manual.
Greenl. Greenleaf's Reports, Maine.
Greenl. Cr. Greenleaf's Cruise on Real Property.
Greenl. Ev. Greenleaf on Evidence.
Greenl. Ov. Cas. Greenleaf's Over-ruled Cases.
Greenw. Courts. Greenwood on Courts.
Greenw. & M. Greenwood & Martin's Police Guide.
Grein. Dig. Greiner's Digest, Louisiana.
Gren. (*Ceylon*). Grenier's Ceylon Reports.
Gresl. Eq. Ev. Gresley's Equity Evidence
Grey Deb. Grey's Debates in Parliament.
Grif. P. R. Cas. Griffith's English Poor Rate Cases.
Griff. Cr. Griffith on Arrangements with Creditors.
Griff. Ct. Mar. Griffith on Courts-Martial.
Griff. Inst. Griffith's Institutes of Equity.
Griff. L. R. Griffith's Law Register, Burlington, N. J.

Griff. Pat. Cas. Griffin's Abstract of Patent Cases.
Grimke Ex. Grimke on Executors and Administrators.
Grimke Just. Grimke's Justice.
Grimke P. L. Grimke's Public Laws of South Carolina.
Grisw. (O.). Griswold's Reports, Ohio.
Grisw. Und. T. B. Griswold's Fire Underwriters' Text Book.
Grot., Gro. B. et P., or *Gro. de J. B.* Grotius *de Jure Belli et Pacis.*
Grot. Dr. de la Guer. Grotius *Le Droit de la Guerre.*
Gude Pr. Gude's Practice on the Crown Side of the King's Bench.
Guern. Eq. Jur. Guernsey's Key to Equity Jurisprudence.
Gundry. Gundry Manuscripts in Lincoln's Inn Library.
Guthrie. Guthrie's Sheriff Court Cases, Scotland.
Guy Med. Jur. Guy on Medical Jurisprudence.
Guy Réper. Guy's *Répertoire de la Jurisprudence.*
Gwill. Gwillim's Tithe Cases, English Courts.
H. Hilary Term.
H. King Henry; thus 1 H. I. signifies the first year of the reign of King Henry I.
h. a. Hoc anno.
H. Bla. Henry Blackstone's Reports, English.
H. C. House of Commons.
H. Ct. R. N. W. P. High Court Reports, North West Province, India.
H. H. C. L. Hale's History of the Common Law.
H. H. P. C. Hale's History, Pleas of the Crown.
H. L. House of Lords.
H. L. C. House of Lords Cases. (Clark's.)
H. L. F. Hall's Legal Forms.
H. L. Rep. Clark and Finnelly's House of Lords Reports, New Series.
H. P. C. Hale's Pleas of the Crown.
H. T. Hilary Term.
h. t. Hoc titulum, or hoc titulo.
h. v. Hoc verbum, or his verbis.
H. & B. Hudson and Brooke's Reports, Irish King's Bench.
H. & C. Hurlstone and Coltman's Reports, English Exchequer.
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H. & Disb. Pr. Holmes and Disbrow's Practice.
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H. & W. Harrison and Wollaston's Reports, English King's Bench.
H. & W. Hurlstone and Walmesley's Reports, English Exchequer.
Ha. & Tw. Hall and Twell's Reports, English Chancery.
Hab. Corp. Habeas Corpus.
Hab. fa. poss. Habere facias possessionem.
Hab. fa. seis. Habere facias seisinam.
Hadd. Haddington's Reports, Scotch Court of Session.
Hadl. Hadley's Reports, New Hampshire.
Hadl. Int. R. L. Hadley's Introduction to the Roman Law.
Hag. (Utah). Hagan's Utah Reports.
Hag. (W. Va.). Hagan's Reports, West Virginia.
Hagg. Adm. Haggard's Admiralty Reports, English.
Hagg. Con. Haggard's Consistory Reports, English.
Hagg. Ecc. Haggard's Ecclesiastical Reports, English.
Hagn. & M. (Md.). Hagner and Miller's Maryland Reports.
Hailes. Hailes's Decisions, Scotch Court of Session.
Hailes Ann. Hailes's Annals of Scotland.
Haines Am. L. Man. Haines' American Law Manual.
Halc. Cas. Halcomb's Mining Cases, London, 1826.
Hale. Hale's Reports, California.
Hale C. L. Hale's History of the Common Law.
Hale Jur. H. L. Hale's Jurisdiction of the House of Lords.
Hale P. C. Hale's Pleas of the Crown.
Hale Prec. Hale's Precedents in Criminal Cases.
Hale Sum. Hale's Summary of Pleas.
Halk. Dig. Halkerton's Digest of the Law of Scotland, concerning Marriages.
Hall. Hall's Reports, New York City Superior Court.
Hall Adm. Hall's Admiralty Practice.
Hall Am. L. J. American Law Journal (Hall's).
Hall. (Col.). Hallett's Colorado Reports.
Hall (N. H.). Hall's New Hampshire Reports.
Hall Sea Sh. Hall on the Sea Shore.
Hall Jour. Journal of Jurisprudence (Hall's).
Hall L. J. American Law Journal (Hall's).
Hall Law of W. Halleck's International Law and Law of War.
Hall Neut. Hall on Neutrals.
Hall & Tw. Hall and Twell's Reports, English Chancery.
Hallam. Hallam's Middle Ages.
Hallam's Const. Hist. Hallam's Constitutional History of England.
Hallett. Hallett's Reports, Colorado Reports, vols. 1–2.
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Halst. Ch. or *Halst. Eq.* Halsted's Chancery Reports, New Jersey Equity, vols. 5–8.
Halst. Ev. Halsted's Digest of the Law of Evidence.
Ham. Hamilton's Reports, Scotch Court of Session.
Hamm. A. & O. Hamerton, Allen & Otter's Magistrate Cases, English Courts.
Hamm. (Ga.). Hammond's Reports, Georgia.
Hamm. (Ohio). Hammond's Reports, Ohio.
Hamm. F. Ins. Hammond on Fire Insurance.
Hamm. Insan. Hammond on Insanity.
Hamm. N. P. Hammond's Nisi Prius.
Hamm. Part. Hammond on Parties to Action.
Hamm Pl. Hammond's Principles of Pleading.
Hamm. & J. Hammond and Jackson's Reports, Georgia, vol. 45.
Han. Hannay's Reports, New Brunswick.
Han. Ent. Hansard's Entries.
Han. Horse. Hanover on the Law of Horses.
Hand. Hand's Reports, New York Court of Appeals, vols. 40–45.
Hand Ch. Pr. Hand's Chancery Practice.
Hand Cr. Pr. Hand's Crown Practice.
Handy. Handy's Reports, Cincinnati, Ohio.
Hanmer. Hanmer's Lord Kenyon's Notes, English King's Bench.
Hann. Hannay's Reports, New Brunswick.
Hans. Hansard's Entries.
Hans. Parl. Deb. Hansard's Parliamentary Debates.
Hanson. Hanson on Probate Acts, etc.
Har. & G. Harris and Gill's Reports, Maryland.
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Har. & McH. Harris and McHenry's Reports, Maryland.
Har. & W. Harrison and Wollaston's Reports, English King's Bench.
Harc. Harcase's Decisions, Scotch Court of Session.
Hard. Hardres's Reports, English Exchequer.
Hard. Stat. L. Hardcastle's Construction and Effect of Statutory Law.
Hard. (Ky.) or *Hardin.* Hardin's Reports, Kentucky.
Hardw. Cases *temp.* Hardwicke, English King's Bench.
Hare. Hare's Reports, English Chancery.
Hare Const. Hare on the Constitution of the U. S.
Hare Dis. or *Hare Ev.* Hare on Discovery of Evidence.
Hare & W. Hare & Wallace's American Leading Cases.
Harg. Hargrove's Reports, North Carolina Reports.

Harg. C. B. M. Hargrave's Collection, British Museum.
Harg. Co. Litt. Hargrave's Notes to Coke on Littleton.
Harg. Coll. Hargrave's Judicial Arguments and Collection.
Harg. Exer. Hargrave's Jurisconsult Exercitations.
Harg. Jud. Arg. Hargrave's Judicial Arguments.
Harg. Law Tr. Hargrave's Law Tracts.
Harg. St. Tr. Hargrave's State Trials.
Harg. Th. Hargrave on the Thellusson Act.
Harl. C. B. M. Harleian Collection, British Museum.
Harm. Harmon's Reports, California Reports, vols. 13-15.
Harm. (U. C.). Harman's Common Pleas Reports, Upper Canada.
Harp. Harper's Reports, South Carolina.
Harp. Con. Cas. Harper's Conspiracy Cases, Maryland.
Harp. Eq. Harper's Equity Reports, South Carolina.
Harr. Harrison's Reports, New Jersey Law.
Harr. (Del.). Harrington's Reports, Delaware.
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Harr. (Mich.). Harrington's Chancery Reports, Michigan.
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Harr. Ch. Harrison's Chancery Reports, Michigan.
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Harr. Ent. Harris's Book of Entries.
Harr. Proc. Harrison's Common Law Procedure Act.
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Harris. Harris's Reports, Pennsylvania.
Hart. Hartley's Reports, Texas.
Hart. Dig. Hartley's Digest of Laws, Texas.
Harv. Law Rev. Harvard Law Review.
Hask. Haskell's Reports, United States Courts, Maine (Fox's Decisions).
Hasl. Med.Jur. Haslam's Medical Jurisprudence.
Hast. Hastings' Reports, Maine Reports.
Hast. Tr. Sp. Speeches in the trial of Warren Hastings, Ed. by Bond.
Hats. Pr. Hatsell's Parliamentary Precedents.
Hav. Ch. Rep. Haviland's Chancery Reports, Prince Edward Island.
Haw. Hawkins; Hawaiian Reports.
Hawaii. Hawaii (Sandwich Island) Reports.
Haw. Am. Cr. Rep. Hawley's American Criminal Reports.
Haw. W. Cas. Hawe's Will Case.
Hawk. Hawkin's Reports, Louisiana Annual.
Hawk. Abr. or *Hawk. Co. Litt.* Hawkins's Coke upon Littleton.
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Hawk. W. Hawkins on Construction of Wills.
Hawks. Hawks's Reports, North Carolina.
Hawl. (Nev.). Hawley's Nevada Reports and Digest.
Hawley Cr. R. Hawley's American Criminal Reports.
Hay. Hayes' Reports, Irish Exchequer.
Hay Acc. Cas. Hay's Cases of Accident or Negligence.
Hay. Conv. Hayes's Conveyancer.
Hay (Calc.). Hay's Reports, Calcutta.
Hay. Est. or *Hay. U. D. & F.* Hayes on the Law of Uses, Devises, and Trusts, with reference to the Creation and Conveyance of Estates.
Hay. Exch. Hayes's Reports, Irish Exchequer.
Hay. Lim. Hayes on Limitations.
Hay. & J. or *Hayes & Jones.* Hayes and Jones's Reports, Irish Exchequer.
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Hayes Conv. Hayes on Conveyancing.
Hays R. P. Hays on Real Property.
Haynes Lead. Cas. Haynes' Students' Leading Cases.
Hayw. L. R. Hayward's Law Register, Boston.
Hayw. (N. C.). Haywood's Reports, North Carolina.
Hayw. (Tenn.). Haywood's Reports, Tennessee.
Hayw. & H. (D. C.). Hayward and Hazleton Circuit Court Reports.
Haz. Pa. Reg. Hazard's Pennsylvania Register.
Haz. U. S. Reg. Hazard's United States Register.
Haz. & Roch. M. War. Hazlitt and Roche on Maritime Warfare.
Head. Head's Reports, Tennessee.
Heard Civ. Pl. Heard's Civil Pleading.
Heard Cr. L. Heard's Criminal Law, Massachusetts.
Heard Cr. Pl. Heard's Criminal Pleading.
Heard L. & Sl. Heard on Libel and Slander.
Heath. Heath's Reports, Maine.
Heath Max. Heath's Maxims.
Heck. Cas. Hecker's Leading Cases on Warranty.
Hein. Heineccius Opera.
Heisk. Heiskell's Reports, Tennessee.
Helm. Helm's Reports, Nevada Reports.
Hem. & Mil. Hemming and Miller's Reports, English Chancery.
Heming. (Miss.). Hemingway's Mississippi Reports.
Hemp. Hempstead's Reports, U. S. 9th Circuit and Dist. of Ark.
Hen. King Henry; thus 1 Hen. I. signifies the first year of the reign of King Henry I.
Hen. Bla. Henry Blackstone's Reports, English.
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Hen. La. Dig. Hennen's Louisiana Digest.
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Hen. Va. J. P. Hening's Virginia Justice of the Peace.
Hen. & M. Hening and Munford's Reports, Virginia.
Hepb. Hepburn's Reports, California.
Hepb. (Pa.). Hepburn's Pennsylvania State Reports.
Her. Herne's Pleader.
Her. Char. U. Herne's Law of Charitable Uses.
Her. Estop. Herman on Estoppel.
Her. Ex. Herman on Executions.
Her. Hist. or *Her. Jur.* Heron's History of Jurisprudence.
Het. Hetley's Reports, English Common Pleas.
Heyle Imp. D. Heyle's United States Import Duties.
Heyw. El. Heywood on Elections.
Hig. Dig. Pat. Cas. Higgin's Digest of Patent Cases.
High. Bail. Highmore on Bail.
High Ct. R. High Court Reports, N. W. Provinces, India.
High Inj. High on Injunction.
High Leg. Rem. High on Legal Remedies.
High. Lun. Highmore on Lunacy.
High. Mortm. Highmore on Mortmain.
High Rec. High on Receivers.
Hil. T. Hilary Term.
Hildy M. Ins. Hildy on Marine Insurance.
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Hill. Am. Jur. Hilliard's American Jurisprudence.
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Hill Fixt. Hill on Fixtures.
Hill. Inj. Hilliard on Injunction.
Hill. Mort. Hilliard on Mortgages.
Hill. N. T. Hilliard on New Trials.
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Hill. Sales. Hilliard on Sales.
Hill. Tax. Hilliard on the Law of Taxation.
Hill. Tort. Hilliard on Torts.
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Hill. Vend. Hilliard on Vendors.

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Hillyer. Hillyer's Reports, California Reports.
Hilt. Hilton's Reports, Common Pleas, New York.
Hind. Pat. Hindemarch on Patents.
Ho. Lord Cas. House of Lords Cases (Clark's).
Hob. Hobart's Reports, English Common Pleas and Chancery.
Hod. Hodge's Reports, English Common Pleas.
Hod. Railw. Hodge on the Law of Railways
Hodg. El. Cas. (*Ont.*). Hodgin's Election Cases.
Hoff. Hoffman's Reports, U. S. Dist. of California.
Hoff. (*N. Y.*) or *Hoff. Ch.* Hoffman's Chancery Reports, New York.
Hoff. Ch. Pr. Hoffman's Chancery Practice.
Hoff. Ecc.L. Hoffman's Ecclesiastical Law.
Hoff. Land Ca. Hoffman's Land Cases, California.
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Hoff. Mas. Ch. Hoffman's Master in Chancery.
Hoff. Outl. Hoffman's Outlines of Legal Studies.
Hoff. Publ. Pap. Hoffman's Public Papers, New York.
Hoff. Ref. Hoffman on Referees.
Hog. Hogan's Reports, Irish Rolls Court.
Hog. St. Tr. Hogan's Pennsylvania State Trials.
Hogue. Hogue's Reports, Florida.
Hol. Inst. Holland's Institutes of Justinian.
Holc. D. & Cr. Holcombe's Law of Debtor and Creditor.
Holc. Dig. Holcombe's Digest.
Holc. Eq. Jur. Holcombe's Equity Jurisprudence.
Holc. Lead. Cas. Holcombe's Leading Cases on Commercial Law.
Holl. (*Minn.*). Hollinshead's Minnesota Reports.
Holm. Holmes' Reports, U. S. Circuit Court, 1st Circuit.
Holt Holt's Reports, English King's Bench.
Holt Adm. Holt's Admiralty Cases. (Rule of the Road at Sea.)
Holt Ch. Holt's Equity V. C. Court.
Holt. L. Dic. Holthouse's Law Dictionary.
Holt Eq. Rep. Holt's Equity Reports, English.
Holt N. P. Holt's Nisi Prius Reports, English Courts.
Holt Rule of R. Holt's Rule of the Road at Sea.
Holt Sh. Holt on Shipping.
Holthouse Dic. Holthouse's Law Dictionary.
Home. Clerk Home's Reports, Scotch Court of Session.
Hood Ex. Hood on Executors.
Hook. Hooker's Reports, Connecticut.
Hoonahan. Hoonahan's Scinde Reports, India.
Hope. Hope's Reports, Scotch Court of Session.
Hope Min. Pr. Hope's Minor Practicks, Scotland.
Hopk. Hopkinson's Works.
Hopk. Adm. Dec. Hopkinson's Admiralty Decisions, Pennsylvania.
Hopk. Ch. Hopkins's Chancery Reports, New York
Hopk. Mar. Ins Hopkins on Marine Insurance.
Hopw. & C. Hopwood and Coltman's English Registration Appeal Cases.
Hopw. & P. Hopwood and Philbrick's English Registration Appeal Cases.
Horn & H. Horn and Hurlstone's Reports, English Exchequer.
Horne Mir. Horne's Mirror or Justices.
Horr. & T. Cas. Horrigan and Thompson's Cases on Self Defence.
Horw. Y. B.(*Horwood's*). Year-Books of Edward I.
Houard Ang.-Sax. Laws. Houard's Anglo-Saxon Laws and Ancient Laws of the French.
Houard Dict. Houard's Dictionary of the Customs of Normandy.
Hough Am. Con. Hough on the American Constitution.
Hough C. M. Hough on Court Martial.
Hous. Pr. Housman's Precedents in Conveyancing.
House of L. House of Lords, House of Lords Cases.
Houst. Houston's Reports, Delaware.
Houst. Cr. Cas. Houston's Criminal Cases, Delaware.
Houst. on St. in Tr. Houston on Stoppage in Transitu
Hov. Fr. Hovenden on Frauds
Hov. Sup. Ves. Hovenden's Supplement to Vesey, Junior's, Reports.
How. Howard's Reports, U. S. Supreme Court.
How. (*Miss.*). Howard's Reports, Mississippi.
How. App. Cas. or *How.* (*N. Y.*). Howard's Reports, N. Y. Court of Appeals.
How. Cr. Tr. Howison's Criminal Trials, Virginia.
How. Pop. Cas. Howard's Popery Cases, Ireland.
How. Pr. R. Howard's Practice Reports, New York.
How. St. Tr. Howell's State Trials.
How. U. S. Howard's Reports, U. S. Supreme Court.
Howe Pr. Howe's Practice, Massachusetts.
Hub. Leg. Dir. Hubbell's Legal Directory.
Hubb. Hubbard's Reports, Maine.
Hud. & B. Hudson and Brooke's Reports, Irish King's Bench.
Hud. & Will. Dig. (*U. S.*). Hudson and William's United States Digest.
Hugh. Hughes's Reports, U. S. Circuit Court, 4th Circuit.
Hugh. (*Ky.*). Hughes's Reports, Kentucky.
Hughs Abr. Hughs's Abridgment.
Hugh. Con. Hughes's Precedents in Conveyancing.
Hugh. Ent. Hughes's Book of Entries.
Hugh. Ins. Hughes on Insurance.
Hugh. Wills. Hughes on Wills.
Hugh. Writs. Hughes on Writs.
Hum. (*Tenn.*). Humphrey's Tennessee Reports.
Hume. Hume's Decisions, Scotch Court of Session.
Hume Com. or *Hume Cr. L.* Hume's Commentaries on Criminal Law of Scotland.
Humph. Humphrey's Reports, Tennessee.
Humph. R. P. Humphrey on Real Property.
Hun. Hun's Reports, New York Supreme Ct. 81.
Hunt or *Hunt Ann. Cas.* Hunt's Collection of Annuity Cases.
Hunt Bound. Hunt's Law of Boundaries and Fences.
Hunt Fr. Conv. Hunt on Fraudulent Conveyances.
Hunt Mer. Mag. Hunt's Merchants' Magazine, New York.
Hunt. Rom. L. Hunter on Roman Law.
Hurd Hab. Corp. Hurd on Habeas Corpus.
Hurd Pers. Lib. Hurd on Personal Liberty.
Hurlst. & C. Hurlstone and Coltman's Reports, English Exchequer.
Hurlst. & G. Hurlstone and Gordon's Reports, English Exchequer ; Exchequer Reports.
Hurlst. & N. Hurlstone and Norman's Reports, English Exchequer.
Hurlst. & W. Hurlstone and Walmsley's Reports, English Exchequer.
Husb. Mar. Wom Husband on Married Women.
Hust. L. T. Huston on Land Titles in Pennsylvania.
Hut. Hutton's Reports, English Common Pleas.
Hutch Car. Hutchinson on Carriers.
Hux. Judg. Huxley's Judgments.
Hyde. Hyde's Reports, India.
I. The Institutes of Justinian.
I. A. Irish Act.
I. C. C. Interstate Commerce Commission Reports.
I. C. L. R. Irish Common Law Reports.
I. C. R. Irish Chancery Reports.
I. E. R. Irish Equity Reports.
I. J. C. Irvine's Justiciary Cases, Scotch Justiciary Court.
I. Jur. Irish Jurist, Dublin.
I. Jur. N. S. Irish Jurist, New Series, Dublin.
I. L. T. Irish Law Times, Dublin.
I. O. U. I owe you.
I. P. Institutes of Polity.
I. R. C. L. Irish Reports, Common Law Series.
I. R. Eq. Irish Reports, Equity Series.
I. R. R. Internal Revenue Record, New York.
I. T. R. Irish Term Reports, by Ridgway, Lapp and Schoales.
Ia. Iowa Reports
Ib. or *Id.* *Ibidem* or *Idem*, The same.
Ida. Idaho Reports.
Il Cons. del Mar. Il Consolato del Mare. See Consolato del Mare, in the body of this work.
Ill. Illinois Reports.
Ill. App. Illinois Appellate Court Reports.
Imp. C. P. Impey's Practice, Common Pleas.
Imp. K. B. Impey's Practice, King's Bench.
Imp. Pl. Impey's Pleader's Guide.

Imp. Pr. C. P. Impey's Practice in Common Pleas.
Imp. Pr. K. B. Impey's Practice in King's Bench.
Imp. Sh. Impey's Office of Sheriff.
In Dom. Proc. In the House of Lords. See *Dom. Proc.*
In f. In fine. At the end of the title, law, or paragraph quoted.
In pr. In principio. At the beginning of a law, before the first paragraph.
In sum. In summa. In the summary.
Ind. Indiana Reports.
Ind. App. Law Reports, Indian Appeals.
Ind. App. Sup. Indian Appeals Supplement, P. C.
Ind. Jur. India Jurist, Calcutta.
Ind. L. Mag. Indiana Law Magazine.
Ind. L. R. (East) Indian Law Reports.
Ind. L. R. All. Allahabad Series of Indian Law Reports.
Ind. L. Reg. Indiana Legal Register, Lafayette.
Ind. L. Reg. Indiana Legal Register.
Ind. L. Rep. Indiana Law Reporter.
Ind. Super. Indiana Superior Court Reports (Wilson's).
Ind. T. Indian Territory.
Inder. Com. L. Indermaur's Principles of the Common Law.
Inder. L. C. Com. L. Indermaur's Leading Common Law Cases.
Inder. L. C. Eq. Indermaur's Leading Equity Cases.
Index Rep. Index Reporter.
Inf. Infra. Beneath or below.
Ing. Dig. Ingersoll's Digest of the Laws of the U. S.
Ing. Roc. Ingersoll's Roccus.
Ingr. Insolv. Ingraham on Insolvency.
Inj. Injunction.
Ins. Insurance. Insolvency.
Ins. L. J. Insurance Law Journal, New York and St. Louis.
Ins. L. Mon. Insurance Law Monitor, New York.
Ins. Rep. Insurance Reporter, Philadelphia.
Inst. Institutes; when preceded by a number denoting a volume (thus 1 Inst.), the reference is to Coke's Institutes; when followed by several numbers (thus Inst. 4, 2, 1), the reference is to the Institutes of Justinian.
Inst. Cler. Instructor Clericalis.
Inst. Conn. Com. Interstate Commerce Commission Reports.
Inst. Jur. Angl. Institutiones Juris Anglicani, by Doctor Cowell.
Int. Com. Rep. Interstate Commerce Reports.
Int. Rev. Rec. Internal Revenue Record, New York.
Iowa. Iowa Reports.
Iowa Univ. L. Bul. Iowa University Law Bulletin.
Ir. Irish. Ireland.
Ir. C. L. or *Ir. L. N. S.* Irish Common Law Reports.
Ir. Ch. or *Ir. Ch. N. S.* Irish Chancery Reports.
Ir. Cir. Irish Circuit Reports.
Ir. Eccl. Irish Ecclesiastical Reports, by Milward.
Ir. Eq. Irish Equity Reports.
Ir. Jur. Irish Jurist, Dublin.
Ir. L. Irish Law Reports.
Ir. L. T. Irish Law Times and Solicitors' Journal, Dublin.
Ir. L. T. Rep. Irish Law Times Reports.
Ir. Law Rec. Irish Law Recorder.
Ir. Law & Ch. Irish Law and Equity Reports, New Series.
(1894) 182 Ir. R. Irish Reports.
Ir. Law & Eq. Irish Law and Equity Reports, Old Series.
Ir. Law Rec. Irish Law Recorder.
Ir. Law Rep. N. S. Irish Common Law Reports.
Ir. R. C. L. Irish Reports, Common Law Series.
Ir. R. Eq. Irish Reports, Equity Series.
Ir. Reg. & Land Cas. Irish Registry and Land Cases.
Ir. Rep. Reg. App. Irish Reports, Registration Appeals.
Ir. Rep. Reg. & L. Irish Reports, Registry and Land Cases.
Ir. St. Tr. Irish State Trials (Ridgeway's).
Ir. T. R. Irish Term Reports (Ridgeway, Lapp and Schoale's).
Ired. L. Iredell's Law Reports, North Carolina.
Ired. Dig. Iredell's Digest.
Ired. Eq. Iredell's Equity Reports, North Carolina.
Irv. Irvine's Justiciary Cases, Scotch Justiciary Court.
Iv. Ersk. Ivory's Notes on Erskine's Institutes.
J. Justice.
J. Institutes of Justinian.
J. Adv. Gen. Judge Advocate General.
J. C. Juris Consultus.
J. C. P. Justice of the Common Pleas.
J. et J. De Justitia et Jure.
J. Glo. Juncta Glossa.
JJ. Justices.
J. J. Mar. J. J. Marshall's Reports, Kentucky.
J. K. B. Justice of the King's Bench.
J. Kel. J. Kelyng's Reports, English King's Bench.
J. P. Justice of the Peace.
J. P. Sm. J. P. Smith's English King's Bench Reports.
J. S. Gr. (N. J.). J. S. Green's New Jersey Reports.
J. Q. B. Justice of the Queen's Bench.
J. U. B. Justice of the Upper Bench.
J. & H. Johnson and Hemming's Reports, English Chancery.
J. & La T. Jones and La Touche's Reports, Irish Chancery.
J. & W. Jacob and Walker's Reports, English Chancery.
Jac. King James; thus 1 Jac. I. signifies the first year of the reign of King James I.
Jac. Jacob's Reports, English Chancery.
Jac. Int. Jacob's Introduction to the Common, Civil and Canon Law.
Jac. Dict. or *Jac. L. D.* Jacob's Law Dictionary.
Jac. Fish. Dig. Jacob's Fisher's Digest.
Jac. L. G. Jacob's Law Grammar.
Jac. Lex Mer. Jacob's Lex Mercatoria, or the Merchant's Companion.
Jac. Sea Law. Jacobsen's Law of the Sea.
Jac. & W. Jacob and Walker's Reports, English Chancery.
Jack. Jackson's Reports, Georgia,
Jack. Tex. App. Jackson's Texas Court of Appeals Reports.
Jackson & Lumpkin (Ga.). Jackson & Lumpkin's Georgia Reports.
James. James's Reports, Nova Scotia.
James. Const. Con. Jameson on Constitutional Conventions.
James Op. James's Opinions, Charges, etc., London, 1820.
James Sel. Cas. James's Select Cases, Nova Scotia.
James & Mont. Jameson and Montagu's English Bankruptcy Reports (in 2 Glyn and Jameson).
Jan. Angl. Jani Anglorum.
Jar. Ch. Pr. Jarman's Chancery Practice.
Jar. Pow. Dev. Powell on Devises, with Notes by Jarman.
Jar. Prec. Bythewood and Jarman's Precedents.
Jar. Wills. Jarman on Wills.
Jard. Tr. Jardine's Criminal Trials.
Jarm. Ch. Pr. Jarman's Chancery Practice.
Jarm. Pow. Dev. Powell on Devises, with Notes by Jarman.
Jarm. Wills. Jarman on Wills.
Jarm. & By. Conv. Jarman and Bythewood's Conveyancing
Jctus. Jurisconsultus.
Jebb Cr. Cas. or *Jebb Ir. Cr. Cas.* Jebb's Irish Crown Cases.
Jebb & B. Jebb and Bourke's Reports, Irish Queen's Bench.
Jebb & S. Jebb and Symes's Reports, Irish Queen's Bench.
Jeff. Jefferson's Reports, Virginia.
Jeff. Man. Jefferson's Parliamentary Manual.
Jenk. Jenkin's Reports, English Exchequer.
Jenn. Jennison's Reports, Michigan.
Jer. Eq. Jur. Jeremy's Equity Jurisdiction.
Jo. Juris. Journal of Jurisprudence.
Jo. & La T. Jones and La Touche's Reports, Irish Chancery.
John. & H. Johnson and Hemming's Reports, English Chancery.
Johns. Johnson's Reports, New York Supreme Court.
Johns. Bills. Johnson on Bills of Exchange, etc.
Johns. Cas. Johnson's Cases, New York Supreme Court.
Johns. Ch. Johnson's Chancery Reports, New York.
Johns. Ch. Johnson's Reports, English Chancery.
Johns. Ch. (Md.) or *Johns. Dec.* Johnson's Maryland Chancery Decisions.

Johns. Ch. (*N. Y.*) or *Johns. Ch. Cas.* Johnson's Chancery Reports, New York.
Johns. Ct. Err. Johnson's Reports, N. Y. Court of Errors.
Johns. Eccl. Law. Johnson's Ecclesiastical Law.
Johns. (*Md.*). Johnson's Maryland Reports.
Johns. (*New Zealand*). Johnson's New Zealand Reports.
Johns. Tr. Johnson's Impeachment Trial.
Johns. U. S. Johnson's Reports, U. S. 4th Circuit, Chase's Decisions.
Johns. V. Ch. Cas. Johnson's Cases in Vice-Chancellor Wood's Court.
Johns. & H. Johnson and Hemming's Reports, English Chancery.
Johnst. Inst. Johnston's Institutes of the Law of Spain.
Johnst. N. Z. Johnston's Reports, New Zealand.
1 *Jon.* Wm. Jones's Reports, English King's Bench and Common Pleas.
2 *Jon.* Thos. Jones's Reports, English King's Bench and Common Pleas.
Jon. (*Ala.*). Jones's Reports, Alabama, 62.
Jon. (*Mo.*). Jones's Reports, Missouri.
Jon. (*N. C.*). Jones's Law Reports, North Carolina.
Jon. (*N. C.*) *Eq.* Jones's Equity Reports, North Carolina.
Jon. (*Pa.*). Jones's Reports, Pennsylvania.
Jon. (*U. C.*). Jones's Reports, Upper Canada.
Jon. B. & W. Jones, Barclay, and Whittelsey's Reports, Missouri, vol. 31.
Jon. Bailm. Jones's Law of Bailments.
Jon. Corp. Sec. Jones on Corporate Securities.
Jon. Eq. Jones's Equity Reports, North Carolina.
Jon. Exch. Jones's Reports, Irish Exchequer.
Jon. Inst. Jones's Institutes of Hindoo Law.
Jon. Intr. Jones's Introduction to Legal Science.
Jon. Ir. Exch. Jones's Reports, Irish Exchequer.
Jon. L. O. T. Jones on Land Office Titles.
Jon. Mort. Jones on Mortgages.
Jon. Railw. Sec. Jones on Railway Securities.
Jon. Salv. Jones on Salvage.
Jon. T. Thos. Jones's Reports, English King's Bench and Common Pleas. Sometimes cited as 2 Jones.
Jon. W. Wm. Jones's Reports, English King's Bench and Common Pleas. Sometimes cited as 1 Jones.
Jon. & C. Jones and Cary's Reports, Irish Exchequer.
Jon. & La T. Jones and La Touche's Reports, Irish Chancery.
Jon. & S. Jones and Spencer's Reports, New York City Superior Court, vols. 33–46.
Jones. See *Jon.*
Jones, B. & W. (*Mo.*). Jones, Barclay and Whittelsey's Reports, Missouri Supreme Court (31 Missouri).
Jord. P. J. Jordan's Parliamentary Journal.
Jour. Jur. Journal of Jurisprudence (Hall's), Philadelphia.
Jour. Jur. (*Sc.*). Journal of Jurisprudence and Scottish Law Magazine, Edinburgh.
Jour. Law. Journal of Law, Philadelphia.
Jour. Trib. Com. Journal des Tribunaux de Commerce, Paris.
Joy Chal. Joy on Challenge to Jurors.
Joy Ev. Acc. Joy on the Evidence of Accomplices.
Jud. Judgments. Judicial. Judicature.
Jud. Book of Judgments, English Courts.
Jud. Chr. Judicial Chronicle.
Jud. Com. of P. C. Judicial Committee of the Privy Council.
Jud. Repos. Judicial Repository, New York.
Jud. & Sw. (*Jamaica*). Judah and Swan's Reports, Jamaica.
Jur. The Jurist Reports in all the Courts, London.
Jur. Eccl. Jura Ecclesiastica.
Jur. Mar. Molloy's De Jure Maritimo.
Jur. N. S. The Jurist, New Series, Reports in all the Courts, London.
Jur. N. Y. The Jurist or Law and Equity Reporter, New York.
Jur. Ros. Roscoe's Jurist, London.
Jur. Sc. Scottish Jurist, Court of Session, Scotland.
Jur. Soc. P. Juridical Society Papers, London.
Jur. St. Juridical Styles, Scotland.
Jur. Wash. D. C. The Jurist, Washington, D. C.
Jurisp. The Jurisprudent, Boston.
Jus Nav. Rhod. Jus Navale Rhodiorum.
Just. Inst. Justinian's Institutes.
Just. Itin. Justice Itinerant *or* of Assize.
Just. P. The Justice of the Peace, London.
Just. S. L. Justice's Sea Law.
Just. T. Justice of Trailbaston.
K. B. King's Bench.
K. C. King's Council.
K. C. R. Reports *tempore* King, English Chancery.
K. & G. R. C. Keane and Grant's Registration Appeal Cases.
K. & J. Kay and Johnson's Reports, English Chancery.
K. & O. Knapp and Ombler's Election Cases, English.
Kam. or *Kam. Dec.* Kames's Decisions, Scotch Court of Session.
Kam. Eluc. Kames's Elucidations of the Law of Scotland.
Kam. Eq. Kames's Principles of Equity.
Kam. Ess. Kames's Essays.
Kam. Hist. L. Tr. or *Kam. L. T.* Kames's Historical Law Tracts.
Kam. Rem. Dec. Kames's Remarkable Decisions, Scotch Court of Session.
Kam. Sel. Dec. Kames's Select Decisions, Scotch Court of Session.
Kam. Tr. Kames's Historical Law Tracts.
Kan. or *Kans.* Kansas Reports.
Kay. Kay's Reports, English Chancery.
Kay Sh. Kay on Shipping.
Kay & J. Kay and Johnson's Reports, English Chancery.
K. B. (*U. C.*). King's Bench Reports, Upper Canada.
K. C. R. Reports *temp.* King, English Chancery.
K. & B. Dig. Kerford's and Box's Victorian Digest.
Kan. C. L. Rep. Kansas City Law Reporter.
Kan. L. J. Kansas Law Journal.
Kan. Univ. Lawy. Kansas University Lawyer, Lawrence.
Keane & G. R. C. Keane and Grant's Registration Appeal Cases.
Keat. Fam. Sett. Keating on Family Settlements.
Keb. or *Keble.* Keble's Reports, English King's Bench.
Keb. J. Keble's Justice of the Peace.
Keb. Stat. Keble's Statutes of England.
Keen. Keen's Reports, English Rolls Court.
Keen. Cas. Qua. Cont. Keener's Cases on Quasi Contracts.
Keil. or *Keilw.* Keilway's Reports, English King's Bench.
Kel. Ga. Kelly's Reports, Georgia Reports, vols. 1–3.
Kel. J. or 1 *Kel.* J. Kelyng's Reports, English Crown Cases.
Kel. W. or 2 *Kel.* W. Kelynge's Reports, English Chancery and King's Bench.
Kel. & C. Kelly and Cobb's Reports, Georgia.
Kelh. Norm. L. D. Kelham's Norman French Law Dictionary.
Kelly. Kelly's Reports, Georgia.
Kelly & C. Kelly and Cobb's Reports, Georgia.
Ken. Kentucky. See *Ky.*
Ken. (*N. C.*). Kenan's North Carolina Reports.
Kenn. Gloss. Kennett's Glossary.
Kenn. Imp. Kennett on Impropriations.
Kent or *Kent Com.* Kent's Commentaries on American Law.
Keny. Kenyon's Notes, English King's Bench.
Kern. Kernan's Reports, New York Ct. of Appeals, vols. 11–14.
Kerr. Kerr's Reports, Indiana.
Kerr (*N. B.*). Kerr's Reports, New Brunswick.
Kerr Act. Kerr on Actions at Law.
Kerr Anc. L. Kerr on Ancient Lights.
Kerr Disc. Kerr on Discovery.
Kerr Extra. Kerr on Inter-state Extradition.
Kerr Fr. Kerr on Fraud and Mistake.
Kerr Inj. Kerr on Injunction.
Kerr Rec. Kerr on Receivers.
Keyes. Keyes's Reports, New York Ct. of Appeals. Sometimes cited as vols. 39–41 N. Y.
Keyes F. I. C. Keyes on Future Interest in Chattels.
Keyes F. I. L. Keyes on Future Interest in Lands.
Keyes Rem. Keyes on Remainders.
Kilk. Kilkerran's Reports, Scotch Court of Session.
King. King's Reports, Louisiana Annual.
Kirby. Kirby's Reports, Connecticut.
Kirt. Sur. Pr. Kirtland on Practice in Surrogates' Courts.

Kn. or *Knapp.* Knapp's Reports, English Privy Council.
Kn. A. C. or *Knapp A. C.* Knapp's Appeal Cases.
Kn. & M. or *Knapp & M.* Knapp and Moore's Reports, English Privy Council.
Kn. & O. or *Knapp & Omb.* Knapp and Ombler's Election Cases.
Knowles. Knowles's Reports, Rhode Island.
Kulp. Kulp's Reports, Pennsylvania.
Ky. Kentucky Reports.
Ky. Dec. Kentucky Decisions, Sneed's Reports.
Ky. L. Rep. Kentucky Law Reporter.
Kyd Aw. Kyd on the Law of Awards.
Kyd Bills. Kyd on Bills of Exchange.
Kyd Corp. Kyd on Corporations.
L. Law. Loi. Liber.
L. Alam. Law of the Alamanni.
L. Baiwar. or *L. Boior.* Law of the Bavarians.
L. C. Lord Chancellor; Lower Canada; Leading Cases.
L. C. B. Lord Chief Baron.
L. C. C. C. Lower Canada Civil Code.
L. C. C. P. Lower Canada Civil Procedure.
L. C. Eq. White and Tudor's Leading Cases in Equity.
L. C. G. Local Court's Gazette, Toronto.
L. C. J. Lord Chief Justice.
L. C. J. or *L. C. Jur.* Lower Canada Jurist, Montreal.
L. C. L. J. Lower Canada Law Journal, Montreal.
L. C. R. Lower Canada Reports.
L. F. Leges Forestarum.
L. Fr. Law French.
L. H. C. Lord High Chancellor.
L. I. Legal Intelligencer, Philadelphia.
L. I. L. Lincoln's Inn Library.
L. J. House of Lords Journal.
L. J. Lord Justices Court.
L. J. The Law Journal, London.
L. J. (*M. & W.*). Morgan and William's Law Journal, London.
L. J. (*Sm.*). Smith's Law Journal, London.
L. J. or *L. J. O. S.* Law Journal Reports, in all the Courts.
L. J. Adm. Law Journal Reports, New Series, English Admiralty.
L. J. App. Law Journal Reports, New Series, English Appeals.
L. J. Bankr. Law Journal Reports, New Series, English Bankruptcy.
L. J. C. or *L. J. C. P.* Law Journal Reports, New Series, English Common Pleas.
L. J. Chan. Law Journal Reports, New Series, English Chancery.
L. J. Ecc. Law Journal Reports, New Series, English Ecclesiastical Court.
L. J. Exch. Law Journal Reports, New Series, English Exchequer.
L. J. H. L. Law Journal Reports, New Series, English House of Lords.
L. J. M. C. or *L. J. Mag. Cas.* Law Journal Reports, New Series, English Magistrates Cases.
L. J. Mat. Cas. Law Journal Reports, New Series, Divorce and Matrimonial Causes.
L. J. N. S. Law Journal, New Series, London.
L. J. Notes Cases. Law Journal Notes of Cases.
L. J. P. or *L. J. P. C.* Law Journal Reports, New Series, English Privy Council.
L. J. P. D. & A. Law Journal Reports, New Series, English Probate, Divorce, and Admiralty.
L. J. Prob. Law Journal Reports, New Series, English Probate.
L. J. Q. B. Law Journal Reports, New Series, English Queen's Bench.
L. J. Rep. Law Journal Reports.
L. J. Rep. N. S. Law Journal Reports, New Series.
L. J. U. C. Law Journal, Upper Canada.
LL. Laws.
L. L. Law Latin. Local Law.
L. L. Law Library, Philadelphia (reprint of English treatises).
L. L. N. S. Law Library, New Series.
L. Lat. Law Latin.
L. M. & P. Lowndes, Maxwell, and Pollock's Reports, English Bail Court.
L. Mag. Law Magazine, London.
L. Mag. & L. R. Law Magazine and Law Review, London.
L. Mag. & R. Law Magazine and Review, London.
L. N. Liber Niger, *or* the Black Book.
L. O. Legal Observer, London.
L. P. B. Lawrence's Paper Book. See *A. P. B.*
L. P. C. Lord of the Privy Council.
L. R. Law Reporter, Law Reports, Law Review.
L. R. Law Recorder, Reports in all the Irish Courts.
L. R. A. Lawyer's Reports Annotated.
L. R. A. & E. Law Reports, English Admiralty and Ecclesiastical.
L. R. App. Cas. Law Reports, English Appeal Cases.
L. R. Burm. Law Reports, British Burmah.
L. R. C. C. R. Law Reports, English Crown Cases Reserved.
L. R. C. P. Law Reports, English Common Pleas.
L. R. C. P. D. Law Reports, Common Pleas Division, English Supreme Court of Judicature.
L. R. Ch. Law Reports, English Chancery Appeal Cases.
L. R. Ch. D. Law Reports, Chancery Division, English Supreme Court of Judicature.
L. R. E. & Ir. App. Law Reports, English and Irish Appeal Cases.
L. R. Eq. Law Reports, English Equity.
L. R. Ex. or *L. R. Exch.* Law Reports, English Exchequer.
L. R. Ex. D. Law Reports, Exchequer Division, English Supreme Court of Judicature.
L. R. H. L. Law Reports, English and Irish Appeal Cases, House of Lords.
L. R. H. L. Sc. Law Reports, Scotch and Divorce Appeal Cases, House of Lords.
L. R. Ind. App. Law Reports, Indian Appeals.
L. R. Ir. Law Reports, Ireland.
L. R. N. S. W. Law Reports, New South Wales.
L. R. P. C. Law Reports, English Privy Council, Appeal Cases.
L. R. P. Div. Law Reports, Probate, Divorce, and Admiralty Division, English Supreme Court.
L. R. P. & D. Law Reports, English Probate and Divorce.
L. R. Q. B. Law Reports, English Queen's Bench.
L. R. Q. B. Div. Law Reports, Queen's Bench Division, English Supreme Court of Judicature.
L. R. S. A. Law Reports, South Australia.
L. R. Sc. Div. App. Cas. Scotch and Divorce Appeal Cases, Law Reports.
L. R. Sess. Cas. English Law Reports, Session Cases.
L. R. Stat. Law Reports, Statutes.
L. Rep. (*Mont.*) Law Reporter (Montreal).
L. Repos. Law Repository.
L. Rev. & Quart. J. Law Review and Quarterly Journal.
L. Ripar. Law of the Riparians.
L. S. Locus sigilli, place of the seal.
L. Salic. Salic Law.
L. Stu. Mag. N. S. Law Student's Magazine, New Series.
L. T. The Law Times, Scranton, Pa.
L. T. The Law Times, London.
L. T. B. American Law Times Bankruptcy Reports.
L. T. J. Law Times Journal.
L. T. N. S. or *L. T. Rep. N. S.* Law Times Reports, New Series, English Courts, with Irish and Scotch Cases.
L. T. R. Law Times Reports, in all the Courts.
L. V. Rep. Lehigh Valley Reporter, Pennsylvania.
L. & B. Ins. Dig. Littleton and Blatchley's Insurance Digest.
L. & C. C. C. Leigh and Cave's Crown Cases, English.
L. & E. Rep. Law and Equity Reporter, New York.
L. & E. English Law and Equity Reports, Boston Edition.
L. & G. t. Plunk. Lloyd and Goold's Cases *tempore* Plunkett, Irish Chancery.
L. & G. t. Sug. Lloyd and Goold *temp.* Sugden, Irish Chancery.
L. & M. Lowndes and Maxwell's Reports, English Bail Court.
L. & T. Longfield and Townsend's Reports, Irish Exchequer.
L. & W. or *L. & Welsb.* Lloyd and Welsby's Mercantile Cases, English Courts.
La. Lane's Reports, English Exchequer.
La. Louisiana Reports.
La. Ann. Louisiana Annual Reports.
La. L. J. Louisiana Law Journal, New Orleans, 1875.
La. L. J. (*Schm.*). Louisiana Law Journal (Schmidt's), New Orleans.

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La. T. R. Martin's Louisiana Term Reports, vols. 2–12.
Lab. Labatt's Reports, U. S. District Ct., California.
Lac. Dig. Ry. Dec. Lacey's Digest of Railway Decisions.
Lack. Leg. R. Lackawana Legal Record, Scranton, Pa.
Lal. R. P. Lalor on Real Property.
Lalor. Lalor's Supplement to Hill and Denio's Reports, New York.
Lamb. Archai. Lambard's Archaionomia.
Lamb. Eiren. Lambard's Eirenarcha.
Lanc. B. The Lancaster Bar, Pennsylvania.
Lanc. L. Rev. Lancaster Law Review.
Land. Est. C. Landed Estates Court.
Lane. Lane's Reports, English Exchequer.
Lang. Eq. Pl. Langdell's Summary of Equity Pleading.
Lang. Lead. Cas. Langdell's Leading Cases on Contracts.
Lang. L. C. Sales. Langdell's Leading Cases on Sales.
Lans. Lansing's Reports, New York Supreme Court Reports, vols. 1–7.
Lans. Ch. or *Lans. Sel. Cas.* Lansing's Select Chancery Cases, New York.
Laper. Dec. Laperriere's Speaker's Decisions, Canada.
Lat. or *Latch.* Latch's Reports, English King's Bench.
Lath. Lathrop's Reports, Massachusetts.
Lauder. (Lauder of) Fountainhall's Scotch Session Cases.
Laur. Prim. Laurence on the Law and Custom of Primogeniture.
Lauss. Eq. Laussat's Equity in Pennsylvania.
Law Bul. Law Bulletin, San Francisco.
Law Chron. Law Chronicle, London.
Law Chron. Law Chronicle, Edinburgh.
Law. Con. Lawson on Contracts.
Law Ex. J. Law Examination Journal, London.
Law Fr. & Lat. Dict. Law French and Latin Dictionary.
Law Int. Law Intelligencer.
Law Jour. Law Journal. See *L. J.*
Law Jour. (M. & W.). Morgan and Williams's Law Journal, London.
Law Jour. (Smith's). J P. Smith's Law Journal, London.
Law Jur. Law's Jurisdiction of the Federal Courts.
Law Lib. Law Library, Philadelphia (reprint of English treatises).
Law Lib. N. S. Law Library, New Series, Philadelphia.
Law Mag. Law Magazine, London.
Law News. Law News, St. Louis, Mo.
Law Pat. Dig. Law's Digest of Patent, Copyright and Trade-mark Cases.
Law. Pl. Lawes's Treatise on Pleading in Assumpsit.
Law Pr. Law's Practice in the Courts of the U. S.
Law Quart. Rev. Law Quarterly Review, London.
Law Rec. Law Recorder, Reports in all the Irish Courts.
Law Rep. Law Reports. See *L. R.*
Law Rep. Law Reporter, Boston.
Law Rep. N. S. Monthly Law Reporter, Boston.
Law Rep. (Tor.). Law Reporter, Toronto.
Law Repos. Carolina Law Repository, North Carolina.
Law Rev. Law Review, London.
Law Rev. Qu. Law Review Quarterly, Albany, N. Y.
Law Rev. & Qu. J. Law Review and Quarterly Journal, London.
Law Stu. Mag. Law Students' Magazine, London.
Law Times. Law Times, Cases in all the English Courts.
Law Times N. S. or *Law Times Rep. N. S.* Law Times Reports, New Series, English Courts, with Irish and Scotch Cases.
Law Times (Scranton). Law Times, Scranton, Pa.
Law Weekly. Law Weekly, New York.
Law & Mag. Mag. Lawyers' and Magistrates' Magazine, London.
Lawes C. Lawes on Charter Parties.
Lawes Pl. Lawes on Pleading.
Lawr. Lawrence's Reports, Ohio.
Laws. Cas. Crim. L. Lawson's Leading Cases in Criminal Law.
Laws. Cas. Eq. Lawson's Leading Cases in Equity and Constitutional Law.
Laws. Lead. Cas. Simp. Lawson's Leading Cases Simplified.
Lawson Cont. Lawson on Contracts.
Laws. R. & Rem. Lawson, Rights and Remedies.
Lay. Lay's Reports, English Chancery.
Ld. Ken. Kenyon's Reports, English King's Bench.
Ld. Raym. Raymond's Reports, English King's Bench.
Lea or *Lea B. J.* Lea's Reports, Tennessee.
Leach or *Leach C. C.* Leach's Crown Cases, English Courts,
Leach Cas. Leach's Club Cases, London.
Lead. Cas. Eq. White and Tutor's Leading Cases in Equity.
Leake Contr. Leake on Contracts.
Lec. Elm. Leçons Elémentaires du Droit Civil Romain.
Le Droit C. Can. Le Droit Civil Canadian, Montreal.
Lee or *Lee Cas. Ecc.* Lee's Cases, English Ecclesiastical Courts.
Lee (Cal.). Lee's Reports, California.
Lee Abs. Lee on Abstracts of Title.
Lee Cas. t. H. or *Lee & H.* Lee's Cases *tempore* Hardwicke, English King's Bench.
Lee Dict. or *Lee Pr.* Lee's Dictionary of Practice.
Lef. Dec. Lefevre's Parliamentary Decisions, reported by Bourke.
Lefroy. Lefroy's English Railroad and Canal Cases.
Leg. Leges.
Leg. Adv. Legal Adviser, Chicago, Ill.
Leg. Bibl. Legal Bibliography, by J. G. Marvin.
Leg. Burg. Leges Burgorum, Scotland.
Leg. Chron. Legal Chronicle, Pottsville, Pa.
Leg. Chron. Rep. Legal Chronicle Reports, Pennsylvania.
Leg. Exam. Legal Examiner, London.
Leg. Exam. N. S. Legal Examiner, New Series, London.
Leg. Exam. & L. C. Legal Examiner and Law Chronicle, London.
Leg. Exam. & Med. J. Legal Examiner and Medical Jurist, London.
Leg. Exam. W. R. Legal Examiner, Weekly Reporter, London.
Leg. Exch. Legal Exchange, Des Moines, Iowa.
Leg. G. Legal Guide, London.
Leg. Gaz. Legal Gazette, Philadelphia.
Leg Gaz. Rep. Legal Gazette Reports, Pennsylvania Courts.
Leg. Ing. Legal Inquirer, London.
Leg. Int. Legal Intelligencer, Philadelphia.
Leg. News. Legal News, Montreal.
Leg. Obs. Legal Observer, London.
Leg. Oler. The Laws of Oleron.
Leg. Op. Legal Opinions, Harrisburg, Penna.
Leg. Out. Legge on Outlawry.
Leg. Rec. Rep. Legal Record Reports.
Leg. Rem. Legal Remembrancer, Calcutta High Court.
Leg. Rep. Legal Reporter, Nashville, Tenn.
Leg. Rep. (Ir.). Legal Reporter, Irish Courts.
Leg. Rev. Legal Review, London.
Leg. Rhod. Laws of Rhodes.
Leg. T. Cas. Legal Tender Cases.
Leg. Ult. The Last Law.
Leg Wisb. Laws of Wisbuy.
Leg. Y. B. Legal Year Book, London.
Leg. & Ins. Rept. Legal and Insurance Reporter, Philadelphia.
Legg. Legget's Reports, Scinde, India.
Legul. The Leguleian, London.
Lehigh Val. L. Rep. Lehigh Valley Law Reporter.
Leigh. Leigh's Reports, Virginia.
Leigh N. P. Leigh's Nisi Prius Law.
Leigh & C. Leigh and Cave's Crown Cases, English Courts.
Leigh & D. Conv. Leigh and Dalzell on Conversion of Property.
Leith R. P. St. Leith's Real Property Statutes, Ontario.
Le Mar. Le Marchant's Gardner Peerage Case.
Leo. or *Leon.* Leonard's Reports, English King's Bench.
Lester. Lester's Reports, Georgia.
Lest. P. L. C. Lester's Decisions in Public Land Cases, U. S. 1860–70.

Lester Supp. or *Lester & B.* Lester & Butler's Supplement to 33d Georgia Reports.
Lev. Levinz's Reports, English King's Bench.
Lew. Lewis's Reports, Nevada.
Lew. C. C. Lewin's Crown Cases, English Courts.
Lew. Cr. Law. Lewis's Criminal Law of the U. S.
Lew. L. Cas. on L. L. Lewis's Leading Cases on Public Land Law.
Lew. L. T. in Phila. Lewis on Land Titles in Philadelphia.
Lew. Perp. Lewis on the Law of Perpetuities.
Lew. Pr. Lewis's Principles of Conveyancing.
Lew. Stocks. Lewis on Stocks, Bonds, etc.
Lew. Tr. Lewin on Trusts.
Lex Cust. Lex Custumaria.
Lex Man. Lex Manerlorum.
Lex Mer. or *Lex Mer. Red.* Lex Mercatoria, by Beawes.
Lex Mer. Am. Lex Mercatoria Americana.
Lex Parl. Lex Parliamentaria.
Ley. Ley's Reports, English Court of Wards and other Courts.
Lib. Liber, Book.
Lib. Ass. Liber Assisarum (Part 5 of the Year Books).
Lib. Ent. Old Book of Entries.
Lib. Feud. Liber Feudorum; Consuetudines Feudorum, at end of *Corpus Juris Civilis.*
Lib. Intr. Liber Intrationum: Old Book of Entries.
Lib. L. & Eq. Library of Law and Equity.
Lib. Niger. Liber Niger, or the Black Book.
Lib. Pl. Liber Placitandi, Book of Pleading.
Lib. Reg. Register Books.
Lib. Rub. Liber Ruber, the Red Book.
Lib. Ten. Liber Tenementum.
Lieb. Civ. Lib. Lieber on Civil Liberty and Self-Government.
Life & Acc. Ins. Life and Accident Insurance Reports (Bigelow's).
Lig. Dig. Ligon's Digest (Alabama).
Lil. Lilly's Reports or Entries, English Court of Assize.
Lil. Abr. Lilly's Abridgment.
Lil. Reg. Lilly's Practical Register.
Lind. Jur. Lindley's Jurisprudence.
Lind. Part. Lindley on Partnership.
Lit. Littleton's Reports, English Common Pleas and Exchequer.
Lit. s. Littleton, section.
Lit. Ten. Littleton's Tenures.
Litt. (Ky.). Littell's Reports, Kentucky.
Litt. Sel. Cas. Littell's Select Cases, Kentucky.
Litt. & B. Littleton and Blatchley's Digest of Insurance Decisions.
Liv. Livre, Book.
Liv. Cas. Livingston's Cases in Error, New York.
Liv. Jud. Op. Livingston's Judicial Opinions, New York.
Liv. L. Mag. Livingston's Law Magazine, New York.
Liv. L. Reg. Livingston's Law Register, New York.
Liverm. Ag. Livermore on Principal and Agent.
Liverm. Diss. Livermore's Dissertation on the Contrariety of Laws.
Liz. Sc. Exch. Lizars' Scotch Exchequer Cases.
Ll. Leges, Laws.
Llo. Ch. St. Lloyd's Chitty's Statutes.
Llo. T. M. Lloyd on Trademarks.
Llo. & G. t. P. Lloyd and Goold's Reports, *tempore* Plunkett, Irish Chancery.
Llo. & G. t. S. Lloyd and Goold's Reports, *tempore* Sugden, Irish Chancery.
Llo. & W., Lloyd & W., or *Llo. & W. Mer. Cas.* Lloyd and Welsby's Mercantile Cases, English King's Bench.
Loc. cit. Loco citato, in the place cited.
Loc. Ct. Gaz. Local Courts and Municipal Gazette, Toronto, Ont.
Lock. Rev. Cas. Lockwood's Reversed Cases, New York.
Lofft. Lofft's Reports, English King's Bench.
Log. Comp. Logan's Compendium of English, Scotch, and Ancient Roman Law.
Lois des Batim. Lois des Batiments.
Lom. C. H. Rep. Lomas's City Hall Reporter, New York.
Lom. Dig. Lomax's Digest of the Law of Real Property in the U. S.
Lond. Jur. London Jurist, Reports in all the Courts.
Lond. Jur. N. S. London Jurist, New Series.
Lond. L. Mag. London Law Magazine.

Long Quint. Year Book, part 10.
Longf. & T. Longfield and Townsend's Reports, Irish Exchequer.
Lor. Inst. Lorimer's Institutes.
Lor. & Russ. Loring & Russell, Election Cases, Massachusetts.
Lords Jour. Journal of the House of Lords.
Lorenz (Ceylon). Lorenz's Ceylon Reports.
Louis. Code. Civil Code of Louisiana.
Love. Wills. Lovelass on Wills.
Low. Lowell's Decisions, U. S. Dist. of Massachusetts.
Low. Can. Jur. Lower Canada Jurist, Montreal.
Low. Can. L. J. Lower Canada Law Journal.
Low. Can. Repts. Lower Canada Reports.
Low. C. Seign. Lower Canada Seignorial Reports.
Lown. Av. Lowndes on Average.
Lown. Col. Lowndes on Collisions at Sea.
Lown. Leg. Lowndes on Legacies.
Lown. & M. Lowndes and Maxwell's Bail Court Reports, English.
Lown. M. & P. Lowndes, Maxwell and Pollock's Bail Court Reports, English.
Lube Eq. Lube on Equity Pleading.
Luc. Lucas's Reports, English (10 Modern).
Lud. El. Cas. Luder's Election Cases, English.
Ludd. Ludden's Reports, Maine.
Lum. Cas. or *Lum. P. L. Cas.* Lumley's Poor Law Cases.
Lum. Parl. Pr. Lumley's Parliamentary Practice.
Lum. Set. Lumley on Settlements and Removal.
Lush. or *Lush. Adm.* Lushington's Admiralty Reports, English.
Lush. P. L. Lushington on Prize Law.
Lush. Pr. Lush's Practice.
Lut. Lutwyche's Reports, English Common Pleas.
Lut. Elec. Cas. Lutwyche's Election Cases, English.
Lut. Ent. Lutwyche's Entries.
Lut. R. C. Lutwyche's Registration Cases.
Luz. L. J. Luzerne Law Journal.
Luz. L. T. Luzerne Law Times.
Luz. Leg. Ob. Luzerne Legal Observer, Carbondale, Pa.
Luz Leg. Reg. Luzerne Legal Register, Wilkesbarre, Pa.
Lynd. Prov. Lyndwood's Provinciales.
Lyne. Lyne's Reports, Irish Chancery.
M. Queen Mary; thus 1 M. signifies the first year of the reign of Queen Mary.
M. Michaelmas Term. Mortgage.
M. Morison's Dictionary of Decisions, Scotch Court of Session.
M. Session Cases, 3d Series, Scotland (Macpherson).
M. See *Mc.*
M. Cas Magistrates' Cases.
M. C. C. Moody's Crown Cases.
M. D. & D. Montague, Deacon and DeGex's Reports, English Bankruptcy.
M. G. & S. Manning, Granger and Scott's Reports, English Common Pleas, Common Bench Reports, vols. 1-8.
M. L. Mercian Law.
M. L. J. Memphis Law Journal, Tennessee.
M. L. R. Maryland Law Record, Baltimore.
M. M. R. Mitchell's Maritime Register, London.
M. P. C Moore's Privy Council Cases, English.
M. R. Master of the Rolls.
MS Manuscript, Manuscript Reports.
M. St. More's Notes on Stair's Institutes.
M. T. Michaelmas Term.
M. & Ayr. Montagu and Ayrton's Reports, English Bankruptcy.
M. & B. Montagu and Bligh's Reports, English Bankruptcy.
M. & C. Mylne and Craig's Reports, English Chancery.
M. & C. Bankr. Montagu and Chitty's Bankruptcy Reports, English.
M. & G. Manning and Granger's Reports, English Common Pleas.
M. & Gel. Maddock and Gelhart's Reports, English Chancery.
M. & Gord. Macnaghten and Gordon's Reports, English Common Pleas.
M. & H. Murphy and Hurlstone's Exchequer Reports.
M. & K. Mylne and Keen's Reports, English Chancery.
M. & M. Moody and Malkin's Reports, English Nisi Prius.

M. & McA. Montague and McArthur's Reports, English Bankruptcy.
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M. & R. Manning and Ryland's Reports, English King's Bench.
M. & R. M. C. Manning and Ryland's Magistrate Cases, English King's Bench.
M. & Rob. Moody and Robinson's Nisi Prius Cases, English Courts.
M. & S. Maule and Selwyn's Reports, English King's Bench.
M. & S. or *M. & Scott.* Moore and Scott's Reports, English Common Pleas.
M. & W. Meeson and Welsby's Reports, English Exchequer.
M. & Y. Martin and Yerger's Reports, Tennessee.
McAll. McAllister's Reports, U. S. Dist. of California.
McArth. McArthur's Reports, Dist. of Columbia.
McArth. C. M. McArthur on Courts Martial.
MacAr. & Mackey. MacArthur and Mackey, Reports of District of Columbia Supreme Court.
MacArth. Pat. Cas. MacArthur, Patent Cases, District of Columbia.
McCahon. McCahon's Reports, Supreme Court of Kansas and U. S. Courts, Dist. of Kansas.
McCall Pr. McCall's Precedents.
McCart. McCarter's Chancery Reports, New Jersey Equity, vols. 14–15.
McClain Cas. Car. McClain's Cases on Carriers.
McClel. McClelland's Reports, English Exchequer.
McClel. Pro. Pr. McClellan's Probate Practice.
McClel. & Y. McClelland and Younge's Reports, English Exchequer.
McCook. McCook's Reports, Ohio.
McCord. McCord's Law Reports, South Carolina.
McCord Ch. McCord's Chancery Reports, South Carolina.
McCork. McCorkle's Reports, North Carolina, vol. 65.
McCr. Elect. McCrary's American Law of Elections.
McCrary. McCrary, United States Circuit Court Reports.
McCull. Dict. McCullough's Commercial Dictionary.
McDon. Inst. McDonall's Institutes of the Law of Scotland.
McGill. Sc. Sess. McGill's Manuscript Decisions, Scotch Court of Session.
McGloin. McGloin's Reports, Louisiana Court of Appeals.
McKinn. Jus. McKinney's Justice.
McKinn. Phil. Ev. McKinnon's Philosophy of Evidence.
McL. or *McLean.* McLean's Reports, U. S. Circuit Court, 7th Circuit.
McMas. R. L. McMaster's Railroad Law, New York.
McMull. McMullan's Law Reports, South Carolina.
McMull. Ch. or *McMull. Eq.* McMullan's Chancery Reports, South Carolina.
McNagh. Elem. McNaghten's Elements of Hindoo Law.
Macas. Macassey's Reports, New Zealand.
Macc. Cas. Maccola's Breach of Promise Cases.
Maccles. Macclesfield's Reports (10 Modern).
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Mack. C. L. Mackeldey on Civil Law.
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Mack. Rom. L. Mackenzie's Studies in Roman Law.
Mackey. Mackey's Supreme Court Reports, District of Columbia.
Macl. Dec. Maclaurin's Decisions, Scotch Courts.
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Macn. Macnaghten's (W. H.) Reports, India.
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Macn. Nul. Macnamara on Nullities and Irregularities in the Practice of the Law.
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Macph. Macpherson's Cases, Court of Session Cases, 3d Series.
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Macr. P. Cas. Macrory's Patent Cases.
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Mad. Exch. Madox's History of the Exchequer.
Mad. Form. Madox's Formulare Anglicarum.
Mad. H. Ct. Rep. Madras High Court Reports.
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Mad. Papers. Madison's (James) Papers.
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Madd. Maddock's Reports, English Chancery.
Madd. Ch. Pr. Maddock's Chancery Practice.
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Mag. Cas. Magistrate Cases, Edited by Bittleston, Wise and Parnell.
Mag. Char. Magna Charta.
Mag. Ins. Magen on Insurance.
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Maine Vil. Com. Maine on Village Communities.
Mal. Malyne's Lex Mercatoria.
Mall. Ent. Mallory's Modern Entries.
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Man. El. Cas. Manning's Election Cases.
Man. Exch. Pr. Manning's Exchequer Practice.
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Manl. Fines. Manley on Fines.
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Mar. Maritime.
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Max. Maxims.
Maxw. Int. Sts. Maxwell on the Interpretation of Statutes.
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Me. Maine Reports.
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Mem. L. J. Memphis Law Journal, Tennessee.
Menz. Menzie's Reports, Cape of Good Hope.
Mer. or *Meriv.* Merivale's Reports, English Chancery.
Merc. Cas. Mercantile Cases.
Merch. Dict. Merchant's Dictionary.
Merl. Quest. Merlin, Questions de Droit.
Merl. Répert. Merlin's *Répertoire de Jurisprudence.*
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Mich. Michigan Reports.
Mich. Cir. Ct. Rep. Michigan Circuit Court Reporter.
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Mich. Lawyer. Michigan Lawyer, Detroit, Mich.
Mich. L. Michigan Lawyer, Detroit, Mich.
Mich. L. J. Michigan Law Journal, Detroit, Mich.
Mich. Leg. News. Michigan Legal News.
Mich. N. P. Michigan Nisi Prius Cases (Brown's).
Mich. Rev. St. Michigan Revised Statutes.
Mich. T. Michaelmas Term.
Middx. Sit. Middlesex Sittings at Nisi Prius.
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Mill. & C. Bills. Miller and Collier on Bills of Sale.
Mills Em. D. Mills on Eminent Domain.
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Min. Dig. Minot's Digest, Massachusetts.
Min. Ev. Minutes of Evidence.
Minn. Minnesota Reports.
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Mirch. D. & S. Mirchall's Doctor and Student.
Misc. R. Miscellaneous Reports, New York.
Miss. Mississippi Reports, 1851–1896.
Miss. St. Cas. Mississippi State Cases.
Mitch. M. R. Mitchell's Maritime Register, London.
Mitf. Eq. Pl. Mitford on Chancery Pleading.
Mitf. & Ty. Eq. Pl. Mitford and Tyler's Practice and Pleading in Equity.
M'Mul. Ch. (S. C.). M'Mullan's South Carolina Equity Reports.
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Mo. J. B. Moore's Reports, English Common Pleas.
Mo. Missouri Reports, 1821–1896.
Mo. App. Missouri Appeal Reports. 1876–96.
Mo. Bar. Missouri Bar, Jefferson City.
Mo. Jur. Monthly Jurist, Bloomington, Ill.
Mo. Law Mag. Monthly Law Magazine, London.
Mo. Law Rep. Monthly Law Reporter, Boston.
Mo. Leg. Exam. Monthly Legal Examiner, New York.
Mo. W. J. Monthly Western Jurist, Bloomington, Ill.
Mobl. Mobley, Contested Election Cases, U. S. House of Representatives, 1882–9.
Mod. Modern Reports, English Courts.
Mod. Cas. Modern Cases (6 Modern Reports).
Mod. Cas. L. & Eq. Modern Cases in Law and Equity (8 and 9 Modern Reports).
Mod. Ent. Modern Entries.
Mod. Int. Modus Intrandi.
Mol. Molloy's Reports, Irish Chancery.
Mol. de J. M. Molloy de Jure Maritimo.
Moly. Molyneaux's Reports, English Courts, *temp.* Car. I.
Mon. or *Monagh.* Monaghan's Unreported Cases, S. C. of Pennsylvania.
Mon. or *Monr.* or *Mon. T. B.* T. B. Monroe's Reports, Kentucky.
Mon. B. or *Monr. B.* Ben Monroe's Reports, Kentucky.
Mont. Montana Reports.
Mont. or *Mont. B. C.* Montagu's Reports, English Bankruptcy.
Mont. Cas. Montriou's Cases in Hindoo Law.
Mont. Cond. Rep. Montreal Condensed Reports.
Mont. Comp. Montagu on the Law of Composition.
Mont. D. & De G. Montagu, Deacon and De Gex's Reports, English Bankruptcy.
Mont. Dig. or *Mont. Eq. Pl.* Montagu's Digest of Pleadings in Equity.
Mont. Inst. Montriou's Institutes of Jurisprudence.
Mont. L. Rep. Super. Ct. Montreal Law Reports, Superior Court.
Mont. Set-Off. Montagu on Set-Off.
Mont. & A. Montagu and Ayrton's Reports, English Bankruptcy.
Mont. & B. Montagu and Bligh's Reports, English Bankruptcy.
Mont. & C. Montagu and Chitty's Reports, English Bankruptcy.
Mont. & McA. Montagu and McArthur's Reports, English Bankruptcy.

Montesq. Montesquieu's Spirit of Laws.
Mo. Moore, K. B.
Montg. Co. L. Rep. Montgomery County Law Reporter.
Month. J. L. Monthly Journal of Law, Washington.
Montr. L. R. Montreal Law Reports.
Moo. Francis Moore's Reports, English. When a volume is given, it refers to J. B. Moore's Reports, English Common Pleas.
Moo. A. Moore's Reports, English (1st Bosanquet and Puller's Reports, after page 470).
Moo. C. Cas. Moody's Crown Cases, English Courts.
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Moo. & Sc. Moore and Scott's Reports, English Common Pleas.
Moore (Ark.). Moore's Reports, Arkansas.
Moore & W. Moore and Walker's Reports, Texas, vols. 22–24.
Mor. or *Mor. Dict. Dec.* Morison's Dictionary of Decisions, Scotch Court of Session.
Mor. Dig. Morley's Digest of the Indian Reports.
Mor. Min. Rep. Morrison's Mining Reports.
Morrell. Morrell's Bankruptcy Cases.
More St. More's Notes on Stair's Institutes, Scotland.
Morg. Ch. A. & O. Morgan's Chancery Acts and Orders.
Morg. & W. L. J. Morgan and Williams's Law Journal, London.
Morr. Morris's Reports, Iowa.
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Moult. Ch. (N. Y.). Moulton's New York Chancery Practice.
Moy. Ent. Moyle's Book of Entries.
Moz. & W. Mozley and Whitley's Law Dictionary.
MS. Manuscript.
Mumf. (Jamaica). Mumford's Jamaica Reports.
Mun. Municipal.
Munf. Munford's Reports, Virginia.
Munic. & P. L. Municipal and Parish Law Cases, English.
Mur. & H. Murphy and Hurlstone's Reports, English Exchequer.
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Murr. Over. Cas. Murray's Overruled Cases.
Murray (Ceylon). Murray's Ceylon Reports.
Murray (New South Wales). Murray's New South Wales Reports.
Mut. (Ceylon). Mutukisna's Ceylon Reports.
Myers Fed. Dec. Myers's Federal Decisions.
Myl. & C. Mylne and Craig's Reports, English Chancery.
Myl. & K. Mylne and Keen's Reports, English Chancery.
Myrick. Myrick's Probate Court Reports, San Francisco, Cal.
N. Novellæ. The Novels or New Constitutions.
N. A. Non allocatur.
N. B. Nulla bona.
N. B. New Brunswick Reports.
N. Benl. New Benloe's Reports, English King's Bench, Edition of 1661.
N. B. R. National Bankruptcy Register, New York.
N. C. Ecc. Notes of Cases, English Ecclesiastical and Maritime Courts.
N. C. North Carolina Reports.
N. C. Conf. North Carolina Conference Reports.
N. C. Ecc. Notes of Cases in the Ecclesiastical and Maritime Courts.
N. C. Str. Notes of Cases, by Strange, Madras.
N. C. Law Repos. North Carolina Law Repository.
Nat. Corp. Rep. National Corporation Reporter.
N. C. Term. R. North Carolina Term Reports (2 Taylor).
N. Chip. N. Chipman's Reports, Vermont.
N. D. North Dakota Reports.
N. E. New Edition.
N. E. Rep. Northeastern Reporter.
N. Eng. Rep. New England Reporter.
N. E. I. Non est inventus.
N. F. Newfoundland Reports.
N. H. New Hampshire Reports.
N. H. & C. Nicholl, Hare and Carrow's English Railway Cases.
N. J. New Jersey Reports.
N. J. Ch. or *N. J. Eq.* New Jersey Equity Reports.
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N. J. L. J. New Jersey Law Journal, Somerville, N. J.
N. L. Nelson's Lutwyche's Reports, English Common Pleas.
N. L. L. New Library of Law, etc., Harrisburg, Pa.
N. L. L. New Library of Law and Equity, English.
N. of Cas. Notes of Cases, English Ecclesiastical and Maritime Courts.
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N. P. Nisi Prius. Notary Public. Nova Placita. New Practice.
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N. R. Not reported.
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N. T. Repts. New Term Reports, Q. B.
N. W. Law Rev. Northwestern Law Review, Chicago, Ill.
N. W. P. North West Provinces Reports, India.
N. W. Reptr. North Western Reporter, St. Paul.
N. Y. New York Reports, Court of Appeals.
N. Y. Ch. Sent. New York Chancery Sentinel.
N. Y. City H. Rec. New York City Hall Recorder.
N. Y. Code Rept. New York Code Reporter, New York City.
N. Y. Code Repts. N. S. New York Code Reports, New Series, New York City.
N. Y. Cr. New York Criminal Repots.
N. Y. Daily. L. Gaz. New York Daily Law Gazette.
N. Y. Elec. Cas. New York Contested Election Cases.
N. Y. Jud. Rep. New York Judicial Repository, New York (Bacon's).
N. Y. Jur. New York Jurist.
N. Y. L. J. New York Law Journal, New York City.
N. Y. Law Gaz. New York Law Gazette, New York City.
N. Y. Law Rev. New York Law Review, Ithaca, N. Y
N. Y. Leg. N. New York Legal News.
N. Y. Leg. Obs. New York Legal Observer, New York City (Owen's).
N. Y. Leg. Reg. New York Legal Register, New York City.
N. Y. Misc. New York Miscellaneous Reports.
N. Y. Mo. Law Bull. New York Monthly Law Bulletin, New York City.
N. Y. Mun. Gaz. New York Mnnicipal Gazette, New York City.
N. Y. Pr. Rep. New York Practice Reports.
N. Y. Rec. New York Record.
N. Y. Reg. New York Daily Register, New York City.
N. Y. Reptr. New York Reporter (Gardenier's).
N. Y. Sup. New York Supplement, St. Paul, Minnesota.
N. Y. St. Rep. New York State Reporter, 1886–1896.

N. Y. Sup. Ct. New York Superior Court Reports.
N. Y. Supr. Ct. Repts. New York Supreme Court Reports.
N. Y. Supr. Ct. Repts. (T. & C.). New York Supreme Court Reports, by Thompson and Cook.
N. Y. Term R. New York Term Reports, by Caines.
N. Y. Them. New York Themis, New York City.
N. Y. Trans. New York Transcript, New York City.
N. Y. Trans. N. S. New York Transcript, New Series, New York City.
N. Y. Week. Dig. New York Weekly Digest, New York City.
N. Z. Jur. New Zealand Jurist, Dunedin, N. Z.
N. Z. or *N. Z. Rep.* New Zealand Reports, Court of Appeals.
N. Z. App. Rep. New Zealand Appeal Reports.
N. Z. Col. L. J. New Zealand Colonial Law Journal.
N. & H. Nott and Huntington's Reports, U. S. Court of Claims Reports, vols. 1–7.
N. & Hop. Nott and Hopkins's Reports, U. S. Court of Claims Reports. vols. 8–29.
N. & M. Neville and Manning's Reports, English King's Bench.
N. & McC. Nott and McCord's Reports, South Carolina.
N. & P. Neville and Perry's Reports, English Queen's Bench.
Nal. St. P. Nalton's Collection of State Papers.
Nam. Dr. Com. Namur's Cour de Droit Commercial.
Napt. Napton's Reports, Missouri.
Nas. Inst. Nasmith's Institutes of English Law.
Nat. Brev. Natura Brevium.
Nat. Bk. Cas. National Bank Cases, American.
Nat. Corp. Rep. National Corporation Reporter, Chicago.
Nat. Reg. National Register, Edited by Mead, 1816.
Nd. Newfoundland Reports.
Neal F. & F. Neal's Feasts and Fasts.
Neb. Nebraska Reports, 1871–1896.
Nell (Ceylon). Nell's Ceylon Reports.
Nels. Nelson's Reports, English Chancery.
Nels. Abr. Nelson's Abridgment.
Nels. Fol. Rep. Reports *temp.* Finch, Edited by Nelson.
Nels. Lex Maner. Nelson's Lex Maneriorum.
Nels. Rights Cler. Nelson's Rights of the Clergy.
Nem. con. Nemine contradicente.
Nem. dis. Nemine dissentiente.
Nev. Nevada Reports, 1865–1896.
Nev. & M. Neville and Manning's Reports, English King's Bench.
Nev. & M. M. Cas. Neville and Manning's Magistrate Cases, English.
Nev. & M. R. & C. Cas. Neville and McNamara's Railway and Canal Cases.
Nev. & P. Neville and Perry's Reports, English Common Pleas.
Nev. & P. M. Cas. Neville and Perry's Magistrate Cases, English.
New Ann. Reg. New Annual Register, London.
New Benl. New Benloe's Reports, English King's Bench, Edition of 1661.
New Br. New Brunswick Reports.
New M. Cas. New Magistrate Cases, English Courts.
New Pr. Cas. New Practice Cases, English Courts.
New Rep. New Reports, English Common Pleas. Bosanquet and Puller's Reports.
New Sess. Cas. Carrow, Hamerton and Allen's Reports, English Courts.
New York. See *N. Y.*
Newb. Newberry's Admiralty Reports, U. S. Dist. Courts.
Newf. Newfoundland Reports.
Newl. Contr. Newland on Contracts.
Newm. Conv. Newman on Conveyancing.
Nich. Adult. Bast. Nicholas on Adulterine Bastardy.
Nich. H. & C. Nicholl, Hare and Carrow's English Railway and Canal Cases, vols. 1–2.
Nient Cul. Nient culpable, Not guilty.
Niles Reg. Niles's Register, Baltimore.
Nix. F. Nixon's Forms.
No. Cas. Ecc. & M. Notes of Cases in the English Ecclesiastical and Maritime Courts.
No. N. Novæ Narrationes.
Nol. M. Cas. Nolan's Magistrate Cases, English.
Nol. Sett. Nolan's Settlement Cases.
Non. Cul. Non culpabilis, Not guilty.
Nor. Fr. Norman French.
Nor. L. C. Inh. Norton's Leading Cases on Inheritance, India.
Norr. Norris's Reports, Pennsylvania.
Norr. Peake. Norris's Peake's Law of Evidence.
North. Northington's Reports, English Chancery, Eden's Reports.
North. Co. Rep. Northampton County Reporter, Pennsylvania.
North W. L. J. Northwestern Law Journal.
Northwest. Rep. Northwestern Reporter, St. Paul, Minn.
Not. Cas. Ecc. & M. Notes of Cases in the English Ecclesiastical and Maritime Courts.
Not. Cas. Madras. Notes of Cases at Madras.
Nott. Mech. L. L. Nott on the Mechanics' Lien Law.
Nott & H. Nott and Huntington's Reports, U. S. Court of Claims Reports, vols. 1–17.
Nott & Hop. Nott and Hopkins's Reports, U. S. Court of Claims, vols. 8–29.
Nott & McC. Nott and McCord's Reports, South Carolina.
Nouv. Den. Denizart Collection de Decisions Nouvelles.
Nouv. Rev. Nouvelle Revue de Droit Francais, Paris.
Nov. Novellæ. The Novels, or New Constitutions.
Nov. Rec. Novisimi Recopilacion de las Leyes de Espana.
Nov. Sc. Nova Scotia Supreme Court Reports.
Nova Scotia L. Rep. Nova Scotia Law Reports.
Noy. Noy's Reports, English Courts.
Noy Max. Noy's Maxims.
Noyes Char. U. Noyes on Charitable Uses.
O. Ordonnance.
O. Ohio Reports. Otto's Reports, U. S. Supreme Court Reports, vols. 91–107.
O. B. Session Papers of the Old Bailey.
O. B. S. Old Bailey Sessions.
O. Benl. Old Benloe's Reports, English Common Pleas (Benloe, of Benloe and Dalison, Edition of 1689).
O. Bridg. Orlando Bridgman's Reports, English Common Pleas.
O'Brien M. L. O'Brien's Military Law.
O. C. Orphans' Court.
O. C. Old Code. (Louisiana Civil Code of 1808.)
O. G. Official Gazette, U. S. Patent Office, Washington, D. C.
O'Mal. & H. O'Malley and Hardcastle's Election Cases.
O. N. B. Old Natura Brevium.
O'Neal Neg. L. O'Neal's Negro Law of South Carolina.
O. S. Old Series.
O. St. Ohio State Reports.
O. & T. Oyer and Terminer.
Oct. Str. Strange's Reports, English Courts, Octavo Edition.
Off. Br. Officina Brevium.
Off. Ex. Wentworth's Office of Executors.
Off. Gaz. Pat. Off. Official Gazette, U. S. Patent Office, Washington, D. C.
Off. Min. Officer's Reports, Minnesota.
Ogd. Ogden's Reports, Louisiana Annual.
Ohio. Ohio Reports.
Ohio C. C. Ohio Circuit Court Reports.
Ohio L. J. Ohio Law Journal.
Ohio Leg. N. Ohio Legal News, Norwalk, Ohio.
Ohio N. P. Ohio Nisi Prius Reports.
Ohio Prob. Ohio Probate Court Reports.
Ohio R. Cond. Ohio Reports, Condensed.
Ohio St. Ohio State Reports.
Oke Mag. Syn. Oke's Magisterial Synopsis.
Okla. Oklahoma Territorial Reports.
Ol. Con. Oliver's Conveyancing.
Ol. Prec. Oliver's Precedents.
Olc. or *Olc. Adm.* Olcott's Admiralty Reports, U. S. So. Dist. of N. Y.
Oldr. Oldright's Reports, Nova Scotia.
Oliph. Oliphant on Law of Horses.
Oliv. B. & L. Oliver, Beavan and Lefroy's Reports, English Railway and Canal Cases, vols. 5–7.
Oll. B. & Fitz. (New Zealand). Ollivier, Bell and Fitzgerald's New Zealand Reports.
Oll. Bell & Fitz. Sup. Ollivier, Bell and Fitzgerald (Supreme Ct. N. Z.).
Onsl. N. P. Onslow's Nisi Prius.
Ont. Ontario Reports.
Ont. App. Rep. Ontario Appeal Reports, Canada.
Ont. Pr. Ontario Practice Reports.

Op. Att.-Gen. (U. S.). Opinions of the Attorney-Generals, United States.
Op. Att.-Gen. N. Y. Opinions of the Attorney-Generals, New York (Sickel's Compilation).
Or. Oregon Reports.
Ord. Ord on Usury.
Ord. Amst. Ordinance of Amsterdam.
Ord. Ant. Ordinance of Antwerp.
Ord. Bilb. Ordinance of Bilboa.
Ord. Ch. Orders in Chancery.
Ord. Cla. Lord Clarendon's Orders.
Ord. Copenh. Ordinance of Copenhagen.
Ord. Ct. Orders of Court.
Ord. Flor. Ordinances of Florence.
Ord. Gen. Ordinance of Genoa.
Ord. Hamb. Ordinance of Hamburg.
Ord. Königs. Ordinance of Königsberg.
Ord. Leg. Ordinances of Leghorn.
Ord. de la Mer. Ordonnance de la Marine de Louis XIV.
Ord. Port. Ordinances of Portugal.
Ord. Prus. Ordinances of Prussia.
Ord. Rott. Ordinances of Rotterdam.
Ord. Swed. Ordinances of Sweden.
Ord U. Ord on the Law of Usury.
Ordr. Jud. Ins. Ordronaux on Judicial Aspects of Insanity.
Ordr. Med. Jur. Ordronaux's Medical Jurisprudence.
Oreg. Oregon's Reports.
Orf. M. L. Orfila's Medecine Legale.
Orl. Bridg. Orlando Bridgman's Reports, English Common Pleas.
Orl. T. R. Orleans Term Reports, vols. 1 and 2, Martin's Reports, Louisiana.
Orm. Ormond's Reports, Alabama, N. S.
Ort. R. L. Ortolan's History of Roman Law.
Otto. Otto's Reports, Supreme Court, U. S.
Ought. Oughton's Ordo Judiciorum.
Out. Outerbridge's Reports, Pennsylvania.
Over. Overton's Reports, Tennessee.
Ow. or *Owen.* Owen's Reports, English King's Bench and Common Pleas.
Owen (New South Wales). Owen's New South Wales Reports.
P. Easter Term.
P. 1891, or *1891 P.* English Law Reports, Probate Division, 1891.
P. C. Privy Council. Prize Court. Probate Court.
P. C. Parliamentary Cases. Pleas of the Crown. Practice Cases. Prize Cases.
P. C. Precedents in Chancery. Procédure Civile.
P. C. Penal Code. Political Code.
P. C. Act. Probate Court Act.
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P. C. R. Parker's Criminal Reports, New York.
P. C. Rep. Privy Council Reports, English.
P. D. English Law Reports, Probate Division.
P. Div. Probate Division, English Law Reports.
P. E. I. Rep. Prince Edward Island Reports (Haviland's).
P. F. S. P. F. Smith's Reports, Pennsylvania.
P. L. Pamphlet Laws. Public Laws. Poor Laws.
P. L. Com. Poor Law Commissioners.
P. L. J. Pennsylvania Law Journal.
P. L. J. Pittsburgh Legal Journal, Pa.
P. L. R. Pennsylvania Law Record, Philadelphia.
P. N. P. Peake's Nisi Prius Cases.
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P. W. or *P. Wms.* Peere Williams's Reports, English Chancery.
P. & C. Prideaux and Cole's Reports, English Courts.
P. & D. Perry and Davidson's Reports, English Queen's Bench.
P. & H. Patton and Heath's Reports, Virginia.
P. & K. Perry and Knapp's Election Cases.
P. & M. Philip and Mary; thus 1 P. & M. signifies the first year of the reign of Philip & Mary.
P. & R. Pigott and Rodwell's Election Cases, English.
P. & W. Penrose and Watt's Pennsylvania Reports.
Pa. Pennsylvania State Reports.
Pa. Co. Ct. R. Pennsylvania County Court Reports.
Pa. Dist. R. Pennsylvania District Reports.
Pa. L. G. or *Pa. Leg. Gaz.* Legal Gazette Reports (Campbell's), Pennsylvania.
Pa. L. J. or *Pa. Law Jour.* Pennsylvania Law Journal, Philadelphia.
Pa. L. J. Rep. or *Pa. Law Jour. Rep.* Pennsylvania Law Journal Reports (Clark's Reports).
Pa. La. Rec. or *Pa. Law Rec.* Pennsylvania Law Record, Philadelphia.
Pa. St. Pennsylvania State Reports.
Pac. Coast L. J. Pacific Coast Law Journal, San Francisco.
Pac. Law Mag. Pacific Law Magazine, San Francisco.
Pac. Law Reptr. Pacific Law Reporter, San Francisco.
Pac. Rep. Pacific Reporter, St. Paul.
Page Div. Page on Divorce.
Pai., Paige, or *Paige Ch.* Paige's Chancery Reports, New York.
Paige Cas. Dom. Rel. Paige's Cases in Domestic Relations.
Paige Cas. Part. Paige's Cases in Partnership.
Paine. Paine's Reports, U. S. Circ. Ct., 2d Circuit.
Pal. Ag. Paley on Agency.
Pal. Conv. Paley on Summary Convictions
Palm. Palmer's Reports, English King's Bench.
Palm. Pr. Lords. Palmer's Practice in the House of Lords.
Palm. (Vt.). Palmer's Vermont Reports.
Pamph. Pamphlets.
Papy. Papy's Reports, Florida.
Par. Parker's Reports, English Exchequer.
Par. Paragragh.
Par. W. C. Parish Will Case.
Par. & Fonb. M. J. Paris and Fonblanque on Medical Jurisprudence.
Pard. Pardessus's Cours de Droit Commercial.
Pard. Lois Mar. Pardessus's Lois Maritimes.
Pard. Serv. Pardessus's Traités des Servitudes.
Park. Parker's Reports, English Exchequer.
Park. Cr. Cas. or *Park. Cr. Rep.* Parker's Criminal Reports, New York.
Park Dow. Park on Dower.
Park Ins. Park on Insurance.
Park. Hist. Ch. Parker's History of Chancery.
Park. (N. H.). Parker's New Hampshire Reports.
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Park. Pr. Ch. Parker's Practice in Chancery.
Park. Sh. Parker on Shipping and Insurance.
Parl. Cas. Parliamentary Cases. House of Lords.
Parl. Hist. Parliamentary History.
Parl. Reg. Parliamentary Register.
Pars. Bills & N. Parsons on Bills and Notes.
Pars. Cas. Parsons's Select Equity Cases, Pennsylvania.
Pars. Com. Parsons's Commentaries on American Law.
Pars. Con. Parsons on Contracts.
Pars. Costs. Parsons on Costs.
Pars. Dec. Parsons's Decisions, Massachusetts.
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Pars. Essays. Parsons's Essays on Legal Topics.
Pars. Ins. Parsons on Marine Iusurance.
Pars. Law Bus. Parsons's Law of Business.
Pars. Mar. Ins. Parsons on Marine Insurance.
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Pars. Merc. L. Parsons on Mercantile Law.
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Pars. Sh. & Adm. Parsons on Shipping and Admiralty.
Pars. Wills. Parsons on Wills.
Pas. Terminus Paschæ. Easter Term.
Pasch. Paschal's Reports, Texas.
Pasch. Ann. Const. Paschal's Annotated Constitution of the U. S.
Pat. App. Cas. Paton's Scotch Appeal Cases, English House of Lords. Craigie, Stewart and Paton's Reports.

Pat. Com. Paterson's Compendium of English and Scotch Law.
Pat. Dec. Patent Decisions.
Pat. H. L. Sc. See *Pat. App. Cas.*
Pat. Law Rev. Patent Law Review, Washington, D. C.
Pat. Off. Gaz. Official Gazette, U. S. Patent Office, Washington, D. C.
Pat. St. Ex. Paterson's Law of Stock Exchange.
Pat. & H. or *Patton & H.* Patton and Heath's Reports, Virginia.
Pat. & Mur. Paterson and Murray's Reports, New South Wales.
Paters. App. Cas. Paterson's Scotch Appeal Cases.
Paters. St. Ex. Paterson's Law of Stock Exchange.
Patr. El. Cas. Patrick's Election Cases, Upper Canada.
Paul Par. Off. Paul's Parish Officer.
Pay. Munc. Rights. Payne on Municipal Rights.
P. D. Probate Division. Law Reports.
Peach. Mar. Sett. Peachey on Marriage Settlements.
Peak. Peake's Nisi Prius Cases, English Courts.
Peak. Add. Cas. Peake's Additional Cases, Nisi Prius, English.
Peak. Ev. Peake on Evidence.
Peak. N. P. Cas. Peake's Nisi Prius Cases, English.
Pear. Pearson's Reports, Pennsylvania.
Pearce C. C. Pearce's Crown Cases, English.
Peck. (*Ill.*). Peck's Reports, Illinois Supreme Court (11–38 Illinois).
Peck or *Peck* (*Tenn.*). Peck's Reports, Tennessee.
Peck. El. Cas. Peckwell's Election Cases, English.
Peck (*Ill.*). Peck's Reports, Illinois.
Peck Mun. L. Peck's Municipal Laws of Ohio.
Peck Tr. Peck's Impeachment Trial.
Peckw. Eng. El. Cas. Peckwell's English Election Cases.
Peere Wms. or *Peere Williams.* Peere Williams's Reports, English Chancery.
Pemb. J. & O. Pemberton's Judgments and Orders.
Pen. Pennington's Reports, New Jersey Law.
Penn. Pennsylvania State Reports.
Penn. Bla. Pennsylvania Blackstone, by John Reed.
Penn. Co. Ct. Rep. Pennsylvania County Court Reports.
Penn. Dist. Rep. Pennsylvania District Reports.
Penn. L. G. or *Penn. Leg. Gaz.* Pennsylvania Legal Gazette Reports (Campbell's).
Penn. L. J. or *Penn. Law Jour.* Pennsylvania Law Journal, Philadelphia.
Penn. L. J. R. or *Penn. Law Jour. Rep.* Pennsylvania Law Journal Reports (Clark's).
Penna. L. R. or *Penn. Law Rec.* Pennsylvania Law Record, Philadelphia.
Penn. Pr. Pennsylvania Practice, by Troubat and Haly.
Penn. R. Pennsylvania Reports.
Penn. St. Pennsylvania State Reports.
Penning. Pennington's Reports, New Jersey.
Penny. Pennypacker. Pennsylvania Supreme Court Reports
Penr. & W. Penrose and Watts's Pennsylvania Reports.
Penrud. Anal. Penruddock's Analysis of the Criminal Law.
Peo. L. Adv. People's Legal Adviser, Utica, N. Y.
Per. Or. Cas. Perry's Oriental Cases, Bombay.
Per. T. & T. Perry on Trusts and Trustees.
Per. & Dav. Perry and Davison's Reports, English Queen's Bench.
Per. & K. El. Cas. Perry and Knapp's Election Cases, English.
Perk. Prof. Bk. Perkins's Profitable Book.
Perp. Pat. Perpigna on Patents
Perry. Sir Erskine Perry's Reports, in Morley's (East) Indian Digest; Perry's Oriental Cases.
Pet. Peters's Reports, U. S. Supreme Court.
Pet. Adm. Peters's Admiralty Decisions, U. S. Dist. of Pa.
Pet. Brooke. Petit Brooke *or* Brooke's New Cases, English King's Bench (Bellewe's Cases *temp.* Hen. VIII.).
Pet. C. C. Peters's Reports, U. S. Circuit Court, 3d Circuit.
Peters. Peters's Reports, U. S. Supreme Court.
Peters Adm. Peters's Admiralty Decisions, U. S. Dist. of Pa.
Peters C. C. Peters's Reports, U. S. Circuit Court, 3d Circuit.
Petersd. Abr. Petersdorff's Abridgment.
Petersd. B. Petersdorff on the Law of Bail.
Petersd. L. of N. Petersdorff on the Law of Nations.
Petersd. Pr. Petersdorff's Practice.
Peth. Int. Petheram on Interrogatories.
Petit Br. Petit Brooke.
Ph. or *Phil.* Phillips's Reports, English Chancery.
Phalen. Phalen's Criminal Cases.
Phear W. Phear on Rights of Water.
Phila. Philadelphia Reports, Common Pleas of Philadelphia County.
Phill. Copyr. Phillips on Copyright.
Phill. Phillimore's Reports, English Ecclesiastical Courts.
Phill. Cr. L. Phillimore's Study of the Criminal Law.
Phill. Dom. Phillimore on the Law of Domicil.
Phill. Eccl. Phillimore on Ecclesiastical Law.
Phill. Eccl. Judg. Phillimore's Ecclesiastical Judgments.
Phill. El. Cas. Phillips's Election Cases.
Phill. Eq. Phillip's Equity Reports, North Carolina.
Phill. Ev. Phillips on Evidence.
Phill. Ev. Philimore on Evidence.
Phill. Fam. Cas. Phillips's Famous Cases in Circumstantial Evidence.
Phill. Ins. Phillips on Insurance.
Phill. Insan. Phillips on Insanity.
Phill. Int. Phillimore on International Law.
Phill. Jur. Phillimore on Jurisprudence.
Phill. Law (*N. C.*). Phillips's Law Reports, North Carolina.
Phill. Mech. Liens. Phillips on Mechanics' Liens.
Phill. Prin. Jur. Phillimore's Principles and Maxims of Jurisprudence.
Phill. Priv. L. Phillimore's Private Law among the Romans.
Phill. Rom. L. Phillimore's Study and History of the Roman Law.
Phill. St. Tr. Phillips's State Trials.
Phillim. See *Phill.*
Pick. Pickering's Reports, Massachusetts.
Pickle. Pickle's Reports, Tennessee.
Pierce R. R. Pierce on Railroads.
Pig. Rec. Pigott on Common Recoveries.
Pig. & R. Pigott and Rodwell's Registration Appeal Cases, English.
Pike. Pike's Reports, Arkansas.
Pinn. Pinney's Reports, Wisconsin.
Pist. Piston's Reports, Mauritius.
Pitc. Tr. Pitcairn's Ancient Criminal Trials, Scotland.
Pitm. S. Pitman on Suretyship.
Pitts. L. J. or *Pitts. Leg. Jour.* Pittsburg Legal Journal, Pittsburg, Penn.
Pitts. Repts. Pittsburgh Reports, Pennsylvania Courts (reprinted from the Journal).
Pl. Placiti Generalia.
Pl. C. Placita Coronæ (Pleas of the Crown).
Pl. or *Pl. Com.* Plowden's Commentries *or* Reports, English King's Bench.
Pl. U. Plowden on Usury.
Platt Cov. Platt on the Law of Covenants.
Platt Lease. Platt on Leases.
Plowd. or *Plowd. Com.* Plowden's Commentaries *or* Reports, English King's Bench.
Plowd. Crim. Con. Tr. Plowden's Crim. Con. Trials.
Plèb. Plébiscite.
Plff. Plaintiff.
Plum. Contr. Plumptre on Contracts.
Po. Ct. Police Court.
Pol. Pollexfen's Reports, English King's Bench.
Poll. Contr. Pollock on Contracts.
Poll. Doc. Pollox on Production of Documents.
Poll. Dig. Part. Pollock's Digest on the Law of Partnership.
Poll. Lead. Cas. Pollock's Leading Cases.
Poll. & Maitl. Pollock & Maitland's History of English Law.
Poll. Part. Pollock on Partnership.
Pols. Int. or *Pols. Law of Nat.* Polson on Law of Nations.
Pom. Con. L. Pomeroy's Constitutional Law of the U. S.
Pom. Contr. Pomeroy on Contracts.
Pom. Mun. L. Pomeroy's Municipal Law.
Poore Const. Poore's Federal and State Constitutions.
Pope C. & E. Pope on Customs and Excise.
Poph. Popham's Reports, English King's Bench.

2 Poph. Cases at the end of Popham's Reports.
Port. Porter's Reports, Alabama.
Port. (Ind.). Porter's Reports, Indiana.
Posey. Unreported Commissioner Cases, Texas.
Post. Post's Reports, Michigan.
Post (Mo.). Post's Reports, Missouri, vol. 64.
Postl. Dict. Postlethwaite's Commercial Dictionary.
Poth. Cont. Pothier on Contracts.
Poth. Œuv. Pothier's Œuvres.
Poth. Obl. Pothier on Obligations.
Poth. Pand. Pothier's Pandects.
Poth. Part. Pothier on Partnership.
Poth. Proc. Civ. Pothier de la Procédure Civile.
Potter Corp. Potter on Corporations.
Potter's Dwar. St. Potter's Dwarris on Statutes.
Potts L. D. Potts's Law Dictionary.
Pow. Am. L. Powell's American Law.
Pow. Apr. Pr. Powell's Appellate Proceedings.
Pow. Con. Powell on Contracts.
Pow. Conv. Powell on Conveyancing.
Pow. Dev. Powell on Devises.
Pow. Ev. Powell on Evidence.
Pow. Mort. Powell on Mortgages.
Pow. Powers. Powell on Powers.
Pow. Pr. Powell's Precedents in Conveyancing.
Pow. R. & D. Power, Rodwell and Dew's Election Cases, English.
Poyn. M. & D. Poynter on Marriage and Divorce.
Pr. Ch. Precedents in Chancery (Finch's).
Pr. Ct. Prerogative Court.
Pr. Dec. Kentucky Decisions, by Sneed.
Pr. Exch. Price's Exchequer Reports, English.
Pr. Falc. President Falconer's Reports, Scotch.
Pr. L. Private Law *or* Private Laws.
Pr. Reg. B. C. Practical Register in the Bail Court.
Pr. Reg. C. P. Practical Register in the Common Pleas.
Pr. Reg. Ch. Practical Register in Chancery (Styles's).
Pr. St. Private Statutes.
Pr. & Div. Probate & Divorce.
Pract. The Practitioner.
Prat. Cas. Prater's Cases on Conflict of Laws.
Prat. H. & W. Prater on the Law of Husband and Wife.
Pratt B. S. Pratt on Beneficial Building Societies.
Pratt C. W. Pratt on Contraband of War.
Preb. Dig. Preble Digest, Patent Cases.
Prec. Ch. Precedents in Chancery,
Pref. Preface.
Prel. Préliminaire.
Prer. Prerogative Court.
Pres. Abs. Preston on Abstracts.
Pres. Conv. Preston on Conveyancing.
Pres. Est. Preston on Estates.
Pres. Leg. Preston on Legacies.
Pres. Merg. Preston on Merger.
Pres. Shep. T. Preston's Sheppard's Touchstone.
Price or *Price Exch.* Price's Reports, Exchequer, English.
Price Liens. Price on Liens.
Price P. P. Price's Notes of Points in Exchequer Practice.
Price R. Est. Price on Acts relating to Real Estate (Pa.).
Price & St. Price and Steuart Trade-mark Cases.
Prick. (Id.). Prickett's Idaho Reports.
Prid. Chu. Gui. Prideaux's Churchwarden's Guide.
Prid. Prec. Prideaux's Precedents in Conveyancing.
Prid. & C. Prideaux and Cole's Reports, English, New Sessions Cases, vol. 4.
Prin. Principium. The beginning of a title or law.
Prin. Dec. Kentucky Decisions, printed by Sneed.
Prior Lim. Prior on Construction of Limitations.
Pritch. Ad. Dig. Pritchard's Admiralty Digest.
Pritch. M. & D. Pritchard on Marriage and Divorce.
Priv. Lond. Customs or Privileges of London.
Pro. L. Province Law.
Pro. quer. Pro querentem. For the plaintiff.
Prob. & Adm. Div. Probate and Admiralty Division, Law Reports.
Prob. & Div. Probate and Divorce, Law Reports.
Prob. & Matr. Probate and Matrimonial Cases.
Proc. Ch. Proceedings in Chancery.
Proc. Pr. Proctor's Practice.
Proff. Corp. Proffatt on Corporations.
Proff. Jury Tr. Proffatt on Jury Trials.
Proff. Not. Proffatt on Notaries.
Proff. Wills. Proffatt on Wills.
Proud. Dom. Pub. Proudhon's Domaine Public.
Proudf. Land Dec. (U. S.). Proudfit's United States Land Decisions.
Puff. Puffendorf's Law of Nature and Nations.
Pugs. Pugsley's Reports, New Brunswick.
Pugs. & Bur. Pugsley and Burbridge's Reports, New Brunswick.
Pull. Attor. Pulling on the Law of Attorneys.
Puls. Pulsifer's Reports, Maine.
Pult. Pulton de Pace Regis.
Purd. Dig. Pa. Purdon's Digest of Pennsylvania Laws.
Purd. Dig. U. S. Purdon's Digest of United States Laws.
Puter. Pl. Puterbauch's Pleading.
Pyke. Pyke's Reports, Lower Canada, King's Bench.
Q. Question. Quorum.
Q. Attach. Quoniam Attachiamenta.
Q. B. Court of Queen's Bench.
Q. B. Queen's Bench Reports, Adolphus and Ellis's Reports, N. S., English.
Q. B. English Law Reports, Queen's Bench Division, 1891.
Q. B. Div. Queen's Bench Division, English Law Reports.
Q. B. U. C. Queen's Bench Reports, Upper Canada.
Q. C. Queen's Counsel.
Q. L. R. Quebec Law Reports.
Q. S. Quarter Sessions.
Q. t. Qui tam.
Q. v. *Quod vide*; Which see.
Q. Vict. Statutes of Province of Quebec (Reign of Victoria).
Q. War. Quo Warranto.
Qua. cl. fr. Quare clausum fregit (*q. v.*).
Qu. L. Jour. Quarterly Law Journal, Richmond, Va.
Qu. L. Rev. Quarterly Law Review, Richmond, Va.
Quebec L. Rep. Quebec Law Reports.
Queens. L. J. Queensland Law Journal.
Queens. L. R. Queensland Law Reports.
Quin. Quincy's Reports, Massachusetts.
Quinti, Quinto. Year Book, 5 Hen. V.
Quo War. Quo Warranto.
R. Resolved. Repealed. Revised. Revision. Rolls.
R. King Richard; thus 1 R. III. signifies the first year of the reign of King Richard III.
R. Rawle's Reports, S. C. of Pennsylvania.
R. A. Regular Appeals. Registration Appeals.
Rc. Rescriptum.
R. C. Record Commission. Railway Cases.
R. C. & C. R. Revenue, Civil and Criminal Reporter, Calcutta.
R. I. Rhode Island Reports.
R. J. & P. J. Revenue, Judicial and Police Journal, Calcutta.
R. L. Roman Law. Revised Laws.
R. L. & S. Ridgeway, Lapp and Schoales's Reports, Irish King's Bench.
R. L. & W. Roberts, Leaming and Wallis's County Court Reports, English.
R. M. Charlt. R. M. Charlton's Reports, Georgia.
R. S. Revised Statutes.
R. S. L. Reading on Statute Law.
R. P. Cas. Real Property Cases, English.
R. P. & W. (Pa.). (Rawle) Penrose and Watt's Pennsylvania Reports.
R. R. & Can. Cas. Railway and Canal Cases, English.
R. t. F. Reports *tempore* Finch, English Chancery.
R. t. Hardw. Reports *tempore* Hardwicke, English King's Bench.
R. t. Holt. Reports *tempore* Holt, English King's Bench.
R. & B. Cas. Redfield and Bigelow's Leading Cases on Bills and Notes.
R. & M. or *R. & My.* Russell and Mylne's Reports, English Chancery.
R. & M. C. C. Ryan and Moody's Crown Cases Reserved, English.
R. & M. N. P. Ryan and Moody's Nisi Prius Cases, English.
R. & R. C. C. Russell and Ryan's Crown Cases Reserved, English.
Raff. Pens. Man. Raff's Pension Manual.
Railw. Cas. Railway Cases.
Railw. & C. Cas. Railway and Canal Cases, English.

Railw. & Corp. Law J. Railway and Corporation Law Journal.
Ram A. Ram on Assets.
Ram Cas. P. & E. Ram's Cases of Pleading and Evidence.
Ram F. Ram on Facts.
Ram Judgm. Ram on Science of Legal Judgment.
Ram. W. Ram on Exposition of Wills.
Rand. Randolph's Reports, Virginia.
Rand. (Kan.). Randolph's Reports, Kansas.
Rand. (La.). Randolph's Reports, Louisiana Annual Reports, vols. 7–11.
Rand. Perp. Randall on Perpetuities.
Raney. Raney's Reports, Florida.
Rang. Dec. Sparks Rangoon Decisions, British Burmah.
Rank P. Rankin on Patents.
Rast. Rastell's Entries and Statutes.
Ratt. L. C. Rattigan's Leading Cases on Hindoo Law.
Ratt. R. L. Rattigan's Roman Law.
Rawle. Rawle's Reports, Pennsylvania.
Rawle Const. Rawle on the Constitution.
Rawle Covt. Rawle on Covenants for Title.
Rawle Eq. Rawle's Equity in Pennsylvania.
Ray Med. Jur. Ray's Medical Jurisprudence of Insanity.
Ray Men. Path. Ray's Mental Pathology.
Raym. or *Raym. Ld.* Raymond's Reports, English King's Bench.
Raym. B. of Ex. Raymond on Bill of Exceptions.
Raym. Ch. Dig. Raymond's Chancery Digest.
Raym. Ent. Raymond's Book of Entries.
Raym. T. T. Raymond's Reports, English King's Bench.
Rayn. Rayner's Tithe Cases, Exchequer.
Real Est. Rec. Real Estate Record, New York.
Rec. Recorder.
Rec. Com. Record Commission.
Rec. Dec. Vaux's Recorder's Decisions, Philadelphia.
Red. R. L. Reddie's Roman Law.
Redes. Pl. Mitford's Chancery Pleading.
Redf. Redfield's Surrogate Court Reports, N. Y.
Redf. Am. Railw. Cas. Redfield's American Railway Cases.
Redf. Bailm. Redfield on Carriers and Bailments.
Redf. L. Cas. Wills. Redfield's Leading Cases on Wills.
Redf. Pr. Redfield's Practice, New York.
Redf. Railw. Redfield on Railways.
Redf. R. Cas. or *Redf. Railw. Cas.* Redfield's American Railway Cases.
Redf. Surr. Redfield's Surrogate Court Reports, N. Y.
Redf. Wills. Redfield on Wills.
Redf. & Big. L. Cas. Redfield and Bigelow's Leading Cases on Notes and Bills.
Reding. Redington's Reports, Maine.
Redm. Redman on Arbitrations and Awards.
Reed Fraud or *Reed Lead. Cas.* Reed's Leading Cases in Law of Statute of Frauds.
Reeve Des. Reeve on Descents.
Reeve Dom. R. Reeve on Domestic Relations.
Reeve Eng. L. or *Reeve H. E. L.* Reeve's History of the English Law.
Reeve Sh. Reeve on the Law of Shipping and Navigation.
Reg. The Daily Register, New York City.
Reg. Brev. Register of Writs.
Reg. Cas. Registration Cases.
Reg. Deb. (Gales). Register of Debates in Congress, 1789–91 (Gales's).
Reg. Deb. (G. & S.). Register of Debates in Congress, 1824–37 (Gales and Seaton's).
Reg. Gen. Regulæ Generales.
Reg. Jud. Registæm Judiciale.
Reg. Lib. Register Book.
Reg. Maj. Books of Regiam Majestatem.
Reg. Orig. Registrum Originale.
Reg. Pl. Regula Placitandi.
Rep. Repealed. Reports. Répertoire.
Rep. Coke's Reports, English King's Bench.
Rep. The Reporter, Boston, Mass.
Rep. (N. Y.) or *Rep. (Wash.).* The Reporter, Washington and New York.
Rep. Cas. Madr. Reports of Cases, Dewanny Adawlut, Madras.
Rep. Cas. Pr. Reports of Cases of Practice (Cooke's).
Rep. Ch. Reports in Chancery.
Rep. Ch. Pr. Reports on the Chancery Practice.
Rep. Com. Cas. Reports of Commercial Cases, Bengal.
Rep. Const. Reports of the Constitutional Court of South Carolina.
Rep. Cr. L. Com. Reports of Criminal Law Commissioners.
Rep. de Jur. Répertoire de Jurisprudence, Paris.
Rep. de Jur. Com. Répertoire de Jurisprudence Commerciale, Paris.
Rep. du Not. Répertoire du Notariæ, Paris.
Rep. Ec. C. C. Répétitions Ecrites sur le Code Civil.
Rep. Eq. Guilbert's Reports in Equity, English.
Rep. in Ch. Reports in Chancery, English.
Rep. t. Q. A. Reports *tempore* Queen Anne (11 Modern).
Rep. Sel. Cas. in Ch. Kelynge's (W.) Reports, English Chancery.
Rep. t. Finch. Reports *tempore* Finch, English Chancery.
Rep. t. Hard. Reports *tempore* Hardwicke, English King's Bench.
Rep. t. Holt. Reports *tempore* Holt, English King's Bench.
Rep. t. O. Br. Reports *temp.* O. Bridgman, 1660–67. C. P.
Rep. t. Talb. Reports *tempore* Talbot, English Chancery.
Report. Coke's Reports, English King's Bench.
Reptr. The Reporter, Boston, Mass.
Res. Cas. Reserved Cases.
Ret. Brev. Retorna Brevium.
Rettie. Rettie's Scotch Court of Session Cases (4th Series).
Rev. Reversed. Revised. Revenue.
Rev. Cas. Revenue Cases.
Rev. Crit. La Révue Critique, Montreal.
Rev. Crit. de Leg. Révue Critique de Legislation, Paris.
Rev. de Leg. Révue de Legislation, Montreal.
Rev. Dr. Int. Révue de Droit International, Paris.
Rev. Dr. Leg. Révue de Droit Législation, Paris.
Rev. Leg. La Révue Légale, Sorel, Quebec.
Rev. Stat. Revised Statutes.
Reyn. Reynold's Reports, Mississippi.
Reyn. Steph. Reynolds's Stephens on Evidence.
Rho. L. Rhodian Law.
Rice. Rice's Law Reports, South Carolina.
Rice Ch. Rice's Chancery Reports, South Carolina.
Rice. Dig. Pat. Rice's Digest of Patent Office Decisions.
Rich. Richardson's Law Reports, South Carolina.
Rich. (N. H.). Richardson's Reports. New Hampshire Reports, vols. 3–5.
Rich. Cas. Ch. Richardson's Cases in Chancery, South Carolina.
Rich. Ch. or *Rich. Eq.* Richardson's Chancery Reports, South Carolina.
Rich. N. S. Richardson's Reports, New Series, South Carolina.
Rich. Pr. C. P. Richardson's Practice Common Pleas.
Rich. Pr. K. B. Richardson's Practice in the King's Bench.
Rich. P. R. C. P. Richardson's Practical Register, Common Pleas.
Rich. & Hook. Richardson & Hook's American Street Railway Decisions.
Rich. & W. Richardson and Woodbury's Reports, Massachusetts, vol. 2.
Ridg. Ridgeway's Reports, English Chancery and King's Bench.
Ridg. App. Ridgeway's Appeal Cases, Ireland.
Ridg. L. & S. Ridgeway, Lapp and Schoales's Reports (Irish Term Reports).
Ridg. P. C. Ridgeway's Appeal Cases, Ireland.
Ridg. St. Tr. Ridgeway's State Trials, Ireland.
Riley. Riley's Law Reports, South Carolina.
Riley Ch. or *Riley Eq.* Riley's Chancery Reports, South Carolina.
Riv. Ann. Reg. Rivington's Annual Register.
Rob. Robinson's Reports, English House of Lords, Scotch Appeals.
Rob. (Cal.). Robinson's Reports, California.
Rob. (Hawaiian). Robinson's Hawaiian Reports.
Rob. (La.). Robinson's Reports, Louisiana.
Rob. (La. Ann.). Robinson's Reports, Louisiana Annual, vols. 1–4.
Rob. (Mo.). Robard's Reports, Missouri.
Rob. (N. Y.). Robertson's Reports, New York City Superior Court Reports, vols. 24–30.

Rob. (Nev.). Robinson's Reports, Nevada Reports, vol. 1.
Rob. (Va.). Robinson's Reports, Virginia.
Rob. Adm. or *Rob. Chr.* Chr. Robinson's Reports, English Admiralty.
Rob. Adm. & Pr. Roberts on Admiralty and Prize.
Rob. App. Robinson's Scotch Appeals, English House of Lords.
Rob. Chr. Adm. Chr. Robinson's Reports, English Admiralty.
Rob. Conscr. Cas. Robard's Conscript Cases, Texas.
Rob. Ecc. Robertson's Ecclesiastical Reports, English.
Rob. Ent. Robinson's Entries.
Rob. Eq. Roberts's Principles of Equity.
Rob. Fr. Roberts on Frauds.
Rob. Fr. Conv. Roberts on Fraudulent Conveyances.
Rob. Gavelk. Robinson on Gavelkind.
Rob. Jr. or *Rob. Wm.* Wm. Robinson's Reports, English Admiralty.
Rob. Jus. Robinson's justice of the Peace.
Rob. Mar. (N. Y.). Robertson & Jacob's New York Marine Court Reports.
Rob. Pr. Robinson's Practice.
Rob. S. I. Robertson's Reports, Sandwich Islands.
Rob. Sc. App. Robinson's Scotch Appeals, English House of Lords.
Rob. St. Fr. Roberts on the Statute of Frauds.
Rob. U. C. Robinson's Reports, Upper Canada.
Rob. Wm. Adm. Wm. Robinson's Reports, English Admiralty.
Rob. Wills. Roberts on Wills.
Rob. & J. Robard and Jackson's Reports, Texas Reports, vols. 26–27.
Robb Pat. Cas. Robb's Patent Cases.
Robert. Robertson's Scotch Appeals, English House of Lords.
Robt. (N. Y.). Robertson's Reports, New York City Superior Court Reports, vols. 24–30.
Roc. Ins. Roccus on Insurance.
Roc. Mar. L. Roccus on Maritime Law.
Roc. & H. Bank. Roche and Hazlitt on Bankruptcy.
Rockw. Sp. & Mex. L. Rockwell's Spanish and Mexican Law.
Rodm. (Ky.). Rodman's Kentucky Reports, vols. 78–82.
Roelk. Man. Roelker's Manual for Notaries and Bankers.
Rog. Ecc. Rogers's Ecclesiastical Law.
Rog. Rec. Rogers City Hall Recorder, New York.
Roll. or *Rolle.* Rolle's Reports, English King's Bench.
Rolle Abr. Rolle's Abridgment.
Rolls Ct. Rep. Rolls Court Reports, English.
Rom. Romilly's Notes of Cases, English Chancery.
Rom. Cr. L. Romilly's Criminal Law.
Root. Root's Reports, Connecticut.
Rop. H. & W. Roper on Husband and Wife.
Rop. Leg. Roper on Legacies.
Rop. Prop. Roper on Property.
Rop. Rev. Roper on Revocation of Wills.
Rorer Int. St. L. Rorer on Inter-State Law.
Rorer Jud. Sales. Rorer on Judicial Sales.
Rosc. Bills. Roscoe on Bills and Notes.
Rosc. Civ. Ev. Roscoe on Civil Evidence.
Rosc. Cr. Ev. Roscoe on Criminal Evidence.
Rosc. Jur. Roscoe's Jurist, London.
Rosc. N. P. Roscoe on Nisi Prius Evidence.
Rosc. Pl. Roscoe on Pleading.
Rosc. R. Ac. Roscoe on Real Actions.
Rosc. St. D. Roscoe on Stamp Duties.
Rose. Rose's Reports, English Bankruptcy.
Rose W. C. Rose Will Case, New York.
Ross Lead. Cas. Ross's Leading Cases on Commercial Law.
Ross V. & P. Ross on Vendors and Purchasers.
Rot. Chart. Rotulus Chartarum.
Rot. Cur. Reg. Rotuli Curiæ Regis.
Rot. Parl. Rotulæ Parliamentariæ.
Rouse Cop. Rouse's Copyhold Enfranchisement Manual.
Rouse Pr. Mort. Rouse on Precedents of Mortgages.
Rowe. Rowe's Reports, English Parliamentary and Military Cases.
Rowe Sci. Jur. Rowe's Scintilla Juris.
Rowell. Rowell's Reports, Vermont.
Rowell. Rowell's Contested Election Cases, U. S. House of Representatives, 1889–1891.
Royle Stock Sh. Royle on the Law of Stock Shares, etc.
Rt. Law Repts. Rent Law Reports, India.
Rub. Rubric.
Ruff. Ruffin's Reports, North Carolina (vol. 1, Hawk's Reports).
Ruffh. or *Ruffh. St.* Ruffhead's Statutes-at-Large of England.
Runn. Runnell's Reports, Iowa.
Runn. Stat. Runnington's Statutes-at-Large of England.
Rush. Rushworth's Historical Collection.
Russ. Russell's Reports, English Chancery.
Russ. Arb. Russell on Arbitrators.
Russ. Cr. Russell on Crimes.
Russ. Elec. Cas. Russell's Election Cases, Nova Scotia.
Russ. & Ches. Russell and Chesley's Reports, Nova Scotia.
Russ. & Chess. Eq. Russell and Chesley's Equity Reports, Nova Scotia.
Russ. & Geld. Russell and Geldert's Reports, Nova Scotia.
Russ. & M. Russell and Mylne's Reports, English Chancery.
Russ. & R. Russell and Ryan's Crown Cases Reserved, English.
Rutger Cas. Rutger-Waddington Case, New York City, 1784 (First of New York Reports).
Ruth. Inst. or *Ruth. Nat. L.* Rutherford's Institutes of Natural Law.
Ry. Cas. Railway Cases, Reports of.
Ry. F. Rymer's Fœdera, Conventiones, etc.
Ry. & M. C. C. Ryan and Moody's Crown Cases Reserved, English.
Ry. & M. N. P. Ryan and Moody's Nisi Prius Reports, English.
S. Section.
S. Shaw and Dunlap's Reports, Scotch Court of Session (1st Series).
S. App. Shaw's Appeal Cases, Scotland.
S. A. L. R. South Australian Law Reports.
S. B. Upper Bench.
S. C. Same Case. Senatus-Consulti. Session Cases. Superior Court. Supreme Court.
S. C. South Carolina Reports.
S. C. C. Select Chancery Cases.
S. C. E. Select Cases relating to Evidence.
S. C. Rep. Supreme Court Reports.
S. D. A. or *S. L. D.* Sudder Dewany Adawlut Reports, India.
S. Dak. South Dakota Reports.
S. E. Rep. Southeastern Reporter.
S. F. A. Sudder Foujdaree Adawlut Reports, India.
S. J. Solicitors' Journal.
S. Just. Shaw's Justiciary Cases, Scotch.
S. L. Session Law. Solicitor at Law. Statute Law.
S. L. C. App. Stuart's Lower Canada Appeal Cases.
S. L. Ev. Select Laws relating to Evidence.
S. L. J. Scottish Law Journal, Edinburgh.
S. L. R. Southern Law Review, St. Louis.
S. L. R. Scottish Law Reporter, Edinburgh.
S. P. Same Point. Same Principle.
S. S. Synopsis Series of U. S. Treasury Decisions.
S. S. C. Sanford's Reports, New York City Superior Court Reports, vols. 3–7.
S. Teinds. Shaw's Teinds Cases, Scotch Courts.
S. V. A. R. Stuart's Vice-Admiralty Reports, Lower Canada.
S. W. L. J. Southwestern Law Journal, Nashville, Tenn.
S. W. Rep. Southwestern Reporter.
S. & B. Smith and Batty's Reports, Irish King's Bench.
S. & D. Shaw and Dunlop's Scotch Court of Session (1st Series).
S. & L. Schoales and Lefroy's Reports, Irish Chancery.
S. & M. or *S. & M'L.* Shaw and Maclean's Appeal Cases, English House of Lords.
S. & M. or *S. & Mar.* Smedes and Marshall's Reports, Mississippi Reports, vols. 9–22.
S. & M. Ch. or *S. & Mar. Ch.* Smedes and Marshall's Chancery Reports, Mississippi.
S. & R. Sergeant and Rawle's Reports, Pennsylvania.
S. & S. Simon and Stuart's Reports, English Chancery.
S. & Sc. Sausse and Scully's Reports, Irish Chancery.
S. & Sm. Searle and Smith's Reports, English Probate and Divorce Cases.

S. & T. Swabey and Tristram's Reports, English Probate and Divorce Cases.
Salk. Salkeld's Reports, English Courts.
Salm. Abr. Salmon's Abridgment.
San Fr. L. J. San Francisco Law Journal, California.
San. U. Sanders on Uses and Trusts.
Sand. Eq. Sands's Suit in Equity.
Sand. Essays. Sanders's Essays.
Sand. Inst. or *Sand. Jus.* Sandar's Institutes of Justinian.
Sand. U. & T. Sanders on Uses and Trusts.
Sandf. Sandford's Reports, New York City Superior Court Reports, vols. 3–7.
Sandf. Ch. Sandford's Chancery Reports, New York.
Sandf. Ent. Sandford on Entails.
Sandl. St. Pap. Sandler's State Papers.
Sanf. (Ala.). Sanford's Reports, Alabama.
Sant. de Assec. Santerna, de Assecurationibus.
Sar. Ch. Sen. Saratoga Chancery Sentinel.
Sau. & Sc. Sausse and Scully's Reports, Irish Chancery.
Saund. Saunders's Reports, English King's Bench.
Saund. Bank. Pr. Saunders's Bankrupt Practice.
Saund. Neg. Saunders on the Law of Negligence.
Saund. Pl. Saunders on Civil Pleading.
Saund. & C. Saunders and Cole's Reports, English Bail Court.
Sausse & Sc. Sausse and Scully's Reports, Irish Chancery.
Sav. Saviless Reports, English Common Pleas.
Sav. Dr. Rom. Savigny, Droit Romain.
Sav. His. Rom. L. Savigny's History of the Roman Law.
Sav. Obl. Savigny on Obligations.
Sav. Priv. Int. L. Savigny on Private International Law.
Sav. Priv. Trial of the Savannah Privateers.
Saw. Sawyer's Reports, U. S. Circuit Court, 9th Circuit.
Sax. or *Saxt. Ch.* Saxton's Chancery Reports, New Jersey Equity Reports, vol. 1.
Say. Sayer's Reports, English King's Bench.
Say. Costs. Sayer on Costs.
Say. Pr. Sayle's Practice in Texas.
Sc. Scott's Reports, English Common Pleas.
Sc. Scilicet, That is to say.
Sc. Liber Rubeus Scaccarii, Scottish.
Sc. Jur. Scottish Jurist, Edinburgh.
Sc. L. J. Scottish Law Journal, Glasgow.
Sc. L. M. Scottish Law Magazine, Edinburgh.
Sc. L. R. Scottish Law Reporter, Edinburgh.
Sc. Sess. Cas. Scotch Court of Session Cases.
Scac. Scaccaria Curia, Court of Exchequer.
Scam. Scammon's Reports, Illinois.
Scan. Mag. Scandalum Magnatum.
Sch. & Lef. Schoales and Lefroy's Reports, Irish Chancery.
Schalck (Jam.). Schalck's Jamaica Reports.
Scheiff. Pr. Scheiffer's Practice.
Schm. C. L. Schmidt's Civil Law of Spain and Mexico.
Schm. L. J. Schmidt's Law Journal, New Orleans.
Schoul. Bailm. Schouler on Bailments, including Carriers.
Schoul. Dom. Rel. Schouler on Domestic Relations.
Schoul. Per. Pr. Schouler on Personal Property.
Schuyl Leg. Rec. Schuylkill Legal Record, Pottsville, Pa.
Sci. fa. Scire facias.
Sci. fa. ad dis. deb. Scire facias ad disprobandum debitum.
Scil. Scilicet, That is to say.
Sco. Scott's Reports, English Common Pleas.
Sco. Costs. Scott on Costs.
Sco. Int. Scott's Intestate Laws.
Sco. N. R. Scott's New Reports, English Common Pleas.
Sco. Nat. Scott on Naturalization of Aliens.
Sco. & J. Tel. Scott and Jarnigan on the Law of Telegraphs.
Scot. Scotland. Scottish.
Scot. Jur. Scottish Jurist, Edinburgh.
Scot. L. J. Scottish Law Journal, Glasgow.
Scot. L. M. Scottish Law Magazine, Edinburgh.
Scot. L. R. Scottish Law Reporter, Edinburgh.
Scr. L. T. Scranton Law Times, Pennsylvania.
Scrat. Life As. Scratchley on Life Assurance.
Scrib. Dow. Scribner on Dower.
Scriv. Cop. Scriven on Copyholds.
Seab. V. & P. Seaborne on Vendors aed Purchasers.
Searle & Sm. Searle and Smith's Reports, English Probate and Divorce.
Seat. F. Ch. Seaton's Forms in Chancery.
Seb. T. M. Sebastian on Trademarks.
Sec. Section.
Sec. leg. Secundum legem, According to law.
Sec. reg. Secundum regulam, According to rule.
Sedg. L. Cas. Sedgwick's Leading Cases on the Measure of Damages.
Sedg. Meas. D. Sedgwick on the Measure of Damages.
Sedg. St. L. Sedgwick on Statutory and Constitutional Law.
Seign. Seigniorial Reports, Quebec.
Sel. Cas. or *Sel. Cas. Ch.* Select Cases in Chancery, English.
Sel. Cas. A. S. Law. Select Cases in Anglo-Saxon Law.
Sel. Cas. D. A. Select Cases, Sudder Dewanny Adawlut, India.
Sel. Cas. Ev. Select Cases in Evidence, English.
Sel. Cas. N. F. Select Cases, Newfoundland Courts.
Sel. Cas. N. W. P. Selected Cases, Northwest Provinces, India.
Sel. Cas. N. Y. Select Cases, Yates et al., New York.
Sel. Cas. with Opin. Select Cases with Opinions.
Sel. Ch. Cas. Select Cases in Chancery, English.
Sel. Dec. Bomb. Selected Decisions, Sudder Dewanny Adawlut, Bombay.
Sel. Dec. Mad. Selected Decrees, Suder Udawlut, Madras.
Sel. L. Cas. Select Law Cases.
Seld. or *Seld. (N. Y.).* Selden's Beports, New York Ct. of Appeals Reports, vols. 5-10.
Seld. Notes. Selden's Notes of Cases, New York Court of Appeals.
Self. Tr. Selfridge's Trial.
Sell. Pr. Sellon's Practice in the King's Bench.
Selw. N. P. Selwin's Nisi Prius.
Selw. & Barn. The first part of Barnwell and Alderson's Reports.
Serg. Attach. Sergeant on Attachment Law, Pa.
Serg. Const. L. Sergeant on Constitutional Law.
Serg. Land L. Sergeant on the Land Laws of Pennsylvania.
Serg. Mech. L. L. Sergeant on Mechanics' Lien Law.
Serg. & Rawle. Sergeant and Rawle's Reports, Pennsylvania.
Sess. Cas. Session Cases, English King's Bench.
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Set. Dec. or *Set. F. Dec.* Seton's Forms of Equity Decrees.
Sett. Cas. Settlement Cases.
Sev. Sevestre's Reports, Calcutta.
Sev. S. D. A. Sevestre's Sudder Dewanny Adawlut Reports, Bengal.
Sh. Shaw's Reports, Scotch Court of Session (1st Series).
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Sharsw. Leg. Eth. Sharswood's Legal Ethics.
Sharsw. Law Lec. Sharswood's Law Lectures.
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Shaw & Macl. Shaw and Maclean's Scotch Appeal Cases, English House of Lords.
Shearm. & Red. Neg. Shearman and Redfield on the Law of Negligence.
Sheld. Sheldon's Reports, Superior Court of Buffalo, N. Y.
Shelf. Copy. Shelford on Copyholds.
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Shelf. Mort. Shelford on Mortmain.
Shelf. Railw. Shelford on Railways.
Shelf. R. Pr. Shelford's Real Property Statutes.
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Shep. Sel. Cas. Shepherd's Select Cases, Alabama.
Shep. Touch. Sheppard's Touchstone.
Shepl. Shepley's Reports, Maine.
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Shepp. Act. Sheppard's Action upon the Case.
Shepp. Cas. Sheppard's Cases on Slander.
Shepp. Touch. Sheppard's Touchstone.
Sher. Ct. Rep. Sheriff Court Reports, Scotland.
Ship. Gaz. Shipping Gazette, London.
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Shirl. Shirley's Reports, New Hampshire.
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Shortt Copy. Shortt on Copyrights.
Show. Shower's Reports, English King's Bench.
Show. P. C. Shower's Parliamentary Cases.
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Sieye. Sieye Traité sur l'Adultère.
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Sinclair. Sinclair MS. Scotch Court of Session Cases.
Six Circ. Cas. Cases on the Six Circuits, Irish N. P.
Skene Verb. Sign. Skene's De Verborum Significatione.
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Slade. Slade Reports, Vermont.
Sloan Leg. Reg. Sloan's Legal Register, New York.
Sm. Smith's Reports, English King's Bench.
Sm. (E. D.). E. D. Smith's Reports, New York Common Pleas.
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Sm. (N. H.). Smith's Reports, New Hampshire.
Sm. (N. Y.). Smith's Reports, New York Court of Appeals Reports, vols. 15–27.
Sm. (Pa.) or *Sm. (P. F.).* Smith's Reports, Pennsylvania State Reports, vols. 51–81*.
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Sm. & Bat. Smith and Batty's Reports, Irish King's Bench.
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Sm. & M. Smedes and Marshall's Reports, Mississippi Reports, vols. 9–22.
Sm. & M. Ch. Smedes and Marshall's Chancery Reports, Mississippi.
Sm. & S. Dig. Vict. Smith & Skinner's Digest of Victorian Reports.
Sm. & Sod. L. & T. Smith and Soden on Landlord and Tenant.
Smale & Giff. Smale and Giffard's Reports, English Chancery.
Smedes & M. Smedes and Marshall's Reports, Mississippi Reports, vols. 9–22.
Smedes & M. Ch. Smedes and Marshall's Chancery Reports, Mississippi.
Smith. See *Sm.*
Smoult. Notes of cases in Smoult's Collection of Orders, Calcutta.
Smy. Smythe's Reports, Irish Common Pleas and Exchequer.
Sn. or *Sneed.* Sneed's Reports, Tennessee.
Sneed Dec. or *Sneed Ky.* Sneed's Kentucky Decisions.
Snell Eq. Snell's Principles of Equity.
Snow Cas. Int. L. Snow's Cases on International Law.
Snyder Rel. Corp. Snyder on Religious Corporations.
So. Austr. L. R. South Australian Law Reports.
So. Car. South Carolina Reports.
So. Car. Const. South Carolina Constitutional Reports.
So. Car. L. J. South Carolina Law Journal, Columbia.
So. L. J. Southern Law Journal and Reporter, Nashville, Tenn.
So. L. R. Southern Law Review, Nashville, Tenn.
So. L. R. N. S. Southern Law Review, New Series, St. Louis, Mo.
So. L. T. Southern Law Times.
So. Rep. Southern Reporter.
So. West. L. J. Southwestern Law Journal, Nashville, Tenn.
Sol. Gen. Solicitor General.
Sol. J. Solicitor's Journal, London.
Sol. J. & R. Solicitor's Journal and Reporter, London.
South. Southard's Reports, New Jersey Law.
South. L. J. & Rep. Southern Law Journal and Reporter, Nashville, Tenn.
South. L. Rev. Southern Law Review, Nashville, Tenn.
South. L. Rev. N. S. Southern Law Review, New Series, St. Louis, Mo.
Sp. A. Special Appeal.
Sp. Laws. Spirit of Laws, by Montesquieu.
Sp. T. Special Term.
Spear Extr. Spear's Law of Extradition.
Spear. Spear's Reports, South Carolina.
Spear Ch. or *Spear Eq.* Spear's Chancery Reports, South Carolina.
Spel. Spelman's Glossary.
Spel. Feud. Spelman on Feuds.
Spenc. Spencer's Reports, New Jersey Law.
Spenc. (Minn.). Spencer's Reports, Minnesota.
Spence Eq. Jur. Spence's Equitable Jurisdiction.
Spence Or. L. Spence's Origin of Laws.

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Spr. Sprague's Decisions, U. S. Dist. Court, Massachusetts.
St. State. Statute. Statutes at Large.
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St. Abm. Statham's Abridgment.
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St. Clem. St. Clement's Church Case, Philadelphia.
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St. Inst. Stair's Institutes of the Law of Scotland.
St. Marks. St. Mark's Church Case, Philadelphia.
St. P. State Papers.
St. Rep. State Reports.
St. Tr. State Trials.
Stair. Stair's Reports, Scotch Court of Session.
Stair Inst. Stair's Institutes of the Laws of Scotland.
Stair Pr. Stair's Principles of the Laws of Scotland.
Stant. Stanton's Reports, Ohio.
Star Ch. Cas. Star Chamber Cases.
Stark. Cr. L. Starkie on Criminal Law.
Stark. Cr. Pl. Starkie on Criminal Pleading.
Stark. Ev. Starkie on Evidence.
Stark. Jury Tr. Starkie on Trial by Jury.
Stark. N. P. Starkie's Reports, English Nisi Prius.
Stark. Slan. Starkie on Slander and Libel.
Stat. Statute.
Stat. at L. Statutes at Large.
Stat. Glo. Statute of Gloucester.
Stat. Marl. Statute of Marlbridge.
Stat. Mer. Statute of Merton.
Stat. Westm. Statute of Westminster.
Stat. Winch. Statute of Winchester.
State Tr. State Trials.
Statk. Abr. Statham's Abridgment of the Law.
Staunf. P. C. & Pr. Staunforde's Pleas of the Crown and Prerogative.
Stearn R. A. Stearn on Real Actions.
Steph. Com. Stephen's Commentaries on English Law.
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Steph. Dig. Stephen's Digest, New Brunswick Reports.
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Steph. Ev. Stephen's Digest of Evidence.
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Steph. Pl. Stephen on Pleading.
Stev. & Ben. Av. Stevens and Benecke on Average and Insurance.
Stew. (Ala.). Stewart's Reports, Alabama.
Stew. Adm. or *Stew. V. A.* Stewart's Vice-Admiralty Reports, Nova Scotia.
Stew. (N. J.). Stewart's Reports, New Jersey Equity Reports, vols. 28–33.
Stew. & Port. Stewart and Porter's Reports, Alabama.
Stiles. Stiles's Reports, Iowa.
Stillingfl. Ecc. Stillingfleet's Ecclesiastical Cases, English.
Sto. Story's Reports, U. S. Circuit Courts, 1st Circuit.
Sto. & H. Cr. Ab. Storer and Heard on Criminal Abortion.
Stock. Stockton's Reports, New Jersey Equity.
Stock. (Md.). Stockett's Reports, Maryland.
Stock Non. Com. Stock on the Law of Non Compotes Mentis.
Stokes L. of A. Stokes on Liens of Attorneys.
Stone B. B. S. Stone on Benefit Building Societies.
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Story. Story's Reports, U. S. Circuit Court, 1st Circuit.
Story Ag. Story on Agency.
Story Bailm. Story on Bailments.
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Story Comm. Story's Commentaries.
Story Confl. L. Story on Conflict of Laws.
Story Const. Story on the Constitution.
Story Contr. Story on Contracts.
Story Eq. Jur. Story's Equity Jurisprudence.
Story Eq. Pl. Story's Equity Pleading.
Story L. U. S. Story's Laws of the United States.
Story Part. Story on Partnership.
Story Prom. N. Story on Promissory Notes.
Story Sales. Story on Sales of Personal Property
Stra. or *Strange.* Strange's Reports, English Courts.
Str. H. L. Strange's Hindoo Laws.
Str. N. C. Strange's Notes of Cases, Madras.
Straac. de Mer. Straacha de Mercatura, Navibus Assecurationibus.
Strah. Dom. Strahan's Translation of Domat's Civil Law.
Stringf. Stringfellow's Reports, Missouri.
Strob. Strobhart's Law [3]Reports, South Carolina.
Strob. Ch. or *Strob. Eq.* Strobhart's Equity Reports, South Carolina.
Stu. or *Stuart.* Stuart, Milne and Peddie's Reports, Scotch Court of Session.
Stu. App., Stu. K. B., or *Stu. L. C.* Stuart's Reports, Lower Canada King's Bench
Stu. Adm. or *Stu. V. A.* Stuart's Vice-Admiralty Reports, Lower Canada.
Stu. M. & P. Stuart, Milne and Peddie's Reports, Scotch Court of Session.
Sty. Styles's Reports, English King's Bench.
Sty. Pr. Reg. Styles's Practical Register.
Sud. Dew. Adul. Sudder Dewanny Adulat Reports, India.
Sud. Dew. Rep. Sudder Dewanny Reports, N. W. Provinces, India.
Sugd. Est. Sugden on the Law of Estates.
Sugd. Pow. Sugden on Powers.
Sugd. Pr. Sugden on the Law of Property.
Sugd. Pr. St. Sugden on Property Statutes.
Sugd. Vend. & P. Sugden on Vendors and Purchasers.
Sull. Land Tit. Sullivan on Land Titles in Massachusetts.
Sull. Lect. Sullivan's Lectures on Constitution and Laws of England.
Sum. Summa, the summary of a law.
Sumn. Sumner's Reports, U. S. Circuit Court, 1st Circuit.
Sup. Superseded. Superior. Supreme.
Sup. or *Supp.* Supplement.
Supp. Ves. Jr. Supplement to Vesey, Junior's, Reports.
Supr. Ct. Rep. Federal & Supreme Court Reporter. All the Federal Courts, 1887–1896.
Surr. Surrogate.
Suth. Sutherland's Reports, Calcutta.
Suth. P. C. J. Sutherland's Privy Council Judgments.
Suth. W. Rep. Sutherland's Weekly Reporter, Calcutta.
Swab. Adm. Swabey's Admiralty Reports, English.
Swab. & Trist. Swabey and Tristram's Reports, English Probate and Divorce.
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Swan Just. Swan's Justice.
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Swan Pr. Swan's Practice.
Swans. Swanston's Reports, English Chancery.
Sweeny. Sweeny's Reports, New York Superior Court Reports, vols. 31–32.
Sweet M. Sett. Cas. Sweet's Marriage Settlement Cases.
Sweet Pr. Conv. Sweet's Precedents in Conveyancing.
Swift Dig. Swift's Digest, Connecticut.
Swift Sys. Swift's System of the Laws of Connecticut.
Swin. Jus. Cas. Swinton's Justiciary Cases, Scotland.
Swinb. Des. Swinburne on the Law of Descents.
Swinb. Mar. Swinburne on Marriage.
Swinb. Spo. Swinburne on Spousals.
Swinb. Wills. Swinburne on Wills.
Syd. App. Sydney on Appeals.
Syme. Syme's Justiciary Cases, Scotland.

Syn. Ser. Synopsis Series of the U. S. Treasury Decisions.
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Tait Ev. Tait on Evidence.
Talb. Cases *tempore* Talbot, English Chancery.
Taml. Tamlyn's Reports, English Chancery.
Taml. Ev. Tamlyn on Evidence.
Taml. T. Y. Tamlyn on Term of Years.
Tan. Dec. or *Taney.* Taney's Decisions, by Campbell, U. S. Circuit Court, 4th Circuit.
Tann. Tanner's Reports, Indiana.
Tap. or *Tapp.* Tappan's Nisi Prius Reports, Ohio.
Tap. C. M. Tapping's Copyholder's Manual.
Tap. Man. Tapping on the Writ of Mandamus.
Tapp M. & C. Tapp on the Law of Maintenance and Champerty.
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Tayl. (*J. L.*). Taylor's Reports, North Carolina Term Reports.
Tayl. (*U. C.*). Taylor's Reports, Upper Canada King's Bench.
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Tayl. Ev. Taylor on Evidence.
Tayl. Gov. Taylor on Government.
Tayl. L. & T. Taylor on Landlord and Tenant.
Tayl. Law Glos. Taylor's Law Glossary.
Tayl. Med. Jur. Taylor's Medical Jurisprudence.
Tayl. Pois. Taylor on Poisons.
Tayl. Wills. Taylor on Wills.
Tech. Dict. Crabb's Technological Dictionary.
Tel. The Telegram, London.
Temp. & M. Temple and Mew's Reports, English Criminal Appeal Cases.
Tenn. Tennessee Reports.
Tenn. Ch. Tennessee Chancery Reports (Cooper's).
Tenn. Leg. Rep. Tennessee Legal Reporter, Nashville.
Term. Term Reports, English King's Bench (Durnford and East's Reports).
Term N. C. Term Reports, North Carolina, by Taylor.
Terr. Terrell's Reports, Texas.
Terr. & Wal. Terrell and Walker's Reports, Texas Reports, vols. 38–51.
Tex. Texas Reports.
Tex. App. Texas Court of Appeals Reports.
Tex. Cr. App. Texas Criminal Appeals.
Tex. Civ. App. Texas Civil Appeals.
Tex. L. J. Texas Law Journal, Tyler, Texas.
Tex. Unrep. Cas. Texas Unreported Cases, Supreme Court.
Th. B. & N. Thomson on Bills and Notes.
Th. Br. Thesaurus Brevium.
Th. C. Theodon Capitula et Fragmenta.
Th. Dig. Theloall's Digest.
Th. Ent. Thompson's Entries.
Thach. Cr. Cas. Thacher's Criminal Cases, Massachusetts.
Thayer Cont. L. Thayer's Cases on Constitutional Law.
Thayer Cas. Ev. Thayer's Select Cases on Evidence.
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Thes. Brev. Thesaurus Brevium.
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Thomp. (*Cal.*). Thompson's Reports, California Reports, vols. 39–40.
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Thomp. Tenn. Cas. Thompson's Tennessee Cases.
Thomp. & C. Thompson and Cook's Reports, New York Supreme Court.
Thorn. Thornton's Notes of Cases Ecclesiastical and Maritime, English.
Thorn. Conv. Thornton's Conveyancing.
Throop Ag. or *Throop V. Ag.* Throop on Verbal Agreements.
Tichb. Tr. Report of the Tichborne Trial, London.
Tidd Pr. Tidd's Practice in the King's Bench.
Tiff. Tiffany's Reports, New York Court of Appeals Reports, vols. 28–39.
Tiff. & B. Tr. Tiffany and Bullard on Trusts and Trustees.
Tiff. & S. Pr. Tiffany and Smith's Practice, New York.
Till. Prec. Tillinghast's Precedents.
Till. & Sh. Pr. Tillinghast and Shearman's Practice.
Till. & Yates App. Tillinghast and Yates on Appeals.
Tinw. Tinwald's Reports, Scotch Court of Session.
Tit. Title.
Tobey. Tobey's Reports, Rhode Island.
Toll. Ex. Toller on Executors.
Tomk. Inst. or *Tomk. R. L.* Tompkins's Institutes of Roman Law.
Tomk. & J. R. L. Tompkins and Jeckens's Roman Law.
Toml. Tomlin's Election Evidence Cases.
Toml. L. D. Tomlin's Law Dictionary.
Toml. Supp. Br. Tomlin's Supplement to Brown's Parliamentary Cases.
Tor. Deb. Torbuck's Reports of Debates.
Toth. Tothill's Reports, English Chancery.
Touch. Sheppard's Touchstone.
Toull. Dr. Civ. Toullier's Droit Civil Français.
Town. Sl. & L. Townshend on Slander and Libel.
Town. St. Tr. Townsend's Modern State Trials.
Town. Sum. Proc. Townshend's Summary Proceedings by Landlords against Tenants.
Tr. Translation. Translator.
Tr. Eq. Treatise of Equity, by Fonblanque.
Tr. & H. Pr. Troubat and Haly's Practice, Pennsylvania.
Tr. & H. Prec. Troubat and Haly's Precedents of Indictments.
Traill Med. Jur. Traill on Medical Jurisprudence.
Train & H. Prec. Train and Heard's Precedents of Indictments.
Trans. App. Transcript Appeals, New York.
Trat. Jur. Mer. Tratade de Jurisprudentia Mercantil.

Trav. Tw. L. of N. Travers Twiss on the Law of Nations.
Tread. Treadway's Reports, South Carolina (Constitutional Reports).
Treb. Jur. de la Med. Trebuchet, Jurisprudence de la Médecine.
Trem. Tremaine's Pleas of the Crown.
Trev. Tax. Suc. Trevor on Taxes on Succession.
Tri. Bish. Trial of the Seven Bishops.
Tri. per Pais. Trials per Pais.
Trib. Civ. Tribunal Civil.
Trib. de Com. Tribunal de Commerce.
Trin. or *Trin. T.* Trinity Term.
Tripp. Dakota Reports, vol. 5.
Trop. Dr. Civ. Troplong's Droit Civil.
Troub. Lim. Part. Troubat on Limited Partnerships.
Troub & H. Pr. Troubat and Haly's Practice, Pennsylvania.
Tru. Railw. Rep. Truman's Railway Reports.
Tuck. Tucker's Surrogate Reports, New York.
Tuck. Tucker's Court of Appeals, D. of Col., vols. 1-2.
Tuck. & Cl. Tucker and Clephane's Reports, D. of Col., vol. 21.
Tuck. Bla. Com. Blackstone's Commentaries, by Tucker.
Tuck. Lect. Tucker's Lectures.
Tuck. Pl. Tucker's Pleadings.
Tuck. Sel. Cas. Tucker's Select Cases, Newfoundland Courts.
Tud. Char. Tr. Tudor on Charitable Trusts.
Tud. L. Cas. or *Tud. L. Cas. M. L.* Tudor's Leading Cases on Mercantile Law.
Tud. L. Cas. R. P. Tudor's Leading Cases on Real Property.
Tup. App. Tupper's Appeal Reports, Ontario.
Turn. (Ark.). Turner's Reports, Arkansas, vols. 35-48.
Turn. Ch. Pr. Turner on Chancery Practice.
Turn. Pr. Turnbull's Practice, New York.
Turn. & Ph. Turner and Phillip's Reports, English Chancery.
Turn. & Rus. Turner and Russell's Reports, English Chancery.
Tutt. Tuttle's Reports, California.
Tutt. & Carp. Tuttle and Carpenter's Reports, California Reports, vol. 52.
Twiss L. of Nat. Twiss's Law of Nations.
Tyler. Tyler's Reports, Vermont.
Tyler Bound. & Fences. Tyler's Law of Boundaries and Fences.
Tyler Ecc. Tyler on American Ecclesiastical Law.
Tyler Ej. Tyler on Ejectment and Adverse Enjoyment.
Tyler Fixt. Tyler on Fixtures.
Tyler Inf. Tyler on Infancy and Coverture.
Tyler Us. Tyler on Usury.
Tyng. Tyng's Reports, Massachusetts.
Tyrw. Tyrwhitt's Reports, English Exchequer.
Tyrw. & G. Tyrwhitt and Granger's Reports, English Exchequer.
U. B. Upper Bench.
U. B. Prec. Upper Bench Precedents *tempore* Car. I.
U. C. Upper Canada.
U. C. App. Upper Canada Appeal Reports.
U. C. C. P. Upper Canada Common Pleas Reports.
U. C. Cham. Upper Canada Chambers Reports.
U. C. Chan. Upper Canada Chancery Reports.
U. C. E. & A. Upper Canada Error and Appeals Reports.
U. C. L. J. Upper Canada Law Journal, Toronto.
U. C. O. S. Upper Canada Queen's Bench Reports, Old Series.
U. C. Pr. Upper Canada Practice Reports.
U. C. Q. B. Upper Canada Queen's Bench Reports.
U. C. Q. B. O. S. Upper Canada Queen's Bench Reports, Old Series.
U. K. United Kingdom.
U. S. United States Reports.
U. S. App. United States Appeals, Circuit Courts of Appeals.
U. S. Crim. Dig. United States Criminal Digest, by Waterman.
U. S. Dig. Abbott's United States Digest.
U. S. Eq. Dig. United States Equity Digest.
U. S. Jur. United States Jurist, Washington, D. C.
U. S. L. Int. United States Law Intelligencer (Angell's), Providence and Philadelphia.
U. S. L. J. United States Law Journal, New Haven and New York.
U. S. L. M. or *U. S. Law Mag.* United States Law Magazine (Livingston's), New York.
U. S. R. S. United States Revised Statutes.
U. S. Reg. United States Register, Philadelphia.
U. S. Stat. United States Statutes at Large.
U. S. Sup. Ct. Rep. United States Supreme Court Reporter.
Ulm. L. Rec. Ulman's Lawyer's Record, New York.
Ulp. Ulpian's Fragments.
Underh. Torts. Underhill on Torts.
Up. Can. See *U. C.*
Upt. Mar. W. & Pr. Upton on Maritime Warfare and Prize.
Url. Trust. Urling on Trustees.
Utah. Utah Reports.
V. Versus. Victoria. Victorian.
V. A. C. or *V. Adm.* Vice-Admiralty Court.
V. C. Vice-Chancellor. Vice-Chancellor's Court.
V. C. Rep. Vice-Chancellor's Reports, English.
V. O. De Verborum Obligationibus.
V. S. De Verborum Significatione.
V. & B. Vesey and Beames's Reports, English Chancery.
V. & S. Vernon and Scriven's Reports, Irish King's Bench.
Va. Virginia Reports.
Va. Cas. Virginia Cases.
Va. L. J. Virginia Law Journal, Richmond.
Va. R. Gilmer's Reports, Virginia.
Val. Com. Valen's Commentaries.
Vall. Ir. L. Vallencey's Ancient Laws of Ireland.
Van Hey. Eq. Van Haythuysen's Equity Draftsman.
Van Hay. Mar. Ev. Van Haythuyer on Maritime Evidence.
Van K. Van Koughnet's Reports, Upper Canada C. P. Reports, vols. 15-21.
Van Ness. Van Ness's Reports, U. S. District Courts, New York.
Van Sant. Eq. Pr. Van Santvoord's Equity Practice.
Van Sant. Pl. Van Santvoord's Pleadings.
Van Sant. Prec. Van Santvoord's Precedents.
Vatt. Vattel's Law of Nations.
Vaugh. Vaughan's Reports, English Common Pleas.
Vaux. Vaux's Recorder's Decisions, Philadelphia.
Vaz. Extrad. Vazelhes's Etude sur l'Extradition.
Veaz. Veazey's Reports, Vermont.
Vend. Ex. Venditioni Exponas.
Vent. Ventris's Reports, English King's Bench.
Verm. Vermont Reports.
Vern. Vernon's Reports, English Chancery.
Vern. & Sc. Vernon and Scriven's Reports, Irish King's Bench.
Verpl. Contr. Verplanck on Contracts.
Verpl. Ev. Verplanck on Evidence.
Ves. Vesey, Senior's Reports, English Chancery.
Ves. Jun. Vesey, Junior's Reports, English Chancery.
Ves. Jun. Supp. Supplement to Vesey, Junior's, Reports, English Chancery.
Ves. & Beam. Vesey and Beames's Reports, English Chancery.
Vet. Entr. Old Book of Entries.
Vet. N. B. Old Natura Brevium.
Vic. or *Vict.* Queen Victoria.
Vict. C. S. Victorian Consolidated Statutes.
Vict. L. R. Victorian Law Reports, Colony of Victoria.
Vict. L. R. Min. Victorian Mining Law Reports.
Vict. L. T. Victorian Law Times, Melbourne.
Vict. Rep. Victorian Reports, Colony of Victoria.
Vict. Rev. Victorian Review.
Vict. St. Tr. Victorian State Trials.
Vid. Entr. Vidian's Entries.
Vin. Abr. Viner's Abridgment.
Vin. Supp. Supplement to Viner's Abridgment.
Vincens Leg. Com. Vincens's Legislation Commerciale.
Vinn. Vinnius.
Vint. Can. L. Vinton on American Canon Law.
Vir. Virgin's Reports, Maine.
Virg. Virginia Reports.
Virg. Cas. Virginia Cases.
Virg. L. J. Virginia Law Journal.
Viz. Videlicet, That is to say.
Von Holst Const. His. Von Holst's Constitutional History of the U. S.
Voorh. Code. Voorhies's Code, New York.
Voorh. Cr. Jur. Voorhies on the Criminal Jurisprudence of Louisiana.

Vr. or *Vroom.* Vroom's Reports, New Jersey Law Reports, vols. 30-56.
Vs. Versus.
Vt. Vermont Reports.
W. King William; thus 1 W. I. signifies the first year of the reign of King William I.
W. Statute of Westminster.
W. Bla. William Blackstone's Reports, English King's Bench and Common Pleas.
W. C. C. Washington's Circuit Court Reports, U. S., 3d Circuit.
W. Coast Rep. West Coast Reporter.
W. Ent. Winch's Book of Entries.
W. H. Chron. Westminster Hall Chronicle, London.
W. H. & G. Welsby, Hurlstone and Gordon's Reports, English Exchequer Reports, vols. 1-9.
W. J. Western Jurist, Des Moines, Iowa.
W. Jones. Wm. Jones's Reports, English Courts.
W. Kel. Wm. Kelynge's Reports, English King's Bench and Chancery.
W. L. Gaz. Western Law Gazette, Cincinnati, O.
W. L. Jour. Western Law Journal, Cincinnati, O.
W. L. M. Western Law Monthly, Cleveland, O.
W. L. R. Washington Law Reporter, Washington, D. C.
W. N. Weekly Notes, London.
W. N. Cas. Weekly Notes of Cases, Philadelphia.
W. P. Cas. Wollaston's Practice Cases.
W. R. Weekly Reporter, London.
W. R. Calc. Southerland's Weekly Reporter, Calcutta.
W. Rep. West's Reports *temp.* Hardwicke, English Chancery.
W. T. R. Weekly Transcript Reports, New York.
W. Ten. Wright's Tenures.
W. Ty. R. Washington Territory Reports.
W. Va. West Virginia Reports.
W. W. & D. Willmore, Wollaston and Davison's Reports, English Queen's Bench.
W. W. & H. Willmore, Wollaston and Hodge's Reports, English Queen's Bench.
W. & Buh. West & Buhler's Collection of Futwahs, India.
W. & M. William & Mary.
W. & M. Woodbury and Minot's Reports, U. S. Circuit Court, 1st Circuit.
W. & S. Watts and Sergeant's Reports, Pennsylvania.
W. & S. App. Wilson and Shaw's Scotch Appeals, English House of Lords.
Wa. Wales.
Wa. Watts's Reports, Pennsylvania.
Wadd. Dig. Waddilove's Digest of English Ecclesiastical Cases.
Wade Notice. Wade on the Law of Notice.
Wade Retro. L. Wade on Retroactive Laws.
Wait Act. & Def. Wait's Actions and Defence.
Wait Pr. Wait's New York Practice.
Wait St. Pap. Wait's State Papers of the U. S.
Walf. Railw. Walford on Railways.
Walk. (*Mich.*). Walker's Reports, Michigan Chancery.
Walk. (*Miss.*). Walker's Reports, Mississippi Reports, vol. 1.
Walk. (*Tex.*). Walker's Reports, Texas Reports, vol. 25.
Walk. Am. L. Walker's Introduction to American Law.
Walk. Bank. L. Walker on Banking Law.
Walk. Ch. Cas. Walker's Chancery Cases, Michigan.
Walk. Com. L. Walker's Theory of the Common Law.
Walk. Wills. Walker on Wills.
Walker. Walker's Unreported Cases, S. C. of Pennsylvania.
Wall. Wallace's Reports, U. S. Supreme Court.
Wall. C. C. Wallace's Reports, U. S. Circuit Court, 3d Circuit.
Wall. Jun. Wallace, Junior's, Reports, U. S. Circuit Court, 3d Circuit.
Wall. Pr. Wallace's Principles of the Laws of Scotland.
Wallis. Wallis's Reports, Irish Chancery.
Walsh. Walsh's Registry Cases, Ireland.
Ward. (*Ohio*). Warden's Reports, Ohio State.
Ward Nat. Ward on the Law of Nations.
Ward. & Sm. Warden and Smith's Reports, Ohio State Reports, vol. 3.
Ware. Ware's Reports. U. S. District Court, Maine.
Warr. Bla. Warren's Blackstone.
Warr. L. S. Warren's Law Studies.
Wash. Washington State Reports.
Wash. (*Va.*). Washington's Reports, Virginia.
Wash. C. C. Washington's Reports, U. S. Circuit Court, 3d Circuit.
Wash. L. Rep. Washington Law Reporter, Washington, D. C.
Wash. Ty. Washington Territory Reports.
Washb. Washburn's Reports, Vermont.
Washb. Cr. L. Washburn on Criminal Law.
Washb. Easem. Washburn on Easements and Servitudes.
Washb. R. P. Washburn on Real Property.
Wat. (*C. G. H.*). Watermeyer's Cape of Good Hope Supreme Court Reports.
Wat. Cr. Proc. Waterman's Criminal Procedure.
Wat. Jus. Waterman's Justice.
Wat. Set-Off. Waterman on Set-Off, etc.
Wat. Tres. Waterman on Trespass.
Watermeyer. Watermeyer's Cape of Good Hope Supreme Court Reports.
Watk. Conv. Watkins's Conveyancing.
Watk. Copyh. Watkins's Copyholds.
Wats. Arb. Watson on Arbitration.
Wats. Comp. or *Wats. Eq.* Watson's Compendium of Equity.
Wats. Const. Hist. Watson's Constitutional History of Canada.
Wats. Part. Watson on Partnership.
Wats. Sher. Watson on Sheriffs.
Watts. Watts's Reports, Pennsylvania.
Watts (*W. Va.*). Watts's Reports, West Virginia.
Watts & Ser. Watts and Sergeant's Reports, Pennsylvania.
Web. Pat. Webster on Patents.
Web. Pat. Cas. Webster's Patent Cases, English Courts.
Webb. Webb's Reports, Kansas.
Webb, A'B. & W. Webb, A'Beckett and Williams's Reports, Victoria.
Webb, A'B. & W. Eq. Webb, A'Beckett and Williams's Equity Reports, Victoria.
Webb, A'B. & W. I. P. & M. Webb, A'Beckett and Williams's Insolvency, Probate and Matrimonial Reports, Victoria.
Webb, A'B. & W. Min. Webb, A'Beckett and Williams's Mining Cases, Victoria.
Webb. & D. Webb and Duval's Reports, Texas.
Webs. Pat. Cas. Webster's Patent Cases, English Courts.
Wedg. Gov. & Laws. Wedgwood's Government and Laws of the U. S.
Weekl. Cin. L. B. Weekly Cincinnati Law Bulletin.
Weekl. Dig. Weekly Digest, New York.
Weekl. Jur. Weekly Jurist, Illinois.
Weekl. L. Record. Weekly Law Record.
Weekl. L. Rev. Weekly Law Review, San Francisco, Cal.
Weekl. No. Weekly Notes of Cases, London.
Weekl. No. Cas. Weekly Notes of Cases, Philadelphia.
Weekl. Reptr. Weekly Reporter, London.
Weekl. Trans. Repts. Weekly Transcript Reports, New York.
Weeks Att. at Law. Weeks on Attorneys at Law.
Weeks D. A. Inj. Weeks, Damnum Absque Injuria.
Weeks Dep. Weeks on the Law of Deposition.
Weight. M. & L. Weightman's Marriage and Legitimacy.
Welf. Eq. Pl. Welford on Equity Pleading.
Wellw. Abr. Wellwood's Abridgment of Sea Laws.
Wells L. & F. Wells's Questions of Law and Facts.
Wells Res Ad. & St. D. Wells on *Res Adjudicata* and *Stare Decisis.*
Wells Sep. Pr. of Mar. Wom. Wells on Separate Property of Married Women.
Welsby, H. & G. Welsby, Hurlstone & Gordon's Reports, English Exchequer Reports, vols. 1-9.
Welsh. Welsh's Registry Cases, Ireland.
Wend. Wendell's Reports, New York Supreme Court.
Wendt Mar. Leg. Wendt on Maritime Legislation.
Went. Ex. or *Went. Off. Ex.* Wentworth on Executors.
Went. Pl. Wentworth on Pleadings.
Wesk. Ins. Weskett on Insurance.
West. West's Reports, English Chancery, *tempore* Hardwicke.
West Coast Rep. West Coast Reporter.
West H. L. West's Reports, English House of Lords.

West. Jur. Western Jurist, Des Moines, Iowa.
West. L. J. or *West. Law Jour.* Western Law Journal, Cincinnati, Ohio.
West. L. Mo. or *West. Law Mo.* Western Law Monthly, Cleveland, Ohio.
West. L. O. or *West. Leg. Obs.* Western Legal Observer, Quincy, Ill.
West. L. T. Western Law Times.
West. Rep. Western Reporter, St. Paul.
West. T. Cas. Western's Tithes Cases.
West Va. West Virginia Reports.
West t. H. West's Reports, English Chancery, *tempore* Hardwicke.
West. Confl. Westlake on Conflict of Laws.
Westm. Statute of Westminster.
Weston. Weston's Reports, Vermont.
Weth. (U. C.). Wethey's Upper Canada Reports, Queen's Bench.
Wh. or *Whart.* Wharton's Reports, Pennsylvania.
Wh. Wheaton's Reports, U. S. Supreme Court.
Wh. Cr. Cas. Wheeler's Criminal Cases, New York.
Wh. & T. L. Cas. White and Tudor's Leading Cases, Equity.
Whart. or *Wh.* Wharton's Reports, Pennsylvania.
Whart. Ag. Wharton on Agency and Agents.
Whart. Confl. Wharton on Conflict of Laws.
Whart. Conv. Wharton's Conveyancing.
Whart. Cr. Law. Wharton's Criminal Law.
Whart. Ev. Wharton's Evidence.
Whart. Hom. Wharton on Homicide.
Whart. Law. Dic. or *Whart. Lex.* Wharton's Law Lexicon.
Whart. Prec. Wharton's Precedents of Indictments.
Whart. St. Tr. Wharton's State Trials of the United States.
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Wheat. Hist. L. of N. Wheaton's History of the Law of Nations.
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Whit. Eq. Pr. Whitworth's Equity Precedents.
Whit. War. P. Whiting on War Powers under the Constitution.
White. White's Reports, West Virginia.
White L. L. White's Land Law of California.
White Rec. White's Recopilacion.
White Supp. White on Supplement and Revivor.
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Whitm. Pat. Cas. Whitman's Patent Cases.
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Wig. Disc. Wigram on Discovery.
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Wight. Wightwick's Reports, English Exchequer.
Wight El. Cas. Wight's Election Cases, Scotland.
Wilc. Wilcox's Reports, Ohio.
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Wilde Sup. Wilde's Supplement to Barton's Conveyancing.
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Will. Bankt. L. Williams on the Bankrupt Law.
Will. Williams on Executors.
Will. Just. Williams's Justice.
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Willard Real Est. & Con. Willard's Real Estate and Conveyancing.
Willc. Const. Willcock's Office of Constable.
Willc. L. Med. Pr. Willcock's Law relating to the Medical Profession.
Willc. Mun. Corp. Willcocks on Municipal Corporations.
Willes. Willes's Reports, English King's Bench and Common Pleas.
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Willis Int. Willis on Interrogatories.
Willis Trust. Willis on Trustees.
Willm. W. & D. Willmore, Wollaston and Davison's Reports, English Queen's Bench.
Willm. W. & H. Willmore, Wollaston and Hodges' Reports, English Queen's Bench.
Wills Cir. Ev. Wills on Circumstantial Evidence.
Wilm. Wilmot's Notes of Opinions and Judgments, English King's Bench.
Wils. Wilson's Reports, English King's Bench and Common Pleas.
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Wils. (Ind.). Wilson's Reports, Indiana Supreme Court Reports.
Wils. (Oreg.). Wilson's Reports, Oregon.
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Wils. Exch. Wilson's Reports, English Exchequer.
Wils. Fines & Rec. Wilson on Fines and Recoveries.
Wils. Parl. L. Wilson's Parliamentary Law.
Wils. Uses. Wilson on Uses.
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Wils. & S. Wilson and Shaw's Reports, English House of Lords, Appeals from Scotland.
Win. or *Winch.* Winch's Reports, English Common Pleas.
Win. Ent. Winch's Entries.
Wing. Max. Wingate's Maxims.
Wins. Winston's Reports, North Carolina.
Wins. Eq. Winston's Equity Reports, North Carolina.
Wis. Wisconsin Reports.
Wis. Leg. N. Wisconsin Legal News, Milwaukee.
With. Withrow's Reports, Iowa.
With. Corp. Cas. Withrow's American Corporation Cases.
Wm. Bl. William Blackstone's Reports, English Courts.
Wm. Rob. William Robinson's New Admiralty Reports, English.
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Wms. (Vt.). Williams's Reports, Vermont.
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Wms. Ex. Williams on Executors.
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Wms. L. D. Williams's Law Dictionary.
Wms. Notes. Williams's Notes to Saunders's Reports.

Wms. P. Peere Williams's Reports, English Chancery.
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Wms. Saund. Williams's Notes to Saunders's Reports.
Wms. & Br. Adm. Jur. Williams and Bruce on Admiralty Jurisdiction.
Wolf. Inst. Wolffius' Institutiones Juris Naturæ et Gentium.
Wolf. & B. Wolferstan and Bristow's Election Cases.
Wolf. & D. Wolferstan and Dew's Election Cases.
Woll. Wollastan's Reports, English Bail Court.
Wood. Wood's Reports, U. S. Circuit Court, 5th Circuit.
Wood (H.). Hutton Wood's Decrees in Tithe Cases, English.
Wood Civ. L. Wood's Institutes of the Civil Law.
Wood Com. L. Wood's Institutes of the Common Law.
Wood Conv. Wood on Conveyancing.
Wood Fire Ins. Wood on Fire Insurance.
Wood Inst. Eng. L. Wood's Institutes of English Law.
Wood Man. Wood on Mandamus.
Wood Mast. & St. Wood on Master and Servant.
Wood Mayne Dam. Wood's Mayne on Damages.
Wood Nuis. Wood on Nuisances.
Woodb. & M. Woodbury and Minot's Reports, U. S. Circuit Court, 1st Circuit.
Woodd. Jur. Wooddeson's Elements of Jurisprudence.
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Woodf. L. & T. Woodfall on Landlord and Tenant.
Woodf. Parl. Deb. Woodfall's Parliamentary Debates.
Woodm. Cr. Cas. Woodman's Criminal Cases, Boston.
Woodm. & T. on For. Med. Woodman and Tidy on Forensic Medicine.
Woods or *Woods C. C.* Woods's Reports, U. S. Circuit Courts, 5th Circuit.
Wool. C. C. Woolworth's Reports, U. S. Circuit Courts, 8th Circuit.
Woolr. Com. Woolrych on Commons.
Woolr. Comm. L. Woolrych on Commercial Law.
Woolr. P. W. Woolrych on Party Walls.
Woolr. Sew. Woolrych on Sewers.
Woolr. Waters. Woolrych on Law of Waters.
Woolr. Ways. Woolrych on Law of Ways.
Woolr. Window L. Woolrych on Law of Window Lights.
Wools. Div. Woolsey on Divorce.
Wools. Int. L. Woolsey's International Law.
Woolw. Woolworth's Reports, U. S. Circuit Court, 8th Circuit.
Woolw. (Neb.). Woolworth's Reports, Nebraska Reports, vol. 1.
Word. Elect. Wordsworth's Law of Election.
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Word. Min. Wordsworth on the Law of Mining.
Worth. Jur. Worthington on the Powers of Juries.
Worth. Prec. Wills. Worthington's Precedents for Wills.
Wr. or *Wr. Pa.* Wright's Reports, Pennsylvania State Reports, vols. 37–50.
Wr. Ch. or *Wr. Ohio.* Wright's Chancery Reports, Ohio.
Wr. Cr. Consp. Wright on Criminal Conspiracies.
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Wr. Ten. Wright on Tenures.
Wy. Wyoming Territory Reports.
Wyatt P. R. Wyatt's Practical Register in Chancery.
Wyatt, W. & A'B. Wyatt, Webb and A'Beckett's Reports, Victoria.
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Wyatt & W. Wyatt and Webb's Reports, Victoria.
Wyatt & W. Eq. Wyatt and Webb's Equity Reports, Victoria.
Wyatt & W. I. P. & M. Wyatt and Webb's Insolvency, Probate and Matrimonial Reports, Victoria.
Wyatt & W. Min. Wyatt and Webb's Mining Cases, Victoria.
Wym. Wyman's Reports, Bengal.
Wynne. Wynne's Bovill Patent Case.
Wythe Ch. Wythe's Chancery Reports, Virginia.
Y. B. Year Book.
Y. & C. Younge and Collyer's Reports, English Exchequer and Equity.
Y. & C. C. C. Younge and Collyer's Chancery Cases, English.
Y. & J. Younge and Jervis's Reports, English Exchequer.
Yale Law J. Yale Law Journal.
Yates Sel. Cas. Yates's Select Cases, New York.
Yeates. Yeates's Reports, Pennsylvania.
Yelv. Yelverton's Reports, English King's Bench.
Yerg. Yerger's Reports, Tennessee.
Yool Waste. Yool on Waste, Nuisance and Trespass.
Young. Young's Reports, Minnesota.
Young M. L. Cas. Young's Maritime Law Cases, English.
Younge. Younge's Reports, English Exchequer Equity.
Younge & Coll. Younge and Collyer's Reports, English Exchequer Equity.
Younge & Coll. Ch. Younge and Collyer's Chancery Cases, English.
Younge & Jer. Younge and Jervis's Reports, English Exchequer.
Zab. Zabriskie's Reports, New Jersey Law.
Zach. Dr. Civ. Zachariæ Droit Civil Francais.
Zinn L. C. Zinn's Leading Cases on Trusts.
Zouch Adm. Zouch's Admiralty Jurisdiction.

ABBREVIATORS. **Eccl. law.** Officers whose duty it is to assist in drawing up the Pope's briefs, and reducing petitions into proper form, to be converted into Papal Bulls.

ABBROCHMENT. **Old Eng. law.** The forestalling of a market or fair.

ABBUTTALS. See ABUTTALS.

ABDICATION. A simple renunciation of an office; generally understood of a supreme office.

James II. of England, Charles V. of Germany, and Christiana, Queen of Sweden, are said to have *abdicated*. When James II. of England left the kingdom, the Commons voted that he had *abdicated* the government, and that thereby the throne had become vacant. The House of Lords preferred the word *deserted*; but the Commons thought it not comprehensive enough, for then the king might have the liberty of returning.

ABDUCTION. Forcibly taking away a man's wife, his child, or his maid. 3 Bla. Com. 139–141; 93 N. C. 567.

The unlawful taking or detention of any female for purposes of marriage, concubinage, or prostitution. 4 Steph. Com. 84.

In some states the fact that a female taken for concubinage was not chaste is no defence; 115 Mo. 480; 96 Cal. 315; the law presumes a woman's previous life to have been chaste, and the burden of proof to show otherwise rests on the defendant; 90 Ill. 274; 6 Park. Cr. 129; 8 Barb. 603.

The remedy for taking away a man's wife was by a suit by the husband for damages, and the offender was also answerable to the king; 3 Bla. Com. 139.

If the original removal was without consent, subsequent assent to the marriage does not change the nature of the act.

It is stated to be the better opinion, that if a man marries a woman under age, without the consent of her father or guardian, that act is not indictable at common law; but if children are taken from their parents

or guardians, or others intrusted with the care of them, by any sinister means, either by violence, deceit, conspiracy, or any corrupt or improper practices, as by intoxication, for the purpose of marrying them, though the parties themselves consent to the marriage, such criminal means will render the act an offence at common law; 1 East, Pl. Cr. 458; 1 Rus. Cr. 962; Rosc. Cr. Ev. 260.

A mere attempt to abduct is not sufficient; 6 Park. Cr. 129.

Solicitation or inducement is sufficient, and the taking need not be by force; 37 Hun 190; 90 Ill. 274; 46 Mich. 442.

ABEARANCE. Behavior; as a recognizance to be of good abearance, signifies to be of good behavior. 4 Bla. Com. 251, 256.

ABEREMURDER. In old Eng. law. An apparent, plain, or downright murder. It was used to distinguish a wilful murder from chance-medley, or manslaughter. Spel.; Cowel: Blount.

ABET. In crim. law. To encourage or set another on to commit a crime. This word is always applied to aiding the commission of a crime. To abet another to commit a murder, is to command, procure, or counsel him to commit it. Old Nat. Brev. 21; Co. Litt. 475.

ABETTOR. An instigator, or setter on; one that promotes or procures the commission of a crime. Old Nat. Brev. 21.

The distinction between abettors and accessaries is the presence or absence at the commission of the crime; Cowel; Fleta. *lib.* 1, *cap.* 34. Presence and participation are necessary to constitute a person an abettor; 4 Sharsw. Bla. Com. 33; Russ. & R. 99; 9 Bingh. N. C. 440; 13 Mo. 382; 1 Wis. 159; 10 Pick. 477; 81 Ill. 333; 26 Ind. 495; 54 Barb. 299; 21 Ga. 220.

ABEYANCE (Fr. *abbayer*, to expect). In expectation, remembrance, and contemplation of law; the condition of a freehold when there is no person in being in whom it is vested.

In such cases the freehold has been said to be *in nubibus* (in the clouds), and *in gremio legis* (in the bosom of the law). It has been denied by some that there is such a thing as an estate in abeyance; Fearne, Cont. Rem. 513. See also the note to 2 Sharsw. Bla. Com. 107; 1 P. Wms. 516.

The law requires that the freehold should never, if possible, be in *abeyance*. Where there is a tenant of the freehold, the remainder or reversion in fee may exist for a time without any particular owner, in which case it is said to be in abeyance; 9 S. & R. 367; 3 Plowd. 29 *a*, *b*, 35 *a*; 1 Washb. R. P. 47.

It is a maxim of the common law that a fee cannot be in abeyance. It rests upon reasons that now have no existence, and it is not now of universal application. But if it were, being a common-law maxim, it must yield to statutory provisions inconsistent with it; 92 U. S. 212.

A glebe, parsonage lands, may be in abeyance, in the United States; 9 Cra. 47; 2 Mass. 500; 1 Washb. R. P. 48. So also may the franchise of a corporation; 4 Wheat. 691. So, too, personal property may be in abeyance or legal sequestration, as in case of a vessel captured at sea from its captors until it becomes invested with the character of a prize; 1 Kent 102; 1 C. Rob. Adm. 139; 3 *id.* 97, n. See generally, also, 5 Mass. 555; 15 *id.* 464.

ABIATICUS (Lat.). A son's son; a grandson in the male line. Spel. Sometimes spelled *Aviaticus*. Du Cange, *Avius*.

ABIDE. When used as to an order of court, it means to perform, to execute, to conform to such order. A. & E. Encyc. As, to abide the judgment of the court; 7 Tex. App. 38; abide by an award; 6 N. H. 162; 48 N. H. 36; or abide the decision; 108 Mass. 585.

ABIDING BY. In Scotch law. A judicial declaration that the party abides by the deed on which he founds, in an action where the deed or writing is attacked as forged. Unless this be done, a decree that the deed is false will be pronounced. Pat. Comp. It has the effect of pledging the party to stand the consequences of founding on a forged deed. Bell, Dict.

ABIGEATORES. See ABIGEUS.

ABIGEATUS. The offence of driving away and stealing cattle in numbers. See ABIGEUS.

ABIGEI. See ABIGEUS.

ABIGERE. See ABIGEUS.

ABIGEUS (Lat. *abigere*). One who steals cattle in numbers.

This is the common word used to denote a stealer of cattle in large numbers, which latter circumstance distinguishes the *abigeus* from the *fur*, who was simply a thief. He who steals a single animal may be called *fur*; he who steals a flock or herd is an *abigeus*. The word is derived from *abigere*, to lead or drive away, and is the same in signification as *Abactor* (q. v.), *Abigeatores*, *Abigatores*, *Abigei*. Du Cange; Guyot, Rép. Univ.; 4 Bla. Com. 239.

A distinction is also taken by some writers depending upon the place whence the cattle are taken; thus, one who takes cattle from a stable is called *fur*. Calvinus, Lex, *Abigei*.

ABJUDICATIO (Lat. *abjudicare*). A removal from court. Calvinus, Lex. It has the same signification as *foris-judicatio* both in the civil and canon law. Co. Litt. 100 *b*. Calvinus. Lex.

Used to indicate an adverse decision in a writ of right: Thus, the land is said to be *abjudged* from one of the parties and his heirs. 2 Poll. & Maitl. 62.

ABJURATION (Lat. *abjuratio*, from *abjurare*, to forswear). A renunciation of allegiance, upon oath.

In Am. law. Every alien, upon application to become a citizen of the United States, must declare on oath or affirmation before the court where the application is made, amongst other things, that he doth absolutely and entirely renounce and *abjure* all allegiance and fidelity which he owes to any foreign prince, state, etc., and particularly, by name, the prince, state, etc., whereof he was before a citizen or

subject. Rawle, Const. 93; Rev. Stat. U. S. § 2165.

In Eng. Law. The oath by which any person holding office in England was formerly obliged to bind himself not to acknowledge any right in the Pretender to the throne of England; 1 Bla. Com. 368; 13 and 14 W. III. c. 6. Repealed by 30 and 31 Vict. c. 59.

It also denotes an oath abjuring certain doctrines of the church of Rome.

In the ancient English law, it was a renunciation of one's country and taking an oath of perpetual banishment. A man who had committed a felony, and for safety fled to a sanctuary, might within forty days confess and take the oath of abjuration and perpetual banishment; he was then transported. This was abolished by stat. 21 Jac. I. c. 28; Ayliffe, Pareg. 14; Burr. L. Dic., Abjuration of the Realm; 4 Bla. Com. 332.

But the doctrine of abjuration has been referred to, at least, in much later times; 4 Sharsw. Bla. Com. 56, 124, 332; 11 East 301; 2 Kent 156, n.; Termes de la Ley.

In medieval justice, every consecrated church was a sanctuary. If a malefactor took refuge therein, he could not be extracted; he had a choice between *abjuring* the realm and submitting to trial. If he chose the former he left England, bound by his oath never to return. His lands were escheated, his chattels were forfeited, and if he came back he was an outlaw; 2 Poll. & Maitl. 588; *Réville, L'Abjuratio regni, Revue historique.* 7 Val. 50, p. 1.

ABLEGATI. Papal ambassadors of the second rank, who are sent with a less extensive commission to a court where there are no nuncios. This title is equivalent to *envoy*, which see.

ABNEPOS (Lat.). A great-great-grandson. The grandson of a grandson or granddaughter. Calvinus, Lex.

ABNEPTIS (Lat.). A great-great-granddaughter. The granddaughter of a grandson or granddaughter. Calvinus, Lex.

ABODE. Where a person dwells; it is the criterion determining the residence of a legal voter, and which must be with the present intention not to change it. 71 Pa. 302; 78 Ill. 181.

ABOLITION (Lat. *abolitio*, from *abolere*, to utterly destroy). The extinguishment, abrogation, or annihilation of a thing.

In the civil, French and German law, abolition is used nearly synonymously with pardon, remission, grace. Dig. 39. 4. 3. 3. There is, however, this difference: *grace* is the generic term; *pardon*, according to those laws, is the clemency which the prince extends to a man who has participated in a crime, without being a principal or accomplice; *remission* is made in cases of involuntary homicides, and self-defence. *Abolition* is different: it is used when the crime cannot be remitted. The prince then may, by letters of abolition, remit the punishment, but the infamy remains, unless letters of abolition have been obtained before sentence. *Encycl. de D'Alembert.*

ABORDAGE (Fr.). The collision of vessels.

If the collision happen in the open sea, and the damaged ship is insured, the insurer must pay the loss, but is entitled in the civil law, at least to be subrogated to the rights of the insured against the party causing the damage. *Ordonnance de la Marine de* 1681, *Art.* 8; *Jugements d'Oleron*; Emer. Ins. c. 123, 14.

ABORTION. The expulsion of the fœtus at a period of utero-gestation so early that it has not acquired the power of sustaining an independent life.

Its natural and innocent causes are to be sought either *in the mother*—as in a nervous, irritable temperament, disease, malformation of the pelvis, immoderate veneral indulgence, a habit of miscarriage, plethora, great debility; or *in the fœtus* or its dependencies; and this is usually disease existing in the ovum, in the membranes, the placenta, or the fœtus itself.

The criminal means of producing abortion are of two kinds. *General*, or those which seek to produce the expulsion through the constitution of the mother, which are venesection, emetics, cathartics, diuretics, emmenagogues, comprising mercury, savin, and the *secale cornutum* (spurred rye, ergot), to which much importance has been attached; or *local or mechanical* means, which consist either of external violence applied to the abdomen or loins, or of instruments introduced into the uterus for the purpose of rupturing the membranes and thus bringing on premature action of the womb. The latter is the more generally resorted to, as being the most effectual. These local or mechanical means not unfrequently produce the death of the mother, at well as that of the fœtus.

At common law, an attempt to destroy a child *en ventre sa mere* appears to have been held in England to be a misdemeanor; Rosc. Cr. Ev. 4th Lond. ed. 260; 1 Russ. Cr. 3d Lond. ed. 671. At an early period it was held to be murder, in case of death of the child; 2 Whart. Cr. L. § 1220. In this country, it has been held that it is not an indictable offence, at common law, to administer a drug, or perform an operation upon a pregnant woman with her consent, with the intention and for the purpose of causing an abortion and premature birth of the fœtus of which she is pregnant, by means of which an abortion is in fact caused, unless, at the time of the administration of such drug or the performance of such operation, such woman was *quick* with child; 11 Gray 85; 2 Zabr. 52; 3 Clarke 274; 15 Iowa 177; 49 N. Y. 86; 78 Ky. 264; 33 Me. 48; 22 N. J. L. 52; 82 N. C. 653; 11 Humph. 159. A case in Kentucky citing all the earlier cases holds that this is the rule at common law, and must prevail in the absence of statute; 10 Cent. L. J. 338. But in Pennsylvania a contrary doctrine has been held; 13 Pa. 631; 6 Pa. 29. Wharton supports the latter doctrine on principle. See, also, 116 Mass. 343.

The former English statutes on this subject, the 43 Geo. III. c. 58, and 9 Geo. IV. c. 51, § 14, distinguished between the case where the woman was quick and was not quick with child; and under both acts the woman must have been pregnant at the time; 1 Mood. Cr. Cas. 216; 3 C. & P. 605. The terms of the act (24 and 25 Vict. c. 100, s. 62) are, "with intent to procure the miscarriage of any woman whether she be with child or not." See 1 Den. Cr. Cas. 18; 2 C. & K. 293.

When, in consequence of the means used to secure an abortion, the death of the woman ensues, the crime is murder; 41 Wis. 309; 9 Metc. 263; 1 Hale, P. C. 430; 1 East's P. C. 230. And if a person, intending to procure abortion, does an act which causes a child to be born so much earlier than the natural time that it is born in a state much less capable of living, and afterwards dies in consequence of its exposure to the ex-

ternal world, the person who by this misconduct so brings the child into the world, and puts it thereby in a situation in which it cannot live, is guilty of murder; and the mere existence of a possibility that something might have been done to prevent the death will not render it less murder; 2 C. & K. 784.

A woman who takes a potion given to her to cause a miscarriage, is not an accomplice with the person administering it; 39 N. J. L. 598. On a trial for criminal malpractice the party on whom the operation has been performed is not an accomplice; 155 Mass. 274.

In New York if a person advises a woman to take medicine to procure a miscarriage the crime of abortion is not complete unless the advice is acted on: 133 N. Y. 267.

Consult 1 Beck. Med. Jur. 288–331, 429–435; Rosc. Cr. Ev. 190; 1 Russ. Cr. 3d. Lond. ed. 671; 1 Briand, *Méd. Leg.* pt. 1, c. 4; 2 Whart. & Still. Med. Jur. § 84 *et seq.*; 1 Whart. Cr. L. 10th ed. § 592; 2 With. & Beech. Med. Jur. 97; 2 Hamilton, Leg. Med. 467; 2 Luff. For. Med. 172; Reese, Med. Jur. 458.

ABORTIVE TRIAL. Used "when a case has gone off, and no verdict has been pronounced without the fault, contrivance, or management of the parties." Jebb & B. 51.

ABORTUS. The fruit of an abortion; the child born before its time, incapable of life. See ABORTION: BIRTH; BREATH; DEAD-BORN; GESTATION; LIFE.

ABOUT. It means almost or approximately; near in time, quantity, number, quality or degree. The import of the qualifying word "about" is simply, that the actual quantity is a near approximation to that mentioned, and its effect is to provide against accidental variations; 115 U. S. 188. When there is a material and valuable variation, a court of equity upon a petition for specific performance will give the word its proper effect; 40 Ohio St. 341.

ABOUTISSEMENT (Fr.) An abuttal or abutment. See Guyot. Repert. Univ. *Aboutissans.*

ABOVE. Higher; superior. As, court above, bail above.

ABPATRUUS (Lat.). A great-great-uncle; or, a great-great-grandfather's brother. Du Cange, *Patruus.* It sometimes means uncle, and sometimes great-uncle.

ABRIDGE. In Practice. To shorten a declaration or count by taking away or severing some of the substance of it. Brooke, Abr. *Abridgment;* Comyn, Dig. *Abridgment;* 1 Viner, Abr. 109.

To abridge a plaint is to strike out a part of the demand and pray that the tenant answer to the rest. This was allowable generally in real actions where the writ was *de libero tenemento*, as assize, dower, etc., where the demandant claimed land of which the tenant was not seized. See 1 Wms. Saund. 207, n. 2; 2 *id.* 24, 330; Brooke, Abr. *Abridgment;* 1 Pet. 74; Stearns, Real Act. 204.

ABRIDGEMENT. An epitome or compendium of another and larger work, wherein the principal ideas of the larger work are summarily contained.

Copyright law. When fairly made, it may justly be deemed, within the meaning of the law, a new work, the publication of which will not infringe the copyright of the work abridged. The abridgment must be something more than a mere copy of the whole or parts of the original. It must be the result of independent labor other than copying, and there must be substantial fruits of authorship on the part of the maker; Drone, Copyr. 158; Chamier, Copyr. 127, 128; Copinger, Copyr. 35, 101; Bewes, Copyr. 13; 4 McLean 306; 2 Am. L. T. R. N. S. 402; 1 Bro. C. C. 450; Amb. 402; 1 Yo. & C. 301; 12 Ves. 470; 8 Jur. 183. See 16 U. C. B. 409; 4 Cliff. 79. For a discussion of this subject in which it is maintained that an abridgment is piratical, see Drone, Copyr. 44. See, also, 5 Am. L. T. R. 158; L. R. 8 Exch. 1.

An injunction will be granted against a mere colorable abridgment; 2 Atk. 143; 1 Bro. Ch. 451; 5 Ves. 709; Lofft 765; Ambl. 403; 1 Story 11; 3 *id.* 6; 1 Y. & C. Ch. 298; 2 Kent 382.

Abridgments of the law or digests of adjudged cases serve the very useful purpose of an index to the cases abridged; 5 Coke 25. Lord Coke says they are most profitable to those who make them; Co. Litt., in preface to the table at the end of the work. With few exceptions, they are not entitled to be considered authoritative. See 2 Wils. 1, 2; 1 Burr. 364; 1 W. Bla. 101; 3 Term 64, 241; and an article in the North American Review, July, 1826, p. 8, for an account of the principal abridgments, which was written by the late Justice Story, and is reprinted in his "Miscellaneous Writings," p. 79; Warren, Law Stud. 778.

ABROGATION. The destruction of or annulling a former law, by an act of the legislative power, or by usage.

A law may be abrogated, or only derogated from: it is abrogated when it is totally annulled; it is derogated from when only a part is abrogated; *derogatur legi, cum pars detrahitur; abrogatur legi, cum prorsus tollitur.* Dig. 50. 17. 1. 102. Lex *rogatur* dum fertur (when it is passed); *abrogatur* dum tollitur (when it is repealed); *derogatur* idem dum quoddam ejus caput aboletur (when any part of it is abolished); *subrogatur* dum aliquid ei adjicitur (when anything is added to it); *abrogatur* denique, quoties aliquid in ea mutatur (as often as anything in it is changed). Dupin, *Proleg Jur.* art. iv.

Express abrogation is that literally pronounced by the new law either in general terms, as when a final clause abrogates or repeals all laws contrary to the provisions of the new one, or in particular terms, as when it abrogates certain preceding laws which are named.

Implied abrogation takes place when the new law contains provisions which are posi-

tively contrary to the former laws, without expressly abrogating such laws; for it is a maxim, *posteriora derogant prioribus;* 10 Mart. La. 172, 560; and also when the order of things for which the law had been made no longer exists, and hence the motives which had caused its enactment have ceased to operate; *ratione legis omnino cessante, cessat lex;* Toullier, Dr. Civ. Fr. tit. prel. § 11, n. 151; Merlin, Répert. *Abrogation.*

ABSCOND. To go in a clandestine manner out of the jurisdiction of the courts, or to lie concealed, in order to avoid their process.

A person who departs from his usual place of abode secretly or suddenly, or retires or conceals himself from public view in order to avoid legal process; 2 Sneed 152; 2 Root 133.

ABSCONDING DEBTOR. One who absconds from his creditors.

The statutes of the various states, and the decisions upon them, have determined who shall be treated in those states, respectively, as absconding debtors, and liable to be proceeded against as such. A person who has been in a state only transiently, or has come into it without any intention of settling therein, cannot be treated as an absconding debtor; 2 Cai. 318; 15 Johns. 196; nor can one who openly changes his residence; 3 Yerg. 414; 5 Conn. 117; 43 Ill. 185. For the rule in Vermont, see 2 Vt. 489; 6 *id.* 614. It is not necessary that the debtor should actually leave the state; 7 Md. 209. It is essential that there be an intention to delay and defraud creditors. The fact of converting a large amount of goods into money by auction sales, at a sacrifice and clandestinely, furnishes a reasonable presumption that debtor intended to abscond or absent himself to avoid service of process upon him; 32 Mo. 296.

ABSENCE. The state of being away from one's domicile or usual place of residence.

A presumption of death arises after the absence of a person for seven years without having been heard from; Peake, Ev. c. 14, § 1; 2 Stark. Ev. 457, 458; Park, Ins. 433; 1 W. Bla. 404; 1 Stark. 121; 2 Campb. 113; 4 B. & Ald. 422; 4 Wheat. 150, 173; 15 Mass. 305; 18 Johns. 141; 1 Hardin 479; 71 Me. 72; 45 N. H. 467; 45 Barb. 124; 42 Pa. 159. One who is dead is not absent; 71 Me. 452.

In Louisiana a curator is appointed under some circumstances to take charge of the estate of those who are out of the state, during their absence; La. Civ. Code, art. 50, 51.

ABSENTEE. A landlord who resides in a country other than that from which he draws his rents. The discussions on the subject have generally had reference to Ireland. McCulloch, Polit. Econ.; 33 British Quarterly Review, 455. Also where a person has left his residence in a state, leaving no one to represent him.

ABSOILE. To pardon; to deliver from excommunication. Staunford, Pl. Cr. 72; Kelham. Sometimes spelled *Assoile*, which see.

ABSOLUTE (Lat. *absolvere*). Complete, perfect, final; without any condition or incumbrance; as an absolute bond (*simplex obligatio*) in distinction from a conditional bond; an absolute estate, one that is free from all manner of condition or incumbrance. See CONDITION.

A *rule* is said to be absolute when on the hearing it is confirmed and made final. A *conveyance* is said to be absolute, as distinguished from a mortgage or other conditional conveyance; 1 Powell, Mort. 125.

Absolute *rights* are such as appertain and belong to particular persons merely as individuals or single persons, as distinguished from relative rights, which are incident to them as members of society; 1 Sharsw. Bla. Com. 123; 1 Chit. Pr. 32.

Absolute *property* is where a man hath solely and exclusively the right and also the occupation of movable chattels; distinguished from a qualified property, as that of a bailee; 2 Sharsw. Bla. Com. 388; 2 Kent 347.

It may be used in the sense of vested; 17 Fed. Rep. 65; 29 Conn. 20.

ABSOLUTION. In Civil Law. A sentence whereby a party accused is declared innocent of the crime laid to his charge.

In Canon Law. A juridical act whereby the clergy declare that the sins of such as are penitent are remitted. The formula of absolution in the Roman Church is absolute; in the Greek Church it is deprecatory; in the Reformed Churches, declaratory. Among Protestants it is chiefly used for a sentence by which a person who stands excommunicated is released or freed from that punishment. Encyc. Brit.

In French Law. The dismissal of an accusation.

The term *acquitment* is employed when the accused is declared not guilty, and *absolution* when he is recognized as guilty but the act is not punishable by law or he is exonerated by some defect of intention or will; Merlin, Répert.

ABSOLUTISM. In Politics. That government in which public power is vested in some person or persons, unchecked and uncontrolled by any law or institution.

The word was first used at the beginning of this century, in Spain, where one who was in favor of the absolute power of the king, and opposed to the constitutional system introduced by the Cortes during the struggle with the French, was called *absolutista.* The term Absolutist spread over Europe, and was applied exclusively to absolute monarchism; but absolute power may exist in an aristocracy and in a democracy as well. Dr. Lieber, therefore, uses in his works the term Absolute Democracy for that government in which the public power rests unchecked in the multitude (practically speaking, in the majority).

ABSQUE ALIQUO INDE REDDENDO (Lat. without reserving any rent therefrom). A term used of a free grant by the crown. 2 Rolle, Abr. 502.

ABSQUE HOC (Lat.). Without this. See TRAVERSE.

ABSQUE IMPETITIONE VASTI (Without impeachment of waste). A term indicating freedom from any liability on the part of the tenant or lessee to answer in damages for the waste he may commit. See WASTE.

ABSQUE TALI CAUSA (Lat. without such cause). **In Pleading.** A form of replication in an action *ex delicto* which works a general denial of the whole matter of the defendant's plea of *de injuria*. Gould, Pl. c. 7, § 10.

ABSTENTION. **In French Law.** The tacit renunciation of a succession by an heir. Merlin, Répert.

ABSTRACT OF A FINE. A part of the record of a fine, consisting of an abstract of the writ of covenant and the concord; naming the parties, the parcel of land, and the agreement. 2 Bla. Com. 351.

ABSTRACT OF A TITLE. An epitome, or brief statement of the evidences of ownership of real estate.

An abstract should set forth briefly, but clearly, every deed, will, or other instrument, every recital or fact relating to the devolution of the title, which will enable a purchaser, or mortgagee, or his counsel, to form an opinion as to the exact state of the title.

In England this is usually prepared at the expense of the owner; 1 Dart, Vend. 279. The failure to deliver an abstract in England relieves the purchaser from his contract in law; *id.* 305. It should run back for sixty years; or, since the Act of 38 and 39 Vict. c. 78, forty years prior to the intended sale, etc.

In the United States, where offices for registering deeds are universal, and conveyancing much less complicated, abstracts are much simpler than in England, and are usually prepared at the expense of the purchaser, etc., or by his conveyancer.

Where an abstract of title is made for a vendor, warranted to be true and perfect, the vendee refusing to take the property without it, the company was held liable for omissions in it; 89 Tenn. 431. Where the register of deeds records full satisfaction instead of a partial release on the margin of the mortgage record, a person relying on the marginal entry is guilty of negligence; 51 Minn. 282.

See Whart. Law Dict.; Ward. Abstr.; 7 W. Va. 390.

ABUSE. Everything which is contrary to good order established by usage. Merlin, Répert.

Among the civilians, abuse has another signification; which is the destruction of the substance of a thing in using it. For example, the borrower of wine or grain *abuses* the article borrowed by using it, because he cannot enjoy it without consuming it.

ABUSE OF A FEMALE CHILD. An injury to the genital organs in an attempt at carnal knowledge, falling short of actual penetration. 58 Ala. 376. See RAPE.

ABUT. To reach, to touch.

In old law, the ends were said to abut, the sides to adjoin. Cro. Jac. 184.

To take a new direction; as where a bounding line changes its course. Spelman, Gloss. *Abuttare*. In the modern law, to bound upon. 2 Chit. Pl. 660.

ABUTTALS (Fr.). The buttings or boundings of lands, showing to what other lands, highways, or places they belong or are abutting. Termes de la Ley.

ABUTTER. One whose property abuts, is contiguous or joins at a border or boundary, as where no other land, road or street intervenes.

AC ETIAM (Lat. and also). The introduction of the statement of the real cause of action, used in those cases where it was necessary to allege a fictitious cause of action to give the court jurisdiction, and also the real cause in compliance with the statutes. It was first used in the K. B., and was afterwards adopted by Lord C. J. North in addition to the *clausum fregit* writs of his court upon which writs of *capias* might issue. He balanced awhile whether he should not use the words *nec non* instead of *ac etiam*. It is sometimes written *acetiam*. 2 Stra. 933. This clause is no longer used in the English courts. 2 Will. IV. c. 39. See Burgess, Ins. 149–157; 3 Bla. Com. 288.

AC ETIAM BILLÆ. And also to a bill. See AC ETIAM.

ACCEDAS AD CURIAM (Lat. that you go to court). **In Eng. Law.** An original writ issuing out of chancery and directed to the sheriff, for the purpose of removing a replevin suit from the Hundred Court or Court Baron before one of the superior courts of law. It directs the sheriff *to go to the lower court*, and there cause the plaint to be recorded and to return, etc. See Fitzherbert, Nat. Brev. 18; Dy. 169.

ACCEDAS AD VICE COMITEM (Lat. that you go to the sheriff). **In Eng. law.** A writ directed to the coroner, commanding him to deliver a writ to the sheriff, when the latter, having had a *pone* delivered him, suppressed it. Reg. Orig. 83.

ACCELERATION. The shortening of the time for the vesting in possession of an expectant interest. Wharton.

ACCEPTANCE (Lat. *accipere*, to receive). The receipt of a thing offered by another with an intention to retain it, indicated by some act sufficient for the purpose. 2 Parsons, Contr. 221.

The element of receipt must enter into every acceptance, though receipt does not necessarily mean in this sense some actual manual taking. To this element there must be added an intention to retain. This intention may exist at the time of the receipt, or subsequently; it may be indicated by words, or acts, or any medium understood by the parties; and an acceptance of goods will be implied from mere detention, in many instances.

An acceptance involves very generally the idea of a receipt in consequence of a previous undertaking on the part of the person offering to deliver such a thing as the party accepting is in some manner bound to receive. It is through this meaning that the term acceptance, as used in reference to bills of exchange, has a relation to the more general use of the term. As distinguished from assent, acceptance would denote receipt of something in compliance with, and satisfactory fulfilment of, a

contract to which assent had been previously given. See ASSENT.

Under the statute of frauds (29 Car. II. c. 3) delivery and *acceptance* are necessary to complete an oral contract for the sale of goods, in most cases. In such cases it is said the acceptance must be absolute and past recall; 2 Exch. 290; 5 Railw. Cas. 496; 1 Pick. 278; 10 *id.* 326; 16 Wall. 146. If an article is found defective, but is retained and used, it is a sufficient acceptance; 3 N. Y. Misc. R. 296. If goods are delivered to a third person by order of the purchaser they are deemed to have been received and accepted by the latter through his agent; 88 Ga. 578. Where a verbal contract was made for the sale of goods to be delivered at a specified point where purchaser was to pay freight for the seller, it was held that the acceptance by the carrier and possession of freight after reaching its destination, was not such an acceptance by purchaser as would take it out of the statute; 64 Vt. 147. As to how far a right to make future objections invalidates an acceptance, see 3 B. & Ald. 521; 10 Q. B. 111; 6 Exch. 903.

Of a Dedication. If an offer to dedicate land for a street is not formally accepted, to constitute an acceptance, the use by the public must be shown to have been under claim of right; 81 Cal. 524; but if there is a failure to accept within a reasonable time, no rights are acquired in a platted street which a city failed to use for years; 84 Mich. 54. Where land is described as bounded on a certain street and so sold, it is at least an offer of dedication, and it is a sufficient acceptance if in a resolution of the city council they accept as public all streets which have been dedicated by the owners; 83 Cal. 623. Where a city constructs sewers through land dedicated for a street and files liens against abutting property-holders for the improvements, it is an acceptance of the dedication; 152 Pa. 494; or where the public use the street and the city repairs it; 37 N. E. Rep. (Ind.) 133.

A common law as well as a statutory dedication must be completed by acceptance, and a failure to accept will prevent the opening of a street as against a person in possession for years; 31 Ill. App. 284.

Of Bills of Exchange. An engagement to pay the bill in money when due. 4 East 72; 19 Law Jour. 297; Byles, Bills 288.

Acceptances are said to be of the following kinds:

Absolute, which is a positive engagement to pay the bill according to its tenor.

Conditional, which is an undertaking to pay the bill on a contingency.

The holder is not bound to receive such an acceptance, but if he does receive it, must observe its terms; 4 M. & S. 466; 2 Wash. C. C. 485; Dan. Neg. Inst. 411. For some examples of what do and what do not constitute conditional acceptances, see 6 C. & P. 218; 3 C. B. 841; 15 Miss. 245; 7 Me. 126; 10 Ala. N. S. 533; 1 Strob. 271; 4 W. & S. 346; 105 Mass. 401; 10 C. B. N. S. 214; 44 Ga. 513; 73 Ill. 469; 62 Me. 498; 14 Cal. 407; 36 Neb. 844; 65 Hun 625; 37 Minn. 191; 29 W. Va. 462.

Express or *absolute*, which is an undertaking in direct and express terms to pay the bill.

Implied, which is an undertaking to pay the bill inferred from acts of a character which fairly warrant such an inference.

Where one receives certain goods and sells them, knowing that a draft has been drawn on him for their price, the retaining of the proceeds is equivalent to an acceptance of the draft; 153 Ill. 234.

If the payee writes upon a bill of exchange drawn upon him the words "payable the 15th day of May, 1883," and signs it, it constitutes a qualified acceptance; 37 Minn. 191.

Partial, which is one varying from the tenor of the bill.

An acceptance to pay part of the amount for which the bill is drawn, 1 Strange 214; 2 Wash. C. C. 485; or to pay at a different time, 14 Jur. 806; 25 Miss. 376; Molloy, b. 2, c. 10, § 20; or at a different place, 4 M. & S. 462, would be partial.

Qualified, which are either conditional or partial, and introduce a variation in the sum, time, mode, or place of payment; 1 Dan. Neg. Inst. 414.

Supra protest, which is the acceptance of the bill after protest for non-acceptance by the drawee, for the honor of the drawer or a particular indorser.

When a bill has been accepted *supra protest* for the honor of one party to the bill, it may be accepted *supra protest* by another individual for the honor of another; Beawes, Lex Merc. *Bills of Exchange*, pl. 52; 5 Camp. 447.

The acceptance must be made by the drawee or some one authorized to act for him. The drawee must have capacity to act and bind himself for the payment of the bill, or it may be treated as dishonored. See ACCEPTOR SUPRA PROTEST; 2 Q. B. 16. As to when an acceptance by an agent, an officer of a corporation, etc., on behalf of the company, will bind the agent or officer personally, see 6 C. B. 766; 9 Exch. 154; 4 N. Y. 208; 8 Pick. 56; 11 Me. 267; 2 South. 828; see also 17 Wend. 40; 5 B. Monr. 51; 2 Conn. 660; 19 Me. 352; 16 Vt. 220; 7 Miss. 371.

The acceptance and delivery of negotiable paper on Sunday is void between the parties, but if dated falsely as of another day, it is good in the hands of an innocent holder; 76 Ga. 218.

It may be made before the bill is drawn, in which case it must be in writing; 3 Mass. 1; 15 Johns. 6; 2 Wend. 545; 1 Bail. 522; 2 Green 239; 2 Dana 95; 5 B. Monr. 8; 15 Pa. 453; 2 Ind. 488; 3 Md. 265; 1 Pet. 264; 2 Wheat. 66; 2 McLean 462; 2 Blatchf. 335. See 1 Story 22; 43 Minn. 260. It may be made after it is drawn and before it comes due, which is the usual course, or after it becomes due; 1 H. Bla. 313; 2 Green 339; or even after a previous refusal to accept; 5 East 514; 1 Mas. 176. It must be made within twenty-four hours after presentment, or the holder may treat the bill as dishonored; Chit. Bills, 212, 217. And upon refusal to accept, the bill is at once dishonored, and should be protested; Chit. Bills, 217.

It may be in writing on the bill itself or on another paper; 4 East 91; 97 N. C. 1; and it seems that the holder may insist on having a written acceptance, and in default thereof consider the bill as dishonored; 1 Dan. Neg. Inst. 406; or it may be oral: 6 C. & P. 218; 1 Wend. 522; 2 Green 339; 1 Rich. 249; 2 Metc. 53; 22 N. H. 153; 115 Mass. 374; 91 U. S. 406; 75 Ill. 595; 11 Moore 320. An acceptance by telegraph has been held good; 87 Ill. 98; 109 Mass. 414; 39 Fed. Rep. 163; 41 Fed. Rep. 381; 47 Fed. Rep. 867; 51 Fed Rep. 168; but must now be in writing, in England, New York, Missouri and Pennsylvania; Stat. 19 & 20 Vict. c. 97, § 6; 55 Mo. App. 81; 57 *id.* 556; 156 Pa. 414; 161 *id.* 199. The usual form is by writing "accepted" across the face of the bill and signing the acceptor's name; 1 Pars. Contr. 223; 1 Man. & R. 90; but the drawee's name alone is sufficient, or any words of equivalent force to accepted. See Byles, Bills 147; 1 Atk. 611; 1 Man. & R. 90; 21 Pick. 307; 9 Gill 350. So if the drawee writes the word "accept" and signs his name; 22 Neb. 697.

The drawee cannot make his acceptance after the bill has been delivered to the holder's agent, though it had not been communicated to the holder; 152 Mass. 34. See 54 N. J. L. 599.

A parol promise to accept a bill of exchange, upon sufficient consideration, binds the acceptor; 142 U. S. 116; 91 U. S. 121; 75 Ill. 595; 85 *id.* 551; 11 M. & W. 383; 71 Tex. 81; 99 N. C. 49; 9 Wash. 659. Where the holder of an overdue bill of exchange by parol agreement accepts pay in instalments, the failure of acceptor to carry out his contract does not release the drawer; 2 Pa. Dist. R. 279.

Consult Bayley, Byles, Chitty, Parsons, Story, on Bills; Pars. Cont.; Dan. Neg. Inst.

In Insurance. Acceptance of abandonment in insurance is is effect an acknowledgement of its sufficiency, and perfects the right of the assured to recover for a total loss if the cause of loss and circumstances have been truly made known. No particular form of acceptance is requisite, and the underwriter is not obliged to say whether he accepts; 2 Phil. Ins. § 1689. An acceptance may be a constructive one, as by taking possession of an abandoned ship to repair it without authority so to do; 2 Curt. 322; or by retaining such possession an unreasonable time, under a stipulation authorizing the underwriter to take such possession; 16 Ill. 235.

Acceptance of *rent* destroys the effect of a notice to quit for non-payment of such rent; 4 B. & Ald. 401; 13 Wend. 530; 11 Barb. 33; 1 Bush 418; 2 N. H. 163; 19 Vt. 587; and may operate as a waiver of forfeiture for other causes; 3 Co. 64; 1 Wms. Saund. 287 *c*, note; 3 Cow. 220; 5 Barb. 339; 3 Cush. 325.

ACCEPTILATION. In Civil Law. A release made by a creditor to his debtor of his debt, without receiving any consideration. Ayl. Pand. tit. 26, p. 570. It is a species of donation, but not subject to the forms of the latter, and is valid unless in fraud of creditors. Merlin, Répert.

Acceptilation may be defined *verborum conceptio qua creditor debitori, quod debet, acceptum fert;* or, a certain arrangement of words by which, on the question of the debtor, the creditor, wishing to dissolve the obligation, answers that he admits as received what in fact he has not received. The acceptilation is an imaginary payment; Dig. 46. 4. 1, 19; Dig. 2. 14. 27. 9; Inst. 3. 30. 1.

ACCEPTOR. One who accepts a bill of exchange. 3 Kent 75.

The party who undertakes to pay a bill of exchange in the first instance.

The drawee is in general the acceptor; and unless the drawee accepts, the bill is dishonored. The acceptor of a bill is the principal debtor, and the drawer the surety. He is bound, though he accepted without consideration and for the sole accommodation of the drawer. By his acceptance he admits the drawer's handwriting; for before acceptance it was incumbent upon him to inquire into the genuineness of the drawer's handwriting; 3 Kent 75; 3 Burr. 1384; 1 W. Bla. 390; 4 Dall. 204.

The drawee by acceptance only vouches for the genuineness of the signature of the drawer and not of the body of the instrument; 64 N. Y. 316; 40 N. Y. 323; 63 Ala. 519.

ACCEPTOR SUPRA PROTEST. One who accepts a bill which has been protested, for the honor of the drawer or any one of the endorsers.

Any person, even the drawee himself, may accept a bill *supra protest;* Byles, Bills *262, and two or more persons may become acceptors *supra protest* for the honor of different persons. A *general* acceptance *supra protest* is taken to be for the honor of the drawer; Byles, Bills *263. The obligation of an acceptor *supra protest* is not absolute but only to pay if the drawee do not; 16 East 391. See 3 Wend. 491; 19 Pick. 220; 8 N. H. 66. An acceptor *supra protest* has his remedy against the person for whose honor he accepted, and against all persons who stand prior to that person. If he takes up the bill for the honor of the endorser, he stands in the light of an endorsee paying full value for the bill, and has the same remedies to which an endorsee would be entitled against all prior parties, and he can, of course, sue the drawer and endorser; 1 Ld. Raym. 574; 1 Esp. 112; 3 Kent 75; Chit. Bills 312. The acceptor *supra protest* is required to give the same notice, in order to charge a party, which is necessary to be given by other holders; 19 Pick. 220.

If a bill is accepted and is subsequently dishonored, the acceptor cannot then accept for the honor of the endorser, as he is already bound; 13 Ves. Jr. 180.

ACCESS. Approach, or the means or power of approaching.

Sometimes by access is understood sexual intercourse; at other times, the opportunity of communicating together so that sexual intercourse may have taken place, is also called access.

In this sense a man who can readily be in company with his wife is said to have access to her; and in that case her issue are presumed to be his issue. But this presumption may be rebutted by positive evidence that no sexual intercourse took place; 1 Turn. & R. 141.

Parents are not allowed to prove non-access for the purpose of bastardizing the issue of the wife, whether the action be civil or criminal, or whether the proceeding is one of settlement or bastardy, or to recover property claimed as heir at law; Bull. N. P. 113; 2 Munf. 242; 3 Hawks 323; 3 Hayw. 221; 1 Grant, Cas. 377; 3 Pai. Ch. 129; 75 Pa. 436; 70 N. C. 263.

The modern doctrine is that children born in lawful wedlock (when there has been no divorce *a mensa et thoro*) are presumed legitimate, but this presumption may be rebutted by evidence (not that of the parents) tending to show that intercourse could not have taken place, impotency, etc. Where there were opportunities for intercourse, evidence is generally not allowed to establish illegitimacy; 2 Greenl. Ev. §§ 150, 151, and n. See 9 Beav. 552; 1 Whart. Ev. § 608; 2 *id.* § 1298; 1 Bish. Mar. & Div. §§ 1170, 1179.

Non-access is not presumed from the mere fact that husband and wife lived apart; 1 Gale & D. 7. See 3 C. & P. 215; 1 Sim. & S. 153; 1 Greenl. Ev. § 28.

ACCESSARY. **In Criminal Law.** He who is not the chief actor in the perpetration of the offence, nor present at its performance, but is some way concerned therein, either before or after the fact committed.

An accessary before the fact is one who, being absent at the time of the crime committed, yet procures, counsels, or commands another to commit it; 1 Hale, Pl. Cr. 615. With regard to those cases where the principal goes beyond the terms of the solicitation, the approved test is, "Was the event alleged to be the crime to which the accused is charged to be accessary, a probable effect of the act which he counselled?" 1 F. & F. Cr. Cas. 242; Rosc. Cr. Ev. 181. When the act is committed through the agency of a person who has no legal discretion or a will, as in the case of a child or an insane person, the incitor, though absent when the crime was committed, will be considered, not an accessary, for none can be accessary to the acts of a madman, but a principal in the first degree; 1 Hale, Pl. Cr. 514; 12 Wheat. 469. But if the instrument is aware of the consequences of his act, he is a principal in the first degree, and the employer, if he is absent when the act is committed, is an accessary before the fact; 1 R. & R. Cr. Cas. 363; 1 Den. Cr. Cas. 37; 1 C. & K. 589; or if he is present, as a principal in the second degree; 1 Fost. Cr. Cas. 349; unless the instrument concur in the act merely for the purpose of detecting and punishing the employer, in which case he is considered as an innocent agent.

An accessary after the fact is one who, knowing a felony to have been committed, receives, relieves, comforts, or assists the felon; 4 Bla. Com. 37.

No one who is a principal can be an accessary; but if acquitted as principal he may be indicted as an accessary after the fact; 14 R. I. 283.

In certain crimes, there can be no accessaries; all who are concerned are principals, whether they were present or absent at the time of their commission. These are treason, and all offences below the degree of felony; 4 Bla. Com. 35; Hawk. Pl. Cr. b. 2, c. 29, § 16; 1 Whart. Cr. L. § 223; 2 Den. Cr. Cas. 453; 5 Cox, Cr. Cas. 521; 2 Mood. Cr. Cas. 276; 8 Dana 28; 20 Miss. 58; 3 Gray 448; 14 Mo. 137; 18 Ark. 198; 4 J. J. Marsh. 182; 67 Ill. 587; 90 Ala. 583; 45 Fed. Rep. 851. Such is the English law; but in the United States it appears not to be determined as regards the cases of persons assisting traitors. Sergeant, Const. Law 382; 4 Cranch 472, 501; U. S. *v.* Fries, 3 Dall. 515. See 2 Wall. Jr. 134, 139; 16 Wall. 147; 12 Wall. 347. That there cannot be an accessary in cases of treason, see Davis, Cr. L. 38. *Contra*, 1 Whart. Cr. L. § 224.

It is evident there can be no accessary when there is no principal; if a principal in a transaction be not liable under our laws, no one can be charged as a mere accessary to him; 1 Woodb. & M. 221; 28 Tex. App. 526. But see 6 Ohio Cir. Ct. R. 331.

Where two persons are indicted, one as principal and the other as aider or abettor, the latter may be convicted as principal, where the evidence shows he was the perpetrator of the deed; 92 Ky. 1.

By the rules of the common law, an accessary cannot be tried, without his consent, before the conviction of the principal; Fost. Cr. Cas. 360. This is altered by statute in most of the states. This rule is said to have been the outcome of strict medieval logic. The trial of the accused being by sacred or supernatural processes, it would be a shame to the law if the principal were acquitted after the accessary had been hanged. 2 Poll. & Maitl. 508.

But an accessary to a felony committed by several, some of whom have been convicted, may be tried as accessary to a felony committed by these last; but if he be indicted and tried as accessary to a felony committed by them all, and some of them have not been proceeded against; it is error; 7 S. & R. 491; 10 Pick. 484. If the principal is dead, the accessary cannot, by the common law, be tried at all; 16 Mass. 423.

One indicted as an aider and abettor of the crime of murder may be placed on trial, convicted and sentenced for that offence, notwithstanding the principal offender had been tried previously, and convicted and sentenced for manslaughter only; 46 Ohio St. 457.

See also Whart. Crim. Law; Desty, Crim. Law; Bishop, Crim. Law; Whart. Cr. Ev.; Roscoe, Cr. Ev.

ACCESSIO (Lat.). An increase or addition; that which lies next to a thing, and is supplementary and necessary to the prin-

cipal thing; that which arises or is produced from the principal thing. Calvinus, Lex.

A manner of acquiring the property in a thing which becomes united with that which a person already possesses.

The doctrine of property arising from accessions is grounded on the rights of occupancy. It is said to be of six kinds in the Roman law.

First. That which assigns to the owner of a thing its products, as the fruit of trees, the young of animals.

Second. That which makes a man the owner of a thing which is made of another's property, upon payment of the value of the material taken. See La. Civ. Code, art. 491. As where wine, bread, or oil is made of another man's grapes or olives; 2 Bla. Com. 404; 10 Johns. 288.

Third. That which gives the owner of land new land formed by gradual deposit. See ALLUVION.

Fourth. That which gives the owner of a thing the property in what is added to it by way of adorning or completing it: as if a tailor should use the cloth of B. in repairing A.'s coat, all would belong to A.; but B. would have an action against both A. and the tailor for the cloth so used. This doctrine holds in the common law; F. Moore 20; Poph. 38; Brooke, Abr. *Propertie* 23.

Fifth. That which gives islands formed in a stream to the owner of the adjacent lands on either side.

Sixth. That which gives a person the property in things added to his own so that they cannot be separated without damage. Guyot, Répert. Univ.

An accessary obligation, and sometimes also the person who enters into an obligation as surety in which another is principal. Calvinus, Lex.

ACCESSION. The right to all which one's own property produces, whether that property be movable or immovable, and the right to that which is united to it by accessary, either naturally or artificially. 2 Kent 360; 2 Bla. Com. 404.

If a man hath raised a building upon his own ground with the material of another, or, on the contrary, if a man shall have built with his own materials upon the ground of another, in either case the edifice becomes the property of him to whom the ground belongs; for every building is an accession to the ground upon which it stands; and the owner of the ground, if liable at all, is only liable to the owner of the materials for the value of them; Inst. 2. 1. 29, 30; 2 Kent 362. And the same rule holds where trees, vines, vegetables, or fruits are planted or sown in the ground of another; Inst. 2. 1. 31, 32.

The building of a rail fence on another's land vests the rails in the owner of the land; 12 Ired. 297. And see 7 Johns. 473; 33 Me. 404.

If the materials of one person are united by labor to the materials of another, so as to form a single article, the property in the joint product is, in the absence of any agreement, in the owner of the principal part of the materials by accession; 7 Johns. 473; 5 Pick. 177; 6 *id.* 209; 32 Me. 404; 16 Conn. 322; Inst. 2. 1. 26; 15 Mass. 242; 22 Mich. 311; 21 Pick. 305; 49 N. Y. 35. But a vessel built of materials belonging to different persons, it has been said, will belong to the owner of the keel, according to the rule, *proprietas totius navis carinæ causam sequitur;* 2 Kent 361; 6 Pick. 209; 7 Johns. 473; 11 Wend. 139. It is said to be the doctrine of the civil law, that the rule is the same though the adjunction of materials may have been dishonestly contrived; for, in determining the right of property in such a case, regard is had only to the *things joined*, and not to *the persons*, as where the materials are changed in species; Wood Inst. 93; Inst. 2. 1. 25. And see ADJUNCTION.

The tree belongs to the owner of the land on which the root is, and its fruit is to the owner of the tree; 1 Ld. Raym. 737; although limbs overhang a neighbor's land; 46 Barb. 337. The original title to ice is in the possessor of the water where it is formed; 41 Mich. 318; 33 Ind. 402.

Where, by agreement, an article is manufactured for another, the property in the article, while making and when finished, vests in him who furnished the whole or the principal part of the materials; and the maker, if he did not furnish the same, has simply a lien upon the article for his pay; 2 Denio 268; 10 Johns. 268; 15 Mass. 242; 4 Ired. 102; 49 Mich. 641; 21 Barb. 92; 52 Me. 63.

The increase of an animal, as a general thing, belongs to its owner; 30 Mo. 154; 55 Me. 184; 64 Ill. 238; but, if it be let to another, the person who thus becomes the temporary proprietor will be entitled to its increase; 8 Johns. 435: Inst. 2. 1. 38; 55 Me. 184; 33 Mo. 154; 46 Mich. 131; though it has been held that this would not be the consequence of simply putting a mare to pasture, in consideration of her services; 2 Pa. 166. The increase of a female animal held under a bailment or executory contract belongs to the bailor or vendor until the agreed price is paid; 55 Me. 113; 56 Ala. 400. The Civil Code of Louisiana, following the Roman law, makes a distinction in respect of the issue of slaves, which, though born during the temporary use or hiring of their mothers, belong not to the hirer, but to the permanent owner; Inst. 2. 1. 37; and see 31 Miss. 557; 4 Sneed 99; 2 Kent 361; 11 How. 396. But the issue of slaves born during a tenancy for life belong to the tenant for life; 7 Harr. & J. 257.

If there be a sale, mortgage, or pledge of a chattel, carried into effect by delivery or by a recording of the mortgage where that is equivalent to a delivery, and other materials are added, afterwards, by the labor of the vendor or mortgagor, these pass with the principal by accession; 12 Pick. 83; 1 R. I. 511.

If, by the labor of one man, the property of another has been converted into a thing of different species, so that its identity is destroyed, the original owner can only recover the value of the property, in its unconverted state, and the article itself will belong to the person who wrought the conversion, if he wrought it *believing the material to be his own.* Such a change is said to be wrought when wheat is made into bread, olives into oil, or grapes into wine; Inst. 2. 1. 25; 4 Denio 332; Year B. 5 H. VII. 15;

Brooke, Abr. *Property* 23; or bricks out of clay; 29 Neb. 227.

But, if there be a mere change of form or value, which does not destroy the identity of the materials, the original owner may still reclaim them or recover their value as thus improved; Brooke, Abr. *Property* 23; F. Moore 20; 2 N. Y. 379; 9 Barb. 440. So, if the change have been wrought by a wilful trespasser, or by one who knew that the materials were not his own; in such case, however radical the change may have been, the owner may reclaim them, or recover their value in their new shape: thus, where whiskey was made out of another's corn, 2 N. Y. 379; shingles out of another's trees, 9 Johns. 362; coals out of another's wood, 6 Johns. 168; 12 Ala. N. S. 590; leather out of another's hides, 21 Barb. 92; in all these cases, the change having been made by one who knew the materials were another's, the original owner was held to be entitled to recover the property, or its value in the improved or converted state. And see 6 Hill 425; 2 Rawle 427; 5 Johns. 349; 21 Me. 287; 11 Metc. 493; Story, Bailm. § 40; 1 Brown, Civ. and Adm. Law, 240, 241.

An aerolite which falls from the sky and is imbedded in the soil to a depth of 3 feet is the property of the owner of the land on which it falls, rather than of the person who finds it; 86 Ia. 71.

In International Law. The absolute or conditional acceptance, by one or several states, of a treaty already concluded between other sovereignties. Merlin, Répert. *Accession.*

ACCESSORY. Any thing which is joined to another thing as an ornament, or to render it more perfect.

For example, the halter of a horse, the frame of a picture, the keys of a house, and the like, each belong to the principal thing. The sale of the materials of a newspaper establishment will carry with it, as an accessory, the subscription list; 2 Watts 111; but a bequest of a house would not carry the furniture in it, as accessory to it. Domat, Lois Civ. Part 2, liv. 4, tit. 2, s. 4, n. 1. *Accessorium non ducit, sed sequitur principale.* Co. Litt. 152, *a.*

See ACCESSION; ADJUNCTION; APPURTENANCES. Used also in the same sense as ACCESSARY, which see.

ACCESSORY ACTIONS. In Scotch Law. Those which are in some degree subservient to others. Bell Dict.

ACCESSORY CONTRACT. One made for assuring the purpose of the performance of a prior contract, either by the same parties or by others; such as suretyship, mortgages, and pledges.

It is a general rule that payment or release of the debt due, or the performance of a thing required to be performed by the first or principal contract, is a full discharge of such accessory obligation; Pothier, Ob. 1, c. 1, s. 1, art. 2, n. 14; *id.* n. 182, 186; see 8 Mass. 551: 5 Metc. 310; 7 Barb. 22; 2 Barb. Ch. 119; 1 Hill & D. 65; 6 Pa. 228; 24 N. H. 484; 3 Ired. 337; and that an assignment of the principal contract will carry the accessory contract with it: 7 Pa. 280; 17 S. & R. 400; 5 Cow. 202; 5 Cal. 515; 4 Iowa 434; 24 N. H. 484.

If the accessory contract be a contract by which one is to answer for the debt, default or miscarriage of another, it must, under the statute of frauds, be in writing, and disclose the consideration, either explicitly, or by the use of terms from which it may be implied; 5 M. & W. 128; 5 B. & Ad. 1109; 6 Bingh. 201; 8 Cush. 156; 15 Pa. 27; 13 N. Y. 232; 4 Jones, N. C. 287; 62 Mich. 454. Such a contract is not assignable so as to enable the assignee to sue thereon in his own name; 21 Pick. 140; 5 Wend. 307. A pledge of property to secure the debt of another does not come within the statute of frauds; 76 Cal. 171.

An accessory contract of this kind is discharged not only by the fulfilment or release of the principal contract, but also by any material change in the terms of such contract by the parties thereto; for the surety is bound only by the precise terms of the agreement he has guaranteed; 2 Nev. & P. 126; 9 Wheat. 680; 1 Eng. L. & Eq. 1; 3 Wash. C. C. 70; 12 N. H. 320; 13 *id.* 240. Thus, the surety will be discharged if the right of the creditor to enforce the debt be suspended for any definite period, however short; and a suspension for a day will have the same effect as if it were for a month or a year; 2 Ves. Sen. 540; 2 White & T. Lead. Cas. 707; 5 Ired. Eq. 91; 3 Denio 512; 2 Wheat. 253; 28 Vt. 209. But the surety may assent to the change, and waive his right to be discharged because of it; 14 N. H. 240; 2 McLean 99; 5 Ohio 510; 8 Me. 121.

If a valuable consideration passes at the time to the promisor, a verbal promise to pay the debt of another is a new and original undertaking, and not within the statute of frauds; 85 Tenn. 224; 85 Ala. 127; 62 Mich. 377.

If the parties to the principal contract have been guilty of any misrepresentation, or even concealment, of any material fact, which, had it been disclosed, would have deterred the surety from entering into the accessory contract, the security so given is voidable at law on the ground of fraud; 5 Bingh. N. C. 156; B. & C. 605; 1 B. & P. 419; 9 Ala. N. S. 42; 2 Rich. 590; 10 Clark & F. 936. A surety ceases to be liable for default of a firm after it has been changed by the addition of new members; 148 Ill. 453. The party giving a letter of guarantee is not bound until it is accepted; 7 Pet. 125.

So the surety will be discharged should any condition, express or implied, that has been imposed upon the creditor by the accessory contract, be omitted by him; 8 Taunt. 208; 14 Barb. 123; 6 Cal. 24; 27 Pa. 317; 9 Wheat. 680; 17 Wend. 179, 422. If a surety alters the original contract to his own prejudice, he is presumed to consent thereto and is not discharged; 9 C. C. A. 366.

An accessory contract to guarantee an original contract which is void, has no

binding effect; 7 Humphr. 261; and see 27 Ala. N. S. 291.

ACCESSORY OBLIGATIONS. In Scotch Law. Obligations to antecedent or primary obligations, such as obligations to pay interest, etc. Erskine, Inst. lib. 3, tit. 3, § 60.

ACCIDENT (Lat. *accidere*,—*ad*, to, and *cadere*, to fall). An event which, under the circumstances, is unusual and unexpected by the person to whom it happens.

The happening of an event without the concurrence of the will of the person by whose agency it was caused; or the happening of an event without any human agency. The burning of a house in consequence of a fire made for the ordinary purposes of cooking or warming the house is an accident of the first kind; the burning of the same house by lightning would be an accident of the second kind; 1 Fonbl. Eq. 374, 375, n.; 32 Conn. 85; 76 N. C. 322.

In Equity Practice. Such an unforeseen event, misfortune, loss, act, or omission as is not the result of any negligence or misconduct in the party; Francis, Max. 87; Story, Eq. Jur. § 78.

An occurrence in relation to a contract which was not anticipated by the parties when the same was entered into, and which gives an undue advantage to one of them over the other in a court of law; Jeremy, Eq. 358. This definition is objected to, because, as accidents may arise in relation to other things besides contracts, it is inaccurate in confining accidents to contracts; besides, it does not exclude cases of unanticipated occurrence resulting from the negligence or misconduct of the party seeking relief. See also 1 Spence, Eq. Jur. 628. In many instances it closely resembles MISTAKE, which see.

In general, courts of equity will relieve a party who cannot obtain justice at law in consequence of an accident which will justify the interposition of a court of equity.

The jurisdiction which equity exerts in case of accident is mainly of two sorts: over bonds with penalties to prevent a forfeiture where the failure is the result of accident; 2 Freem. Ch. 128; 1 Spence, Eq. Jur. 629; 25 Ala. N. S. 452; 9 Ark. 533; 4 Paige, Ch. 148; 4 Munf. 68; 48 Pa. 450; as sickness; 1 Root 298, 310; or where the bond has been lost; 5 Ired. Eq. 331; but if the penalty be liquidated damages, there can be no relief; Merwin, Eq. § 409. And, second, where a negotiable or other instrument has been lost, in which case no action lay at law, but where equity will allow the one entitled to recover upon giving proper indemnity; 1 Ves. Ch. 338; 16 *id.* 430; 4 Price 176; 7 B. & C. 90; 101 Mass. 370; Bispham's Eq. § 177. In some states it has been held that a court of law can render judgment for the amount, but requires the defendant to give a bond of indemnity: 34 Conn. 546; 8 Conn. 431; 10 Cush. 421. Relief against a penal bond can now be obtained in almost all common-law courts; Merwin, Eq. § 411.

The ground of equitable interference where a party has been defeated in a suit at law to which he might have made a good defence had he discovered the facts in season, may be referred also to this head; 2 Rich. Eq. 63; 3 Ga. 226; 7 Humphr. 130; 18 Miss. 502; 6 How. 114. See 4 Ired. Eq. 178; but in such case there must have been no negligence on the part of the defendant; 18 Miss. 103; 7 Humphr. 120; 1 Morr. 150; 7 B. Monr. 120.

Under this head equity will grant relief in cases of the defective exercise of a power in favor of a purchaser, creditor, wife, child, or charity, but not otherwise; Bisph. Eq. § 182. So also in other cases, viz., where a testator cancels a will, supposing that a later will is duly executed, which it is not; where boundaries have been accidentally confused; where there has been an accidental omission to endorse a promissory note, etc.; *id.* § 183.

See INEVITABLE ACCIDENT; MISTAKE; ACT OF GOD.

It is exercised by equity where there is not a plain, adequate, and complete remedy at law; 44 Me. 206; but not where such a remedy exists; 9 Gratt. 379; 5 Sandf. 612; and a complete excuse must be made; 14 Ala. N. S. 342.

ACCIDENT INSURANCE. An insurance against injury or loss of life which, applied to a particular class of risks, depends upon essentially the same principles as other insurance. 1 A. & E. Encyc. 87. See 10 Ex. R. 45; 23 L. J. Ex. 249; 22 Hun 187; Bliss, Life Ins.; 7 Am. L. Rev. 588. It is more analogous to fire than life insurance, since it is a provision for indemnity, except in the case of death by accident; Niblack, Ben. Soc. & Acc. Ins. §§ 363-420.

ACCOMENDA. A contract which takes place when an individual intrusts personal property with the master of a vessel, to be sold for their joint account.

In such case, two contracts take place: first, the contract called *mandatum*, by which the owner of the property gives the master power to dispose of it; and the contract of partnership, in virtue of which the profits are to be divided between them. One party runs the risk of losing his capital, the other his labor. If the sale produces no more than first cost, the owner takes all the proceeds: it is only the profits which are to be divided; Emerigon, Mar. Loans, s. 5.

ACCOMMODATION PAPER. Promissory notes or bills of exchange made, accepted, or endorsed without any consideration therefor.

Such paper, in the hands of the party to whom it is made or for whose benefit the accommodation is given, is open to the defence of want of consideration, but when taken by third parties in the usual course of business, is governed by the same rules as other paper; 2 Kent 86; 1 Bingh. N. C. 267; 1 M. & W. 212; 33 Eng. L. & Eq. 282; 2 Duer 33; 26 Vt. 19; 5 Md. 389; 150 Pa. 409.

Where an accommodation note is purchased from the payee at a usurious rate, it is void as against the accommodation maker,

though it was represented as business paper; 8 N. Y. Misc. Rep. 323.

An endorsement on accommodation paper may be withdrawn before it is discounted unless rights in the meantime for valuable consideration have attached to others; 88 Va. 1001.

ACCOMPLICE (Lat. *ad* and *complicare—con*, with, together, *plicare*, to fold, to wrap,—to fold together).

In Criminal Law. One who is concerned in the commission of a crime.

The term in its fulness includes in its meaning all persons who have been concerned in the commission of a crime, all *participes criminis*, whether they are considered in strict legal propriety as principals in the first or second degree, or merely as accessaries before or after the fact; Fost. Cr. Cas. 341; 1 Russ. Cr. 21; 4 Bla. Com. 331; 1 Phil. Ev. 28; Merlin, Répert. *Complice*.

It has been questioned, whether one who was an accomplice to a suicide can be punished as such. A case occurred in Prussia where a soldier, at the request of his comrade, had cut the latter in pieces; for this he was tried capitally. In the year 1817, a young woman named Leruth received a recompense for aiding a man to kill himself. He put the point of a bistoury on his naked breast, and used the hand of the young woman to plunge it with greater force into his bosom; hearing some noise, he ordered her away. The man, receiving effectual aid, was soon cured of the wound which had been inflicted, and she was tried and convicted of having inflicted the wound, and punished by ten years, imprisonment. Lepage, *Science du Droit*, ch. 2, art. 3, § 5. The case of Saul, the King of Israel, and his armor-bearer (1 Sam. xxxi. 4), and of David and the Amalekite (2 Sam. i. 2-16), will doubtless occur to the reader.

In Massachusetts, it has been held, that, if one counsels another to commit suicide, he is principal in the murder; for it is a presumption of law, that advice has the influence and effect intended by the adviser, unless it is shown to have been otherwise, as, for example, that it was received with scoff or manifestly rejected and ridiculed at the time; 13 Mass. 359. See 7 Bost. Law Rep. 215.

It is now finally settled, that it is not a rule of law, but of *practice* only, that a jury should not convict on the unsupported testimony of an accomplice. Therefore, if a jury choose to act on such evidence only, the conviction cannot be quashed as bad in law. The better practice is for the judge to advise the jury to acquit, unless the testimony of the accomplice is corroborated, not only as to the circumstances of the offence, but also as to the participation of the accused in the transaction; and when several parties are charged, that it is not sufficient that the accomplice should be confirmed, as to one or more of the prisoners, to justify a conviction of those prisoners with respect to whom there is no confirmation; 7 Cox, Cr. Cas. 20; Dearsl. Cr. Cas. 555; 10 Cush. 535. See 1 Fost. & F. 388; Greenl. Ev. § 111; 127 Mass. 424; 34 Amer. Rep. 391, 408.

An accomplice is a competent witness for the prosecution; 53 Fed. Rep. 536; he is not incompetent when indicted separately; 115 Mo. 452. Though the evidence of an accomplice uncorroborated is sufficient, it should be received with caution; 53 Fed. Rep. 536; 117 Mo. 302; 52 Kan. 335. See KING'S EVIDENCE.

ACCORD. In Contracts. An agreement between two parties to give and accept something in satisfaction of a right of action which one has against the other, which when performed is a bar to all actions upon this account; generally used in the phrase "accord and satisfaction." 2 Greenl. Ev. 28; 3 Bla. Com. 15; Bacon, Abr. *Accord;* 5 Md. 170. It may be pleaded to all actions except real actions; Bacon, Abr. *Accord* (B); 50 Miss. 257.

It must be *legal*. An agreement to drop a criminal prosecution, as a satisfaction for an assault and imprisonment, is void; 5 East 294; 14 Ia. 429; 99 Mass. 1. See 2 Wils. 341; Cro. Eliz. 541.

It must be *advantageous* to the creditor, and he must receive an actual benefit therefrom which he would not otherwise have had; 2 Watts 325; 2 Ala. 476; 3 J. J. Marsh 497; 83 Ind. 529. Restoring to the plaintiff his chattels, or his land, of which the defendant has wrongfully dispossessed him, will not be any consideration to support a promise by the plaintiff not to sue him for those injuries: Bacon, Abr. *Accord*, A; 1 Stra. 426; 2 Litt. Ky. 49; 5 Day 360; 1 Root 426; 1 Wend. 164; 14 *id.* 116. The payment of a part of the whole debt due is not a good satisfaction, even if accepted; 2 Greenl. Ev. § 28; 2 Pars. Contr. 199; 4 Mod. 88; 3 Bingh. N. C. 454; 10 M. & W. 367; 12 Price, Ex. 183; 1 Zabr. 391; 5 Gill 189; 20 Conn. 559; 70 N. C. 573; 6 Heisk. 1; 1 Metc. 276; 27 Me. 362, 370; 2 Strobh. 203; 15 B. Monr. 566; 38 N. J. L. 358; 70 N. C. 573; 118 Mass. 482; 2 Pa. Dist. R. 497; otherwise, however, if the amount of the claim is disputed; Cro. Eliz. 429; 3 M. & W. 651; 5 B. & Ald. 117; 1 Ad. & E. 106; 21 Vt. 223; 4 Gill 406; 4 Denio 166; 65 Barb. 161; 43 Conn. 455; 56 Ga. 494; 52 Miss. 494; 12 Metc. n. 551; 56 Vt. 609; 67 Barb. 393; 141 Mass. 502; 49 Mo. App. 556; or contingent; 14 B. Monr. 451; or there are mutual demands; 6 El. & B. 691; and if the negotiable note of the debtor, 15 M. & W. 23, or of a third person, 2 Metc. 283; 20 Johns. 76; 14 Wend. 116; 13 Ala. 353; 4 B. & C. 506; 51 Ala. 349, for part, be given and received, it is sufficient; or if a part be given at a different place, 29 Miss. 139, or an earlier time, it will be sufficient, 18 Pick. 414; and, in general, payment of part suffices if any additional benefit be received; 30 Vt. 424; 26 Conn. 392; 27 Barb. 485; 4 Jones 518; 4 Iowa 219; 44 Conn. 541. Acceptance by several creditors, by way of composition of sums respectively less than their demands, held to bar actions for the residue; 37 Iowa 410. And the receipt of specific property, or the performance of services, if agreed to, is sufficient, whatever its value; 19 Pick. 273; 5 Day 360; 51 Ala. 349; provided the value be not agreed upon; 65 Barb. 161; but both delivery and acceptance must be proved; 1 Wash. C. C. 328; 3 Blackf. 354; 1 Dev. & B. 565; 8 Pa. 106; 16 *id.* 450; 4 Eng. L. & Eq. 185.

It must be *certain*. An agreement that the defendant shall relinquish the possession of a house in satisfaction, etc., is not valid, unless it is so agreed at what time it shall

be relinquished; Yelv. 125. See 4 Mod. 88; 2 Johns. 342; 3 Lev. 189; 2 Iowa 553; 1 Hempst. 315; 102 Mass. 140.

It must be *complete*. That is, everything must be done which the party undertakes to do; Comyns, Dig. *Accord*, B, 4; T. Raym. 203; Cro. Eliz. 46; 9 Co. 79, *b*; 14 Eng. L. & Eq. 296; 2 Iowa 553; 5 N. H. 136; 5 Johns. 386; 16 *id.* 86; 1 Gray 245; 8 Ohio 393; 7 Blackf. 582; 14 B. Monr. 459; 2 Ark. 45; 44 Me. 121; 29 Pa. 179; 8 Md. 188; 50 Tex. 113; 64 Me. 563; but this performance may be merely the substitution of a new undertaking for the old by way of novation if the parties so intended; 2 Pars. Contr. 194 n.; 24 Conn. 613; 23 Barb. 546; 7 Md. 259; 16 Q. B. 1039; it is a question for the jury whether the agreement or the performance was accepted in satisfaction; 16 Q. B. 1039; and in some cases it is sufficient if performance be tendered and refused; 2 Greenl. Ev. § 31; 2 B. & Ad. 328; 3 *id.* 701. An accord with tender of satisfaction is not sufficient, but it must be executed; 3 Bingh. N. C. 715; 16 Barb. 598; 23 Wend. 341; 56 Ill. 96; 44 Me. 121; 37 Barb. 483; 151 Pa. 415; 5 R. I. 219; but where there is a sufficient consideration to support the agreement, it may be that a tender, though unaccepted, would bar an action; Story, Contr. § 1357; 3 Johns. Cas. 243. Satisfaction without accord is not sufficient; 9 M. & W. 596; nor is accord without satisfaction; 3 B. & C. 257.

Where there is a dispute as to the value of the services and a check is sent for part with a statement that it was to be in full satisfaction, the debt, which was unliquidated, was satisfied by the retention of the check; 138 N. Y. 231.

It must be *by the debtor or his agent*; 3 Wend. 66; 2 Ala. 84; and if made by a stranger, will not avail the debtor in an action at law; Stra. 592; 3 T. B. Monr. 302; 6 Johns. 37. See 6 Ohio St. 71. His remedy in such a case is in equity; Cro. Eliz. 541; 3 Taunt. 117; 5 East 294. In case of a disputed claim, an agreement to pay part to a third person in satisfaction of the whole is a good consideration; 7 Ohio Cir. Ct. R. 204.

Accord with satisfaction, when completed, has two effects: it is a payment of the debt; and it is a species of sale of the thing given by the debtor to the creditor, in satisfaction; but it differs from it in this, that it is not valid until the delivery of the article, and there is no warranty of the thing thus sold, except perhaps the title; for in regard to this it cannot be doubted, that if the debtor gave on an accord and satisfaction the goods of another, there would be no satisfaction. But the intention of the parties is of the utmost consequence; 30 Vt. 424; as the debtor will be required only to execute the new contract to that point whence it was to operate a satisfaction of the pre-existing liability.

An accord and satisfaction may be rescinded by subsequent agreement; 58 N. W. Rep. (Minn.) 982; 54 Mo. App. 66; or it may be avoided on account of fraud; 88 Ga. 594; 81 Wis. 160.

In America accord and satisfaction may be given in evidence under the general issue, in *assumpsit*, but it must be pleaded specially in debt, covenant, and trespass; 2 Greenl. Ev. 15th ed. § 29. In England it must be pleaded specially in all cases; Rosc. N. P. 569. See PAYMENT.

ACCOUCHEMENT. The act of giving birth to a child. It is frequently important to prove the filiation of an individual; this may be done in several ways. The fact of the accouchement may be proved by the direct testimony of one who was present, as a physician, a midwife, or other person; 1 Bouvier, Inst. n. 314.

ACCOUNT. A detailed statement of the mutual demands in the nature of debt and credit between parties, arising out of contracts or some fiduciary relation. 1 Metc. 216; 1 Hempst. 114; 32 Pa. 202.

A statement of the receipts and payments of an executor, administrator, or other trustee, of the estate confided to him.

An *open* account is one in which some term of the contract is not settled by the parties, whether the account consists of one item or many; 1 Ala. N. S. 62; 6 *id.* 438; 73 Wis. 545.

A form of action, called also *account render*, in which such a statement, and the recovery of the balance which thereby appears to be due, is sought by the party bringing it.

In Practice. In Equity. Jurisdiction concurrent with courts of law is taken over matters of account; 9 Johns. 470; 1 J. J. Marsh. 82; 2 Cai. Cas. 1; 1 Yerg. 360; 1 Ga. 376, on three grounds: mutual accounts; 18 Beav. 575; dealings so complicated that they cannot be adjusted in a court of law; 1 Sch. & L. 305; 2 Hou. L. Cas. 28; 2 Leigh 6; 1 Metc. 216; 15 Ala. N. S. 34; 17 Ga. 558; the existence of a fiduciary relation between the parties; 1 Sim. Ch. N. S. 573; 4 Gray 227; 1 Story, Eq. Jur. 8th ed. § 459, *a*.

In addition to these peculiar grounds of jurisdiction, equity will grant a discovery in cases of account on the general principles regulating discoveries; 8 Ala. N. S. 743; 4 Sandf. 112; 35 N. H. 339, and will afterwards proceed to grant full relief in many cases; 1 Madd. 86; 6 Ves. 136; 10 Johns. 587; 5 Pet. 495.

Equitable jurisdiction over accounts applies to the *appropriation of payments*; 1 Story, Eq. Jur. 8th ed. §§ 459-461; *agency*; 2 McCord, Ch. 469; including factors, bailiffs, consignees, receivers, and stewards, where there are mutual or complicated accounts; 1 Jac. & W. 135; 9 Beav. 284; 17 Ala. N. S. 667; *trustees' accounts*; 1 Story, Eq. Jur. § 465; 2 M. & K. 664; 9 Beav. 284; 1 Stockt. 218; 4 Gray 227; administrators and executors; 22 Vt. 50; 14 Mo. 116; 3 Jones, Eq. 316; 32 Ala. N. S. 314; see 23 Miss. 361; guardians, etc.; 31 Pa. 318; 9 Rich. Eq. 311; 33 Miss. 553; *tenants in common*, joint tenants of real

estate or chattels; 4 Ves. 752; 1 Ves. & B. 114; partners; 1 Hen. & M. 9; 3 Gratt. 364; 3 Cush. 331; 23 Vt. 576; 4 Sneed 238; 1 Johns. Ch. 305; *directors of companies*, and similar officers; 1 Y. & C. 326; *apportionment* of apprentice fees; 2 Bro. Ch. 78; 13 Jur. 596; or rents; 2 P. Will. 176, 501; see 1 Story, Eq. Jur. § 480; *contribution* to relieve real estate; 3 Co. 12; 2 Bos. & P. 270; 1 Johns. Ch. 409, 425; 7 Mass. 355; 1 Story, Eq. Jur. § 487; *general average;* 2 Abbott, Shipp. pl. 3, c. 8, § 17; 4 Kay & J. 367; 2 Curt. 59; between *sureties;* 1 Story, Eq. Jur. § 492; *liens;* Sugd. Vend. 7th ed. 541; 8 Paige, Ch. 182, 277; *rents* and *profits* between landlord and tenant; 1 Sch. & L. 305; 4 Johns. Ch. 287; in case of *torts;* Bacon, Abr. *Accompt*, B; a levy; 1 Ves. Sen. 250; 1 Eq. Cas. Abr. 285; and in other cases; 3 Gratt. 330; *waste;* 1 P. Will. 407; 6 Ves. 88; 1 Bro. Ch. 194; 6 Jur. N. S. 809; 4 Johns. Ch. 169; *tithes* and *moduses;* Com. Dig. *Chauncery* (3 C.), *Distress* (M. 13).

Equity follows the analogy of the law, in refusing to interfere with stated accounts; 2 Sch. & L. 629; 3 Bro. Ch. 639, n.; 19 Ves. 180; 13 Johns. Ch. 578; 3 McLean, 83; 4 Mas. 143; 3 Pet. 44; 9 *id.* 405. See ACCOUNT STATED.

At Law. The action lay against bailiffs, receivers, and guardians, in socage only, at the common law, and, by a subsequent extension of the law, between merchants; 11 Co. 89; 12 Mass. 149.

Privity of contract was required, and it did not lie by or against executors and administrators; 1 Wms. Saund. 216, n.; Willes 208, until statutes were passed for that purpose, the last being that of 3 & 4 Anne, c. 16; 1 Story, Eq. Jur. § 445.

In several states of the United States, the action has received a liberal extension; 13 Vt. 517; 7 Pa. 175; 25 Conn. 137; 5 R. I. 402. Thus, it is said to be the proper remedy for one partner against another; 3 Binn. 317; 10 S. & R. 220; 2 Conn. 425; 4 Vt. 137; 3 Barb. 419; 1 Cal. 448; for money used by one partner after the dissolution of the firm; 18 Pick. 299; though equity seems to be properly resorted to where a separate tribunal exists; 1 Hen. & M. 9; 1 Johns. Ch. 305. And see 1 Metc. 216; 1 Iowa 240.

In other states, reference may be made to an auditor by order of the court, in the common forms of actions founded on contract or tort, where there are complicated accounts or counter-demands; 6 Pick. 193; 8 Conn. 499; 13 N. H. 275; 1 Tex. 646. See AUDITOR. In the action of account, an interlocutory judgment of *quod computet* is first obtained; 2 Greenl. Ev. § 36; 11 Ired. 391; 12 Ill. 111, on which no damages are awarded except *ratione interplacitationis;* Cro. Eliz. 83; 5 Binn. 564.

The account is then referred to an auditor, who now generally has authority to examine parties, 4 Fost. 198 (though such was not the case formerly), before whom issue of law and fact may be taken in regard to each item, which he must report to the court; 2 Ves. 388; 5 Binn. 433; 5 Vt. 543; 26 N. H. 139. Only the controverted items need be proved in an action on a verified account; 26 S. W. Rep. (Tex.) 141.

A final judgment *quod recuperet* is entered for the amount found by him to be due; and the auditor's account will not be set aside except upon a very manifest case of error; 5 Pa. 413; 1 La. Ann. 380. See AUDITOR.

In case of mutual accounts the statute of limitations commences to run from the date of the last item on either side; 2 Wood, Lim. 714; where the last item of a mutual running account is within six years from the commencement of a suit, the statute does not apply; 155 Pa. 260; 115 Mo. 581; but in Vermont the debt runs from the date of the last credit, and not from the last debit; 65 Vt. 287.

If the defendant is found in surplusage, that is, is creditor of the plaintiff on balancing the accounts, he cannot in this action recover judgment for the balance so due. He may bring an action of debt, or, by some authorities, a sci. fa., against the plaintiff, whereon he may have judgment and execution against the plaintiff. See Palm. 512; 1 Leon. 219; 3 Kebl. 362; 1 Rolle, Abr. 599, pl. 11; Brooke, Abr. *Accord*, 62; 1 Rolle 87.

As the defendant could wage his law; 2 Wms. Saund. 65 *a*; Cro. Eliz. 479; and as the discovery, which is the main object sought, 5 Taunt. 431, can be more readily obtained and questions in dispute more readily settled in equity, resort is generally had to that jurisdiction in those states where a separate tribunal exists, or under statutes to the courts of law; 18 Vt. 345; 13 N. H. 275; 8 Conn. 499; 1 Metc. (Mass.) 216.

The fact that one possesses an open account in favor of another is not presumptive evidence of the holder's ownership; 111 N. C. 74. In a statement of account it is not necessary to say "E. & O. E."; that is implied; 6 El. & Bl. 69.

ACCOUNT BOOK. A book kept by a merchant, trader, mechanic, or other person, in which are entered from time to time the transactions of his trade or business. Such books, when regularly kept, may be admitted in evidence. Greenl. Ev. §§ 115–118; 160 Mass. 328; 129 N. Y. 498.

ACCOUNT CURRENT. An open or running account between two parties.

ACCOUNT IN BANK. See BANK ACCOUNT.

ACCOUNT STATED. An agreed balance of accounts. An account which has been examined and accepted by the parties. 2 Atk. 251.

An account cannot become an account stated with reference to a debt payable on a contingency; 76 Cal. 96. Although an item of an account may be disputed, it may become an account stated as to the items admittedly correct; 53 Mo. App. 263.

In Equity. Acceptance may be inferred from circumstances, as where an account

is rendered to a merchant, and no objection is made, after sufficient time; 1 Sim. & S. 333; 3 Johns. Ch. 569; 7 Cra. 147; 1 M'Cord, Ch. 156; 2 Md. Ch. Dec. 433; 10 Barb. 213.

Such an account is deemed conclusive between the parties; 2 Bro. Ch. 62, 310; 2 Ves. 566, 837; 20 Ala. N. S. 747; 3 Johns. Ch. 587; 1 Gill 350; 3 Jones, Eq. 109; to the extent agreed upon; 1 Hopk. Ch. 239; unless some fraud, mistake, or plain error is shown; 1 Johns. Ch. 550; 1 McCord, Ch. 156; and in such case, generally, the account will not be opened, but liberty to surcharge or falsify will be given; 9 Ves. 265; 1 Sch. & L. 192; 7 Gill 119.

At Law. An account stated is conclusive as to the liability of the parties, with reference to the transactions included in it; 3 Johns. Ch.; except in cases of fraud or manifest error; 1 Esp. 159; 24 Conn. 591; 4 Wis. 219; 5 Fla. 478. See 4 Sandf. 311; 83 Va. 432.

Acceptance by the party to be charged must be shown by the one who relies upon the account; 10 Humphr. 238; 12 Ill. 111. The acknowledgment that the sum is due is sufficient; 2 Term 480; though there be but a single item in the account; 13 East 249; 5 M. & S. 65.

Acceptance may also be inferred from retaining the account a sufficient time without making objection; 7 Cr. 147; 3 W. & S. 109; 10 Barb. 213; 4 Sandf. 311; see 22 Pa. 454; and from other circumstances; 1 Gill 234. The rule that delay in objecting to an account stated is an acquiescence also applies to corporations; 2 Blatchf. 354.

If the parties had already come to a disagreement when the account is rendered, assent cannot be inferred from silence; 38 Fed. Rep. 635; the acceptance need not be in express terms; 65 Mo. 658; 81 N. Y. 268.

A definite ascertained *sum* must be stated to be due; 9 S. & R. 241.

It must be made *by a competent person*, excluding infants and those who are of unsound mind; 1 Term 40; and an infant or an insane person is not concluded by an account stated; 1 Chit. Cont. 187.

Husband and wife may join and state an account with a third person; 2 Term 483; 16 Eng. L. & Eq. 290.

An agent may bind his principal; 3 Johns. Ch. 569; but he must show his authority; 4 Wend. 394; 13 Hun 392. Partners may state accounts; and an action lies for the party entitled to the balance; 4 Dall. 434; 1 Wash. C. C. 435; 16 Vt. 169.

The acceptance of the account is an acknowledgment of a debt due for the balance, and will support assumpsit. It is not, therefore, necessary to prove the items, but only to prove an existing debt or demand, and the stating of the account; 16 Ala. N. S. 742; 74 Cal. 60.

Facts known to a party when he settles an account stated cannot be used later to impeach it; 53 Mo. App. 610; and it should not be set aside except for clear showing of fraud or mistake; 51 Fed. Rep. 117; 66 Hun 626; 53 Mo. App. 610.

ACCOUNTANT. One who is versed in accounts. A person or officer appointed to keep the accounts of a public company.

He who renders to another or to a court a just and detailed statement of the property which he holds as trustee, executor, administrator, or guardian. See 16 Viner, Abr. 155.

ACCOUNTANT GENERAL. An officer of the English Court of Chancery, by whom the moneys paid into court are received, deposited in bank, and disbursed. The office appears to have been established by an order of May 26, 1725, and 12 Geo. I. c. 32, before which time the effects of the suitors were locked up in the vaults of the Bank of England, under the care of the masters and two of the six clerks; 1 Smith, Ch. Pr. 22.

ACCOUPLE. To unite; to marry.

ACCREDIT. In International Law. To acknowledge.

Used of the act by which a diplomatic agent is acknowledged by the government near which he is sent. This at once makes his public character known, and becomes his protection. It is used also of the act by which his sovereign commissions him.

ACCRESCERE (Lat.). To grow to; to be united with; to increase.

The term is used in speaking of islands which are formed in rivers by deposit; Calvinus, Lex.; 3 Kent 428.

In Scotch Law. To pass to any one. Bell, Dict.

It is used in a related sense in the common-law phrase *jus accrescendi*, the right of survivorship; 1 Washb. R. P. 426.

In Pleading. To commence; to arise; *to accrue. Quod actio non accredit infra sex annos*, that the action did not accrue within six years; 3 Chit. Pl. 914.

ACCRETION (Lat. *accrescere*, to grow to). The increase of real estate by the addition of portions of soil, by gradual deposition through the operation of natural causes, to that already in possession of the owner. 3 Washb. R. P. 5th ed. 50.

The term *alluvion* is applied to the deposit itself, while accretion rather denotes the act.

If an island in a non-navigable stream results from accretion, it belongs to the owner of the bank on the same side of the *filum aquæ*; 3 Washb. R. P. 60; 2 Bla. Com. 261, n.; 3 Kent 428; Hargrave, Law Tracts 5; Hale, de Jur. Mar. 14; 3 Barn. & C. 91, 107; 6 Cow. 537; 4 Pick. 268; 17 Vt. 387.

"It is generally conceded that the riparian title attaches to subsequent accretions to the land effected by the gradual and imperceptible operation of natural causes. But whether it attaches to land reclaimed by artificial means from the bed of the river, or to sudden accretions produced by unusual floods, is a question which each state decides for itself;" 94 U. S. 337; 35 Cent. L. J. 368. As a general rule, such accretions do not belong to the riparian owner; 29 S. W. (Tex.) 681; 31 S. W. (Mo.) 592; 22 S. W. (Tex.) 122; 117 Mo. 33; but

if after an avulsion, an accretion forms within the original land line, it belongs to the riparian owner, though separated from the main land by a slough; 28 S. W. Rep. 746.

An accretion formed on the other side of a public street which bounds the property of an individual belongs to the street, if the fee of that is in the public; 112 Mo. 525; 21 S. W. (Mo.) 202. A reliction formed by the gradual drying up of a lake belongs to the riparian owners; 32 Pac. (Utah) 690; 61 N.W. (S. D.)749; but not one formed by artificial drainage; 61 N. W. (Ia.) 250.

ACCROACH. To attempt to exercise royal power. 4 Bla. Com. 76.

A knight who forcibly assaulted and detained one of the king's subjects till he paid him a sum of money was held to have committed treason on the ground of accroachment; 1 Hale, Pl. Cr. 80.

In French Law. To delay. Whishaw.

ACCRUE. To grow to; to be added to, as the interest accrues on the principal. *Accruing costs* are those which become due and are created after judgment; as the costs of an execution. See 91 Ill. 95.

To arise, to happen, to come to pass; as the statute of limitation does not commence running until the cause of action has accrued. 1 Bouvier, Inst. n. 861; 2 Rawle 277; 10 Watts 363; Bacon, Abr. *Limitation of Actions* (D, 3).

ACCUMULATIVE SENTENCES. A second or additional judgment given against one who has been convicted, the execution or effect of which is to commence after the first has expired.

Thus, where a man is sentenced to an imprisonment for six months on conviction of larceny, and afterwards he is convicted of burglary, he may be sentenced to undergo an imprisonment for the latter crime, to commence after the expiration of the first imprisonment: this is called an accumulative judgment. And if the former sentence is shortened by a pardon, or by reversal on a writ of error, it expires, and the subsequent sentence takes effect, as if the former had expired by lapse of time; 11 Metc. 581. Where an indictment for misdemeanor contained four counts, the third of which was held on error to be bad in substance, and the defendant, being convicted on the whole indictment, was sentenced to four successive terms of imprisonment of equal duration, one on each count, it was held that the sentence on the fourth count was not invalidated by the insufficiency of the third count, and that the imprisonment on it was to be computed from the end of the imprisonment on the second count; 15 Q. B. 594.

Upon an indictment for misdemeanor containing two counts for distinct offences, the defendant may be sentenced to imprisonment or penal servitude for consecutive terms of punishment, although the aggregate of the punishments may exceed the punishment allowed by law for one offence, and this rule is in many states prescribed by statute; 1 Bish. New Crim. Proc. § 1327 (2); Whart. Cr. Pl. & Pr. § 932; 50 Kans. 299; 37 Neb. 454; 29 S. W. (Tex.) 174; 39 Pac. (Utah) 498. But it may in some cases be the means of perpetrating great injustice. See O'Neil v. Vermont, 144 U. S. 323, where a justice of the peace imposed a fine of $6638, and on failure to pay it, a sentence of nearly 60 years' imprisonment, for selling intoxicating liquors. The Supreme Court of the United States refused to interfere. See 31 Am. L. Reg. 619.

Upon an indictment for perjury charging offences committed in different suits, the defendant, upon conviction, may be sentenced to distinct punishments, although the suits were instituted with a common object; 5 Q. B. Div. 490.

In New York, it has been held that where upon trial of an indictment—containing several counts—charging separate and distinct misdemeanors, identical in character, a general verdict of guilty is rendered, or a verdict of guilty upon two or more specified counts, the court has no power to impose a sentence or cumulative sentences exceeding in the aggregate what is prescribed by statute as the maximum punishment for one offence of the character charged; 60 N. Y. 559; but this case stands alone, and has been rejected by every court to which it has been cited as authority. See 1 Bish. New Cr. Proc. § 1327 (2); 6 App. Cas. 241.

ACCUSATION. In Criminal Law. A charge made to a competent officer against one who has committed a crime or misdemeanor, so that he may be brought to justice and punishment.

A neglect to accuse may in some cases be considered a misdemeanor, or misprision (which see); 1 Brown, Civ. Law 247; 2 *id.* 389; Inst. *lib.* 4, *tit.* 18.

It is a rule that no man is bound to accuse himself or testify against himself in a criminal case; 7 Q. B. 126. A man is competent, though not compellable, to prove his own crime; 14 Mees. & W. 256. See EVIDENCE; INTEREST; WITNESS.

ACCUSED. One who is charged with a crime or misdemeanor. See 30 Mich. 468.

ACCUSER. One who makes an accusation.

ACHAT. In French Law. A purchase.

It is used in some of our law-books, as well as *achetor*, a purchaser, which in some ancient statutes means purveyor. Stat. 36 Edw. III.; Merlin, Répert.

ACHERSET. An ancient English measure of grain, supposed to be the same with our quarter, or eight bushels.

ACKNOWLEDGMENT. The act of one who has executed a deed, in going before some competent officer or court and declaring it to be his act or deed.

The acknowledgment is certified by the officer or court; and the term acknowledgment is sometimes used to designate the certificate.

The function of an acknowledgment is two-fold: to authorize the deed to be given in evidence without further proof of its execution, and to entitle it to be recorded. The same purposes may be accomplished by a subscribing witness going before the officer or court and making oath to the fact of the execution, which is certified in the same manner; but in some states this is only permitted in case of the death, absence, or refusal of the grantor. In some of the states a deed is void except as between the parties and their privies, unless acknowledged or proved.

Nature of. In most states the act is held to be a judicial one, while in some it is held to be a ministerial act.

Who may take. An officer related to the parties; 6 N. Y. 422; 81 N. Y. 474. The presumption is that the officer took it within his jurisdiction; 16 La. Ann. 100; 19 Me. 274; 60 Mo. 33; and that it was duly executed; 71 Hun 227.

A notary cannot take acknowledgment in another county than the one within which he was appointed and resides; 33 How. Pr. 312; nor the attorney of record; 4 How. Pr. 153; 11 N. B. R. 289; 24 Wend. 91; 37 Miss. 482; 15 B. Mon. 106; nor if his term has expired; 78 Mo. 452; 78 Ala. 542. In Pennsylvania, by a recent statute, a notary may act anywhere within the state; 1893, June 6; Acts, 1893, p. 323.

One cannot take an acknowledgment of a deed in which he has any interest; 20 Me. 413; 13 Mich. 329; 2 Sandf. 630; 54 Miss. 351; 38 Tex. 645; 7 Watts 227. *Contra*, 14 Bank. Reg. 513; 75 Va. 491; 51 Mo. 589; 88 Ill. 263; 43 Ark. 420.

Sufficiency of. Certificate need only substantially comply with the statute. The fact of acknowledgment and the identity of the parties are the essential parts, and must be stated; 8 Cal. 461; 21 Miss. 373; 13 Miss. 470; 9 Mo. 514. Important words omitted cannot be supplied by intendment; 20 Ark. 190; 11 Conn. 129; 17 Iowa 528; 5 Biss. 160.

In the following cases it was held that the statute must be strictly complied with; 24 Mich. 145; 66 Ala. 600; 96 Pa. 427; 5 Biss. 160; 30 Ill. 103; 3 M & McH. 321. Where notary takes the acknowledgment and attaches his seal, but fails to sign his name, it is not sufficient; 127 Ill. 449.

Effect of. Only purchasers for value can take advantage of defects; 46 Mo. 472; 61 Mo. 196.

An acknowledged deed is evidence of seizin in the grantee, and authorizes recording it; 82 Mass. 48.

An unacknowledged deed is good between the parties and subsequent purchasers with actual notice; 8 Kan. 112; 82 Mass. 48; 46 Mo. 404, 472, 483.

The certificate will prevail over the unsupported denial of the grantor; 65 Ill. 505.

Identification of Grantor. An introduction by a common friend is sufficient to justify officer in making certificate; 8 Wall. 513. *Contra*, 48 Barb. 568; 4 Col. 211.

A notary imposed upon by a personation is liable only for clear negligence. It is a legal presumption that he acted on reasonable information, and his absence of memory as to details of what occurred does not destroy that presumption; 10 W. N. C. Pa. 392.

The certificate is not invalidated by want of recollection of the officer; 30 N. J. Eq. 394; nor by mistake in, or omission of, the date; 62 Mo. 516; 45 Md. 389; 61 Tex. 677; 62 Wis. 154.

Correction. Where a notary fails to set forth the necessary facts, he may correct his certificate, and may be compelled by mandamus, but equity has no jurisdiction to correct it; 51 Mo. 150; 63 Cal. 286; 71 Ill. 636. *Contra*, 6 N. Y. 422.

See generally paper by Judge Cooley, 4 Amer. Bar. Assoc. 1881.

The following is a statement of the substance of the laws of the several states and territories on this subject. Though it is not to be inferred that every certificate not conforming to the text is void, an acknowledgment which does may be deemed sufficient. In addition to the statutes cited, there are in many states various acts curing irregularities in acknowledgments and certificates.

See Hubbell's Leg. Direc.; Snyder's Manual; Sharp & Alleman's Lawyers' and Bankers' Directory; Story's Leg. Directory.

ALABAMA.—Acknowledgments and proof may be taken, *within the state*, before judges of the supreme and circuit courts and their clerks, chancellors, registers in chancery, judges of the courts of probate, justices of the peace, and notaries public. The provisions of the code respecting the jurisdiction of justices of the peace define it as extending to take acknowledgments within their respective counties, but do not authorize them to do so without such counties. *Without the state and within the United States;* before judges and clerks of any Federal court, judges of any court of record in any state, notaries public, or Alabama commissioners. *Without the United States;* before the judge of any court of record, mayor, or chief magistrate of any city, town, borough, or county, notaries public, or any diplomatic, consular, or commercial agent of U. S. Code, §§ 1800 *et seq.*

The certificate must be in substantially the following form:—Date. I hereby certify that , whose name is signed to the foregoing conveyance, and who is known to me, acknowledged before me on this day, that being informed of the contents of the conveyance, he executed the same voluntarily on the day the same bears date.

Given under my hand this day of . Code (1886) of Ala. § 1802.

An examination of the wife separate and apart from her husband is necessary to convey the title to any homestead exempted by the laws of this state. This examination may be had before a circuit or supreme court judge, chancellor, or judge of probate, justice of the peace, or notary public, who must endorse thereon a certificate in the following form:—

State of Alabama, }
County of }

I, , judge (chancellor, notary public, or justice of the peace as the case may be), hereby certify, that on the day of , 18 , came before me the within named , known or made known to me to be the wife of the within named , who, being by me examined separate and apart from her husband, touching her signature to the within , acknowledged that she signed the same of her own free will and accord, and without fear, constraint, or threats on the part of her husband.

In witness whereof, I hereunto set my hand this day of , 18 . Code of Ala. § 2508.

There is no special law regulating the execution of deeds, etc., by corporations. This depends altogether on the act of incorporation.

Deeds may be proved by a subscribing witness. Code of Ala. § 1803.

Deeds of land require the signature of the grantor at the foot, and to be attested by one witness, but if the grantor is unable to write, then by two. A scroll seal is sufficient.

ARIZONA.—*Within the territory;* before the clerk of a court having a seal, notary public, or justice of the peace of the proper county. *Without the territory, and within the United States or their territories;* before a clerk of any court of the United States or of any state or territory having a seal, or by any commissioner appointed by the governor of this territory for that purpose, or a notary public. *Without the United States;* before either a minister, commissioner, or *chargé d'affaires* of the United States resident and accredited in the country where acknowledgment is made, a consul-general, consul, vice-consul, commercial agent, vice-commercial agent, deputy consul, or consular agent of the United States resident where acknowledgment is made, or a notary public.

The certificate must be in substantially the following form:—On this day of , A. D. 18 , before me (title of officer) personally appeared , personally known to me to be the described in and who executed the foregoing instrument, who acknowledged to me that executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

The certificate for acknowledgment of a married woman must be in the following form:—On this day of , A. D. 18 , before me (title of officer) personally appeared wife of , known to me to be the described in and who executed the annexed foregoing instrument, and upon examination apart from and without the hearing of her husband I made her acquainted with the contents of said instrument, and thereupon she acknowledged to me that she executed the same freely and voluntarily, for the purposes and consideration there expressed and without fear or compulsion or undue influence of her husband, and that she does not wish to retract the execution of the same.

ARKANSAS.—*Within the state;* before the supreme or circuit court, or either judge, or clerk thereof, or the clerk of any court of record, or justice of the peace, or notary public. Acts of 1887, p. 193. *Without the state, and within the United States or their territories;* before any court of the United States, or of any state or territory having a seal, or the clerk of any such court, or before the mayor or chief officer of any city or town having a seal of office or notary public, or any commissioner for the state of Arkansas. *Without the United States;* before any court of any state, kingdom, or empire having a seal, or any mayor or chief officer of any city or town having an official seal, or before any officer of any foreign country, who by the laws of such country is authorized to take probate of the conveyance of real estate of his own country, if he have an official seal.

An acknowledgment is to be made by the grantor's appearing in person before the court or officer, and stating that he executed the same for the consideration and purposes therein mentioned and set forth. If the grantor is a married woman, she must, in the absence of her husband, declare that she had of her own free will executed the deed or instrument in question, or that she had signed and sealed the relinquishment of dower for the purposes therein contained and set forth, without any compulsion or undue influence of her husband. Rev. Stat. c. 21; same statute, Gould, Dig. (1858) 237, §§ 18, 21.

In cases of acknowledgment or proof taken within the United States, when taken before a court or officer having a seal of office, such deed or conveyance must be attested under such seal of office; and if such officer have no seal of office, then under his official signature. Rev. Stat. 190; Gould, Dig. 267, § 14.

In all cases, acknowledgments or proof taken without the United States must be attested under the official seal of the court or officer. *Id.* § 15.

Every court or officer that shall take the proof or acknowledgment of any deed or conveyance of real estate, or the relinquishment of dower of any married woman in any conveyance of the estate of her husband, shall grant a certificate thereof, and cause such certificate to be endorsed on the instrument, which certificate shall be signed by the clerk of the court where the probate is taken in court, or by the officer before whom the same is taken, and sealed, if he have a seal of office. *Id.* § 16.

Notaries public may also take acknowledgments of instruments relating to commerce and navigation. Rev. Stat. 104, § 4.

CALIFORNIA.—*Within the state;* by a judge or clerk of the supreme court or a judge of the superior court, and within the city and county or district for which the officer was elected or appointed, before a clerk of a court of record, county recorder, or court commissioner, or some notary public or justice of the peace. *Without the state, and within the United States;* by some justice, judge, or clerk of any court of the United States, or of any state or territory having a seal, a notary public, or by a California commissioner; also, by any other officer of the state or territory where the acknowledgment is made, authorized by its laws to take such proof or acknowledgment. C. C. § 1182. *Without the United States;* by any minister, commissioner, or *chargé d'affaires* of the United States resident and accredited in the country where the proof or acknowledgment is made, or consul, vice-consul, or consular agent of the United States resident in the country where the proof or acknowledgment is made, or a judge of a court of record of the country where the proof or acknowledgment is made, or a commissioner of deeds for California, or a notary public. C. C. § 1183.

The officer's certificate, which must be endorsed or annexed, must be, when granted by a judge or clerk, under the hand of such judge or clerk, and the seal of the court; when granted by an officer who has a seal of office, under his hand and official seal. Cal. Laws, 1850-53, 513, § 5.

The certificate must show, in addition to the fact of the acknowledgment, that the person making such acknowledgment was personally known to the officer taking the same, to be the person whose name was subscribed to the conveyance as a party thereto, or must show that he was proved to be such by a credible witness (naming him). Cal. Laws, 1850-53, 513, §§ 6, 7.

The certificate is to be substantially in the following form:—State of California, County of . On this day of , A. D. , before me (name and quality of officer), personally appeared , known to me (or proved to me on the oath of) to be the person described in, and whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

The certificate for the acknowledgment by a married woman must be in the following form: On this day of , in the year , before me personally appeared , known to me to be the person whose name is subscribed to the within instrument, described as a married woman; and upon an examination, without the hearing of her husband, I made her acquainted with the contents of the instrument, and thereupon she acknowledged to me that she executed the same, and that she does not wish to retract such execution. Civil Code, § 1191. By the act of March 19, 1891, the legislature dispensed with this special form for married women, but it is generally used and considered the safest.

The proof may be by a subscribing witness, or, when all the subscribing witnesses are dead, or cannot be had, by evidence of the handwriting of the party, and of at least one subscribing witness, given by a credible witness to each signature. §§ 1195, 1198.

The certificate of such proof must set forth, that such subscribing witness was personally known to the officer to be the person whose name is subscribed to such conveyance as a witness thereto, or was proved to be such by oath of a witness (naming him); and must also set forth the proof given by such witness of the execution of such conveyance, and of the fact that the person whose name is subscribed in such conveyance, as a party thereto, is the person who executed the same, and that such witness subscribed his name to such conveyance as a witness thereof. Cal. Laws, §§ 1197, 1199.

No proof by evidence of the handwriting of the party and of a subscribing witness shall be taken, unless the officer taking the same shall be satisfied that all the subscribing witnesses to such conveyance are dead, or cannot be had to prove the execution thereof. § 1198.

No estate is allowed the husband as tenant by curtesy, nor is any estate in dower allowed the wife.

COLORADO.—*Within the state;* before any justice of the supreme, district, or county courts, or any clerk or deputy clerk, of such courts, such county judge and such clerk certifying the same under the seal of such court, respectively; or before the clerk and recorder of any county or his deputy, he or his deputy certifying the same under the seal of his county, before any notary public, or before any justice of the peace within his county; provided, that if the land do not lie in the county of such justice, then there must be affixed the certificate of the county clerk of such county, under his hand and the seal of such county, to the official capacity of such justice of the peace, and to the genuineness of his signature. The official certificate of notaries appointed after July 2, 1887, shall designate the date of the expiration of their commissions. *Without the state, and within the United States or their territories;* before the secretary of any such state or territory, certified by him under the seal of such state or territory, before the clerk of any court of record, and before any officer authorized by the laws of such foreign state or territory to take and certify such acknowledgments, provided there shall be affixed a certificate by the clerk of some court of record of the county, city, or district wherein such officer resides, under the seal of such court, that the person certifying such acknowledgment is the officer he assumes to be, that he is authorized to take acknowledgments, and that his signature and seal are genuine; or before any commissioner of deeds appointed under the laws of this state certified under his hand and seal. *Without the United States;* before any court of record having a seal, the judge or justice of such court certifying the acknowledgement to have been made before such court; before the mayor or other chief officer of any city or town having a seal; certified under such seal by such officer; or before any consul of the United States within such foreign country, under the seal of his consulate.

The acknowledgment of a married woman need not be made separate and apart from her husband, but her covenants operate only as a quit-claim.

CONNECTICUT.—All grants and deeds of bargain and sale, and mortgages, must be acknowledged, whether *within or without the state*, by the grantors to be their free act and deed before a justice of the peace, or a notary public, judge of some court of or-

dinary *nisi prius* or superior jurisdiction, or any officer having power by law to take acknowledgments of deeds, and also *within the state* by the commissioner of the school fund, judges of probate, clerks of superior courts, common pleas, or district courts, town clerks and commissioners of the superior court, or before a Connecticut commissioner. When deeds are executed by an attorney, his acknowledgment is sufficient, when the power of attorney is acknowledged by the grantor of the power. All such instruments executed by any grantors residing in a foreign state or country, *without the United States*, may be acknowledged likewise before any United States consul resident in such country, or any notary public or justice of the peace of such country. A certificate of the county clerk should be annexed to an acknowledgment by a justice of the peace or notary public. A separate examination of wife is not necessary.

DELAWARE.—A deed may be acknowledged by any party to it, or by his attorney, the power of attorney being first proved; or it may be proved by a subscribing witness. If acknowledged by a party, it may be in the superior court or before the chancellor, or any judge or notary public, or before two justices of the peace for the same county. A deed may be acknowledged in the superior court by attorney, by virtue of a power either contained in the deed or separate from it, or may be proved in that court by a subscribing witness.

A married woman who executes a deed to which her husband is a party must acknowledge, upon a private examination apart from her husband, that she executed it willingly, without compulsion or threats, or fear of her husband's displeasure. Her examination may be taken in any county before the officers above mentioned.

The certificate of any acknowledgment or proof must be authenticated under the hand and seal of the clerk or prothonotary of the court in which, or under the hand of the chancellor or other officer before whom, the same is taken, and must be endorsed on or annexed to the deed.

Acknowledgment or proof, or the private examination of a married woman, may be taken, *out of the state*, before any consul-general, vice-consul, consular agent, consul, or commercial agent of the United States, duly appointed in any foreign country at the places of their respective official residence, or before a judge of any district or circuit court of the United States, or the chancellor, or any judge of a court of record of any state, territory, or country, or the mayor or chief officer of any city or borough; or, *within the United States*, by a Delaware commissioner. It must then be certified under the hand of such officer and his official seal; or the acknowledgment or proof may be taken in any court above mentioned, and certified under the hand of the clerk or other officer, and the seal of the court. In case of a certificate by a judge, the seal of his court may be affixed to his certificate, or to a certificate of attestation of the clerk or keeper of the seal. Rev. Code (1874), 501–3.

A deed of a corporation may be acknowledged before the chancellor or any judge of the state, or a judge of the district or circuit court of the United states, or a notary public, or two justices of the peace of the same county, by the presiding officer or legally constituted attorney of the corporation. *Id.*

Acknowledgments need not be taken within the county where the lands lie. *Id.*

The form of the certificate is prescribed by statute, but the precise statutory form is probably not obligatory.

DISTRICT OF COLUMBIA.—Acknowledgments of deeds may be made before any judge of a court of record, and of law; any chancellor of state; any judge of supreme, circuit, district, or territorial courts of the United States; any justice of the peace, any notary public, any commissioner of the circuit court of the district, appointed for that purpose. The officer taking the acknowledgment must annex a certificate under his hand and seal. If the acknowledgment is beyond the district and within the United States, the certificate shall be accompanied by a certificate of the register, clerk, or other public officer having cognizance of the fact under his seal.

Without the United States they may be acknowledged before any judge or chancellor of any court, master, or master extraordinary in chancery, or notary public, or before any secretary of legation or consular officer of the United States.

FLORIDA.—*Within the state;* before any judge, clerk or deputy clerk of a court of record, notary public, or justice of the peace. Rev. Stats. § 1973. *Without the state, and within the United States;* before a Florida commissioner, or, in cities and counties where there is no commissioner appointed or acting there, before the chief justice, judge, presiding justice, or president of any court of record of the United States, or of any state or territory thereof, having a seal and a clerk or prothonotary; but the acknowledgment must be taken within the jurisdiction of such court. The certificate must state the place, and that the court is a court of record; and it must be accompanied by the clerk's certificate under seal to the appointment of the judge. *Without the United States;* before any notary public, minister plenipotentiary, minister extraordinary, minister resident, *chargé d'affaires*, commissioner or consul of the United States, or a commissioner of this state. A certificate of the character of an officer not having a seal must be certified by a court of record or by a secretary of state, minister plenipotentiary, minister extraordinary, minister resident, *chargé d'affaires*, or commissioner. *Id.* § 3.

The certificate of acknowledgment of a married woman must state that she acknowledged, on a separate examination apart from her husband, that she executed such deed, etc., freely and without any constraint, apprehension, or fear of her husband.

In any acknowledgment taken out of the state, the certificate must set forth that the officer knew or had satisfactory proof that the party making the acknowledgment was the individual described in, and who executed, the instrument.

GEORGIA.—Deeds are to be executed in the presence of two witnesses. They are to be acknowledged or proved, when *within the state*, before a justice of the peace, or the clerk of the superior court, or judge of any court of record, or a notary public. It is not necessary for the officer to affix his seal.

Without the state, and within the United States; before a Georgia commissioner, or a consul or vice-consul of the United States with their certificates under seal, or by a judge of a court of record in the state where executed, with a certificate of the clerk under seal, of such court, of the genuineness of the signature of such judge. The affidavit of the witness must express the addition of the witness and the place of his abode.

Consuls and vice-consuls may take the acknowledgments of citizens of the United States, or of other persons, being or residing within the districts of their consulates.

A married woman should acknowledge, on a private examination before the chief justice, or any justice of the peace, that she did, of her own free will and accord, subscribe, seal, and deliver the deed, with an intention thereby to renounce, give up, and forever quit-claim her right of dower and thirds of, in, and to the lands, etc., therein mentioned. This is not necessary, however, except where husband is aliening lands to which he derived title through the wife by marriage. Rev. Code, § 1754, clause 5.

IDAHO.—*Within the state;* before some judge or clerk of a court of record, a notary public, or justice of the peace. *Without the state, but within the United States;* before some judge or clerk of any court of record, or before a commissioner for Idaho. *Without the United States;* before some judge or clerk of any court having a seal, or by any notary public, or minister, commissioner, or consul of the United States.

A married woman must be examined apart from and without the hearing of her husband, and must acknowledge that the act is free and voluntary, and without fear or compulsion, or under the influence of her husband, and that she does not wish to retract the execution of the same. Laws (1863–64), 528 *et seq.*

ILLINOIS.—*Within the state;* before a notary public or U. S. Commissioner, who shall affix his seal; master of chancery, circuit or county clerk, justice of the peace (duly certified to if out of the county where the land lies), any court of record having a seal, or any judge, justice, or clerk thereof; if before the court or clerk the seal of court being affixed. *Without the state;* before a justice of the peace duly certified to by clerk of the proper court, notary public, U. S. commissioner, commissioner of deeds,

mayor of a city, or clerk of a county, such officer affixing his seal, or any judge, justice, or clerk of the supreme, or any circuit, district, superior, county, or common pleas court of the United States, or any state or territory; or the acknowledgment may be in conformity to the laws of the state, territory, or district where made, in which case a certificate of conformity from a clerk of a court of record, with his seal affixed, is required, or conformity may be proved by the laws of such state. *Without the United States;* before any minister or secretary of a legation, or consul of the United States, or any court of any republic, state, kingdom, or empire having a seal, or before a mayor or chief officer of a city or town having a seal, or any officer authorized by the laws of such country to take acknowledgments: and proof of his authority must accompany his certificate. The certificate of such court, mayor, or officer must be under their official seal. R. S. 276.

The wife need not be examined separately.

The certificate of an acknowledgment taken before a justice of the peace residing within the state, but in another county than that in which the lands lie, must be certified by the clerk of the county commissioners' court. *Id.* 963, § 18.

A certificate of acknowledgment must state that the person was personally known to the officer to be the person whose name is subscribed to the deed or writing as having executed the same, or that he was proved to be such by a credible witness (naming him). *Id.* § 40.

INDIAN TERRITORY.—Except in the Quapaw Agency, the title to all realty is yet in the United States. The various Indian tribes and nations hold their reservations by patent from the Government in common. Some of the affiliated tribes of the Quapaw Agency are now taking allotments. Citizens of the United States cannot own land here, but must occupy their homes as tenants of some Indian landlord. It is necessary that notaries public have seals and affix the same to all acknowledgments.

INDIANA.—Acknowledgment, or proof by subscribing witness, may be: 1. If taken within the state; before any supreme or circuit judge, or clerk of a court of record, county surveyor, justice of the peace, auditor, recorder, notary public, or mayor of a city. 2. Elsewhere within the United States; before any judge or clerk of a supreme or circuit court, or court of common pleas, any justice of the peace, or mayor, or recorder of a city, notary public, or Indiana commissioner, auditor, or before any officer having power to take acknowledgments in the state or territory where the acknowledgment is taken. 3. Beyond the United States; before a minister, *chargé d'affaires*, or consul of the United States. No separate examination of a married woman is now necessary.

An officer taking an acknowledgment need not affix an ink scroll or seal, unless he is an officer required by law to keep an official seal. Laws of 1858, 39, c. 13, § 3.

IOWA.—Acknowledgment or proof may be made *within the state*, before some court having a seal, or a judge or clerk thereof, or some justice of the peace, notary public, or a county auditor, or his deputy, or any deputy clerk of court. A deed made or acknowledged *without the state, but within the United States*, shall be acknowledged before some court of record, or officer holding the seal thereof, or before an Iowa commissioner, or before some notary public or justice of the peace; and when before a justice of the peace, a certificate, under the official seal of the proper authority, of the official character of the justice and of his authority to take such acknowledgments, and of the genuineness of his signature, shall accompany the certificate of acknowledgment. Code, § 1218, as amended by Laws of 1855, 75, § 2.

A deed executed without the United States may be acknowledged or proved before any ambassador, minister, secretary of legation, consul, *chargé d'affaires*, consular agent, or any other officer of the United States in any foreign country, who is authorized to issue certificates under the seal of the United States; they may also be acknowledged or proven before an officer of a foreign country who is authorized by the laws thereof to certify to the acknowledgment of written documents, but the certificate must be authenticated by one of the above-named officers of the United States, whose official written statement that full faith and credit is due to the certificate of such foreign officer shall be deemed sufficient evidence of the qualification of such officer, and to certify thereto of the genuineness of signature or seal if he have any.

If the grantor die before acknowledging, or if his attendance cannot be procured, or, appearing, he refuses to acknowledge, proof may be made by any competent testimony. In such case the certificate must state the title of the court or officer; that it was satisfactorily proved that the grantor was dead, or that his attendance could not be procured, or that having appeared he refused to acknowledge the deed; the names of the witnesses by whom the proof was made, and that it was proved by them that the instrument was executed by the person whose name is thereunto subscribed as a party. A separate examination of wife is not necessary

KANSAS.—No instrument affecting real estate is of any validity against subsequent purchasers for a valuable consideration without notice, unless recorded in the office of the register of deeds of the county in which the land lies, or in such other office as is, or may be, provided by law.

If acknowledged *within the state*, it must be before some court having a seal, or some judge, justice, or clerk thereof, or some justice of the peace, notary public, or register of deeds, county clerk, or mayor or clerk of a city.

If acknowledged *out of the state*, it must be before some court of record, or clerk, or officer holding the seal thereof, or before some commissioner to take the acknowledgments of deeds for this state, notary public, justice of the peace, or any United States consul resident abroad. If taken before a justice of the peace, the acknowledgment shall be accompanied by a certificate of his official character, under the hand of the clerk of some court of record, to which the seal of said court shall be affixed.

The court or person taking the acknowledgment must endorse upon the deed a certificate setting forth the following particulars: 1. The title of the court or person before whom the acknowledgment is taken; 2. That the person making the acknowledgment was personally known to at least one of the judges of the court, or to the officer taking the acknowledgment, to be the identical person whose name is affixed to the deed as grantor, or that such identity was proved by at least one credible witness (naming him); 3. That such person acknowledged the instrument to be his own voluntary act and deed.

If the grantor die before acknowledging the deed, or if, for any other reason, his attendance cannot be procured in order to make the acknowledgment, or if, having appeared, he refuses to acknowledge it, proof of the due execution and delivery of the deed may be made by any competent testimony before the same court or officers as are authorized to take acknowledgments of grantors.

The certificate endorsed upon the deed must state in this last case: 1. The title of the court or officer taking the proof; 2. That it was satisfactorily proved that the grantor was dead, or that, for some other cause, his attendance could not be procured to make the acknowledgment, or that, having appeared, he refused to acknowledge the deed; 3. The names of the witnesses by whom the proof was made, and that it was proved by them that the instrument was executed by the person whose name is thereunto subscribed as a party.

The certificate of proof or acknowledgment may be given under seal or otherwise, according to the mode by which the courts or officers granting the same usually authenticate their most solemn and formal official acts.

Any court or officer having power to take the proof above contemplated may issue the necessary subpœnas, and compel the attendance of witnesses residing within the county, by attachments, if necessary.

No instrument containing a power to convey, or in any manner affect real estate, certified and recorded as above prescribed, can be revoked by an act of the parties by whom it was executed, until the instrument containing such revocation is acknowledged and deposited for record, and entered on the entry-book, in the same office in which the instrument conferring the power is recorded.

Every instrument in writing affecting real estate which is acknowledged or proved, and certified as hereinbefore directed, may be read in evidence, without further proof.

A married woman may convey her interest in the same manner as other persons.

The wife need not be examined apart from her husband, the right of dower being abolished. § 2129, Kans. Comp. Laws, 1881.

KENTUCKY.—A deed executed *within the state* can be acknowledged before the clerk of the county court where the property lies; or the deed may be proved by the subscribing witnesses, or by one of them if he can prove the attestation of the other; or by proof by two witnesses that the two subscribing witnesses are dead, or out of the state, or one so absent and the other dead, and proof of the signature of one of them and of the grantor. In such case, the certificate must state the witnesses' names.

A deed executed *out of the state, and within the United States*, may be acknowledged before a judge and certified under the seal of his court, or before a clerk of a court, or his deputy, notary public, mayor of a city, secretary of state, or Kentucky commissioner, and certified under his official seal.

A deed executed *out of the United States* may be acknowledged or proved before any foreign minister, consul, or secretary of legation of the United States, or before the secretary of foreign affairs, certified under his seal of office, or a judge of a superior court of the nation where acknowledged. On making proof by others than the subscribing witnesses, the names and residences of the witnesses must be stated in the certificate. Gen. St. ch. 24, § 17.

If a married woman is a grantor, the officer must explain to her the contents and effect of the deed separately and apart from her husband; and she must also declare that she did freely and voluntarily execute it, and is willing that it should be recorded. When the acknowledgment of a married woman is taken within the state, the officer may simply certify that the acknowledgment was made before him, and its date, and it will be presumed that the law was complied with.

When taken without the state, the certificate must be to this effect:—

County [*or*, Town, City, Department, *or* Parish] of , sct.

I, A. B. [here give title], do certify that this instrument of writing from C. D. and wife [*or*, from E. F., wife of C. D.] was this day produced to me by the parties (which was acknowledged by the said C. D. to be his act and deed); and the contents and effect of the instrument being explained to the said E. F. by me, separately and apart from her husband, she thereupon declared that she did, freely and voluntarily, execute and deliver the same, to be her free act and deed, and consented that the same might be recorded.

Given under my hand and seal of office.

[SEAL] A. B.

If the deed of a married woman is not recorded within the time prescribed (viz., if executed in the state, eight months; without the state, and in the United States, twelve months; and without the United States, eighteen months), it is not effectual, but must be re-acknowledged before it can be recorded.

LOUISIANA.—Acknowledgments of deeds to be taken before notaries public, clerks of district courts (Parish of Orleans excepted), said clerks being *ex-officio* recorders of mortgages and conveyances, and notaries public—and their deputies.

Without the state, and within the United States; acknowledgments and proof may be taken by Louisiana commissioners, and certified under their signature and seal; but the commissioner can only take such acknowledgment or proof where the party making it resides in the state or territory where the commissioner resides. All instruments should be attested by two male witnesses besides the Louisiana commissioner or officer taking the acknowledgment, and he should attach his seal thereto. Any acknowledgment made in conformity with the laws of the state where the act is passed is valid in Louisiana. *In any foreign country*, all American ministers, *chargés d'affaires*, consuls-general, consuls, vice-consuls, and commercial agents may act as commissioners.

The certificate of acknowledgment by a married woman must set forth an examination by the officer apart from the presence of her husband touching the freedom of her action, and that he informed her fully of the nature of her rights upon the property of her husband.

MAINE.—Deeds are to be acknowledged by the grantors, or one of them, or by their attorney executing the same, before a justice of the peace or notary public within the state, or any justice of the peace, magistrate, or notary public within the United States, or any minister or consul of the United States, or notary public in any foreign country, and the acknowledgment certified.

When a grantor dies or leaves the state without acknowledging the deed, it may be proved by a subscribing witness before any court of record in the state; and in their absence by proof of the handwriting of the grantor and witness.

A certificate must be endorsed on, or annexed to, the deed.

Acknowledgments and proof may also be taken without the state, but, according to the laws of the state, by a Maine commissioner; his certificate to be under official seal, and annexed or endorsed. Private examination of wife not necessary.

MARYLAND.—From the Pub. Gen. Laws the following is taken, being the law of Maryland on the subject of acknowledgments.

Section 65.—"The following forms of acknowledgment shall be sufficient."

Acknowledgment taken within the state of Maryland.

" county, to wit:—

"I hereby certify, that on this day of , in the year , before the subscriber [here insert style of the officer taking the acknowledgment], personally appeared [here insert the name of person making the acknowledgment], and acknowledged the foregoing deed to be his act."

Form of acknowledgment of husband and wife.

"State of Maryland, county, to wit:—

Section 66.—"I hereby certify, that on this day of , in the year , before the subscriber [here insert the official style of the judge taking the acknowledgment], personally appeared [here insert name of the husband] and [here insert name of the married woman making the acknowledgment], his wife, and did each acknowledge the foregoing deed to be their respective act."

Form of acknowledgment taken out of the state.

"State of , county, to wit:—

Section 67.—"I hereby certify, that on this day of , in the year of , before the subscriber [here insert the official style of the officer taking the acknowledgment], personally appeared [here insert the name of the person making the acknowlment], and acknowledged the aforegoing deed to be his act.

"In testimony whereof, I have caused the seal of the court to be affixed (*or* have affixed my official seal), this day of ," etc., etc.

Seal of the Court.

Section 68.—"Any form of acknowledgment containing in substance the aforegoing forms shall be sufficient."

The acknowledgment is to be taken as follows:—

If in the county or city within which the real estate or any part of it lies, before some one justice of the peace of county or city; a judge of the orphans' court for county or city; the judge of the circuit court for county; the judge of the superior court, court of common pleas, or circuit court for Baltimore city, or notary public. If acknowledged *within the state, but out of the county where the land lies*, before any justice of the peace where the grantor may be, the official character of the justice of the peace must be certified to by the clerk of the circuit court of the county or the superior court of Baltimore city under the official seal.

If acknowledged *out of the state, but within the United States*, before a notary public, judge of any court of the United States, judge of any state or territory having a seal, or a commissioner of Maryland to take acknowledgments.

If acknowledged *without the United States*, before any minister, consul-general, or consul, deputy-consul, vice-consul, consular agent, or consular officer of the United States, a notary public, or a commissioner of Maryland, as above.

When an acknowledgment is taken before a judge, the seal of the court must be affixed.

Code of Public General Laws, Art. 25:—No private acknowledgment by the wife is necessary. The acknowledgment is merely that the parties "acknowledge the foregoing deed to be their act," or to this effect.

There must be added to the acknowledgments of mortgages and bills of sale the affidavit of the mortgagee or vendee, that the consideration is true and *bona fide* as therein set forth. *Id.*

MASSACHUSETTS.—Acknowledgments of deeds are to be by the grantors, or one of them, or by the attorney executing the same.

They may be taken before any justice of the peace of the state, or before any justice of the peace, magistrate, or notary public, or Massachusetts commissioner, within the United States or in any foreign country; or before a minister or consul of the United States in any foreign country.

When acknowledgments are taken out of the state by a justice of the peace, there should be appended a certificate of his appointment and authority, made by the secretary of state or clerk of a court of record.

The wife is not required to be examined separate and apart from her husband.

If the grantor dies, or leaves the state, the execution may be proved by a subscribing witness.

MICHIGAN.—A deed executed *within the state* may be acknowledged before any judge or commissioner of a court of record, or any notary public, or justice of the peace. The officer must endorse on the deed a certificate of the acknowledgment, and the time and date of making it, under his hand.

A deed executed *without the state, and within the United States*, may be executed according to the laws of the state, territory, or district where executed, and may be acknowledged before any judge of a court of record, notary public, justice of the peace, master in chancery, or other officer, authorized by the laws thereof to take acknowledgments, or before a Michigan commissioner. In such case, unless the acknowledgment is taken before a Michigan commissioner, there must be attached a certificate of the clerk, or other proper certifying officer, of a court of record for the county or district within which the acknowledgment was taken, under his official seal, that the person subscribing the certificate was, at the date of it, such officer as represented; that he believes the officer's signature to be genuine, and that the deed is executed according to the laws of the state, territory, or district. A deed executed *in a foreign country* may be executed according to the laws thereof, and acknowledged before any notary public, or any minister plenipotentiary, extraordinary, or resident; any *chargé d'affaires*, commissioner, or consul of the United States appointed to reside therein.

The acknowledgment of a married woman of a deed, in which she joins with her husband, may be the same as if she were sole. Laws of 1875, p. 142.

If a grantor dies, or leaves the state, or resides out of the state, the execution of the deed may be proved before any court of record by proceedings given by the statute; and if the grantor is residing in the state, and refuses to acknowledge the deed, he must be summoned to attend. Rev. Stat. 1846, c. 65, ss.; 2 Comp. Laws, 1857, 840 (2733), §§ 14–20.

MINNESOTA.—*Within the state;* before a judge of the supreme, district, or probate court, or a clerk of said courts, or before clerks of United States circuit and district courts for the district of Minnesota, a notary public, justice of the peace, register of deeds, court commissioner, county auditor, town clerk, city clerk, or recorder of a village, or clerks of municipal courts for St. Paul, Minneapolis and Stillwater. Laws of 1876, p. 59; Laws of 1877, p. 186; Laws of 1873, p. 103.

Without the state, and within the United States; the deed may be executed according to the laws of the state, territory, or district where executed, and acknowledged before any judge or clerk of a court of record, notary public, justice of the peace, or before a Minnesota commissioner.

In a foreign country, the execution may be according to its laws, and the acknowledgment may be before a notary public therein, or any minister plenipotentiary, extraordinary, or resident, *chargé d'affaires*, commissioner, or consul of the United States, appointed to reside therein, to be certified under the hand of the officer, and, if he is a notary, under his seal.

The separate acknowledgment of a married woman is not necessary.

Proof by witnesses may be taken before any court of record, when the grantor dies, or resides out of the state, or refuses to acknowledge. Ch. 40, §§ 11, 12; G. S. 1878, Ch. 40, §§ 11, 12.

MISSISSIPPI.—*When in the state*, deeds may be acknowledged, or proved by one or more of the subscribing witnesses to them, before any judge of the Supreme Court or a judge of the circuit courts, chancellor, any clerk of any court of record, who shall certify the same under the seal of his office, or any justice of the peace, or any chancellor, or member of the board of county supervisors, whether the lands be within his county or not.

When in another state or territory of the United States, such deeds must be acknowledged or proved, as aforesaid, before a judge of the supreme court or of the district courts of the United States, or before any judge of the supreme or superior court of any state or territory in the Union; or any justice of the peace, whose official character shall be certified under the seal of some court of record in his county or by a Mississippi commissioner.

When out of the United States, such acknowledgment or proof may be made before any court of record, or mayor, or other chief magistrate of any city, borough, or corporation of such foreign kingdom, state, nation, or colony, or before any ambassador, foreign minister, secretary of legation, or consul of the United States to the kingdom or state, nation or colony; and the certificate in such cases must show the identity of the party, and that he acknowledged the execution of the deed, or that the execution was duly proved; or, if made before an ambassador, minister, or consul, then as such acts are usually certified by such officer. In the same way, a married woman residing without the United States may acknowledge her conveyance of lands or right to dower.

No separate examination of a wife is required, but she should be described in the acknowledgment as the wife of the grantor. § 2465, Annotated Code.

MISSOURI.—*Within the state;* before a court having a seal, or before a judge, justice, or clerk thereof, a notary public, or some justice of the peace for the county where the land lies. *Without the state, and within the United States*, by any notary public, or by any court of record of the United States, or of any state or territory, having a seal, or the clerk of such court, or before a Missouri commissioner. *Without the United States*, by any court of any state, kingdom, or empire, having a seal; or before the mayor or chief officer of any city or town having an official seal; or by any minister or consul of the United States, or notary public, having a seal.

The certificate must be endorsed on the instrument. If granted by a court, it must be under its seal; if by a clerk, then under his hand and the seal of his court; if by an officer having an official seal, then under his hand and seal; if by one who has no seal, then under his hand

No acknowledgment must be taken unless the person offering to make it is personally known to at least one judge of the court, or to the officer taking it, to be the person whose name is subscribed, or unless he is proved to be such by at least two credible witnesses. The certificate must state this fact, as well as the fact of acknowledgment; and, if the identity was proved by witnesses, their names and residence must be stated.

If the deed is attested by a subscribing witness, proof of the execution of the deed may be made by the subscribing witness before one of the officers mentioned, and the certificate must state the residence of the witness and that he is personally known to the officer so certifying.

When a married woman unites with her husband in the execution of a deed, she shall be described in the acknowledgment as his wife, but in all other respects her acknowledgment shall be taken and certified as if she were sole and no separate examination of a married woman in respect to the execution of any release of dower or other instrument affecting real estate shall be required. R. S. (1889) § 2408.

MONTANA.—*Within the state;* before the secretary of state, some judge or clerk of a court having a seal, a notary public, a justice of the peace, the county clerk and *ex-officio* county recorder. *Without the state, and within the United States;* before some judge or clerk of any court of the United States, or any state or territory having a seal, a notary public, a justice of the peace, or commissioner appointed by the governor of the state for that purpose. If taken by a justice of the peace, his official character must be certified to under the seal of the court, tribunal, or officer within and for the county in which such justice may be acting, which has cognizance of his official character.

The certificate must state that the person acknowledging the execution is personally known to the officer.

The certificate of an acknowledgment by a married woman must state that the officer first made her acquainted with the contents of the instrument, and that on examination, separate, apart from, and without the hearing of her husband, she acknowledged that she executed the same freely and voluntarily, without fear or compulsion or undue influence of her husband, and that she does not wish to retract the execution of the same.

NEBRASKA.—*Within the state;* before some court having a seal, or some judge, justice, or clerk thereof, or some justice of the peace, or notary public. *Without the state;* before a Nebraska commissioner, or before some officer authorized, by the laws of the state or country where the acknowledgment is made, to take the acknowledgment of deeds.

The certificate must be endorsed upon the instrument, and must set forth the title of the court or officer; that the person making the acknowledgment was personally known to at least one of the judges of the court, or to the officer, to be the identical person whose name is affixed to the deed as grantor, or that such identity was proved by at least one credible witness (naming him); that such person acknowledged the instrument to be his voluntary act and deed.

The certificate of acknowledgment or proof may be under seal or otherwise, according to the mode by which the court or officer usually authenticates the most solemn official acts. Laws of 1855, 165, §§ 10–16, 18.

All acknowledgments taken by an officer having no seal must be accompanied with a certificate of a clerk of record or other proper officer of the district, under official seal, that the officer taking the same was the same as represented therein at the date thereof, that the signature is genuine, and the acknowledgment in conformity to law. Gen. Stat. 1873, pp. 141, 239, 343, 494, 873, 877. No separate examination is required in taking the acknowledgment of a married woman. All deeds should have at least one subscribing witness. It is requisite for the husband to join in his wife's conveyance to cut out his right of curtesy.

NEVADA.—Every conveyance in writing, whereby any real estate is conveyed or may be affected, must be acknowledged, or proved, and certified as provided by law. *Within the State;* by some judge or clerk of a court having a seal, or some notary public or justice of the peace of the proper county. *Without the state, but within the United States;* by a judge or clerk of any court of the United States, or of any state or territory having a seal, notary public, or justice of the peace, with a certificate of his official character and the genuineness of his signature; or by a commissioner appointed by the government of the state for the purpose. *Without the United States;* by a judge or clerk of any court of any state, kingdom, or empire having a seal, or by any notary public therein; or by any minister, commissioner, or consul of the United States, appointed to reside therein.

A certificate must be endorsed or annexed by the officer taking the acknowledgment under seal of the court, or under the hand and the official seal of the officer taking it, when he has an official seal.

The person making the acknowledgment must be known personally by the officer taking the acknowledgment, or proved by the oath or affirmation of a credible witness, to be the person executing the instrument, and the fact must be stated in the certificate. The certificate must state, in addition, that the execution was made freely and voluntarily, and for the uses and purposes mentioned in the deed or other instrument.

Proof may be made by subscribing witnesses, and, where they are dead or cannot be had, by evidence of the handwriting of the party.

The subscribing witnesses must be personally known, or their identity established by oath or affirmation of one witness, and must establish that the person whose name is subscribed as a party is the person described as executing the instrument, did execute it, and the witness subscribed his name. The certificate must set forth these facts.

Where the officer is satisfied that the subscribing witnesses are dead, proof may be made by a competent witness who swears or affirms that he knew the person who executed the instrument, knew his signature and believes it to be his, and a witness who testifies in the same manner as to the signature of the subscribing witness.

Compulsory process may be had for the attendance of witnesses.

The examination of the wife must be taken separate and apart from her husband, and her execution of the deed must be acknowledged, and cannot be proved.

A deed so acknowledged or proved may be recorded.

NEW HAMPSHIRE.—Deeds are not valid, except as against the grantor and his heirs, unless attested by two or more witnesses, acknowledged and recorded. Acknowledgments whether within or without the state are to be before a justice of the peace, notary public, or commissioner; or before a minister or consul of the United States in a foreign country. If before a justice of the peace without the state, his official character should be authenticated by the clerk of a court of record or by the secretary of state.

No separate acknowledgment is required to be made by the wife, nor need she be examined apart from her husband.

NEW JERSEY.—Deeds, etc., must be acknowledged by the party or parties who executed them, the officer having first made known to them the contents, and being also satisfied that such person is the grantor mentioned in said deed, of all which the said officer shall make his certificate; or, if it be proved by one or more of the subscribing witnesses to it, that such party signed, sealed and delivered the same as his, her, or their voluntary act and deed, before the chancellor of the state, or one of the justices of the supreme court, or one of the masters in chancery, or one of the judges of any of the courts of common pleas of the state or commissioner of deeds; and if a certificate of such acknowledgment or proof shall be written upon or under the said deed or conveyance, and be signed by the person before whom it was made, the same may be received in evidence.

If the grantor or witnesses reside *without the state, but within the United States*, the acknowledgment or proof may be made before a judge of the U. S. Supreme, circuit or district court, chancellor of the state or territory where taken; judge of a supreme, superior, circuit or district court of the state (all the above without the seal of such officer or court); a mayor or other chief magistrate of a city, under the seal of said city, a master in chancery of New Jersey; a commissioner of deeds for New Jersey, under his seal; a judge of a court of common pleas; or before any judge of any court of record, or any officer authorized by said state or territory to take acknowledgments duly certified to by the great seal of the state or territory, or by the seal of the court of the county in which it was made. The judges of the court of record must be authorized by the laws of the state where the acknowledgment is taken.

If the grantor or witnesses reside *without the United States*, it may be made before any court of law, mayor or chief magistrate of a city, borough, or corporation of the kingdom, state, nation, or colony in which they reside, or any ambassador, public minister, *chargé d'affaires*, or other representative of the United States at the court thereof, any consul or vice-consul, and may be certified as such acts are usually authenticated by such officers and a master of chancery of New Jersey.

No estate of a *feme covert* passes by her deed without her previous acknowledgment, on a private examination apart from her husband, that she signed, sealed, and delivered the same, as her voluntary act and deed, freely, without any fear, threats, or compulsion of her husband, and a certificate thereof written on or under the instrument, signed by the officer.

The mode of making proof in case of the death of parties and witnesses is prescribed by Laws of 1850, 273.

NEW MEXICO.—Every instrument in writing by which real estate is transferred or affected in law or equity must be acknowledged and certified to as provided by law.

Within the territory; before any judge, justice of the peace, a notary public having a seal, or clerk of a court having a seal. *Without the territory, and within the United States;* before any United States court, or the court of any state or territory having a seal, or before a clerk or judge of said

courts, or a commissioner of deeds appointed by the governor of this territory, or before any notary public having a seal. The genuineness of the signature and official character of such judge must be certified to under seal of his court by the clerk thereof. *Without the United States;* before any court of any state, kingdom, or empire having a seal, or before any magistrate, or the supreme power of any city, who may have a seal, before any notary public having a seal, any consul or vice-consul of the United States having a seal, or before the judge of any court of record having a seal.

The person making the acknowledgment must be personally known to the officer taking the same to be the one executing the instrument, or his identity must be proved by two witnesses.

The certificate must state the fact of acknowledgment and one or the other of the above facts, as the case may be.

Acknowledgments may be made by married women before the same officers. In addition to evidence or knowledge of identity, as before stated, the woman must be informed of the contents of the instrument. No separate examination of a married woman is required, but she shall be described in the acknowledgment as the wife of the party making conveyance. Acts of 1889, § 2, p. 99.

NEW YORK.—*Within the state;* before judges of courts of record within the jurisdiction of their respective courts, county judges, surrogates, notaries public, and justices of peace at a place within their counties, mayors, recorders, and commissioners of deeds of cities within their respective cities.

Without the state, but within the United States; before a judge of the United States supreme, circuit or district courts, or of the supreme, superior, or circuit court of any state or territory; but such acknowledgment must be taken at a place within the jurisdiction of such officer. Or before the mayor of any city; or before a New York commissioner, but the certificate of a New York commissioner must be accompanied by the certificate of the secretary of state of the state of New York, attesting the existence of the officer and the genuineness of his signature, and such commissioner can only act within the city or county in which he resided at the time of his appointment.

When made by any person *out of the state, and within the United States*, it may be made before any officer of the state or territory where made, authorized by its laws to take proof or acknowledgment; but no such acknowledgment is valid unless the officer taking the same knows, or has satisfactory evidence, that the person making it is the individual described in and who executed the instrument. And there must be subjoined to the certificate of proof or acknowledgment a certificate under the name and official seal of the clerk and register, recorder, or prothonotary of the county in which such officer resides, or of the county or district court or court of common pleas thereof, specifying that such officer was, at the time of taking such proof or acknowledgment, duly authorized to take the same, and that such clerk, register, recorder, or prothonotary is well acquainted with the handwriting of such officer, and verily believes his signature genuine.

Without the United States; when the party is in other parts of America, or in Europe, before a minister plenipotentiary, or minister extraordinary or *chargé d'affaires* of the United States, resident and accredited there, or before any United States consul-general, consul, vice-consul, consular agent, vice-consular agent, commercial agent and vice-commercial agent of the United States resident in any port or country, or before a judge of the highest court in Upper or Lower Canada. In the British dominions, before the Lord Mayor of London, or chief magistrate of Dublin, Edinburgh, or Liverpool.

Acknowledgment may be made before a person specially authorized by the supreme court of the state, by a commission issued for the purpose.

The governor of New York is also authorized to appoint commissioners of deeds, not exceeding three in each, for the following cities: London, Liverpool, Glasgow, Paris and Marseilles.

No acknowledgment is to be taken unless the officer knows, or has satisfactory evidence, that the person making such acknowledgment is the individual described in and who executed such conveyance.

Married women acknowledge in the same manner as if they were *sole*.

An acknowledgment or proof of conveyance by a *non-resident* married woman joining with her husband, may be made as if she were sole.

Proof of execution may be made by a subscribing witness who shall state his own place of residence, and that he knew the person described in and who executed such a conveyance: and such proof shall not be taken unless the officer is personally acquainted with such subscribing witness, or has satisfactory evidence that he is the same person who was a subscribing witness to such instrument.

The officer must endorse a certificate of the acknowledgment or proof, signed by himself, on the conveyance; and in such certificate shall set forth the matters required to be done, known, or proved, on such acknowledgment or proof, together with the names of the witnesses examined before such officer, and their places of residence, and the substance of the evidence by them given.

The certificate of a New York commissioner appointed in another state must be under his seal of office, and is wholly void unless it specifies the day on which, or [and ?]the city or town in which it was taken.

NORTH CAROLINA.—*Within the state;* before a judge of a court of record or the clerks thereof or clerk of the superior or of the inferior or criminal court, or before a notary public or justice of the peace of such county, or of any other county of the state, who shall enter his certificate thereon.

Without the state; by a commissioner appointed for the purpose by the court of pleas and quarter sessions of the county, or a North Carolina commissioner of affidavits.

Without the state, and within the United States; before a judge, clerk of a court of record, notary public having a seal, mayor of a city having a seal, or a justice of the peace of the state in which the grantor or maker or subscribing witness resides, certified to by a clerk of a court of record; or a commissioner of North Carolina.

Without the United States; before the chief magistrate of the city in which the instrument was executed, attested under the corporate seal; or before an ambassador, public minister, consul, or commercial agent of the United States under his official seal. Rev. Code, 240, § 5; 241, §§ 6, 7; 125, § 2.

A married woman's acknowledgment is to be taken, within the state, before a judge of the supreme or superior court, or in the court of the county where the land lies, she being first privily examined by such judge, or some member of the county court appointed by the court for that purpose, or by a commission issued by the judge or court for that purpose, as to whether she voluntarily assents. Without the state, before the same officers specified above as authorized to take other acknowledgments without the state; but the same private examination is requisite wherever the acknowledgment may be taken. *Id.* 242, §§ 8, 9; 243, § 12.

NORTH DAKOTA.—Acknowledgments *within the state* may be taken before a justice, judge or clerk of any court of record, notary public, mayor of a city, register of deeds, or justice of the peace within their several jurisdictions.

Without the state but within the United States, a justice, judge or clerk of any court of record of the United States, or of any state or territory, notary public, commissioner appointed for the purpose by the governor of this state, or any other officer of the state or territory where the acknowledgment is made, authorized by its laws to take such proof or acknowledgment.

Without the United States, before a minister, commissioner, *chargé d' affaires* of the United States, resident in and accredited in the country where the acknowledgment is made; consul, vice-consul or consular agent of the United States, resident in the country where the acknowledgment is made; judge of a court of record where the acknowledgment is made; or a notary public of such country. All rights of dower or curtesy are abolished, and wife need not join husband in conveyance of land, nor husband join wife in conveyance of land belonging to the wife.

OHIO.—Instruments affecting lands which are executed *within the state* are to be acknowledged before a judge of a court of record, or a clerk thereof, a county auditor or a justice of the peace, notary public, mayor, or other presiding officer of an incorporated town or city, or a county surveyor of the county. The certificate must be upon the same sheet with the instrument. Laws of 1831, 346.

No separate examination of the wife is required.

A certificate of acknowledgment within the state need not show that the officer was satisfied of the identity of the grantor, nor that he made known the contents of the deed to a married woman, nor need it be sealed.

Instruments executed *without the state* may be proved or acknowledged in conformity with the laws of the state, territory, or country where acknowledged, or in conformity with the laws of Ohio. They may be taken before Ohio commissioners. *Id.* 310, § 5; 179, § 3. Laws of 1858, 15, § 12.

OKLAHOMA TERRITORY.—Acknowledments *within the Territory* may be taken before any judge of the supreme or district court, the clerk thereof or his deputy, probate judge of any county, county clerk or his deputy, such judge or clerk certifying the acknowledgment under the seal of such court or county respectively; before any notary public, on certifying the same under seal, or before any justice of the peace, if the land conveyed be within the county where the justice resides.

It may be taken *without the territory*, but *within the United States*, before a commissioner of deeds for the territory, clerk of a U. S. court, such clerk certifying the acknowledgment under his seal; before a notary public, or before any other officer authorized by the laws of any state or territory to take such acknowledgments and who has a seal of office.

All instruments conveying or affecting the title to the homestead exempted by law to the head of a family, shall be void unless husband and wife sign and acknowledge one and the same joint instrument conveying the same, except leases for one year.

OREGON.—Acknowledgments are to be before any judge of the supreme or county court or the clerks thereof, or judge of a circuit court, justice of the peace, or notary public; and the certificate, stating the true date, must be endorsed on the instrument. If the deed is executed in any other state, territory, or district of the United States, it may be executed and acknowledged according to the laws of such state, etc.; but in this case, unless it is acknowledged before an Oregon commissioner, the deed must have attached to it a certificate of the clerk, or other proper certifying officer, of a court of record of the county or district, under his seal of office, certifying that the person taking the acknowledgment was such officer as represented, that his signature is genuine, and that the deed was executed according to the laws of the place. If executed in any foreign country, it may be executed according to the laws thereof, and acknowledged before any notary public therein, or before any minister plenipotentiary, minister extraordinary, minister resident, *chargé d'affaires*, commissioner, or consul of the United States, appointed to reside therein, under his hand, and, if before a notary, under his seal of office.

The acknowledgment of a married woman residing within the state, and joining in execution with her husband, must be taken separately and apart from her husband, and she must acknowledge that the execution was done freely, and without fear or compulsion from any one. If not residing in the state, her acknowledgment may be as if she were sole. No acknowledgment can be taken unless the officer has satisfactory evidence that the person is the individual described in and who executed the conveyance.

Proof may be by a subscribing witness personally known to the officer, or satisfactorily shown to him to be the subscribing witness. The witness must state his residence, and that he knew the person described in and who executed the conveyance.

In case of the death or absence of the grantor and witnesses, proof may be by handwriting of the grantor and of any witness. Proceedings for compelling witnesses to appear are also given by the statute.

The officer must endorse the certificate on the instrument, and set forth the matter required to be done, known, or proved, and the names and residences of witnesses examined, and the substance of their evidence. Statutes (1855), 519, §§ 10-21.

PENNSYLVANIA.—*Within the state;* before a justice of the supreme court of Pennsylvania; any judge of a court of common pleas, the mayor or any magistrate of Philadelphia, any notary public, a justice of the peace, a recorder of deeds, and the commissioners of the courts of common pleas of this state. None of the above named local officers can take an acknowledgment while outside of his own county. A notary may act any where within the state.

Without the state, and within the United States; before a mayor, chief magistrate of a city, town or place where deed is executed, under the public seal; any justice or judge of the supreme or superior court, or court of common pleas; court of probate; court of record of any state or territory of the United States, certified under the hand and seal of the court; any judge of the U. S. supreme court or circuit court or district court; any officer or magistrate of any state or territory within the United States who is authorized by the laws of his own state and territory to take acknowledgments; notaries public, commissioners for Pennsylvania.

When made out of the United States; before ambassadors and other public ministers of the United States under official seal, consuls and vice-consuls of the United States under seal, deputy consuls, commercial agents, vice and deputy commercial agents, or consular agents of the U. S., under their official seal; notaries public, commissioners for Pennsylvania. If the person desiring to take acknowledgment is in the military service of the United States, he may do so before an officer holding a rank not inferior to that of major from the governor of Pennsylvania while in the service of the United States.

A married woman's acknowledgment of a deed to pass her separate estate is to be in the same form as her acknowledgment to bar dower.

The certificate of the acknowledgment of a *feme covert* must state:—1, that she is of full age; 2, that the contents of the instrument have been made known to her; 3, that she has been examined separate and apart from her husband; and, 4. that she executed the deed of her own free will and accord, without any coercion or compulsion of her husband. (A lower court has decided that a separate acknowledgment is not now required.)

It is the practice to make the certificate under seal; though a seal is not required.

RHODE ISLAND.—All deeds are void, except as between the parties and their heirs, unless acknowledged and recorded. Pub. Stats. Ch. 173.

Within the state; the acknowledgment must be before a senator, a judge, justice of the peace, notary public, or town clerk.

A deed executed without the state, and within the United States, may be acknowledged before any judge, justice of the peace, mayor, or notary public, in the state where the same is executed, or by any commissioner, appointed by the governor and qualified; and if without the United States, before any ambassador, minister, *chargé d' affaires*, recognized consul, vice-consul, or commercial agent of the United States, or any commissioner so appointed and qualified in the country in which the same is executed.

Where husband and wife convey real property of which they are seized in the right of the wife, or property wherein the wife might be endowed, the latter must be examined privily and apart from her husband, and declare to the officer that the instrument shown and explained to her by him is her voluntary act, and that she does not wish to retract the same.

SOUTH CAROLINA.—To admit a deed to record in the register's office, or the secretary of state's office, it must be proved by the oath of one of the witnesses before a trial justice, or notary public, or any officer entitled to administer an oath, and without the state before a commissioner of deeds of South Carolina, a clerk of a court of record, who shall certify the same under his seal, notary public, who shall affix his seal and accompany the same with a certificate of his official character; commissioners appointed by *dedimus* issued by the court of common pleas of the county in which the instrument is to be recorded; or before a clerk of a court of record under his official seal.

When without the United States; before a consul or vice-consul, or any consular agent of the United States, or commissioner appointed by *dedimus* as above.

A *feme covert* may renounce her dower according to the form attached. If such renunciation is taken without the state, it should be done before the proper officer.

The State of South Carolina.

District. I, Z. G., one of the judges of the court of common pleas in the said state [or a

magistrate of district, as the case may be], do hereby certify unto all whom it may concern, that E. B., the wife of A. B., did this day appear before me, and, upon being privately and separately examined by me, did declare that she does freely, voluntarily, and without any compulsion, dread, or fear of any person or persons whomsoever, renounce, release and forever relinquish unto the within named C. D., his heirs and assigns forever, all her interest and estate, and also all her right and claim of dower of, in, or to all and singular the premises within mentioned and released. Given under my hand and seal, this day of , Anno Domini

Z. G., E. B.

[L. S.] judge of the court of common pleas in the state of South Carolina (or magistrate, as the case may be).

This provision, it must be observed, applies exclusively to "dower."

A *feme covert* of the age of twenty-one years, who may be entitled to any real estate as her inheritance, may deal with it as a *feme sole*. Gen. Stats. §§ 20–36.

SOUTH DAKOTA. — *Within the state;* before a justice, judge or clerk of any court of record, notary public, mayor of a city, register of deeds, or a justice of the peace within their several judisdictions.

Without the state, and within the United States; before a justice, judge or clerk of any court of record of the United States, or of any state or territory, notary public, commissioner for South Dakota appointed by the governor, or any other officer of the state or territory where acknowledgment is made, authorized by its laws to take such proof or acknowledgment.

Without the United States; before a minister, commissioner, *chargé d'affaires* of the United States, resident in and accredited to the country where acknowledgment is made, consul, vice-consul or consular agent of the United States, resident in the country where acknowledgment is made, judge or clerk of a court of record, register or commissioner, or a notary public.

The wife need not join the husband, nor the husband join the wife in conveyance of land belonging to the other, as the rights of dower and curtesy are abolished.

TENNESSEE.—By a person *within the state;* an acknowledgment is to be before the clerk, or legally appointed deputy clerk, of the county court of some county in the state, and any notary public. *Without the state, but within the United States;* before any court of record, or clerk of any court of record, in any state or territory or a Tennessee commissioner, or a notary public. *Without the United States;* before a Tennessee commissioner or notary public, or before a consul, minister, or ambassador of the United States.

A certificate taken within the state must be endorsed on or annexed to the instrument. A notary, Tennessee commissioner, a consul, minister, or ambassador, must make the certificate under his seal of office. Code (M. & V.), § 2856.

If the acknowledgment is taken before a judge, he must certify under his hand, and the clerk of his court must, under seal (a private seal, if there is no official seal), certify to the official character of the judge; or his official character may be certified by the governor of the state or territory, under its great seal. If it is taken before a court of record, a copy of the entry on the record must be certified by the clerk under seal (a private seal, if he has no official seal); and in this case, or if the acknowledgment be before the clerk of a court of record of another state, the judge, chief justice, or presiding magistrate must certify to the official character of the clerk. Code (M. & V.), §§ 2858, 2859.

Proof by witnesses may be before the same officers.

A married woman uniting with her husband in a deed must be examined, privily and apart from her husband, touching her voluntary execution of the same, and her knowledge of its contents and effect, and must acknowledge that she executed it freely, voluntarily, and understandingly, without any compulsion or constraint on the part of her husband, and for the purposes therein expressed, which must be stated in the certificate.

TEXAS.—*Within the state;* before a notary public, any clerk of a district court, or any judge or clerk, of any county court. *Without the state, and within the United States;* before some judge of a court of record having a seal, a notary public, or Texas commissioner. *Without the United States;* before a notary public, or any public minister, commissioner *chargé d'affaires*, consul-general, consul, vice-consul, commercial agent, vice-commercial agent, deputy consul, or consular agent of the United States.

In all cases the certificate must be under official seal.

The party should state that he executed the instrument for the consideration and purposes therein stated. Proof of execution may be made by one or more subscribing witnesses.

A married woman's acknowledgment of conveyance of her separate property, or of the homestead, or other property exempt from execution, may be before a judge of the supreme or district court, or notary public, or the chief justice of a county court, or the clerk or deputy clerk of a county court.

She must be privily examined by the officer, apart from her husband, and must declare that she did freely and willingly sign and seal the writing, to be then shown and explained to her, and does not wish to retract it, and must acknowledge the instrument, so again shown to her, to be her act. The certificate must show these facts, and that the instrument was fully explained to her.

If the husband and wife executed such conveyance without the state, the acknowledgment (which should be in the same form) may be taken before the officers who are specified above as authorized to take other acknowledgments.

UTAH.—*Within the state:* before a judge, or clerk of a court having a seal, a notary public, county recorder, or justice of the peace. *Without the state, and within the United States;* before a judge, or clerk of a United States court, or before a court of record or the clerk thereof, a notary public, or a Utah commissioner. *Without the United States;* before a judge, or clerk of any court of any state, kingdom or empire, having a seal, a notary public, a minister, commissioner, or consul of the United States, or the lawful deputy of the officer empowered to take acknowledgments.

A married woman may convey her estate as if a *feme sole*.

VERMONT.—All deeds and other conveyances of lands, or any estate therein, must be signed and sealed by the party granting the same, and signed by two or more witnesses, and acknowledged by the grantor before a justice of the peace, a town clerk, a notary public, or master in chancery, or judge or register of probate.

The separate acknowledgment or private examination of the wife is not required.

Acknowledgment or proof taken *without the state*, if certified agreeably to the laws of the state, province, or kingdom in which it was taken, is valid as though duly taken within the state; and the proof of the same may be taken, and the same acknowledged with like effect, before any justice of the peace, magistrate, or notary public, or Vermont commissioner within the United States, or any other officer by the laws of such other state authorized to take acknowledgments of deeds; or in any foreign country before any minister, *chargé d'affaires*, or consul or vice-consul of the United States in any foreign country or commissioner appointed by the Governor for that purpose.

VIRGINIA.—The acknowledgment may be made before the court of the county where the instrument is to be recorded, before the clerk of the court, in his office, or before a justice, notary public, or commissioner in chancery; or the deed may be proved by two witnesses.

A wife conveying must be examined by one of the justices of the court, or by the clerk, privily and apart from her husband; and, having such writing fully explained to her, must acknowledge the same to be her act, and declare that she executed it willingly, and does not wish to retract it. *Without the state, but within the Union;* before a justice (except that that of a married woman must be made before two justices together), or a notary public, or a Virginia commissioner, the clerk of any court of record.

Without the United States; before any minister plenipotentiary, *chargé d'affaires*, consul-general, consul, vice-consul, or commercial agent, appointed by the government of the United States, or by the proper officer of any court of such country, or the mayor or other chief magistrate of any city, town,

or corporation therein; the certificate to be under official seal. Code (1887), § 2501.

WASHINGTON.—A deed shall be in writing, signed and sealed by the party bound thereby, witnessed by two witnesses, and acknowledged by the party making it. *Within the state;* before a judge of the supreme court, judge of the superior court, a judge of the probate court, a justice of the peace, a notary public, or county auditor, or a clerk of the supreme or superior courts or their deputies. *Out of the state, and within the United States;* before a Washington commissioner, or before any person authorized to take acknowledgments by the laws of the state or territory wherein the acknowledgment is taken. *Without the United States;* before any minister plenipotentiary, secretary of legation *chargé d'affaires*, consul-general, vice-consul, or commercial agent appointed by the government of the United States to the country where it is taken, or before the mayor or chief magistrate of any city or town, or other municipal corporation therein. Act, Jan. 27, 1888.

The estates of curtesy and dower have been abolished, but in the conveyance of community property the wife must join with the husband in the execution of the deed. §§ 1405–1400, Hill's Code.

WEST VIRGINIA.—Before a justice, notary public, recorder, clerk of a county court, prothonotary, clerk of any court within the United States, or West Virginia commissioner; and, *without the United States*, before any officer there authorized to take such acknowledgments.

A married woman must be examined separate and apart from her husband, and the certificate must state that the paper executed was fully explained to her, and that she declared that she had willingly executed the same and did not wish to retract it.

WISCONSIN.—Deeds executed within the state may be acknowledged before a judge or commissioner of a court of record, and clerk of the board of supervisors, or a notary public, or justice of the peace of the state. The certificate must state the true date of the acknowledgment.

Deeds executed without the state, and within the United States, before a judge of a court of record, notary public, justice of the peace, master in chancery, or other officer authorized by the law of the place to take acknowledgments, or before a Wisconsin commissioner. Except in the last case, the certificate must be attested by the certifying officer of a court of record.

In a foreign country, before a notary public, or other officer authorized by the laws thereof, or any minister plenipotentiary, minister extraordinary, minister resident, *chargé d'affaires*, commissioner, or consul of the United States, appointed to reside therein. If before a notary public, his certificate must be under seal. Rev. Stat. (1858) 538, §§ 8, 11.

Married women residing in the state may acknowledge as if they were unmarried. *Id.* §§ 12, 14.

WYOMING.—*Within the state;* before any judge or commissioner of a court of record, or before a notary public or justice of the peace. *Without the state;* before a Wyoming commissioner, or any officer there authorized to take such acknowledgment, to be accompanied by a certificate, under the seal of a court of record, of his official capacity and the genuineness of his signature.

A married woman may convey and acknowledge as a *feme sole*.

See Judge Cooley's paper, 4 Rep. Am. Bar. Assn. 1881.

ACKNOWLEDGMENT MONEY. **In English Law.** A sum paid by tenants of copyhold in some parts of England, as a recognition of their superior lords. Cowel; Blount. Called a fine by Blackstone; 2 Sharsw. Bla. Com. 98.

ACOLYTE. An inferior church servant, who, next under the sub-deacon, followed and waited upon the priests and deacons, and performed the meaner offices of lighting the candles, carrying the bread and wine, and paying other servile attendance. Spelman; Cowel.

ACQUAINTED. When used with reference to a paper to which a certificate or affidavit is attached, it indicates a substantial knowledge of the subject-matter thereof. 5 Mo. App. 101; 14 Blatchf. 90.

ACQUEST. An estate acquired by purchase. 1 Reeves, Hist. Eng. Law 56.

ACQUETS. **In Civil Law.** Property which has been acquired by purchase, gift, or otherwise than by succession. Immovable property which has been acquired otherwise than by succession. Merlin, Répert.

The profits of all the effects of which the husband has the administration and enjoyment, either of right or in fact, of the produce of the joint industry and labor of both husband and wife, and of the estates which they may acquire during the marriage, either by donations, made jointly to them both, or by purchase, or in any other similar way, even although the purchase be only in the name of one of the two, and not of both.

This is the signification attached to the word in Louisiana; La. Civ. Code 2371. The rule applies to all marriages contracted in that state, or out of it, when the parties afterward go there to live, as to acquets afterward made there. The acquets are divided into two equal portions between the husband and wife, or between their heirs at the dissolution of their marriage.

The parties may, however, lawfully stipulate there shall be no community of profits or gains; but have no right to agree that they shall be governed by the laws of another country; 3 Mart. La. 581; 17 *id.* 571; La. Civ. Code. See 2 Kent 153, n.

As to the sense in which it is used in Canada, see 2 Low. Can. 175.

ACQUIESCENCE. A silent appearance of consent. Worcester, Dict.

Failure to make any objections.

It is to be distinguished from avowed consent, on the one hand, and from open discontent or opposition, on the other. It amounts to a consent which is impliedly given by one or both parties to a proposition, a clause, a condition, a judgment, or to any act whatever.

When a party is bound to elect between a paramount right and a testamentary disposition, his acquiescence in a state of things which indicates an election, when he was aware of his rights, will be *prima facie* evidence of such election. See 2 Rop. Leg. 439; 1 Ves. 335; 12 *id.* 136; 3 P. Wms. 315. The acts of acquiescence which constitute an implied election must be decided rather by the circumstances of each case, than by any general principle; 1 Swans. 382, note, and the numerous cases there cited.

Acquiescence in the acts of an agent, or one who has assumed that character, will be equivalent to an express authority; 2 Kent 478; Story, Eq. Jur. § 255; 4 Wash. C. C. 559; 4 Mas. 296; 3 Pet. 69, 81; 6 Mass. 193; 1 Johns. Cas. 110; 3 Cow. 281.

Mere delay in repudiating an agent's un-

authorized contract will not ratify it, but is evidence from which the jury may so infer; 3 Tex. Civ. App. 37; but the disapproval must be within a reasonable time; 45 La. Ann. 847; and if payment has been made to an agent after his authority has been revoked, the presumption is that he has accounted to the principal when there is long-continued silence on the latter's part; 150 U. S. 520.

ACQUIETANDIS PLEGIIS. A writ of justices, formerly lying for the surety against a creditor who refuses to acquit him after the debt has been satisfied. Reg. of Writs 158; Cowel; Blount.

ACQUIRE (Lat. *ad*, for, and *quærere*, to seek). To make property one's own.

It is regularly applied to a permanent acquisition. A man is said to obtain or procure a mere temporary acquisition.

ACQUISITION. The act by which a person procures the property in a thing.

The thing the property in which is secured.

Original acquisition is that by which a man secures a property in a thing which is not at the time he acquires it, and in its then existing condition, the property of any other individual. It may result from occupancy; 2 Kent 289; accession; 2 Kent 293; intellectual labor—namely, for inventions, which are secured by patent rights; and for the authorship of books, maps, and charts, which is protected by copyrights; 1 Bouv. Inst. 508, n.

Derivative acquisitions are those which are procured from others, either by act of law or by act of the parties. Goods and chattels may change owners by act of law in the cases of forfeiture, succession, marriage, judgment, insolvency, and intestacy; or by act of the parties, as by gift or sale.

An acquisition may result from the act of the party himself, or those who are in his power acting for him, as his children while minors; 1 N. H. 28; 1 U. S. L. J. 513. See Dig. 41. 1. 53; Inst. 2. 9. 3.

ACQUITTAL. In Contracts. A release or discharge from an obligation or engagement.

According to Lord Coke, there are three kinds of acquittal, namely: by deed, when the party releases the obligation; by prescription; by tenure; Co. Litt. 100 *a*.

In Criminal Practice. The absolution of a party charged with a crime or misdemeanor.

The absolution of a party accused on a trial before a traverse jury. 1 Nott & McC. 36; 3 McCord, 461.

Acquittals in fact are those which take place when the jury, upon trial, finds a verdict of not guilty.

Acquittals in law are those which take place by mere operation of law; as where a man has been charged merely as an accessary, and the principal has been acquitted; Coke, 2 Inst. 364.

An acquittal is a bar to any future prosecution for the offence alleged in the first indictment.

If accused is placed upon trial under a valid indictment before a legal jury, and the latter is discharged by the court without good cause and without defendant's consent, it is equivalent to an acquittal; 26 Ind. 346; 14 Ohio 295; 6 S. & R. 777; Park. Cr. Rep. 676.

When a prisoner has been acquitted, he becomes competent to testify either for the government or for his former co-defendants; 7 Cox, Cr. Cas. 341, 342. And it is clear, that where a married defendant is entirely removed from the record by a verdict pronounced in his favor, his wife may testify either for or against any other persons who may be parties to the record; 12 M. & W. 49, 50, per *Alderson*, B.; 8 Carr. & P. 284; 2 Tayl. Ev. 3d ed. § 1230. See JEOPARDY.

ACQUITTANCE. In Contracts. An agreement in writing to discharge a party from an engagement to pay a sum of money. It is evidence of payment, and differs from a release in this, that the latter must be under seal, while an acquittance need not be under seal. Pothier, Oblig. n. 781. See 3 Salk. 298; Co. Litt. 212 *a*, 273 *a*; 1 Rawle 391.

ACQUITTED. See ACQUITTAL.

ACRE. A quantity of land containing one hundred and sixty square rods of land, in whatever shape. Serg. Land Laws of Penn. 185; Cro. Eliz. 476, 665; 6 Co. 67; Poph. 55; Co. Litt. 5 *b*. The word formerly signified an open field; whence *acre-fight*, a contest in an open field. Jacob, Dict.

The measure seems to have been variable in amount in its earliest use, but was fixed by statute at a remote period. As originally used, it was applicable especially to meadow-lands; Cowel.

ACT (Lat. *agere*, to do; *actus*, done). Something done or established.

In its general legal sense, the word may denote something done by an individual, as a private citizen, or as an officer; or by a body of men, as a legislature, a council, or a court of justice; including not merely physical acts, but also decrees, edicts, laws, judgments, resolves, awards, and determinations. Some general laws made by the Congress of the United States are styled joint resolutions, and these have the same force and effect as those styled acts.

An instrument in writing to verify facts. Webster, Dict.

It is used in this sense of the published acts of assembly, congress, etc. In a sense approaching this, it has been held in trials for treason that letters and other written documents were *acts*; 1 Fost. Cr. Cas. 198; 2 Stark. 116.

In Civil Law. A writing which states in a legal form that a thing has been done, said, or agreed. Merlin, Répert.

Private acts are those made by private persons as registers in relation to their receipts and expenditures, schedules, acquittances, and the like. Nov. 73, c. 2; Code 7. 32. 6; 4. 21; Dig. 22. 4; La. Civ. Code

art. 2231 to 2254; 8 Toullier, *Droit Civ. Francais* 94.

Acts under private signature are those which have been made by private individuals, under their hands. An act of this kind does not acquire the force of an authentic act by being registered in the office of a notary; 11 Mart. 243; 5 Mart. N. S. 693; 3 La. Ann. 419; unless it has been properly acknowledged before the officer by the parties to it; 5 Mart. N. S. 196.

Public acts are those which have a public authority, and which have been made before public officers, are authorized by a public seal, have been made public by the authority of a magistrate, or which have been extracted and been properly authenticated from public records.

In Evidence. The act of one of several conspirators, performed in pursuance of the common design, is evidence against all of them. And see TREASON; PARTNER; PARTNERSHIP; AGENT; AGENCY.

In Legislation. A statute or law made by a legislative body.

General or *public* acts are those which bind the whole community. Of these the courts take judicial cognizance.

Private or *special* acts are those which operate only upon particular persons and private concerns.

The recitals of public acts are evidence of the facts recited, but in private acts they are only evidence against the parties securing them; 17 Wall. 32. When the meaning is doubtful, the title may be considered; 23 Wall. 374. Punctuation is no part of a statute; 105 U. S. 77.

Explanatory acts should not be enlarged by equity; Comb. 410; although such acts may be allowed to have a retrospective operation; Dupin, Notions de Droit 145. 9. If an act of assembly expire or be repealed while a proceeding under it is *in fieri* or pending, the proceeding becomes abortive; as a prosecution for an offence; 7 Wheat. 552; or a proceeding under insolvent laws; 1 W. Bla. 451; 3 Burr. 1456; 6 Cranch 208; 9 S. & R. 283.

A bill signed by the President of the United States after the usual adjournment of Congress for the winter holidays, but within ten days from the time when it was presented to him, was duly approved within the intent and meaning of the Constitution; 29 Ct. Cls. 523.

Judicial Act. An act performed by a court touching the rights of parties or property brought before it by voluntary appearance, or by the prior action of ministerial officers; in short by ministerial acts. 17 Ind. 173.

ACT OF BANKRUPTCY. An act which subjects a person to be proceeded against as a bankrupt.

In England, the bankruptcy acts of 1883 and 1890 enumerate the following acts of bankruptcy:

By traders and non-traders alike, conveyance of property to trustees for the benefit of creditors generally; fraudulent conveyance, gift, delivery, or transfer of property; fraudulent preference; departure out of England; remaining out of England; execution levied without paying the same; declaration of inability to pay debts; departure from his dwelling house; otherwise absenting himself; beginning to keep house; service of bankruptcy notice by creditor, without compliance on his part; notice of suspension.

As to conveyance of property to trustees for benefit of creditors generally, see Williams on Bankt. L. 3. As to fraudulent conveyance, gift, delivery, or transfer of property; 1 Sm. L. C. 1; 36 L. J. Q. B. 289; 1 Ad. & E. 456. As to departure out of England; 1 Q. B. 51; 3 Camp. 349. See generally Williams, Roche, Hazlitt. In the United States see, as to the Act of 1867 (now repealed), Bump, Bankruptcy.

ACT OF GOD. Any accident due to natural causes directly and exclusively without human intervention, such as could not have been prevented by any amount of foresight, and pains, and care reasonably to have been expected. L. R. 7 C. P. D. 423. See also L. R. 10 Ex. 255. The civil law employs, as a corresponding term, *vis major*.

The term generally applies, broadly, to natural accidents, such as those caused by lightning, earthquakes, and tempests; Story, Bailm. § 511; 2 Ga. 349. A severe snow-storm, which blocked up railroads, held within the rule; 40 Mo. 491. So where fruit-trees were frozen, in transit, it was held to be by the act of God, unless there had been improper delay on the part of the carrier; 63 Mo. 230. Also where fruit is in transit; 102 Mass. 276. The freezing of a canal or river held within the rule; 14 Wend. 213; 23 *id.* 306; 4 N. H. 259; 44 N. Y. 437. A frost of extraordinary severity (11 Ex. 781; s. c. 25 L. J. Ex. 212) and an extraordinary fall of snow (28 L. J. Ex. 51) have been held to be the act of God. A sudden failure of wind has been held to be an act of God; 6 Johns. 160 (but this case has been doubted; 1 Sm. L. C. Am. ed. 417; and Kent, Ch. J., substantially dissented; see also 21 Wend. 190). Also a sudden gust of wind or tempest; 11 Ill. 579; 95 Pa. 287. Losses by fire have not generally been held to fall under the act of God; 1 T. R. 33; 6 Seld. 421; 69 Ill. 285, s. c. 18 Am. R. 613; 76 Ill. 542 (the Chicago fire); (though otherwise when the fire is caused by lightning, 26 Me. 181); but where a distant forest fire was driven by a tornado, to where a carrier's cars were on the track awaiting a locomotive, their destruction was held to be by the act of God; 87 Pa. 234; but see 2 Tex. 115, *contra*. When a flood had risen higher than ever before, destruction of goods thereby was held to be by act of God; 30 N. Y. 630, or where there is a flood; 147 Pa. 343; 64 Pa. 106. The bursting of a boiler does not come within the act of God; 5 Strob. 119. See 28 Barb. 408; 12 Md. 9; 4 Stew. & P. 382; 28 Mo. 323. If water in a spring failed by reason of drouth, there is no breach of contract for its supply; 93 Pa. 502. If a person is thrown from his horse and injured, the resulting illness was considered an act of God; 37 N. Y. 586.

In a late and well-considered English case, 1 C. P. D. 34, 423; 34 L. T. R. N. S. 827; s. c. 18 Am. R. 618; 14 Alb. L. J. 164; Cockburn, C. J., held, in an action for the loss of a horse on shipboard, that if a carrier "uses all the known means to which prudent and experienced carriers usually have recourse, he does all that can be reasonably required of him, and if under such circumstances he is overpowered by storm or other natural agency, he is within the rule which gives immunity from the effects of such *vis major* as the act of God." The accident, to come within the rule, must be due entirely to natural causes without human intervention; *ibid.*, also 2 Zab. 373; 1 Murphy 173; 2 Bailey 157, 421.

The term is sometimes defined as equivalent to inevitable accident (2 Sm. & M. 572; 2 Ga. 349), but

incorrectly, as there is a distinction between the two; although Sir William Jones proposed the use of inevitable accident instead of *Act of God*; Jones, Bailm. 104. See Story, Bailm. § 25; 2 Bla. Com. 122; 2 Crabb, R. P. § 2176; 4 Dougl. 287; 21 Wend. 190; 10 Miss. 572; 5 Blackf. 222.

Where the law casts a *duty* on a party, the performance shall be excused if it be rendered impossible by the act of God; *lex neminem cogit ad impossibilia;* 1 Q. B. D. 548: but where the party *by his own contract* engages to do an act, it is deemed to be his own fault that he did not thereby provide against contingencies, and exempt himself from responsibilities in certain events; and in such case (that is, in the instance of an absolute general contract) the non-performance is not excused by an inevitable accident, or other contingency, although not foreseen by, nor within the control of, the party; Chit. Contr. 272, 3; 3 M. & S. 267; 7 Mass. 325; L. R. 5 C. P. 586; L. R. 4 Q. B. 134; Leake, Contr. 683.

Certain contracts are construed as containing an implied exception of impossible events, and even general words in the contract will not be held to apply to the possibility of the particular contingency which afterwards happened; Leake, Contr. 702; L. R. 4 Q. B. 185; 70 Ill. 527; 47 N. Y. 62. So if a bail bond to render a debt is discharged by the debtor's death before default; W. Jones 29. Contracts for strictly personal services, marriage, etc., are discharged by death or incapacity; 3 B. & S. 835; Cro. Eliz. 532; 2 M. & S. 408; L. R. 6 Ex. 269; 79 Pa. 324; 86 N. C. 91; as where a singer could not sing by reason of ill-health. So, when one employed a bailiff for six months, and died, the contract was held dissolved; L. R. 4 C. P. 744. So of contracts of partnership.

See BAILMENT; COMMON CARRIER; PERIL OF THE SEA; SPECIFIC PERFORMANCE.

ACT OF GRACE. In Scotch Law. A statute by which the incarcerating creditor is bound to aliment his debtor in prison, if such debtor has no means of support, under penalty of a liberation of his debtor if such aliment be not provided. Paterson, Comp.

This statute provides that where a prisoner for debt declares upon oath, before the magistrate of the jurisdiction, that he has not wherewith to maintain himself, the magistrate may set him at liberty, if the creditor, in consequence of whose diligence he was imprisoned, does not aliment him within ten days after intimation for that purpose; Stat. 1696, c. 32; Ersk. Prin. 4.

ACT OF HONOR. An instrument drawn up by a notary public, after protest of a bill of exchange, when a third party is desirous of paying or accepting the bill for the honor of any or all of the parties to it.

The instrument describes the bill, recites its protest, and the fact of a third person coming forward to accept, and the person or persons for whose honor the acceptance is made. The right to pay the debt of another, and still hold him, is allowed by the law merchant in this instance, and is an exception to the general rule of law; and the right can only be gained by proceeding in the form and manner sanctioned by the law; 3 Dan. Ky. 554; Bayley, Bills; Sewell, Banking.

ACT IN PAIS. An act performed out of court, and which is not a matter of record.

A deed or an assurance transacted between two or more private persons in the country, that is, according to the old common law, upon the very spot to be transferred, is matter in pais. 2 Bla. Com. 294.

ACT ON PETITION. A form of summary proceeding formerly in use in the High Court of Admiralty, in England, in which the parties stated their respective cases briefly, and supported their statements by affidavit. 2 Dods. Adm. 174, 184; 1 Hagg. Adm. 1, note.

The suitors of the English Admiralty were, under the former practice, ordinarily entitled to elect to proceed either by act on petition, or by the ancient and more formal mode of "plea and proof;" that is, by libel and answer, and the examination of witnesses; W. Rob. Adm. 169, 171, 172. The pleadings in admiralty causes, with a few exceptions, are now the same as in the other divisions of the High Court. See Smith, Adm. Law & Pr. (4th ed.) 146.

ACT OF SETTLEMENT. In English Law. The statute of 12 & 13 Will. III. c. 2, by which the crown of England was limited to the present royal family. 1 Bla. Com. 128; 2 Steph. Com. 290.

ACTA DIURNA (Lat.). A formula often used in signing. Du Cange.

Daily transactions, chronicles, journals, registers. I do not find the thing published in the *acta diurna* (daily records of affairs); Tacitus, Ann. 3, 3; Ainsworth, Lex.; Smith, Lex.

ACTA PUBLICA (Lat.). Things of general knowledge and concern; matters transacted before certain public officers. Calvinus, Lex.

ACTIO. In Civil Law. A specific mode of enforcing a right before the courts of law: *e. g. legis actio; actio sacramenti.* In this sense we speak of *actions* in our law, *e. g.* the action of debt. The right to a remedy, thus: *ex nudo pacto non oritur actio;* no *right of action* can arise upon a naked pact. In this sense we rarely use the word action; 3 Ortolan, Inst. § 1830; 5 Savigny, System 10; Mackeldey, Civ. L. (13th ed.) § 193.

The first sense here given is the older one. Justinian, following Celsus, gives the well-known definition: *Actio nihil aliud est, quam jus persequendi in judicio, quod sibi debetur*, which may be thus rendered: An action is simply the *right* to enforce one's demands in a court of law. See Inst. Jus. 4. 6, *de Actionibus.*

In the sense of a specific form of remedy, there are various divisions of *actiones.*

Actiones civiles are those forms of remedies which were established under the rigid and inflexible system of the civil law, the *jus civilis. Actiones honorariæ* are those which were gradually introduced by the prætors and ædiles, by virtue of their equitable powers, in order to prevent the failure of justice which too often resulted from the employment of the *actiones civiles.* These were found so beneficial in practice that they eventually supplanted the old remedies, of which in the time of Justinian

hardly a trace remained; Mackeldey, Civ. L. § 194; 5 Savigny, System.

Directæ actiones, as a class, were forms of remedies for cases clearly defined and recognized as actionable by the law. *Utiles actiones* were remedies granted by the *magistrate* in cases to which no *actio directa* was applicable. They were framed for the special occasion, by analogy to the existing forms, and were generally fictitious; that is, they proceeded upon the assumption that a state of things existed which would have entitled the party to an *actio directa*, and the cause was tried upon this assumption, which the other party was not allowed to dispute; 5 Savigny, System § 215.

Again, there are *actiones in personam* and *actiones in rem*. The former class includes all remedies for the breach of an *obligation*, and are considered to be directed against the person of the wrong-doer. The second class comprehends all remedies devised for the recovery of property, or the enforcement of a right not founded upon a contract between the parties, and are therefore considered as rather aimed at the *thing* in dispute, than at the person of the defendant; Mackeldey, Civ. L. § 195; 5 Savigny, System, § 206; 3 Ortolan, Inst. § 1952.

In respect to their *object*, actions are either *actiones rei persequendæ causa comparatæ*, to which class belong all *in rem actiones*, and those of the *actiones in personam*, which were directed merely to the recovery of the value of a thing, or compensation for an injury; or they are *actiones pœnales*, called also *actiones ex delicto*, in which a penalty was recovered of the delinquent, or *actiones mixtæ*, in which were recovered both the actual damages and a penalty in addition. These classes, *actiones pœnales* and *actiones mixtæ*, comprehended cases of injuries, for which the civil law permitted redress by private action, but which modern civilization universally regards as crimes; that is, offences against society at large, and punished by proceedings in the name of the state alone. Thus theft, receiving stolen goods, robbery, malicious mischief, and the murder or negligent homicide of a slave (in which case an injury to property was involved), gave rise to private actions for damages against the delinquent; Inst. 4. 1. *De obligationibus quæ ex delicto nascuntur; id.* 2. *De bonis vi raptis; id.* 3. *De lege Aquilia.* And see Mackeldey, Civ. L. § 196; 5 Savigny, System § 210.

In respect to the mode of procedure; *actiones in personam* are divided into *stricti juris*, and *bonæ fidei actiones*. In the former the court was confined to the strict letter of the law; in the latter something was left to the discretion of the judge, who was governed in his decision by considerations of what ought to be expected from an honest man under circumstances similar to those of the plaintiff or defendant. Mackeldey, Civ. L. § 197 *a*.

It would not only be foreign to the purpose of this work to enter more minutely into a discussion of the Roman *actio*, but it would require more space than can here be afforded, since in Savigny's System there are more than a hundred different species of *actio* mentioned, and even in the succinct treatise of Mackeldey nearly eighty are enumerated.

In addition to the works cited in passing may be added the Introduction to Sandars' Justinian, which may be profitably consulted by the student.

To this brief explanation of the most important classes of *actiones* we subjoin an outline of the Roman system of procedure. From the time of the twelve tables (and probably from a much earlier period) down to about the middle of the sixth century of Rome, the system of procedure was that known as the *actiones legis*. Of these but five have come down to us by name; the *actio sacramenti*, the *actio per judicis postulationem*, the *actio per condictionem*, the *actio per manus injectionem*, and the *actio per pignoris captionem*. The first three of these were actions in the usual sense of the term; the last two were modes of execution. The *actio sacramenti* is the best known of all, because from the nature of the questions decided by means of it, which included those of *status*, of property *ex jure Quiritium*, and of successions; and from the great popularity of the tribunal, the *centumviri*, which had cognizance of these questions, it was retained in practice long after the other actions had succumbed to a more liberal system of procedure. As the *actio sacramenti* was the longest-lived, so it was also the earliest, of the *actiones leges;* and it is not only in many particulars a type of the whole class, but the other species are conceived to have been formed by successive encroachments upon its field. The characteristic feature of this action was the *sacramentum*, a pecuniary deposit made in court by each party, which was to be forfeited by the loser. Subsequently, however, the parties were allowed, instead of an actual deposit, to give security in the amount required. Our knowledge of all these actions is exceedingly slight, being derived from fragments of the earlier jurisprudence preserved in literary works, laboriously pieced together by commentators, and the numerous gaps filled out by aid of ingenious and most copious conjectures. They bear all those marks which might have been expected of their origin in a barbarous or semi-barbarous age, among a people little skilled in the science of jurisprudence, and having no acquaintance with the refined distinctions and complex business transactions of civilized life. They were all of that highly symbolical character found among men of rude habits but lively imaginations. They abounded in sacramental words and significant gestures, and, while they were inflexibly rigid in their application, they possessed a character almost sacred, so that the mistake of a word or the omission of a gesture might cause the loss of a suit. In the nature of things, such a system could not maintain itself against the advance of civilization, bringing with it increased complications in all the relations of man to man; and accordingly we find that it gradually, but sensibly, declined, and that at the time of Justinian not a trace of it existed in practice. See 3 Ortolan, Justinian 467 *et seq.*

About the year of Rome 507 began the introduction of the system known as the procedure *per formulam* or *ordinaria judicia*. An important part of the population of Rome consisted of foreigners, whose disputes with each other or with Roman citizens could not be adjusted by means of the *actiones leges*, these being entirely confined to questions of the strict Roman law, which could only arise between Roman citizens.

To supply the want of a forum for foreign residents, a magistrate, the *prætor peregrinus*, was constituted with jurisdiction over this class of suits, and from the procedure established by this new court sprang the formulary system, which proved so convenient in practice that it was soon adopted in suits where both parties were Roman citizens, and gradually withdrew case after case from the domain of the *legis actiones*, until few questions were left in which that cumbrous procedure continued to be employed.

An important feature of the formulary system, though not peculiar to that system, was the distinction between the *jus* and the *judicium*, between the magistrate and the judge. The magistrate was

vested with the civil authority, *imperium*, and that jurisdiction over law-suits which in every state is inherent in the supreme power; he received the parties, heard their conflicting statements, and referred the case to a special tribunal of one or more persons, *judex*, *arbiter*, *recuperatores*. The function of this tribunal was to ascertain the facts and pronounce judgment thereon, in conformity with a special authorization to that effect conferred by the magistrate. Here the authority of the judge ended; if the defeated party refused to comply with the sentence, the victor must again resort to the magistrate to enforce the judgment. From this it would appear that the functions of the judge or judges under the Roman system corresponded in many respects with those of the jury at common law. They decided the question of fact submitted to them by the magistrate, as the jury decides the issue eliminated by the pleadings; and, the decision made, their functions ceased, like those of the jury.

As to the amount at stake, the magistrate, in cases admitting it, had the power to fix the sum in dispute, and then the judge's duties were confined to the simple question whether the sum specified was due the plaintiff or not; and if he increased or diminished this amount he subjected himself to an action for damages. In other cases, instead of a precise sum, the magistrate fixed a *maximum* sum, beyond which the judge could not go in ascertaining the amount due; but in most cases the magistrate left the amount entirely to the discretion of the judge.

The directions of the magistrate to the judge were made up in a brief statement called the *formula*, which gives its name to this system of procedure. The composition of the formula was governed by well-established rules. When complete, it consisted of four parts, though some of these were frequently omitted, as they were unnecessary in certain classes of actions. The *first* part of the formula, called the *demonstratio*, recited the subject submitted to the judge, and consequently the facts of which he was to take cognizance. It varied of course, with the subject-matter of the suit, though each class of cases had a fixed and appropriate form. This form, in an action by a vendor against his vendee, was as follows: "*Quod Aulus Agerius Numerio Negidio hominem vendidit*;" or, in case of a bailment, "*Quod Aulus Agerius apud Numerium Negidium hominem deposuit.*" The *second* part of the *formula* was the *intentio*: in this was stated the claim of the plaintiff, as founded upon the facts set out in the *demonstratio*. This, in a question of contracts, was in these words: "*Si paret Numerium Negidium Aulo Agerio sestertium X milia dare oportere*," when the magistrate fixed the amount; or, "*Quidquid paret Numerium Negidium Aulo Agerio dare facere oportere*," when he left the amount to the discretion of the judge. In a claim of property the form was, "*Si paret hominem ex jure Quiritium Auli Agerii esse.*" The *third* part of the complete *formula* was the *adjudicatio*, which contained the authority to the judge to award to one party a right of property belonging to the other. It was in these words: "*Quantum adjudicari oportet, judex Titio adjudicato.*" The *last* part of the *formula* was the *condemnatio*, which gave the judge authority to pronounce his decision for or against the defendant. It was as follows: "*Judex, Numerium Negidium Aulo Agerio sestertium X milia condemna: si non paret, absolve*," when the amount was fixed; or, "*Judex, Numerium Negidium Aulo Agerio dumtaxat X milia condemna: si non paret, absolvito*" when the magistrate fixed a *maximum*; or, "*Quanti ea res erit, tantam pecuniam, judex, Numerium Negidium Aulo Agerio condemna: si non paret, absolvito*," when it was left to the discretion of the judge.

Of these parts, the *intentio* and the *condemnatio* were always employed: the *demonstratio* was sometimes found unnecessary, and the *adjudicatio* only occurred in three species of actions—*familiæ erciscundæ communi dividundo*, and *finium regundorum*—which were actions for division of an inheritance, actions of partition, and suits for the rectification of boundaries.

The above are the essential parts of the *formula* in their simplest form; but they are often enlarged by the insertion of clauses in the *demonstratio*, the *intentio*, or the *condemnatio*, which were useful or necessary in certain cases: these clauses are called *adjectiones*. When such a clause was inserted for the benefit of the defendant, containing a statement of his defence to the claim set out in the *intentio*, it was called an *exceptio*. To this the plaintiff might have an answer, which, when inserted, constituted the *replicatio*, and so on to the *duplicatio* and *triplicatio*. These clauses like the *intentio* in which they were inserted, were all framed conditionally, and not, like the common-law pleadings, affirmatively. Thus: "*Si paret Numerium Negidium Aulo Agerio X milia dare oportere* (intentio); *si in ea re nihil dolo malo Auli Agerii factum sit neque fiat* (exceptio); *Si non, etc.* (replicatio).

In preparing the *formula* the plaintiff presented to the magistrate his *demonstratio*, *intentio*, etc., which was probably drawn in due form under the advice of a jurisconsult; the defendant then presented his *adjectiones*, the plaintiff responded with his replications and so on. The magistrate might modify these, or insert new *adjectiones*, at his discretion. After this discussion *in jure*, *pro tribunali*, the magistrate reduced the results to form, and sent the *formula* to the judge, before whom the parties were confined to the case thus settled. See 3 Ortolan, Justinian, §§ 1909 *et seq.*

The procedure *per formulam* was supplanted in course of time by a third system, *extraordinaria judicia*, which in the days of Justinian had become universal. The essence of this system consisted in dispensing with the judge altogether, so that the magistrate decided the case himself, and the distinction between the *jus* and the *judicium* was practically abolished. This new system commenced with usurpation by the magistrates, in the extension of an exceptional jurisdiction, which had existed from the time of the *leges actiones*, to cases not originally within its scope. Its progress may be traced by successive enactments of the emperors, and was so gradual that, even when it had completely undermined its predecessor, the magistrate continued to reduce to writing a sort of formula representing the result of the pleadings. In time, however, this last relic of the former practice was abolished by an imperial constitution. Thus the formulary system, the creation of the great Roman jurisconsults, was swept away, and carried with it in its fall all those refinements of litigation in which they had so much delighted. Thenceforth the distinctions between the forms of actions were no longer regarded, and the word *actio*, losing its signification of a *form*, came to mean a *right*, *jus persequendi in judicio quod sibi debetur*.

See Ortolan, Hist. no. 392 *et seq*; *id.* Instit. nos. 1883–2067; 5 Savigny, System § 6; Sandars, Justinian, Introduction; Gaius, by Abdy & Walker.

A recent English work speaks of the English "formulary system" of actions as "distinctively English but also in a certain sense very Roman." It was not "invented in one piece by some all-wise legislator," but "grew up little by little." The age of its rapid growth was between 1154 and 1272. The similarity between the Roman and English formulary systems is so patent that it has naturally aroused the suggestion that one must have been the model for the other, and it is very true that between 1150 and 1250, or thereabouts, the old Roman law in its medieval form exercised a powerful influence on some of the English rules. But the differences in the system were as remarkable as the resemblances. Thus the *Prætor* heard both parties before he composed his formula, while the chancellor issues the writ before he hears the defendant's story. It is usually "as of course." The English forms of action were therefore not mere rubrics, but were institutes of the law. There were in common use some thirty or forty actions between which there were large differences. 2 Poll. & Maitl. Hist. Eng. Law 556.

ACTIO BONÆ FIDEI (Lat. an action of good faith). **In Civil Law.** A class of actions in which the judge might at the trial, *ex officio*, take into account any equitable circumstances that were presented to him affecting either of the parties to the action. 1 Spence, Eq. Jur. 210.

ACTIO COMMODATI CONTRARIA. In Civil Law. An action by the borrower against the lender, to compel the execution of the contract. Pothier, *Prêt à Usage* n. 75.

ACTIO COMMODATI DIRECTA. In Civil Law. An action by a lender against a borrower, the principal object of

which is to obtain a restitution of the thing lent. Pothier, *Prêt à Usage* nn. 65, 68.

ACTIO COMMUNI DIVIDUNDO. **In Civil Law.** An action for a division of the property held in common. Story, Partn. Bennett ed. § 352.

ACTIO CONDICTIO INDEBITATI. **In Civil Law.** An action by which the plaintiff recovers the amount of a sum of money or other thing he paid by mistake. Pothier, *Promutuum* n. 140; Merlin, Rép.

ACTIO EX CONDUCTO. **In Civil Law.** An action which the bailor of a thing for hire may bring against the bailee, in order to compel him to re-deliver the thing hired. Pothier, *du Contr. de Louage* n. 59; Merlin, Rép.

ACTIO EX CONTRACTU. See ACTION.

ACTIO EX DELICTO. See ACTION.

ACTIO DEPOSITI CONTRARIA. **In Civil Law.** An action which the depositary has against the depositor, to compel him to fulfil his engagement towards him. Pothier, *Du Dépôt* n. 69.

ACTIO DEPOSITI DIRECTA. **In Civil Law.** An action which is brought by the depositor against the depositary, in order to get back the thing deposited. Pothier, *Du Dépôt* n. 60.

ACTIO AD EXHIBENDUM. **In Civil Law.** An action instituted for the purpose of compelling the person against whom it was brought to exhibit some thing or title in his power.

It was always preparatory to another action, which lay for the recovery of a thing movable or immovable; 1 Merlin, *Quest. de Droit* 84.

ACTIO IN FACTUM. **In Civil Law.** An action adapted to the particular case which had an analogy to some *actio in jus* which was founded on some subsisting acknowledged law. 1 Spence, Eq. Jur. 212. The origin of these actions is strikingly similar to that of actions on the case at common law. See CASE.

ACTIO FAMILIÆ ERCISCUNDÆ. **In Civil Law.** An action for the division of an inheritance. Inst. 4. 6. 20; Bracton 100 *b*.

ACTIO JUDICATI. **In Civil Law.** An action instituted, after four months had elapsed after the rendition of judgment, in which the judge issued his warrant to seize, first, the movables, which were sold within eight days afterwards; and then the immovables, which were delivered in pledge to the creditors, or put under the care of a curator, and if, at the end of two months, the debt was not paid, the land was sold. Dig. 42. 1; Code, 8. 34.

According to some authorities, if the defendant then utterly denied the rendition of the former judgment, the plaintiff was driven to a new action, conducted like any other action, which was called *actio judicati*, and which had for its object the determination of the question whether such a judgment had been rendered. The exact meaning of the term is by no means clear. See Savigny, Syst. 305, 411; 3 Ortolan, Just. § 2033.

ACTIO MANDATI. **In Civil Law.** An action founded upon a mandate. Dig. 17. 1.

ACTIO NON. **In Pleading.** The declaration in a special plea "that the said plaintiff ought not to have or maintain his aforesaid action thereof against" the defendant (in Latin, *actionem non habere debet*).

It follows immediately after the statement of appearance and defence; 1 Chit. Plead. 531; 2 *id.* 421; Stephens, Plead. 394.

ACTIO NON ACCREVIT INFRA SEX ANNOS (Lat.). The action did not accrue within six years.

In Pleading. A plea of the statute of limitations, by which the defendant insists that the plaintiff's action has not accrued within six years. It differs from *non assumpsit* in this: *non assumpsit* is the proper plea to an action on a simple contract, when the action accrues on the promise; but when it does not accrue on the promise, but subsequently to it, the proper plea is *actio non accrevit*, etc.; Lawes, Plead. 733; 5 Binn. 200, 203; 2 Salk. 422; 2 Saund. 63 *b*.

ACTIO NON ULTERIUS. A name given in English pleading to the distinctive clause in the plea to the further maintenance of the action; introduced in place of the plea *puis darrein continuance*. Steph. Pl. 64, 65, 401; Black, Law Dict.

ACTIO PERSONALIS. A personal action. The proper term in the civil law is *actio in personam*.

ACTIO PERSONALIS MORITUR CUM PERSONA (Lat.). A personal action dies with the person.

In Practice. A maxim which formerly expressed the law in regard to the surviving of personal actions.

To render the maxim perfectly true, the expression "personal actions" must be restricted very much within its usual limits. In the most extensive sense, all actions are *personal* which are neither *real* nor *mixed*, and in this sense of the word personal the maxim is not true. A further distinction, moreover, is to be made between personal actions actually commenced and pending at the death of the plaintiff or defendant, and causes of action upon which suit might have been, but was not, brought by or against the deceased in his lifetime. In the case of actions actually commenced, the old rule was that the suit abated by the death of either party. But the inconvenience of this rigor of the common law has been modified by statutory provisions in England and the states of this country,

which prescribe in substance that when the *cause of action* survives to or against the personal representatives of the deceased, the suit shall not abate by the death of the party, but may proceed on the substitution of the personal representatives on the record by *scire facias*, or in some states, by simple suggestion of the facts on the record. See 6 Wheat. 260. And this brings us to the consideration of what causes of action survive.

CONTRACTS.—It is clear that, in general, a man's personal representatives are liable for his breach of contract on the one hand, and, on the other, are entitled to enforce contracts made with him. This is the rule; but it admits of a few exceptions; 6 Me. 470; 2 D. Chipm. 41.

No action lies against executors upon a covenant to be performed by the testator in person, and which consequently the executor cannot perform, and the performance of which is prevented by the death of testator; 3 Wils. Ch. 99; Cro. Eliz. 553; 1 Rolle 359; 24 Fed. Rep. 583; as if an author undertakes to compose a work, or a master covenants to instruct an apprentice, but is prevented by death. See Wms. Exec. 1467. But, for a breach committed by deceased in his lifetime, his executor would be answerable; Cro. Eliz. 553; 1 M. & W. 423, *per* Parke, B.; 19 Pa. 234.

As to what are such contracts, see 2 Perr. & D. 251; 10 Ad. & E. 45; 1 M. & W. 423; 30 Ga. 866; 86 N. C. 566. But whether the contract is of such a nature is a mere question of construction, depending upon the intention of the parties; Cro. Jac. 282; 1 Bingh. 225; unless the intention be such as the law will not enforce; 19 Pa. 233, *per* Lowrie, J.

Again, an executor, etc., cannot maintain an action on a promise made to deceased where the damage consisted entirely in the personal suffering of the deceased without any injury to his personal estate, as a breach of promise of marriage; 2 M. & S. 408; 4 Cush. 408; 55 Me. 142. Nor will an action for breach of promise of marriage survive against the executor of the promissor where no special damage is alleged; 132 Mass. 359; 106 Mass. 339. And as to the right of an executor or administrator to sue on a contract broken in the testator's lifetime, where no damage to the personal estate can be stated, see 2 Cr. M. & R. 588; 5 Tyrwh. 985, and the cases there cited.

Divorce proceedings being a personal action, death of either of the parties before decree abates the proceedings and the court will not require the executor to become a party in order to answer the wife's demand for additional allowance for counsel fees; 60 Md. 185.

The fact whether or not the estate of the deceased has suffered loss or damage would seem to be the criterion of the right of the personal representative to sue in another class of cases, that is, where there is a breach of an implied promise founded on a *tort*. For where the action, though in form *ex contractu*, is founded upon a *tort to the person*, it does not in general survive to the executor. Thus, with respect to injuries affecting the life and health of the deceased; all such as arise out of the unskilfulness of medical practitioners; or the imprisonment of the party occasioned by the negligence of his attorney, no action, generally speaking, can be sustained by the executor or administrator on a breach of the *implied promise* by the person employed to exhibit a proper portion of skill and attention; such cases being in substance actions for injuries to the person; 2 M. & S. 415, 416; 8 M. & W. 854; 58 N. H. 532; 58 N. H. 517. And it has been held that for the breach of an implied promise of an attorney to investigate the title to a freehold estate, the executor of the purchaser cannot sue without stating that the testator sustained some actual damage to his estate; 4 J. B. Moore 532. But the law on this point has been considerably modified by statute.

On the other hand, where the breach of the implied promise has occasioned damage to the *personal estate* of the deceased, though it has been said that an action in form *ex contractu* founded upon a *tort* whereby damage has been occasioned to the estate of the deceased, as debt against the sheriff for an escape, does not survive at common law, 1 Ga. 514 (though in this case the rule is altered in that state by statute), yet the better opinion is that, if the executor can show that damage has accrued to the *personal estate* of the deceased by the breach of an express or implied promise, he may well sustain an action at common law, to recover such damage, though the action is in some sort founded on a *tort;* Wms. Exec. 676; citing, *in extenso*, 2 Brod. & B. 102; 4 J. B. Moore 532. And see 3 Woodd. Lect. 78. So, by waiving the *tort* in a trespass, and going for the value of the property, the action of *assumpsit* lies as well for as against executors; 1 Bay 58.

A claim for money paid as usury survives against the estate of the person to whom it was paid; 27 Vt. 396.

In the case of an action on a contract commenced against joint defendants one of whom dies pending the suit, the rule varies. In some of the states the personal representatives of the deceased defendant may be added as parties and the judgment taken against them jointly with the survivors; 27 Miss. 455; 9 Tex. 519. In others the English rule obtains which requires judgment to be taken against the survivors only; and this is conceived to be the better rule, because the judgment against the original defendants is *de bonis propriis*, while that against the executors is *de bonis testatoris;* 119 Mass. 361. Where action is pending against two partners, and the death of one is not suggested before judgment, the judgment is a lien on the partnership assets and binds the surviving partner personally; 18 S. E. Rep. (S. C.) 268.

In an action commenced against directors, where one dies after the suit commenced, his executor need not be joined; 158 Pa. 616.

TORTS.—The ancient maxim which we are discussing applies more peculiarly to cases of *tort*. It was a principle of the common law that, if an injury was done either to the person or property of another for which *damages* only could be recovered in satisfaction,—where the declaration imputes a tort done either to the person or property of another, and the plea must be *not guilty*, —the action died with the person to whom or by whom the wrong was done. See Wms. Exec. 668; 3 Bla. Com. 302; 1 Saund. 216, 217, n. (1); 3 Woodd. Lect. 73; Viner, Abr. *Executors* 123; Comyn, Dig. *Administrator*, B. 13.

But if the goods, etc., of the testator taken away continue in specie in the hands of the wrong-doer, it has long been decided that *replevin* and *detinue* will lie for the executor to recover back the specific goods, etc.; W. Jones 173, 174; 1 Saund. 217, note (1); 1 Hempst. 711; 10 Ark. 504; or, in case they are sold, an action for money had and received will lie for the executor to recover the value; 1 Saund. 217, n. (1). And actions *ex delicto*, where one has obtained the property of another and converted it, survive to the representatives of the injured party, as replevin, trespass *de bonis asport.* But where the wrong-doer acquired no gain, though the other party has suffered loss, the death of either party destroys the right of action; 3 Mass. 351; 6 How. 11; 1 Bay 58; 4 Mass. 480; 1 Root 216.

Successive innovations upon this rule of the common law have been made by various statutes *with regard to actions which survive to* executors and administrators.

The stat. 4 Ed. III. c. 7, gave a remedy to executors for a *trespass* done to the personal estate of their testators, which was extended to executors of executors by the stat. 25 Ed. III. c. 5. But these statutes did not include wrongs done to the person or freehold of the testator or intestate; Wms. Exec. 670. By an equitable construction of these statutes, an executor or administrator shall now have the same actions for any injury done to the personal estate of the testator in his lifetime, *whereby it has become less beneficial* to the executor or administrator, as the deceased himself might have had, whatever the form of action may be; 1 Saund. 217, n. (1); 1 Carr. & K. 271; W. Jones 173, 174; 2 M. & S. 416; 5 Co. 27 *a*; Cro. Car. 297; 2 Brod. & B. 103; 1 Stra. 212; 2 Brev. 27.

And the laws of the different states, either by express enactment or by having adopted the English statutes, give a remedy to executors in cases of injuries done to the personal property of their testator in his lifetime. Trover for a conversion in the lifetime of the testator may be brought by his executor; T. U. P. Charlt. 261; 4 Ark. 173; 11 Ala. N. S. 859. But an executor cannot sue for expenses incurred by his testator in defending against a groundless suit; 1 Day 285; nor in *Alabama* (under the Act of 1826) for any injury done in the lifetime of deceased; 15 Ala. 109; nor in *Vermont* can he bring *trespass on the case*, except to recover damages for an injury to some specific property; 20 Vt. 244. And he cannot bring *case* against a sheriff for a false return in testator's action; *ibid.* But he may have *case* against the sheriff for not keeping property attached, and delivering it to the officer holding the execution in his testator's suit; 20 Vt. 244, n.; and case against the sheriff for the default of his deputy in not paying over to testator money collected in execution; 22 Vt. 108. An action in the nature of an action on the *case* for injuries resulting from breach of carrier's contract to transport a passenger safely, survives to the personal representative; 85 Ky. 547. In *Maine*, an executor may revive an action against the sheriff for misfeasance of his deputy, but not an action against the deputy for his misfeasance; 30 Me. 194. So, where the action is merely penal, it does not survive; Cam. & N. 72; as to recover penalties for taking illegal fees by an officer from the intestate in his lifetime; 7 S. & R. 183. But in such case the administrator may recover back the excess paid above the legal charge; *ibid.*

Under the common law an action to recover a penalty or forfeiture dies with the person; 38 Fed. Rep. 80. The action will not abate upon death of the relator, if it is brought by the State upon an official bond; 98 N. C. 500.

The stat. 3 & 4 W. IV. c. 42, § 2, gave a remedy to executors, etc., for injuries done in the lifetime of the testator or intestate to his real property, which case was not embraced in the stat. Ed. III. This statute has introduced a material alteration in the maxim *actio personalis moritur cum persona* as well in favor of executors and administrators of the party injured as against the personal representatives of the wrong-doer, but respects only injuries to personal and real property; Chit. Pl. Parties to Actions in form *ex delicto*. Similar statutory provisions have been made in most of the states. Thus, *trespass quare clausum fregit* survives in *North Carolina*, 4 Dev. & B. 68; 3 Dev. 153; in *Maryland*, 1 Md. 102; in *Tennessee*, 3 Sneed 128; in *Missouri*, 114 Mo. 309; and in *Massachusetts*, 21 Pick. 250; even if action was begun after the death of the injured party; 22 Pick. 495; in *New Jersey*, 38 N. J. L. 296. *Proceedings to recover damages* for injuries to land by overflowing survive in *North Carolina*, 7 Ired. 20; and *Virginia*, 11 Gratt. 1. *Aliter* in *South Carolina*, 10 Rich. 92; and *Maryland*, 1 Harr. & M'H. 224. *Ejectment* in the U. S. circuit court does not abate by death of plaintiff; 22 Vt. 659. In *Illinois* the statute law allows an action to executors only for an injury to the personalty, or personal wrongs, leaving injuries to realty as at common law; 18 Ill. 403.

Injuries to the person. In cases of injuries to the *person*, whether by assault, battery, false imprisonment, slander, negligence, or otherwise, if either the party who received or he who committed the injury die, the maxim applies rigidly, and no action at *common law* can be supported

either by or against the executors or other personal representatives; 3 Bla. Com. 302; 2 M. & S. 408; 95 U. S. 756; 25 Conn. 265; 23 Ind. 133; 16 Mich. 180; 37 Ill. 333; 85 Ky. 547. Case for the seduction of a man's daughter; 9 Ga. 69; case for libel; 5 Cush. 544; and for malicious prosecution; 5 Cush. 543; are instances of this. But in one respect this rule has been materially modified in England by the stat. 9 & 10 Vict. c. 93, known as Lord Campbell's Act, and in this country by enactments of similar purport in many of the states. These provide for the case where a wrongful act, neglect, or default has caused the death of the injured person, and the act is of such a nature that the injured person, had he lived, would have had an action against the wrong-doer. In such cases the wrong-doer is rendered liable, in general, not to the executors or administrators of the deceased, but to his near relations, husband, wife, parent, or child. In the construction given to these acts, the courts have held that the measure of damages is in general the pecuniary value of the life of the person killed to the person bringing suit, and that vindictive or exemplary damages by reason of gross negligence on the part of the wrong-doer are not allowable; Sedg. Damages.

Pennsylvania, New Jersey, New York, Massachusetts, Connecticut, Louisiana, Delaware, Georgia, and some other states, have statutes founded on Lord Campbell's Act. In *Massachusetts*, under the statute, an action may be brought against a city or town for damages to the person of deceased occasioned by a defect in a highway; 7 Gray 544; but it is otherwise in South Carolina; 29 S. C. 161. In Ohio it is considered to be an action "for a nuisance" and abates at the death of the party injured; 46 Ohio 442. But where the death, caused by a railway collision, was instantaneous, no action can be maintained under the statute of Massachusetts; for the statute supposes the party deceased to have been once entitled to an action for the injury, and either to have commenced the action and subsequently died, or, being entitled to bring it, to have died before exercising the right; 9 Cush. 108. But the accruing of the right of action does not depend upon intelligence, consciousness, or mental capacity of any kind on the part of the person injured; 9 Cush. 478. For the law in *New York*, see 16 Barb. 54; 15 N. Y. 432; in *Missouri*, 18 Mo. 162; in *Connecticut*, 24 Conn. 575; in *Maine*, 45 Me. 209; in *Pennsylvania*, 44 Pa. 175; in *Georgia*, 87 Ga. 294.

If the deceased was guilty of contributory negligence, then no action is maintainable; 7 Baxter 239.

In some of the states the statutes vest the right of action in the personal representatives, but the damages recovered accrue to the benefit of the widow and next of kin; 18 Ill. 349; 21 Wis. 305; 38 Vt. 294.

Damages may be recovered by the parents in an action for death of minor child; 83 Ill. 237; 75 Ill. 468; 24 Md. 271; 47 N. Y. 317; 38 Wis. 613; 54 Pa. 495; but there must have been a prospect of some pecuniary benefit had the child lived; 11 Q. B. D. 160; 71 Mo. 164; 3 H. & N. 211.

Actions against the executors or administrators of the wrong-doer. The common-law principle was that if an injury was done either to the person or property of another, for which *damages* only could be recovered in satisfaction, the action died with the person by whom the wrong was committed; 1 Saund. 216 *a*, note (1); 1 H. & M'H. 224. And where the cause of action is founded upon any *malfeasance* or *misfeasance*, is a *tort*, or arises *ex delicto*, such as trespass for taking goods, etc., trover, false imprisonment, assault and battery, slander, deceit, diverting a watercourse, obstructing lights, and many other cases of the like kind, where the *declaration* imputes a tort done either to the person or the property of another, and the *plea* must be *not guilty*, the rule of the common law is *actio personalis moritur cum persona;* and if the person by whom the injury was committed die, no action of that kind can be brought against his executor or administrator. But now in England the stat. 3 & 4 W. IV. c. 42, § 2, authorizes an action of trespass, or trespass on the case, for an injury committed by deceased in respect to property *real* or *personal* of another. And similar provisions are in force in most of the states of this country. Thus, in *Alabama*, by statute, *trover* may be maintained against an executor for a conversion by his testator; 11 Ala. N. S. 859. So in *New Jersey*, 1 Harr. 54; *Georgia*, 17 Ga. 495; and *North Carolina*, 10 Ired. 169.

In *Virginia*, by statute, *detinue* already commenced against the wrong-doer survives against his executor, if the chattel actually came into the executor's possession; otherwise not; 6 Leigh 42, 344. So in *Kentucky*, 5 Dana 34. *Replevin* in *Missouri* does not abate on the death of defendant; 21 Mo. 115; nor does an action on a *replevin bond* in *Delaware*, 5 Harr. (Del.) 381. It has, indeed, been said that where the wrong-doer has secured no benefit to himself at the expense of the sufferer, the cause of action does not survive, but that where, by means of the offence, property is acquired which benefits the testator, then an action for the value of the property survives against the executor; 6 How. 11; 3 Mass. 321; 5 Pick. 285; 20 Johns. 43; 1 Root 216; 4 Halst. 173; 1 Bay 58; and that where the wrong-doer has acquired gain by his wrong, the injured party may waive the *tort* and bring an action *ex contractu* against the representatives to recover compensation; 5 Pick. 285; 4 Halst. 173.

But this rule, that the wrong-doer must have acquired a gain by his act in order that the cause of action may survive against his representatives, is not universal. Thus, though formerly in *New York* an action would not lie for a fraud of deceased which did not benefit the assets, yet it was otherwise for his fraudulent performance of a contract; 20 Johns. 43; and now the statute

of that state gives an action against the executor for every injury done by the testator, whether by force or negligence, to the property of another; Hill & D. 116; as for fraudulent representations by the deceased in the sale of land; 19 N. Y. 464; or wasting, destroying, taking, or carrying away personal property; 2 Johns. 227. In *Massachusetts*, by statute, a sheriff's executors are liable for his official misconduct; 7 Mass. 317; 13 *id.* 454, but not the executors of a deputy sheriff; *ibid.* So in *Kentucky;* 9 B. Monr. 135. And in *Missouri*, for false return of execution; 10 Mo. 234. In *Missouri* an action against a constable for unnecessary assault in arresting the relator, abates with the death of the principal, and also as against his sureties; 48 Mo. App. 421. Under the statute of *Ohio*, case for injury to property survives; 4 McLean 599; under statute in *Missouri*, trespass; 15 Mo. 619; and a suit against an owner for the criminal act of his slave; 23 Mo. 401; in *North Carolina*, deceit in sale of chattels; 1 Car. Law Rep. 529; and the remedy by petition for damages caused by overflowing lands; 1 Ired. 24; in *Pennsylania*, by statute, an action against an attorney for neglect; 24 Pa. 114; and such action has been maintained in England; 3 Stark. 154; 1 Dowl. & R. 30. In *California* an action for damages by reason of false representations as to value of land, resulting in an exchange, passes to the personal representatives; 54 Fed. Rep. 320.

But in *Texas* the rule that the right of action for torts unconnected with contract does not survive the death of the wrong-doer, has not been changed by statute; 12 Tex. 11. And in *California* trespass does not lie against the representatives of the wrong-doer; 3 Cal. 370; nor in *Alabama* does it survive against the representatives of defendant; 19 Ala. 181; and an action for malicious prosecution does not survive defendant's death; 121 Mass. 550. *Detinue* does not survive in *Tennessee*, whether brought in the lifetime of the wrong-doer or not; 3 Yerg. 133; nor in *Missouri*, under the stat. of 1835; 17 Mo. 362. *Trespass for mesne profits* does not lie against personal representatives in *Pennsylvania;* 5 Watts 474; 3 Pa. 93; nor in *New Hampshire;* 20 Vt. 326; nor in *New York;* 2 Bradf. N. Y. 80; but the representatives may be sued on contract; *ibid.* But this action lies in *North Carolina*, 3 Hawks 390, and *Vermont*, by statute; 20 Vt. 326. In *Virginia* an action on the case for false representation, does not survive against the defendant's executor; 17 How. 212. *Trespass for crim. con.*, where defendant dies pending the suit, does not survive against his personal representatives; 9 Pa. 128. Where an action of trespass is brought by a widow for killing her husband, it abates with death of defendant; 14 Pa. Co. Ct. R. 398.

Where the intestate had falsely pretended that he was divorced from his wife, whereby another was induced to marry him, the latter cannot maintain an action against his personal representatives; 31 Pa. 533; 106 Mass. 341. *Case* for nuisance does not lie against executors of a wrong-doer; 1 Bibb 246; 73 Ill. 214; nor for fraud in the exchange of horses; 5 Ala. N. S. 369; nor, under the statute of *Virginia*, for fraudulently recommending a person as worthy of credit; 17 How. 212; nor for negligence of a constable, whereby he failed to make the money on an execution; 3 Ala. N. S. 366; nor for misfeasance of constable; 29 Me. 462; nor against the personal representatives of a sheriff for an escape, or for taking insufficient bail bond; 4 Harr. N. J. 42; nor against the administrators of the marshal for a false return of execution, or imperfect and insufficient entries thereon; 6 How. 11; nor does *debt* for an escape survive against the sheriff's executors; 1 Caines 124; *aliter* in *Georgia*, by statute; 1 Ga. 514. An action against the sheriff to recover penalties for his failure to return process does not survive against his executors; 13 Ired. 483; nor does an action lie against the representatives of a deceased postmaster for money feloniously taken uot of letters by his clerk; 1 Johns. 396. See ABATEMENT.

ACTIO IN PERSONAM. (Lat. an action against the person).

A personal action.

This is the term in use in the civil law to denote the actions which in the common law are called personal. In modern usage it is applied in English and American law to those suits in admiralty which are directed against the person of the defendant, as distinguished from those *in rem* which are directed against the specific thing from which (or rather the proceeds of the sale of which) the complainant expects and claims a right to derive satisfaction for the injury done to him; 2 Pars. Mar. Law, 663.

ACTIO PRÆSCRIPTIS VERBIS. In Civil Law. A form of action which derived its force from continued usage or the *responsa prudentium*, and was founded on the unwritten law. 1 Spence, Eq. Jur. 212.

The distinction between this action and an *actio in factum* is said to be, that the latter was founded not on usage or the unwritten law, but by analogy to or on the equity of some subsisting law; 1 Spence, Eq. Jur. 212.

ACTIO REALIS (Lat.). A real action. The proper term in the civil law was *Rei Vindicatio;* Inst. 4. 6. 3.

ACTIO IN REM. An action against the thing. See ACTIO IN PERSONAM.

ACTIO REDHIBITORIA. In Civil Law. An action to compel a vendor to take back the thing sold and return the price paid. See REDHIBITORY ACTIONS.

ACTIO RESCISSORIA. In Civil Law. An action for rescinding a title acquired by prescription in a case where the party bringing the action was entitled to exemption from the operation of the prescription.

ACTIO PRO SOCIO. In Civil Law. An action by which either partner could compel his co-partners to perform the partnership contract. Story, Partn., Bennett ed. § 352; Pothier, Contr. de Société, n. 34.

ACTIO STRICTI JURIS (Lat. an action of strict right). An action in which the judge followed the formula that was sent to him closely, administered such relief only as that warranted, and admitted such claims as were distinctly set forth by the pleadings of the parties. 1 Spence, Eq. Jur. 218.

ACTIO UTILIS. An action for the benefit of those who had the beneficial use of property, but not the legal title; an equitable action. 1 Spence, Eq. Jur. 214.

It was subsequently extended to include many other instances where a party was equitably entitled to relief, although he did not come within the strict letter of the law and the formulæ appropriate thereto.

ACTIO VENDITI. In Civil Law. Where a person selling seeks to secure the performance of a special obligation found in a contract of sale or to compel the buyer to pay the price through an action. Hunter, Roman Law 332.

ACTIO VULGARIS. In Civil Law. A legal action; a common action. Sometimes used for *actio directa*. 1 Mackeldey, Civ. L. 189.

ACTION (Lat. *agere*, to do; to lead; to conduct). A doing of something; something done.

In Practice. The formal demand of one's right from another person or party, made and insisted on in a court of justice. In a quite common sense, action includes all the formal proceedings in a court of justice attendant upon the demand of a right made by one person or party of another in such court, including an adjudication upon the right and its enforcement or denial by the court.

In the Institutes of Justinian an action is defined as *jus persequendi in judicio quod sibi debetur* (the right of pursuing in a judicial tribunal what is due one's self); Inst. 4. 6. In the Digest, however, where the signification of the word is expressly treated of, it is said, *Actio generaliter sumitur; vel pro ipso jure quod quis habet persequendi in judicio quod suum est sibi ve debetur; vel pro hac ipsa persecutione seu juris exercitio* (Action in general is taken either as that right which each one has of pursuing in a judicial tribunal his own or what is due him; or as the pursuit itself or exercise of the right); Dig. 50. 16. 16. Action was also said *continere formam agendi* (to include the form of proceeding); Dig. 1. 2. 10.

This definition of action has been adopted by Mr. Taylor (Civ. Law, p. 50). These forms were prescribed by the prætors originally, and were to be very strictly followed. The actions to which they applied were said to be *stricti juris*, and the slightest variation from the form prescribed was fatal. They were first reduced to a system by Appius Claudius, and were surreptitiously published by his clerk, Cneius Flavius. The publication was so pleasing to the people that Flavius was made a tribune of the people, a senator, and a curule edile (a somewhat more magnificent return than is apt to await the labors of the editor of a modern book of forms); Dig. 1. 2. 5.

These forms were very minute, and included the form for pronouncing the decision.

In modern law the signification of the right of pursuing, etc., has been generally dropped, though it is recognized by Bracton, 98 *b*; Coke, 2d Inst. 40; 3 Bla. Com. 116; while the two latter senses of the exercise of the right and the means or method of its exercise are still found.

The vital idea of an action is, a proceeding on the part of one person as actor against another, for the infringement of some right of the first, before a court of justice, in the manner prescribed by the court or the law.

Subordinate to this is now connected in a quite common use, the idea of the answer of the defendant or person proceeded against; the adducing evidence by each party to sustain his position; the adjudication of the court upon the right of the plaintiff; and the means taken to enforce the right or recompense the wrong done, in case the right is established and shown to have been injuriously affected.

Actions are to be distinguished from those proceedings, such as writ of error, *scire facias*, mandamus, and the like, where, under the form of proceedings, the court, and not the plaintiff, appears to be the actor; 6 Binn. 9. And the term is not regularly applied, it would seem, to proceedings in a court of equity; 3 S. C. 417; 71 Pa. 170.

In the Civil Law.

Civil Actions.—Those personal actions which are instituted to compel payments or do some other thing purely civil. Pothier, *Introd. Gen. aux Coutumes* 110.

Criminal Actions.—Those personal actions in which the plaintiff asks reparation for the commission of some tort or injury which he or those who belong to him have sustained.

Mixed Actions are those which partake of the nature of both real and personal actions; as, actions of partition, actions to recover property and damages. Just. Inst. 4, 6. 18–20; Domat, *Supp. des Lois Civiles* liv. 4, tit. 1, n. 4.

Mixed Personal Actions are those which partake of both a civil and a criminal character.

Personal Actions are those in which one person (*actor*) sues another as defendant (*reus*) in respect of some obligation which he is under to the actor, either *ex contractu* or *ex delicto*, to perform some act or make some compensation.

Real Actions.—Those by which a person seeks to recover his property which is in the possession of another.

In the Common Law.

The action properly is said to terminate at judgment; Co. Litt. 289 *a*; Rolle, Abr. 291; 3 Bla. Com. 116; 3 Bouvier, Inst. n. 2639.

Civil Actions.—Those actions which have for their object the recovery of private or civil rights, or of compensation for their infraction.

Criminal Actions.—Those actions prosecuted in a court of justice, in the name of the government, against one or more individuals accused of a crime. See 1 Chitty, Crim. Law.

Local Actions.—Those civil actions which can be brought only in the county or other territorial jurisdiction in which the cause of action arose. See LOCAL ACTION.

Mixed Actions.—Those which partake of the nature of both real and personal actions. See MIXED ACTION.

Personal Actions.—Those civil actions which are brought for the recovery of personal property, for the enforcement of some contract, or to recover damages for the commission of an injury to the person or property. See PERSONAL ACTION.

Real Actions.—Those brought for the specific recovery of lands, tenements, or

hereditaments. Steph. Pl. 3. See REAL ACTION.

Transitory Actions.—Those civil actions the cause of which might well have arisen in one place or county as well as another. See TRANSITORY ACTION.

In French Law. Stock in a company; shares in a corporation.

ACTION OF BOOK DEBT. A form of action resorted to in the states of Connecticut and Vermont for the recovery of claims, such as are usually evidenced by a book account. 1 Day 105; 4 *id.* 105; 2 Vt. 366. See 1 Conn. 75; 11 *id.* 205.

ACTION ON THE CASE. This was a remedy given by the common law, but it appears to have existed only in a limited form and to a certain extent until the statute of Westminster 2d. In its most comprehensive signification it includes *assumpsit* as well as an action in form *ex delicto;* at present when it is mentioned it is usually understood to mean an action in form *ex delicto.*

It is founded on the common law or upon acts of Parliament, and lies generally to recover damages for torts not committed with force, actual or implied; or having been occasioned by force where the matter affected was not tangible, or the injury was not immediate but consequential; or where the interest in the property was only in reversion, in all of which cases trespass is not sustainable; 1 Chit. Pl. 132.

ACTION REDHIBITORY. See REDHIBITORY ACTION.

ACTION RESCISSORY. See RESCISSORY ACTIONS.

ACTIONS ORDINARY. **In Scotch Law.** All actions which are not rescissory. Ersk. Inst. 4, 1, 18.

ACTIONABLE. For which an action will lie. 3 Bla. Com. 23.

Where words in themselves are actionable, malicious intent in publishing them is an inference of law; 2 Greenl. Ev. § 418. See LIBEL; SLANDER.

ACTIONARY. A commercial term used in Europe to denote a proprietor of shares or *actions* in a joint stock company.

ACTIONES NOMINATÆ (Lat. named actions).

In English Law. Those writs for which there were precedents in the English Chancery prior to the statute 13 Edw. I. (Westm. 2d) c. 34.

Prior to this statute, the clerks would issue no writs except in such actions. Steph. Pl. 8; 17 S. & R. 195. See CASE; ACTION.

ACTON BURNELL. An ancient English statute, so called because enacted by a parliament held at the village of Acton Burnell. 11 Edw. 1.

It is otherwise known as *statutum mercatorum* or *de mercatoribus*, the statute of the merchants. It was a statute for the collection of debts, the earliest of its class, being enacted in 1283.

A further statute for the same object, and known as De Mercatoribus, was enacted 13 Edw. I. (c. 3.). See STATUTE MERCHANT.

ACTOR (Lat. *agere*). **In Civil Law.** A patron, pleader, or advocate. Du Cange; Cowel; Spelman.

Actor ecclesiæ.—An advocate for a church; one who protects the temporal interests of a church. *Actor villæ* was the steward or head-bailiff of a town or village. Cowel.

One who takes care of his lord's lands: Du Cange.

A guardian or tutor. One who transacts the business of his lord or principal; nearly synonymous with agent, which comes from the same word.

The word has a variety of closely-related meanings, very nearly corresponding with manager. Thus, *actor dominæ*, manager of his master's farm; *actor ecclesiæ*, manager of church property; *actores provinciarum*, tax-gatherers, treasurers, and managers of the public debt.

A plaintiff; contrasted with *reus*, the defendant. *Actores regis*, those who claimed money of the king. Du Cange, *Actor;* Spelman, Gloss.; Cowel.

ACTRIX (Lat.). A female actor; a female plaintiff. Calvinus, Lex.

ACTS OF COURT. Legal memoranda made in the admiralty courts in England, in the nature of pleas.

For example, the English court of admiralty disregards all tenders except those formally made by acts of court; Abbott, Shipp. 403; Dunlop, Adm. Pr. 104, 105; 4 C. Rob. Adm. 103; 1 Hagg. Adm. 157.

ACTS OF SEDERUNT. **In Scotch Law.** Ordinances for regulating the forms of proceeding, before the court of session, in the administration of justice, made by the judges, who have the power by virtue of a Scotch Act of Parliament passed in 1540. Erskine, Pract. book 1, tit. 1, § 14.

ACTUAL. It is something real, in opposition to constructive or speculative, something "existing in act." 31 Conn. 213.

ACTUAL CASH VALUE. **In Insurance.** The term means the sum of money the insured goods would have brought for cash, at the market price, at the time when, and place where, they were destroyed by fire. 4 Fed. Rep. 59. See INSURANCE.

ACTUAL DAMAGES. The damages awarded for a loss or injury actually sustained; in contradistinction from damages implied by law, and from those awarded by way of punishment. See DAMAGES.

ACTUAL DELIVERY. It is held commonly to apply to the ceding of the corporal possession by the seller or his servants, and the actual apprehension of corporal possession by the buyer or his servant, or by some person authorized by him to receive the goods as his representative for the purpose of custody or disposal, but not for mere conveyance. 1 Rawle 19.

ACTUARIUS (Lat.). One who drew the acts or statutes.

One who wrote in brief the public acts.

An officer who had charge of the public baths; an officer who received the money for the soldiers, and distributed it among them; a notary.

An *actor*, which see. Du Cange.

ACTUARY. The manager of a joint stock company, particularly an insurance company. Penny Cyc.

A clerk, in some corporations vested with various powers.

In Ecclesiastical Law. A clerk who registers the acts and constitutions of the convocation.

ACTUM (Lat. *agere*). A deed; something done.

Datum relates to the time of the delivery of the instrument; *actum*, the time of making it; *factum*, the thing made. *Gestum*, denotes a thing done without writing; *actum*, a thing done in writing. Du Cange. Acrus.

ACTUS (Lat. *agere*, to do; *actus*, done).

In Civil Law. A thing done. See ACTUM.

In Roman Law. A servitude which carried the right of driving animals and vehicles across the lands of another.

It included also the *iter*, or right of passing across on foot or on horseback.

In English Law. An act of parliament. 8 Coke 40.

A foot and horse way. Co. Litt. 56 *a*.

AD (Lat.). At; by; for; near; on account of; to; until; upon.

AD ABUNDANTIOREM CAUTELAM (Lat.). For greater caution.

AD ALIUD EXAMEN (Lat.). To another tribunal. Calvinus, Lex.

AD CUSTAGIA. At the costs. Toullier; Cowel; Whishaw.

AD CUSTUM. At the cost. 1 Sharsw. Bla. Com. 314.

AD DAMNUM (Lat. *damnæ*). To the damage.

In Pleading. The technical name of that part of the writ which contains a statement of the amount of the plaintiff's injury.

The plaintiff cannot recover greater damages than he has laid in the *ad damnum*; 2 Greenl. Ev. § 260.

AD EXCAMBIUM (Lat.). For exchange; for compensation. Bracton, fol. 12 *b*, 37 *b*.

AD EXHÆREDITATIONEM. To the disherison, or disinheriting.

The writ of waste calls upon the tenant to appear and show cause why he hath committed waste and destruction in the place named, *ad exhæreditationem*, etc.; 3 Bla. Com. 228; Fitzherbert, Nat. Brev. 55.

AD FACTUM PRÆSTANDUM. In Scotch Law. The name given to a class of obligations of great strictness.

A debtor *ad fac. præs.* is denied the benefit of the act of grace, the privilege of sanctuary, and the *cessio bonorum*; Erskine, Inst. lib. 3, tit. 3, § 62; Kames, Eq. 216.

AD FIDEM. In allegiance. 2 Kent 56. Subjects born in allegiance are said to be born *ad fidem*.

AD FILUM AQUÆ. To the thread of the stream; to the middle of the stream. 2 Cush. 207; 4 Hill (N. Y.) 369; 2 N. H. 869; 2 Washb. R. P. 632; 3 Kent 428; 9 Cush. 552.

A former meaning seems to have been, to a stream of water. Cowel; Blount. *Ad medium filum aquæ* would be etymologically more exact; 2 Eden, Inj. 260, and is often used; but the common use of *ad filum aquæ* is undoubtedly to the thread of the stream; 3 Sumn. 170; 1 M'Cord 580; 3 Kent 431; 20 Wend. 149; 4 Pick. 272; 28 N. H. 195.

AD FILUM VIÆ (Lat.). To the middle of the way. 8 Metc. Mass. 260.

AD FIRMAM. To farm.

Derived from an old Saxon word denoting rent, according to Blackstone, occurring in the phrase, *dedi concessi et ad firmam tradidi* (I have given, granted, and to farm let): 2 Bla. Com. 317. *Ad firmam noctis* was a fine or penalty equal in amount to the estimated cost of entertaining the king for one night. Cowel. *Ad feodi firmam*, to fee farm. Spelman, Gloss.; Cowel.

AD INQUIRENDUM (Lat. for inquiry).

In Practice. A judicial writ, commanding inquiry to be made of anything relating to a cause depending in court.

AD INTERIM (Lat.). In the mean time.

An officer is sometimes appointed *ad interim*, when the principal officer is absent, or for some cause incapable of acting for the time.

AD LARGUM. At large: as, title at large; assize at large. See Dane, Abr. c. 144, art. 16, § 7.

AD LITEM (Lat. *lites*). For the suit.

Every court has the power to appoint a guardian *ad litem*; 2 Kent 229; 2 Bla. Com. 427.

AD LUCRANDUM VEL PERDENDUM. For gain or loss.

AD MAJORAM CAUTELAM (Lat.). For greater caution.

AD NOCUMENTUM (Lat.). To the hurt or injury.

In an assize of nuisance, it must be alleged by the plaintiff that a particular thing has been done, *ad nocumentum liberi tenementi sui* (to the injury of his freehold); 3 Bla. Com. 221.

AD OSTIUM ECCLESIÆ (Lat.). At the church-door.

One of the five species of dower formerly recognized at the common law. 1 Washb. R. P. 149; 2 Bla. Com. 132. See DOWER.

AD QUÆRIMONIAM. On complaint of.

AD QUEM (Lat.). To which.

The correlative term to *a quo*, used in the

computation of time, definition of a risk, etc., denoting the end of the period or journey.

The *terminus a quo* is the point of beginning or departure; the *terminus ad quem*, the end of the period or point of arrival.

AD QUOD DAMNUM (Lat.). What injury.

A writ issuing out of and returnable into chancery, directed to the sheriff, commanding him to inquire by a jury what damage it will be to the king, or any other, to grant a liberty, fair, market, highway, or the like.

The name is derived from the characteristic words denoting the nature of the writ, to inquire how great an injury it will be to the king to grant the favor asked; Whishaw, Fitzherbert, Nat. Brev. 221; Termes de la Ley.

AD RATIONEM PONERE. To cite a person to appear.

AD RESPONDENDUM. To make answer. It is used in certain writs to bring a person before the court in order to make answer, as in *habeas corpus ad respondendum* or *capias ad respondendum*.

AD SATISFACIENDUM. To satisfy. It is used in the writ *capias ad satisfaciendum* and is an order to the sheriff to take the person of the defendant to satisfy the claims of the plaintiff.

AD SECTAM. At the suit of.

It is commonly abbreviated. It is used where it is desirable to put the name of the defendant first, as in some cases where the defendant is filing his papers; thus, Roe *ads.* Doe, where Doe is plaintiff and Roe defendant. It is found in the indexes to cases decided in some of our older American books of reports, but has become pretty much disused.

AD TERMINUM QUI PRÆTERIT. A writ of entry which formerly lay for the lessor or his heirs, when a lease had been made of lands and tenements, for a term of life or years, and, after the term had expired, the lands were withheld from the lessor by the tenant, or other person possessing the same. Fitzherbert, Nat. Brev. 201.

The remedy now applied for holding over is by ejectment, or, under local regulations, by summary proceedings.

AD TUNC ET IBIDEM. In Pleading. The technical name of that part of an indictment containing the statement of the subject-matter "then and there being found." Bacon, Abr. *Indictment*, G. 4; 1 No. C. 93.

In an indictment, the allegation of time and place must be repeated in the averment of every distinct material fact; but after the day, year, and place have once been stated with certainty, it is afterwards, in subsequent allegations, sufficient to refer to them by the words *et ad tunc et ibidem*, and the effect of these words is equivalent to an actual repetition of the time and place. The *ad tunc et ibidem* must be added to every material fact in an indictment; Saund. 95. Thus, an indictment which alleged that J. S. at a certain time and place made an assault upon J. N., *et eum cum gladio felonicè percussit*, was held bad, because it was not said, *ad tunc et ibidem percussit*; Dy. 68, 69. And where, in an indictment for murder, it was stated that J. S. at a certain time and place, having a sword in his right hand, *percussit* J. N., without saying *ad tunc et ibidem percussit*, it was held insufficient; for the time and place laid related to the having the sword, and consequently it was not said when or where the stroke was given; Cro. Eliz. 738; 2 Hale, Pl. Cr. 178. And where the indictment charged that A. B. at N., in the county aforesaid, made an assault upon C. D. of F. in the county aforesaid, and him *ad tunc et ibidem quodam gladio percussit*, this indictment was held to be bad, because two places being named before, if it referred to both, it was impossible; if only to one, it must be to the last, and then it was insensible; 2 Hale, Pl. Cr. § 180.

AD VALOREM (Lat.). According to the valuation.

Duties may be specific or *ad valorem*. *Ad valorem* duties are always estimated at a certain per cent. on the valuation of the property; 3 U. S. Stat. L. 732; 24 Miss. 501.

AD VITAM AUT CULPAM. For life or until misbehavior.

Words descriptive of a tenure of office "for life or good behavior," equivalent to *quamdiu bene se gesserit*.

ADDICERE (Lat.). In Civil Law. To condemn. Calvinus, Lex.

Addictio denotes a transfer of the goods of a deceased debtor to one who assumes his liabilities; Calvinus, Lex. Also used of an assignment of the person of the debtor to the successful party in a suit.

ADDITION (Lat. *additio*, an adding to). Whatever is added to a man's name by way of title or description, as additions of mystery, place, or degree. Cowel; Termes de la Ley; 10 Wentw. Pl. 371; Salk. 5; 2 Ld. Raym. 988; 1 Wils. 244.

Additions of estate are esquire, gentleman, and the like.

These titles can, however, be claimed by none, and may be assumed by any one. In Nash *v.* Battersby (2 Ld. Raym. 986; 6 Mod. 80), the plaintiff declared with the addition of gentleman. The defendant pleaded in abatement that the plaintiff was no gentleman. The plaintiff demurred, and it was held ill; for, said the court, it amounts to a confession that the plaintiff is no gentleman, and then not the person named in the count. He should have replied that he is a gentleman.

Additions of mystery are such as scrivener, painter, printer, manufacturer, etc.

Additions of place are descriptions by the place of residence, as A. B. of Philadelphia, and the like. See Bacon, Abr. *Addition;* Doctr. Plac. 71; 2 Viner, Abr. 77; 1 Lilly, Reg. 39; 1 Metc. Mass. 151.

The statute of additions extends only to the party indicted. An indictment, therefore, need not describe, by any addition, the person upon whom the offence therein set forth is alleged to have been committed; 2 Leach, Cr. Cas. 4th ed. 861; 10 Cush. 402. And if an addition is stated, it need not be proved; 2 Leach, Cr. Cas. 4th ed. 547; 2 Carr. & P. 230. But where a defendant was indicted for marrying E. C., "widow," his first wife being alive, it was held that the addition was material; 1 Mood. Cr. Cas. 303; 4 C. & P. 579. At common law there was no need of addition in any case; 2 Ld. Raym. 988; it was required only by stat. 1 Hen. V. c. 5, in cases where process of outlawry lies. In all other cases it is only a description of the person, and common reputation is sufficient; 2 Ld. Raym. 849. No addition is necessary in a *Homine Replegiando;* 2 Ld. Raym. 987; Salk. 5; 1 Wils. 244, 245; 6 Co. 67.

Addition in the law of mechanics' liens. An addition erected to a former building to constitute a building within the meaning of the mechanics' lien law must be a lateral addition. It must occupy ground without the limits of the building to which it constitutes an addition; so that the lien shall be upon the building formed by the addition, and not the land upon which it stands. An alteration in a former building by adding to its height, or its depth, or to the extent of its interior accommodations, is an alteration merely, and not an addition; 27 N. J. L. 132. See LIEN.

In French Law. A supplementary process to obtain additional information; Guyot, *Répert.*

ADDITIONAL. This term embraces the idea of joining or uniting one thing to another, so as thereby to form *one aggregate.* We add by bringing things together; 53 Miss. 645.

ADDITIONALES. Additional terms or propositions to be added to a former agreement.

ADDRESS. In Equity Pleading. That part of a bill which contains the appropriate and technical description of the court where the plaintiff seeks his remedy. Cooper, Eq. Plead. 8; Barton, Suit in Eq. 26; Story, Eq. Plead. § 26; Van Heyth. Eq. Draft. 2.

In Legislation. A formal request addressed to the executive by one or both branches of the legislative body, requesting him to perform some act.

It is provided as a means for the removal of judges who are deemed unworthy longer to occupy their situations, although the causes of removal are not such as would warrant an impeachment. It is not provided for in the Constitution of the United States; and even in those states where the right exists it is exercised but seldom, and generally with great unwillingness.

ADELANTADO. In Spanish Law. The military and political governor of a frontier province. His powers were equivalent to those of the president of a Roman province. He commanded the army of the territory which he governed, and, assisted by persons learned in the law, took cognizance of the civil and criminal suits that arose in his province. This office has long since been abolished.

ADEMPTION (Lat. *ademptio* from *adimere*, to take away). The extinction or withholding of a legacy in consequence of some act of the testator which, though not directly a revocation of the bequest, is considered in law as equivalent thereto, or indicative of an intention to revoke.

The question of ademption of a *general legacy* depends entirely upon the intention of the testator, as inferred from his acts under the rules established in law. Where the relations of the parties are such that the legacy is, in law, considered as a portion, an advancement during the life of the testator will be presumed an ademption, at least, to the extent of the amount advanced; 5 M. & C. 29; 3 Hare 509; 10 Ala. N. S. 72; 12 Leigh 1; and see 3 C. & F. 154; 18 Ves. 151, 153; but not where the advancement and portion are not *ejusdem generis;* 1 Bro. Ch. 555; 1 Roper, Leg. 375; or where the advancement is contingent and the portion certain; 2 Atk. 493; 3 M. & C. 374; or where the advancement is expressed to be in *lieu* of, or *compensation* for, an interest; 1 Ves. 257; or where the bequest is of uncertain amount; 15 Ves. 513; 4 Bro. Ch. 494; but see 2 Hou. L. Cas. 131; or where the legacy is absolute and the advancement for life merely; 2 Ves. sen. 38; 7 Ves. 516; or where the devise is of real estate; 3 Y. & C. 397. See 3 Del. Ch. 239.

Where deposits are made in a bank by a father for the use of his daughter and in her name, and the passbook is delivered to her, it will not work an ademption of a pecuniary legacy, although deposits are made partly after the execution of the will; 113 N. Y. 560.

But where the testator was not a parent of the legatee, nor standing *in loco parentis*, the legacy is not to be held a portion, and the rule as to ademption does not apply; 2 Hare 424; 2 Story, Eq. Jur. § 1117; except where there is a bequest for a particular purpose and money is advanced by the testator for the same purpose; 2 Bro. Ch. 166; 1 Ball & B. 303; see 6 Sim. 528; 3 M. & C. 359; 2 P. Will. 140; 1 Pars. Eq. Cas. 139; 15 Pick. 133; 1 Rop. Leg. c. 6; a legacy of a sum of money to be received in lieu of an interest in a homestead, is satisfied by money amounting to the legacy during testator's lifetime; 118 Ind. 147.

The ademption of a *specific* legacy is effected by the extinction of the thing or fund, without regard to the testator's intention; 3 Bro. Ch. 432; 2 Cox, Ch. 182; 3 Watts 338; 1 Rop. Leg. 329; and see 6 Pick. 48; 16 *id.* 133; 2 Halst. 414; 8 Pa. Co. Ct. 454; but not where the extinction of the specific thing is by act of law and a new thing takes its place; Forrest 226; Ambl. 59; or where a breach of trust has been committed or any trick or device practised with a view to defeat the specific legacy; 2 Vern. Rathby ed. 748, n.; 8 Sim. 171; or where the fund remains the same in substance, with some unimportant alterations; 1 Cox, Ch. 427; 3 Bro. Ch. 416; 3 M. & K. 296; as a lease of ground rent for 99 years after a devise of it; 25 Atl. Rep. (Md.) 511; or where the testator lends the fund on condition of its being replaced; 2 Bro. Ch. 113.

Republication of a will may prevent the effect of what would otherwise cause an ademption: 1 Rop. Leg. 351.

A specific legacy which has been adeemed will not be revived by a republication of the will after the ademption; 151 Mass. 76.

ADEQUATE CAUSE. In Criminal Law. Such a cause as would commonly produce a degree of anger, rage, resentment, or terror, in a person of ordinary temper, sufficient to render the mind incapable of cool reflection. Insulting

words or gestures, or an assault and battery so slight as to show no intention to inflict pain or injury, etc., are not adequate causes; 2 Tex. App. 100.

ADHERING (Lat. *adhœrere*, to cling to). Cleaving to, or joining; as, adhering to the enemies of the United States.

The constitution of the United States, art. 3, s. 3, defines treason against the United States to consist only in levying war against them, or in *adhering* to their enemies, giving them aid and comfort.

A citizen's cruising in an enemy's ships with a design to capture or destroy Ameri, can ships, would be an adhering to the enemies of the United States; 4 State Trial-328; Salk. 634; 2 Gilbert, Ev. Lofft ed. 798.

If war be actually levied, that is, a body of men be actually assembled for the purpose of effecting by force a treasonable enterprise, all those who perform any part, however minute, or however remote from the scene of action, and who are leagued in the general conspiracy, are to be considered as traitors; 4 Cra. 126.

ADITUS (Lat. *adire*). An approach; a way; a public way. Co. Litt. 56 *a*.

ADJACENT. Next to, or near.

Two of three lots of land might be described as adjacent to the first, while only the second could be said to be adjoining; 1 Cooke 128; 7 La. Ann. 76.

ADJOINING. The word in its etymological sense, means touching or contiguous, as distinguished from lying near or adjacent. 52 N. Y. 397. The words "along" and "adjoining" are used as synonymous terms and as used in a statute imply contiguity, contact; 67 Mo. 58.

ADJOURN (Fr. *adjourner*). To put off; to dismiss till an appointed day, or without any such appointment. See ADJOURNMENT.

ADJOURNED TERM. A continuation of a previous or regular term. 4 Ohio St. 473; 22 Ala. N. S. 27. The Massachusetts General Statutes, c. 112, § 26, provide for holding an adjourned law term from time to time.

ADJOURNMENT. The dismissal by some court, legislative assembly, or properly authorized officer, of the business before them, either finally (which, as popularly used, is called an adjournment *sine die*, without day), or to meet again at another time appointed (which is called a temporary adjournment).

The constitution of the United States, art. 1, s. 5, 4, directs that "neither house, during the session of congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting." See Comyns, Dig.; Viner. Abr.; Dict. de Jur.

In Civil Law. A calling into court; a summoning at an appointed time. Du Cange.

ADJOURNMENT DAY. In English Practice. A day appointed by the judges at the regular sittings for the trial of causes at *nisi prius*.

ADJOURNMENT DAY IN ERROR. In English Practice. A day appointed some days before the end of the term at which matters left undone on the affirmance day are finished. 2 Tidd, Pract. 1224.

ADJOURNMENT IN EYRE. The appointment of a day when the justices in eyre mean to sit again. Cowel; Spelman, Gloss.; 1 Bla. Com. 186.

ADJUDICATAIRE. In Canadian Law. A purchaser at a sheriff's sale. See 1 Low. Can. 241; 10 *id.* 325.

ADJUDICATION. In Practice. A judgment; giving or pronouncing judgment in a case.

In Scotch Law. A process for transferring the estate of a debtor to his creditor. Erskine, Inst. lib. 2, tit. 12, §§ 39–55; Bell., Dict. Shaw ed. 944.

It may be raised not only on a decree of court, but also where the debt is for a liquidated sum. The execution of a summons and notice to the opposite party prevents any transfer of the estate. Every creditor who obtains a decree within a year and a day is entitled to share with the first creditor, and, after ten years' possession under his adjudication, the title of the creditor is complete; Paterson, Comp. 1137, n. The matter is regulated by statute 1672, c.19, Feb. 26. See Erskine, lib. 2, c. 12, §§ 15, 16.

ADJUNCTION (Lat. *adjungere*, to join to).

In Civil Law. The attachment or union permanently of a thing belonging to one person to that belonging to another. This union may be caused by *inclusion*, as if one man's diamond be set in another's ring; by *soldering*, as if one's guard be soldered on another's sword; by *sewing*, as by employing the silk of one to make the coat of another; by *construction*, as by building on another's land; by *writing*, as when one writes on another's parchment; or by *painting*, as when one paints a picture on another's canvas.

In these cases, as a general rule, the accessory follows the principal: hence those things which are attached to the things of another become the property of the latter. The only exception which the civilians made was in the case of a picture, which, although an accession, drew to itself the canvas, on account of the importance which was attached to it; Inst. 2. 1. 34; Dig. 41. 1. 9. 2. The common law implicitly adopts the civil law doctrines. See 2 Bla. Com. 404.

ADJUNCTS. Additional judges sometimes appointed in the Court of Delegates of England, *q. v.* See Shelford, Lun. 310; 1 Hagg. Eccl. Rep. 384; 2 Hagg. Eccl. Rep. 84; 3 Hagg. Eccl. Rep. 471.

ADJUSTMENT. In Insurance. The determining of the amount of a loss. 2 Phillips, Ins. §§ 1814, 1815.

There is no specific form essentially re-

quisite to an adjustment. To render it binding, it must be intended, and understood by the parties to a policy, to be absolute and final. It may be made by indorsement on the policy, or by payment of the loss, or the acceptance of an abandonment; 2 Phillips, Ins. § 1815; 4 Burr. 1966; 1 Campb. 134, 274; 4 Taunt. 725; 13 La. 13; 4 Metc. 270; 22 Pick 191. It must be made with full knowledge of all the facts material to the right of the insured to recover, and the adjustment can be impeached only for fraud or mistake of such material fact; 14 R. I. 247. If there is fraud by either party to an adjustment, it does not bind the other; 2 Phill. Ins. § 1316; 2 Johns. Cas. 233; 3 Campb. 319. If one party is led into a material mistake of fact by fault of the other, the adjustment will not bind him; 2 Phill. Ins. § 1817; 2 East 469; 2 Johns. 157; 8 *id.* 334; 4 *id.* 331; 9 *id.* 405; 2 Johns. Cas. 233.

It is a sufficient adjustment if the party employed by an insurance company goes upon the premises, makes calculations, and states the loss; 18 Ill. App. 570.

The amount of a loss is governed by that of the insurable interest, so far as it is covered by the insurance. See INSURABLE INTEREST; ABANDONMENT; May, Insurance.

ADMEASUREMENT OF DOWER. In Practice. A remedy which lay for the heir on reaching his majority, to rectify an assignment of dower made during his minority, by which the doweress had received more than she was legally entitled to. 2 Bla. Com. 136; Gilbert, Uses 379.

The remedy is still subsisting, though of rare occurrence. See 1 Washb. R. P. 225, 226; 1 Pick. 314; 2 Ind. 336.

In some of the states, the special proceeding which is given by statute to enable the widow to compel an assignment of dower, is termed an admeasurement of dower.

See, generally, DOWER; Fitzherb. Nat. Brev. 148; Bacon, Abr. *Dower*, K; Co. Litt. 39 *a*; 1 Washb. R. P. 225, 226.

ADMEASUREMENT OF PASTURE. In Practice. A remedy which lay in certain cases for surcharge of common of pasture.

It lay where a common of pasture appurtenant or in gross was certain as to number; or where one had common appendant or appurtenant, the quantity of which had never been ascertained. The sheriff proceeded, with the assistance of a jury of twelve men, to admeasure and apportion the common as well of those who had surcharged as those who had not, and, *when the writ was fully executed*, returned it to the superior court. Termes de la Ley.

The remedy is now abolished in England; 3 Sharsw. Bla. Com. 239, n.; and in the United States; 3 Kent 419.

ADMINICLE. In Scotch Law. Any writing or deed introduced for the purpose of proof of the tenor of a lost deed to which it refers. Erskine, Inst. lib. 4, tit. 1, § 55; Stair, Inst. lib. 4, tit. 32, §§ 6, 7.

In English Law. Aid; support. Stat. 1 Edw. IV. c. 1.

In Civil Law. Imperfect proof. Merlin, *Répert.*

ADMINICULAR EVIDENCE. In Ecclesiastical Law. Evidence brought in to explain and complete other evidence. 2 Lee, Eccl. 595.

ADMINISTERING POISON. An offence of an aggravated character, punishable under the various statutes defining the offence.

The stat. 9 G. IV. c. 31, s. 11, enacts "that if any person unlawfully and maliciously shall *administer*, or attempt to administer, to any person, or shall cause to be taken by any person, any poison or other destructive thing," etc., every such offender, etc. In a case which arose under this statute, it was decided that, to constitute the act of administering the poison, it was not absolutely necessary that there should have been a delivery to the party poisoned, but that if she took it from a place where it had been put for her by the defendant, and any part of it went into her stomach, it was an administering; 4 Carr. & P. 369; 1 Mood. Cr. Cas. 114; 88 Ga. 257; 88 Va. 365; 23 Ohio St. 146; 34 N. Y. 223.

The statute 7 Will. IV. & 1 Vict. c. 85 enacts that "Whosoever, with intent to procure the miscarriage of any woman, shall unlawfully administer to her, or cause to be taken by her, any poison, or other noxious thing," shall be guilty of felony. Upon an indictment under this section, it was proved that the woman requested the prisoner to get her something to procure miscarriage, and that a drug was both given by the prisoner and taken by the woman with that intent, but that the taking was not in the presence of the prisoner. It was held, nevertheless, that the prisoner had caused the drug to be taken within the meaning of the statute; 1 Dears. & B. 127, 164. It is not sufficient that the defendant merely imagined that the thing administered would have the effect intended, but it must also appear that the drug administered was either a "poison" or a "noxious thing."

ADMINISTRATION (Lat. *administrare*, to assist in).

Of Estates. The management of the estate of an intestate, or of a testator who has no executor. 2 Bla. Com. 494; 1 Williams, Ex. 401. The term is applied broadly to denote the management of an estate by an executor, and also the management of estates of minors, lunatics, etc., in those cases where trustees have been appointed by authority of law to take charge of such estates in place of the legal owners.

At common law, the real estate of an intestate goes to his heirs; the personal, to his administrator. The fundamental rule is that all just debts shall be paid before any further disposition of the property; Coke, 2d Inst. 398. Originally, the king had the sole power of disposing of an intestate's goods and chattels. This power he early transferred to the bishops or ordinaries; and in England it is still exercised by their legal successors, the ecclesiastical courts, who appoint administrators and superintend the administration of estates; 4 Burns, Eccl. Law, 291; 2 Fonbl. Eq. 313; 1 Williams, Ex. 402.

No administration of an estate is necessary where the heirs are all of age and agree to a settlement, and there are no creditors; 50 Mo. App. 85.

Ad colligendum. That which is granted for collecting and preserving goods about to perish (*bona peritura*). The only power over these goods is under the form prescribed by statute.

Ancillary. That which is subordinate to the principal administration, for collecting the assets of foreigners. It is taken out in the country where the assets are locally

situate; 1 Williams, Ex. [362] 6th Am. ed. note (*u*)—cases cited; 88 Pa. 131; 11 Mass. 256, 263; 44 Ill. 202; 32 Barb. 190; 57 Howard Pr. 208.

It will not be granted in Minnesota on the petition of a now resident creditor, there being no domestic ones, in order to collect shares of a corporation; 45 Minn. 242. An administrator in one state can sue as such in another unless ancillary letters are taken out, but this may be done after the bill is filed, by amendment; 42 Fed. Rep. 618.

One who is both ancillary and domiciliary administratrix of the same estate, cannot be called on in one jurisdiction to account for assets received in the other; 19 S. E. Rep. (S. C.) 616.

Cæterorum. That which is granted as to the residue of an estate, which cannot be administered under the limited power already granted; 1 Wms. Ex. 7th Am. ed. *449; 2 Hagg. 62; 4 Hagg. Eccl. 382, 386; 4 M. & G. 398; 1 Curt. Eccl. 286.

It differs from administration *de bonis non* in this, that in *cæterorum* the full power granted is exercised and exhausted, while in the other the power is, for some cause, not fully exercised.

Cum testamento annexo. That which is granted where no executor is named in the will, or where the one named dies, or is incompetent or unwilling to act. Such an administrator must follow the statute rules of distribution, except when otherwise directed by the will; Willard, Ex.; 2 Bradf. 22; 4 Mass. 634; 6 How. 59, 60. The residuary legatee is appointed such administrator rather than the next of kin; 2 Phil. 54, 310; 1 Ventr. 217; 4 Leigh 152; 2 Add. 352; 1 Williams, Ex. 6th Am. ed. (462) notes (*h*) (*i*).

De bonis non. That which is granted when the first administrator dies before having fully administered. The person so appointed has in general the powers of a common administrator; Bacon, Abr. *Executors*, B, 1; Rolle, Abr. 907; 22 Miss. 47; 27 Ala. 273; 9 Ind. 342; 4 Sneed 411; 31 Miss. 519; 29 Vt. 170; 11 Md. 412; 6 Metc. 197, 198.

A residuary legatee has sufficient interest in an estate to request the appointment of an administrator d. b. n. to collect debts, whether it will make the estate solvent or not; 62 Conn. 218.

De bonis non cum testamento annexo. That which is granted when an executor dies leaving a part of the estate unadministered. Comyns, Dig. Adm. B. 1; 3 Cush. 23; 4 Watts 34, 38, 39. It cannot be based on a will made in a foreign country if invalid there because of defective execution; 13 Pa. Co. Ct. 81.

Durante absentia. That which subsists during the absence of the executor and until he has proved the will. In England, by statute, such an administration is raised during the absence of the executor, and is not determined by the executor's dying abroad; 4 Hagg. Eccl. 360; 3 Bos. & P. 26; see 5 Rawle 264.

Durante minori ætate. That which is granted when the executor is a minor. It continues until the minor attains his lawful age to act, which at common law is seventeen years; Godolph. 102; 5 Coke 29. When an infant is sole executor, the statute 38 Geo. III. c. 87, s. 6 provides that probate shall not be granted to him until his full age of twenty-one years, and that *adm. cum test. annexo* shall be granted in the mean time to his guardian or other suitable person. A similar statute provision exists in most of the United States. This administrator may collect assets, pay debts, sell *bona peritura*, and perform such other acts as require immediate attention. He may sue and be sued; Bacon, Abr. *Executor*, B, 1; Cro. Eliz. 718; 2 Bla. Com. 503; 5 Coke 29; 35 N. H. 484, 493.

Where there are no creditors or heirs of age, the tutor of minor heirs has a right to take possession of succession property and administer their interests in it; 43 La. Ann. 247.

Foreign administration. That which is exercised by virtue of authority properly conferred by a foreign power.

The general rule in England and the United States is that letters granted abroad give no authority to sue or be sued in another jurisdiction, though they may be ground for new probate authority; 5 Ves. 44; 9 Cranch 151; 12 Wheat. 169; 2 Root 462; 20 Mart. La. 232; 1 Dall. 456; 1 Binn. 63; 27 Ala. 273; 9 Tex. 13; 21 Mo. 434; 29 Miss. 127; 4 Rand. 158; 10 Yerg. 283; 5 Me. 261; 35 N. H. 484; 4 McLean C. C. 577; 15 Pet. 1; 13 How. 458; 42 Fed. Rep. 618; 9 N. Y. S. 433. Hence, when persons are domiciled and die in one country as A, and have personal property in another as B, the authority must be had in B, but exercised according to the laws of A; Story, Confl. Laws 23, 447; 15 N. H. 137; 15 Mo. 118; 5 Md. 467; 4 Bradf. 151, 249; 27 Ct. Cls. 529, 539; and see DOMICIL.

There is no legal privity between administrators in different states. The principal administrator is to act in the intestate's domicil, and the ancillary is to collect claims and pay debts in the foreign jurisdiction and pay over the surplus to his principal; 2 Metc. Mass. 114; 3 Hagg. Eccl. 199; 6 Humph. 116; 21 Conn. 577; 19 Pa. 476; 3 Day 74; 1 Blatchf. & H. 309; 23 Miss. 199; 2 Curt. Eccl. 241; 1 Rich. 116.

An administrator appointed in Michigan cannot sue a resident of New York in the U. S. Circuit Court in that state when he had not taken out letters of administration in New York; 139 U. S. 156.

But some courts hold that the probate of a will in a foreign state, if duly authenticated, dispenses with the necessity of taking out new letters in their state; 5 Ired. 421; 2 B. Monr. 12; 18 *id.* 582; 4 Call 89; 15 Pet. 1; 7 Gill 95; 12 Vt. 589; 147 U. S. 557. So it has been held that possession of property may be taken in a foreign state, but a suit cannot be brought without taking out letters in that state; 2 Ala. 429; 18 Miss. 607; 2 Sandf. Ch. 173. In Arizona suit may be brought upon a foreign judgment without taking out new letters of administration;

33 Pac. Rep. (Ariz.) 555. See CONFLICT OF LAWS.

Pendente lite. That which is granted pending the controversy respecting an alleged will or the right of appointment. An officer of the court is appointed to take care of the estate only till the suit terminates; 2 P. Will. 589; 2 Atk. 286; 2 Lee 258; 1 Hagg. Eccl. 313; 26 N. H. 533; 9 Tex. 13; 16 Ga. 13; 18 N. J. L. 15. He may maintain suits, but cannot distribute the assets; 1 Ves. sen. 325; 2 Ves. & B. 97; 1 Ball & B. 192; 7 Md. 282; 31 Pa. 465; 51 Mo. 193. The executor named in the will is not the proper person to appoint when he is the largest beneficiary under the will, and he is charged with influencing testator; 9 N. Y. S. 748.

Public. That which the public administrator performs. This happens in many of the states by statute in those cases where persons die intestate, without leaving any who are entitled to apply for letters of administration; 3 Bradf. 151; 4 *id.* 252.

The authority of a public administrator to take charge of an estate cannot be collaterally questioned; 109 Mo 90; 67 Miss. 434.

Special. That which is limited either in time or in power. Such administration does not come under the statutes of 31 Edw. III. c. 11, and 21 Hen. VIII. c. 5, on which the modern English and American laws are founded. A judgment against a special administrator binds the estate; 1 Sneed 430; although there is no property but merely a right of action, and if there is delay in granting the administration, a special administrator might be appointed where immediate settlement could be made; 91 Mich. 450.

Jurisdiction over administrations is in England lodged in the ecclesiastical courts, and these courts delegate the power of administering by *letters* of administration. In the United States, administration is a subject charged upon courts of civil jurisdiction. A perplexing multiplicity of statutes defines the powers of such courts in the various states. The public officer authorized to delegate the trust is called surrogate, judge of probate, register of wills, etc.; Williams, Ex. 237, notes; 8 Cranch 536; 12 Gratt. 85; 1 Watts & S. 396; 11 Ohio 257; 22 Ga. 431; 29 Miss. 127; 2 Gray 228; 2 Jones N. C. 387. In some states, these courts are of special jurisdiction, while in others the power is vested in county courts; 2 Kent 410; 9 Dana 91; 4 Johns. Ch. 552; 4 Md. 1; 11 S. & R. 432; 7 Paige, Ch. 112; 1 Green N. J. 480; 1 Hill, N. Y. 130; 5 Miss. 638; 12 *id.* 707; 30 *id.* 472.

Death of the intestate must have taken place, or the court will have no jurisdiction. A decree of the court is *prima facie* evidence of his death, and puts the burden of disproof upon the party pleading in abatement; 3 Term 130; 26 Barb. 383; 18 Ohio 268; 150 U. S. 34.

The *formalities* and requisites in regard to valid appointments and rules, as to notice, defective proceedings, etc., are widely various in the different states. Some of the later cases on the subject are these: 26 Mo. 332; 28 Vt. 819; 28 Ala. N. S. 164, 218; 29 *id.* 510; 1 Bradf. 182; 2 *id.* 200; 16 N. Y. 180; 4 Ind. 355; 10 *id.* 60; 18 Ill. 59; 31 Miss. 430; 12 La. Ann. 44; 88 Cal. 478; 43 La. Ann. 458; 92 Mich. 423. If letters appear to have been unduly granted, or to an unfaithful person, they will be revoked; 9 Gill 463; 12 Tex. 100; 18 Barb. 24; 14 Ohio 268; 4 Sneed 263; 6 Metc. 370.

The personal property of a decedent is appropriated to the payment of his debts, so far as required, and, until exhausted, must be first resorted to by creditors. And, by certain statutes, courts may grant an administrator power to sell, lease, or mortgage land, when the personal estate of the deceased is not sufficient to pay his debts; 1 Bradf. 10, 182, 234; 2 *id.* 50, 122, 157; 29 Ala. N. S. 210, 542; 4 Mich. 308; 4 Ind. 468; 18 Ill. 519. The court may direct lands to be sold in order to pay taxes levied against decedent's property; 25 S. W. Rep. (Ky.) 594. The purchasers at such a sale get as full a title as if they had been distributees; but no warranty can be implied by the silence of the administrator; 2 Stockt. 206; 20 Ga. 588; 13 Tex. 322; 30 Miss. 147, 502; 31 *id.* 348, 430; 82 Tex. 58. And a fraudulent sale will be annulled by the court; 16 N Y. 174; 2 Bradf. 200. See ASSETS.

Insolvent estates of intestate decedents are administered under different systems prescribed by the statutes of the various states; 4 R. I. 41; 34 N. H. 124, 381; 35 *id.* 484; 1 Sneed 351; 3 Johns. Ch. 58. See, generally, Croswell; Hallett; Raff; Redfield; Schouler; Toller; Williams; Willard; Wœrner on *Executors;* Blackstone; Kent; Story, *Conflict of Laws;* DOMICIL; CONFLICT OF LAWS.

Of Government. The management of the executive department of the government.

Those charged with the management of the executive department of the government.

ADMINISTRATOR. A person authorized to manage and distribute the estate of an intestate, or of a testator who has no executor.

In English law, administrators are the officers of the Ordinary appointed by him in pursuance of the statute, and their title and authority are derived exclusively from the ecclesiastical judge, by grants called letters of administration. Williams, Ex. 331. At first the Ordinary was appointed administrator under the statute of Westm. 2d. Next, the 31 Edw. III. c. 11, required the Ordinary to appoint the next of kin and the relations by blood of the deceased. Next, under the 21 Hen. VIII., he could appoint the widow or next of kin, or both, at his discretion.

The appointment of the administrator must be lawfully made with his consent, and by an officer having jurisdiction. If an improper administrator be appointed, his acts are not void *ab initio*, but are good, usually, until his power is rescinded by authority. But they are void if a will had been made, and a competent executor ap-

pointed under it; 8 Cra. 23; 1 Dane, Abr. 556-561; 73 N. Y. 292. But, in general, anybody can be administrator who can make a contract. An infant cannot; 4 Mass. 348; a *feme covert* may, with her husband's permission; 4 Bac. Abr. 67; 3 Salk. 21; 65 Pa. 311; 34 Ala. 40. Improvident persons, drunkards, gamblers, and the like, are disqualified by statute; 6 N. Y. 443; 14 *id.* 449; 30 N. J. 106.

Persons holding certain relations to the intestate are considered as entitled to an appointment to administer the estate in established order of precedence; 3 Redf. 512.

Order of appointment.—*First in order of appointment.*—The husband has his wife's personal property, and takes out administration upon her estate. But in some states it is not granted to him unless he is to receive the property eventually. So the widow can ordinarily claim sole administration, though in the discretion of the judge it may be refused her, or she may be joined with another; 2 Bla. Com. 504; Williams, Ex. 342; 18 Pick. 26; 10 Md. 52; 56 Ala. 270; 2 Pa. Dist. R. 742. The widow is entitled to preference though she was not living with her husband at the time; 11 Pa. Co. Ct. R. 601; 12 *id.* 339.

Second in order of appointment are the next of kin. Kinship is computed by the civil-law rule. The English order, which is adopted in some states, is, *first*, husband or wife; *second*, sons or daughters; *third*, grandsons or granddaughters; *fourth*, great-grandsons or great-granddaughters; *fifth*, father or mother; *sixth*, brothers or sisters; *seventh*, grandparents; *eighth*, uncles, aunts, nephews, nieces, etc.; 1 Atk. 454; 1 P. Will. 41; 2 Add. Eccl. 352; 24 Eng. L. & Eq. 593; 12 La. Ann. 610; 2 Kent 514; 53 Ala. 539.

In New York the order is, the widow; the children; the father; the brothers; the sisters; the grandchildren; any distributee being next of kin; 1 Bradf. 64, 200, 259; 2 *id.* 281, 322; 4 *id.* 13, 173; 3 Redf. 512. See 5 Misc. Rep. 176.

When two or three are in the same degree, the probate judge or surrogate may decide between them; and in England he is usually guided by the wishes of the majority of those interested. This discretion, however, is controlled by certain rules of priority concerning equigradal parties, which custom or statute has made. *Males* are generally preferred to females, though from no superior right. *Elder* sons are preferred to younger, usually, and even when no doctrine of primogeniture subsists. So *solvent* persons to insolvent, though the latter may administer. So *business* men to others. So *unmarried* to married women. So relations of the *whole* blood to those of the half blood. So *distributees* to all other kinsmen.

The appointment in all cases is voidable when the court did not give a chance to all parties to come in and claim it. In Massachusetts an administrator cannot be appointed within thirty days, so as to deprive the widow and the next of kin. In general, see Williams, Ex. 251; 1 Salk. 36; 15 Barb. 302; 6 N. Y. 443; 5 Cal. 63; 4 Jones (N. C.) 274; 87 Pa. 163.

Third in order of appointment.—Creditors (and, ordinarily, first the largest one) have the next right; 67 Law T. (N. S.) 503. To prevent fraud, a creditor may be appointed when the appointee of the two preceding classes does not act within a reasonable time. In the United States a creditor may make oath of his account to prove his debt, but no rule establishes the size of the debt necessary to be proved before appointment; 1 Cush. 525. After creditors, any suitable person may be appointed. Generally, consuls administer for deceased aliens; but this is by custom only, and in England there is no such rule.

Where all the persons applying for appointment are equally qualified, and competent, the court must appoint the one having a prior right under the statute, and it has no discretion; 21 Nev. 462.

Co-administrators, in general, must be joined in suing and in being sued; but, like executors, the acts of each, in the delivery, gift, sale, payment, possession, or release of the intestate's goods, are the acts of all, for they have joint power; Bac. Abr. *Exec.* C. 4; 11 Viner, Abr. 358; Comyns, Dig. *Administration* (B, 12); 1 Dane, Abr. 383; 2 Litt. (Ky.) 315; 56 Ala. 173. If one is removed by death, or otherwise, the whole authority is vested in the survivors; 6 Yerk. 167; 5 Gray 341; 29 Pa. 265. Each is liable only for the assets which have come to his own hands, and is not liable for the torts of others except when guilty of negligence or connivance; 1 Strange 20; 2 Ves. 267; 8 Watts & S. 143; 8 Ga. 388; 5 Conn. 19; 24 Pa. 413; 4 Wash. C. C. 186; 3 Sandf. Ch. 99; 3 Rich. Eq. (So. C.) 132. As to the several powers of each, see 10 Ired. 263; 9 Paige, Ch. 52; 35 Me. 279; 4 Ired. 271; 28 Pa. 471; 20 Barb. 91; 16 Ill. 329.

A husband who has the right to administer may have a co-administrator appointed with him; 113 N. C. 545.

A note payable to two administrators for a debt due the estate may be transferred by the endorsement of one; 15 R. I. 121; a surviving administrator has full power to act alone; 3 Tex. Civ. App. 596.

The duty of an administrator is in general to do the things set forth in his bond; and for this he is generally obliged to give security; Williams, Ex. 439, Am. Notes; 4 Yerg. 20; 5 Gray 67. He must publish a notice of his appointment, as the law directs. Usually he must render an inventory. In practice, book accounts and unliquidated damages are not inventoried, but debts evidenced by mercantile paper, bonds, notes, etc., are; 1 Stockt. 572; 23 Pa. 223.

He must collect the outstanding claims and convert property into money; 2 Kent 415; 18 Miss. 404; Taml. 279; 1 Mylne & C. 8; 6 Gill & J. 171; 4 Edw. Ch. 718; 4 Fla. 112; 20 Barb. 100; 25 Miss. 422; 57 Ind. 198; 82 Penn. 193; but he cannot oc-

cupy or lease the lands of the estate, or receive rents or profits therefrom, as these descend to the heir; 131 Pa. 584. As to what constitutes assets, see ASSETS.

For this purpose he acquires a property in the assets of the intestate. His right is not a personal one, but an incident to his office; 9 Mass. 74, 352; 16 N. Y. 278. He owns all his intestate's personal property from the day of death, and for any cause of action accruing after that day may sue in his own name; Williams, Ex. 747; 4 Hill (N. Y.) 57; 17 Vt. 176; 4 Mich. 170, 132; 26 Mo. 76; 64 Vt. 511. This happens by *relation* to the day of death; 12 Metc. 425; 7 Jur. 492; 18 Ark. 424; 34 N. H. 407. An administrator is a trustee, who holds the legal property but not the equitable. If he is a debtor to the estate, and denies the debt, he may be removed; but if he inventories it, it is cancelled by the giving of his bond; 11 Mass. 268.

He may declare, as administrator, whenever the money when received will be assets; and he may sue on a judgment once obtained, as if the debt were his own. He may summon supposed debtors or holders of his intestate's property to account, and has the right to an investigation in equity. He may also bind the estate by arbitration; 4 Harr. (N. J.) 457; 35 Me. 357; 38 Pa. 239. He may assign notes, etc. See 35 N. H. 421; 28 Vt. 661; 2 Stockt. 320; 29 Miss. 70; 3 Ind. 369; 18 Ill. 116; 28 Pa. 459; 2 Patt. & H. Va. 462; 1 Sandf. N. Y. 132. Nearly all debts and actions survive to the administrator. But he has no power over the firm's assets, when his intestate is a partner, until the debts are paid; 1 Bradf. 24, 165; he should merely refer in his inventory to the intestate's interest in the partnership without attempting to give the items of property, as he can have no control over it until the affairs of the partnership are settled; 63 Mich. 355. He must pay the intestate's debts in the order prescribed by law. There is no universal order of payment adopted in the United States; but debts of the last sickness and the funeral are preferred debts everywhere; Bacon, Abr. Ex. L. 2; Williams, Ex. 679, 1213; 2 Kent 416; 4 Leigh 35; 10 B. Monr. 147; 7 Ired. Eq. 62; 23 Miss. 228; 28 N. J. Eq. 327; 29 Ill. App. 184.

Next to these, as a general rule, debts due the state or the United States are privileged. This priority of the United States only extends to the net proceeds of the property of the deceased, and therefore the necessary expenses of the administration are first paid. The act of burial and its accompaniments may be done by third parties, who have a preferred claim therefor, if reasonable; 3 Nev. & M. 512; 8 Ad. & E. 348; 4 Sawy. 199. But the amount is often disputed; 1 B. & Ad. 260; R. M. Charlt. 56. A claim for costs recovered by a creditor in an action to establish his claim is entitled to priority over the debts of the estate; 8 N. Y. S. 652. If the administrator pays debts of a lower degree first, he will be liable out of his own estate in case of a deficiency of assets; 2 Kent 419. If he pays decedent's debts from his own funds he is entitled to repayment from the proceeds of lands originally liable for such debt; 22 S. W. Rep. (Ky.) 321.

The statute prescribes a fixed time within which the administrator must ascertain the solvency of the estate. During this time he cannot be sued, unless he waives the right; 2 Nott & McC. 259; 2 Duer 160; 6 McLean, C. C. 443. And if the commissioner deems the estate insolvent, parties dissatisfied may resort to a court and jury. If the administrator makes payments erroneously, supposing the estate to be solvent, he may recover them, it being a mistake of facts; 3 Pick. 261; 2 Gratt. 319.

The administrator may plead the statute of limitations, but he is not bound to do so, if satisfied that the debt is just; 15 S. & R. 231; 9 Dowl. & R. 40; 11 N. H. 208; 3 Metc. Mass. 369; 9 Mo. 262; 28 Ala. N. S. 484; 10 Md. 242; 23 Pa. 95; 8 How. 402; 10 Humphr. 301; 4 Fla. 481. He is, in some states, chargeable with interest, *first*, when he receives it upon assets put out at interest; *second*, when he uses them himself; *third*, when he has large debts paid him which he ought to have put out at interest; 5 N. H. 497; 1 Pick. 530; 13 Mass. 232; but he is not liable where he has funds which he holds pending legal proceedings to determine the rights of the remaindermen; 3 Misc. Rep. 170. In some cases of need, as to relieve an estate from sale by the mortgagee, he may lend the estate-money and charge interest thereon; 10 Pick. 77. The widow's support is usually decreed by the judge. But the administrator is not liable for the education of infant children, or for mourning-apparel for relatives and friends of the deceased; 11 Paige, Ch. 265; 11 S. & R. 16.

He must distribute the residue among those entitled to it, under direction of the court and according to law; 6 Ired. 4; 86 Pa. 149, 363; 3 Redf. 461. But if he recognizes a claim as proper to be paid, and subsequently finds that there is no legal foundation for it, it is not binding upon the estate; 74 Md. 249. And even after action brought against him by a creditor he may apply the assets in payment of the debt of another creditor; 24 Q. B. Div. 364. In Iowa valid claims that have been approved, though not formally filed, are entitled to be paid in the order with those properly filed; 80 Ia. 750.

The great rule is, that personal property is regulated by the law of the domicil. The rights of the distributees vest as soon as the intestate dies, but cannot be sued for till the lapse of the statute period of distribution. See 118th Novel of Justinian, Cooper's trans. 393; 2 P. Will. 447; 2 Story, Eq. Jur. § 1205; 20 Pick. 670; 12 Cush. 282; 31 Miss. 556. See DISTRIBUTION; CONFLICT OF LAWS.

The liability of an administrator is in general measured by the amount of assets. On his contracts he may render himself liable personally, or as administrator merely, ac-

cording to the terms of the contract which he makes; 7 Taunt. 581; 7 B. & C. 450; 78 Tex. 519. But to make him liable personally for contracts about the estate, a valid consideration must be shown; 3 Sim. 543; 2 Brod. & B. 460. And, in general, assets or forbearance will form the only consideration; 5 My. & C. 71; 9 Wend. 273; 13 *id.* 557. But a bond of itself imports consideration; and hence a bond given by administrators to submit to arbitration is binding upon them personally; 8 Johns. 120; 22 Miss. 161. He may compromise a suit brought for the widow and next of kin, for the death of the intestate; 26 N. E. Rep. (Ill.) 653. In general, he is not liable when he has acted in good faith, and with that degree of caution which prudent men exhibit in the conduct of their own affairs; 2 Ashm. 437. The liability of an administrator for taxes on decedent's estate is not personal but official, and such liability is assumed by his successor; 93 Cal. 465. It is the duty of an administrator to intervene in proceedings for the sale of land in which his intestate had an interest; 31 Ill. App. 483.

An administrator cannot ratify decedent's void transactions, nor make any contracts for him; 62 Mich. 349.

An administrator is liable for torts and for gross negligence in managing his intestate's property. This species of misconduct is called in law a *devastavit;* 2 Williams, Ex. 1529; 4 Hayw. 134; 1 Dev. Eq. 516; 18 Oreg. 168. Such is negligence in collecting notes or debts; 2 Green. Ch. 300; 131 Pa. 584; an unnecessary sale of property at a discount; 8 Gratt. 140; paying undue funeral expenses; 1 B. & Ad. 260; 2 Carr. & P. 207; and the like mismanagements. So he may be liable for not laying out assets for the benefit of the estate, or for turning the money to his own profit or advantage. In such cases he is answerable for both principal and interest. In England he may be charged with increased interest for money withheld by fraud; 2 Cox, Ch. 113; 4 Ves. 620; and he is sometimes made chargeable with compound interest in this country; 10 Pick. 77. Finally, a refusal to account for funds, or an unreasonable delay in accounting, raises a presumption of a wrongful use of them; 5 Dana 70; 6 Gill & J. 186; Williams, Ex. 1567. If he receives rents and profits of land for a long period without accounting, he is liable to the heirs for the reasonable rental value of the land for the entire period; 111 N. C. 297.

An administrator receives no compensation in England; 3 Mer. 24; but in this country he is paid in proportion to his services, and all reasonable expenses are allowed him; 84 Pa. 303. Additional allowance may be made where extraordinary services have been rendered; 96 Cal. 522. An administrator cannot pay himself. His compensation must be ordered by the court; 58 Ind. 374. If too small a compensation be awarded him, he may appeal; 1 Edw. Ch. 195; 4 Whart. 95; 11 Md. 415; 3 Cal. 287; 7 Ohio St. 143; 3 Redf. 465. Allowance by a probate court cannot be impeached in a court of equity unless fraud or deception has been practiced; 53 Fed. Rep. 977. He cannot buy the estate, or any part of it, when sold by a common auctioneer to pay debts; but he may when the auctioneer is a state officer, and the sale public and *bona fide;* 2 Patt. & H. 71; 9 Mass. 75; 4 Ind. 355; 6 Ohio St. 189.

ADMINISTRATRIX. A woman to whom letters of administration have been granted and who administers the estate.

When an administratrix marries, that fact does not prevent her from suing as such; 103 Cal. 268; nor does the marriage of a *feme sole* annul her appointment; 19 S. E. Rep. (S. C.) 610.

ADMIRAL (Fr. *amiral*). A high officer or magistrate that hath the government of the king's navy, and the hearing of all causes belonging to the sea. Cowel. See ADMIRALTY.

By statute of July 25, 1866, the active lists of line-officers of the navy of the United States were divided into ten grades, of which the highest is that of admiral, and the next that of vice-admiral. By statute of Jan. 24, 1873, these grades ceased to exist when the offices became vacant, and the highest rank is rear-admiral.

ADMIRALTY. A court which has a very extensive jurisdiction of maritime causes, civil and criminal.

On the revival of commerce after the fall of the Western empire, and the conquest and settlement by the barbarians, it became necessary that some tribunal should be established that might hear and decide causes that arose out of maritime commerce. The rude courts established by the conquerors had properly jurisdiction of controversies that arose on land, and of matters pertaining to land, that being at the time the only property that was considered of value. To supply this want, which was felt by merchants, and not by the government or the people at large, on the coast of Italy and the northern shores of the Mediterranean, a court of consuls was established in each of the principal maritime cities. Contemporaneously with the establishment of these courts grew up the customs of the sea, partly borrowed, perhaps, from the Roman law, a copy of which had at that time been discovered at Amalfi, but more out of the usage of trade and the practice of the sea. These were collected from time to time, embodied in the form of a code, and published under the name of the *Consolato del Mare.* The first collection of these customs is said to be as early as the eleventh century; but the earliest authentic evidence we have of their existence is their publication, in 1266, by Alphonso X., King of Castile; 1 Pardessus, *Lois Maritimes,* 201. See 3 Kent 16.

On Christmas of each year, the principal merchants made choice of judges for the ensuing year, and at the same time of judges of appeal, and their courts had jurisdiction of all causes that arose out of the custom of the sea, that is, of all maritime causes whatever. Their judgments were carried into execution, under proper officers, on all movable property, ships as well as other goods, but an execution from these courts did not run against land; *Ordonnance de Valentia,* 1288, c. 1, §§ 22, 23.

When this species of property came to be of sufficient importance, and especially when trade on the sea became gainful and the merchants began to grow rich, their jurisdiction in most maritime states was transferred to a court of admiralty; and this is the origin of admiralty jurisdiction. The admiral was originally more a military than a civil officer, for nations were then more warlike than commercial; *Ordonnance de Louis XIV.,* liv. 1; 2 Brown, Civ. & Adm. Law, c. 1. The court had jurisdiction of all national affairs transacted at sea, and particularly of prize; and to this was added jurisdiction of all controversies of a private character that grew

out of maritime employment and commerce; and this, as nations grew more commercial, became in the end its most important jurisdiction.

The admiralty is, therefore, properly the successor of the consular courts, which were emphatically the courts of merchants and sea-going persons. The most trustworthy account of the jurisdiction thus transferred is given in the *Ordonnance de Louis XIV.*, published in 1631. This was compiled under the inspiration of his great minister Colbert, by the most learned men of that age, from information drawn from every part of Europe, and was universally received at the time as an authoritative exposition of the common maritime law; Valin, Preface to his Commentaries; 3 Kent 16. The changes made in the *Code de Commerce* and in the other maritime codes of Europe are unimportant and inconsiderable. This ordinance describes the jurisdiction of the admiralty courts as embracing all maritime contracts and torts arising from the building, equipment, and repairing of vessels, their manning and victualling, the government of their crews and their employment, whether by charter-party or bill of lading, and from bottomry and insurance. This was the general jurisdiction of the admiralty: it took all the consular jurisdiction which was strictly of a maritime nature and related to the building and employment of vessels at sea.

In English Law. The court of the admiral.

This court was erected by Edward III. It was held by the Lord High Admiral, whence it was called the High Court of Admiralty, or before his deputy, the Judge of the Admiralty, by which latter officer it has for a long time been exclusively held. It sat as two courts, with separate commissions, known as the Instance Court and the Prize Court, the former of which was commonly intended by the term admiralty. At its origin the jurisdiction of this court was very extensive, embracing all maritime matters. By the statutes 13 Rich. II. c. 5, and 15 Rich. II. c. 3, especially as explained by the common-law courts, their jurisdiction was much restricted. A violent and long-continued contest between the admiralty and common-law courts resulted in the establishment of the restriction, which continued until the statutes 3 & 4 Vict. c. 65, and 9 & 10 Vict. c. 99, materially enlarged its powers. See 2 Pars. Mar. Law 479, n.; 1 Kent, Lect. XVII.; Smith, Adm. 1 *et seq.*; 2 Gall. 398; 12 Wheat. 611; 1 Baldw. 544; Daveis 93. This court was abolished by the Judicature Act of 1873, and its functions transferred to the High Court of Justice, the Probate, Divorce, and Admiralty Divisions.

The *civil* jurisdiction of the court extends to *torts* committed on the high seas, including personal batteries and false representations; 4 C. Rob. Adm. 73; 62 Fed. Rep. 469; 66 Fed. Rep. 1013; but not where the injury was received on land, though the wrongful act was done on a ship; 63 Fed. Rep. 1009; 66 Fed. Rep. 62; collision of ships; Abbott, Shipp. 230; restitution of possession from a claimant withholding unlawfully; 2 B. & C. 244; 1 Hagg. 81, 240, 342; 2 Dods. Adm. 38; Edw. Adm. 242; 3 C. Rob. Adm. 93, 133, 213; 4 *id.* 275, 287; 5 *id.* 155; cases of piratical and illegal taking at sea and *contracts* of a maritime nature, including suits between part owners; 1 Hagg. 306; 3 *id.* 299; 1 Ld. Raym. 223; 2 *id.* 1235; 2 B. & C. 248; for mariners' and officers' wages; 2 Ventr. 181; 3 Mod. 379; 1 Ld. Raym. 632; 2 *id.* 1206; 2 Str. 858, 937; 1 *id.* 707; pilotage; Abbott, Shipp. 198, 200; wharfage; 2 D. C. App. 51; towage, 66 Fed. Rep. 347; bottomry and respondentia bonds; 6 Jur. 241; 3 Hagg. Adm. 66; 3 Term 267; 2 Ld. Raym. 982; Rep. *temp.* Holt, 48; and salvage claims; 2 Hagg. Adm. 3; 3 C. Rob. Adm. 355; 1 W. Rob. Adm. 18; 65 Fed. Rep. 1002. It has no jurisdiction over an action *in personam* against a pilot for damages arising from a collision between ships on the high seas, due to his negligence; [1892] 1 Q. B. 273.

The *criminal* jurisdiction of the court has been transferred to the Central Criminal Court by the 4 & 5 Will. IV. c. 36. It extended to all crimes and offences committed on the high seas, or within the ebb and flow of the tide, and not within the body of a county. A conviction for manslaughter committed on a German vessel, by reason of negligent collision with an English vessel, within two and a half miles of the English coast, whereby a passenger on the English vessel was lost, is not within the jurisdiction of the English criminal courts; 46 L. J. M. C. 17.

The first step in the process in a plenary action may be the arrest of the person of the defendant, or of the ship, vessel, or furniture; in which cases the defendant must find bail or *fidejussors* in the nature of bail, and the owner must give bonds or stipulations equal to the value of the vessel and her immediate earnings; or the first step may be a monition to the defendant. In 1840, the form of proceeding in this court was very considerably changed. The advocates, surrogates, and proctors of the Court of Arches were admitted to practice there; the proceedings generally were assimilated to those of the common-law courts, particularly in respect of the power to take *vivâ voce* evidence in open court; power to compel the attendance of witnesses and the production of papers; to ordering issues to be tried in any of the courts of Nisi Prius, and allowing bills of exception on the trial of such issues, and the grant of power to admiralty to direct a new trial of such issues; to make rules of court, and to commit for contempt. The judge may have the assistance of a jury, and in suits for collision he usually decides upon his own view of the facts and law, after having been assisted by, and hearing the opinion of, two or more Trinity Brethren.

A court of admiralty exists in Ireland; but the Scotch court was abolished by 1 Will. IV. c. 69. See VICE-ADMIRALTY COURTS.

In American Law. A tribunal exercising jurisdiction over all maritime contracts, torts, injuries, or offences. 2 Pars. Mar. Law 508.

The court of original admiralty jurisdiction in the United States is the United States District Court. From this court causes could formerly be removed, in certain cases, to the Circuit, and ultimately to the Supreme Court. After a somewhat protracted contest, the jurisdiction of admiralty has been extended beyond that of the English admiralty court, and is said to be coequal with that of the English court as defined by the statutes of Rich. II., under the construction given them by the contemporaneous or immediately subsequent courts of admiralty; 2 Pars. Mar. Law 508; Bened. Admir. §§ 7, 8. See 2 Gall. C. C. 398; Daveis 93; 3 Mas. C. C. 28; 1 Stor. C. C. 244; 2 *id.* 176; 12 Wheat. 611; 2 Cranch 406; 4 *id.* 444; 3 Dall. 297; 6 How. 344; 17 *id.* 399, 477; 18 *id.* 267; 19 *id.* 82, 239; 20 *id.* 296, 583.

So much of the foregoing as relates to

appeals from Circuit and District Courts of the United States to the Supreme Court has been changed by chap. 517, 1 Sup. Rev. Stats., so that appeals may be taken direct from those courts to the Supreme Court from the final sentences and decrees in prize causes; in other admiralty cases appeals will lie from Circuit and District Courts to the Circuit Courts of Appeals, the decision of the latter courts being final. In certain cases, however, the decisions of the Circuit Courts of Appeals may be reviewed by the Supreme Court, for which see UNITED STATES COURTS.

It extends to the navigable rivers of the United States, whether tidal or not, the lakes, and the waters connecting them; 4 Wall. 455, 411; 8 Wall. 15; 12 How. 443; 7 Wall. 624; 11 *id.* 185; 16 *id.* 522; 40 Fed. Rep. 765; to a stream tributary to the lakes, but lying entirely within one state; 1 Brown, Adm. 334; to a ferry-boat plying between opposite sides of the Mississippi River; 5 Biss. 200; to a steam ferry-boat to carry railway cars across the Mississippi; 48 Fed. Rep. 312; to an artificial ship-canal connecting navigable waters within the jurisdiction; 2 Hughes 12; to the Welland canal; 1 Brown, Adm. 170; Newb. 101. See as to Erie canal, 8 Ben. 150; to the Detroit River, out of the jurisdiction of any particular state and within the territorial limits of Canada; 150 U. S. 249. The Judiciary Act of 1789 (R. S. § 563), while conferring admiralty jurisdiction upon the Federal courts, saves to suitors their common-law remedy, which has always existed for damages for collision at sea; 102 U. S. 118; where a vessel is outside of the territorial limitation of the civil process of a court, jurisdiction by stipulation or consent of the master, cannot be obtained for the purpose of a libel *in rem;* 41 Fed. Rep. 109.

Admiralty has jurisdiction of a libel by mariners for wages against a vessel plying on navigable waters, even though lying entirely within one state; 2 Am. L. Rev. 455; but see 3 *id.* 610, where all the cases on admiralty jurisdiction by reason of locality are fully treated. Also for services as engineer on a tug-boat; 46 Fed. Rep. 290.

Its *civil* jurisdiction extends to cases of salvage; 2 Cranch 240; 1 Pet. 511; 12 *id.* 72; 2 Low. 302; 50 Fed. Rep. 574; 59 *id.* 177; bonds of bottomry, respondentia, or hypothecation of ship and cargo; 1 Curt. C. C. 340; 3 Sumn. 228; 1 Wheat. 93; 4 Cranch 328; 8 Pet. 538; 18 How. 63; seamen's wages; 1 Low. 203; 2 Pars. Mar. Law 509; 49 Fed. Rep. 651; seizures under the laws of impost, navigation, or trade; 1 U. S. Stat. at Large, 76; 4 Biss. 156; 11 Blatch. 416; Chase, Dec. 503; 6 Biss. 505; cases of prize or ransom; 3 Dall. 6; charter-parties; 1 Sumn. 551; 2 *id.* 589; 2 Stor. C. C. 81; Ware 149; contracts of affreightment between different states or foreign ports; 2 Curt. C. C. 271; 2 Low. 173; 2 Sumn. 567; Ware 188, 263, 322; 6 How. 344; and upon a canal-boat without powers of propulsion, upon an artificial canal; 21 Int. Rev. Rec. 221; but not to coal barges, not licensed or enrolled; 46 Fed. Rep. 204; for injury to vessel in passing through a drawbridge over a navigable river; 40 Fed. Rep. 765; 45 Fed. Rep. 260; but not against schooner for damages done to drawbridge; 55 Fed. Rep. 546; but see also, *contra,* 60 Fed. Rep. 560; contracts for conveyance of passengers; 16 How. 469; 1 Blatchf. 560, 569; 1 Abbott, Adm. 48; 1 Newb. 494; contracts with material-men; 4 Wheat. 438; 6 Ben. 564; see 20 How. 393; 21 Bost. Law Rep. 601; jettisons, maritime contributions, and averages; 6 McLean 573; 7 How. 729; 19 *id.* 162; 21 Bost. Law Rep. 87, 96; pilotage; 1 Mas. C. C. 508; 10 Pet. 108; 12 How. 299; see 2 Paine C. C. 131; 9 Wheat. 1, 207; 13 Wall. 236; 1 Low. 177; 1 Sawy. 463; 5 Ben. 574; R. M. Charlt. 302, 314; 8 Metc. 332; 4 Bost. Law Rep. 20; contracts for wharfage; 95 U. S. 68; 5 Ben. 60, 74; 15 Blatch. 473; to injuries to a vessel by reason of a defective dock; 45 Fed. Rep. 588; but not to injuries to wharves; 1 Brown, Adm. 356; contracts for towage; 5 Ben. 72; surveys of ship and cargo; Story, Const. § 1665; Bened. Adm. § 299; 5 Mas. 465; 10 Wheat. 411; but see 2 Pars. Mar. Law 511, n.; and generally to all assaults and batteries, damages, and trespasses, occurring on the high seas; 2 Pars. Mar. Law; see 2 Sumn. 1; Chase, Dec. 145, 150; 5 Ben. 63; for injury to seamen in consequence of negligence of master or owner; 43 Fed. Rep. 592; 46 Fed. Rep. 400; contract for supplies to a vessel; 48 Fed. Rep. 689; *id.* 569; but see 53 Fed. Rep. 599; 46 *id.* 397; but not for supplies to a pile-driver; 69 Fed. Rep. 1005; for labor and material in completing and equipping a new vessel after she has been launched and named; 46 Fed. Rep. 797; but not to contracts to procure insurance; 53 Fed. Rep. 603; nor to reform a policy of marine insurance; 56 Fed. Rep. 159. It also extends to actions for damages for death caused by collision on navigable waters; 55 Fed. Rep. 98; and for injury to a seaman from the explosion of a steamtug boiler due to negligence; 46 Fed. Rep. 400; or to a laborer, working in the hold of a vessel, from a piece of timber sent without warning down a chute by a person working on a pier; 69 Fed. Rep. 146. It also extends to a bath-house built on boats but designed for transportation; 61 Fed. Rep. 692. A contract for launching a vessel, where the vessel has been stranded a quarter of a mile up the beach by a storm, is a maritime contract, for which the vessel is liable *in rem;* 48 Fed. Rep. 569. The wrongful arrest and imprisonment of seamen who have deserted and are found on shore is not a maritime tort; 60 Fed. Rep. 912.

Its *criminal* jurisdiction extends to all crimes and offences committed on the high seas or beyond the jurisdiction of any country. The criminal jurisdiction of the U. S. courts is extended to the Great Lakes by 26 St. L. 424. The open waters of the Great Lakes are high seas within the meaning of R. S. § 5346; 150 U. S. 249. See, as to ju-

risdiction generally, the article UNITED STATES COURTS.

A civil suit is commenced by filing a libel, upon which a warrant for arrest of the person, or attachment of his property if he cannot be found, even though in the hands of third persons, or a simple monition to appear, may issue; or, in suits *in rem*, a warrant for the arrest of the thing in question; or two or more of these separate processes may be combined. Thereupon bail or stipulations are taken if the party offer them.

In most cases of magnitude, oral evidence is not taken; but it may be taken, and it is the general custom to hear it in cases where smaller amounts are involved. The decrees are made by the court without the intervention of a jury.

A suit *in rem* and a suit *in personam* may be brought concurrently in the same court, when arising on the same cause of action; 40 Fed. Rep. 590; 44 *id.* 102.

In criminal cases the proceedings are similar to those at common law.

Consult the article UNITED STATES COURTS; Conkling; Dunlap, Adm. Prac.; Sergeant; Story, Const.; Abbott, Sh.; Parsons, Mar. Law; Kent; Flanders, Sh.; Kay, Sh.; Henry's Adm. Jur. & Proceed.; and the following cases, viz.: 2 Gall. 398; 5 Mas. 465; Daveis 93; 4 How. 447; 12 *id.* 443; 20 *id.* 296, 393, 583; 21 *id.* 244, 248; 23 *id.* 209, 491. See LIENS.

ADMISSION (Lat. *ad*, to, *mittere*, to send).

In Practice. The act by which attorneys and counsellors become recognized as officers of the court and are allowed to practise. The qualifications required vary widely in the different states. See an article in 15 Am. L. Rev. 295; also a learned report to Amer. Bar Asso. by Mr. Carleton Hunt, published in Rep. of 2d An. Meeting, 1879, and the reports of same for 1893–1896.

It is an encroachment upon the judiciary for the legislature to say that attorneys shall be admitted in specified cases, the question being a judicial and not a legislative one; 123 Pa. 527.

As to the admission of women, see 16 Colo. 441.

In Corporations or Companies. The act of a corporation or company by which an individual acquires the rights of a member of such corporation or company.

In trading and joint-stock corporations no vote of admission is requisite; for any person who owns stock therein, either by original subscription or by transfer, is in general entitled to, and cannot be refused, the rights and privileges of a member; 3 Mass. 364; Dougl. 524; 1 Mann. & R. 529.

All that can be required of the person demanding a transfer on the books is to prove to the corporation his right to the property. See 8 Pick. 90.

In a mutual insurance company it has been held that a person may become a member by insuring his property, paying the premium and deposit-money, and rendering himself liable to be assessed according to the rules of the corporation; 2 Mass. 318.

ADMISSIONS. In Evidence. Confessions or voluntary acknowledgments made by a party of the existence or truth of certain facts.

As distinguished from confessions, the term is applied to civil transactions, and to matters of fact in criminal cases where there is no criminal intent. See CONFESSIONS.

As distinguished from consent, an admission may be said to be evidence furnished by the party's own act of his consent at a previous period.

Direct, called also *express*, admissions are those which are made in direct terms.

Implied admissions are those which result from some act or failure to act of the party.

Incidental admissions are those made in some other connection, or involved in the admission of some other fact.

As to the *parties* by whom admissions must have been made to be considered as evidence:—

They may be made by a party to the record, or by one identified in interest with him; 9 B. & C. 535; 7 Term 563; 1 Dall. 65. Not, however, where the party of record is merely a nominal party and has no active interest in the suit; 1 Campb. 392; 2 *id.* 561; 2 Term 763; 3 B. & C. 421; 5 Pet. 580; 5 Wheat. 277; 7 Mass. 131; 9 Ala. N. S. 791; 20 Johns. 142; 5 Gill & J. 134; nor by one of several devisees on a contest of a will for incapacity and undue influence; 98 Mich. 183.

They may be made by one of several having a joint interest, so as to be binding upon all; 2 Bingh. 306; 8 *id.* 309; 8 B. & C. 36; 1 Stark. 488; 2 Pick. 581; 3 *id.* 291; 4 *id.* 382; 1 M'Cord 541; 1 Johns. 3; 7 Wend. 441; 4 Conn. 336; 8 *id.* 268; 7 Me. 26; 5 Gill & J. 144; 1 Gall. 635. Mere community of interest, however, as in case of co-executors; 1 Greenl. Ev. § 176; Steph. Ev. Art. 17; 4 Cowen, 493; 16 Johns. 277; trustees, 3 Esp. 101; co-tenants; 4 Cowen 483; 15 Conn. 1; is not sufficient. Admissions of one of several defendants against his interests will be receivable in evidence against him only; 88 Ga. 541.

The interest in all cases must have subsisted at the time of making the admissions; 2 Stark. 41; 4 Conn. 544; 14 Mass. 245; 5 Johns. 412; 1 S. & R. 526; 9 *id.* 47; 12 *id.* 328. Admissions made by one subsequently appointed administratrix, are not admissible against her when suing as such nor against her successor in office; 46 Ill. App. 307; 41 *id.* 419; 65 Hun 404.

They may be made by any person interested in the subject-matter of the suit, though the suit be prosecuted in the name of another person as a cestui que trust; 1 Wils. 257; 1 Bingh. 45; but see 3 N. & P. 598; 6 M. & G. 261; or by an indemnifying creditor in an action against the sheriff; 7 C. & P. 629.

They may be made by a third person, a stranger to the suit, where the issue is substantially upon the rights of such a person at a particular time; 1 Greenl. Ev. § 181;

2 Stark. 42; or one who has been expressly referred to for information; 1 Campb. 366, n.; 3 C. & P. 532; or where there is a privity as between ancestor and heir; 5 B. & Ad. 223; 1 Bingh. N. C. 430; assignor and assignee; 54 Taunt. 16; 2 Pick. 536; 2 Me. 242; 10 *id.* 244; 3 Rawle 437; 2 M'Cord 241; 17 Conn. 399; intestate and administrator; 3 Bingh. N. C. 291; 1 Taunt. 141; grantor and grantee of land; 4 Johns. 230; 7 Conn. 319; 4 S. &. R. 174; and others. Letters written by a third person at defendant's request about the matter in controversy, are admissible; 45 Ill. App. 372.

They may be made by an agent, so as to bind the principal; Story, Ag. §§ 134–137; Steph. Ev. 17; declarations of an architect to the contractor in directing operations are admissible against the owner in an action for price of work and material; 133 N. Y. 298; so far only, however, as the agent has authority; 1 Greenl. Ev. § 114; Tayl. Ev. 533–536 (8th ed.); 83 Ala. 542; 62 Mich. 424; 114 N. Y. 415; and not, it would seem, in regard to past transactions; 6 Mees. & W. Exch. 58; 11 Q. B. 46; 7 Me. 421; 4 Wend. 394; 7 Harr. & J. 104; 19 Pick. 220; 8 Metc. 142. Declarations of agent not in the course of the business of the agency, will not prove agency or ratification; 48 Ill. App. 659. One cannot prove agency by the declarations of an alleged agent only; 7 Misc. Rep. 165; nor will acts and conduct of an alleged agent not acquiesced in by the principal, establish agency; 39 S. C. 525.

Thus, the admissions of the wife bind the husband so far only as she has authority in the matter; 4 Campb. 92; 1 Carr. & P. 621; 7 Term 112; and so the formal admissions of an attorney bind his client; 7 C. & P. 6; 1 M. & W. 508; but not a necessarily fatal admission unintentionally made; 155 Pa. 429; nor when not within the scope of his authority; 69 Hun 28; and see 2 C. & K. 216; 3 C. B. 608. Declarations of a husband in the absence of his wife are not admissible to affect the title of his wife to personal property; 160 Pa. 273; nor will his admissions affect the wife's separate estate; 82 Tex. 290.

Implied admissions may result from assumed character; 1 B. & Ald. 677; 2 Campb. 513; from conduct; 2 Sim. & S. 600; 6 C. & P. 241; 9 B. & C. 78; 9 Watts 441; from acquiescence, which is positive in its nature; 1 Sumn. 314; 4 Fla. 340; 3 Mas. 81; 2 Vt. 276; from possession of documents in some cases; 5 C. & P. 75; 25 State Tr. 120.

In civil matters, constraint will not avoid admissions, if imposition or fraud were not made use of.

Admissions made in treating for an adjustment cannot be given in evidence; 33 Mo. 323; 117 Mass. 55; 13 Ga. 406; 40 N. Y. Sup. Ct. 8; whether made "without prejudice" or not; 2 Whart. Ev. § 1090; 15 Md. 510; but they may be as to independent facts; 117 Mass. 55; 44 N. H. 223.

Admissions of one in possession of lands, made to others than the owner, are to be considered in determining whether his possession is adverse to the owner; 4 Tex. Civ. App. 291.

Judicial admissions; 1 Greenl. Ev. § 205; 2 Campb. 341; 5 Mass. 365; 5 Pick. 285, those which have been acted on by others; 3 Rob. La. 243; 17 Conn. 355; 13 Jur. 253; and in deeds as between parties and privies; 4 Pet. 1; 6 *id.* 611; are conclusive evidence against the party making them.

Declarations and admissions are admissible to prove partnership, if made by alleged partners; 8 Misc. Rep. 502; admission of one that he is in partnership with another, is not binding on the latter; 50 Mo. App. 124.

It frequently occurs in practice, that, in order to save expenses as to mere formal proofs, the attorneys on each side consent to admit, reciprocally, certain facts in the cause without calling for proof of them.

These are usually reduced to writing, and the attorneys shortly add to this effect, namely, "We agree that the above facts shall on the trial of this cause be admitted, and taken as proved on each side;" and signing two copies now called "admissions" or "stipulations," in the cause, each attorney takes one; Gresley, Eq. Ev. 38.

In Pleading. The acknowledgment or recognition by one party of the truth of some matter alleged by the opposite party.

In Equity.

Partial admissions are those which are delivered in terms of uncertainty, mixed up with explanatory or qualifying circumstances.

Plenary admissions are those which admit the truth of the matter without qualification, whether it be asserted as from information and belief or as from actual knowledge.

At Law.

In all pleadings in confession and avoidance, admission of the truth of the opposite party's pleading is made. Express admissions may be made of matters of fact only.

The usual mode of making an express admission in pleading is, after saying that the plaintiff ought not to have or maintain his action, etc., to proceed thus, "Because he says that, although it be true that," etc., repeating such of the allegations of the adverse party as are meant to be admitted; Lawes, Civ. Pl. 143, 144. See 1 Chitty, Pl. 600; Archb. Civ. Pl. 215.

Pleadings which have been withdrawn from a court of law may be offered in evidence subject to explanation, to prove admissions of the pleader: 42 Ill. App. 375; admissions contained in original answer are not conclusive, where an amended answer has been filed excluding such matter; 22 S. W. Rep. (Tex.) 1002; the plea of the general issue admits the corporate existence of the plaintiff corporation; 127 Ill. 332; and in many states, in a suit against a firm or corporation, the partnership or corporate existence is taken as admitted unless denied by affidavit filed with the pleas; where the complainant sets a plea down for argument without reply, he admits its

truth, but denies its sufficiency; 35 Fed. Rep. 833.

Allegations of the complaint not denied by the answer are to be taken as true; 129 U. S. 233.

ADMITTANCE. In English Law. The act of giving possession of a copyhold estate. It is of three kinds: namely, upon a voluntary grant by the lord, upon a surrender by the former tenant, and upon descent. 2 Bla. Com. 366–370.

ADMITTENDO IN SOCIUM. In English Law. A writ associating certain persons to justices of assize. Cowel.

ADMIXTURE. See ACCESSION; CONFUSION OF GOODS.

ADMONITION. A reprimand from a judge to a person accused, on being discharged, warning him of the consequences of his conduct, and intimating to him that, should he be guilty of the same fault for which he has been admonished, he will be punished with greater severity. Merlin, *Répert.*

The admonition was authorized as a species of punishment for slight misdemeanors.

ADNEPOS. The son of a great-great-grandson. Calvinus, Lex.

ADNEPTIS. The daughter of a great-great-granddaughter. Calvinus, Lex.

ADNOTATIO (Lat. *notare*). A subscription or signing.

In the civil law, casual homicide was excused by the indulgence of the emperor, signed with his own sign-manual, called *adnotatio*; Code, 9. 16. 5; 4 Bla. Com. 187.

ADOLESCENCE. That age which follows puberty and precedes the age of majority. It commences for males at fourteen, and for females at twelve years completed, and continues until twenty-one years complete. Wharton.

ADOPTION. The act by which a person takes the child of another into his family, and treats him as his own.

A juridical act creating between two persons certain relations, purely civil, of paternity and filiation. 6 Demolombe, § 1.

Adoption was practised in the remotest antiquity, and was established to console those who had no children of their own. Cicero asks, "*Quod est jus adoptionis? nempe ut is adoptat, qui neque procreare jam liberos possit, et cum potuerit, sit expertus.*" At Athens, he who had adopted a son was not at liberty to marry without the permission of the magistrates. Gaius, Ulpian, and the Institutes of Justinian only treat of adoption as an act creating the paternal power. Originally, the object of adoption was to introduce a person into the family and to acquire the paternal power over him. The adopted took the name of the adopter, and only preserved his own adjectively, as *Scipio Æmilianus*; *Cæsar Octavianus*, etc. According to Cicero, adoptions produced the right of succeeding to the name, the property, and the lares: "*hereditates nominis, pecuniæ, sacrorum secutæ sunt;*" *Pro Dom.* §§ 13, 35.

The first mode of adoption was in the form of a law passed by the *comitia curiata*. Afterwards, it was effected by the *mancipatio, alienatio per æs et libram*, and the *in jure cessio*; by means of the first the paternal authority of the father was dissolved, and by the second the adoption was completed. The *mancipatio* was a solemn sale made to the *emptor* in presence of five Roman citizens (who represented the five classes of the Roman people), and a *libripens*, or scalesman, to weigh the piece of copper which represented the price. By this sale the person sold became subject to the *mancipium* of the purchaser, who then emancipated him; whereupon he fell again under the paternal power; and in order to exhaust it entirely it was necessary to repeat the *mancipatio* three times: *si pater filium ter venumdabit, filius a patre liber esto.* After the paternal power was thus dissolved, the party who desired to adopt the son instituted a fictitious suit against the purchaser who held him *in mancipium*, alleging that the person belonged to him or was subject to his paternal power; the defendant not denying the fact, the prætor rendered a decree accordingly, which constituted the *cessio in jure*, and completed the adoption. *Adoptantur autem, cum a parente in cujus potestate sunt, tertia mancipatione in jure ceduntur, atque ab eo, qui adoptat, apud eum apud quem legis actio est, vindicantur;* Gell. 5. 19.

Towards the end of the Republic another mode of adoption had been introduced by custom. This was by a declaration made by a testator, in his will, that he considered the person whom he wished to adopt as his son: In this manner Julius Cæsar adopted Octavius.

It is said that the adoption of which we have been speaking was limited to persons *alieni juris*. But there was another species of adoption, called adrogation, which applied exclusively to persons who were *sui juris*. By the adrogation a *pater-familias*, with all who were subject to his *patria potestas*, as well as his whole estate, entered into another family, and became subject to the paternal authority of the chief of that family. *Quæ species adoptionis dicitur adrogatio, quia et is qui adoptat rogatur, id est interrogatur, an velit eum quem adopturus sit justum sibi filium esse; et is, qui adoptatur rogatur an id fieri patiatur; et populus rogatur an id fieri jubeat*; Gaius, 1. 99. The formulæ of these interrogations are given by Cicero, in his oration *pro Dom.* 20: "*Velitis, jubeatis, Quirites, uti Lucius Valerius Lucio Titio tam jure legeque filius sibi siet, quam si ex eo patre matreque familias ejus natus esset, utique eo vitæ necisque in eum potestas siet uti pariendo filio est; hoc ita ut dixi vos, Quirites rogo.*" This public and solemn form of adoption remained unchanged, with regard to adrogation, until the time of Justinian: up to that period it could only take place *populi auctoritate*. According to the Institutes, 1. 11. 1, adrogation took place by virtue of a rescript of the emperor,—*principali rescripto*, which only issued *causa cognita*; and the ordinary adoption took place in pursuance of the authorization of the magistrate,—*imperio magistratus*. The effect of the adoption was also modified in such a manner, that if a son was adopted by a stranger, *extranea persona*, he preserved all the family rights resulting from his birth, and at the same time acquired all the family rights produced by the adoption.

In the United States, adoption is regulated by the statutes of the several states. See 1 Am. & Eng. Enc. of Law, 204–207. In Louisiana, where the civil law prevails, it was abolished by the Code of 1808, art. 35, p. 50. See 13 La. Ann. 517. In many of the continental states of Europe it is still permitted under various restrictions.

When an infant child has been released to another, such release is not revocable without sufficient legal reasons; 54 Ga. 10; and unless proceedings to revoke are made promptly, it will be fatal to their maintenance; 101 Ind. 340.

For legal status of adopted children, see 31 Cent. L. J. 67.

ADPROMISSOR (Lat. *promittere*). One who binds himself for another; a surety; a peculiar species of *fidejussor*. Calvinus, Lex.

The term is used in the same sense in the

Scotch law. The cautionary engagement was undertaken by a separate act: hence, one entering into it was called *adpromissor* (promissor in addition to). Erskine, Inst. 3. 3. 1.

ADROGATION. In Civil Law. The adoption of one who was *impubes*, that is, if a male, under fourteen years of age; if a female, under twelve. Dig. 1. 7. 17. 1.

ADSCRIPTI (Lat. *scribere*). Joined to by writing; ascribed; set apart; assigned to; annexed to.

ADSCRIPTI GLEBÆ. Slaves who served the master of the soil; who were annexed to the land, and passed with it when it was conveyed. Calvinus, Lex.

These *servi adscripti* (or *adscriptitii*) *glebæ* held the same position as the *villeins regardant* of the Normans; 2 Bla. Com. 93. See 1 Poll. & Mait. 372.

ADSCRIPTITII (Lat.). A species of slaves. See 1 Poll. & Mait. 372.

Those persons who were enrolled and liable to be drafted as legionary soldiers. Calvinus, Lex.

ADSESSORES (Lat. *sedere*). Side judges. Those who were joined to the regular magistrates as assistants or advisers; those who were appointed to supply the place of the regular magistrates in certain cases. Calvinus, Lex.

ADULT. In Civil Law. A male infant who has attained the age of fourteen; a female infant who has attained the age of twelve. Domat, *Liv. Prel.* tit. 2, § 2, n. 8.

In Common Law. One of the full age of twenty-one. Swanst. Ch. 553.

ADULTER (Lat.). One who corrupts; one who corrupts another man's wife.

Adulter solidorum. A corrupter of metals; a counterfeiter. Calvinus, Lex.

ADULTERA (Lat.). A woman who commits adultery. Calvinus, Lex.

ADULTERATION. The act of corrupting or debasing; the act of mixing something impure or spurious with something pure or genuine, or an inferior article with a superior one of the same kind. See 16 M. & W. 644; 2 Ired. L. 40.

As to the police powers of a state in making regulations for the protection of health and the prevention of fraud, see 127 U. S. 678. In England and in most of the United States, there are laws punishing the adulteration of, or sale of adulterated, food products, beverages, and drugs, either in general, or specifically. See Laws N. H. 1891, c. 39; [1892], 1 Q. B. 220. E.g., cheese, Laws Wis. 1891, c. 264; honey, Laws Minn. 1893, c. 21; Laws Vt. 1890, c. 52; lard, Act Pa. 1891, June 8, P. L. 213; 81 Iowa 642; milk, 153 Mass. 159; 155 Mass. 442; 157 Mass. 460; 159 Mass. 8; 160 Mass. 533; 12 N. Y. S. 628; 65 Hun 582; 123 N. Y. 70; 68 Hun 341; 85 Hun 71; 1 D. R. (Pa.) 51; olive oil, Stat. Cal. 1891, c. 47; and vinegar, Laws Kans. 1891, c. 1; Laws Mo. 1891, p. 218; Act Pa. 1891, June 11, P. L. 297; Laws Wis. 1891, c. 394; 40 N. E. Rep. (Ohio) 1001.

Adulterations of food, when wilful, are punishable by the laws of most countries. In Paris, malpractices connected with such adulteration are investigated by the Conseil de Salubrité, and punished. In Great Britain, numerous acts have been passed for the prevention of adulterations: they are usually punished by a fine determined by a summary process before a magistrate. In Pennsylvania, the adulteration of articles of food and drink, and of drugs and medicines, is, by a statute of March 31, 1860, made a misdemeanor punishable by fine or imprisonment, or both.

ADULTERATOR (Lat.). A corrupter; a counterfeiter.

Adulterator monetæ. A forger. Du-Cange.

ADULTERINE. The issue of adulterous intercourse.

Those are not deemed adulterine who are begotten of a woman openly married through ignorance of a former wife being alive.

Adulterine children are regarded more unfavorably than the illegitimate offspring of single persons. The Roman law refused the title of natural children, and the canon law discouraged their admission to orders.

ADULTERINE GUILDS. Companies of traders acting as corporations, without charters, and paying a fine annually for the privilege of exercising their usurped privileges. Smith, Wealth of Nat. book 1, c. 10; Wharton, Dict. 2d Lond. ed.

ADULTERIUM. A fine imposed for the commission of adultery. Barrington, Stat. 62, n.

ADULTERY. The voluntary sexual intercourse of a married person with a person other than the offender's husband or wife. Bishop, Mar. & D. § 415; 6 Metc. 243; 36 Me. 261; 11 Ga. 56; 2 Strobh. Eq. 174.

Unlawful voluntary sexual intercourse between two persons, one of whom at least is married, is the essence of the crime in all cases. In general, it is sufficient if either party is married; and the crime of the married party will be adultery, while that of the unmarried party will be fornication; 1 Yeates 6; 2 Dall. 124; 5 Jones N. C. 416; 27 Ala. N. s. 23; 35 Me. 205; 7 Gratt. 591; 6 *id.* 673; 96 Ala. 78. In Massachusetts, however, by statute, and some of the other states, if the woman be married, though the man be unmarried, he is guilty of adultery; 21 Pick. 509; 2 Blackf. 318; 18 Ga. 264; 9 N. H. 515; and see 1 Harr. N. J. 380; 29 Ala. 313. In Connecticut, and some other states, it seems that to constitute the offence of adultery it is necessary that the *woman* should be married; that if the man only is married, it is not the crime of adultery at common law or under the statute, so that an indictment for adultery could be sustained against either party; though within the meaning of the law respecting divorces it is adultery in the man. Cohabitation with a man after marriage is not adultery, unless the woman knows of such marriage; 96 Ala. 78; 83 *id.* 55; it is not necessary to prove emission on prosecution for adultery; 157 Mass. 415.

It is not, by itself, indictable at common law; 4 Bla. Com. 65; Whart. Cr. Law 1717; 5 Rand. 627, 634; but is left to the ecclesiastical courts for punishment. In the United States it is punishable by fine and imprisonment under various statutes, which generally define the offence.

Parties to the crime may be jointly in-

dicted; 2 Metc. 190; or one may be convicted and punished before or without the conviction of the other; 5 Jones 416.

As to civil remedies, see CRIM. CON.

ADVANCEMENT. A gift by anticipation from a parent to a child of the whole or a part of what it is supposed such child will inherit on the death of the parent. 6 Watts 87; 4 S. & R. 333; 17 Mass. 358; 11 Johns. 91; Wright 339; 82 Va. 859. The doctrine applies only to intestate estates, and it proceeds upon the natural presumption, in the absence of a will, that the conveyance is a gift in anticipation of the parent's death, and that he intended equality; but a subsequent disposal by will rebuts the presumption; 3 Del. Ch. 239, per Bates, Ch.

A gift to a husband by wife's father is considered an advancement to the wife; 82 Va. 352; but it is a question of fact, where decedent in his lifetime made a conveyance to his son-in-law; 65 Hun 625.

An advancement can only be made by a parent to a child; 5 Miss. 356; 2 Jones 137; Bisph. Eq. 84; or in some states, by statute, to a grandchild; 4 Kent 419; 4 Watts 82; 4 Ves. 437.

The intention of the parent is to decide whether a gift is intended as an advancement; 23 Pa. 85; 11 Johns. 91; 2 M'Cord, Ch. 103. See 26 Vt. 665.

A mere gift is presumptively an advancement, but the contrary intention may be shown; 22 Ga. 574; 8 Ired. 121; 18 Ill. 167; 3 Jones 190; 3 Conn. 31; 6 *id.* 356; 1 Mass. 527; 82 Va. 352; 83 *id.* 643; 133 Ind. 294. The maintenance and education of a child, or the gift of money without a view to a portion or settlement in life, is not deemed an advancement; 5 Rich, Eq. 15; 23 Conn. 516. If security is taken for repayment, it is a debt and not an advancement; 21 Pa. 283; 29 *id.* 298; 23 Ga. 531; 22 Pick. 508; and see 17 Mass. 93, 359; 2 Harr. & G. 114. Payment of a son's debts will be considered an advancement; 85 Tenn. 430; or the payment by the father as surety of the notes of his son who had no estate; 92 Ky. 556.

No particular formality is requisite to indicate an advancement; Stat. 22 & 23 Car. II. c. 10; 1 Madd. Ch. Pr. 507; 4 Kent 418; 16 Vt. 197; unless a particular form of indicating such intention is prescribed by statute as requisite; 4 Kent 418; 1 Gray 587; 5 *id.* 341; 5 R. I. 255, 457.

Where a father divides his property equally between two sons, conveying to one his share, it is considered an advancement where no deed is delivered to the other; 73 Ia. 733.

The effect of an advancement is to reduce the distributive share of the child by the amount so received, estimating its value at the time of receipt; 1 S. & R. 422; 21 Mo. 347; 3 Yerg. 112; 5 Harr. & J. 459; 1 Wash. Va. 224; 3 Pick. 450; in some states the child has his option to retain the advancement and abandon his distributive share; 9 Dana 193; 4 Ala. N. S. 121; to abandon his advancement and receive his equal share of the estate; 12 Gratt. 33; 15 Ala. N. S. 85; 26 Miss. 592; 28 *id.* 674; 18 Ill. 167; but this privilege exists only in case of intestacy; 1 Hill, Ch. 10; 3 Yerg. 95; 3 Sandf. Ch. 520; 5 Paige, Ch. 450; 14 Ves. Ch. 323. See ADEMPTION.

It is not chargeable with interest; 31 Pa. 337; until the settlement of the estate.

ADVANCES. Payments made to the owner of goods by a factor or agent, who has or is to have possession of the goods for the purpose of selling them.

An agent is entitled to reimburse himself from the proceeds of the goods, and has a lien on them for the amount paid; Liverm. Ag. 38; 19 Oreg. 35; and an action over for the balance, against his principal, if the sales are insufficient to cover the advances; 22 Pick. 40; 3 N. Y. 62; 12 N. H. 239; 2 Pars. Contr. 466; 2 Bouvier, Inst. n. 1340; 150 Pa. 481; 44 Fed. Rep. 845; but he must first exhaust the property in his hands; 27 Atl. Rep. (R. I.) 507. Where to save himself from loss the factor buys the goods himself, the consignor may elect whether he will ratify the sale or demand the value of the goods; 37 S. C. 402.

It also refers to a case where money is paid before, or in advance of, the proper time of payment; it may characterize a loan or a gift, or money advanced to be repaid conditionally; 10 Barb. 73; 51 *id.* 613; 97 U. S. 117.

ADVENA (Lat. *venire*). **In Roman law.** One of foreign birth, who has left his own country and settled elsewhere, and who has not acquired citizenship in his new locality; often called *albanus*. Du Cange.

ADVENT. The period commencing on Sunday falling on St. Andrew's day (30th of November), or the nearest Sunday to it, and continuing till Christmas. Blount.

It took its name from the fact that it immediately preceded the day set apart to commemorate the birth or coming (advent) of Christ. Cowel; Termes de la Ley.

Formerly, during this period, "all contentions at law were omitted." But, by statute 13 Edw. I. (Westm. 2) c. 48, certain actions were allowed.

ADVENTITIOUS (Lat. *adventitius*). That which comes incidentally, or out of the regular course.

ADVENTITIUS (Lat.). Foreign; coming from an unusual source.

Adventitia bona are goods which fall to a man otherwise than by inheritance.

Adventitia dos is a dowry or portion given by some friend other than the parent.

ADVENTURE. Sending goods abroad under charge of a supercargo or other agent, which are to be disposed of to the best advantage for the benefit of the owners.

The goods themselves so sent.

In Marine Insurance. It is used synonymously with "perils"; it is often used by writers to describe the enterprise or voyage as a "marine adventure" insured against; 14 Fed. Rep. 233.

ADVERSE ENJOYMENT. The possession or exercise of an easement or privilege under a claim of right against the owner of the land out of which the easement is derived. 2 Washb. R. P. 42.

Such an enjoyment, if open, 4 M. & W. 500; 4 Ad. & E. 369, and continued uninterruptedly, 9 Pick. 251; 8 Gray 441; 17 Wend. 564; 26 Me. 440; 20 Pa. 331; 2 N. H. 255; 9 *id.* 454; 2 Rich. 136; 11 Ad. & E. 788; 153 Pa. 294, for the term of twenty years, raises a conclusive presumption of a grant, provided that there was, during the time, some one in existence, in possession and occupation, who was not under disability to resist the use; 2 Washb. R. P. 48.

ADVERSE POSSESSION. The enjoyment of land, or such estate as lies in grant, under such circumstances as indicate that such enjoyment has been commenced and continued under an assertion or color of right on the part of the possessor. 3 East 394; 1 Pick. 466; 2 S. & R. 527; 3 Pa. 132; 8 Conn. 440; 2 Aik. Vt. 364; 9 Johns. 174; 18 *id.* 40, 355; 5 Pet. 402; 4 Bibb 550; 43 Ala. 643. The intention must be manifest; 83 N. Y. 348; 6 Metc. 360. There can be no adverse possession against a state; 84 Va. 701.

When such possession has been actual, 3 S. & R. 517; 7 *id.* 192; 2 Wash. C. C. 478, and has been adverse for twenty years, of which the jury are to judge from the circumstances, the law raises the presumption of a grant; Angell, Wat. Cour. 85, *et seq.* But this presumption arises only when the use or occupation would otherwise have been unlawful; 3 Me. 120; 6 Cow. 617, 677; 8 *id.* 589; 4 S. & R. 456. The statute does not run against the rights of a reversioner pending an intervening life estate; 37 Minn. 338; 86 Ky. 240; 37 W. Va. 634.

As to the history of the English doctrine of possessory title to real estate founded on prescription, see 4 Del. Ch. 643, per Bates, Ch.

Evidence of adverse possession must be strictly construed and every presumption is in favor of the actual owner; 73 Wis. 463.

The adverse possession must be "actual, continued, visible, notorious, distinct, and hostile;" 6 S. & R. 21; 69 Tex. 375; 84 Ky. 124; 149 Mass. 201; 95 Mich. 410; 150 U. S. 597. See note to Nepean *v.* Doe, 2 Sm. Lead. Cas. 597; Angell, Lim. 392, 393.

To make the possession of one tenant in common adverse, it must be with acts of exclusive ownership of an unequivocal character; 97 Mo. 426; 37 Minn. 338; 98 N. C. 307; 74 Ia. 359. One claiming by adverse possession cannot avail himself of the previous possession of another person with whose title he is in no way connected; 71 Tex. 438; 70 *id.* 347; 38 Minn. 122.

In 55 Miss. 671 it is said that there must be a claim of ownership; but see 41 N. J. L. 527.

When both parties claim under the same title; as, if a man seised of certain land in fee have issue two sons, and die seised, and one of the sons enter by abatement into the land, the statute of limitations will not operate against the other son; for when the abator entered into the land of his father, before entry made by his brother, the law intends that he entered claiming as heir to his father, by which title the other son also claims; Co. Litt. s. 396.

There can be no adverse possession between husband and wife while the marital relation continues to exist; 37 Ala. 536; 61 Cal. 169; 70 Ga. 809; 53 Mich. 575.

When the possession of the one party is consistent with the title of the other; as, where the rents of a trust estate were received by a *cestui que trust* for more than twenty years after the creation of the trust, without any interference of the trustee, such possession being consistent with and secured to the *cestui que trust* by the terms of the deed, the receipt was held not to be adverse to the title of the trustee; 8 East 248. See 69 Mo. 117. When trust property is taken possession of by a trustee, it is the possession of the *cestui que trust* and cannot be adverse until the trust is disavowed or denied, and this fact is brought to the knowledge of the *cestui que trust;* 126 Ill. 58.

When, in contemplation of law, the claimant has never been out of possession; as, where Paul devised lands to John and his heirs, and died, and John died, and afterwards the heirs of John and a stranger entered, and took the profits for twenty years; upon ejectment brought by the devisee of the heir of John against the stranger, it was held that the perception of the rents and profits by the stranger was not adverse to the devisee's title; for when two men are in possession, the law adjudges it to be the possession of him who has the right; 1 Ld. Raym. 329;

When the occupier has acknowledged the claimant's title; as, if a lease be granted for a term, and, after paying the rent for the land during such term, the tenant hold for twenty years without paying rent, his possession will not be adverse. See 1 B. & P. 542; 8 B. & C. 717; 2 Bouvier, Inst. n. 2193, 2194, 2351.

The title by adverse possession for such a period as is required by statute to bar an action, is a fee-simple title, and is as effective as any otherwise acquired; 17 Wash. L. Rep. 53.

An action for the recovery of lands in the District of Columbia is barred in twenty years, and a claim to ownership, and an open, visible, continuous, and exclusive possession for that period, gives title to the occupant; 144 U. S. 533, 548. When there has been a severance of the title to the surface and that to the minerals beneath it, adverse possession of the surface will not affect the title to the minerals; 170 Pa. 33; 172 *id.* 331. See LIMITATIONS.

ADVERTISEMENT (Lat. *advertere*, to turn to).

Information or knowledge communicated to individuals or the public in a manner designed to attract general attention.

A notice published either in handbills or in a newspaper.

The law in many instances requires parties to advertise in order to give notice of acts which are to be done; in these cases, the advertisement is in general equivalent to notice. But there are cases in which such notice is not sufficient, unless brought home to the actual knowledge of the party. Thus, notice of the dissolution of partnership by advertisement in a newspaper printed in the city or county where the business is carried on, although it is of itself notice to all persons who have had no previous dealings with the firm, yet it is not notice to those who have had such previous dealings; it must be shown that persons of the latter class have received actual notice; 4 Whart. 484. See 17 Wend. 526; 22 *id.* 183; Lind. Part. *222; 2 Ala. N. S. 502; 8 Humphr. 418; 3 Bingh. 2. It has been held that the printed conditions of a line of public coaches are sufficiently made known to passengers by being posted up at the place where they book their names; 8 W. & S. 373; 3 Esp. 271. An advertisement by a railroad corporation in a newspaper in the English language of a limitation of its liability for baggage is not notice to a passenger who does not understand English; 16 Pa. 68.

An ordinary advertising sheet is not a newspaper for the purpose of advertisement as required by law, and when notice is required to be published in two newspapers, English papers are presumed to be intended; 1 Pittsb. 225; the posting up of a page of a newspaper, containing a large number of separate advertisements, will not be considered a handbill; 1 Pittsb. 224.

When an advertisement contains the terms of sale, or description of the property to be sold, it will bind the seller; and if there be a material misrepresentation, it may avoid the contract, or at least entitle the purchaser to a compensation and reduction from the agreed price.

Advertisements published *bona fide* for the apprehension of a person suspected of crime, or for the prevention of fraud, are privileged. Thus, an advertisement of the loss of certain bills of exchange, supposed to have been embezzled, made in the belief that it was necessary either for the purposes of justice with a view to the discovery and conviction of the offender, or for the protection of the defendant himself against the liability to which he might be exposed on the bills, is privileged, if these were the defendant's only inducements; Heard, Lib. & Sland. § 131.

A sign-board, at a person's place of business, giving notice of lottery-tickets being for sale there, is an "advertisement;" and, if erected before the passage of a statute making the advertising of lottery-tickets penal, a continuance of it is within the statute; 5 Pick. 42.

The publication of summons is valid, although one of the days was a national holiday; 50 Minn. 457.

ADVICE. Information given by letter by one merchant or banker to another in regard to some business transaction which concerns him. Chit. Bills 185.

ADVISARE, ADVISARI (Lat.). To advise; to consider; to be advised; to consult.

Occurring often in the phrase *curia advisari vult* (usually abbreviated *cur. adv. vult* or *C. A. V.*), the court wishes to consider of the matter. When a point of law requiring deliberation arose, the court, instead of giving an immediate decision, ordered a *cur. adv. vult* to be entered, and then, after consideration, gave a decision. Thus, from amongst numerous examples, in Clement *vs.* Chivis, 2 B. & C. 172, after the account of the argument we find *cur. adv. vult;* then, "on a subsequent day judgment was delivered," etc.

ADVISEMENT. Consideration; deliberation; consultation.

ADVOCATE. An assistant; adviser; a pleader of causes.

Derived from *advocare*, to summon to one's assistance; *advocatus* originally signified an assistant or helper of any kind, even an accomplice in the commission of a crime; Cicero, *Pro Cœcina*, c. 8; Livy, lib. ii. 55; iii. 47; Tertullian, *De Idolatr.* cap. xxiii.; Petron. *Satyric.* cap. xv. Secondarily, it was applied to one called in to assist a party in the conduct of a suit; Inst. 1, 11, D, 50, 13. *de extr. cogn.* Hence, a pleader, which is its present signification.

In Scotch and Ecclesiastical Law. An officer of the court, learned in the law, who is engaged by a suitor to maintain or defend his cause. Advocates, like counsellors, have the exclusive privilege of addressing the court either orally or in written pleadings; and, in general, in regard to duties, liabilities, and privileges, the same rules apply *mutatis mutandis* to advocates as to counsellors. See COUNSELLOR.

In the English ecclesiastical and admiralty courts, advocates had the exclusive right of acting as counsel. They were incorporated (8 Geo. III.) under the title of "The College of Doctors of Law Exercent in the Ecclesiastical and Admiralty Courts." In 1857, on the creation of the new court of probate and matrimonial causes, this college was empowered to surrender its charter and sell its real estate.

In Scotland all barristers are called advocates.

Lord Advocate.—An officer in Scotland appointed by the crown, during pleasure, to take care of the king's interest before the courts of session, justiciary, and exchequer. All actions that concern the king's interest, civil or criminal, must be carried on with concourse of the lord advocate. He also discharges the duties of public prosecutor, either in person or by one of his four deputies, who are called *advocates-depute.* Indictments for crimes must be in his name as accuser. He supervises the proceedings in important criminal cases, and has the right to appear in all such cases. He is, in fact, secretary of state for Scotland, and his principal duties are connected directly with the administration of the government.

Inferior courts have a *procurator fiscal*, who supplies before them the place of the lord advocate in criminal cases. See 2 Bankt. Inst. 492.

College or Faculty of Advocates.—A cor-

porate body in Scotland, consisting of the members of the bar in Edinburgh. A large portion of its members are not active practitioners, however ; 2 Bankt. Inst. 486.

Queen's Advocate.—A member of the College of Advocates, appointed by letters patent to advise the crown on questions of civil, canon, and ecclesiastical law. He takes precedence next after the solicitor general.

Church or Ecclesiastical Advocates.—Pleaders appointed by the church to maintain its rights.

In Ecclesiastical Law. A patron of a living; one who has the advowson, *advocatio.* Tech. Dict. ; Ayliffe, Par. 53 ; Dane, Abr. c. 31, § 20 ; Erskine, Inst. 79, 9.

Those persons whom we now call patrons of churches, and who reserved to themselves and their heirs a license to present on any avoidance. The term originally belonged to the founders of churches and convents and their heirs, who were bound to protect their churches as well as to nominate or present to them. But when the patrons grew negligent of their duty or were not of ability or interest in the courts of justice, then the religious began to retain law *advocates*, to solicit and prosecute their causes. Spelm. ; Jacob, Law Dict.

A person admitted by the Archbishop of Canterbury to practise in the court of arches in the same manner as barrister in the common law courts. Rap. and Law. Law Dict.

ADVOCATI (Lat.). **In Roman Law.** Patrons ; pleaders ; speakers.

Originally the management of suits at law was undertaken by the *patronus* for his *cliens* as a matter of duty arising out of their reciprocal relation. Afterwards it became a profession, and the relation, though a peculiarly confidential one while it lasted, was but temporary, ending with the suit. The profession was governed by very stringent rules: a limited number only were enrolled and allowed to practise in the higher courts—one hundred and fifty before the *præfectus prætorio ;* Dig. 8, 11 ; Code 2, 7 ; fifty before the *præf. aug.* and *dux Ægypticus* at Alexandria ; Dig. 8, 13 ; etc., etc. The enrolled advocates were called *advocati ordinarii.* Those not enrolled were called *adv. supernumerarii* or *extraordinarii*, and were allowed to practise in the inferior courts ; Dig. 8, 13. From their ranks vacancies in the list of *ordinarii* were filled ; *Ibid.* The *ordinarii* were either *fiscales*, who were appointed by the crown for the management of suits in which the imperial treasury was concerned, and who received a salary from the state ; or *privati* whose business was confined to private causes. The *advocati ordinarii* were bound to lend their aid to every one applying to them, unless a just ground existed for a refusal ; and they could be compelled to untertake the cause of a needy party ; l. 7, C. 2, 6. The *supernumerarii* were not thus obliged, but, having once undertaken a cause, were bound to prosecute or defend it with diligence and fidelity.

The client must be defended against every person, even the emperor, though the *advocati fiscales* could not undertake a cause against the *fiscus* without a special permission ; ll. 1 et 2, C. 2, 9 ; unless such cause was their own, or that of their parents, children, or ward ; l. 10, pr. C. 11, D. 3, 1.

An advocate must have been at least seventeen years of age ; l. 1, § 3, D. 3, 1 ; he must not be blind or deaf ; l. 1, §§ 3 et 5, D. 3, 1 ; he must be of good repute, not convicted of an infamous act; l. 1, § 8, D. 3, 1 ; he could not be advocate and judge in the same cause ; l. 6, pr. C. 2, 6 ; he could not even be a judge in a suit in which he had been engaged as advocate ; l. 17, D. 2, 1 ; l. 14, C. 1, 51 ; nor after being appointed judge could he practise as advocate even in another court ; l. 14, pr. C. 1, 51 ; nor could he be a witness in the cause in which he was acting as advocate ; l. ult. D. 22, 5 ; 22 Glück, Pand. p. 161, *et seq.*

He was bound to bestow the utmost care and attention upon the cause, *nihil studii reliquentes, quod sibi possibile est;* l. 14, § 1, C. 3, 1. He was liable to his client for damages caused in any way by his fault ; 5 Glück, Pand. 110. If he had signed the *concepit*, he was responsible that it contained no matter punishable or improper ; Boehmer, Cons. et Decis. t. ii. p. 1, resp. cviii. no. 5. He must clearly and correctly explain the law to his clients, and honestly warn them against transgression or neglect thereof. He must frankly inform them of the lawfulness or unlawfulness of their cause of action, and must be especially careful not to undertake a cause clearly unjust, or to let himself be used as an instrument of chicanery, malice, or other unlawful action ; l. 6, §§ 3, 4, C. 2, 6 ; l. 13, § 9 ; l. 14, § 1, C. 3, 1. In pleading, he must abstain from invectives against the judge, the opposite party or his advocate ; l. 6, § 1, C. 2, 6. Should it become necessary or advantageous to mention unpleasant truths, this must be done with the utmost forbearance, and in the most moderate language; 5 Glück, Pand. 111. Conscientious honesty forbade his betraying secrets confided to him by his client or making any improper use of them ; he should observe inviolable secrecy in respect to them ; *ibid.* ; he could not, therefore, be compelled to testify in regard to such secrets ; l. ult. D. 22, 5.

If he violated the above duties, he was liable, in addition to compensation for the damage thereby caused, to fine, or imprisonment, or suspension, or entire removal from practice, or to still severer punishment, particularly where he had been guilty of a *prævaricatio*, or betrayal of his trust for the benefit of the opposite party ; 5 Glück, Pand. 111.

Compensation.—By the *lex Cincia*, A. U. C. 549, advocates were prohibited from receiving any reward for their services. In course of time this became obsolete. Claudius allowed it, and fixed ten thousand sesterces as the maximum fee. Trajan prohibited this fee, called *honorarium*, from

being paid before the termination of the action. This, too, was disregarded, and prepayment had become lawful in the time of Justinian ; 5 Glück, Pand. 117. The fee was regulated by law, unless the advocate had made a special agreement with his client, when the agreement fixed the amount. But a *pactum de quota litis, i. e.*, an agreement to pay a contingent fee, was prohibited, under penalty of the advocate's forfeiting his privilege of practising ; l. 5, C. 2, 6. A *palmarium*, or conditional fee in addition to the lawful charge and depending upon his gaining the cause, was also prohibited ; 5 Glück, Pand. 120 *et seq.* But an agreement to pay a *palmarium* might be enforced when it was not entered into till after the conclusion of the suit ; l. 1, § 12, D. 50, 13. The compensation of the advocate might also be in the way of an annual salary ; 5 Glück, Pand. 122.

Remedy.—The advocate had the right to retain papers and instruments of his client until payment of his fee ; l. 26, Dig. 3, 2. Should this fail, he could apply for redress to the court where the cause was tried by petition, a formal action being unnecessary ; 5 Glück, Pand. 122.

Anciently, any one who lent his aid to a friend, and who was supposed to be able in any way to influence a judge, was called *advocatus*.

Causidicus denoted a speaker or pleader merely ; *advocatus* resembled more nearly a counsellor ; or, still more exactly, causidicus might be rendered *barrister*, and advocatus *attorney*, or *solicitor*, though the duties of an *advocatus* were much more extended than those of a modern attorney ; Du Cange ; Calvinus, Lex.

A witness.

ADVOCATI ECCLESIÆ. Advocates of the church.

These were of two sorts : those retained as pleaders to argue the cases of the church and attend to its law-matters ; and advocates, or patrons of the advowson ; Cowel ; Spelman, Gloss.

ADVOCATI FISCI. In Civil Law. Those chosen by the emperor to argue his cause whenever a question arose affecting his revenues. Calvinus, Lex. ; 3 Bla. Com. 27.

ADVOCATIA. In Civil Law. The functions, duty, or privilege of an advocate. Du Cange, *Advocatia*.

ADVOCATION. In Scotch Law. The removal of a cause from an inferior to a superior court by virtue of a writ or warrant issuing from the superior court. See BILL OF ADVOCATION ; LETTER OF ADVOCATION.

ADVOCATUS. A pleader ; a narrator. Bracton, 412 *a*, 372 *b*.

ADVOWSON. A right of presentation to a church or benefice.

He who possesses this right is called the patron or advocate. When there is no patron, or he neglects to exercise his right within six months, it is called a *lapse*, and a title is given to the ordinary to collate to a church : when a presentation is made by one who has no right, it is called a *usurpation*.

Advowsons are of different kinds ; as *advowson appendant*, when it depends upon a manor, etc. ; *advowson in gross*, when it belongs to a person and not to a manor ; *advowson presentative*, where the patron presents to the bishop ; *advowson donative*, where the king or patron puts the clerk into possession without presentation ; *advowson collative*, where the bishop himself is a patron ; *advowson of the moiety of the church*, where there are two several patrons and two incumbents in the same church ; *a moiety of advowson*, where two must join the presentation of one incumbent : *advowson of religious houses*, that which is vested in the person who founded such a house. 2 Bla. Com. 21 ; Mirehouse, *Advowsons ;* Comyns, Dig. *Advowson, Quare Impedit ;* Bacon, Abr. *Simony ;* Burns, Eccl. Law. See 2 Poll. & Maitl. 135.

ADVOWTRY. In English Law. The crime committed by a woman who, having committed adultery, continued to live with the adulterer. Cowel ; Termes de la Ley.

ÆDES (Lat.). **In Civil Law.** A dwelling ; a house ; a temple.

In the country everything upon the surface of the soil passed under the term *ædes*. Du Cange ; Calvinus, Lex.

ÆDILE (Lat.). **In Roman Law.** An officer who attended to the repairs of the temples and other public buildings : the repairs and cleanliness of the streets ; the care of the weights and measures ; the providing for funerals and games ; and regulating the prices of provisions. Ainsworth, Lex. ; Smith, Lex. ; Du Cange.

ÆDILITIUM EDICTUM (Lat.). **In Roman Law.** That provision by which the buyer of a diseased or imperfect slave, horse, or other animal was relieved at the expense of the vendor who had sold him as sound knowing him to be imperfect. Calvinus, Lex.

AEL (Norman). A grandfather. Spelled also *aieul, ayle*. Kelham.

ÆS ALIENUM (Lat.). **In Civil Law.** A debt.

Literally translated, the money of another ; the civil law considering borrowed money as the property of another, as distinguished from *æs suum*, one's own.

ÆSTIMATIO CAPITIS (Lat. the value of a head). The price to be paid for taking the life of a human being.

King Athelstan declared, in an assembly held at Exeter, that mulcts were to be paid *per æstimationem capitis*. For a king's head (or life), 30,000 thuringæ ; for an archbishop's or prince's, 15,000 ; for a priest's or thane's, 2000 ; Leg. Hen. 1.

ÆTAS INFANTILI PROXIMA (Lat.). The age next to infancy. Often written *ætas infantiæ proxima*. This lasted until the age of twelve years ; 4 Bla. Com. 22. See AGE.

ÆTAS PUBERTATI PROXIMA (Lat.). The age next to puberty. This lasted until the age of fourteen, in which there might or might not be criminal re-

sponsibility according to natural capacity or incapacity. Under twelve, an offender could not be guilty in will, neither after fourteen could he be supposed innocent, of any capital crime which he in fact committed. 4 Bla. Com. ch. ii. See AGE.

AFFECT. To have an effect upon; to lay hold of, to act upon, impress or influence. It is often used in the sense of acting injuriously upon persons and things. 93 U. S. 84.

AFFECTION. The making over, pawning, or mortgaging a thing to assure the payment of a sum of money, or the discharge of some other duty or service. Crabb, Techn. Dict.

AFFECTUS (Lat.). Movement of the mind; disposition; intention.

One of the causes for a challenge of a juror is *propter affectum*, on account of a suspicion of *bias* or favor; 3 Bla. Com. 363; Co. Litt. 156.

AFFEER. In English Law. To fix in amount; to liquidate.

To affeer an amercement.—To establish the amount which one amerced in a court-leet should pay.

To affeer an account.—To confirm it on oath in the exchequer. Cowel; Blount; Spelman.

AFFEERORS. In Old English Law. Those appointed by a court-leet to mulct those punishable, not by a fixed fine, but by an arbitrary sum called amercement. Termes de la Ley; 4 Bla. Com. 373.

AFFIANCE (Lat. *affidare, ad, fidem, dare*, to pledge to).

A plighting of troth between man and woman. Littleton, § 39.

An agreement by which a man and woman promise each other that they will marry together. Pothier, *Traité du Mar.* n. 24. Marriage. Co. Litt. 34 *a*. See Dig. 23, 1. 1; Code, 5. 1. 4.

AFFIANT. A deponent.

AFFIDARE (Lat. *ad fidem dare*). To pledge one's faith or do fealty by making oath. Cowel.

Used of the mutual relation arising between landlord and tenant; 1 Washb. R. P. 19; 1 Bla. Com. 367; Termes de la Ley, *Fealty*. Affidavit is of kindred meaning.

AFFIDATUS. One who is not a vassal, but who for the sake of protection has connected himself with one more powerful. Spelman, Gloss.; 2 Bla. Com. 46.

AFFIDAVIT (Lat.). **In Practice.** A statement or declaration reduced to writing, and sworn or affirmed to before some officer who has authority to administer an oath or affirmation.

It differs from a deposition in this, that in the latter the opposite party has an opportunity to cross-examine the witness, whereas an affidavit is always taken *ex parte*; Gresley, Eq. Ev. 413; 3 Blatch. 456.

An affidavit includes the oath, and may show what facts the affiant swore to, and thus be available as an oath, although unavailable as an affidavit; 28 Wis. 460.

By general practice, affidavits are allowable to present evidence upon the hearing of a motion, although the motion may involve the very merits of the action; but they are not allowable to present evidence on the trial of an issue raised by the pleadings. Here the witnesses must be produced before the adverse party. They are generally required on all motions to open defaults or to grant delay in the proceedings and other applications by the defendant addressed to the favor of the court.

Formal parts.—An affidavit must intelligibly refer to the cause in which it is made. The strict rule of the common law is that it must contain the exact title of the cause. This, however, is not absolutely essential; 80 Ill. 307. If not entitled in the cause it cannot be considered in opposition to motion for preliminary injunction; 62 Fed. Rep. 124.

The place where the affidavit is taken must be stated, to show that it was taken within the officer's jurisdiction; 1 Barb. Ch. Pr. 601; if the officer fails to append to his signature to the jurat the name of the county for which he is appointed, if it already appears in the caption, it will not be defective; 94 Mich. 617. The deponent must sign the affidavit at the end; 11 Paige, Ch. 173. The jurat must be signed by the officer with the addition of his official title. In the case of some officers the statutes conferring authority to take affidavits require also his seal to be affixed.

In the absence of a rule of court or statute requiring it, if affiant's name appears in an affidavit as the person who took the oath, the subscription to it by affiant is not necessary; 47 Minn. 405; or if his name is omitted in the body of the verification but it is properly signed, it is sufficient; 5 Misc. Rep. 219. If the notary fails to attach his seal to an affidavit of an assignee in insolvency, it is not void; 159 Mass. 193; if he omits to add his name in the jurat in affidavit for writ of certiorari, the court may permit it to be done *nunc pro tunc*; 58 N. W. Rep. (Wis.) 771; and if he omits to add his title it is not invalid; 143 Mass. 380.

In general, an affidavit must describe the deponent sufficiently to show that he is entitled to offer it; for example, that he is a party, or agent or attorney of a party, to the proceeding; 7 Hill 177; 4 Denio 71, 258; and this matter must be stated, not by way of recital or as mere description, but as an allegation in the affidavit; 3 N. Y. 41; 8 *id.* 158.

AFFIDAVIT OF DEFENCE. In Practice. A statement made in proper form that the defendant has a good ground of defence to the plaintiff's action upon the merits.

The statements required in such an affidavit vary considerably in the different states where they are required. In some, it must state a ground of defence; 1 Ashm. 4; Troub. & H. Pr. § 399; 138 Pa. 974; 187 *id.* 197; Br. Pr. 22-37; in others, a simple statement of belief that it exists is sufficient. Called also an affidavit of merits, as in Massachusetts. See as to its salutary effect, 20 Pa. 387; 1 Grant 190.

It must be made by the defendant, or some

person in his behalf who possesses a knowledge of the facts; 1 Ashm. 4. In a suit against a corporation an affidavit of defence made by a mere stockholder should set out some reason why it is not made by an officer or director; 127 Pa. 164.

The effect of a failure to make such affidavit is, in a case requiring one, to default the defendant; 8 Watts 367. It was first established in Philadelphia by agreement of members of the bar; 3 Binn. 423; and afterwards by act of assembly. A law permitting judgment in default of such an affidavit is constitutional; 99 Mass. 104; 86 Pa. 225.

AFFIDAVIT TO HOLD TO BAIL. In Practice. An affidavit which is required in many cases before a person can be arrested.

Such an affidavit must contain a statement, clearly and certainly expressed, by some one acquainted with the fact, of an indebtedness from the defendant to the plaintiff, and must show a distinct cause of action; Selwyn, Pr. 105; 1 Chit. Pl. 165. See BAIL.

AFFILARE. To put on record; to file. 8 Coke 319; 2 M. & S. 202.

AFFILIATION. In French Law. A species of adoption which exists by custom in some parts of France.

The person affiliated succeeded equally with other heirs to the property acquired by the deceased to whom he had been affiliated, but not to that which he inherited.

In Ecclesiastical Law. A condition which prevented the superior from removing the person affiliated to another convent. Guyot, *Répert.*

AFFINES (Lat. *finis.*) **In Civil Law.** Connections by marriage, whether of the persons or their relatives. Calvinus, Lex.

From this word we have affinity, denoting relationship by marriage; 1 Bla. Com. 434.

The singular, *affinis*, is used in a variety of related significations—a boundary; Du Cange; a partaker or sharer, *affinis culpæ* (an aider or one who has knowledge of a crime); Calvinus, Lex.

AFFINITAS. In Civil Law. Affinity.

AFFINITAS AFFINITATIS. That connection between parties arising from marriage which is neither consanguinity nor affinity.

This term intends the connection between the kinsmen of the two persons married, as, for example, the husband's brother and the wife's sister; Erskine, Inst. 1. 6. 8.

AFFINITY. The connection existing, in consequence of marriage, between each of the married persons and the kindred of the other. 45 N. Y. Super. Ct. 84.

It is distinguished from consanguinity, which denotes relationship by blood. Affinity is the tie which exists between one of the spouses with the kindred of the other: thus, the relations of my wife, her brothers, her sisters, her uncles, are allied to me by affinity, and my brothers, sisters, etc., are allied in the same way to my wife. But my brother and the sister of my wife are not allied by the ties of affinity.

A person cannot, by legal succession, receive an inheritance from a relation by affinity; neither does it extend to the nearest relations of husband and wife, so as to create a mutual relation between them. The degrees of affinity are computed in the same way as those of consanguinity. See 1 Bla. Com. 435; Pothier, Traité du Mar. pt. 3, c. 3, art. 2; Inst. 1, 10. 6; Dig. 38, 10, 4, 3; 1 Phill. Eccl. 210; 5 Mart. La. 296.

AFFIRM (Lat *affirmare*, to make firm; to establish).

To ratify or confirm a former law or judgment. Cowel.

Especially used of confirmations of the judgments of an inferior by an appellate tribunal.

To ratify or confirm a voidable act of the party.

To make a solemn religious asseveration in the nature of an oath. See AFFIRMATION.

AFFIRMANCE. The confirmation of a voidable act by the party acting, who is to be bound thereby.

The term is in accuracy to be distinguished from *ratification*, which is a recognition of the validity or binding force as against the party ratifying, of some act performed by another person; and from *confirmation*, which would seem to apply more properly to cases where a doubtful authority has been exercised by another in behalf of the person ratifying; but these distinctions are not generally observed with much care; 1 Pars. Contr. 243.

This term is also applied to the ratification, or upholding of a judgment of a lower court by an appellate court. A dismissal of an appeal for want of prosecution is not an affirmance; 14 N. Y. 60.

Express affirmance takes place where the party declares his determination of fulfilling the contract; Dudl. Ga. 203.

A mere acknowledgment that the debt existed, or that the contract was made, is not an affirmance; 10 N. H. 561; 2 Esp. 628; 1 Bail. 28; 9 Conn. 330; 2 Hawks 535; 1 Pick. 203; Dudl. Ga. 203; but it must be a direct and express confirmation, and substantially (though it need not be in form) a promise to pay the debt or fulfil the contract; 3 Wend. 479; 4 Day 57; 12 Conn. 550; 8 N. H. 374; 2 Hill 120; 19 Wend. 301; 1 Pars. Contr. 243; Bingham Inf., 1st Am. ed. 69.

Implied affirmance arises from the acts of the party without any express declaration; 15 Mass. 220. See 10 N. H. 194; 11 S. & R. 305; 1 Pars. Contr. 243; Ans. Contr. 338; 1 Bla. Com. 466, n. 10.

AFFIRMANCE-DAY-GENERAL. In the English Court of Exchequer, is a day appointed by the judges of the common pleas, and barons of the exchequer, to be held a few days after the beginning of every term for the general affirmance or reversal of judgments. 2 Tidd, Pract. 1091.

AFFIRMANT. In Practice. One who makes affirmation instead of making oath that the evidence which he is about to give shall be the truth, as if he had been sworn.

He is liable to all the pains and penalty of perjury, if he shall be guilty of wilfully and maliciously violating his affirmation. See PERJURY.

AFFIRMATION. In Practice. A solemn religious asseveration in the nature of an oath. 1 Greenl. Ev. § 371.

Quakers, as a class, and other persons who have conscientious scruples against taking an oath, are allowed to make affirmation in any mode which they may declare to be binding upon their consciences, in confirmation of the truth of testimony which they are about to give; 1 Atk. 21, 46; Cowp. 340, 389; 1 Leach Cr. Cas. 64; 1 Ry. & M. 77; 6 Mass. 262; 16 Pick. 153; Buller, N. P. 292; 1 Greenl. Ev. § 371. See oaths and affirmations in Great Britain and Ireland, etc., reviewed in 25 Law J. 169.

AFFIRMATIVE. That which establishes; that which asserts a thing to be true.

It is a general rule of evidence that the affirmative of the issue must be proved; Buller, N. P. 298; Peake, Ev. 2. But when the law requires a person to do an act, and the neglect of it will render him guilty and punishable, the negative must be proved, because every man is presumed to do his duty, and in that case they who affirm he did not must prove it; Buller, N. P. 298; 1 Rolle 83; Comb. 57; 3 Bos. & P. 307.

AFFIRMATIVE PREGNANT. In Pleading. An affirmative allegation implying some negative in favor of the adverse party.

For example, if to an action of assumpsit, which is barred by the act of limitations in *six* years, the defendant pleads that he did not undertake, etc., within *ten* years, a replication that he did undertake, etc., within ten years would be an affirmative pregnant; since it would impliedly admit that the defendant had not promised within six years. Such a plea should be demurred to; Gould, Pl. c. 6, §§ 29, 37; Steph. Pl. 381; Lawes, Civ. Pl. 113; Bacon, Abr. *Pleas* (n. 6).

AFFORCE THE ASSIZE. To compel unanimity among the jurors who disagree.

It was done either by confining them without meat and drink, or, more anciently, by adding other jurors to the panel, to a limited extent, securing the concurrence of twelve in a verdict. See Bracton, 185 *b*, 292 *a*; Fleta, book 4, c. 9, § 2.

The practice is now discontinued.

AFFRANCHISE. To make free.

AFFRAY. In Criminal Law. The fighting of two more persons in some public place to the terror of the people.

It differs from a riot in not being premeditated; for if any persons meet together upon any lawful or innocent occasion, and happen on a sudden to engage in fighting, they are not guilty of a riot, but an affray only; and in that case none are guilty except those actually engaged in it; Hawk. Pl. Cr. book 1, c. 65, § 3; 4 Bla. Com. 146; 1 Russell, Cr. 271; 2 Bish. Cr. L. 1150.

Fighting in a private place is only an assault; 1 C. M. & R. 757; 1 Cox, Cr. Cas. 177; it must be in a public place and the indictment need not describe it; 83 N. C. 649; 20 Tex. 431; 8 Humph. 84.

AFFRECTAMENTUM (Fr. *fret*). Affreightment.

The word *fret* means tons, according to Cowel. *Affreightamentum* was sometimes used. Du Cange.

AFFREIGHTMENT. The contract by which a vessel, or the use of it, is let out to hire. See FREIGHT; GENERAL SHIP.

AFORESAID. Before mentioned; already spoken of or described.

Whenever in any instrument a person has once been described, all future references may be made by giving his name merely and adding the term "aforesaid" for the purpose of identification. The same rule holds good also as to the mention of places or specific things described, and generally as to any description once given which it is desirable to refer to.

Where a place is once particularly described in the body of the indictment, it is sufficient afterwards to name such place, and to refer to the venue by adding the word "aforesaid," without repeating the whole description of the venue; 1 Gabbett, Cr. Law 212; 5 Term 616.

AFORETHOUGHT. In Criminal Law. Premeditated; prepense.

The length of time during which the accused has entertained the thought of committing the offence is not very material, provided he has in fact entertained such thought; he is thereby rendered criminal in a greater degree than if he had committed the offence without premeditation. See MALICE AFORETHOUGHT; PREMEDITATION; 2 Chit. Cr. Law, 785; 4 Bla. Com. 199; Fost. Cr. Cas. 132, 291, 292; Cro. Car. 131; Palm. 545; W. Jones, 198; 4 Dall. 146; 25 Ark. 446; 2 Mason 91.

AFTER. Behind, following, subsequent to an event or date.

There is no invariable sense, however, to be attached to the word, but like "from," "succeeding," "subsequent," and similar words, where it is not expressly declared to be exclusive or inclusive, is susceptible of different significations and is used in different senses, as it will in the particular case effectuate the intention of the parties. Its true meaning must be collected from its context and subject-matter in any particular case; 18 Conn. 27.

AFTER ACQUIRED. See FUTURE ACQUIRED.

AFTERMATH. A second crop of grass. A right to last crop. 1 Chit. Pr. 181.

AGAINST THE FORM OF THE STATUTE. Technical words which must be used in framing an indictment for a breach of the statute prohibiting the act complained of.

The Latin phrase is *contra formam statuti*.

AGAINST THE WILL. Technical words which must be used in framing an indictment for robbery from the person. 1 Chit. Cr. Law 244.

In the statute of 13 Edw. I. (Westm. 2d) c. 34, the offence of rape is described to be ravishing a woman "where she did not consent," and not ravishing *against her will*. Per *Tindal*, C. J., and *Parke*, B., in the addenda to 1 Den. Cr. Cas. 1. And in Eng-

land this statute definition was adopted by all the judges; Bell, Cr. Cas. 63, 71.

AGARD. Award. Burrill, Dict.

AGE. That period of life at which the law allows persons to do acts or discharge functions which for want of years they were prohibited from doing or undertaking before.

The full age of twenty-one years is held to be completed on the day preceding the twenty-first anniversary of birth; 1 Bla. Com. 464; 1 Kebl. 589; 1 Salk. 44; 1 Ld. Raym. 84; 3 Harr. Del. 557; 4 Dana 597; 6 Ind. 447.

Males, before fourteen, are said not to be of discretion; at that age they may consent to marriage and choose a guardian. Twenty-one years is full age for all private purposes, and they may then exercise their rights as citizens by voting for public officers, and are eligible to all offices, unless otherwise provided for by law.

Females, at twelve, arrive at years of discretion, and may consent to marriage; at fourteen, they may choose a guardian; and twenty-one, as in males, is full age, when they may exercise all the rights which belong to their sex. The age of puberty for both sexes is fourteen.

As to the age of consent in prosecution for rape, see RAPE,

In the United States, at twenty-five, a man may be elected a representative in congress; at thirty, a senator; and at thirty-five, he may be chosen president. He is liable to serve in the militia from eighteen to forty-five inclusive, unless exempted for some particular reason. In England no one can be chosen member of parliament till he has attained twenty-one years; nor be ordained a priest under the age of twenty-four; nor made a bishop till he has completed his thirtieth year. The age of serving in the militia is from sixteen to forty-five years. The law, according to Blackstone, recognizes no minority in the heir to the throne.

In French Law. A person must have attained the age of forty to be a member of the legislative body; twenty-five to be a judge of a tribunal *de première instance;* twenty-seven, to be its president, or to be judge or clerk of a *cour royale;* thirty, to be its president or *procureur-général;* twenty-five, to be a justice of the peace; thirty, to be judge of a tribunal of commerce, and thirty-five, to be its president; twenty-five, to be a notary public; twenty-one, to be a testamentary witness; thirty, to be a juror. At sixteen, a minor may devise one-half of his property as if he were a major. A male cannot contract marriage till after the eighteenth year, nor a female before full fifteen years. At twenty-one, both males and females are capable to perform all the acts of civil life; Touillier, *Droit Civ.* liv. 1, Intr. n. 188.

In Roman Law. Infancy (*infantia*) extended to the age of seven; the period of childhood (*pueritia*), which extended from seven to fourteen, was divided into two periods; the first, extending from seven to ten and a half, was called the period nearest childhood (*ætas infantiæ proxima*); the other, from ten and a half to fourteen, the period nearest puberty (*ætas pubertati proxima*); puberty (*pubertas*) extended from fourteen to eighteen: full puberty extended from eighteen to twenty-five: at twenty-five, the person was *major*. See Taylor, Civ. Law 254; *Leçon El. du Droit Civ.* 22.

AGE-PRAYER. A statement made in a real action to which an infant is a party, of the fact of infancy and a request that the proceedings may be stayed until the infant becomes of age.

It is now abolished; stat. 11 Geo. IV.; 1 Will. IV. c. 37, § 10; 1 Lilly, Reg. 54; 3 Bla. Com. 300.

AGENCY. A relation between two or more persons, by which one party, usually called the agent or attorney, is authorized to do certain acts for, or in relation to the rights or property of, the other, who is denominated the principal, constituent, or employer. Prof. Joel Parker, MS. Lect. 1851.

A contract by which one person, with greater or less discretionary power, undertakes to represent another in certain business relations. Whart. Ag. 1.

The right on the part of the agent to act, is termed his authority or power. In some instances the authority or power must be exercised in the name of the principal, and the act done is for his benefit alone. In others, it may be executed in the name of the agent, and if the power is coupled with an interest on the part of the agent, it may be executed for his own benefit; Prof. Joel Parker, Harvard Law School Lect. 1851.

The creation of the agency, when express, may be either by deed, in writing not by deed, or by a verbal delegation of authority; 2 Kent 612; 9 Ves. 250; 11 Mass. 27, 97, 288; 1 Binn. 450; 4 Johns. Ch. 667.

When the agency is not express, it may be inferred from the relation of the parties and the nature of the employment, without proof of any express appointment; 2 Kent 613; 15 East 400; 1 Wash. Va. 19; 5 Day 556. Where relations exist which will constitute agency, it will be such whether the parties understand it to be or not; 72 Tex. 115. The admissions of a supposed agent cannot prove the existence of the agency; 23 Ill. App. 116; 48 *id.* 659; 35 Kan. 391; 70 Hun 568; 51 Minn. 141; 116 Mo. 51.

In most of the ordinary transactions of business the agency is either conferred verbally, or is implied from circumstances. But where the act is required to be done in the name of the principal by deed, the authority to the agent must also be by deed, unless the principal be present and verbally or impliedly authorize the agent to fix his name to the deed; 1 Liverm. Ag. 35; Paley, Ag. 157; Story, Ag. §§ 49, 51; 5 Binn. 613; 1 Wend. 424; 9 *id.* 54, 68; 12 *id.* 525; 14 S. & R. 331.

The *authority* may be *general*, when it extends to all acts connected with a particular business or employment; or *special*,

when it is confined to a single act; Story, Ag. § 17; Mech. Ag. 284, 285; 21 Wend. 279; 9 N. H. 263; 3 Blackf. 436; 82 Cal. 1. If the powers are special, they form the limits of the authority; if general, they will be more liberally construed, according to the necessities of the occasion and the course of the transaction.

The agency must be antecedently given, or subsequently adopted; and in the latter case there must be an act of recognition, or an acquiescence in the act of the agent from which a recognition may be fairly implied: 2 Kent 614. If, with full knowledge of what the agent has done, the principal ratify the act, the ratification will be equivalent to an original authority,—according to the maxim, *omnis ratihabitio retrotrahitur et mandato æquiparatur;* Paley, Ag. 172; 4 Ex. 798. The ratification relates back to the original making of the contract; 31 L. J. Ex. 163; 57 Fed. Rep. 973; except as to intermediate vested rights; 4 Ct. Cl. 511; 49 Ill. 59; 43 Mo. 113; 12 Minn. 255. It must be ratified in its entirety; 31 N. Y. 611; 1 Oreg. 115; 45 Ga. 153; 27 Mo. 163; 31 Iowa 547; 24 Neb. 653; 15 So. Rep. (La.) 16; and subject to the charges imposed by the agent; 9 H. L. C. 391. If the principal accepts the benefit of a contract, he is responsible for the fraudulent representations of the agent, although made without authority: 85 Tenn. 139; 40 Minn. 476; 78 Cal. 490; 157 Mass. 248; 65 Hun 182; 144 Pa. 398. An intention to ratify may be presumed from the silence of the principal who has received a letter from the agent informing him of what has been done on his account; 12 Wall. 358; 2 Biss. 255; 105 Mass. 551; 49 Pa. 457; 69 *id.* 426; 21 Mich. 374; 37 Ill. 442; 26 Iowa 38; 27 Tex. 120; 13 Colo. 69; or from any acts inconsistent with a contrary presumption; 26 Me. 84; 69 Pa. 426; 59 Ill. 23; 12 Kan. 135; or from a suit by the principal; 56 Me. 564; 21 Ark. 539; 28 Ill. 135; 9 B & C. 59; 12 Wall. 681; 12 Johns. 300; 3 Cow. N. Y. 281; 4 Wash. C. C. 549; 14 S. & R. 30; or by adoption of a submission to arbitration, although the agent exceeded his authority; 57 Conn. 105; or by keeping and enforcing a mortgage, obtained by an agent for the release of another mortgage; 63 Mich. 599. Ratification can only take place where the agent professed to act for the person ratifying; 5 B. & C. 909; Leake, Cont. 470. Thus a forged signature to a note cannot be ratified; L. R. 6 Ex. 89; *contra*, 46 Me. 176; 32 Ill. 387; 33 Conn. 95; 42 Pa. 143; Whart. Ag. § 71. A principal cannot ratify the acts of his agent where he has no knowledge of such acts; 71 Md. 200; 76 Ia. 129. The acts of the agent must be disapproved within a reasonable time after notice, or the principal will be considered as having ratified them by his silence; 45 La. Ann. 847.

The business of the agency may concern either the property of the principal, of a third person, of the principal and a third person, or of the principal and the agent, but must not relate solely to the business of the agent. A contract in relation to an illegal or immoral transaction cannot be the foundation of a legal agency; 1 Liverm. Ag. 6. 14.

The termination of the agency may be *by a countermand of authority* on the part of the principal, at the mere will of the principal; and this countermand may, in general, be effected at any time before the contract is completed; Story, Ag. §§ 463, 465; 53 Pa. 256; 46 *id.* 426; Whart. Ag. § 94; 141 U. S. 627; even though in terms irrevocable, provided there is no valid consideration, and the agent has not an interest in the execution of the authority entrusted to him; Story, Ag. §§ 476, 477; but when a contract has been made with contingent compensation for agency it cannot be revoked; 118 N. Y. 586. But when the authority or power is coupled with an interest, or when it is given for a valuable consideration, or when it is a part of a security, then, unless there is an express stipulation that it shall be revocable, it cannot be revoked; Story, Ag. §§ 476, 477; 2 Kent 643, 644; 8 Wheat, 174; 10 Paige 205; 34 N. Y. 24; 53 Pa. 212; 3 Const. 62: 2 Mas. C. C. 244, 342; 35 Fed. Rep. 22. When the authority has been partially executed by the agent, if it admit of severance, or of being revoked as to the part which is unexecuted, it may be revoked as to that part; but if it be not thus severable, and the agent by its execution in part will sustain damage, it cannot be revoked as to the unexecuted part unless the agent be fully indemnified; Story, Ag. § 466. This revocation may be by a formal declaration publicly made known, by an informal writing, or by parol; or it may be implied from circumstances, as, if another person be appointed to do the same act; Story, Ag. § 474; 5 Binn. 305; 6 Pick. 198. See 11 Allen 208. It takes effect from the time it is made known, and not before, both as regards the agent and third persons; Story, Ag. § 470; 2 Kent 644; Poll. Contr. 93; 11 N. H. 397; 7 Ct. of Cl. 535; 44 Ill. 114; 35 Vt. 179; 95 U. S. 48; 38 Conn. 197. When one is not notified of revocation of agent's authority, he is justified in acting upon the presumption of its continuance; 128 U. S. 374; 75 Cal. 159; 82 Va. 712.

The determination may be by the *renunciation* of the agent either before or after a part of the authority is executed; Story, Ag. § 478; it should be observed, however, that if the renunciation be made after the authority has been partly executed, the agent by renouncing it becomes liable for the damages which may thereby be sustained by his principal; Story, Ag. § 478; Jones, Bailm. 101; 4 Johns. 84; or by *operation of law*, in various ways. And the agency may terminate by the expiration of the period during which it was to exist and to have effect; as, if an agency be created to endure a year, or until the happening of a contingency, it becomes extinct at the end of the year, or on the happening of the contingency; Story, Ag. § 480.

The determination may result from the

marriage of a principal, if a *feme sole;* 46 Mo. App. 1; the *insanity* of the principal; 10 N. H. 156; 8 Wheat. 174; *bankruptcy;* Story, Ag. § 482; 16 East 382; Baldw. C. C. 38; or *death;* 75 Cal. 349; Story, Bailm. § 209; 2 Kent 645. In England and most of the United States this revocation is instantaneous, even as to third parties without notice; L. R. 4 C. P. 744; 84 Ill. 286; 10 M. & W. 1; 5 Pet. 319; 12 N. H. 145; 25 Ind. 182; 2 Humph. 350; 31 Ala. 274; 29 Tex. 204; 28 Cal. 645; 77 Iowa 73; 9 Wend. 452. No notice is necessary to relieve the estate of the principal of responsibility, even on contracts into which the agent has entered with third persons, who are ignorant of principal's death; 113 N. Y. 600; 64 Hun 194; if an order is sent by mail the day before principal died and is filled in ignorance of the death, the contract is binding as of the date on which the order was mailed; 93 Ala. 173; but notice is necessary in Pennsylvania, Missouri, and, in some cases, in Ohio; 4 W. & S. 282; 26 Mo. 313; 8 Ohio St. 520; and under the civil law; Whart. Ag. § 101; *but not* when the authority is coupled with an interest; 53 Pa. 266; 4 Campb. 325; 8 Wheat. 174; 10 Paige 201; see 4 Pet. 332; or from the *insanity;* Story, Ag. § 487; *bankruptcy;* 5 B. & Ald. 27, 31; or *death* of the agent; 2 Kent 643; though not necessarily by *marriage* or *bankruptcy;* Story, Ag. §§ 485, 486; 12 Mod. 383; 3 Burr. 1469, 1471; from *the extinction* of the subject-matter of the agency, or of the principal's power over it, or by the complete execution of the trust; Story, Ag. 499.

As to revocation by *lunacy* of principal, see 4 Q. B. D. 661; s. c. 19 Am L. Reg. 106, with Judge Bennett's note reviewing cases. As to revocation by *death* of principal, see *id.* 401.

See AGENT.

AGENS (Lat. *agere*, to do; to conduct). A conductor or manager of affairs.

Distinguished from *factor*, a workman.

A plaintiff. Fleta, lib. 4, c. 15, § 8.

AGENT (Lat. *agens;* from *agere*, to do). One who undertakes to transact some business, or to manage some affair, for another, by the authority and on account of the latter, and to render an account of it; 1 Livermore, Ag. 67; 2 Bouvier, Inst. 3. See Co. Litt. 207; 1 B. & P. 316.

The term is one of a very wide application, and includes a great many classes of persons to which distinctive appellations are given; as, factors, brokers, attorneys, cashiers of banks, auctioneers, clerks, supercargoes, consignees, ships' husbands, masters of ships, and the like. The terms agent and attorney are often used synonymously. Thus, a letter or power of attorney is constantly spoken of as the formal instrument by which an agency is created; Paley, Ag. Dunl. ed. 1, n.

Who may be.

Many person disqualified from acting for themselves, such as infants (117 Mass. 479; 1 A. K. Marsh. 460), persons attainted or outlaws, aliens (19 La. Ann. 482; see 18 Wall. 106; 42 N. Y. 54; 62 Ill. 61), slaves, and others, could act as agents in the execution of a naked authority; Whart. Ag. § 14; Mechem, Ag. § 57; 45 Ala. 656; 1 Hill S. C. 270; Co. Litt. 252 *a;* Story, Ag. § 4. A *feme covert* may be the agent of her husband, and as such, with his consent, bind him by her contract or other act; 47 Ala. 624; 16 Vt. 633; 3 Head 471; 64 Hun 83; 70 Ga. 385; 101 N. Y. 77; 78 Ala. 31; 58 Md. 523; but she cannot contract for the sale of his land without express authority; 141 Ill. 454; see 70 Pa. 181; and she may be the agent of another in a contract with her husband; Bacon, Abr. *Authority*, B; 6 N. H. 124; 3 Whart. 369; 16 Vt. 653; Story, Ag. § 7. But although she is in general competent to act as the agent of a third person; 7 Bingh. 565; 1 Esp. 142; 2 *id.* 511; 4 Wend. 465; 110 Mass. 97; 24 Miss. 121; 42 Barb. 194; it is not clear that she can do so when her husband expressly dissents, particularly when he may be rendered liable for her acts; Story, Ag. § 7. See 78 Ala. 31. The husband may be agent for the wife; 151 Mass. 11; 61 Hun 624; 87 Mich. 278; 94 *id.* 268; 3 Ind. App. 415; by virtue of his relations alone he has no implied power to act; 46 Ia. 696; 26 *id.* 297; 54 Miss. 700; or a son may be the agent of his father; 87 Mich. 629. Persons *non compos mentis* cannot be agents for others; Whart. Ag. § 15 (but see Ewell's Evans, Agency * 10; 4 Exch. 7; s. c. Ewell, Lead. Cas. on Disabilities 614; as to cases when one deals with a lunatic, not knowing of his lunacy. See, also, 55 Ill. 62; 34 Ind. 181; 14 Barb. 488; 23 Iowa 433; 48 N. H. 133; 6 Gray 279; 23 Ark. 417; 24 Ind. 238; 38 N. J. L. 536; 4 Q. B. D. 661); nor can a person act as agent in a transaction where he has an adverse interest or employment; 2 Ves. Ch. 317; 11 Cl. & F. 714; 3 Beav. 783; 2 Campb. 203; 2 Chit. Bail. 205; 30 Me. 431; 24 Ala. N. S. 358; 3 Denio 575; 19 Barb. 595; 20 *id.* 470; 6 La. 407; 7 Watts 472; 113 Mass. 133; 40 Mich. 375; 37 Ohio St. 396; Mechem, Ag. § 66; and whenever the agent holds a fiduciary relation, he cannot contract with the same general binding force with his principal as when such a relation does not exist; Story, Ag. § 9; 1 Story, Eq. Jur. §§ 308, 328; 4 M. & C. 134; 14 Ves. 290; 3 Sumn. 476; 2 Johns. Ch. 251; 11 Paige 538; 5 Me. 420; 6 Pick. 198; 4 Conn. 717; 10 Pet. 269.

Extent of authority.

The authority of the agent, unless the contrary clearly appears, is presumed to include all the necessary and usual means of executing it with effect; 5 Bingh. 442; 2 H. Bla. 618; 10 Wend. 218; 6 S. & R. 146; 11 Ill. 177; 9 Metc. 91; 22 Pick. 85; 15 Miss. 365; 9 Leigh Va. 387; 11 N. H. 424; 6 Ired. 252; 10 Ala. N. S. 386; 21 *id.* 488; 1 Ga. 418; 1 Sneed 497; 8 Humphr. 509; 15 Vt. 155; 2 McLean 543; 8 How. 441; 15 Conn. 347; 90 N. C. 101; 15 La. Ann. 247; 43 Mich. 364; 93 N. Y. 495; 87 Ind. 187. Where, however, the whole authority is conferred by a

written instrument, its nature and extent must be ascertained from the instrument itself, and cannot be enlarged by parol evidence; 1 Taunt. 347; 5 B. & Ald. 204; 7 Rich. 45; 1 Pet. 264; 3 Cranch 415; 45 Mo. 528; 39 *id.* 228; and parol evidence cannot be used to contradict the writing; Bish. Cont. § 169.

Generally, in *private* agencies, when an authority is given by the principal; 7 N. H. 253; 1 Dougl. Mich. 119; 11 Ala. N. S. 755; 1 B. & P. 229; 3 Term 592; to two or more persons to do an act, and no several authority is given, all the agents must concur in doing it in order to bind the principal, though one die or refuse; 3 Pick. 232; 6 *id.* 198; 12 Mass. 185; 23 Wend. 324; 6 Johns. 39; 9 W. & S. 56; 10 Vt. 532; 12 N. H. 226; 1 Gratt. 226; 53 N. Y. 114; 57 Ill. 180; 25 Ia. 115; 11 Ala. 755; 10 Wis. 271.

The words jointly *and* severally, and jointly *or* severally, have been construed as authorizing all to act jointly, or each one to act separately, but not as authorizing any portion of the number to do the act jointly; Paley, Ag. Lloyd ed. 177, *note;* 5 B. & Ald. 628. But where the authority is so worded that it is apparent the principal intended to give power to either of them, and execution by a part will be valid; Co. Litt. 49 *b;* Dyer 62; 5 B. & Ald. 628; 25 Ia. 115; 53 N. Y. 114. And generally, in commercial transactions, each one of several agents possesses the whole power. For example, on a consignment of goods for sale to two factors (whether they are partners or not), each of them is understood to possess the whole power over the goods for the purposes of the consignment; 20 Pick. 59; 24 *id.* 13; see 53 N. Y. 114. In public agencies an authority executed by a majority will be sufficient; 1 Co. Litt. 181 *b;* Comyns, Dig. *Attorney*, C. 15; Bacon, Abr. *Authority*, C; 1 Term 592; 10 Wis. 271; 11 Ala. 755; 154 Mass. 277.

A mere agent cannot, generally, appoint a sub-agent, so as to render the latter directly responsible to the principal; 9 Co. 75; 2 M. & S. 298, 301; 1 Younge & J. 387; 4 Mass. 597; 12 *id.* 241; 1 Hill 501; 13 B. Monr. 400; 12 N. H. 226; 3 Story, 411; 72 Pa. 491; 26 Wend. 485; 11 How. 209; 28 Tex. 163; 34 Miss. 63; 71 Wis. 292; 21 N. H. 149; 114 Mass. 331; 50 Ala. 347; but may when such is the usage of trade, or is understood by the parties to be the mode in which the particular business might be done; 9 Ves. 234; 1 M. & S. 484; 2 *id.* 301; 6 S. & R. 386; 1 Ala. N. S. 249; 3 Johns. Ch. 167; 51 N. Y. 117; 16 Mass. 396; 28 Tex. 163; 3 Bing. N. Cas. 814; or when necessity requires it; 1 Cush. 177; 1 Ala. 249; 3 Johns. Ch. 167; and also if agent is given all the powers the principal might have exercised; 87 Mich. 278; but not if the agency is of such a nature as to be personal to the agent; 83 Ala. 384; or if it requires special skill, discretion, or judgment; 12 Mass. 237; 1 Hill 501; 75 N. C. 534; 4 McLean 259.

Duties and liabilities.

The particular obligations of an agent vary according to the nature, terms, and end of his employment; Paley, Ag. 3; 2 Ld. Raym. 517. He is bound to execute the orders of his principal whenever, for a valuable consideration, he has undertaken to perform them; 5 Cow. 128; 20 Wend. 321. When his authority is limited by instructions, it is his duty to adhere faithfully to those instructions; Paley, Ag. 3, 4; 3 B. & P. 75; 5 *id.* 269; 3 Johns. Cas. 36; 1 Sandf. 111; 26 Penn. 394; 14 Pet. 494; 25 N. J. Eq. 202; 48 Ga. 128; 3 W. Va. 133; 31 Ill. 200; 37 Ill. App. 124; Mechem, Ag. § 473; but cases of extreme necessity and unforeseen emergency constitute exceptions to this rule; 1 Story 45; 4 Binn. 361; 5 Day 556; 26 Pa. 394; 4 Campb. 83; 13 Allen 363; 21 N. Y. 386; 45 Ill. 186; and where the agent is required to do an illegal or an immoral act; 6 C. Rob. Adm. 207; 7 Term 157; 11 Wheat. 258; 14 Johns. (N. Y.) 119; 57 Ind. 54; 6 Heisk. 45; he may violate his instructions with impunity; Story, Ag. §§ 193, 194, 195. If he have no specific instructions, he must follow the accustomed course of the business; 1 Gall. C. C. 360; 11 Mart. La. 636. Where parties carry on business in name of another, they are justified in employing an attorney to defend a suit in the name of such person; 38 Minn. 32. When the transaction may, with equal advantage to the principal, be done in two or more different ways, the agent may in general do it in either, provided a particular mode has not been prescribed to him; 1 Liverm. Ag. 103. He is to exercise the skill employed by persons of common capacity similarly engaged, and the same degree of diligence that persons of ordinary prudence are accustomed to use about their own affairs; 6 Taunt. 495; 10 Bingh. 57; 1 Johns. 364; 20 Pick. 167; 6 Metc. 13; 24 Vt. 149; 57 Mo. 93; 66 Ill. 136; 21 Wall. 178; 38 Miss. 242; 147 Pa. 523; 11 M. & W. 113; 27 N. H. 460; 88 N. Y. 535; 28 Me. 97; 69 Ill. 155. It is his duty to keep his principal informed of his doings, and to give him reasonable notice of whatever may be important to his interests; 5 M. & W. 527; 4 W. & S. 305; 1 Story 43, 56; 4 Rawle 229; 6 Whart. 9; 13 Mart. La. 214, 365. He is also bound to keep regular accounts, and to render his accounts to his principal at all reasonable times, without concealment or overcharge; 22 Tex. 703; 22 La. Ann. 599; 9 Iowa 589; 52 Ill. 512; 17 Mass. 145; 52 Ill. 512; 22 La. Ann. 599.

As to their principals, the liabilities of agents arise from a violation of duties and obligations to them by exceeding his authority, by misconduct, or by any negligence, omission, or act by the natural result or just consequence of which the principal sustains a loss; Paley, Ag. 7, 71; 74 Mech. Ag. 454 *et seq.*; 1 B. & Ad. 415; 6 Hare 366; 12 Pick. 328; 20 *id.* 167; 11 Ohio 363; 13 Wend. 518; 125 Pa. 123; 27 N. H. 460; 105 Mass. 477; 88 N. Y. 535. And joint agents who have a common interest are liable for the misconduct and omissions of each other, in violation of their duty, although the business has, in fact, been wholly transacted

by one with the knowledge of the principal, and it has been privately agreed between themselves that neither shall be liable for the acts or losses of the other; Paley, Ag. 52, 53; 7 Taunt. 403; 3 Wils. 73; 51 N. Y. 373.

One undertaking to settle a debt for another cannot purchase it on his own account; 45 N. J. Eq. 306; and a sale by agent of principal's property to himself is void at the option of the principal; 84 Ky. 565; 77 Cal. 126; and a sale of land by agent to his wife is voidable; 128 Ill. 136.

An agent of a vendor, who speculates in the subject-matter of his agency, or intentionally becomes interested in it as a purchaser, or as the agent of a purchaser, violates his contract of agency, betrays his trust, forfeits his commission, and becomes indebted to his principal for any profit made by his breach of duty; 74 Fed. Rep. 94.

The degree of neglect which will make the agent responsible for damages varies according to the nature of the business and the relation in which he stands to his principal. The rule of the common law is, that where a person holds himself out as of a certain business, trade, or profession, and undertakes, whether gratuitously or otherwise, to perform an act which relates to his particular employment, an omission of the skill which belongs to his situation or profession is imputable to him as a fraud upon his employer; Paley, Ag. Lloyd ed. 7, *note* 4. But where his employment does not necessarily imply skill in the business he has undertaken, and he is to have no compensation for what he does, he will not be liable to an action if he act *bona fide* and to the best of his ability; 1 Liverm. Ag. 336, 339, 340. See 11 M. & W. 113.

As to third parties, generally, when a person having full authority is known to act merely for another, his acts and contracts will be deemed those of the principal only, and the agent will incur no personal responsibility; Paley, Ag. 368, 369; 2 Kent 629, 630; Poll. Contr. 94; 15 East 62; 3 P. Wms. 277; 6 Binn. 324; 13 Johns. 58, 77; 15 *id.* 1; 37 Fed. Rep. 852. But when an agent does an act without authority, or exceeds his authority, and the want of authority is unknown to the other party, the agent will be personally responsible to the person with whom he deals; Story, Ag. § 264; Mech. Ag. 542, 550; 2 Taunt. 385; 7 Wend. 315; 8 Mass. 178. In case the agent conducts the business in his own name, for the benefit and with the property of the principal, the latter cannot escape liability for the purchase price of goods by a secret limitation on the agent's authority to purchase; 124 Pa. 291; 19 Pitts. L. J. N. S. 425; 90 Mich. 125. If the agent having original authority contract in the name of his principal, and it happen that at the time of the contract, unknown to both parties, his authority was revoked by the death of the principal, the agent will not be personally responsible; Story, Ag. § 265 *a*; 10 M. & W. 1; but no notice of the death is necessary to relieve the estate of the principal from responsibility, those dealing with an agent assuming the risk that his authority may be terminated without notice to them; 113 N. Y. 600.

An agent will be liable on a contract made with him when he expressly, or by implication, incurs a personal responsibility; Story, Ag. §§ 156–159, 269; 85 Ala. 211; 21 Com. 627; 8 M. & W. 834; 2 *id.* 440; as, if he make an express warranty of title, and the like; or if, though known to act as agent, he give or accept a draft in his own name; 5 Taunt. 74; 1 Mass. 27, 54; 2 Duer 260; 2 Conn. 453; 5 Whart. 288; 114 N. Y. 535; 81 Ga. 175; and public as well as private agents may, by a personal engagement, render themselves personally liable; Paley, Ag. 381. If he makes a contract, signs a note, or accepts a draft as "agent," without disclosing his principal, he becomes personally liable unless the person with whom he is dealing has knowledge of the character and extent of the agency or the circumstances of the transaction are sufficient to inform him; 1 Am. L. C. 766, 767; 61 Pa. 69; 79 *id.* 298; 12 Colo. 161; 86 Ky. 530; 44 La. Ann. 209; 63 Law T. 765; 42 Ill. 238; 36 *id.* 82; 48 Ga. 96; 71 N. Y. 348; 139 Mass. 275; 9 Fed. Rep. 423. In general, although a person contract as agent, yet if there be no other responsible principal to whom resort can be had, he will be personally liable; as, if a man sign a note as "guardian of A. B.," an infant, in that case neither the infant nor his property will be liable, and the agent alone will be responsible; 2 Brod. & B. 460; 5 Mass. 299; 6 *id.* 58; 8 Cowen 31; 2 Wheat. 45; 84 N. C. 680; 5 East 147. The fact that a person may sue an agent in a contract made with him does not prevent suit from being brought against principal when he is discovered; 123 Pa. 95. The case of an agent of government, acting in that capacity for the public, is an exception to this rule, even though the terms of the contract be such as might, in a case of a private nature, involve him in a personal obligation; it not being presumed that a public agent meant to bind himself individually; Paley, Ag. 376, 377; and see 5 B. & Ald. 34; 1 Brown, Ch. 101; 6 Dowl. & R. 122; 7 Bingh. 110; 1 Cra. 345; 48 N. J. L. 22; 3 Dall. 384. Masters of ships, though known to contract for the owners of the ships and not for themselves, are liable for the contracts they make for repairs, unless they negative their responsibility by the express terms of the contract; Paley, Ag. 388; 15 Johns. 298; 16 *id.* 89; 11 Mass. 34. As a general rule, the agent of a person resident in a foreign country is personally liable upon all contracts made by him for his employer, whether he describe himself in the contract as agent or not, this being the usage of trade, and it being presumed that the credit was given to him and not to his principal; 15 East 68; 9 B. & C. 78; L. R. 9 Q. B. 572; 35 Md. 396; 15 East 62; 22 Wend. 244; 33 Me. 106; 5 W. & S. 9; 3 Hill, N. Y. 72; but this presumption may be rebutted by proof of a contrary agreement; 11 Ad. & E. 589, 594, 595; and does

not apply to agents in a different state within the U. S.; 23 Ind. 63. An agent for a foreign principal now stands upon the same grounds as those acting for domestic employers; 38 La. Ann. 485; 109 Mass. 187; 23 How. 49; 14 Ad. & El. N. S. 405; L. R. 9 Q. B. 572.

An agent is personally responsible where money has been paid to him for the use of his principal under such circumstances that the party paying it becomes entitled to recall it. In such cases, as long as the money has not been paid over by the agent, nor his situation altered, as by giving his principal *fresh credit* upon the faith of it, it may be recovered from the agent; Story, Ag. § 300; 3 M. & S. 344; 7 Johns. 179; 1 Wend. 173; and if, in receiving the money, the agent was a wrong-doer, he will not be exempted from liability by payment to his principal; Paley, Ag. 393, 394; 1 Campb. 396. If his principal was not entitled to it, but the agent pays it to him after notice not to do so, the agent is liable therefor; 63 Hun 636.

With regard to the liability of agents to third persons for torts, there is a distinction between acts of misfeasance or positive wrongs, and nonfeasances or mere omissions of duty. In the former case, the agent is personally liable to third persons, although authorized by his principal; Story, Ag. § 311; Paley, Ag. 396; 1 Wils. 328; 1 B. & P. 410; 28 Me. 464; 37 Minn. 120; 87 Ind. 549; 67 Barb. 47; 47 Mich. 569; 136 Mass. 229; 91 Ill. 297; but see 83 Ala. 333; while in the latter he is, in general, solely liable to his principal; Story, Ag. § 308; Paley, Ag. 396, 397, 398; Story, Bailm. §§ 400, 404, 507; 34 La. Ann. 1123; 16 Fed. Rep. 87; 62 Me. 552.

A principal is liable civilly for the neglect, fraud, deceit, or other wrongful act of his *general* agent, though personally innocent of the fraud; 58 Mo. 380; 132 Mass. 335; 121 Ill. 140; 91 U. S. 45; 82 Mich. 315.

But this rule does not apply to *special* agents; 152 Mass. 112. If a special agent makes false representations on the subject of the transaction in order to influence the other party to enter into the contract, the principal is responsible for the deceit; 23 Wend. 260; Webb's note to Poll. Torts 383.

Where the principal receives and retains the benefit of a contract obtained through the fraud of his agent, he is liable to an action for deceit; *id.* 384; 63 Pa. 87.

For an independent fraud by an agent not within the scope of his agency, the principal is not responsible; Webb, Poll. Torts 384, citing 36 Barb. 655.

As to misrepresentations by an agent, the rules are thus given in Poll. Torts 384:

Where the principal knows the representation to be false and authorizes the making of it, he is clearly liable; the agent is liable or not according as he does or does not himself believe the representation to be true.

Where the principal knows the contrary of the representation to be true and it is made by the agent in the general course of his employment, but without specific authority, if the agent does not believe his representation to be true, he commits a fraud in the interest of the principal and the principal is liable; 6 M. & W. 373. If the agent does believe the representation to be true, an action would probably lie against the principal; though see 14 App. Ca. 337, S. C. 58 L. J. Ch. 864. In the latter class of cases there is no doubt that the other contracting party may rescind; Poll. Torts 384.

The principal and agent are both liable where a tortious act was committed by the agent; 3 Ind. App. 491.

Where the *sub-agents* are appointed, if the agent has either express or implied authority to appoint a sub-agent, he will not ordinarily be responsible for the acts or omissions of the substitute; 2 B. & P. 438; 2 M. & S. 301; 1 Wash. C. C. 479; 8 Cow. 198 (but only for negligence in choosing the substitute; Whart. Negl. § 277; Mechem, Ag. § 197); and this is especially true of public officers; 1 Ld. Raym. 646; Cowp. 754; 15 East 384; 7 Cra. 242; 9 Wheat. 720; 8 Wend. 403; 3 Hill 531; 22 N. H. 252; 13 Ohio 523; 1 Pick. 418; 4 Mass. 378; 8 Watts 455; but the sub-agent will himself be directly responsible to the principal for his own negligence or misconduct; Story, Ag. §§ 201, 217 *a*; 2 Gall. C. C. 565; 8 Cow. 198.

Rights and privileges.

As to his principal, an agent is ordinarily entitled to compensation for his services, commonly called a commission, which is regulated either by special agreement, by the usage of trade, or by the presumed intention of the parties; Story, Ag. §§ 324, 326; 8 Bingh. 65; 1 Caines 349; 2 *id.* 357; 36 Fed. Rep. 217; 38 Ill. 443. In general, he must have faithfully performed the whole service or duty before he can claim any commissions; Story, Ag. §§ 329, 331; 1 C. & P. 384; 4 *id.* 289; 7 Bingh. 99; 16 Ohio 412; 47 Fed. Rep. 361. The right to commissions accrues on orders for the sale of articles where there is absence of warranty as to responsibility of parties giving the orders, when they are accepted and the goods forwarded; 37 Fed. Rep. 760. See 3 Wash. St. 737. The right to commissions accrues where the agent has a purchaser who accepts property and is ready to perform a contract of sale, although the principal refuse to be bound by authority of agent; 147 Mass. 417; 44 Ill. App. 113. Also if vendor releases the purchaser from his obligation; 43 Ill. App. 21. He may forfeit his right to commissions by gross unskilfulness, by gross negligence, or gross misconduct, in the course of his agency; 3 Campb. 451; 7 Bingh. 569; 12 Pick. 328; as, by not keeping regular accounts; 8 Ves. 48; 11 *id.* 358; 17 Mass. 145; 2 Johns. Ch. 108; by violating his instructions; by wilfully confounding his own property with that of his principal; 9 Beav. 284; 5 B. & P. 136; 11 Ohio 363; by fraudulently misapplying the funds of his principal; see

Chit. Com. L. 222; by embarking the property in illegal transactions; or by doing anything which amounts to a betrayal of his trust; 12 Pick. 328, 332, 334; 20 Gratt. 672; 21 Iowa 326; L. R. 9 Q. B. 480; 98 Mass. 348; 25 Conn. 386; 52 Ill. 512; 9 Kans. 320; 29 Cal. 142; 71 Pa. 206; 44 La. Ann. 383.

The agent has a right to be reimbursed his advances, expenses, and disbursements reasonably and in good faith incurred and paid, without any default on his part, in the course of the agency; 5 B. & C. 141; 3 Binn. 295; 11 Johns. 439; 4 Halst. Ch. 657; 127 N. Y. 151; 45 Ga. 501; 57 *id.* 362; 86 Pa. 120; 69 Ill. 575. And also to be paid interest on such advancements and disbursements whenever it may fairly be presumed to have been stipulated for, or to be due to him; 15 East 223; 3 Campb. 467; 7 Wend. 315; 3 Caines 226; 3 Binn. 295. But he cannot recover for advances and disbursements made in the prosecution of an illegal transaction, though sanctioned by or even undertaken at the request of his principal; Story, Ag. § 344; 3 B. & C. 639; 17 Johns. 142; and he may forfeit all remedy against his principal even for his advances and disbursements made in the course of legal transactions by his own gross negligence, fraud, or misconduct; 12 Wend. 362; 12 Pick. 328, 332; 20 *id.* 167; 65 Ind. 32; nor will he be entitled to be reimbursed his expenses after he has notice that his authority has been revoked; 2 Term 113; 8 *id.* 204; 3 Brown, Ch. 314.

The agent may enforce the payment of a debt due him from his principal on account of the agency, either by an action at law or by a bill in equity, according to the nature of the case; and he may also have the benefit of his claim by way of set-off to an action of his principal against him, provided the claim is not for uncertain damages, and is in other respects of such a nature as to be the subject of a set-off; Story, Ag. §§ 350, 385; 4 Burr 2133; 6 Cow. 181; 11 Pick. 482. He may recover actual damages sustained in an action brought at the end of the term for breach of contract; 61 N. Y. 362; 78 *id.* 192; 78 Ind. 422; 15 Ad. & El. N. S. 576; 44 Ohio St. 226. He has also a lien for all his necessary commissions, expenditures, advances, and services in and about the property intrusted to his agency, which right is in many respects analogous to the right of set-off; Story, Ag. § 373; Mech. Ag. 1032; 40 N. H. 88, 511; 67 Ill. 139; 8 Iowa 211; 30 Miss. 578; but it is only a *particular* lien; 9 Cush. 215; 8 Engl. (Ark.) 437; 8 H. L. Cas. 838; 22 Me. 138; 42 *id.* 50; 8 Iowa 207; 30 Mo. 581; 86 Pa. 486. Factors have a *general* lien upon the goods of their principal in their possession, and upon the price of such as have been lawfully sold by them, and the securities given therefor; 2 Kent 640; 26 Wend. 367; 10 Paige, Ch. 205; 60 Wis. 406; 37 Conn. 378; 2 McLean 145; 8 How. 384; 52 Ill. 307; 63 N. Y. 598. There are other cases in which a general lien exists in regard to particular classes of agents, either from usage, from a special agreement of the parties, or from the peculiar habit of dealing between them: such, for example, as insurance brokers, bankers, common carriers, attorneys-at-law, and solicitors in equity, packers, calico-printers, fullers, dyers, and wharfingers; Story, Ag. §§ 379-384. See LIEN.

As to third persons, in general, a mere agent who has no beneficial interest in a contract which he has made on behalf of his principal cannot support an action thereon; 1 Liverm. Ag. 215; 22 Pa. 522. An agent acquires a right to maintain an action upon a contract against third persons in the following cases: *First*, when the contract is in writing, and made expressly with the agent, and imports to be a contract personally with him; as, for example, when a promissory note is given to the agent, as such, for the benefit of the principal, and the promise is to pay the money to the agent *eo nomine;* in such case the agent is the legal plaintiff, and alone can bring an action; Story, Ag. §§ 393, 394, 396; 3 Pick. 322; 16 *id.* 381; 5 Vt. 500; Dicey, Parties 134; 5 Pa. 520; 27 *id.* 97; 13 Gray 64; 8 Conn. 60; 99 Mass. 378; 121 U. S. 451; 105 N. Y. 653; L. R. 6 Q. B. 361; and it has been held that the right of the agent in such case to sue in his own name is not confined to an express contract; thus, it has been said that one holding, as mere agent, a bill of exchange, or promissory note, indorsed in blank, or a check or note payable to bearer, may yet sue on it in his own name; Paley, Ag. Dunl. ed. 361, *note;* 30 Ala. 482; 39 Me. 205; 9 Ind. 260; 8 Mass. 103. *Second*, the agent may maintain an action against third persons on contracts made with them, whenever he is the only known and ostensible principal, and consequently, in contemplation of law, the real contracting party; Russ. Fact. & B. 241, 244; Story, Ag. § 393; Dicey, Parties 136-138; 5 Pa. 41; 9 Vt. 407; 5 B. & Ad. 389; as, if an agent sell goods of his principal in his own name, as though he were the owner, he is entitled to sue the buyer in his own name; 12 Wend. 413; 5 M. & S. 833; 29 Md. 232; 4 Bing. 2; and, on the other hand, if he so buy, he may enforce the contract by action. The renunciation of the agent's contract by the principal does not necessarily preclude the agent from maintaining an action, but he will still be entitled to sue the party with whom he has contracted for any damages which he may have sustained by reason of a breach of contract by the latter; Russ. Fact. & B. 243, 244; 2 B. & Ald. 962. *Third*, the right of the agent to sue in his own name exists when, by the usage of trade or the general course of business, he is authorized to act as owner, or as a principal contracting party, although his character as agent is known; Story, Ag. § 393. *Fourth*, where the agent has made a contract in the subject-matter of which he has a special interest or property, he may enforce his contract by action, whether he held himself out at the time to be acting in his own be-

half or not; 1 Liverm. Ag. 215–219; Story, Ag. § 393; 27 Ala. N. S. 215; Dicey, Parties 139; 22 Pa. 522; 53 N. H. 519; 99 Mass. 383; for example, an auctioneer who sells the goods of another may maintain an action for the price, though the sale be on the premises of the owner of the goods, because the auctioneer has a possession coupled with an interest; 2 Esp. 493; 1 H. Bla. 81, 84, 85. But this right of the agent to bring an action in his own name is subordinate to the rights of the principal, who may, unless in particular cases where the agent has a lien or some other vested right, bring a suit himself, and suspend or extinguish the right of the agent; Story, Ag. § 403; 3 Hill 72, 73; 6 S. & R. 27; 4 Campb. 194; 5 M. & Sel. 385; 99 Mass. 383; 105 N. Y. 653.

An agent may maintain an action of trespass or trover against third persons for injuries affecting the possession of his principal's property; and when he has been induced by the fraud of a third person to sell or buy goods for his principal, and he has sustained a personal loss, he may maintain an action against such third person for such wrongful act, deceit, or fraud; Story, Ag. §§ 414, 415; 9 B. & C. 208; 3 Campb. 320; 1 H. Bla. 81; 1 B. & Ald. 59. But his remedy for mere torts is confined to cases like the foregoing, where his "right of possession is injuriously invaded, or where he incurs a personal responsibility, or loss, or damage in consequence of the tort"; Story, Ag. § 416. See 28 Mich. 366.

Gifts procured by agents and purchases made by them from their principals should be scrutinized with vigilant and close scrutiny; 129 U. S. 663.

A sub-agent employed without the knowledge or consent of the principal has his remedy against his immediate employer only, with regard to whom he will have the same rights, obligations, and duties as if the agent were the sole principal. But where sub-agents are ordinarily or necessarily employed in the business of the agency, the sub-agent can maintain his claim for compensation both against the principal and the immediate employer, unless the agency be avowed and exclusive credit be given to the principal, in which case his remedy will be limited to the principal; 6 Taunt. 147; 4 Wend. 285; 16 La. Ann. 127; 6 S. & R. 386; 3 Johns. 167.

A sub-agent will be clothed with a lien against the principal for services performed and disbursements made by him on account of the sub-agency, whenever a privity exists between them; Story, Ag. § 388; Mech. Ag. 693; 2 Campb. 218, 597; 2 East 523; 6 Wend. 475; 22 Me. 138. If he is appointed without the express or implied authority of the principal, he can acquire no lien; Story, Ag. § 389; 1 East 335; 4 Campb. 348. He will acquire a lien against the principal if the latter ratifies his acts, or seeks to avail himself of the proceeds of the sub-agency, though employed by the agent without the knowledge or consent of the principal; Story, Ag. § 389; 2 Campb. 218, 597, 598; 4 *id.* 348, 353; 22 Me. 138. He may avail himself of his general lien against the principal by way of substitution to the rights of his immediate employer, to the extent of the lien of the latter; 1 East 335; 2 *id.* 523, 529; 7 *id.* 7; 6 Taunt. 147; 2 M. & S. 298; 2 *id.* 301; 6 Taunt. 147. And there are cases in which a sub-agent who has no knowledge or reason to believe that his immediate employer is acting as an agent for another will have a lien on the property for his general balance; 2 Livermore, Ag. 87–92; Paley, Ag. 148, 149; Story, Ag. § 390; 4 Campb. 60, 349, 353.

See INSURANCE AGENT; AGENCY.

Consult Livermore, Paley, Ross, Story, Wharton, Mechem, *Agency;* Addison, Chitty, Parsons, Story, *Contracts;* Cross, *Lien;* Kent, *Commentaries;* Bouvier, *Institutes.*

AGENT AND PATIENT. A phrase indicating the state of a person who is required to do a thing, and is at the same time the person to whom it is done; as, when a man is indebted to another, and he appoints him his executor, the latter is required to pay the debt in his capacity of executor, and entitled to receive it in his own right; he is then *agent and patient.* Termes de la Ley.

AGER (Lat.). **In Civil Law.** A field; land generally.

A portion of land enclosed by definite boundaries.

Used like the word *acre* in the old English law, denoting a measure of undetermined and variable value; Spelman, Gloss.; Du Cange; 3 Kent 441.

AGGRAVATION (Lat. *ad*, to, and *gravis*, heavy; *aggravare*, to make heavy). That which increases the enormity of a crime or the injury of a wrong.

In Criminal Law. One of the rules respecting variances is, that cumulative allegations, or such as merely *operate in aggravation*, are immaterial, provided that sufficient is proved to establish some right, offence, or justification included in the claim, charge, or defence specified on the record. This rule runs through the whole criminal law, that it is invariably enough to prove so much of the indictment as shows that the defendant has committed a substantive crime therein specified; per Lord Ellenborough, 2 Campb. 583; 4 B. & C. 329; 21 Pick. 525; 4 Gray 18; 7 *id.* 49, 331; 1 Tayl. Ev. § 215; 1 Bish. Cr. L. 600. Thus, on an indictment for murder the prisoner may be convicted of manslaughter, for the averment of malice aforethought is merely matter of aggravation; Co Litt. 282 *a.*

In Pleading. The introduction of matter into the declaration which tends to increase the amount of damages, but does not affect the right of action itself. Steph. Pl. 257; Gould, Pl. 42; 12 Mod. 597. See 3 Am. Jur. 287–313.

An example of this is found in the case where a plaintiff declares in trespass for entering his house, and breaking his close, and tossing his goods about;

the entry of the house is the principal ground and foundation of the action, and the rest is only stated by way of aggravation; 3 Wils. 294; 19 Vt. 107; and this matter need not be proved by the plaintiff or answered by the defendant.

See ALIA ENORMIA.

AGGREGATE. Consisting of particular persons or items, formed into one body. See CORPORATION.

AGGRESSOR. One who begins a quarrel or dispute, either by threatening or striking another. No man may strike another because he has been threatened, or in consequence of the use of any words.

AGGRIEVED. Having a grievance, or suffered loss or injury.

The "parties aggrieved" are those against whom an appealable order or judgment has been entered; 17 Cal. 260. One cannot be said to be aggrieved unless error has been committed against him; 67 Mo. 95; 6 Metc. 197; 25 N. J. Eq. 503; 4 Q. B. Div. 90.

AGIO. A term used in commercial transactions to denote the difference of price between the value of bank-notes or other nominal money and the coin of the country.

AGISTMENT. The taking of another person's cattle into one's own ground to be fed, for a consideration to be paid by the owner. See AGISTOR.

AGISTOR. One who takes in horses or other animals to pasture at certain rates. Story, Bailm. § 443.

He is not, like an innkeeper, bound to take all horses offered to him, nor is he liable for any injury done to such animals in his care, unless he has been guilty of negligence, or from his ignorance, negligence may be inferred; Holt 547. See 49 Mo. App. 470; 2 Tex. Civ. App. 188.

In the absence of an express contract, as to the kind of feed and the degree of care to be taken, he is bound to provide reasonable feed and use ordinary care to protect cattle; 30 Neb. 532.

As to whether he is entitled to a lien, see 3 Hill 485, and LIEN. Where a number of animals are taken to pasture for an agreed compensation, one of them cannot be taken away without payment for all, the party having a lien on each for the amount due on all; 140 Pa. 238; 34 Neb. 482. The lien of agistor is prior to claim of assignee of overdue notes secured by mortgage on the horses; 36 Ill. App. 214.

AGNATES. In Scotch Law. Relations on the father's side.

AGNATI. In Civil Law. The members of a Roman family who traced their origin and name to a common deceased ancestor through the male line, under whose paternal power they would be if he were living.

They were called *agnati—adgnati*, from the words *ad eum nati*. Ulpianus says: "*Adgnati autem sunt cognati virilis sexus ab eodem orti: nam post suos et consanguineos statim mihi proximus est consanguinei mei filius, et ego ei; patris quoque frater qui patruus appellatur; deincepsque ceteri, si qui sunt, hinc orti in infinitum;*" Dig. 38, 16, *De suis*, 2, § 1. Thus, although, the grandfather and father being dead, the children become *sui juris*, and the males may become the founders of new families, still they all continue to be agnates; and the *agnatio* spreads and is perpetuated not only in the direct but also in the collateral line. Marriage, adoption, and adrogation also create the relationship of the *agnatio*. In the Sentences of Paulus, the order of inheritance is stated as follows: *Intestatorum hereditas, lege Duodecim Tabularum primum suis heredibus, deinde adgnatis et aliquando quoque gentibus deferebatur.*

They are distinguished from the *cognati*, those related through females. See COGNATI.

AGNATIO (Lat.). **In Civil Law.** A relationship through males; the male children.

Especially spoken of the children of a free father and slave mother; the rule in such cases was *agnatio sequitur ventrem*; Du Cange.

AGNOMEN (Lat.). A name or title which a *man* gets by some action or peculiarity; the last of the four names sometimes given a Roman. Thus, Scipio *Africanus* (the African), from his African victories. Ainsworth, Lex.; Calvinus, Lex. See NOMEN.

AGRARIAN LAWS. In Roman Law. Those laws by which the commonwealth disposed of its public land, or regulated the possession thereof by individuals were termed Agrarian Laws.

The greater part of the public lands acquired by conquest were laid open to the possession of any citizen, but the state reserved the title and the right to resume possession. The object of many of the agrarian laws was to limit the area of public land of which any one person might take possession. The law of Cassius, B. C. 486, is the most noted of these laws.

Until a comparatively recent period, it has been assumed that these laws were framed to reach private property as well as to restrict possession of the public domain, and hence the term agrarian is, in legal and political literature, to a great degree fixed with the meaning of a confiscatory law, intended to reduce large estates and increase the number of landholders. Harrington, in his "Oceana," and the philosophers of the French Revolution, have advocated agrarian laws in this sense. The researches of Heyne, Op. 4. 351; Niehbuhr, Hist. vol. ii. trans.; and Savigny, Das Recht des Besitzes, have redeemed the Roman word from the burden of this meaning.

AGREAMENTUM. Agreement.

Spelman says that it is equivalent in meaning to *aggregatio mentium*, though not derived therefrom.

AGREED. A term used to indicate the consent or agreement of both parties; united in opinion or being in harmony; it is a technical term and synonymous with contracted.

AGREEMENT. A coming together of parties in opinion or determination; the union of two or more minds in a thing done or to be done; a mutual assent to do a thing. Comyn, Dig. *Agreement*, A 1; Plowd. 5 *a*, 6 *a*.

Aggregatio mentium.—When two or more minds are united in a thing done or to be done.

It ought to be so certain and complete that either party may have an action on it, and there must be a *quid pro quo*; Dane, Abr. c. 11.

The consent of two or more persons concurring, the one in parting with, the other in receiving, some property, right, or benefit; Bacon, Abr. An act in the law where-

by two or more persons declare their assent as to any act or thing to be done or forborne by some or one of those persons for the use of the others or other of them. Poll. Contr. 2.

" The expression by two or more persons of a common intention to affect the legal relations of those persons ; " Anson, Contr. 3.

An agreement " consists of two persons being of the same mind, intention, or meaning concerning the matter agreed upon ; " Leake, Contr. 12. See Poll. Contr. 2, 3.

"*Agreement*" is seldom applied to specialties; "*contract*" is generally confined to simple contracts ; and "*promise*" refers to the engagement of a party without reference to the reasons or considerations for it, or the duties of other parties ; Pars. Contr. 6.

An agreement ceases to be such by being put in writing under seal, but not when put in writing for a memorandum ; Dane, Abr. c. 11.

It is a wider term than " contract ; " Anson, Contr. 4 ; an agreement might not be a contract, because not fulfilling some requirement of the law of the place in which it is made.

A promise or undertaking.

This is the loose and inaccurate use of the word ; 5 East 10 ; 3 B. & B. 14 ; 3 N. Y. 335.

The writing or instrument which is evidence of an agreement.

This is a loose and evidently inaccurate use of the term. The agreement may be valid, and yet the written evidence thereof insufficient ; as, if a promissory note be given for twenty dollars, the amount of a previous debt, where the note may generally be neglected and the debt collected by means of other evidence ; or, again, if a note good in form be given for an illegal consideration, in which case the instrument is good and the agreement void.

Conditional agreements are those which are to have full effect only in case of the happening of certain events, or the existence of a given state of things.

Executed agreements are those where nothing further remains to be done by the parties.

Executed agreements take place when two or more persons make over their respective rights in a thing to one another, and thereby change their property therein either presently and at once, or at a future time upon some event that shall give it full effect without either party trusting to the other. Such an agreement exists where a thing is bought, paid for, and delivered.

Executory agreements are such as rest on articles, memorandums, parol promises or undertakings, and the like, to be performed in the future, or which are entered into preparatory to more solemn and formal alienations of property ; Powell, Contr.

An *executed* agreement always conveys a *chose* in *possession*, while an executory one conveys a *chose* in *action* only.

Express agreements are those in which the terms are openly uttered and avowed by the parties at the time of making.

Implied agreements are those which the law supposes the parties to have made although the terms were not openly expressed.

Thus, every one who undertakes any office, employment, or duty impliedly contracts to do it with integrity, diligence, and skill ; and he impliedly contracts to do whatever is fairly within the scope of his employment ; 6 Scott 761. Implied promises, or promises in law, only exist where there is no express stipulation between the parties touching the same matter for *expressum facit cessare tacitum* ; 2 Bla. Com. 444 ; 2 Term 105 ; 7 Scott 69 ; 1 N. & P. 633.

The parties must agree or assent. There must be a definite promise by one party accepted by the other ; 3 Johns. 534 ; 12 *id.* 190 ; 9 Ala. 69 ; 29 Ala. N. S. 864 ; 4 R. I. 14 ; 2 Dutch. 268 ; 3 Halst. 147 ; 29 Pa. 358 ; 49 Ill. App. 141. There must be a communication of assent by the party accepting ; a mere mental assent to the terms in his own mind is not enough ; L. R. 2 App. Ca. 691. See 102 Mo. 309. But the assent need not be formally made ; it can be inferred from the party's acts ; L. R. 6 Q. B. 607 ; L. R. 10 C. P. 307 ; 90 Ala. 529. They must assent to the same thing in the same sense ; 4 Wheat. 225 ; 1 Sumn. 218 ; 2 Woodb. & M. 359 ; 7 Johns. 240 ; 18 Ala. 605 ; 9 M. & W. 535 ; 4 Bing. 660 ; L. R. 6 Q. B. 597. The assent must be mutual and obligatory ; there must be a request on one side, and an assent on the other ; 5 Bingh. N. C. 75 ; 150 Mass. 248. Where there is a misunderstanding as to the date of performance there is no contract, for want of mutual assent ; 42 La. Ann. 107 ; or where there is a misunderstanding as to the manner of payment ; 53 Mo. App. 582. The assent must comprehend the whole of the proposition ; it must be exactly equal to its extent and provision, and it must not qualify them by any new matter ; 1 Pars. Contr. 400 ; and even a slight qualification destroys the assent ; 5 M. & W. 535 ; 2 Sandf. 133. The question of assent when gathered from conversations is for the jury ; 1 Cush. 89 ; 13 Johns. 294.

A sufficient consideration for the agreement must exist ; 2 Bla. Com. 444 ; 2 Q. B. 851 ; 5 Ad. & E. 548 ; 7 Brown, Ch. 550 ; 7 Term 350 ; as against third parties this consideration must be good or valuable ; 10 B. & C. 606 ; Chit. Contr. 28 ; as between the parties it may be equitable only ; 1 Pars. Contr. 431.

But it need not be adequate, if only it have some real value ; 3 Anstr. 732 ; 2 Sch. & L. 395, n. *a* ; 9 Ves. 246 ; 16 East 372 ; 11 Ad. & E. 983 ; 1 Metc. Mass. 84 ; 117 N. Y. 515 ; 48 Ohio St. 562 ; refraining from use of tobacco and liquor for a period is sufficient consideration for a promise to pay the party a sum of money ; 124 N. Y. 538. If the consideration be illegal in whole or in part, the agreement will be void ; 6 Dana 91 ; 3 Bibb 500 ; 9 Vt. 23 ; 5 Pa. 452 ; 22 Me. 488 ; 32 S. C. 149 ; 27 Mo. App. 649 ; 80 Ia. 738. A contract to regulate the price of commodities at a certain specified amount is a contract in restraint of trade, without consideration and cannot be enforced ; 63 Law T. 455 ; 96 Cal. 510 ; so also if the consideration be impossible ; 5 Viner, Abr. 110, *Condition* ; Co. Litt. 206 *a* ; Shepp. Touchst. 164 ; L. R. 5 C. P. 588 ; 2 Lev. 161. See CONSIDERATION.

The agreement may be to do anything which is lawful, as to sell or buy real estate or personal property. But the evidence of the sale of real property must generally be by deed, sealed ; and in many cases agree-

ments in regard to personal property must be in writing. See STATUTE OF FRAUDS.

The construction to be given to agreements is to be favorable to upholding them, and according to the intention of the parties at the time of making it, as nearly as the meaning of the words used and the rules of law will permit; 1 Pars. Contr. 7; 2 Kent 555; 1 H. Bla. 569, 614; 30 Eng. L. & E. 479; 5 Hill 147; 40 Me. 43; 10 A. & E. 326; 19 Vt. 202. This intent cannot prevail against the plain meaning of words; 5 M. & W. 535. Neither will it be allowed to contravene established rules of law.

And that the agreement may be supported, it will be construed so as to operate in a way somewhat different from that intended, if this will prevent the agreement from failing altogether; 22 Pick. 376; 9 Wend. 611; 16 Conn. 474; but the meaning of the contracting parties is their agreement; 101 U. S. 396.

Agreements are construed most strongly against the party proposing (*i. e.*, *contra proferentem*); 6 M. & W. 662; 2 Pars. Contr. 20; 3 B. & S. 929; 7 R. I. 26. See CONTRACTS.

The effect of an agreement is to bind the parties to the performance of what they have thereby undertaken. In case of failure, the common law provides a remedy by damages, and equity will in some cases compel a specific performance.

The obligation may be avoided or destroyed by *performance*, which must be by him who was bound to do it; and whatsoever is necessary to be done for the full discharge of this duty, although only incidental to it, must be done by him; 11 Q. B. 368; 4 B. & S. 556; 48 Iowa 462; 39 Wis. 553; by *tender* of exact performance according to the terms of the contract, which is sufficient when the other party refuses to accept performance under the contract; 6 M. & G. 610; Benj. Sales 563; Ans. Contr. 274; an agreement to pay a sum of money upon receipt of certain funds, is not broken on refusal to pay on receipt of part of the funds; 62 N. H. 419; by *acts of the party* to be benefited, which prevent the performance, or where some act is to be done by one party before the act of the other, the second party is excused from performance, if the first fails; 15 M. & W. 109; 8 Q. B. 358; 6 B. & C. 325; 10 East 359; by *rescission*, which may be made by the party to be benefited, without any provision therefor in the agreement, and the mere acquiescence of the other party will be evidence of sufficient mutuality to satisfy the general rule that rescission must be mutual; 4 Pick. 114; 5 Me. 277; 7 Bingh. 266; 1 W. & S. 442; rescission, before breach, must be by agreement; Anson, Contr. 247; Leake, Contr. 787; 7 M. & W. 55; 2 H. & N. 79; 6 Exch. 39; by *acts of law*, as confusion, merger; 29 Vt. 412; 4 Jones, N. C. 87; *death*, as when a master who has bound himself to teach an apprentice dies; *inability* to perform a personal service, such as singing at a concert; L. R. 6 Exch. 269; or *extinction* of the subject-matter of the agreement. See also ASSENT; CONTRACT; DISCHARGE OF CONTRACTS; PARTIES; PAYMENT; RESCISSION.

AGREEMENT FOR INSURANCE. An agreement often made in short terms preliminary to the filling out and delivery of a policy with specific stipulations.

Such an agreement, specifying the rate of premium, the subject, and risk, and amount to be insured, in general terms, and being assented to by the parties, is binding; 4 Rob. N. Y. 150; 2 Curt. 277; 19 N. Y. 305. It is usually in writing, but may be by parol or by parol acceptance of a written proposal; 2 Curt. C. C. 524; 19 How. 318; 31 Ala. 711; 4 Abb. Pr. Rep. 179; 50 N. Y. 402; 11 N. H. 356. It must be in such form or expression that the parties, subject, and risk can be thereby distinctly known, either by being specified or by references so that it can be definitely reduced to writing; 1 Phillips, Ins. §§ 6–14 *et seq.*; 2 Pars. Marit. Law 19; 19 N. Y. 305.

Such an agreement must have an express or implied reference to some form of policy. The ordinary form of the underwriters in like cases is implied, where no other is specified or implied; 56 Pa. 256; 7 Taunt. 157; 2 C. & P. 91; 3 Bingh. 285; 3 B. & Ad. 906; 33 Iowa 325; 76 *id.* 609; 2 Curt. 277; 36 Wis. 509; May, Ins. § 23.

Where the agreement is by a communication between parties at a distance, an offer by either will be binding upon both on a despatch by the other of his acceptance within a reasonable or the prescribed time, and prior to the offer having been countermanded; 1 Phil. Ins. §§ 17, 21; 27 Pa. 263. See INSURANCE POLICY.

AGRICULTURE. The cultivation of soil for food products or any other useful or valuable growths of the field or garden; tillage, husbandry; also, by extension, farming, including any industry practised by a cultivator of the soil in connection with such cultivation, as breeding and rearing of stock, dairying, etc. The science that treats of the cultivation of the soil. Stand. Dict.

A person is actually engaged in the science of agriculture when he derives the support of himself and family in whole or in part from the tillage and cultivation of fields; it must be something more than a garden, though it may be less than a field, and the uniting of any other business with this is not inconsistent with the pursuit of agriculture; 22 Pa. 193. See 62 Me. 526; 7 Heisk. 515.

AID AND COMFORT. Help; support; assistance; counsel; encouragement.

The constitution of the United States, art. 3, s. 3, declares that adhering to the enemies of the United States, giving them aid and comfort, shall be treason. These words, as they are to be understood in the constitution, have not received a full judicial construction; but see 97 U. S. 39, as to their meaning in the Act of Congress, March 12, 1863. See also 92 U. S. 187; 13 Wall. 128; 12 *id.* 347; 16 *id.* 147; 7 Ct. of Cl. 398; 2 *id.* 533. They import help, support, assistance, countenance, encouragement. The voluntary execution of an official bond of a commissioned officer of the Confederacy from motives of personal friendship, is giving aid and comfort; 9 Wall. 539;

as is the giving of mechanical skill to build boats for the Confederacy; 3 Ct. of Cl. 172. The word *aid*, which occurs in the stat. Westm. I. c. 14, is explained by Lord Coke (2 Inst. 182) as comprehending all persons counselling, abetting, plotting, assenting, consenting, and encouraging to do the act (and he adds, what is not applicable to the crime of treason), who are not present when the act is done. See also 1 Burn, Just. 5, 6; 4 Bla. Com. 37, 38.

To constitute aid and comfort it is not essential that the effort to aid should be successful and actually render assistance; 4 Sawy. 472.

AID BONDS. See BONDS.

AID PRAYER. In English Law. A petition to the court calling in help from another person who has an interest in the matter in dispute. For example, a tenant for life, by the curtesy, or for years, being impleaded, may pray aid of him in reversion; that is, desire the court that he may be called by writ, to allege what he thinks proper for the maintenance of the right of the person calling him, and of his own. Fitzh. Nat. Brev. 50; Cowel.

AIDER BY VERDICT. In Pleading. The presumption which arises after verdict, whether in a civil or criminal case, that those facts, without proof of which the verdict could not have been found, were proved, though they are not distinctly alleged in the record; provided it contains terms sufficiently general to comprehend them in reasonable intendment.

The rule is thus laid down, that where a matter is so essentially necessary to be proved, that had it not been in evidence the jury could not have given such a verdict as that recorded, there the want of stating that matter in express terms in a declaration, provided it contains terms sufficiently general to comprehend it in fair and reasonable intendment, will be cured by the verdict; and where a general allegation must, in fair construction, so far require to be restricted that no judge and no jury could have properly treated it in an unrestrained sense, it may reasonably be presumed after verdict that it was so restrained at the trial; 1 Maule & S. 234, 237; 1 Saund. 6th ed. 227, 228; 1 Den. Cr. Cas. 356; 2 Carr. & K. 868; 13 Q. B. 790; 1 *id.* 911, 912; 2 M. & G. 405; 2 Scott, New Rep. 459; 9 Dowl. 409; 13 M. & W. 377; 6 C. B. 136; 9 *id.* 364; 6 Metc. 334; 6 Pick. 409; 16 *id.* 541; 2 Cush. 316; 6 *id.* 524; 17 Johns. 439, 458; 24 Ill. App. 364; 29 Mo. App. 53; 134 Ill. 586; 2 Ind. App. 391.

AIDING AND ABETTING. In Criminal Law. The offence committed by those persons who, although not the direct perpetrators of a crime, are yet present at its commission, doing some act to render aid to the actual perpetrator thereof. 4 Bla. Com. 34; Russ. & R. 363, 421; 9 Ired. 440; 1 Woodb. & M. 221; 10 Pick. 477; 26 Miss. 299. See 9 Cent. L. J. 206; 90 Mich. 362. And they are principals in the crime; 45 Fed. Rep. 851; 54 N. J. Law 247.

A principal in the second degree is he who is present aiding and abetting the fact to be done. 1 Hale, Pl. Cr. 615; 1 Bish. Cr. L. 648 (4). See 41 N. H. 407; 1 Metc. (Ky.) 413; 28 Ga. 604; 18 Tex. 713; 26 Ind. 496; 2 Nev. 226; 2 Brev. 338.

Actual presence is not necessary: it is sufficient to be so situated as to come readily to the assistance of his fellows; 13 Mo. 382.

One cannot be convicted as aider and abettor unless the principal is jointly indicted with him, or if indicted alone, the indictment should give the name and description of the principal; 84 Ky. 229; and the one charged as an abettor may be convicted as principal; 92 Ky. 1; and the abettor may be convicted of murder in the second degree, though the principal has been acquitted; 113 N. C. 716; 52 Kan. 79.

The aider and abettor in a misdemeanor is chargeable as principal; 160 Mass. 300; 58 Fed. Rep. 1000.

AIDS. In English Law. A species of tax payable by the tenant of lands to his superior lord on the happening of certain events.

They were originally mere benevolences granted to the lord in certain times of danger and distress, but soon came to be claimed as a right. They were originally given in three cases only, and were of uncertain amount. For a period they were demanded in additional cases; but this abuse was corrected by Magna Charta (of John) and the stat. 25 Edw. I. (*confirmatio chartarum*), and they were made payable only,—to ransom the lord's person, when taken prisoner; to make the lord's eldest son a knight; to marry the lord's eldest daughter, by giving her a suitable portion. The first of these remained uncertain; the other two were fixed by act of parliament (25 Edw. III. c. 11) at twenty shillings each, being the supposed twentieth part of a knight's fee; 2 Bla. Com. 64. They were abolished by the 12 Car. II. c. 24; 2 Bla. Com. 77, n. See 1 Poll. & Maitl. 330.

AIEL (spelled also *Ayel*, *Aile*, and *Ayle*). A writ which lieth where the grandfather was seized in his demesne as of fee of any lands or tenements in fee simple the day that he died, and a stranger abateth or entereth the same day and dispossesseth the heir. Fitzh. Nat. Brev. 222; Spelm. Gloss.; Termes de la Ley; 3 Bla. Com. 186; 2 Poll. & Maitl. 57.

AIELESSE (Norman). A grandmother. Kelham.

AILE. A corruption of the French word *aieul*, grandfather. See AIEL.

AIR. That fluid transparent substance which surrounds our globe.

No property can be had in the air; it belongs equally to all men, being indispensable to their existence. But this must be understood with this qualification, that no man has a right to use the air over another man's land in such a manner as to be injurious to him. To poison or materially to change the air, to the annoyance of the public, is a nuisance; Cro. Car. 510; 2 Ld. Raym. 1163; 1 Burr. 333; 1 Strange 686; Dane, Abr. Index; see NUISANCE.

An easement of light and air coming over the land of another cannot be acquired by prescription in most of the United States; 17 Am. L. Reg. 440, note; 111 Mass. 119; 2 Watts 327; 54 N. Y. 439; 5 W. Va. 1; 2

Conn. 597; 16 Ill. 217; 25 Tex. 238; 5 Rich. 311; 26 Me. 436; 11 Md. 23; 10 Ala. N. S. 63; 68 Ill. App. 478. In Delaware the English doctrine is recognized as having been included in the constitutional adoption of the common law; Clawson v. Primrose, 4 Del. Ch. 643; S. C. 15 Am. Law Reg. N. S. 6, and note; see 2 Washb. R. P. 62 *et seq.* Servitude of light and air through windows in a wall cannot be acquired by prescription against the owner of the lot adjacent, unless he is able to assert the right to have them closed; 44 La. Ann. 492; 156 Mass. 89; though the rule is otherwise in England; 8 E. & B. 39.

Upon a conveyance the right to air over the grantor's remaining land is implied in grantee; 34 Md. 1; S. C. 11 Am. L. Reg. 24; but in other states only where it is an easement of necessity; 18 Am. L. Reg. 646; Washb. Easem. 618; 58 Ga. 268; 5 W. Va. 1. When it is never implied, see 115 Mass. 204; 10 Barb. 537; 33 Pa. 371; 51 Ind. 316. The right would not be implied in the grantor; 24 Iowa 35; S. C. 7 Am. L. Reg. 336, note; L. R. 2 C. P. D. 13. The lessee of a building has no implied right to the use of the light and air from surrounding land although owned by the lessor; 146 Ill. 481.

AISIAMENTUM (spelled also *Esamentum*). An easement. Spelman, Gloss.

AJUAR. In Spanish Law. The jewels and furniture which a wife brings in marriage.

AJUTAGE (spelled also *Adjutage*). A conical tube used in drawing water through an aperture, by the use of which the quantity of water drawn is much increased.

When a privilege to draw water from a canal, through the forebay or tunnel, by means of an aperture, has been granted, it is not lawful to add an *ajutage*, unless such was the intention of the parties; 2 Whart. 477.

ALABAMA (Indian for "here we rest"). One of the United States of America, being the ninth admitted into the Union. It was formerly a part of Georgia, but in 1798 the territory now included in the states of Alabama and Mississippi was organized as a territory called Mississippi, which was cut off from the Gulf coast by Florida, then Spanish territory, extending to the French possessions in Louisiana. During the war of 1812, part of Florida lying between the Perdido and Pearl rivers was occupied by United States troops and afterwards annexed to Mississippi territory, forming part of the present state of Alabama, which was occupied principally by Creek Indians. The country becoming rapidly settled by the whites, the western portion was admitted into the Union as the state of Mississippi, and, by act of Congress of March 3, 1817, the eastern portion was organized as the territory of Alabama; 3 U. S. Stat. L. 371.

An act of Congress was passed March 2, 1819, authorizing the inhabitants of the territory of Alabama to form for themselves a constitution and state government. In pursuance of that act, the constitution of the state of Alabama ways adopted by a convention which met at Huntsville, July 5, and adjourned August 2, 1819.

Alabama was the fourth state to withdraw from the Union. In Dec., 1860, this state sent delegations to the other southern states urging them to withdraw from the Federal Union, and a convention assembled at Montgomery, Jan. 7, 1861, which on Jan. 11 adopted an ordinance of secession. From that time until the close of the war it formed one of the Confederate states. The state ratified the fifteenth amendment of the Federal Constitution Nov. 16, 1870, and thereafter its senators and representatives were admitted to Congress.

The present constitution was adopted in 1875. It provides that the general assembly may, whenever two-thirds of each house shall deem it necessary, propose amendments thereto, which, having been read on three several days in each house, shall be duly published in such manner as the general assembly may direct, at least three months before the next general election for representatives, for the consideration of the people; that the several returning officers, at the next general election which shall be held for representatives, shall open a poll for the vote of the qualified electors on the proposed amendments, and shall make a return of said vote to the secretary of state; and that, if it shall thereupon appear that a majority of all the qualified electors of the state, who voted at such election, voted in favor of the proposed amendments, said amendments shall be valid, to all intents and purposes, as parts of the constitution; Const. art. xvii. § 1.

The constitution also provides "That no convention shall hereafter (Dec. 6, 1875) be held for the purpose of altering or amending the constitution of this state, unless the question of convention or no convention shall be first submitted to a vote of all the electors of the state, and approved by a majority of those voting at said election;" Const. art. xvii. § 2.

Prior to the constitution of 1868, the acceptance by the people of proposed constitutional amendments must have been afterwards, and before another election, ratified by two-thirds of each house of the general assembly. Under this provision the constitution was amended in 1830, 1846, and 1850. In 1861, 1865, 1868, and 1875, respectively, new constitutions were submitted to the people by conventions called for that purpose, and with the exception of that proposed in 1868 were subsequently ratified and adopted.

The Legislative Power.—The legislative power of the state is vested in a senate and house of representatives, together composing the general assembly. The senators are elected for a term of four years, and the representatives for a term of two years, on the first Monday in August, by the electors. The general assembly meets annually at the capitol, and is composed of thirty-three senators and one hundred representatives, the largest number in both houses allowed by the constitution. The representatives are apportioned among the counties according to the number of their inhabitants, by the general assembly at its regular session next after each decennial census of the United States, each county being entitled to, at least, one representative. The senators are apportioned among thirty-three senatorial districts, the districts being as nearly equal to each other in the number of inhabitants as may be, and each district being entitled to one senator and no more.

The Executive Department.—The executive department consists of a governor, secretary of state, state treasurer, state auditor, attorney-general, superintendent of education, and a sheriff for each county.

The governor is the chief magistrate of the state, and in him is vested the supreme executive power.

The Judicial Department.—The judicial power of the state is vested in the senate sitting as a court of impeachment, a supreme court, circuit courts, chancery courts, courts of probate, such inferior courts of law and equity, to consist of not more than five members, as the general assembly may from time to time establish, and such persons as may be by law invested with powers of a judicial nature.

The constitution provides that the supreme court shall consist of one chief justice and such number

of associate justices as may be prescribed by law. Under this provision the powers of the supreme court have been by statutory regulation vested in five judges, who are elected by the qualified electors of the state, and who appoint one of their number chief justice. They also appoint a reporter of the decisions of the court, its clerk, and the marshal and librarian.

The constitution prescribes that the court shall be held at the seat of government, and that it shall have appellate jurisdiction coextensive with the state, under such restrictions and regulations not repugnant to the constitution as may from time to time be prescribed by law: *Provided*, that it shall have power to issue *writs of injunction, quo warranto habeas corpus*, and such other remedial and original writs as may be necessary to give it a general superintendence and control of inferior jurisdictions; and the judges by the constitution are made conservators of the peace throughout the state; Const. art. vi. §§ 2, 3, 16.

Qualifications—Term of office, etc.—The judges of the supreme court hold office for the term of six years, and until their successors are elected or appointed and qualified. Vacancies are filled by appointment by the governor, and such appointee holds office for the unexpired term of his predecessor, and until his successor is elected or appointed and qualified.

The Circuit Court.—The circuit court has original jurisdiction in all matters civil and criminal within the state, not otherwise excepted in the constitution; but in civil cases only when the matter or sum in controversy exceeds fifty dollars. A circuit court is required to be held in each county in the state at least twice in every year.

The constitution directs that the state shall be divided into convenient circuits, not to exceed eight in number, unless increased by a vote of two-thirds of the members of the general assembly, and that no circuit shall contain less than three nor more than twelve counties; and that there shall be a judge for each circuit, who shall reside in it. The judges are chosen by the qualified electors of the respective circuits. The number of circuits into which the state was divided has, by recent legislation, been reduced from twelve to eight; Const. art. vi.

City Courts are held in the principal cities, with civil and criminal jurisdiction.

Chancery Courts.—Equity jurisdiction was exercised by the circuit courts till 1839, when a separate chancery court was established. The state is now divided into three chancery divisions, for each of which there is a chancellor, who is elected by the qualified electors of his division; Const. p. 139, §§ 1, 7, 8; Acts of 1839, p. 22; Acts of 1878–79, p. 90; Const. p. 140, § 12; Code of 1876, § 615.

Probate Courts.—These courts are established in each county. They have a single officer, who is styled the judge of probate. Courts of probate have, in the cases defined by law, original jurisdiction of wills, and other matters of probate and coordinate jurisdiction.

ALASKA. This territory was first visited by a Russian exploring expedition under command of Vitus Bering in 1741, and after his return and the dissemination of his reports of the abundance of fur-bearing animals found there, the country soon became settled by Siberian traders. In 1799 Russia granted a monopoly of the entire fur trade to the Russian American Fur Company; whose charter, being twice renewed, finally expired in 1864, when that country began negotiations for the sale of Alaska to the United States.

A treaty ceding the Russian possessions in North America to the United States was concluded March 30, 1867, and ratified May 28, 1867, by which Alaska was sold to the United States for seven million two hundred thousand dollars in gold; 15 U. S. Stat. L. 539.

At first violations of the laws prescribed for the territory of Alaska, within its limits, were prosecuted in any of the district courts of the United States in California, Oregon or Washington; § 1957 R. S.

A civil government was created for the territory in 1884, by which it was made a civil and judicial district, the seat of government being fixed at Sitka.

The Judicial Power is vested in a district court of the United States with the civil and criminal jurisdiction of district courts of the United States, exercising jurisdiction of circuit courts and such other jurisdiction as may be established by law. The judge of this court, together with the clerk of the court, district attorney, marshal and commissioners, are appointed by the President of the United States for a period of four years. The clerk of the court is *ex officio* secretary and treasurer of the district, recorder of deeds and mortgages and register of wills. Four commissioners are appointed for the district, and have powers of commissioners of circuit courts, and also similar powers and duties, civil and criminal, as the justices of the peace of the state of Oregon.

The general laws of the state of Oregon were declared to be the laws of the territory, so far as applicable and not in conflict with the laws of the United States. Writs of error in criminal cases issue to the district court from the United States circuit court for the district of Oregon. See 23 U. S. Stat. L. 24 *et seq.*

ALBA FIRMA. White rents; rents reserved payable in silver, or white money.

They were so called to distinguish them from *reditus nigri*, which were rents reserved payable in work, grain, and the like. Coke, 2d Inst. 19.

ALCALDE. **In Spanish Law.** A judicial officer in Spain, and in those countries which have received the body of their laws from those of Spain. His powers and duties are similar to those of a justice of the peace.

ALDERMAN (equivalent to senator or senior).

In English Law. An associate to the chief civil magistrate of a corporate town or city.

The word was formerly of very extended signification. Spelman enumerates eleven classes of aldermen. Their duties among the Saxons embraced both magisterial and executive power, but would seem to have been rather an appellation of honor, originally, than a distinguishing mark of office. Spelman, Gloss.

Aldermannus civitatus burgi seu castellæ (alderman of a city, borough, or castle). 1 Bla. Com. 475, n.

Aldermannus comitatus (alderman of the county), who is thought by Spelman to have held an intermediate place between an earl and a sheriff; by others, held the same as the earl. 1 Bla. Com. 116.

Aldermannus hundredi seu wapentachii (alderman of a hundred or wapentake). Spelman.

Aldermannus regis (alderman of the king) was so called, either because he was appointed by the king, or because he gave the judgment of the king in the premises allotted to him.

Aldermannus totius Angliæ (alderman of all England). An officer of high rank whose duties cannot be precisely determined. See Spelman, Gloss.

The aldermen of the city of London were probably originally the chiefs of guilds. See 1 Spence, Eq. Jur. 54, 56. For an account of the selection and installation of aldermen of the guild merchant of a borough, see 1 Poll. & Maitl. 648.

In American Cities. The aldermen are generally a legislative body, having limited judicial powers as a body, as in matters of internal police regulation, laying out and repairing streets, constructing sewers, and the like; though in many cities they hold separate courts, and have magisterial powers to a considerable extent.

Consult Spelman, Gloss.; Cowel; 1 Sharsw. Bla. Com. 116; Reeve, Hist. Eng. Law; Spence, Eq. Jur.

ALEATOR (Lat. *alea*, dice). A dice-player; a gambler.

"The more skilful a player he is, the wickeder he is." Calvinus, Lex.

ALEATORY CONTRACT. In Civil Law. A mutual agreement, of which the effects, with respect both to the advantages and losses, whether to all the parties or to some of them, depend on an uncertain event. La. Civ. Code, art. 2951. See 8 La. Ann. 488; May, Ins. § 5.

The term includes contracts, such as insurance, annuities, and the like. See MARGIN; OPTION.

ALE-CONNER (also called *ale-taster*). An officer appointed by the court-leet, sworn to look to the assize and goodness of ale and beer within the precincts of the leet. Kitchin, Courts 46; Whishaw.

An officer appointed in every court-leet, and sworn to look to the assize of bread, ale, or beer within the precincts of that lordship. Cowel.

This officer is still continued in name, though the duties are changed or given up; 1 Crabb, Real Prop. 501.

ALER SANS JOUR (Fr. *aller sans jour*, to go without day).

In Practice. A phrase formerly used to indicate the final dismissal of a case from court.

The defendant was then at liberty to go, without any day appointed for his subsequent appearance; Kitchin, Courts 146.

ALFET. The vessel in which hot water was put, for the purpose of dipping a criminal's arm in it up to the elbow in the ordeal by water. Cowel.

ALIA ENORMIA (Lat. other wrongs).

In Pleading. A general allegation, at the end of a declaration, of wrongful acts committed by the defendant to the damage of the plaintiff. In form it is, "and other wrongs then and there did against the peace," etc. Under this allegation, damages and matters which naturally arise from the act complained of may be given in evidence; 2 Greenl. Ev. § 678; including battery of servants, etc., in a declaration for breaking into and entering a house; 6 Mod. 127; 2 Term 166; 7 Harr. & J. Md. 68; and all matters in general which go in aggravation of damages merely, but would not of themselves be ground for an action; Bull. N. P. 89; 3 Mass. 222; 6 Munf. 308.

But matters in aggravation may be stated specially; 15 Mass. 194; Gilm. 227; and matters which of themselves would constitute a ground of action must be so stated; 1 Chit. Pl. 348; 17 Pick. 284. See generally 1 Chit. Pl. 648; Bull. N. P. 89; 2 Greenl. Ev. §§ 268, 273, 278; 2 Salk. 643; Peake, Ev. 505. See AGGRAVATION.

ALIAS (Lat. *alius*, another). **In Practice.** Before; at another time; otherwise.

The term is sometimes used to indicate an assumed name. See ALIAS DICTUS.

An *alias* writ is a writ issued where one of the same kind has been issued *before* in the same cause.

The second writ runs, in such case, "we command you as we have *before* commanded you" (*sicut alias*), and the Latin word *alias* is used to denote both the writ and the clause in which it or its corresponding English word is found. It is used of all species of writs.

No waiver can make an alias attachment writ good and it is unauthorized; 37 Ill. App. 385; an alias execution should not issue on return of the original which had been delivered long prior thereto, except it be shown that it had been delivered to an officer during its life, and had not been satisfied; 37 Ill. App. 319.

ALIAS DICTUS (Lat. otherwise called). A description of the defendant by adding to his real name that by which he is known in some writing on which he is to be charged, or by which he is known. 4 Johns. 118; 2 Caines 362; 3 *id.* 219.

ALIBI (Lat. elsewhere). Presence in another place than that described.

When a person, charged with a crime, proves (*se eadem die fuisse alibi*) that he was, at the time alleged, in a different place from that in which it was committed, he is said to prove an *alibi*, the effect of which is to lay a foundation for the necessary inference that he could not have committed it. See Bracton 140.

This proof is usually made out by the testimony of witnesses, but it is presumed it might be made out by writings; as if the party could prove by a record, properly authenticated, that on the day or at the time in question he was in another place.

It has been said that this defence must be subjected to a most rigid scrutiny, and that it must be established by a preponderance of proof; 30 Vt. 377; 5 Cush. 124; 20 Pa. 429; 81 Ill. 565; 24 Iowa 570; 62 *id.* 40. See remarks of Shaw, C. J., in Webster's Case, and 2 Alison's Cr. L. of Scotland, 624; Bish. Crim. L. 1061–1068. In many states the defence is established if the evidence raises in the minds of the jury a reasonable doubt as to the guilt of the defendant; 100 Mo. 628; 28 Fla. 511; 94 Ala. 14; 64 Cal. 253; 70 Ga. 651; 62 Ia. 40; 50 Ind. 190; 50 Mich. 233; and if the testimony tends to prove an *alibi*, failure to instruct thereon is error; 85 Ga. 666. An instruction that an *alibi* need not be established beyond a reasonable doubt, but it should be to the satisfaction of the jury, is correct; 117 N. Y. 480; 28 Tex. App. 566; 107 Ill. 162; 81 Mo. 185; 67 Ga. 349. It is peculiarly liable to be supported by perjury and false testimony of all sorts. There must be satisfactory proof

that the prisoner could not have been at the place where the crime was committed, but the proof need not be higher than is required as to other facts; 59 Ga. 142. See 48 Iowa 583; 69 Cal. 552.

ALIEN (Lat. *alienus*, belonging to another; foreign). A foreigner; one of foreign birth.

In England, one born out of the allegiance of the king.

In the United States, one born out of the jurisdiction of the United States, and who has not been naturalized under their constitution and laws. 2 Kent 50. The children of ambassadors and ministers at foreign courts, however, are not aliens. And see 10 U. S. Stat. 604. Persons born in a foreign country of American parents, who, though residing there, still claim citizenship, are citizens of the United States; 50 Fed. Rep. 310; so if the father only is a citizen; Rev. St. § 1993. An alien woman by marriage with a citizen of the United States becomes a citizen; but the converse, that a citizen woman by marriage with an alien becomes an alien, is not law; 56 Fed. Rep. 556. The right to exclude or to expel aliens in war or in peace is an inherent and inalienable right of every sovereign and independent nation; 149 U. S. 698; and in the United States, Congress may exclude aliens altogether from its territory and prescribe the conditions upon which they may come to this country, and may have its policy in that respect enforced exclusively through executive officers without judicial intervention; 12 Wall. 457; 130 U. S. 581; 142 *id.* 651; 158 U. S. 438.

An alien cannot in general acquire title to real estate by descent, or by other mere operation of law; 7 Co. 25 *a*; 1 Ventr. 417; 3 Johns. Cas. 109; Hard. 61; 133 U. S. 265; and if he purchase land, he may be divested of the fee, upon an inquest of office found; but until this is done he may sell, convey, or devise the lands and pass a good title to the same; 4 Wheat. 453; 12 Mass. 143; 6 Johns. Ch. 365; 7 N. H. 475; 1 Washb. R. P. 49. The disabilities of aliens in respect to holding lands are removed by statute in many of the states of the United States; in *Alabama*, wholly; Rev. Code, 1886, § 1914; in *Arizona*, as our citizens in the alien's country; Rev. Stat. 1887, § 1472; in *Arkansas*, wholly; S. & H. Dig. 1894, § 247; *California*, wholly, if resident; if non-resident, must appear and claim within five years; Civ. Code, 1885, § 671; *Colorado*, wholly; Laws, 1891, p. 20; *Connecticut*, if resident, wholly; if non-resident, only for certain purposes; Gen. Stat. 1888, § 15; *Delaware*, after declaration of intention to become citizens; Rev. Code, 1893, c. 81, § 1; all conveyances to aliens prior to Feb. 1, 1892, are legalized; Laws, 1893, ch. 769; *Florida*, wholly; Const. 1887, Decl. of Rights, § 18; *Georgia*, wholly, so long as alien government is at peace with U. S.; Rev. Code, 1882, § 1661; *Idaho*, wholly, after declaration of intention to become a citizen of the United States; Laws, 1890-1891, p. 108; *Illinois*, wholly, after declaration of intention to become a citizen of the United States, but non-residents, not; Myers, Rev. Stat. 1895, p. 95; *Indiana*, wholly; 2 Burns, Rev. Stat. 1894, § 3389; see § 3328; *Iowa*, residents, wholly; non-residents, not; Miller, Rev. Code, 1888, p. 708; *Kansas*, resident, for six years, after having declared intention to become a citizen of the U. S. with forfeiture of citizenship not acquired within that time; non-residents, not at all; Laws, 1891, ch. iii.; *Kentucky*, not being an enemy, wholly, after declaration of intention to become a citizen of U. S.; a resident alien may hold for twenty-one years for actual residence, occupation or business purposes, a non-resident alien may take and hold by descent or devise, but must alienate within eight years thereafter; B. & C. Stat. 1894, §§ 334, 337, 338; *Louisiana*, under the civil law; incapable of taking by will or inheritance; 2 Dom. Civ. L. § 2502; but incapacity ceases with naturalization; *id.* § 2511; *Maine*, wholly; Rev. Stat. 1884, c. 73, § 2; *Maryland*, wholly, if not enemies; Pub. Gen. L. 1888, art. iii. § 1; *Massachusetts*, wholly; Pub. Stat. 1882, c. 126, § 1; *Michigan*, wholly, if *bona fide* residents; Const. art. xviii. § 13; see Stat. 1882, § 5775; *Minnesota*, after declaration only, unless actual settlers; Wenzell, Stat. 1894, § 5875; *Mississippi*, wholly, if resident; Ann. Code, 1892, § 2439; *Missouri*, wholly, Rev. Stat. 1889, § 342; *Montana*, inherit as in Idaho, no provision as to conveyance of real estate *inter vivos;* Booth, Civil Code, 1895, § 1867; *Nebraska*, residents, wholly; Const. art. i. § 25; non-residents, not; Comp. Stat. 1895, § 4161; *Nevada*, wholly, except Chinese; Gen. Stat. 1885, § 2655; *New Hampshire*, wholly, if resident; Pub. Stat. 1891, c. 17, § 16, p. 378; *New Jersey*, wholly, Rev. Stat. 1877, c. 1, § 1; *New York*, to a very limited extent; 4 Thr. Rev. Stat. p. 2420; *North Carolina*, wholly; Code, 1883, § 7; *North Dakota*, wholly; Rev. Code, 1895, §§ 3277, 3758; *Ohio*, wholly; Rev. Stat. 1892, § 4173; *Oregon*, wholly; Hill's Ann. L. 1892, § 2988; *Pennsylvania*, up to five thousand acres, or $20,000 net annual income; Act 1861, 1 P & L. Dig. 119, § 11; *Rhode Island*, wholly; Rev. Stat. 1882, c. 172, § 6, p. 442; *South Carolina*, wholly; Rev. Stat. 1893, 1880; *South Dakota*, wholly; Code, 1887, §§ 2686, 3417, Laws, 1890, p. 283; *Tennessee*, wholly; Code, 1884, § 2804; *Texas*, *bona fide* residents, wholly; non-residents, hold only for ten years; Suppl. Sayle's Tex. Civ. Stat. 1892, arts. 10*a*–10*e*; *Utah*, remains under the laws as to territories, *post*, no statute having been passed since its admission as a state; *Vermont*, every person of good character, who comes to settle, having first taken the oath of allegiance to the state; Const. § 39; no prohibition as to aliens and no provisions as to forfeiture: 23 Vt. 433; *Virginia*, wholly; Code, 1887, § 42; *Washington*, wholly as to those who have declared their intention; Const. art. ii. § 33; see Hill's Ann. Stat. & Code, 1891, § 2955; *West*

Virginia, wholly; Const. art. ii. § 5; Code, 1891, c. 70, p. 632; *Wisconsin*, wholly, as to residents, partly as to non-residents; S. & B. Ann. Stat. 1889, § 2200; *Wyoming*, wholly, as to residents; Const. art i. § 29.

It is unlawful for any alien person or corporation to acquire, hold or own real estate or any interest therein in any of the territories of the United States, or in the district of Columbia, except such as may be acquired by inheritance or in good faith in the ordinary course of justice in the collection of debts, except where the right to hold and dispose of lands in the United States is secured by existing treaties with such foreign countries. Corporations of which more than twenty per cent. of the stock is held by aliens come within the same category; 24 U. S. Stat. L. 476; 1 R. S. Suppl. p. 556.

Foreign governments and their representatives may own real estate for legations or residences in the district of Columbia; 25 Stat. L. 45; 1 R. S. Suppl. 582.

An alien has a right to acquire personal estate, make and enforce contracts in relation to the same; he is protected from injuries and wrongs to his person and property, his relative rights and character; he may sue and be sued; 7 Co. 17; Dyer 2*b*; 1 Cush. 531; 2 Sandf. Ch. 586; 2 Woodb. & M. 1; 5 Sawy. 573; 8 Otto 491; 16 Wall. 147; 21 Minn. 175.

He may be an executor or administrator unless probibited by statute; 9 Wis. 309; 1 Schouler's Exrs. 270, 537; 2 Murph. 268.

An alien, even after being naturalized, is ineligible to the office of president of the United States, and in some states, as in New York, to that of governor; he cannot be a member of congress till the expiration of seven years after his naturalization. An alien can exercise no political rights whatever; he cannot, therefore, vote at any political election, fill any office, or serve as a juror. See Bryce, Am. Com.; 6 Johns. 332. The disabilities of aliens may be removed, and they may become citizens, under the provisions of the acts of Congress of April 14, 1802, c. 28; March 3, 1813, c. 184; March 22, 1816, c. 32; May 26, 1824, c. 186; May 24, 1828, c. 116. See 2 Curt. 98; 1 Woodb. & M. 323; 4 Gray 559; 33 N. H. 89. A native of Japan of the Mongolian race cannot become naturalized; 62 Fed. Rep. 126. Where a certificate of naturalization misnames the person, the true name may be proved by parol; 135 Ill. 591.

Upon the admission of a territory into the Union, Congress may effect a collective naturalization of its foreign-born inhabitants as citizens of the United States; 143 U. S. 135.

An alien owes a temporary local allegiance, and his property is liable to taxation.

As to the case of alien enemies, see that title.

Of Estates. To alienate; to transfer.

ALIEN ENEMY. One who owes allegiance to the adverse belligerent. 1 Kent 73.

He who owes a temporary but not a permanent allegiance is an alien enemy in respect to acts done during such temporary allegiance only; and when his allegiance terminates, his hostile character terminates also; 1 B. & P. 163.

Alien enemies are said to have no rights, no privileges, unless by the king's special favor, during time of war; 1 Bla. Com. 372; Bynkershoek 195; 8 Term 166. But the tendency of modern law is to give them protection for person and property until ordered out of the country. If resident within the country, they may sue and be sued; 2 Kent 63; 10 Johns. 69; 6 Binn. 241; 50 Ill. 186; they may be sued as non-resident defendants; 11 Wall. 259; 30 Md. 512; and may be served by publication, even though they had no actual notice, being within the hostile lines; 37 Md. 25. Partnership with a foreigner is dissolved by the same event that makes him an alien enemy; 6 Wall. 532.

ALIENAGE. The condition or state of an alien.

ALIENATE. To convey; to transfer. Co. Litt. 118 *b*. *Alien* is very commonly used in the same sense; 1 Washb. R. P. 53.

ALIENATION. Of Estates. The transfer of the property and possession of lands, tenements, or other things, from one person to another. Termes de la Ley.

It is particularly applied to absolute conveyances of real property; 1 N. Y. 290, 294.

Alienations by deed may be by conveyances at common law, which are either *original* or *primary*, being those by means of which the benefit or estate is created or first arises; or *derivative* or *secondary* conveyances, being those by which the benefit or estate originally created is enlarged, restrained, transferred, or extinguished; or they may be by conveyances under the statute of uses. The *original* conveyances are the following: feoffment, gift, grant, lease, exchange, partition. The *derivative* are, release, confirmation, surrender, assignment, defeasance. Those deriving their force from the *statute of uses* are, covenants to stand seised to uses, bargains and sale, lease and release, deeds to lead or declare the uses of other more direct conveyances, deeds of revocation of uses; 2 Bla. Com. c. 20; 2 Washb. R. P. 600. See 1 Demb. Land Titles 320; 1 Devlin, Deeds 115; CONVEYANCE; DEED.

Alienations by matter of record may be: by private acts of the legislature; by grants, as by patents of lands; by fines; by common recovery.

As to *alienations by devise*, see DEVISE; WILL.

In Medical Jurisprudence. A generic term denoting the different kinds of aberration of the human understanding. 1 Beck, Med. Jur. 535.

ALIENATION OFFICE. In English Law. An office to which all writs of covenants and entries were carried for the recovery of fines levied thereon.

ALIENEE. One to whom an alienation is made.

ALIENI GENERIS (Lat.). Of another kind.

ALIENI JURIS (Lat.). Subject to the authority of another. An infant who is under the authority of his father or guardian, and a wife under the power of her husband, are said to be *alieni juris*. See SUI JURIS.

ALIENIGENA (Lat.). One of foreign birth; an alien. 7 Coke 31.

ALIENOR. He who makes a grant or alienation.

ALIMENT. In Scotch Law. To support; to provide with necessaries. Paterson, Comp. §§ 845, 850.

Maintenance; support; an allowance from the husband's estate for the support of the wife. Paterson, Comp. § 893.

In Civil Law. Food and other things necessary to the support of life; money allowed for the purpose of procuring these. Dig. 50. 16. 43.

In Common Law. To supply with necessaries. 3 Edw. Ch. 194.

ALIMENTA (Lat. *alere*, to support). Things necessary to sustain life.

Under the appellation are included food, clothing, and a house; water also, it is said, in those regions where water is sold; Calvinus, Lex.; Dig. 50. 16. 43.

ALIMONY. The allowance which a husband by order of court pays to his wife, living separate from him, for her maintenance. 2 Bish. Marr. & D. 351; Lloyd, Div. 212; 55 Me. 21; 36 Ga. 286.

It is also commonly used as equally applicable to all allowances, whether annual or in gross, made to a wife upon a decree of divorce. 107 Mass. 432; 9 N. H. 309; 38 Vt. 248; 28 Ind. 291.

Alimony pendente lite is that ordered during the pendency of a suit.

Permanent alimony is that ordered for the use of the wife after the termination of the suit during their joint lives.

To entitle a wife to permanent alimony, the following conditions must be complied with. *First*, a legal and valid marriage must be proved; 1 Rob. Eccl. 484; 2 Add. Eccl. 484; 4 Hen. & M. 507; 10 Ga. 477; 5 Sess. Cas. N. S. Sc. 1288; 24 Ill. App. 165. *Second*, by the common law the relation of husband and wife must continue to subsist; for which reason no alimony could be awarded upon a divorce *a vinculo matrimonii*, or a sentence of nullity; 1 Lee, Eccl. 621; 1 Blackf. 360; 1 Ia. 440; Saxt. 96; 13 Mass. 264; 18 Me. 308; 4 Barb. 295; 1 Gill & J. 463; 8 Yerg. 67. This rule, however, has been very generally changed by statute in this country; 2 Bish. M. & D. § 376. *Third*, the wife must be separated from the bed and board of her husband by judicial decree; voluntary separation, for whatever cause, is insufficient. And, as a general rule, the alimony must be awarded by the same decree which grants the separation, or at least in the same suit, it not being generally competent to maintain a subsequent and independent suit for that purpose; 9 Watts 90; 27 Miss. 630, 692; 21 Conn. 185; 1 Blackf. 360; 8 Yerg. 67. The right to alimony need not be determined in the suit for divorce, if such right is reserved in the judgment; 138 N. Y. 272. *Fourth*, the wife must not be the guilty party; 1 Paige, Ch. 276; 2 Ill. 242; Wright, Ohio 514; 6 B. Monr. 496; 11 Ala. N. S. 763; 24 N. H. 564; 40 Ill. App. 73; 133 Ind. 122; but in some states there are statutes in terms which permit the court, in its discretion, to decree alimony to the guilty wife; 2 Bish. M. & D. 378; [1892] Prob. Div. 1; Lloyd, Div. 222; and continued adultery of wife after divorce, is no ground for vacating a previous order allowing her permanent alimony; 35 Ill. App. 544.

In California, a divorce having been decreed against a non-resident, an order for alimony and for custody of children was vacated on appeal. 33 Am. Law Rev. (July, 1896) 604, *q. v.* for an elaborate discussion and criticism of this ruling.

Alimony *pendente lite* is granted much more freely than permanent alimony, it being very much a matter of course to allow the former, unless the wife has sufficient separate property, upon the institution of a suit; 1 Hagg. Eccl. 773; 1 Curt. Eccl. 444; 2 B. Monr. 142; 2 Paige, Ch. 8; 11 *id.* 166; 40 Ill. App. 202; 37 *id.* 491; either for the purpose of obtaining a separation from bed and board; 1 Edw. Ch. 255; a divorce *a vinculo matrimonii*; 9 Mo. 539; 18 Me. 308; 1 Bland, Ch. 101; or a sentence of nullity, and whether the wife is plaintiff or defendant. The reason is, that it is improper for the parties to live in matrimonial cohabitation during the pendency of such a suit, whatever may be its final result; 1 Sandf. Ch. 483. She need only show probable ground for divorce to entitle her to alimony; 24 Ill. App. 431. Upon the same principle, the husband who has all the money, while the wife has none, is bound to furnish her, whether plaintiff or defendant, with the means to defray her expenses in the suit; otherwise, she would be denied justice; 2 Barb. Ch. 146; Walk. Ch. 421; 2 Md. Ch. Dec. 335, 393. See 1 Jones, N. C. 528. This alimony ceases as soon as the fault of the wife is finally determined; 37 Mo. App. 207.

Alimony is not a sum of money nor a specific proportion of the husband's estate given absolutely to the wife, but it is a continuous allotment of sums payable at regular intervals, for her support from year to year; 6 Harr. & J. 485; 9 N. H. 309; 9 B. Monr. 49; 6 W. & S. 85; 75 N. C. 70; 12 Fla. 449; 62 Barb. 109; but in some states statutory allowances of a gross sum have been given to the wife under the name of alimony; see 9 N. H. 309; 21 Conn. 185; 9 Ohio 37; 47 *id.* 544; 107 Mass. 428; 40 Mich. 493; 78 Ill. 402; 36 Wis. 362; 23 Ind. 370; 19 Kan. 159; 83 Cal. 460; if in gross it should not ordinarily exceed one-half the husband's estate; 37 Mo. App. 471. It must secure to

her as wife a maintenance separate from her husband: an absolute title in specific property, or a sale of a part of the husband's estate for her use, cannot be decreed or confirmed to her as alimony; 3 Hagg. Eccl. 322; 7 Dana 181; 6 Harr. & J. 485; 4 Hen. & M. 587; 6 Ired. 293. Nor is alimony regarded, in any general sense, as the separate property of the wife. Hence she can neither alienate nor charge it; 4 Paige, Ch. 509; if she suffers it to remain in arrear for more than one year, she cannot generally recover such arrears; 3 Hagg. Eccl. 322; if she saves up anything from her annual allowance, upon her death it will go to her husband; 6 W. & S. 85; 12 Ga. 201; if there are any arrears at the time of her death, they cannot be recovered by her executors; 8 Sim. 321; 8 Term 545; 6 W. & S. 85; as the husband is only bound to support his wife during his own life, her right to alimony ceases with his death; 1 Root 349; 4 Hayw. 75; 4 Md. Ch. Dec. 289; 33 W. Va. 695; 23 Ill. App. 558; and as it is a maintenance for the wife living separate from her husband, it ceases upon reconciliation and cohabitation. So also its amount is liable at any time to be increased or diminished at the discretion of the court; 8 Sim. 315, 321, n.; 6 W. & S. 85; and the court may insert a provision in the decree allowing any interested party to thereafter request a modification of the amount allowed on account of changed conditions; 59 Hun 621. The preceding observations, however, respecting the nature and incidents of alimony should be received with some caution in this country, where the subject is so largely regulated by statute; 10 Paige, Ch. 20; 7 Hill 207.

In respect to the amount to be awarded for alimony, it depends upon a great variety of considerations and is governed by no fixed rules; 4 Gill 105; 7 Hill N. Y. 207; 1 Green, Ch. 90; 1 Iowa 151; 10 Ga. 477. The ability of the husband, however, is a circumstance of more importance than the necessity of the wife, especially as regards permanent alimony; and in estimating his ability his entire income will be taken into consideration, whether it is derived from his property or his personal exertions; 3 Curt. Eccl. 3, 41; 1 Rich. Eq. 282; 2 B. Monr. 370; 5 Pick. 427; 1 R. I. 212; 28 Neb. 843; 48 Mo. App. 668. But if the wife has separate property; 2 Phill. 40; 2 Add. Eccl. 1, or derives income from her personal exertions, this will also be taken into account. If she has sufficient means to support herself in the rank of life in which she moved, she is entitled to no alimony; 49 Mich. 504; 75 N. C. 70; 1 Curteis, Eccl. 444; 2 Hagg. Consis. 203. The method of computation is, to add the wife's annual income to her husband's; consider what, under all the circumstances, should be allowed her out of the aggregate; then from the sum so determined deduct her separate income, and the remainder will be the annual allowance to be made her. There are various other circumstances, however, beside the husband's ability, to be taken into consideration: as, whether the bulk of the property came from the wife, or belonged originally to the husband; 2 Litt. Ky. 337; 4 Humphr. 510; 101 Ill. 416; or was accumulated by the joint exertions of both, subsequent to the marriage; 11 Ala. N. S. 763; 3 Harr. Del. 142; whether there are children to be supported and educated, and upon whom their support and education devolves; 3 Paige, Ch. 267; 3 Green, Ch. 171; 2 Litt. 337; 10 Ga. 477; 68 Hun 37; 100 Ill. 570; 65 Me. 407; 65 Ga. 476; the nature and extent of the husband's *delictum*; 3 Hagg. Eccl. 657; 2 Johns. Ch. 391; 4 Des. Eq. 183; 24 N. H. 564; the demeanor and conduct of the wife towards the husband who desires cohabitation; 7 Hill 207; 5 Dana 499; 15 Ill. 145; 95 Ala. 443; the condition in life, place of residence, health, and employment of the husband, as demanding a larger or smaller sum for his own support; 1 Hagg. Eccl. 526, 532; the condition in life, circumstances, health, place of residence, and consequent necessary expenditures of the wife; 5 Pick. 427; 4 Gill 105; 11 Ala. N. S. 763; the age of the parties; 6 Johns. Ch. 91; 4 Gill, Md. 105; 29 Ind. 488; and whatever other circumstances may address themselves to a sound judicial discretion.

So far as any general rule can be deduced from the decisions and practice of the courts, the proportion of the joint income to be awarded for permanent alimony is said to range from one-half, where the property came from the wife (2 Phill. 235), to one-third, which is the usual amount; 29 L. J. Mat. Cas. 150; 4 Gill 105; 8 Bosw. 640; 44 Ind. 106; 44 Ala. 437; or even less; 37 Ind. 164; 68 Ill. 17; 38 Ind. 139. In case of alimony *pendente lite*, it is not usual to allow more than about one-fifth, after deducting the wife's separate income; Lloyd, Div. 212; 2 Bish. Mar. Div. & Sep. §§ 945–951; and generally a less proportion will be allowed out of a large estate than a small one; for, though no such rule exists in respect to permanent alimony, there may be good reasons for giving less where the question is on alimony during the suit; when the wife should live in seclusion, and wants only a comfortable subsistence; 2 Phill. Eccl. 40. See 4 Thomp. & C. 574; 36 Iowa 383; 39 Ind. 185; 29 Wis. 517.

ALIO INTUITU (Lat.). Under a different aspect. See DIVERSO INTUITU.

ALITER (Lat.). Otherwise; as otherwise held or decided.

ALIUNDE (Lat.). From another place. Evidence *aliunde* (*i. e.* from without the will) may be received to explain an ambiguity in a will. 1 Greenl. Ev. § 291. The word is also used in the same sense with respect to the admission of evidence to modify or explain other documents, generally treated as conclusive. It was thus frequently employed in connection with the electoral commission of 1877 which determined the disputed presidential election in the United States.

ALL. Completely, wholly, the whole amount, quantity or number.

It is frequently used in the sense of "each" or "every one of;" 143 Mass. 442; 144 *id.* 100; and is a general rather than a universal term, to be understood in one sense or the other according to the demands of sound reason; 18 Pa. 391; 9 Ves. Jr. 137.

ALL FOURS. A metaphorical expression, signifying that a case agrees in all its circumstances with another.

ALLEGATA. A word which the emperors formerly signed at the bottom of their rescripts and constitutions; under other instruments they usually wrote *signata* or *testata*. Encyc. Lond.

ALLEGATA ET PROBATA (Lat., things alleged and proved). The allegations made by a party to a suit, and the proof adduced in their support.

It is a general rule of evidence that the *allegata* and *probata* must correspond; that is, the proof must at least be sufficiently extensive to cover all the allegations of the party which are material; 1 Greenl. Ev. § 51; 2 Sumn. 206; 3 Mart. N. S. La. 636.

ALLEGATION. The assertion, declaration, or statement of a party of what he can prove.

In Ecclesiastical Law. The statement of the facts intended to be relied on in support of the contested suit.

It is applied either to the libel, or to the answer of the respondent, setting forth new facts, the latter being, however, generally called the *defensive allegation*. See 1 Browne, Civ. Law 472, 473, n.

ALLEGATION OF FACULTIES. A statement made by the wife of the property of her husband, for the purpose of obtaining alimony. 11 Ala. N. S. 763; 3 Tex. 168.

To such an allegation the husband makes answer, upon which the amount of alimony is determined; 2 Lee, Eccl. 593; 3 Phill. Eccl. 387; or she may produce other proof, if necessary in consequence of his failure to make a full and complete disclosure; 2 Hagg. Cons. 199; Lloyd, Div. 276; 3 Knapp 42; 2 Bish. M. & Div. § 1082.

ALLEGIANCE. (Lat. *alligare*, to bind to). The tie which binds the citizen to the government, in return for the protection which the government affords him. The duty which the subject owes to the sovereign, correlative with the protection received.

Acquired allegiance is that binding a citizen who was born an alien, but has been naturalized.

Local or *actual allegiance* is that which is due from an alien while resident in a country, in return for the protection afforded by the government. From this are excepted foreign sovereigns and their representatives, naval and armed forces when permitted to remain in or pass through the country or its waters.

Natural allegiance is that which results from the birth of a person within the territory and under the obedience of the government. 2 Kent 42.

Allegiance may be an absolute and permanent obligation, or it may be a qualified and temporary one; the citizen or subject owes the former to his government or sovereign, until by some act he distinctly renounces it, whilst the alien domiciled in the country owes a temporary and local allegiance continuing during such residence; 16 Wall. 154.

At common law, in England and America, natural allegiance could not be renounced except by permission of the government to which it was due; 1 Bla. Com. 370, 371; 1 East, Pl. Cr. 81; 3 Pet. 99, 242; but see 8 Op. Att.-Gen. U. S. 139; 9 *id.* 356. Held to be the law of Great Britain in 1868; Cockb. Nationality. It was otherwise in the civil law and in most continental nations. After many negotiations between the two countries, the rule has been changed in the United States by act of July 27, 1868, and in England by act of May 14, 1870. Whether natural allegiance revives upon the return of the citizen to the country of his allegiance is an open question; Whart. Confl. L. § 6. See Cockb. Nationality; Webster, Citizenship; Webster, Naturalization; 2 Whart. Int. L. Dig. ch. vii.; Whart. Confl. L.; 18 Am. L. Reg. 595, 565; Lawrence's Wheat. Int. L. App. See NATURALIZATION; EXPATRIATION.

ALLEGING DIMINUTION. The allegation in an appellate court of some error in a subordinate part of the *nisi prius* record. Black's Dict.

On a certiorari an allegation of diminution is filed to require the court below to send up a part of the record which is omitted in the transcript upon which the appeal is to be heard. An allegation of diminution is frequently made where the record of a judgment obtained before a justice of the peace is removed by certiorari to a superior court having appellate or supervisory jurisdiction of it.

ALL FAULTS. A term in common use in the trade. A sale of goods with "all faults," in the absence of fraud on the part of the vendor, covers all such faults and defects as are not inconsistent with the identity of the goods as the goods described; 118 Mass. 242; 5 B. & Ald. 240.

ALLIANCE (Lat. *ad*, to, *ligare*, to bind). The union or connection of two persons or families by marriage; affinity.

In International Law. A contract, treaty, or league between two sovereigns or states, made to insure their safety and common defence.

Defensive alliances are those in which a nation agrees to defend her ally in case she is attacked.

Offensive alliances are those in which nations unite for the purpose of making an attack, or jointly waging the war against another nation.

ALLISION. Running one vessel against another.

To be distinguished from collision, which denotes the running of two vessels against each other.

The distinction is not very carefully observed, but collision is used to denote cases strictly of allision.

ALLOCATION. An allowance upon an account in the English Exchequer. Cowel.

Placing or adding to a thing. Encyc. Lond.

ALLOCATIONE FACIENDA. In English Law. A writ directed to the lord treasurer and barons of the exchequer, commanding that an allowance be made to an accountant for such moneys as he has lawfully expended in his office.

ALLOCATUR (Lat., it is allowed).

A Latin word formerly used to denote that a writ or order was allowed. See 2 Halst. N. J. 38.

A word denoting the allowance by a master or prothonotary of a bill referred for his consideration, whether touching costs, damages, or matter of account. Lee, Dict.; Archb. Pr. 129.

ALLOCATUR EXIGENT. A writ of exigent which issued in a process of outlawry, upon the sheriff's making return to the original exigent that there were not five county courts held between the *teste* of the original writ and the return day. 1 Tidd, Pr. 128.

ALLODARII. Those who own allodial lands.

Those who have as large an estate as a subject can have. Coke, Litt. 1; Bacon, Abr. *Tenure*, A.

ALLODIAL. Held in allodium; the antithesis of feudal. See ALLODIUM.

ALLODIAN. Sometimes used but not well authorized. Cowel.

ALLODIUM (Sax. *a*, privative, and *lode* or *leude*, a vassal; that is, without vassalage).

An estate held by absolute ownership, without recognizing any superior to whom any duty is due on account thereof. 1 Washb. R. P. 5th ed. *16.

It is used in opposition to *feodum* or *fief*, which means property, the use of which was bestowed upon another by the proprietor, on condition that the grantee should perform certain services for the grantor, and upon the failure of which the property should revert to the original possessor. See 1 Poll. & Mait. 45.

In the United States the title to land is essentially allodial, and every tenant in fee-simple has an absolute and unqualified dominion over it; yet in technical language his estate is said to be in fee, a word which implies a feudal relation, although such a relation has ceased to exist in any form, while in several of the states the lands have been declared to be allodial; 44 Pa. 492; 2 *id.* 191; 10 Gill & J. 443; 10 Peters 717; but see 7 Cush. 92; 2 Sharsw. Bla. Com. 77, n.; 1 Washb. R. P. 5th ed. *41, 42; Sharswood's Lecture on Feudal Law, 1870. In some states, the statutes have declared lands to be allodial. See also 28 Wis. 367.

In England there is no allodial tenure, for all land is held mediately or immediately of the king; but the words *tenancy in fee-simple* are there properly used to express the most absolute dominion which a man can have over his property; 3 Kent, Com. *487; Cruise, Prelim. Dis. c. 1, § 13; 2 Bla. Com. 105.

ALLONGE (Fr.). A piece of paper annexed to a bill of exchange or promissory note, on which to write endorsements for which there is no room on the instrument itself. Pardessus, n. 343; Story, Prom. Notes, §§ 121, 151; Tied. on Com. Paper 264.

ALLOTMENT. A share or portion; that which is allotted. The division or distribution of land.

Allotment system. A system in England of assigning small portions of land, from the eighth of an acre to four or five acres, to be cultivated by day-laborers after their ordinary day's work. Brande.

ALLOWANCE. The share or portion given to a married woman, child, trustee, etc. 45 Ala. 264. The term is ordinarily only another name for a gift or gratuity to a child or other dependent; 8 R. I. 170.

ALLOY (spelled also *allay*). An inferior metal used with gold and silver in making coin.

The amount of alloy to be used is determined by law, and is subject to changes from time to time.

ALLUVIO MARIS (Lat.). Soil formed by the washing-up of earth from the sea. Schultes, Aq. Rights 138.

ALLUVION. That increase of the earth on a shore or bank of a river, or to the shore of the sea, by the force of the water, as by a current or by waves, or from its recession in a navigable lake, which is so gradual that no one can judge how much is added at each moment of time. Inst. l. 2, t. 1, § 20; 3 B. & C. 91; Code Civil Annoté, n. 556; Ang. Watercourses 53; 9 Cush. 551; 64 Ill. 58; Gould, Waters § 155.

Conversely, where land is submerged by the gradual advance of the sea, the sovereign acquires the title to the part thereby covered and it ceases to belong to the former owner; 11 Oregon 217; 5 Mees. & W. 327; 4 C. P. D. 438; 84 N. Y. 218; Gould, Waters § 155.

The proprietor of the bank increased by alluvion is entitled to the addition, this being regarded as the equivalent for the loss he may sustain from the breaking-in or encroachment of the waters upon his land; 3 Washb. R. P. 5th ed. *451; 2 Md. Ch. Dec. 485; 1 Gill & J. 249; 4 Pick. 273; 17 *id.* 41; 1 Hawk. 56; 6 Mart. La. 19; 11 Ohio 311; 18 La. 122; 5 Wheat. 380; 48 N. H. 9; 64 Ill. 56; 26 Ohio St. 40; 58 N. Y. 437; 18 Iowa 549; 23 Wall. 46; 4 *id.* 502; 134 U. S. 178; 10 Pet. 662; 35 Fed. Rep. 188; 42 Md. 348; 43 *id.* 23. The increase is to be divided among riparian proprietors by the following rule: measure the whole extent of their ancient line on the river, and ascertain how many feet each proprietor owned on this line; divide the newly-formed river-line into equal parts, and appropriate to each proprietor as many

of these parts as he owned feet on the old line, and then draw lines from the points at which the proprietors respectively bounded on the old to the points thus determined as the points of division on the newly-formed shore. In applying this rule, allowance must be made for projections and indentations in the old line; 17 Pick. 41; 9 Me. 44; 51 N. H. 496; 17 Vt. 387; see 19 Mich. 325; 18 How. 150; 1 Black 209; 114 Ill. 313. Where the increase is instantaneous, it belongs to the sovereign, upon the ground that it was a part of the bed of the river of which he was proprietor; 17 Ala. 9; 2 Bla. Com. 269; the character of *alluvion* depends upon the addition being imperceptible; 3 B. & C. 91; 26 Wall. 46; 18 La. 122.

Sea-weed which is thrown upon a beach, as partaking of the nature of alluvion, belongs to the owner of the beach; 7 Metc. 332; 2 Johns. 322; 3 B. & Ad. 967; 40 Conn. 382; 43 N. H. 609; 68 N. Y. 459; 84 *id.* 215; 7 Jur. N. S. 926; 1 Alc. & Nap. 348. But sea-weed below low-water mark on the bed of a navigable river belongs to the public; 9 Conn. 38; 40 *id.* 382; 17 N. H. 527; 5 Day 22.

The doctrine as to alluvion is equally applicable to tide-waters, non-tidal rivers and lakes; Gould, Waters § 155; 94 U. S. 324; 23 Wall. 46; 64 Ill. 56; 61 Mo. 345; 58 Ind. 248; 4 C. P. D. 438; 7 H. & N. 151.

Alluvion differs from avulsion in this, that the latter is sudden and perceptible; 23 Wall. 46. See AVULSION. And see 2 Ld. Raym. 737; Cooper, Inst. l. 2, t. 1; Ang. Waterc. § 53; Phill. Int. Law 255; 2 Am. L. J. 282, 393; Ang. Tide Waters 249; Inst. 2. 1. 20; Dig. 41. 1. 7; *id.* 39. 2. 9; *id.* 6. 1. 23; *id.* 41. 1. 5. For an interesting English case involving the *jus alluvion*, see address of M. Crackanthorpe before Am. Bar. Assn. Report 1896. See ACCRETION.

ALLY. A nation which has entered into an alliance with another nation. 1 Kent 69.

A citizen or subject of one of two or more allied nations. 4 C. Rob. Adm. 251; 6 *id.* 205; 2 Dall. 15; Dane, Abr. Index.

ALMANAC. A book or table containing a calendar of days, weeks, and months, to which various statistics are often added, such as the times of the rising and setting of the sun and moon, etc. Whewell.

The court will take judicial notice of an almanac; 47 Conn. 179; 55 Md. 11; 41 N. J. L. 29; 61 Cal. 404.

ALMS. Any species of relief bestowed upon the poor.

That which is given by public authority for the relief of the poor. Shelf. Mortm. 802, note (X); Hayw. Elect. 263; 1 Dougl. El. Cas. 370; 2 *id.* 107.

ALNAGER (spelled also *Ulnager*). A public sworn officer of the king, who, by himself or his deputy, looks to the assize of woollen cloth made throughout the land, and to the putting on the seals for that purpose ordained. Statute 17 Ric. II. c. 2; Cowel; Blount; Termes de la Ley.

ALNETUM. A place where alder-trees grow. Domesday Book; Cowel; Blount.

ALONG. It means "by," "on," or "over," according to the subject-matter and context. 34 Conn. 425; 67 Mo. 58; 1 B. & Adol. 448.

ALTA PRODITIO. High treason.

ALTA VIA. The highway.

ALTARAGE. In Ecclesiastical Law. Offerings made on the altar; all profits which accrue to the priest by means of the altar. Ayliffe, Par. 61.

ALTERATION. A change in the terms of a contract or other written instrument by a party entitled under it, without the consent of the other party, by which its meaning or language is changed.

The term is properly applied to the change in the language of instruments, and is not used of changes in the contract itself. And it is in strictness to be distinguished from the act of a stranger in changing the form or language of the instrument, which is called a *spoliation*. This latter distinction is not always observed in practice, however.

Also sometimes applied to a change made in a written instrument, by agreement of the parties; but this use of the word is rather colloquial than technical. Such an alteration becomes a new agreement, superseding the original one; Leake, Cont. 430.

An alteration avoids the instrument; 11 Coke 27; 5 C. B. 181; 4 Term 320; 8 Cowen 71; 2 Halst. 175; 28 Tex. App. 419; 121 Ind. 135; but not, it seems, if the alteration be not material; 2 N. H. 543; 10 Conn. 192; 5 Mass. 540; 20 Vt. 217; 3 Ohio St. 445; 5 Nebr. 233, 439; 12 N. H. 466; 13 Colo. 69. The insertion of such words as the law supplies is said to be not material; 15 Pick. 239; 29 Me. 298. As to whether tearing and putting on a seal is material, see 2 Pick. 451; 4 Gilm. 411; 11 M. & W. 778; 1 Pars. Contr. 8th ed. *27; 2 *id.* *721. The question of materiality is one of law for the court; 1 N. H. 95; 2 *id.* 543; 11 Me. 115; 13 Pick. 165; 5 Miss. 231; 77 Ga. 463; and depends upon the facts of each case; L. R. 1 Ex. D. 176. The principle seems to be that a party "is discharged from his liability, if the altered instrument, supposed to be genuine, would operate differently to the original instrument, whether it be or be not to his prejudice;" Anson, Contr. 2d Am. ed. *327; 5 E. & B. 89. For instances, see 74 N. Y. 307; 39 Mich. 182; 57 Ala. 379; 51 Iowa 473; 66 Ind. 331; 69 Mo. 429; 126 Pa. 347; 46 Minn. 531. Alteration of a deed will not defeat a vested estate or interest acquired under the deed; 11 M. & W. 800; 2 H. Bla. 259; 23 Pick. 231; 1 Me. 73; 1 Watts 236; 3 Barb. 404; see 18 Vt. 466; but as to an action upon covenants, has the same effect as alteration of an unsealed writing; 11 M. & W. 800; 23 Pick. 231; 2 Barb. Ch. 119. As to filling up blanks in deeds, see 6 M. & W. 200; 5 Mass. 538; 20 Pa. 12; 4 M'Cord 239; 7 Cow. 484; 2 Dana 142; 2 Wash. Va. 164; 2 Ala. 517; 10 Am. Dec. 267.

The same rule as to alterations applies to

negotiable promissory notes as to other instruments: 40 Minn. 531; 40 Alb. L. J. 8. The unauthorized insertion of "or bearer" in a note, if made innocently, will not make the note void; 81 Me. 44; but the insertion of "or order" will avoid; 20 S. W. Rep. (Tex.) 53; the fraudulent detaching a stub containing conditions favorable to maker, from a note, avoids the note; 85 Tenn. 271. As to the burden of proof in the case of alterations of note; 32 Cent. L. J. 8.

A spoliation by a third party without the knowledge or consent of a party to the instrument will not avoid an instrument even if material, if the original words can be restored with certainty; 2 Pars. Contr. 8th ed. *721, and note 1; *id.* 718, note 1; 1 Greenl. Ev. § 566; 50 Ark. 358; but the material alteration of an instrument by a stranger, *while it is in the custody of the promisee*, avoids his rights under it; 11 Coke 27 *b*; L. R. 10 Ex. 330; because one who "has the custody of an instrument made for his benefit, is bound to preserve it in its original state;" 13 M. & W. 352; 3 E. & B. 687; Leake, Cont. 425; but see 23 Pick. 231.

When a note was given by a corporation payable to its manager's wife for his salary, an alteration making it payable to the manager himself is material; 73 Fed. Rep. 925.

Where there has been manifestly an alteration of a parol instrument, the party claiming under it is bound to explain the alteration; 6 Cush. 314; 9 Pa. 186; 11 N. H. 395; 2 La. 290; 3 Har. Del. 404; 8 Miss. 414; 7 Barb. 564; 6 C. & P. 273; see 11 Conn. 531; 9 Mo. 705; 2 Zabr. 424; 5 Harr. & J. 36; 20 Vt. 205; 13 Me. 386; 134 Pa. 31. As to the rule in case of deeds, see Co. Litt. 225 *b*; 1 Kebl. 22; 5 Eng. L. & Eq. 349; 1 Zabr. 280.

Under the common law the rule of evidence was to presume erasures and alterations of written instruments to have been made at the time of, or anterior to, their execution, the law presuming the honesty of purpose and action until the contrary is shown; 63 Mo. 66; 13 Me. 386; 22 Wend. 388; 22 N. J. L. 424.

ALTERNAT. A usage among diplomatists by which the rank and places of different powers, who have the same right and pretensions to precedence, are changed from time to time, either in a certain regular order, or one determined by lot. In drawing up treaties and conventions, for example, it is the usage of certain powers to alternate, both in the preamble and the signatures, so that each power occupies, in the copy intended to be delivered to it, the first place; Wheat. Int. Law § 157; Pol. Int. Law 319.

ALTERNATIVE. Allowing a choice between two or more things or acts to be done.

In contracts, a party has often the choice which of several things to perform. A writ is in the alternative which commands the defendant to do the thing required, or show the reason wherefore he has not done it; Finch 257; 3 Bla. Com. 273. Under the common-law practice, the first *mandamus* is an alternative writ; 3 Bla. Com. 111; but in modern practice this writ is often dispensed with and its place is taken by a rule to show cause. See MANDAMUS.

ALTIUS NON TOLLENDI. In Civil Law. A servitude by which the owner of a house is restrained from building beyond a certain height.

ALTIUS TOLLENDI. In Civil Law. A servitude which consists in the right, to him who is entitled to it, to build his house as high as he may think proper. In general, every one enjoys this privilege, unless he is restrained by some contrary title.

ALTO ET BASSO. High and low.

This phrase is applied to an agreement made between two contending parties to submit all matters in dispute, alto et basso, to arbitration. Cowel.

ALTUM MERE. The high sea.

ALUMNUS. A foster-child.

Also a graduate from a school, college, or other institution of learning.

ALVEUS (Lat.). The bed or channel through which the stream flows when it runs within its ordinary channel. Calvinus, Lex.

Alveus derelictus, a deserted channel. 1 Mackeldey, Civ. Law 280.

AMALGAMATION. Union of different races, or diverse elements, societies, or corporations, so as to form a homogeneous whole or new body; interfusion; intermarriage; consolidation; coalescence; as the amalgamation of stock. Stand. Dict.

In England it is used in the case of the merger of two incorporated societies or companies. See MERGER.

AMALPHITAN TABLE. A code of sea laws compiled for the free and trading republic of Amalphi toward the end of the eleventh century. 3 Kent 9.

It consists of the laws on maritime subjects which were or had been in force in countries bordering on the Mediterranean; and, on account of its being collected into one regular system, it was for a long time received as authority in those countries. 1 Azuni, Mar. Law 376.

AMBACTUS (Lat. *ambire*, to go about). A servant sent about; one whose services his master hired out. Spelman, Gloss.

AMBASSADOR. In International Law. A public minister sent abroad by some sovereign state or prince, with a legal commission and authority to transact business on behalf of his country with the government to which he is sent.

Extraordinary are those employed on particular or extraordinary occasions, or residing at a foreign court for an indeterminate period. Vattel, *Droit des Gens*, l. 4, c. 6, §§ 70–79.

Ordinary are those sent on permanent missions.

An ambassador is a minister of the highest rank.

The United States, until recently, were represented by ministers plenipotentiary, never having sent a person of the rank of an ambassador in the diplomatic sense; 1

Kent 39, n. This was changed, however, and on March 1, 1893, a law was passed authorizing the President to designate as ambassadors the representatives of the United States to such countries as he might be advised were so represented or about to be represented in the United States. In consequence of this provision the United States is now represented by ambassadors in Great Britain, Germany, France, and Italy; 27 Stat. L 496.

Ambassadors, when acknowledged as such, are exempted absolutely from all allegiance, and from all responsibility to the laws; Pol. Int. Law 208; 7 Cranch 138. If, however, they should be so regardless of their duty, and of the object of their privilege, as to insult or openly to attack the laws of the government, their functions may be suspended by a refusal to treat with them, or application can be made to their own sovereign for their recall, or they may be dismissed, and required to depart within a reasonable time. By fiction of law, an ambassador is considered as if he were out of the territory of the foreign power; and it is an implied agreement among nations, that the ambassador, while he resides in the foreign state, shall be considered as a member of his own country, and the government he represents has exclusive cognizance of his conduct and control of his person; Grotius, b. 2, c. 18, §§ 1–6.

Ambassadors' children born abroad are held not to be aliens; 7 Coke 18 *a*. The persons of ambassadors and their domestic servants are exempt from arrest on civil process; 1 Burr. 401; 3 *id.* 1731; Cas. *temp.* Hardw. 5; Stat. 7 Anne, c. 12; Act of Cong. April 30, 1790, § 25.

Consult 2 Wash. C. C. 435; 7 Cra. 138; 1 Kent 14, 38, 182; 1 Bla. Com. 253; Rutherford, Inst. b. 2, c. 9; Vattel, b. 4, c. 8, § 113; Grotius, l. 2, c. 8, §§ 1, 3; 4 Wash. C. C. 531; 1 Bald. 234; as to exemption of household furniture, see 24 Q.B. Div. 338; 2 Wash. C. C. 435.

AMBIDEXTER (Lat.). Skilful with both hands.

Applied anciently to an attorney who took pay from both sides, and subsequently to a juror guilty of the same offence; Cowel.

AMBIGUITY (Lat. *ambiguitas*, indistinctness; duplicity). Duplicity, indistinctness, or uncertainty of meaning of an expression used in a written instrument.

Latent is that which arises from some collateral circumstance or extrinsic matter in cases where the instrument itself is sufficiently certain and intelligible. 56 Me. 107; 60 N. H. 377; 131 Mass. 179; 83 N. Y. 518.

Patent is that which appears on the face of the instrument; that which occurs when the expression of an instrument is so defective that a court of law which is obliged to put a construction upon it, placing itself in the situation of the parties, cannot ascertain therefrom the parties' intention. 4 Mass. 205; 4 Cra. 167; 1 Greenl. Ev. §§ 292–300; Ans. Contr. 248; 1 Mason 9; 69 Ala. 140; 50 Iowa 429; 8 Lea 499.

The term does not include mere *inaccuracy*, or such uncertainty as arises from the use of peculiar words, or of common words in a peculiar sense; Wigr. Wills 174; 3 Sim. 24; 3 M. & G. 452; 8 Metc. 576; 13 Vt. 36; see 21 Wend. 651; 8 Bing. 244; and intends such expressions as would be found of uncertain meaning by persons of competent skill and information; 1 Greenl. Ev. § 298.

Latent ambiguities are subjects for the consideration of a jury, and may be explained by parol evidence; 1 Greenl. Ev. § 301; and see Wigram, Wills 48; 2 Starkie, Ev. 565; 1 Stark. 210; 5 Ad. & E. 302; 6 *id.* 153; 3 B. & Ad. 728; 8 Metc. 576; 7 Cowen 202; 1 Mas. 11. *Patent* ambiguity cannot be explained by parol evidence, and renders the instrument as far as it extends inoperative; 4 Mass. 205; 7 Cra. 167; Jarm. Wills, 6th Am ed. *400. See 88 Ga. 298; 44 Mo. App. 320; 35 N. J. L. 307; 59 Iowa 444; 50 N. H. 349; 23 Barb. 285; 47 Mich. 283; 46 Ill. 247.

AMBIT. A boundary line.

AMBITUS (Lat.). A space beside a building two and a half feet in width, and of the same length as the building; a space two and a half feet in width between two adjacent buildings; the circuit, or distance around. Cicero; Calvinus, Lex.

AMBULATORY (Lat. *ambulare*, to walk about). Movable; changeable; that which is not fixed.

Ambulatoria voluntas (a changeable will) denotes the power which a testator possesses of altering his will during his lifetime.

AMBUSH. The noun means, 1st, the act of attacking an enemy unexpectedly from a concealed station; 2d, a concealed station, where troops or enemies lie in wait to attack by surprise; an ambuscade; 3d, troops posted in a concealed place, for attacking by surprise. The verb *ambush* means to lie in wait, to surprise, to place in ambush. 46 Ala. 142.

AMELIORATIONS. Betterments. 6 Low. Can. 294; 9 *id.* 503.

AMENABLE. Responsible; subject to answer in a court of justice; liable to punishment.

AMENDE HONORABLE. In English Law. A penalty imposed upon a person by way of disgrace or infamy, as a punishment for any offence, or for the purpose of making reparation for any injury done to another, as the walking into church in a white sheet, with a rope about the neck and a torch in the hand, and begging the pardon of God, or the king, or any private individual, for some delinquency.

In French Law. A punishment somewhat similar to this, and which bore the same name, was common in France; it was abolished by the law of the 25th of September, 1791; Merlin, *Répert.*

AMENDMENT. In Legislation. An

alteration or change of something proposed in a bill or established as law.

Thus the senate of the United States may amend money-bills passed by the house of representatives, but cannot originate such bills. The constitution of the United States contains a provision for its amendment; U. S. Const. art. 5.

In Practice. The correction, by allowance of the court, of an error committed in the progress of a cause.

Amendments, at common law, independently of any statutory provision on the subject, are in all cases in the discretion of the court, for the furtherance of justice. Under statutes in modern practice, they are very liberally allowed in all formal and most substantial matters, either without costs to the party amending, or upon such terms as the court think proper to order.

An amendment, where there is something to amend by, may be made in a criminal as in a civil case; 12 Ad. & E. 217; 2 Pick. 550. But an indictment, which is a finding upon the oaths of the grand jury, can only be amended with their consent before they are discharged; 2 Hawk. Pl. Cr. c. 25, §§ 97, 98; 13 Pick. 200; 17 R. I. 370; but see 63 Miss. 221. In many states there are statutory provisions relative to the amendment of indictments; 60 Hun 577; 44 La. Ann. 320. A bill of exceptions when signed and filed becomes a part of the record and may be amended like any other record; 53 Ark. 250; 49 N. J. Law 26; 35 Ill. App. 370; 116 Mo. 358.

An information may be amended after demurrer; 4 Term 457; 4 Burr. 2563. At common law a mistake in an information may be amended at any time; 24 Atl. Rep. (Vt.) 250.

AMENDS. A satisfaction given by a wrong-doer to the party injured, for a wrong committed. 1 Lilly, Reg. 81.

By statute 24 Geo. II. c. 44, in England, and by similar statutes in some of the United States, justices of the peace, upon being notified of an intended suit against them, may tender amends for the wrong alleged as done by them in their official character, and, if found sufficient, the tender bars the action; 5 S. & R. 209, 517; 4 Binn. 20; 6 *id.* 83.

AMERCEMENT. **In Practice.** A pecuniary penalty imposed upon an offender by a judicial tribunal.

The judgment of the court is, that the party be at the mercy of the court (*sit in misericordia*), upon which the *affeerors*—or, in the superior courts, the coroner—liquidate the penalty. As distinguished from a fine, at the old law an *amercement* was for a lesser offence, might be imposed by a court not of record, and was for an uncertain amount until it had been affeered. Either party to a suit who failed was to be amerced *pro clamore falso* (for his false claim); but these amercements have been long since disused; 4 Bla. Com. 379; Bacon, Abr. *Fines* and *Amercements*.

The officers of the court, and any person who committed a contempt of court, was also liable to be amerced.

Formerly, if the sheriff failed in obeying the writs, rules, or orders of the court, he might be amerced; but this practice has been generally superseded by attachment. In some of the United States, however, the sheriff may, by statutory provision, be amerced for making a return contrary to the provision of the statute; 1 Salk. 56; 3 *id.* 33; Coxe 136, 169; 2 South 433; 3 Halst. 270; 6 *id.* 334; 1 Green, N. J. 159, 341; 2 *id.* 350; 1 Ohio 275; 6 *id.* 452; Wright, Ohio 720; 3 Ired. 407; 5 *id.* 385; Cam. & N. 477; or if he fails to make a return within the proper time; 7 Ohio Cir. Ct. 55.

AMEUBLISSEMENT. A species of agreement which by a fiction gives to immovable goods the quality of movable. Merl. Rép.; 1 Low. Can. 25, 58.

AMI (Fr.). A friend. See PROCHEIN AMY.

AMICABLE ACTION. **In Practice.** An action entered by agreement of parties on the dockets of the courts.

This practice prevails in Pennsylvania. When entered, such action is considered as if it had been adversely commenced and the defendant had been regularly summoned.

See CASE STATED.

AMICUS CURIÆ (Lat. a friend of the court).

In Practice. A friend of the court.

One who, for the assistance of the court, gives information of some matter of law in regard to which the court is doubtful or mistaken; such as a case not reported or which the judge has not seen or does not, at the moment, recollect; 2 Co. Inst. 178; 2 Viner, Abr. 475. This custom cannot be traced to its origin, but is immemorial in the English law. It is recognized in the Year Books, and it was enacted in 4 Hen. IV. (1403) that any stranger as "*amicus curiæ*" might move the court, etc. Under the Roman system the *Judex*, "especially if there was but one, called some lawyer to assist him with their counsel," "*sibi advocavit ut in consilio adessent;*" Cic. Quint. 2 Gell. xiv. 2; Suet. Lib. 33. There was in that day also the "*amicus consiliari*," who was ready to make suggestions to the advocate, and this "*amicus*" was called a "*ministrator*;" Cic. de Orat. II. 75. With many others this custom of the Romans became incorporated in the English system, and it was recognized throughout the earlier as well as the later periods of the common law. At first suggestions could come only from the barristers or counsellors, although by the statute of Hen. IV. a "bystander" had the privilege. The custom included *instructing, warning, informing,* and *moving* the court. The information so communicated may extend to any matter of which the court takes judicial cognizance; 8 Coke 15. But it is not the function of *amicus curiæ* to take upon himself the management of a cause; 56 N. H. 416.

Any one as *amicus curiæ* may make application to the court in favor of an infant, though he be no relation; 1 Ves. Sen. 313; and see 11 Gratt. 656; 11 Tex. 698; 2 Mass. 215. Any attorney as *amicus curiæ* may

move the dismissal of a fictitious suit; 21 Nev. 127; or one in which there is no jurisdiction; 2 Mass. 215; or move to quash a vicious indictment, for in case of trial and verdict judgment must be arrested; Comberb 13; or suggest an error which would prevent judgment when the absence of the party prevented a motion in arrest; 2 Show. 297. They may be allowed a reasonable compensation to be taxed by the court; 27 Mo. App. 633.

The term is sometimes applied to counsel heard in a cause because interested in a similar one; 11 Grat. 656; 2 Brock, 461; and occasionably to strangers suggesting the correction of errors in the proceedings; Year Books 4; Hen VI. 16; Thal. Dig. lib. 13. c. 14; Hard. 85; 11 Mod. 137; 109 U. S. 68. See also 11 Pitts. L. J. 321.

AMITA (Lat.). An aunt on the father's side.

Amita magna. A great-aunt on the father's side.

Amita major. A great-great-aunt on the father's side.

Amita maxima. A great-great-great-aunt, or a great-great-grandfather's sister. Calvinus, Lex.

AMITINUS. The child of a brother or sister; a cousin; one who has the same grandfather, but different father and mother. Calvinus, Lex.

AMITTERE CURIAM (Lat. to lose court).

To be excluded from the right to attend court. Stat. Westm. 2, c. 44.

AMITTERE LIBERAM LEGEM. To lose the privilege of giving evidence under oath in any court; to become infamous, and incapable of giving evidence. Glanville 2.

If either party in a wager of battle cried "craven" he was condemned *amittere liberam legem;* 3 Bla. Com. 340.

AMNESTY. An act of oblivion of past offences, granted by the government to those who have been guilty of any neglect or crime, usually upon condition that they return to their duty within a certain period.

Express amnesty is one granted in direct terms.

Implied amnesty is one which results when a treaty of peace is made between contending parties. Vattel, 1, 4, c. 2, §§ 20–22.

Amnesty and pardon are very different. The former is an act of the sovereign power, the object of which is to efface and to cause to be forgotten a crime or misdemeanor; the latter is an act of the same authority, which exempts the individual on whom it is bestowed from the punishment the law inflicts for the crime he has committed; 7 Pet. 160. Amnesty is the abolition and forgetfulness of the offence; pardon is forgiveness. A pardon is given to one who is certainly guilty, or has been convicted; amnesty, to those who may have been so.

Their *effects* are also different. That of pardon is the remission of the whole or a part of the punishment awarded by the law,—the conviction remaining unaffected when only a partial pardon is granted; an amnesty, on the contrary, has the effect of destroying the criminal act, so that it is as if it had not been committed, as far as the public interests are concerned.

Their *application* also differs. Pardon is always given to individuals, and properly only after judgment or conviction; amnesty may be granted either before judgment or afterwards, and it is in general given to whole classes of criminals, or supposed criminals, for the purpose of restoring tranquillity in the state. But sometimes amnesties are limited, and certain classes are excluded from their operation.

The term *amnesty* belongs to international law, and is applied to rebellions which, by their magnitude, are brought within the rules of international law, but has no technical meaning in the common law, but is a synonym of *oblivion*, which, in the English law, is the synonym of *pardon;* 10 Ct. Cl. 397.

As to amnesty proclamation of 29th May, 1865, see 7 Ct. Cl. 444.

The general amnesty granted by President Johnson on Dec. 25, 1868, does not entitle one receiving its benefits to the proceeds of his property previously condemned and sold under the act of 17th July, 1862, the proceeds having been paid into the treasury; 95 U. S. 147. As to amnesty in cases arising out of the rebellion; 6 Wall. 766; 4 *id.* 333; 13 *id.* 128, 154; 16 *id.* 147; 7 Ct. Cl. 398, 443, 501, 595; 8 *id.* 457.

AMONG. Mingled with or in the same group or class.

AMORTISE. To alien lands in mortmain.

AMORTIZATION. An alienation of lands or tenements in mortmain.

The reduction of the property of lands or tenements to mortmain.

AMOTION (Lat. *amovere*, to remove; to take away).

An unlawful taking of personal chattel. out of the possession of the owner, or of one who has a special authority in them.

A turning out the proprietor of an estates in realty before the termination of his estate. 3 Bla. Com. 198, 199.

In Corporations. A removal of an official agent of a corporation from the station assigned to him, before the expiration of the term for which he was appointed. 8 Term 356; 1 East 562; 6 Conn. 532; Beach, Priv. Corp. 184; Dill. Mun. Corp. 4th ed. § 238.

The term is distinguished from *disfranchisement*, which deprives a *member* of a public corporation of all rights as a corporator. *Expulsion* is the usual phrase in reference to loss of membership of private corporations. The term seems in strictness not to apply properly to cases where officers are appointed merely during the will of the corporation, and are superseded by the choice of a successor, but, as commonly used, includes such cases.

The right of amotion of an officer *for just cause* is a common-law incident of all corporations; 1 Burr. 517; 2 Kent 297; 1 Dill. Mun. Corp. 4th ed. § 251; 30 W. Va. 491; 35 La. Ann. 1075; 89 N. C. 125; 1 Ves. Jr. 1; 1 Burr. 517; and in case of mere ministerial officers appointed *durante bene placito*, at the mere pleasure of those appointing him, without notice; Willcock, Mun. Corp. 253; 23 Mo. 22; see 1 Ventr. 77; 2 Show. 70; 11 Mod. 403; 9 Wend. 394; 149 Mass. 443. Notice and an opportunity to be heard are requisite where the appointment is *during good behavior*, or the re-

moval is for a specified cause; 32 Pa. 478; 8 B. Monr. 648; 3 Dutch. 265; 32 Ind. 74; 13 Mich. 346; 10 H. L. Cas. 404. Mere acts, which are a cause for amotion, do not create a vacancy till the amotion takes place; 2 Green, N. J. 332; 5 Ind. 77; 12 Pick. 244.

Directors themselves have no implied power to remove one of their own number from office even for cause; nor to exclude him from taking part in their proceedings; Beach, Pr. Corp. § 223; Taylor, Corp. § 650.

The causes for amotion are said by Lord Mansfield (1 Burr. 538) to be:—"*first*, such as have no immediate relation to the office, but are in themselves of so infamous a nature as to render the offender unfit to execute any public franchise (but indictment and conviction must precede amotion for such causes, except where he has left the country before conviction; 1 B. & Ad. 936); *second*, such as are only against his oath and the duty of his office as a corporator, and amount to breaches of the tacit condition annexed to his office; *third*, such as are offences not only against the duty of his office, but also matter indictable at common law;" Dougl. 149; 2 Binn. 448; 50 Pa. 107; 11 Mod. 379.

Sufficient grounds of removal:—*poverty* and inability to pay taxes; 3 Salk. 229; *total desertion of duty;* Bull. N. P. 206; 1 Burr. 541; as to *neglect* of duty, see Eng. & Am. Corp. § 427; 2 Kyd 65; 1 B. & Ad. 936; 4 Burr. 2004; 2 Stra. 819; 1 Vent. 146; *habitual drunkenness;* 3 Salk. 231; 3 Bulst. 190; *official misconduct*, in the office; 4 Burr. 1999. See 1 Q. B. 751.

Insufficient grounds of removal:—*bankruptcy;* 2 Burr. 723; *casual* intoxication; 3 Salk. 231; 1 Rolle 409; *old age;* 2 Rolle 11; *threats, insulting language*, or *libel upon the mayor or officers;* 11 Coke 93; 11 Mod. 270; 1 C. & P. 257; 10 Ad. & E. 374; 2 Perry & D. 498.

The Q. B. in England will see that a right of amotion of an officer is lawfully exercised; but it will not control the discretion of the corporation, if so exercised; L. R. 5 H. L. 636 (1872).

Consult Angell & A. Corp. §§ 408, 423–432; Willc. Mun. Corp.; 6 Conn. 532; 6 Mass. 462; 50 Pa. 107; Dill. Mun. Corp. § 238 *et seq.*; Beach, Pr. Corp. § 184; Beach, Pub. Corp. § 190; 30 W. Va. 491.

AMOUNT COVERED. In Insurance. The amount that is insured, and for which underwriters are liable for loss under a policy of insurance.

It is limited by that specified in the policy to be insured, and this limit may be applied to an identical subject only, as a ship, a building, or life; or to successive subjects, as successive cargoes on the same ship, or successive parcels of goods transmitted on a certain canal or railroad during a specified period; and it may also be limited by the terms of the contract to a certain proportion, as a quarter, half, etc., of the value of the subject or interest on which the insurance is made; 2 Phillips, Ins. c. xiv. sect. 1, 2; 10 Ill. 235; 16 B. Monr. 242; 2 Dutch. N. J. 111; 6 Gray 574; 13 La. Ann. 246; 34 Me. 487; 39 Eng. L. & Eq. 228.

AMOUNT OF LOSS. In Insurance. The diminution, destruction, or defeat of the value of, or of the charge upon, the insured subject to the assured, by the direct consequence of the operation of the risk insured against, according to its value in the policy, or in contribution for loss, so far as its value is covered by the insurance. 2 Phill. Ins. c. xv., xvi., xvii.; 2 Pars. Mar. Law, c. x. § 1, c. xi., xii.; 1 Gray 371; 26 N. H. 389; 5 Du. N. Y. 1; 1 Dutch. N. J. 506; 6 Ohio St. 200; 5 R. I. 426; 2 Md. 217; 7 Ell. & B. 172; Beach, Ins. 1293.

AMOVEAS MANUS (Lat. that you remove your hands). After office found, the king was entitled to the things forfeited, either lands or personal property; the remedy for a person aggrieved was by "petition," or "*monstrans de droit*," or "*traverses*," to establish his superior right. Thereupon a writ issued, *quod manus domini regis amoveantur;* 3 Bla. Com. 260.

AMPARO (Span.). A document protecting the claimant of land till properly authorized papers can be issued. 1 Tex. 790.

AMPLIATION. In Civil Law. A deferring of judgment until the cause is further examined.

In this case, the judges pronounced the word *amplius*, or by writing the letters N. L. for *non liquet*, signifying that the cause was not clear. It is very similar to the common-law practice of entering *cur. adv. vult* in similar cases.

In French Law. A duplicate of an acquittance or other instrument.

A notary's copy of acts passed before him, delivered to the parties.

AMY (Fr.). Friend. See PROCHEIN AMY.

AN, JOUR ET WASTE. See YEAR, DAY AND WASTE.

ANALOGY. The similitude of relations which exist between things compared. See 63 Ga. 58.

Analogy has been declared to be an argument or guide in forming legal judgments, and is very commonly a ground of such judgments; 3 Bingh. 265; 4 Burr. 1962, 2022, 2068; 6 Ves. 675; 3 Swanst. 561; 3 P. Will. 391; 3 Bro. Ch. 639, n.

ANARCHY. The absence of all political government; by extension, Confusion in government.

It is the absence of government; it is a state of society where there is no law or supreme power. 122 Ill. 253.

ANATHEMA. In Ecclesiastical Law. A punishment by which a person is separated from the body of the church, and forbidden all intercourse with the faithful.

It differs from excommunication, which simply forbids the person excommunicated from going into the church and communicating with the faithful.

ANATOCISM. In Civil Law. Taking interest on interest; receiving compound interest.

ANCESTOR. One who has preceded another in a direct line of descent; an ascendant.

A former possessor; the person last seised. Termes de la Ley; 2 Bla. Com. 201.

In the common law, the word is understood as well of the immediate parents as of those that are higher; as may appear by the statute 25 Edw. III., *De natis ultra mare*, and by the statute 6 Ric. II. c. 6, and by many others. But the civilians' relations in the ascending line, up to the great-grandfather's *parents*, and those above them, they term *majores*, which common lawyers aptly expound *antecessors* or ancestors, for in the descendants of like degree they are called *posteriores*; Cary, Litt. 45. The term *ancestor* is applied to natural persons. The words predecessors and successors are used in respect to the persons composing a body corporate. See 2 Bla. Com. 209; Bacon, Abr.; Ayliffe, Pand. 58; Reeve, Descents.

It designates the ascendants of one in the right line, as father and mother, grandfather and grandmother, and does not include collateral relatives as brothers and sisters; 31 Barb. 659.

ANCESTRAL. What relates to or has been done by one's ancestors; as homage ancestral, and the like.

That which belonged to one's ancestors.

Ancestral estates are such as come to the possessor by descent. 3 Washb. R. P. 5th ed. 411, 412.

ANCHOR. A measure containing ten gallons.

The instrument used by which a vessel or other body is held. See 2 Low. 220; 106 Eng. Com. L. R. 852; 77 N. Y. 448; 19 Hun 284.

ANCHORAGE. A toll paid for every anchor cast from a ship in a port.

Such a toll is said to be incident to almost every port; 1 W. Bla. 413; 4 Term 260; and is sometimes payable though no anchor is cast; 2 Chit. Com. Law 16.

ANCIENT DEEDS. See ANCIENT WRITINGS.

ANCIENT DEMESNE. Manors which in the time of William the Conqueror were in the hands of the crown and are so recorded in the Domesday Book. Fitzh. Nat. Brev. 14, 56.

Tenure in *ancient demesne* may be pleaded in abatement to an action of ejectment; 2 Burr. 1046.

Tenants of this class had many privileges; 2 Bla. Com. 99.

ANCIENT HOUSE. One which has stood long enough to acquire an easement of support. 3 Kent 437; 2 Washb. R. P. 5th ed. *74, *76. See SUPPORT; EASEMENT.

ANCIENT LIGHTS. Windows or openings which have remained in the same place and condition twenty years or more. 5 Harr. & J. 477; 12 Mass. 157, 220.

In England, a right to unobstructed light and air through such openings is secured by mere user for that length of time under the same title.

In the United States, such right is not acquired without an express grant, in most of the states; 2 Washb. R. P. 5th ed. 62, 63; 3 Kent 446, n. See 11 Md. 1; 5 Del. Ch. 578; 19 Wend. 309; 37 Ala. 501; 26 Me. 436; 115 Mass. 204; and cases under AIR; LIGHT AND AIR. This same doctrine has been upheld in Illinois and Louisiana; 16 Ill. 217; 35 La. Ann. 469. But see 4 Del. Ch. 643; s. c. 24 Am. Law Reg. 6 and note.

ANCIENT READINGS. Essays on the early English statutes. Co. Litt. 280.

ANCIENT RECORDS. See ANCIENT WRITINGS.

ANCIENT RENT. The rent reserved at the time the lease was made, if the building was not then under lease. 2 Vern. 542.

ANCIENT WRITINGS. Deeds, wills, and other writings, more than thirty years old.

They may, in general, be read in evidence without any other proof of their execution than that they have been in the possession of those claiming rights under them; Taylor, Ev. 111; 1 Phill. Ev. 273; 1 Greenl. Ev. § 141; 1 Rice, Ev. §§ 31, 32, 214, 215; 2 Bingh. N. C. 183, 200; 12 M. & W. 205; 8 Q. B. 158; 11 *id.* 884; 1 Price 225; 7 Beav. 93; 4 Wheat. 213; 5 Pet. 319; 9 *id.* 663; 3 Johns. 292; 2 Nott & M'C. 55, 400; 4 Pick. 160; 16 Me. 27; 27 Fed. Rep. 170; 120 N. Y. 109; 76 Tex. 362; 81 *id.* 614; 139 Mass. 244; 47 Fed. Rep. 154; 91 Ga. 577; 73 Ill. 109. As to the admission of duplicate copies, see 71 Hun 295.

ANCIENTS. Gentlemen in the Inns of Courts who are of a certain standing.

In the Middle Temple, all who have passed their readings are termed ancients. In Gray's Inn, the ancients are the oldest barristers; besides which, the society consists of benchers, barristers, and students; in the Inns of Chancery, it consists of ancients, and students or clerks.

ANCIENTY. Eldership; seniority. Used in the statute of Ireland, 14 Hen. VIII.; Cowel.

ANCILLARY (Lat. *ancilla*, a handmaid). Auxiliary, subordinate.

As it is beneath the dignity of the king's courts to be merely ancillary to other inferior jurisdictions, the cause, when once brought there, receives its final determination; 3 Bla. Com. 98.

Used of deeds, and also of an administration of an estate taken out in the place where assets are situated, which is subordinate to the principal administration, which is that of the domicil; 1 Story, Eq. Jur. 13th ed. § 583.

ANCIPITIS USUS (Lat.). Useful for various purposes.

As it is impossible to ascertain the final use of an article *ancipitis usus*, it is not an injurious rule which deduces the final use from its immediate destination; 1 Kent 140. See NEUTRALITY.

ANDROLEPSY. The taking by one nation of the citizens or subjects of another in order to compel the latter to do justice to the former. Wolffius, § 1164; Molloy, *de Jure Mar.* 26.

ANECIUS (Lat. Spelled also *æsnecius*, *enitius*, *æneas*, *eneyus* Fr. *aisne*). The eldest-born; the first-born; senior, as contrasted with the *puis-ne* (younger); Burrill, Law Dict. 99; Spelman, Gloss. *Æsnecia.*

ANGARIA. In Roman Law. A service or punishment exacted by government.

They were of six kinds, viz.: maintaining a post-station where horses are changed; furnishing horses or carts; burdens imposed on lands or persons; disturbance, injury, anxiety of mind; the three or four-day periods of fasting observed during the year; saddles or yokes borne by criminals from county to county, as a disgraceful mode of punishment among the German or Franks; Du Cange, *verb. Angaria.*

In Feudal Law. Any troublesome or vexatious personal service paid by the tenant to his lord. Spelman, Gloss.

ANGEL. An ancient English coin, of the value of ten shillings sterling. Jacobs, Law Dict.

ANGILD (Sax.). The bare, single valuation or estimation of a man or thing, according to the legal estimates.

The terms *twigild*, *trigild*, denote twice, thrice, etc., *angild*. *Leges Inœ*, c. 20; Cowel.

ANHLOTE (Sax.). The sense is, that every one should pay, according to the custom of the country, his respective part and share. Spelman, Gloss.

ANIENS. Void; of no force. Fitzherbert, Nat. Brev. 214.

ANIENT (Fr. *anèantir*). Abrogated, or made null. Littleton, § 741.

ANIMAL. Any animate being which is not human, endowed with the power of voluntary motion.

Domitœ are those which have been tamed by man; domestic.

Ferœ naturœ are those which still retain their wild nature.

A man may have an absolute property in animals of a domestic nature; 2 Mod. 319; 2 Bla. Com. 390; but not so in animals *ferœ naturœ*, which belong to him only while in his possession; 3 Binn. 546; 3 Caines 175; 7 Johns. 16; 13 Miss. 383; 8 Blackf. 498; 2 B. & C. 934; 4 Dowl. & R. 518. Yet animals which are sometimes *ferœ naturœ* may be tamed so as to become subjects of property; as an otter; 65 N. C. 615; s. c. 6 Am. Rep. 744; pigeons which return to their house or box; 2 Den. Cr. Cas. 361, 362, n.; 4 C. & P. 131; 9 Pick. 15; or pheasants hatched under a hen; 1 Fost. & F. 350. And the flesh of animals *ferœ naturœ* may be the subject of larceny; 3 Cox, Cr. Cas. 572; 1 Den. Cr. Cas. 501; Templ. & M. 193; 2 C. & K. 981; 65 N. C. 615.

It was not larceny at common law to steal dogs or other inferior animals that did not serve for food; 4 Bla. Com. 235; 78 N. C. 481; 1 Greene 106. See note in 15 Am. Rep. 356. In America, dogs are generally regarded as a species of property; 31 Conn. 121; 100 Mass. 136; and when all personal property is subject to larceny, they are generally regarded as subject thereto; 9 Baxt. 53; 86 N. Y. 365. See 1 Am. & Eng. Encyc. of Law, 573. In Pennsylvania they are expressly declared to be subjects of larceny; Act Pa. 1893, May 25; P. L. 136, § 7. Summary proceedings for the destruction of dogs kept contrary to municipal regulations are entirely within legislative power; 69 Miss. 34.

The owner of a mischievous animal, known to him to be so, is responsible, when he permits him to go at large, for the damages he may do; 2 Esp. 482; 4 Campb. 198; 1 B. & Ald. 620; 2 Cro. M. & R. 496; 5 C. & P. 1; 99 U. S. 645; 105 Mass. 71; 35 Ind. 178; 75 Ill. 141; 38 Wis. 300; Tayl. Ev. 613; 9 Q. B. 110; 62 Hun 619; 64 *id.* 636; 155 Pa. 225; 161 *id.* 98; 37 Fed. Rep. 317; he is liable although not negligent in the matter of his escape from a close; 42 Ill. App. 186. And any person may justify the killing of ferocious animals; 9 Johns. 233; 13 *id.* 312; 11 Chic. Leg. N. 295; 35 Neb. 638. The owner of such an animal may be indicted for a common nuisance; 1 Russ. Crimes 643; Burn, Just. *Nuisance*, O.

The keeper of an animal *ferœ naturœ* is liable for any injury it may cause, unless he can disprove negligence (which need not be averred in the declaration); 38 Barb. 14; 35 Ind. 178; 41 Cal. 138; 9 Q. B. 101. The owner of any animal, tame or wild, is liable for the exercise of such dangerous tendencies as generally belong to its nature, but not of any not in accordance with its nature, unless the owner or keeper knew, or ought to have known, of the existence of such dangerous tendency; Whart. Negl. § 923. To recover for damages inflicted by a ferocious dog, it is not necessary actually to prove that it has bitten a person before; L. R. 2 C. P. 1; 126 Mass. 511; 65 N. Y. 54.

The common-law requirement that the owner of domestic cattle must keep them on his own premises (42 Ill. App. 561) does not apply to a region like the Black Hills; 6 Dak. 86.

See on the general subject of *Animals*, 20 Alb. L. J. 6, 104; 2 *id.* 101; 1 Thomps. Negl. 173 *et seq.*

ANIMALS OF A BASE NATURE. Those animals which, though they may be reclaimed, are not such that at common law a larceny may be committed of them, by reason of the baseness of their nature.

Some animals which are now usually tamed come within this class, as dogs and cats; and others which, though wild by nature and often reclaimed by art and industry, clearly fall within the same rule, as bears, foxes, apes, monkeys, ferrets, and the like; Coke, 3d Inst. 109; 1 Hale, Pl. Cr. 511, 512; 1 Hawk. Pl. Cr. 33, § 36; 4 Bla. Com. 236; 2 East, Pl. Cr. 614. See 1 Wms. Saund. 84, note 2.

ANIMO (Lat.). With intention.

Quo animo, with what intention. *Animo cancellandi*, with intention to cancel; 1 Powell, Dev. 608; *furandi*, with intention to steal; 4 Sharsw. Bla. Com. 230; 1 Kent 188; *lucrandi*, with intention to gain or profit; 3 Kent 357; *manendi*, with intention to remain; 1 Kent 76; *morandi*, with intention to stay, or delay; *republicandi*, with intention to republish; 1 Powell. Dev. 609; *revertendi*, with intention to return; 2 Sharsw. Bla. Com. 392; *revocandi*, with intention to revoke; 1 Powell, Dev. 595; *testandi*, with intention to make a will.

ANIMUS (Lat., mind). The intention with which an act is done.

ANIMUS CANCELLANDI. An in-

tention to destroy or cancel. See CANCELLATION.

ANIMUS CAPIENDI. The intention to take. 4 C. Rob. Adm. 126, 155.

ANIMUS FURANDI. The intention to steal.

In order to constitute larceny, the thief must take the property *animo furandi*; but this is expressed in the definition of larceny by the word felonious; Coke, 3d Inst. 107; Hale, Pl. Cr. 503; 4 Bla. Com. 229. See 2 Russell, Crimes 96; 2 Tyl. Com. 272; Rapalje, Larceny, § 18. When the taking of property is lawful, although it may afterwards be converted *animo furandi* to the taker's use, it is not larceny; Bacon, Abr. *Felony*, C; 14 Johns. 294; Ry. & M. 160, 137; 55 Mo. 83; [1895] 2 Ir. 709; Prin. of Pen. Law c. 23, § 3, pp. 279, 281.

ANIMUS MANENDI. The intention of remaining.

To acquire a domicil, the party must have his abode in one place, with the intention of remaining there; for without such intention no new domicil can be gained, and the old will not be lost. See DOMICIL.

ANIMUS RECIPIENDI. The intention of receiving.

A man will acquire no title to a thing unless he possesses it with an intention of receiving it for himself; as, if a thing be bailed to a man, he acquires no title.

ANIMUS RESTITUENDI. An intention of restoring. Fleta, lib. 3, c. 2, § 3.

ANIMUS REVERTENDI. The intention of returning.

A man retains his domicil if he leaves it *animo revertendi*; 3 Rawle 312; 4 Bla. Com. 225; 2 Russ. Cr. 9th Amer. ed. 23; Poph. 42, 52; 4 Coke 40. See DOMICIL.

ANIMUS REVOCANDI. An intention to revoke.

ANIMUS TESTANDI. An intention to make a testament or will.

This is required to make a valid will; for, whatever form may have been adopted, if there was no *animus testandi*, there can be no will. An idiot, for example, can make no will, because he can have no intention; Beach, Wills 77.

ANN. **In Scotch Law.** Half a year's stipend, over and above what is owing for the incumbency, due to a minister's relict, or child, or next of kin, after his decease. Whishaw.

ANNALES. A title given to the Year Books. Burrill, Law Dict. Young cattle; yearlings. Cowel.

ANNATES. **In Ecclesiastical Law.** First-fruits paid out of spiritual benefices to the pope, being the value of one year's profit.

ANNEXATION. (Lat. *ad*, to, *nexare*, to bind). The union of one thing to another.

It conveys the idea, properly, of fastening a smaller thing to a larger; an incident to a principal. It has been applied to denote the union of Texas to the United States.

Actual annexation includes every movement by which a chattel can be joined or united to the freehold. Mere juxtaposition, or the laying on of an object, however heavy, does not amount to annexation; 14 Cal. 64.

Constructive annexation is the union of such things as have been holden parcel of the realty, but which are not actually annexed, fixed, or fastened to the freehold. Sheppard, Touchst. 469; Amos & F. Fixt. 3d ed. See FIXTURES.

ANNI NUBILES (Lat. marriageable years). The age at which a girl becomes by law fit for marriage; the age of twelve.

ANNICULUS (Lat.). A child a year old. Calvinus, Lex.

ANNO DOMINI (Lat. the year of our Lord; abbreviated A. D.). The computation of time from the birth of Jesus Christ.

The Jews began their computation of time from the creation; the Romans, from the founding of Rome; the Mohammedans, from the Hegira, or flight of the Prophet; the Greeks reckoned by Olympiads; but Christians everywhere reckon from the birth of Jesus Christ.

In a complaint, the year of the alleged offence may be stated by means of the letters "A. D.," followed by words expressing the year; 4 Cush. 596. But an indictment or complaint which states the year of the commission of the offence in figures only, without prefixing the letters "A. D.," is insufficient; 5 Gray 91. The letters "A. D.," followed by figures expressing the year, have been held sufficient in several states; 3 Vt. 481; 1 Greene, Ia. 418; 35 Me. 489; 1 Bennett & H. Lead. Cr. Cas. 512; but the phrase, or its equivalents, may be dispensed with; 12 Q. B. 834; 2 Cart. Ind. 91; 22 Minn. 67; but see 1 Breese 4. See Whart. Prec. 4th ed. (2) n. g.

ANNONA (Lat.). Barley; corn; grain; a yearly contribution of food, of various kinds, for support.

Annona porcum, acorns; *annona frumentum hordeo admixtum*, corn and barley mixed; *annona panis*, bread, without reference to the amount. Du Cange; Spelman, Gloss.; Cowel.

The term is used in the old English law, and also in the civil law quite generally, to denote anything contributed by one person towards the support of another; as, *si quis mancipio annonam dederit* (if any shall have given food to a slave); Du Cange; Spelman, Gloss.

ANNONÆ CIVILES. Yearly rents issuing out of certain lands, and payable to monasteries.

ANNOTATION. **In Civil Law.** The answers of the prince to questions put to him by private persons respecting some doubtful point of law. See RESCRIPT.

Summoning an absentee; Dig. 1. 5.

The designation of a place of deportation. Dig. 32. 1. 3.

ANNUAL ASSAY. An annual trial of the gold and silver coins of the United States, to ascertain whether the standard fineness and weight of the coinage is maintained.

At every delivery of coins made by the coiner to a superintendent, it is made the duty of the superintendent, in the presence of the assayer, to take indiscriminately a certain number of pieces of each

variety for the annual trial of coins, the number for gold coins being not less than one piece for each one thousand pieces, or any fractional part of one thousand pieces delivered; and for silver coins, one piece for each two thousand pieces, or any fractional part of two thousand pieces delivered. The pieces so taken shall be carefully sealed up in an envelope, properly labelled, stating the date of the delivery, the number and denominations of the pieces enclosed, and the amount of the delivery from which they were taken. These sealed parcels containing the reserved pieces shall be deposited in a pyx, designated for the purpose at each mint, which shall be under the joint care of the superintendent and assayer, and be so secured that neither can have access to its contents without the presence of the other, and the reserved pieces in their envelopes from the coinage of each mint shall be transmitted quarterly to the mint at Philadelphia. A record shall also be kept of the number and denomination of the pieces so delivered, a copy of which shall be transmitted quarterly to the director of the mint; Sect. 40, Act of Feb. 12, 1873; U. S. Rev. Stat. § 3539.

To secure a due conformity in the gold and silver coins to their respective standards and weights, it is provided by law that an annual trial shall be made of the pieces reserved for this purpose at the mint and its branches, before the judge of the district court of the United States for the eastern district of Pennsylvania, the comptroller of the currency, the assayer of the assay office at New York, and such other persons as the president shall from time to time designate for that purpose, who shall meet as assay commissioners, on the second Wednesday in February annually, at the mint in Philadelphia, to examine and test, in the presence of the director of the mint, the fineness and weight of the coins reserved by the several mints for this purpose, and may continue their meetings by adjournment, if necessary; and if a majority of the commissioners shall fail to attend at any time appointed for their meeting, then the director of the mint shall call a meeting of the commissioners at such other time as he may deem convenient, and if it shall appear that these pieces do not differ from the standard fineness and weight by a greater quantity than is allowed by law, the trial shall be considered and reported as satisfactory; but if any greater deviation from the legal standard or weight shall appear, this fact shall be certified to the president of the United States, and if, on a view of the circumstances of the case, he shall so decide, the officer or officers implicated in the error shall be thenceforward disqualified from holding their respective offices; § 43, Act of Feb. 12, 1873 (U. S. Rev. Stat. § 3547); *id.* §§ 49, 50 (R. S. §§ 3548, 3549). As to the standard weight and fineness of the gold and silver coins of the United States, see sections of the last-cited act. The limit of allowance for wastage is fixed; § 43, Act of Feb. 12, 1873; R. S. § 3542.

For the purpose of securing a due conformity in the weight of the coins of the United States, the brass troy pound weight procured by the minister of the United States (Mr. Gallatin) at London, in the year 1827, for the use of the mint, and now in the custody of the director thereof, shall be the standard troy pound of the mint of the United States, conformably to which the coinage thereof shall be regulated; and it is made the duty of the director of the mint to procure and safely keep a series of standard weights corresponding to the aforesaid troy pound, and the weights ordinarily employed in the transactions of the mint shall be regulated according to such standards at least once in every year under his inspection, and their accuracy tested annually in the presence of the assay commissioners on the day of the annual assay; Act of Feb. 12, 1873; R. S. § 3548.

In England, the accuracy of the coinage is reviewed once in about every four years; no specific period being fixed by law. It is an ancient custom or ceremony, and is called the *Trial of the Pyx;* which name it takes from the pyx or chest in which the specimen-coins are deposited. These specimen-pieces are taken to be a fair representation of the whole money coined within a certain period. It having been notified to the government that a trial of the pyx is called for, the lord chancellor issues his warrant to summon a jury of goldsmiths, who, on the appointed day, proceed to the Exchange Office, Whitehall, and there, in the presence of several privy councillors and the officers of the mint, receive the charge of the lord chancellor as to their important functions, who requests them to deliver to him a verdict of their finding. The jury proceed to Goldsmiths' Hall, London, where assaying apparatus and all other necessary appliances are provided, and, the sealed packages of the specimen-coins being delivered to them by the officers of the mint, they are tried by weight, and then a certain number are taken from the whole and melted into a bar, from which the assay trials are made, and a verdict is rendered according to the results which have been ascertained; Encyc. Brit. titles Coinage, Mint, Money, Numismatics.

ANNUAL INCOME. The annual receipts from property. See INCOME.

ANNUAL RENT. In Scotch Law. Interest.

To avoid the law against taking interest, a yearly rent was purchased; hence the term came to signify interest; Bell, Dict.; Paterson, Comp. §§ 19, 265.

ANNUALLY. Yearly; returning every year.

As applied to interest it is not an undertaking to pay interest at the end of one year only, but to pay interest at the end of each and every year during a period of time, either fixed or contingent; 6 Gray 164.

ANNUITY (Lat. *annuus*, yearly). A yearly sum stipulated to be paid to another in fee, or for life or years, and chargeable only on the person of the grantor; Co. Litt. 144 *b*; 2 Bla. Com. 40; Lumley, Ann. 1; 5 Mart. La. 312; Dav. Ir. 14; 24 N. J. Eq. 358; 23 Barb. 216.

An annuity is different from a rent-charge, with which it is sometimes confounded,—the annuity being chargeable on the person merely, and so far personalty; while a rent-charge is something reserved out of realty, or fixed as a burden upon the estate in land; 2 Bla. Com. 40; Rolle, Abr. 226; 10 Watts 127. An annuity in fee is said to be a personal fee; for, though transmissible, as is real estate of inheritance; Ambl. Ch. 782; Challis, R. P. 46; liable to forfeiture as a hereditament; 7 Coke, 34 *a*; and not constituting assets in the hands of an executor, it lacks some other characteristics of realty. The husband is not entitled to curtesy, nor the wife to dower, in an annuity; Co. Litt. 32 *a*. It cannot be conveyed by way of use; 2 Wils. 224; is not within the statute of frauds, and may be bequeathed and assigned as personal estate; 2 Ves. Sen. 70; 4 B. & Ald. 59; Roscoe, Real Act. 68, 85; 3 Kent 460.

To enforce the payment of an annuity, an action of annuity lay at common law, but when brought for arrears must be before the annuity determines; Co. Litt. 285. In case of the insolvency or bankruptcy of the debtor, the capital of the constituted annuity becomes exigible; La. Civ. Code, art. 2769; stat. 6 Geo. IV. c. 16, §§ 54, 108; 5 Ves. 708; 4 *id.* 763; 1 Belt, Supp. Ves. 308, 431. See 1 Rop. Leg. 588; CHARGE.

ANNUL. To abrogate, nullify, or abolish; to make void.

It is not a technical word and there is nothing which prevents the idea from being expressed in equivalent words; 22 Mo. 24.

ANNULUS ET BACULUS (Lat. ring and staff). The investiture of a bishop was *per annulum et baculum* by the prince's delivering to the prelate a ring and pastoral staff, or crozier. 1 Sharsw. Bla. Com. 378; Spelman, Gloss.

ANNUM, DIEM ET VASTUM. See YEAR, DAY, AND WASTE.

ANNUS LUCTUS (Lat.). The year of mourning. Code, 5. 9. 2.

It was a rule among the Romans, and also the Danes and Saxons, that the widows should not marry *infra annum luctus* (within the year of mourning); 1 Bla. Com. 457.

ANNUS UTILIS. A year made up of available or serviceable days. Brissonius; Calvinus, Lex.

ANNUUS REDITUS. A yearly rent; annuity. 2 Sharsw. Bla. Com. 41; Reg. Orig. 158 *b*.

ANONYMOUS. Without name.

Books published without the name of the author are said to be anonymous. Cases in the reports of which the names of the parties are not given are said to be anonymous.

ANSWER. In Equity Pleading. A defence in writing, made by a defendant to the charges contained in a bill or information filed by the plaintiff against him in a court of equity.

In case relief is sought by the bill, the answer contains both the defendant's defence to the case made by the bill, and the examination of the defendant, on oath, as to the facts charged in the bill, of which discovery is sought; Gresley, Eq. Ev. 19; Jeremy's Mitf. Eq. Pl. 15, 16. These parts were kept distinct from each other in the civil law; their union, in chancery, has caused much confusion, in equity pleading; Langd. Eq. Pl. 41; Story, Eq. Pl. § 850; Dan. Ch. Pl. & Pr. *711.

As to the *form* of the answer, it usually contains, in the following order: *the title*, specifying which of the defendants it is the answer of, and the names of the plaintiffs in the cause in which it is filed as answer; 8 Ves. 79; 11 *id.* 62; 1 Russ. 441; see 17 Ala. N. S. 89; *a reservation* to the defendant of all the advantages which might be taken by exception to the bill, which is mainly effectual in regard to other suits; Beames, Eq. Pl. 46; 1 Hompst. 715; 4 Md. 107; *the substance* of the answer, according to the defendant's knowledge, remembrance, information, and belief, in which the matter of the bill, with the interrogatories founded thereon, are answered, one after the other, together with such additional matter as the defendant thinks necessary to bring forward in his defence, either for the purpose of qualifying or adding to the case made by the bill, or to state a new case on his own behalf; *a general traverse* or denial of all unlawful combinations charged in the bill, and of all other matters therein contained not expressly answered.

The answer must be upon oath of the defendant, or under the seal of a corporation defendant; Bish. Eq. 9; 21 Ga. 161; 1 Barb. 22; see 8 Gill 170; 1 Dan. Ch. Pl. & Pr. *734; 10 Ia. 264; unless the plaintiff waives the right; Story, Eq. Pl. § 824; 10 Cush. 58; 2 Gray, 431; 6 Wall. 299; 14 N. J. Eq. 306; 40 Ill. 527; in which case it must be generally signed by the defendant; 6 Ves. 171, 285; 10 *id.* 441; Cooper, Eq. Pl. 326; 10 Ia. 264; and must be signed by counsel; Story, Eq. Pl. § 876; unless taken by commissioners; 4 McL. 136; 1 Dan. Ch. Pl. & Pr. *732.

As to substance, the answer must be full and perfect to all the material allegations of the bill, confessing and avoiding, denying or traversing, all the material parts; Comyns, Dig. *Chauncery*, K, 2; 28 N. H. 440; 6 Rich. Eq. 1; 10 Ga. 449; 21 N. J. Eq. 31; 24 Beav. 421; not literally merely, but answering the substance of the charge; Mitf. Eq. Pl. 309; 28 Ala. N. S. 289; 16 Ga. 442; 1 Halst. Ch. 60; and see 2 Stockt. Ch. 267; must be responsive; 3 Halst. Ch. 17; 13 Ill. 318; 21 Vt. 326; and must state facts, and not arguments, directly and without evasion; Story, Eq. Pl. § 852; 7 Ind. 661; 24 Vt. 70; 4 Ired. Eq. 390; 9 Mo. 605; without scandal; 19 Me. 214; 18 Ark. 215; or impertinence; 3 Story 13; 6 Beav. 558; 4 McL. 202; 8 Blackf. 124. See 10 Sim. 345; 17 Eng. L. & Eq. 509; 22 Ala. N. S. 221; 6 Paige 239; 24 Fed. Rep. 823; 39 N. J. Eq. 76; 1 Swanst. 228; 6 Ves. 456.

Under the modern English practice the form of the answer has been much simplified; 15 & 16 Vict. c. 86, § 17. Under the General Orders of 1852 a form was adopted, though scarcely necessary in view of the absence of all technicality; 2 Dan. Ch. Pr. ed. of 1865, 724; 3 *id.* 2139. In the United States generally the answer has been simplified, but the variations from the old practice consist mainly in dividing the answer into numbered paragraphs, adjusting its general form to the bill as now drawn (see BILL), and in omitting the clause reserving exceptions (though in practice this is very frequently retained), and the clause denying combination, retaining merely, to form an issue on them, a general traverse of all allegations not expressly answered.

A material allegation in a bill, which is neither expressly admitted or denied, is deemed to be controverted; 133 Ill. 197; 44 Ill. App. 145.

Insufficiency of answer is a ground for exception when some material allegation, charge, or interrogatory is unanswered or not fully answered; 1 Md. Ch. Dec. 358; 7 How. 726; 6 Humphr. 18. See 10 Humphr. 280; 11 Paige 543; 40 Fed. Rep. 384; 1 Dan. Ch. Pl. & Pr. 760; 16 Vt. 179.

Where the defendant in equity suffers a default he does not admit facts not alleged in the bill nor conclusions of the pleader from the facts stated; 24 Ill. App. 219.

An answer may, in some cases, be amended; 2 Bro. Ch. 143; 2 Ves. 85; to correct a mistake of fact; Ambl. 292; 1 P. Wms. 297; but not of law; Ambl. 65; nor any mistake in a material matter except upon evidence of surprise; 36 Me. 124; 3 Sumn. 583; 1 Bro. Ch. 319; and not, it seems, to the injury of others; Story, Eq. Pl. § 904; 1 Halst. Ch. 49. The court may permit an answer to be amended even after the announcement of the decision of the cause; 46 N. J. Eq. 543. A supplemental answer may be filed to introduce new

matter ; 6 McL. 459 ; 7 Mackey 8 ; or correct mistakes ; 2 Coll. 133 ; 15 Ala. N. S. 634 ; 7 Ga. 99 ; 8 Blackf. 24 ; which is considered as forming a part of the original answer. See DISCOVERY ; Mitf. Eq. Pl. 244, 254 ; Cooper, Eq. Pl. 312, 327 ; Beames, Eq. Pl. 34. The 60th Equity Rule S. C. of U. S. provides for amendments.

For an historical account of the instrument, see 2 Brown, Civ. Law 371, n. ; Barton, Suit in Eq. See also Langdell's learned Summary of Equity 41.

In Practice. The declaration of a fact by a witness after a question has been put, asking for it.

ANTAPOCHA (Lat.). An instrument by which the debtor acknowledges the debt due the creditor, and binds himself. A copy of the *apocha* signed by the debtor and delivered to the creditor. Calvinus, Lex.

ANTE JURAMENTUM (Lat. ; called also *Juramentum Calumniæ*). The oath formerly required of the parties previous to a suit,—of the plaintiff that he would prosecute, and of the defendant that he was innocent. Jacobs, Dict. ; Whishaw.

ANTE LITEM MOTAM. Before suit brought.

ANTE-NUPTIAL. Before marriage ; before marriage, with a view to entering into marriage.

ANTE-NUPTIAL CONTRACT. A contract made before marriage.

The term is most generally applied to a contract entered into between a man and woman in contemplation of their future marriage, and in that case it is called a marriage contract.

A wife may waive any and all right to any portion of the estate of her husband by an ante-nuptial contract, and this is binding on her unless fraud, advantage, or collusion can be shown ; 39 Ill. App. 145. An ante-nuptial agreement that the wife shall claim no right of dower does not deprive her of her distributive share in the husband's personal property ; 54 N. W. Rep. (Iowa) 215. A contract by which each agreed to make no claim to the property of the one dying first is void so far as dower is concerned, as it makes no provision in lieu thereof ; 51 Mo. App. 237.

Conveyances made by one of two persons about to be married, usually called marriage settlements.

They are usually made on the prospect of marriage, for the benefit of the married pair, or one of them, or for the benefit of some other persons ; as their children. They may be of either personal or real estate. Such settlements vest the property in trustees upon specified terms, usually, for the benefit of the husband and wife during their joint lives, and then for the benefit of the survivor for life, and afterwards for the benefit of children.

Ante-nuptial agreements of this kind will be enforced in equity by a specific performance of them, provided they are fair and valid and the intention of the parties is consistent with the principles and policy of law ; 8 Blackf. 284 ; 4 R. I. 276 ; 28 Penn. 73 ; 7 Pet. 348 ; 9 How. 196. Settlements after marriage, if made in pursuance of an agreement in writing entered into prior to the marriage, are valid both against creditors and purchasers ; 22 Ga. 402. A wife may waive any and all right to any portion of her husband's estate by ante-nuptial contract, where no fraud, collusion, overreaching, or advantage is shown ; 39 Ill. App. 145.

A conveyance by the husband or wife prior to marriage, which, if permitted, would deprive the other of his or her marital rights in the property conveyed.

After an elaborate examination of the subject of equitable relief against ante-nuptial agreements and a review of the English and American authorities, Bates, Ch., held that the husband will be protected against a voluntary conveyance or settlement, by his intended wife, of all her estate, to the exclusion of the husband, made pending an engagement of marriage, without his knowledge, even in the absence of express misrepresentation or deceit, and whether the husband knew of the existence of the property or not ; and that the wife's dower will be protected against the voluntary conveyance of the husband, made pending a marriage engagement, under the same circumstances in which the husband is relieved against an ante-nuptial settlement by the wife ; 3 Del. Ch. 99.

ANTEDATE. To put a date to an instrument of a time before the time it was written.

ANTENATI (Lat. born before). Those born in a country before a change in its political condition such as to affect their allegiance.

The term is ordinarily applied by American writers to denote those born in this country prior to the Declaration of Independence. It is distinguished from *postnati*, those born after the event.

As to the rights of British *antenati* in the United States, see Kirby 413 ; 2 Halst. 305, 337 ; 2 Mass. 236, 244 ; 9 *id.* 460 ; 2 Pick. 394 ; 2 Johns. Cas. 29 ; 4 Johns. 75 ; 1 Munf. 218 ; 6 Call. 60 ; 3 Binn. 75 ; 4 Cra. 321 ; 3 Pet. 99. As to their rights in England, see 7 Coke 1, 27 ; 2 B. & C. 779 ; 5 *id.* 771 ; 1 Wood, Lect. 382.

ANTI-MANIFESTO. The declaration of the reasons which one of the belligerents publishes, to show that the war as to him is defensive. Wolffius § 1187.

ANTICHRESIS (Lat.). **In Civil Law.** An agreement by which the debtor gives to the creditor the income from the property which he has pledged, in lieu of the interest on his debt. Guyot, *Répert.*; Story Bailm. § 344.

It is analogous to the Welsh mortgage of the common law. In the French law, if the income was more than the interest, the debtor was entitled to demand an account of the income, and might claim any excess ; La. Civ. Code, 2085. See Dig. 20. 1. 11 ; *id.* 18. 7. 1 ; Code, 8. 28. 1 ; 11 Pet. 351 ; 1 Kent 137 ; 23 La. Ann. 658.

ANTICIPATION (Lat. *ante*, before, *capere*, to take). The act of doing or taking a thing before its proper time.

In deeds of trust there is frequently a provision that the income of the estate shall be paid by the trustee as it shall accrue, and not by way of anticipation. A payment made contrary to such provision would not be considered as a discharge of the trustee; Bisp. Eq. 104.

ANTINOMIA. In Roman Law. A real or apparent contradiction or inconsistency in the laws. Merlin, *Répert.*

It is sometimes used as an English word, and spelled Antinomy.

ANTIQUA CUSTUMA (L. Lat. ancient custom). The duty due upon wool, woolfells, and leather, under the statute 3 Edw. I.

The distinction between *antiqua* and *nova custuma* arose upon the imposition of a new and increased duty upon the same articles, by the king, in the twenty-second year of his reign; Bacon, Abr. *Smuggling*, C. 1.

ANTIQUA STATUTA. Also called *Vetera Statuta*. English statutes from the time of Richard First to Edward Third. Reeves, Hist. Eng. Law 227.

ANTIQUARE. In Roman Law. To resolve a former law or practice; to reject or vote against a new law; to prefer the old law. Those who voted against a proposed law wrote on their ballots the letter "A," the initial of *antiquo*, I am for the old law; Calvin; Black, Dict.

ANTITHETARIUS. In Old English Law. A man who endeavors to discharge himself of the crime of which he is accused, by retorting the charge on the accuser. He differs from an approver in this, that the latter does not charge the accuser, but others; Jacobs, Law Dict.

ANY. Used in the sense of "some;" one out of many; an indefinite number.

It is synonymous with "either;" 3 Wheel. Crim. Law Cas. 508; and is given the full force of "every" or "all;" 43 Mo. 254; 4 Q. B. D. 409; 91 U. S. 265.

ANY TERM OF YEARS. In Criminal Law. In Massachusetts, this term, in the statutes relating to additional punishment, means a period of time not less than two years. 14 Pick. 40, 86, 90, 94.

APANAGE. In French Law. A portion set apart for the use and support of the younger ones, upon condition, however, that it should revert, upon failure of male issue, to his original donor and his heirs. Spelman, Gloss.

APARTMENT. A part of a house occupied by a person, while the rest is occupied by another, or others. 7 M. & G. 95; 6 Mod. 214; Woodf. L. & T. 1st Am. ed. 660.

The occupier of a part of a house, who has a key of the outer door, the landlord not residing in or occupying any portion of the premises, is entitled to vote; per *Maule, J.*, "Apartments is a proper description of the premises so occupied;" 7 M. & G. 95.

The occupier of part of a house, where the landlord resides on the premises and retains the key of the outer door, is a mere lodger, and is not a person occupying "as owner or tenant;" 7 M. & G. 85.

If a house, originally entire, be divided into several apartments, with an outer door to each apartment, and no communication with each other, the several apartments shall be rated as distinct mansion houses; but if the owner live therein, all the untenanted apartments shall be considered as parts of his house; 6 Mod. 214.

By the lease of apartments in a building, in a town, for the purpose of trade, the lessee takes only such interest in the subjacent lands as is dependent upon the enjoyment of the apartments rented and necessary thereto; and if they are totally destroyed by fire, this interest ceases; 42 Ala. 356. See 34 W. N. C. (Pa.) 353; s. c. 3 Pa. Dist. 291.

In an indictment for "entering a *room* or *apartment*, with the intention to commit larceny," it is right to charge the ownership of the room to be his who rented it from one who had the general supervision and control of the whole house, and occupied the same as a lodger; 38 Cal. 137.

A small building on the same lot with a dwelling-house, at the distance of forty-five rods from it, with a passageway between them, is *not an apartment* or dependence of the dwelling-house, though the same person occupies the whole lot, including the house and building. A license, therefore, to the occupant, which authorizes him to sell spirituous liquors at his *dwelling-house*, will not justify him in selling them at the small building; 10 Pick. 293.

APEX JURIS (Lat. the summit of the law). A term used to indicate a rule of law of extreme refinement. A term used to denote a stricter application of the rules of law than is indicated by the phrase *summum jus*. 2 Caines 117; 2 Story 143; 5 Conn. 334; 1 Burr. 341; 14 East 522; 2 Pars. Notes and B. ch. 25, § 11. See, also, Co. Litt. 3046; Wing. Max. 19; MAXIMS.

APHASIA. Loss of the power of using words properly, of comprehending them when spoken or written, or of remembering the nature and uses of familiar objects. *Sensory aphasia* or *apraxia* is an inability to recognize the use or import of objects or the meaning of words, and includes *word blindness* and *word deafness*. *Motor aphasia* is a loss of memory of the efforts necessary to pronounce words, and often includes *agraphia*, or the inability to write words of the desired meaning.

APOCÆ (Lat.). A writing acknowledging payments; acquittance.

It differs from acceptilation in this, that acceptilation imports a complete discharge of the former obligation whether payment be made or not; *apocha*, discharge only upon payment being made. Calvinus, Lex.

APOCRISARIUS (Lat.). **In Civil Law.** A messenger; an ambassador.

Applied to legatees or messengers, as they carried the messages (ἀπόκρισεις) of their principals. They performed several duties distinct in character, but generally pertaining to ecclesiastical affairs.

A messenger sent to transact ecclesiastical business and report to his superior; an officer who had charge of the treasury of a monastic edifice; an officer who took charge of opening and closing the doors. Du Cange; Spelman, Gloss.; Calvinus, Lex.

Apocrisarius Cancellarius. An officer who took charge of the royal seal and signed royal despatches.

Called, also, *secretarius, consiliarius* (from his giving advice); *referendarius; a consiliis* (from his acting as counsellor); *a responsis*, or *responsalis.*

APOGRAPHIA. In Civil Law. An examination and enumeration of things possessed; an inventory. Calvinus, Lex.

APOPLEXY. In Medical Jurisprudence. The group of symptoms arising from hemorrhage into the substance of the brain or from the lodgment of a minute clot in one of the cerebral arteries.

The symptoms consist usually of sudden loss of consciousness, muscular relaxation, lividity of the face and slow stertorous respiration, lasting from a few hours to several days. On the return of consciousness there is found paralysis of some of the voluntary muscles, very frequently of the muscles of the face, arm, and leg upon one side, giving the symptom of hemiplegia. There is usually more or less mental impairment.

The mental impairment presents no uniform characters, but varies indefinitely, in extent and severity, from a little failure of memory, to an entire abolition of all the intellectual faculties. The power of speech is usually more or less affected: it may be a slight difficulty of utterance, or an inability to remember certain words or parts of words, or an entire loss of the power of articulation. This feature may arise from two different causes—either from a loss of the power of language, or a loss of power in the muscles of the larynx. This fact must be borne in mind by the medical jurist, and there can be little difficulty in distinguishing between them. In the latter, the patient is as capable as ever of reading, writing, or understanding spoken language. In the former, he is unable to communicate his thoughts by writing, because they are disconnected from their articulate signs. He recognizes their meaning when he sees them, but cannot recall them by any effort of the perceptive powers. This affection of the faculty of language is manifested in various ways. One person loses all recollection of the names of persons and things, while other parts of speech are still at command. Another forgets everything but substantives, and only those which express some mental quality or abstract idea. Another loses the memory of all words but yes or no. In these cases the patient is able to repeat the words on hearing them pronounced, but, after a second or third repetition, loses them altogether.

See APHASIA.

Wills and contracts are not unfrequently made in that equivocal condition of mind which sometimes follows an attack of apoplexy or paralysis; and their validity is contested on the score of mental incompetency. In cases of this kind there are, generally, two questions at issue, viz., the absolute amount of mental impairment, and the degree of foreign influence exerted upon the party. They cannot be considered independently of each other. Neither of them alone might be sufficient to invalidate an act, while together, even in a much smaller degree, they would have this effect.

In testing the mental capacity of paralytics, reference should be had to the nature of the act in question. The question is not, had the testator sufficient capacity to make *a* will? but, had he sufficient capacity to make *the* will in dispute? A capacity which might be quite adequate to a distribution of a little personal property among a few near relatives would be just as clearly inadequate to the disposition of a large estate among a host of relatives and friends possessing very unequal claims upon the testator's bounty. Here, as in other mental conditions, all that is required is mind sufficient for the purpose, neither more nor less. See DEMENTIA; DELIRUM; IMBECILITY; MANIA. In order to arrive at correct conclusions on this point, we must be careful, among other things, not to confound the power to appreciate the terms of a proposition with the power to discern its relations and consequences.

In testing the mental capacity of one who has lost the power of speech, it is always difficult, and often impossible, to arrive at correct results. If the person is able and willing to communicate his thoughts in writing, his mental capacity may be clearly revealed. If not disposed to write, he may communicate by constructing words and sentences by the help of a dictionary or block letters. Failing in this, the only other intellectual manifestation possible is the expression of assent or dissent by signs to propositions made by others. Any of these means of communication, other than that of writing, must leave us much in the dark respecting the amount of intellect possessed by the party. If the act in question is complicated in its relations, if it is unreasonable in its dispositions, if it bears the slightest trace of foreign influence, it cannot but be regarded with suspicion. If the party has only the power of assenting or dissenting, it must always be impossible to decide whether this does not refer to the terms rather than the merits of the proposition; and, therefore, an act which bears no other evidence than this of the will of the person certainly ought not to be established. Besides, it must be considered that a will drawn up in this manner is, actually, not the will of the testator, since every disposition has originated in the minds of others; Ray, Med. Jur. 363. The phenomena and legal consequences of paralytic affections are extensively discussed in 1 Paige, Ch. 171; 1 Hagg. Eccl. 502, 577; 2 *id.* 84; 1 Curt. Eccl. 782; Parish Will Case, 4 vols. N. Y. 1858. And see DEATH; INSANITY.

APOSTLES. Brief letters of dismissal granted to a party who takes an appeal from the decision of an English court of admiralty, stating the case, and declaring that the record will be transmitted. 2 Brown, Civ. and Adm. Law 438; Dig. 49. 6.

This term was used in the civil law. It is derived from *apostolos*, a Greek word, which signifies *one sent*, because the judge from whose sentence an appeal was made, sent to the superior judge these letters of dismission, or apostles; Merlin, *Répert.*

mot *Apôtres*; 1 Pars. Marit. Law 745; 1 Blatchf. 663.

APOSTOLI. In Civil Law. Certificates of the inferior judge from whom a cause is removed, directed to the superior. Dig. 49. 6. See APOSTLES.

Those sent as messengers. Spelman, Gloss.

APOTHECARY. "Any person who keeps a shop or building where medicines are compounded or prepared according to prescriptions of physicians, or where medicines are sold, shall be regarded as an apothecary." 14 Stat. L. 119, § 23.

The term "druggist" properly means one whose occupation is to buy and sell drugs without compounding or preparation. The term is more limited in meaning than "apothecary;" 28 La. Ann. 767.

See DRUGGIST.

APPARATOR (Lat.). A furnisher; a provider.

The sheriff of Bucks had formerly a considerable allowance as *apparator comitatus* (apparator for the county); Cowel.

APPARENT (Lat. *apparens*). That which appears; that which is manifest; what is proved. It is required that all things upon which a court must pass should be made to appear, if matter in pais, under oath; if matter of record, by the record. It is a rule that those things which do not appear are to be considered as not existing: *de non apparentibus et non existentibus eadem est ratio;* Broom, Max. 20. What does not appear does not exist: *quod non apparet, non est;* 8 Cow. 600; 1 Term 404; 12 M. & W. 316.

In case of homicide when the term "apparent danger" is used it means such overt actual demonstration, by conduct and acts, of a design to take life or do some great personal injury as would make the killing apparently necessary for self-preservation; 44 Miss. 762.

APPARITOR (Lat.). An officer or messenger employed to serve the process of the spiritual courts in England and summon offenders. Cowel.

APPARURA (Lat.). **In Old English Law.** Furniture or implements.

Carucariæ apparura, plough-tackle. Cowel; Jacob, Dict.

APPEAL (Fr. *appeler*, to call). **In Criminal Practice.** A formal accusation made by one private person against another of having committed some heinous crime. 4 Bla. Com. 312.

Anciently, appeals lay for treason as well as felonies; but appeals for treason were abolished by statutes 5 Edw. III. c. 9, 25 Edw. III. c. 24, and 1 Hen. IV. c. 14, and for all other crimes by the statute 59 Geo. III. c. 46.

An appeal lay for the heir male for the death of his ancestors; for the widow while unmarried for the death of her husband; and by the party injured, for certain crimes, as robbery, rape, mayhem, etc.; Co. Litt. 287 *b*; 2 Bish Cr. Law 1001, note, par. 4.

It might be brought at any time within a year and a day, even though an indictment had been found. If the appellee was found innocent, the appellor was liable to imprisonment for a year, a fine, and damages to the appellee.

The appellee might claim *wager of battle.* This claim was last made in the year 1818 in England; 1 B. & Ald. 405. And see 2 W. Bla. 713; 5 Burr. 2643, 2793; 4 Sharsw. Bla. Com. 312–318, and notes.

In Practice. The removal of a cause from a court of inferior to one of superior jurisdiction, for the purpose of obtaining a review and retrial; Ellsworth, C. J., 3 Dall. 321; 7 Cra. 110; 10 Pet 205; 14 Mass. 414; 1 S. & R. 78; 1 Binn. 219; 3 *id.* 48.

It is a civil-law proceeding in its origin, and differs from a writ of error in this, that it subjects both the law and the facts to a review and a retrial, while a writ of error is a common-law process which removes matter of law only for re-examination; 7 Cra. 111.

On an appeal the whole case is examined and tried, as if it had not been tried before, while on a writ of error the matters of law merely are examined, and judgment reversed if any errors have been committed; Dane, Abr. *Appeal.* The word is used, however, in the sense here given both in chancery and in common-law practice; 16 Md. 282; 20 How. 198; and in criminal as well as in civil law; 9 Ind. 569; 6 Fla. 679.

An appeal generally supersedes the judgment of the inferior court so far that no action can be taken upon it until after the final decision of the cause; 26 Barb. 55; 5 Fla. 234; 4 Iowa 230; 5 Wis. 185; 106 Ill. 147; 4 Mass. 107; 86 N. Y. 162. A decree is final for the purposes of an appeal to the Supreme court when it terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution what has been determined; 108 U. S. 24; 106 *id.* 3; 106 *id.* 429. Before an appeal can be prosecuted by one of several defendants the case should be determined as to all; 145 U. S. 611. In equity cases all parties against whom a joint decree is rendered must join in an appeal, if any be taken; and when only one takes an appeal, and there is nothing in the record to show that the others were applied to and refused to appeal, and no order is entered by court, on notice, granting him a separate appeal, his appeal cannot be sustained; 158 U. S. 123.

It is a general rule of the law that all the judgments, decrees, or other orders of the courts, however conclusive in their character, are under the control of the court which pronounces them during the term at which they are rendered or entered of record, and they may then be set aside, vacated, modified, or annulled by that court; 104 U. S. 415.

The rules of the various states regulating appeals are too numerous and various, and too much matters of mere local practice, to be given here. See Bliss, Code Pleading. For the practice in federal courts, see Phil. Pr. in S. C. of U. S.; Rev. Stat. U. S. title Judiciary; Fost. Fed. Pr.; Field, Fed. Courts; and COURTS OF THE UNITED STATES.

In Legislation. The act by which a member of a legislative body who questions the correctness of a decision of the presiding officer, or "chair," procures a vote of the body upon the decision. In the House of Representatives of the United States the question on an appeal is put to the House in this form: "Shall the decision of the chair stand as the judgment of the House?" Rob. R. of O. 14, 66.

If the appeal relates to an alleged breach of decorum, or transgression of the rules of order, the question is taken without debate. If it relates to the admissibility or relevancy of a proposition, debate is permitted, except when a motion for the previous question is pending.

APPEARANCE. In Practice. A coming into court as party to a suit, whether as plaintiff or defendant.

The formal proceeding by which a defendant submits himself to the jurisdiction of the court. Tr. & H. Prac. 226, 271.

Appearance anciently meant an actual coming into court, either in person or by attorney. It is so used both in the civil and the common law. It is indicated by the word "comes," "and the said C. D. *comes* and *defends*," and, in modern practice, is accomplished by the entry of the name of the attorney of the party in the proper place on the record, or by filing bail where that is required. It was a formal matter, but necessary to give the court jurisdiction over the person of the defendant.

A time is generally fixed within which the defendant must enter his appearance; usually the *quarto die post*. If the defendant failed to appear within this period, the remedy in ancient practice was by distress infinite when the injuries were committed without force, and by capias or attachment when the injuries were committed against the peace, that is, were technical trespasses. But, until appearance, the courts could go no further than apply this process to secure appearance. See PROCESS.

In modern practice, a failure to appear generally entitles the plaintiff to judgment against the defendant by default.

It may be of the following kinds:—

Compulsory.—That which takes place in consequence of the service of process.

Conditional.—One which is coupled with conditions as to its becoming general.

De bene esse.—One which is to remain an appearance, except in a certain event. See DE BENE ESSE.

General.—A simple and absolute submission to the jurisdiction of the court.

Gratis.—One made before the party has been legally notified to appear.

Optional.—One made where the party is not under any obligation to appear, but does so to save his rights. It occurs in chancery practice, especially in England.

Special.—That which is made for certain purposes only, and does not extend to all the purposes of the suit.

Subsequent.—An appearance by the defendant after one has already been entered for him by the plaintiff. See Dan. Ch. Pr.

Voluntary.—That which is made in answer to a subpœna or summons, without process; 1 Barb. Ch. Pr. 77.

How to be made.—On the part of the plaintiff no formality is required. On the part of the defendant it may be effected by making certain formal entries in the proper office of the court, expressing his appearance; 5 W. & S. 215; 2 Ill. 250; 15 Ala. 352; 6 Mo. 50; 17 Vt. 531; 2 Ark. 26; or, in case of arrest, is effected by giving bail; or by putting in an answer; 4 Johns. Ch. 94; 21 Cal. 51; 28 Wis. 257; or a demurrer; 6 Pet. 323; 10 Ind. 550; 7 Ohio 233; or notice to the other side; 4 Johns. Ch. 94; or motion for continuance; 2 Greene 464; or taking an appeal; 2 Grant 422; 13 Ohio 563; appearance and offer to file answer; 40 Mo. 110; or motion to have interlocutory order set aside; 11 Wis. 401.

A general appearance waives all question as to the service of process and is equivalent to a personal service; 34 Fed. Rep. 817; 78 Ga. 215; 79 *id.* 532; 85 Ala. 593; an appearance in a federal court waives the defence that the defendant was not served in the district of which he was an inhabitant; 39 Fed. Rep. 23; 47 *id.* 705. A general notice of appearance in a United States court may be amended so as to make it special; 38 Fed. Rep. 273. Objection cannot be taken to the jurisdiction of the court after pleading to the merits of the action; 145 U. S. 593; 59 Conn. 117.

By whom to be made.—In civil cases it may in general be made either by the party or his attorney; and in those cases where it is said that the party must appear in person, it is sufficient if it is so entered on the record; although, in fact, the appearance is by attorney; 2 Johns. 192; 14 *id.* 417. The unauthorized appearance of an attorney will not give the court jurisdiction; 12 Colo. 46; 84 Me. 299.

An appearance by attorney is, in strictness, improper where a party wishes to plead to the jurisdiction of the court, because the appointment of an attorney of the court admits its jurisdiction; 1 Chit. Pl. 398; 2 Wms. Saund. 209 *b*; and is insufficient in those cases where the party has not sufficient capacity to appoint an attorney. Thus *an idiot* can appear only in person, and as a plaintiff he may sue in person or by his next friend.

An infant cannot appoint an attorney; he must, therefore, appear by guardian or prochein ami.

A lunatic, if of full age, may appear by attorney; if under age, by guardian only. 2 Wms. Saund. 335; *id.* 232 (*a*), n. (4).

A married woman, when sued without her husband, should defend in person: 1 Wms. Saund. 209 *b*. And see 1 Chit. Pl. 398.

The effect of an appearance by the defendant is, that both parties are considered to be in court.

In criminal cases the personal appearance of the accused in court is often necessary. See 2 Burr. 931; *id.* 1786; 1 W. Bla. 198. The verdict of the jury must, in all cases of treason and felony, be delivered in open court, in the presence of the defendant. In cases of misdemeanor, the presence of the defendant during the trial is not essential; Bacon, Abr. *Verdict*, B; Arch, Cr. Pl. 14th ed. 149.

No motion for a new trial is allowed un-

less the defendant, or, if more than one, the defendants, who have been convicted, are present in court when the motion is made; 3 M. & S. 10, note; 17 Q. B. 503; 2 Den. Cr. Cas. 372, note. But this rule does not apply where the offence of which the defendant has been convicted is punishable by a fine only; 2 Den. Cr. Cas. 459; or where the defendant is in custody on criminal process; 4 B. & C. 329. On a charge of felony, a party suing out a writ of error must appear in person to assign errors; and it is said that if the party is in custody in the prison of the county or city in which the trial has taken place, he must be brought up by *habeas corpus*, for the purpose of this formality, which writ must be moved for on affidavit. This course was followed in 2 Den. Cr. Cas. 287; 17 Q. B. 317; 8 E. & B. 54; 1 D. & B. 375.

Where a defendant is not liable to personal punishment, but to a fine, sentence may be pronounced against him in his absence; 1 Chit. Cr. L. 695; 2 Burr. 931; 3 *id.* 1780.

APPELLANT. In Practice. He who makes an appeal from one jurisdiction to another.

APPELLATE JURISDICTION. In Practice. The jurisdiction which a superior court has to re-hear causes which have been tried in inferior courts. See JURISDICTION.

APPELLATIO (Lat.). An appeal.

APPELLEE. In Practice. The party in a cause against whom an appeal has been taken.

APPELLOR. A criminal who accuses his accomplices; one who challenges a jury.

APPENDAGE. Something added as an accessory to or the subordinate part of another thing. 28 N. J. Law 26; 21 Kans. 536.

APPENDANT (Lat. *ad*, to, *pendere*, to hang). Annexed or belonging to something superior; an incorporeal inheritance belonging to another inheritance.

Appendant in deeds includes nothing which is substantial corporeal property, capable of passing by feoffment and livery of seisin. Co. Litt. 121; 4 Coke 86; 8 B. & C. 150; 6 Bingh. 150. A matter *appendant* must arise by prescription; while a matter appurtenant may be created at any time; 2 Viner, Abr. 594; 3 Kent 404.

APPENDITIA (Lat. *appendere*, to hang at or on). The appendages or pertinances of an estate; the appurtenances to a dwelling, etc.; thus, *pent-houses* are the *appenditia domus*.

APPLICATION (Lat. *applicare*). The act of making a request for something. A written request to have a certain quantity of land at or near a certain specified place. 3 Binn. 21; 5 *id.* 151.

The use or disposition made of a thing.

In Insurance. The preliminary statement made by a party applying for an insurance on life, or against fire. It usually consists of written answers to interrogatories proposed by the company applied to, respecting the proposed subject. It corresponds to the "representations" preliminary to maritime insurance. It is usually referred to expressly in the policy as being the basis or a part of the contract, and this reference creates in effect a warranty of the truth of the statements. In an action on a policy, the application and policy must be construed as one instrument; 61 N. Y. Super. Ct. 287. If the policy does not make the answers a part of the contract, this will have only the effect of representation; May, Ins. § 159; 50 Pa. 331. To constitute a warranty it must be made a part of the policy; 67 Tex. 69. A mere reference in the policy to the application does not make its answers warranties; it is a question of intention; 7 Wend. 72; 22 Conn. 235; 18 Ind. 352; the courts tend to consider the answers representations, rather than warranties, except in a clear case; 98 Mass. 381; 31 Iowa 216; 4 R. I. 141. An oral misrepresentation of a material fact will defeat a policy on life or against fire, no less than in maritime insurance on the ground of fraud; 1 Phill. Ins. § 650. Misrepresentation as to one of several buildings all being in one policy cannot defeat a recovery on another; 121 Ind. 570. See REPRESENTATION; MISREPRESENTATION.

Of Purchase-Money. The disposition made of the funds received by a trustee on a sale of real estate held under the trust.

Where there is a general power to sell for debts, or debts and legacies, the purchaser need not look to the application of the purchase-money; 2 Rawle 392; 13 Pick. 393; 1 Beas. 69; 5 Ired. Eq. 357; 3 Mas. 178; so as to legacies where there is a trust for reinvestment; 8 Wheat. 421; 6 Ohio 114; where the trust is to pay specified debts, the purchaser must see to the application of the purchase-money; 3 Mas. 178; 10 Pa. 267; 1 Pars. Eq. 57; 6 Gill. 487. See note to Elliot *v.* Merryman, 1 Lead. Cas. Eq. 74; Perry, Trusts; Adams, Eq. *155. The doctrine is abolished in England by 23 & 24 Vict. c. 145, § 29, and is of little importance in the United States; Bisp. Eq. 278, 279.

Of Payments. See APPROPRIATION.

APPOINTEE. A person who is appointed or selected for a particular purpose; as, the appointee under a power is the person who is to receive the benefit of the power.

APPOINTMENT. The designation of a person, by the person or persons having authority therefor, to discharge the duties of some office or trust.

The making out a commission is conclusive evidence of an appointment to an office for holding which a commission is required; 1 Cra. 137; 10 Pet. 343. For discussion of constitutional and statutory limitations of executive and legislative functions in respect to appointments to office, see 30 Amer. & Eng. Corp. Cas. 321, note.

The governor cannot make a valid appointment to an office which at the time is

rightfully held by an incumbent whose term has not expired; 124 Ind. 515.

As distinguished from an election, it seems that an appointment is generally made by one person, or a limited number acting with delegated powers, while an election is made by all of a class.

The word is sometimes used in a sense quite akin to this, and apparently derived from it as denoting the right or privilege conferred by an appointment: thus, the act of authorizing a man to print the laws of the United States by authority, and the right thereby conveyed, are considered such an appointment, but the right is not an office; 17 S. & R. 29, 233. And see 3 *id.* 157; Cooper, Justin. 599, 604,

In Chancery Practice. The exercise of a right to designate the person or persons who are to take the use of real estate. 2 Washb. R. P. 302.

By whom to be made.—It must be made by the person authorized; 2 Bouv. Inst. § 1922; who may be any person competent to dispose of an estate of his own in the same manner; 4 Kent 324; including a married woman; 1 Sugd. Pow. 182; 3 C. B. 578; 5 *id.* 741; 3 Johns. Ch. 523; 2 Dall. 201; 8 How. 27; even though her husband be the appointee; 21 Pa. 72; or an infant, if the power be simply collateral; 2 Washb. R. P. 5th ed. *317. And see Sugd. Pow. 8th ed. 177, 910. Where two or more are named as donees, all must in general join; 2 Washb. R. P. 5th ed. *322; 14 Johns. 553; but where given to several who act in a trust capacity, as a class, it may be by the survivors; 10 Pet. 564; 13 Metc. Mass. 220; Story, Eq. Jur. § 1062, n. When such a right is devolved upon two executors and two others are named as successors in case of their death, no others can execute the trust so long as any one of the four is living and has not declined the trust, and an administrator c. t. a. will be liable to suit by the succeeding trustee for trust property with which he intermeddles; 147 U. S. 557.

How to be made.—A very precise compliance with the directions of the donor is necessary; 2 Ves. Ch. 231; 1 P. Will. 740; 3 East 410, 430; 1 Jac. & W. Ch. 93; 6 Mann. & G. 386; 8 How. 30; having regard to the intention, especially in substantial matters; Tudor, Lead. Cas. 306; 2 Washb. R. P. 5th ed. *318; Ambl. Ch. 555; 3 Ves. Ch. 421. It may be a partial execution of the power only, and yet be valid; 4 Cruise, Dig. 205; or, if excessive, may be good to the extent of the power; 2 Ves. Sen. 640; 3 Dru. & W. 339. It must come within the spirit of the power; thus, if the appointment is to be *to* and *amongst* several, a fair allotment must be made to each; 4 Ves. Ch. 771; 2 Vern. Ch. 513; otherwise, where it is made to such as the donee may select; 5 Ves. Ch. 857.

The effect of an appointment is to vest the estate in the appointee, as if conveyed by the original donor; 2 Washb. R. P. 5th ed. *320; 2 Crabb. R. P. 726, 741; 2 Sugd. Pow. 22; 11 Johns. 169. See POWER. Consult 2 Washb. R. P. 5th ed. *298, 337; Tudor, Lead. Cas.; Chance, Pow.; 4 Greenl. Cruise, Dig. In Pennsylvania where the appointer, after an estate for life, is a lineal descendant of the donor, there is no collateral inheritance tax; 2 Chest. Co. R. 246.

APPOINTOR. One authorized by the *donor*, under the statute of uses, to execute a power. 2 Bouv. Inst. n. 1923.

APPORTIONMENT. The division or distribution of a subject-matter in proportionate parts. Co. Litt. 147; 1 Swanst. 37, n.; 1 Story, Eq. Jur. 13th ed. § 475 *a*.

Of Contracts. The allowance, in case of the partial performance of a contract, of a proportionate part of what the party would have received as a recompense for the entire performance of the contract. See generally Ans. Contr. 291.

Where the contract is to do an entire thing for a certain specified compensation, there can be no apportionment; 9 B. & C. 92; 2 Pars. Contr. 520; 82 Pa. 267; 44 Cal. 18; 38 Conn. 290; 4 Heisk. 590; 1 Story, Eq. §§ 470 *et seq.*; 1 Washb. R. P. 133, 549, 555; 2 *id.* 302; but see *contra*, 36 Tex. 1. A contract for the sale of goods is entire; 9 B. & C. 386; 60 Pa. 182; 6 Oreg. 248; but where there has been a part delivery of the goods, the buyer is liable on a *quantum valebant* if he retain the part delivered; 9 B. & C. 386; 10 *id.* 441; 18 Pick. 555 (but *contra* in New York and Ohio; 13 Wend. 258; 16 Ohio 238); though he may return the part delivered and escape liabilities. A contract consisting of several distinct items, and founded on a consideration apportioned to each item, is several; 66 Pa. 351. The question of entirety is one of intention, to be gathered from the contract; 2 Pars. Contr. 8th ed. *517. Where no compensation is fixed, the contract is usually apportionable; 3 B. & Ad. 404; Cutter *v.* Powel, 2 Sm. Lead. Cas. note (*q. v.* on this whole subject).

Annuities, at common law, are not apportionable; 6 Metc. 194; 6 Vt. 430; 2 P. W. 501; so that if the annuitant died before the day of payment, his representative is entitled to no proportionate share of the annuity for the time which has elapsed since last payment; 37 N. J. Eq. 126; 16 Q. B. 357; 12 Ves. 484; 71 Ind. 526; 13 Hun 147; 13 Phila. 185; but by statute 11 Geo. II. it was enacted that annuities, rents, dividends, etc., and all other payments of every description made payable at fixed periods, should be apportioned; 2 P. Wms. 501; 2 W. Bla. 843; 17 S. & R. 173; 3 Kent 471. This has been adopted by statute or decision in many of the states.

Wages are not apportionable where the hiring takes place for a definite period; 6 Term 320; 5 B. & P. 651; 11 Q. B. 755; 19 Pick. 528; 12 Metc. Mass. 286; 28 Ill. 257; 34 Me. 102; 13 Johns. 365; 14 Wend. 257; 12 Vt. 49; 1 Ind. 257; 19 Ala. N. S. 54; 44 Conn. 333. See 2 Pick. 332; 17 Me. 38; 11 Vt. 273; 3 Denio 175; *contra*, 6 N. H. 481.

Of Incumbrances. The ascertainment of the amounts which each of several parties interested in an estate shall pay towards the removal or in support of the burden of an incumbrance.

As between a tenant for life and the remainderman, the tenant's share is limited to keeping down the interest; but not beyond the amount of rent accruing; 46 Vt.

45; 31 E. L. & E. 345; if the principal is paid, the tenant for life must pay a gross sum equivalent to the amount of all the interest he would pay, making a proper estimate of his chances of life; 1 Washb. R. P. 5th ed. *96; 1 Story. Eq. Jur. 13th ed. § 487. See 2 Dev. & B. Eq. 179; 5 Johns. Ch. 482; 10 Paige, Ch. 71, 158; 13 Pick. 158; 27 Barb. 49.

Of Rent. The allotment of their shares in a rent to each of several parties owning it.

The determination of the amount of rent to be paid when the tenancy is terminated at some period other than one of the regular intervals for the payment of rent.

An apportionment of rent follows upon every transfer of a part of the reversion; 17 Mass. 439; 22 Wend. 121; 22 Pa. 144; see 18 N. Y. 529; or where there are several assignees, as in case of a descent to several heirs; 3 Watts 394; 13 Ill. 25; 25 Wend. 456; 10 Coke 128; Comyn, Land. & Ten. 422; where a levy for debt is made on a part of the reversion, or it is set off to a widow for dower; 1 Rolle, Abr. 237; but whoever owns at the time the rent falls due is entitled to the whole; 7 Md. 368; 3 Metc. Mass. 76; 1 Washb. R. P. 5th ed. *98, 337. See Williams, Ex. 7th Am. ed. *730. If a tenancy at will is terminated between two rent days by a conveyance of the premises from the landlord to a third person, the tenant is not liable and the rent cannot be apportioned; 132 Mass. 346.

Rent is not, at common law, apportionable as to time; Smith, Land. & T. 134; Taylor, Land. & T. §§ 384–387; 3 Kent 470; 5 W. & S. 432; 13 N. H. 343; 3 Bradf. Surr. 359. It is apportionable by statute 11 Geo. II. c. 19, § 15; and similar statutes have been adopted in this country to some extent; 2 Washb. R. P. 5th ed. *289; 13 N. H. 343; 14 Mass. 94; 1 Hill, Abr. c. 16, § 50. In the absence of express statute or agreement, it is not; 121 Mass. 178.

Consult also 3 Kent 469, 470; 1 Pars. Contr. 8th ed. *516, 517; ; 1 Story, Eq. Jur. 13th ed. 475 *a*; Wms. Exec. 709. See LANDLORD AND TENANT.

Of Representatives. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for president and vice-president of the United States, representatives in congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced to the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state; Art. 14, § 2, U. S. Const.; Story, Const. 1963.

The actual enumeration shall be made within three years after the first meeting of the congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of representatives shall not exceed one for every thirty thousand; but each state shall have at least one representative; U. S. Const. Art. 1, § 2.

The Revised Statutes of the United States provide that from and after March 3, 1893, the house of representatives shall be composed of three hundred and fifty-six members, and provide the number to which each state is entitled. Upon the admission of a new state, the representatives to be assigned to it are in addition to the above three hundred and fifty-six. The admission of Utah, under this provision, makes the present number three hundred and fifty-seven; Rev. Stat. U. S. 1 Suppl. 888.

Under the present constitution, apportionments of representatives have been made as follows. The first house of representatives consisted of sixty-five members, or one for every thirty thousand of the representative population. By the census of 1790, it consisted of one hundred and six representatives, or one for every thirty-three thousand; by the census of 1800, one hundred and forty-two representatives, or one for every thirty-three thousand; by the census of 1810, one hundred and eighty-three representatives, or one for every thirty-five thousand; by the census of 1820, two hundred and thirteen representatives, one for every forty thousand; by the census of 1830, two hundred and forty-two representatives, or one for every forty-seven thousand seven hundred; by the census of 1840, two hundred and twenty-three representatives, or one for every seventy thousand six hundred and eighty; by the census of 1850, and under the act of May 23, 1850, the number of representatives was increased to two hundred and thirty-three, or one for every ninety-three thousand four hundred and twenty-three of the representative population; Sheppard's Const. Text Book 65; Acts 30 July, 1852, 10 Stat. 25; May 11, 1858, 11 Stat. 285; 14 Feb. 1859, 11 Stat. 383. Under the census of 1860, the ratio was ascertained to be for one hundred and twenty-four thousand one hundred and eighty-three, upon the basis of two hundred and thirty-three members; but by the act of 4th March, 1862, the number of representatives was increased to two hundred and forty-one. This, by the act of 1872, Feb. 2, Rev. Stat. U. S. 1878, §§ 20, 21, was increased to two hundred and ninety-two members, and by act of 1891, Feb. 7, Rev. Stat. U. S. Supp. p. 888, the number was increased to three hundred and fifty-six.

APPOSAL OF SHERIFFS. In English Law. The charging them with money received upon account of the Exchequer. 22 & 23 Car. II. Cowel.

APPOSER. In English Law. An officer of the Exchequer, whose duty it was to examine the sheriffs in regard to their

accounts handed in to the exchequer. He was also called the foreign apposer.

APPOSTILLE. In French Law. An addition or annotation made in the margin of a writing. Merlin, *Répert.*

APPRAISEMENT. A just valuation of property.

Appraisements are required to be made of the property of persons dying intestate, of insolvents, and others; an inventory (*q. v.*) of the goods ought to be made, and a just valuation put upon them. When property real or personal is taken for public use, an appraisement of it is made, that the owner may be paid its value.

APPRAISER. In Practice. A person appointed by competent authority to appraise or value goods or real estate.

APPREHENSION. In Practice. The capture or arrest of a person on a criminal charge.

The term apprehension is applied to criminal cases, and arrest to civil cases; as, one having authority may *arrest* on *civil* process, and *apprehend* on a *criminal* warrant. See ARREST.

APPRENTICE. A person bound in the form of law to a master, to learn from him his art, trade, or business, and to serve him during the time of his apprenticeship. 1 Bla. Com. 426; 2 Kent 211; 3 Rawle 307; 4 Term 735; Bouvier, Inst. *Index.*

Formerly the name of *apprentice en la ley* was given indiscriminately to all students of law. In the reign of Edward IV. they were sometimes called *apprenticii ad barras.* And in some of the ancient law-writers the terms apprentice and barrister are synonymous; Coke, 2d Inst. 214; Eunomius, Dial. 2, § 53, p. 155.

APPRENTICESHIP. A contract by which one person who understands some art, trade, or business, and is called the master, undertakes to teach the same to another person, commonly a minor, and called the apprentice, who, on his part, is bound to serve the master, during a definite period of time, in such art, trade, or business.

The term during which an apprentice is to serve. Pardessus, *Droit Comm.* n. 34.

A contract of apprenticeship is not invalid because the master to whom the apprentice is bound is a corporation; [1891] 1 Q. B. 75.

At common law, an infant may bind himself apprentice by indenture, because it is for his benefit; 5 M. & S. 257; 5 D. & R. 339. But this contract, both in England and in the United States, on account of its liability to abuse, has been regulated by statute, and is not binding upon the infant unless entered into by him with the consent of the parent or guardian (the father, if both parents be alive, being the proper party to such consent; 8 W. & S. 339), or by the parent and guardian for him, with his consent, such consent to be made a part of the contract; 2 Kent 261; 8 Johns. 328; 2 Pa. 977; 43 Me. 458; 12 N. H. 437; 4 Leigh 493; 4 Blackf. 337; or, if the infant be a pauper, by the proper authorities without his consent; 3 S. & R. 158; 32 Me. 299; 3 Jones, N. C. 21; 15 B. Monr. 499; 30 N. H. 104; 5 Gratt. 285. The contract need not specify the particular trade to be taught, but is sufficient if it be a contract to teach such manual occupation or branch of business as shall be found best suited to the genius or capacity of the apprentice; 9 Barb. 309; 1 Sandf. 672. Where the apprentice is bound to accept employment only from the master, but there is no covenant by the latter to provide employment, and the contract may be terminated only by him, it is invalid as being unreasonable and not for the benefit of the child; 45 Ch. Div. 430. In a common indenture of apprenticeship the father is bound for the performance of the covenants by the son; Dougl. 500; 3 B. & Ald. 59. But to an action of covenant against the father for the desertion of the son, it is a sufficient answer that the master has abandoned the trade which the son was apprenticed to learn, or that he has driven the son away by cruel treatment; 4 Eng. L. & Eq. 412; 2 Pick. 357.

This contract must generally be entered into by indenture or deed; 1 Salk. 68; 4 M. & S. 383; 10 S. & R. 416; 1 Vt. 69; 18 Conn. 337; and is to continue, if the apprentice be a male, only during minority, and if a female, only until she arrives at the age of eighteen; 2 Kent 264; 5 Term 715. An apprenticeship other than one entered into by indenture in conformity with the statute is not binding; 40 Mo. App. 44. The English statute law as to binding out minors as apprentices to learn some useful art, trade, or business, has been generally adopted in the United States, with some variations which cannot be noticed here; 2 Kent 264.

The duties of the master are to instruct the apprentice by teaching him the knowledge of the art which he has undertaken to teach him, though he will be excused for not making a good workman if the apprentice is incapable of learning the trade, the burden of proving which is on the master; 2 Dana 131; 5 Metc. Mass. 37; 1 Dev. & B. 402; Wood, Mast. & Serv. § 49. He ought to watch over the conduct of the apprentice, giving him prudent advice and showing him a good example, and fulfilling towards him the duties of a father, as in his character of master he stands *in loco parentis.* He is also required to fulfil all the covenants he has entered into by the indenture. He must not abuse his authority, either by bad treatment or by employing his apprentice in menial employments wholly unconnected with the business he has to learn, or in any service which is immoral or contrary to law; 4 Clark & F. 234; Wood, Mast. & Serv. § 60, n. 3; 1 Mass. 172; but may correct him with moderation for negligence and misbehavior, 1 Ashm. 267; 4 Keb. 661, pl. 50; 1 Wheel. Cr. Cas. 502. He cannot dismiss his apprentice except by consent of all the parties to the indenture; 1 S. & R. 330; 12 Pick. 110; 2 Burr. 766, 801; 1 Carr. & K. 622; or with the sanction of some competent tribunal; 2 Pick. 451; 8 Conn. 14; 1 Bail. 209; even

though the apprentice should steal his master's property, or by reason of incurable illness become incapable of service, the covenants of the master and apprentice being independent; 2 Pick. 451; 2 Dowl. & R. 465; 1 B. & C. 460; 5 Q. B. 447. If the apprentice proves to be an habitual thief, held that he may be properly dismissed; [1891] 1 Q. B. 431. He cannot remove the apprentice out of the state under the laws of which he was apprenticed, unless such removal is provided for in the contract or may be implied from its nature; and if he do so remove him, the contract ceases to be obligatory; 6 Binn. 202; 6 S. & R. 526; 2 Pick. 357; 13 Metc. Mass. 80; 12 Me. 315; 1 Houst. 527. An infant apprentice is not capable in law of consenting to his own discharge; 1 Burr. 501; 3 B. & C. 484; nor can the justices, according to some authorities, order money to be returned on the discharge of an apprentice; Stra. 69; *contra*, Salk. 67, 68, 490; 11 Mod. 110; 12 *id.* 498, 553. After the apprenticeship is at an end, the master cannot retain the apprentice on the ground that he has not fulfilled his contract, unless specially authorized by statute.

An apprentice is bound to obey his master in all his lawful commands, take care of his property, and promote his interest, endeavor to learn his trade or business, and perform all the covenants in his indenture not contrary to law. He must not leave his master's service during the terms of his apprenticeship; 6 Johns. 274; 2 Pick. 357. The apprentice is entitled to payment for extraordinary services when promised by the master; 1 Am. L. Jour. 308; see 1 Whart. 113; and even when no express promise has been made, under peculiar circumstances; 2 Cranch 240, 270; 3 C. Rob. Adm. 237; but see 1 Whart. 113. Upon the death of the master, the apprenticeship, being a personal trust, is dissolved; 1 Salk. 66; Strange 284; 1 Day 30.

To be binding on the apprentice, the contract must be made as prescribed by statute; 5 Cush. 417; 5 Pick. 250; but if not so made, it can only be avoided by the apprentice himself; 9 Barb. 309; 8 Johns. 328; 5 Strobh. 104; and if the apprentice do elect to avoid it, he will not be allowed to recover wages for his services, the relation being sufficient to rebut any promise to pay which might otherwise be implied; 12 Barb. 473; 2 *id.* 208; but see 13 Metc. Mass. 80. The master will be bound by his covenants, though additional to those required by statute; 10 Humphr. 179.

Where an apprentice is employed by a third person without the knowledge or consent of the master, the master is entitled to all his earnings, whether the person who employed him did or did not know that he was an apprentice; 6 Johns. 274; 3 N. H. 274; 7 Me. 457; 1 E. D. Smith 408; 1 Sandf. 711; but in an action for harboring or enticing away an apprentice, a knowledge of the apprenticeship by the defendant is a prerequisite to recovery; 2 Harr. & G. 182; 1 Wend. 376; 1 Gilm. 46; 5 Ired. 216. He has a right of action against any one injuring his apprentice causing a loss of his service; 117 Mass. 541; 11 Ad. & El. 301.

Apprenticeship is a relation which cannot be assigned at common law; 5 Binn. 423; Dougl. 70; 3 Keble 519; 18 Ala. N. S. 99; Busb. 419; Wood, Mast. & Serv. § 44; 1 Ld. Raym. 683; though, if under such an assignment the apprentice continue with his new master, with the consent of all the parties and his own, it will be construed as a continuation of the old apprenticeship; Dougl. 70; 4 Term 373; 19 Johns. 113; 5 Cow. 363; 2 Bail. 93. But in Pennsylvania and some other states the assignment of indentures of apprenticeship is authorized by statute; 1 S. & R. 249; 3 *id.* 161; 6 Vt. 430. See, generally, 2 Kent 261–266; Bacon, Abr. *Master and Servant;* 1 Saund. 313, n. 1, 2, 3, and 4. The law of France on this subject is strikingly similar to our own; Pardessus, *Droit Comm.* nn. 518, 522.

APPRIZING. In Scotch Law. A form of process by which a creditor formerly took possession of the estates of the debtor in payment of the debt due.

It is now superseded by adjudications.

APPROACH. The right of visit or visitation to determine the national character of the ship approached for that purpose only. 1 Kent 153.

APPROBATE AND REPROBATE. In Scotch Law. To approve and reject.

The doctrine of *approbate and reprobate* is the English doctrine of election. A party cannot both *approbate and reprobate* the same deed; 4 Wils. & S. Hou. L. 460; 1 Ross, Lead. Cas. 617; Pat. Comp. 710; 1 Bell, Comm. 146.

APPROPRIATION. In Ecclesiastical Law. The perpetual annexation of an ecclesiastical benefice which is the general property of the church, to the use of some spiritual corporation, either sole or aggregate.

It corresponds with impropriation, which is setting apart a benefice to the use of a lay corporation. The name came from the custom of monks in England to retain the churches in their gift and all the profits of them *in proprio usu* to their own immediate benefit. 1 Burns, Eccl. Law 71.

To effect a good appropriation, the king's license and the bishop's consent must first be obtained. When the corporation having the benefice is dissolved, the parsonage becomes disappropriate at common law; Co. Litt. 46; 1 Bla. Com. 385; 1 Hagg. Eccl. 162. There have been no appropriations since the dissolution of monasteries. For the form of an appropriation, see Jacob, Introd. 411.

Of Payments. The application of a payment made to a creditor by his debtor, to one or more of several debts.

The debtor has the first right of appropriation; 1 Mer. 605; 2 B. & C. 72. No precise declaration is required of him, his *intention* (12 N. J. Eq. 233, 312), when made known, being sufficient; 7 Blackf. 236; 10 Ill. 449; 1 Fla. 409; 7 Beav. 10; 30 Ind. 429; 58 Ga. 176; 39 Wis. 300; 74 Ill. 238; Taney 460; 59 Ala. 345; 62 Ind. 128; 54 N. H. 395.

Still, such facts must be proved as will lead a jury to infer that the debtor did purpose the specific appropriation claimed; 14 East 239, 243, n.; 4 Ad. & E. 840; 8 W. & S. 320; 2 Hall 185; 10 Leigh 481; 1 Ga. 241; 17 Mass. 575; 5 Ired. 551; 2 Rob. 2, 27; 12 Vt. 608; 36 Me. 222; 4 J. J. Marsh. 621; 4 Gill & J. 361. An entry made by the debtor in his own book at the time of payment is an appropriation, if made known to the creditor; but otherwise, if not made known to him. The same rule applies to a creditor's entry communicated to his debtor; 3 Dowl. & R. 519; 8 C. & P. 704; 2 B. & C. 65; 5 Denio 470; 11 Barb. 80. The appropriation must be made by the debtor at or before the time of payment; suit fixes the appropriation; 14 Cal. 446; 7 Wash. 521. The intention to appropriate may be referred to the jury on the facts of the transaction; 5 W. & S. 542.

The creditor may apply the payment, as a general rule, if the debtor does not; 4 Cra. 316; 7 How. 681; 20 Pick. 339; 25 Pa. 411; 1 M'Cord 308; 5 Day 166; 1 Mo. 315; 2 Ill. 196; 54 Ga. 174; 39 Wis. 300; 32 Ark. 645; 54 N. H. 345; 7 Wash. 521; 74 Hun 176; 78 Wis. 475; 79 Ga. 130. In the absence of directions the creditor may apply credits to the least secure items of his claim; 6 Kulp. 336. But there are some restrictions upon this right. The debtor must have known and waived his right to appropriate. Hence an agent cannot always apply his principal's payment. He cannot, on receipt of money due his principal, apply the funds to debts due himself as agent, selecting those barred by the statute of limitations; 8 Dowl. Bail 563; 1 Mann. & G. 54; 5 N. H. 237. But on an agent's appropriations, see 5 Bligh. N. S. 1; 3 B. & Ad. 320; 9 Pick. 325; 1 La. Ann. 393; 19 N. H. 479; 29 Miss. 139. A prior *legal* debt the creditor must prefer to a posterior equitable debt. Where only one of several debts is valid and lawful, all the payments must be applied to this, irrespective of its order in the account; 27 Vt. 187. Whether if the equitable be prior it must first be paid, see 9 Cow. 420; 2 Stark. 74; 1 C. & M. 33; 6 Taunt. 597.

If the creditor is also *trustee* for another creditor of his own debtor, he must apply the unappropriated funds *pro rata* to his own claims and those of his *cestui que trust*; 18 Pick. 361. But if the debtor, besides the debts in his own right, owe also debts as executor or administrator, the unappropriated funds should first be applied to his personal debt, and not to his debts as executor; 2 Str. 1194; 4 Harr. & J. 566; 14 N. H. 352; 2 Dowl. Parl. Cas. 477. A creditor cannot apply unappropriated funds to such of his claims as are *illegal* and not recoverable at law; 3 B. & C. 165; 4 M. & G. 860; 4 Dowl. & R. 783; 2 Deac. & C. 534; 11 Cush. 44; 14 N. H. 431. But in the case of some debts illegal by statute—namely, those contracted by sales of spirituous liquors—an appropriation to them has been adjudged good; 2 Ad. & E. 41; 1 M. & R. 100; 34 Me. 112. And the debtor may always elect to have his payment applied to an illegal debt.

If some of the debts are barred by the *statute of limitations* the creditor cannot first apply the unappropriated funds to them, and thus revive them and take them out of the statute; 2 Cr. M. & R. 723; 2 C. B. 476; 31 Eng. L. & Eq. 555; 13 Ark. 754; 1 Gray 630. Still, a debtor may waive the bar of the statute, just as he may apply his funds to an illegal debt; and the creditor may insist, in the silence of the debtor, unless other facts controvert it, that the money was paid on the barred debts; 5 M. & W. 300; 26 N. H. 85; 25 Pa. 411. See 31 Mo. App. 180. Proof of such intent on the debtor's part may be deduced from a mutual adjustment of accounts before the money is sent, or from his paying interest on the barred debt. But, in general, the creditor cannot insist that a part-payment revives the rest of the debt. He can only retain such partial payment as has been made; 1 Gray 630. It has been held that the creditor may first apply a general payment to discharging any one of several accounts all barred, and by so doing he will revive the balance of that particular account, but he is not allowed to distribute the funds upon all the barred notes, so as to revive all; 19 Vt. 26. See LIMITATIONS.

Wherever the payment is not *voluntary*, the creditor has not the option in appropriation, but he must apply the funds received ratably to all the notes or accounts. This is the rule wherever proceeds are obtained by judicial proceedings. So, in cases of assignment by an insolvent debtor, the share received by a creditor, a party to the assignment, must be applied *pro rata* to all his claims, and not to such debts only as are not otherwise secured; 10 Pick. 129; 1 M. & G. 54; 1 Miss. 526; 12 N. H. 320; 22 Me. 295; 1 Sandf. 416. See 22 La. Ann. 289; 29 Fla. 655.

A creditor having several demands may apply the payments to a debt not secured by sureties, where other rules do not prohibit it; 11 Metc. 185. Where appropriations are made by a receipt, *prima facie* the creditor has made them, because the language of the receipt is his; Dav. Dist. Ct. 146.

It is sufficiently evident from the foregoing rules that the principle of the Roman law which required the creditor to act for his debtor's interest in appropriation more than for his own, is not a part of the common law; 6 W. & S. 9. The nearest approach to the civil-law rule is the doctrine that when the right of appropriation falls to the creditor he must make such an application as his debtor could not *reasonably* have objected to; 21 Vt. 456; 20 Miss. 631. See IMPUTATION.

The law will apply part-payments in accordance with the justice and equity of the case; 9 Wheat. 720; 12 S. & R. 301; 2 Vern. 24; 6 Cra. 28, 253, 264; 5 Mas. 82; 1 Abb. App. Dec. 295; 2 Del. Ch. 333; Taney 460.

Unappropriated funds are always applied to a *debt due* at the time of payment, rather than to one not then due; 2 Esp.

666 ; 1 Bibb 334 ; 5 Gratt. 57 ; 9 Cow. 420 ; 5 Mas. 11 ; 27 Ala. N. S. 445 ; 10 Watts 255 ; 4 Wisc. 442 ; 47 Ark. 111. But an express agreement with the debtor will make good an appropriation to debts not due ; 22 Pick. 305. The creditor should refuse a payment on an account not yet due, if he be unwilling to receive it ; but if he do receive it he must apply it as the debtor directs ; 40 Me. 325 ; 59 Ala. 345. A payment is applied to a *certain* rather than to a *contingent* debt, and, therefore, to a debt on which the payer is bound directly, rather than to one which binds him collaterally ; 22 Me. 295 ; 1 Smedes & M. Ch. 331. And where the amount paid is precisely equal to one of several debts, a jury is authorized to infer its intended application to that debt ; 8 Wend. 403 ; 3 Caines 14 ; 1 Woodb. & M. 150. Where one holds two notes, one of which is secured, and he receives further security with express agreement that he may apply proceeds thereof to either note, he may make such application to the unsecured note notwithstanding the objection of second mortgagee ; 3 C. C. App. 418. Where a creditor is secured by both chattel and real estate mortgages he may apply proceeds of sale of chattels first to chattel mortgage and then to payment of debts otherwise secured ; 97 Mich. 523.

The law, as a general rule, will apply a payment in the way most beneficial to the *debtor* at the time of payment ; 50 Miss. 175 ; 78 Pa. 96. This rule seems to be similar to the civil-law doctrine. Thus, *e. g.*, courts will apply money to a mortgage debt rather than to a simple contract debt ; see 12 Mod. 559 ; 2 Harr. & J. 402 ; 10 Humphr. 238 ; 12 Vt. 246 ; 9 Cow. 747, 765 ; 1 Md. Ch. Dec. 160 ; 25 Miss. 95. In the absence of specific appropriation, the law will apply payments to unsecured indebtedness in preference to the secured ; 52 Minn. 522. Yet, on the other hand, in the pursuit of equity, courts will sometimes assist the *creditor*. Hence, of two sets of debts, courts allow the creditor to apply unappropriated funds to the debts least strongly secured ; 1 Freem. Ch. 502 ; 18 Miss. 113 ; 15 Conn. 438 ; 10 Ired. 165 ; 2 Rich. Eq. 63 ; 13 Vt. 15 ; 6 Cra. 8 ; 11 Leigh 512 ; 14 Ark. 86 ; 4 Gratt. 53 ; 15 Ga. 321 ; 9 Cow. 747, 765 ; 43 Fed. Rep. 580.

Interest. Payments made on account are first to be applied to the interest which has accrued thereon. And if the payment exceed the amount of interest, the balance goes to extinguish the principal ; 1 Dev. 341 ; 11 Paige, Ch. 619 ; 1 Strobh. Eq. 426 ; 16 Miss. 338 ; 10 Tex. 216 ; 3 Sandf. Ch. 608 ; 5 Ohio 260 ; 2 Fla. 445 ; 8 W. & S. 17 ; 4 Neb. 190 ; 130 Ind. 231. Funds must be applied by the creditor to a judgment bearing interest, and not to an unliquidated account ; 4 T. B. Monr. 389 ; nor to usurious interest ; 22 La. Ann. 418 ; 34 Ohio St. 142.

Priority. When no other rules of appropriation intervene, the law applies part-payments to debts in the order of time, discharging the oldest first ; 3 Woodb. & M. 150, 390 ; 1 Bay 497 ; 40 Me. 378 ; 10 Barb. 183 ; 4 Harr. & J. 351 ; 7 Gratt. 86 ; 27 Vt. 478 ; 9 Watts 386 ; 27 Ala. N. S. 445 ; 46 Vt. 448 ; 39 Iowa 330 ; 116 Mass. 374 ; 58 Fed. Rep. 425. Where the payment is upon an account, the law will apply it to the oldest items ; 48 Fed. Rep. 690. So strong is this priority rule that it has been said that equity will apply payments to the earliest items, even where the creditor has security for these items and none for later ones ; 6 N. Y. 147. But this is opposed to the prevailing rule.

Sureties. The general rule is that neither debtor nor creditor can so apply a payment as to affect the liabilities of sureties, without their consent ; 12 N. H. 320 ; 1 McLean 493 ; 16 Pet. 121 ; Gilp. 106. Where a principal makes general payments, the law presumes them, *prima facie*, to be made upon debts guaranteed by a surety, rather than upon others ; though circumstances and intent will control this rule of surety, as they do other rules of appropriation ; 1 C. & P. 600 ; 8 Ad. & E. 855 ; 10 J. B. Moore 362 ; 4 Gill & J. 361 ; 5 Leigh 329.

Continuous accounts. In these, payments are applied to the earliest items of account, unless a different intent can be inferred ; 4 B. & Ad. 766 ; 1 Nev. & M. 742 ; 4 Q. B. 792 ; 9 Wheat. 720 ; 3 Sumn. 98 ; 23 Me. 24 ; 28 Vt. 498 ; 4 Mas. 336 ; 5 Metc. Mass. 268 ; 19 Conn. 191 ; 53 Ill. 414 ; 27 Ala. 445 ; 32 Ga. 1 ; 26 S. W. Rep. (Tex.) 141 ; 58 N. W. Rep. (Minn.) 36. Where one is indebted on two different accounts and money is paid without directions, the creditor may apply it to the later account ; 155 Mass. 366 ; 17 Colo. 80 ; or he may apply half the amount paid on each of two debts, where neither is barred by the statute of limitations ; 111 Mo. 264.

Partners. Where a creditor of the old firm continues his account with the new firm, payments by the latter will be applied to the old debt, *prima facie*, the preceding rule of continuous accounts guiding the appropriations. As above, however, a different intent, clearly proved, will prevail ; 5 B. & Ad. 925 ; 2 *id.* 39 ; 2 B. & Ald. 39 ; 3 Younge & C. 625 ; 3 Dowl. & R. 252 ; 3 Moore & S. 174 ; 6 W. & S. 9. When a creditor of the firm is also the creditor of one partner, a payment by the latter of partnership funds must be applied to the partnership debts. Yet circumstances may allow a different application ; 1 Mood. & M. 40 ; 10 Conn. 175 ; 1 Rice 291 ; 2 A. K. Marsh. 277 ; 28 Me. 91 ; 2 Harr. Del. 172. See 82 Tex. 29. And so, unappropriated payments made by a party indebted severally and also jointly with another to the same creditor, for items of book-charges, are to be applied upon the several debts ; 33 Me. 428.

The rules of appropriation, it has now been seen, apply equally well whether the debts are of the same or of different orders, and though some are specialties while others are simple contracts ; 2 Vt. 606 ; 4 Cra. 317 ; 15 Ga. 221 ; 22 Pa. 492 ; 2 Hayw. 385. As to the time during which the application must be made in order to be valid, there is much discrepancy among the

authorities, but perhaps a correct rule is that any time will be good as between debtor and creditor, but a *reasonable* time only when third parties are affected; 6 Taunt. 597; 3 Green, N. J. 314; 20 Me. 457; 1 Bail. Eq. 430; 1 Overt. 488; 4 Ired. Eq. 42; 12 Vt. 249; 10 Conn. 184.

When once made, the appropriation cannot be changed but by common consent; and rendering an account, or bringing suit and declaring in a particular way, is evidence of an appropriation; 1 Wash. Va. 128; 2 Rawle 316; 2 Wash. C. C. 47; 12 Ill. 159; 28 Me. 91; 15 So. Rep. (Ala.) 568. If debtor receives without objection an account rendered, he cannot afterward question the imputation; 43 La. Ann. 1042; 43 Minn. 298.

Consult Burge, Suretyship 126; 2 Par. Contr. *Payment;* 1 Am. Lead. Cas. 330; 14 Am. Dec. 694, n.; 2 Cr. M. & R. 723; 2 Sumn. 99; 2 Stor. 243; 31 Me. 497; 3 Ill. 347; 2 J. J. Marsh. 414; 6 Dana 217; 1 M'Mull. 82, 310; 1 M'Cord, Ch. 318; 9 Paige, Ch. 165; 7 Ohio 21; 29 Tex. 419.

Of Government. No money can be drawn from the treasury of the United States but in consequence of appropriations made by law; Const. art. 1, s. 9. Under this clause of the constitution it is necessary for congress to appropriate money for the support of the federal government and in payment of claims against it; and this is done annually by acts of appropriation, some of which are for the general purposes of government, and others special and private in their nature. These general appropriation bills, as they are commonly termed, extend to the 30th of June in the following year, and usually originate in the house of representatives, being prepared by the committee of ways and means; but they are distinct from the bills for raising revenue, which the constitution declares shall originate in the house of representatives. A rule of the house gives appropriation bills precedence over all other business, and requires them to be first discussed in committee of the whole. Where money once appropriated remains unexpended for more than two years after the expiration of the fiscal year in which the act shall have been passed, such appropriations are deemed to have ceased and determined, and the moneys so unexpended are immediately thereafter carried to the "surplus fund," and it is not lawful thereafter to pay them out for any purpose without further and specific appropriations by law. Certain appropriations, however, are excepted from the operation of this law, viz.: moneys appropriated for payment of the interest on the funded debt, or the payment of interest and reimbursement according to contract of any loan or loans made on account of the United States; as likewise moneys appropriated for a purpose in respect to which a longer duration is specially assigned by law. No expenditure is allowed in any department in any year in excess of the appropriation for that year; Rev. St. 1878, §§ 3660–3692; 7 Opinions of Attorney-Generals, 1.

See Bryce. Am. Com. 176; Von Holtz, Cons. Law 131; Story, Const. 958. The term "appropriation" was also used in 13 Stat. at L. 381, to include all taking and use of property by the army and navy in the course of the war not authorized by contract with the government; 9 Wall. 45; 13 *id.* 623; 4 Ct. Cl. 389.

APPROVE. To increase the profits upon a thing.

Used of common or waste lands which were enclosed and devoted to husbandry; 3 Kent 406; Old Nat. Brev. 79.

While confessing crime one's self, to accuse another of the same crime.

It is so called because the accuser must prove what he asserts; Staundf. Pl. Cr. 142; Crompton, Jus. Peace 250.

To vouch. To appropriate. To improve. Kelham.

APPROVED ENDORSED NOTES. Notes endorsed by another person than the maker, for additional security; the endorser being satisfactory to the payee.

Public sales are generally made, when a credit is granted, on approved endorsed notes. The meaning of the term is that the purchaser shall give his promissory note for the amount of his purchases, endorsed by another, which, if approved of by the seller, shall be received in payment. If the party approve of the notes, he consents to ratify the sale; 20 Wend. 431.

APPROVER. In English Criminal Law. One confessing himself guilty of felony, and accusing others of the same crime to save himself. Crompton, Inst. 250; Coke, 3d Inst. 129; 26 Ill. 173; 26 *id.* 344; 1 Cowper 331.

Such an one was obliged to maintain the truth of his charge, by the old law; Cowel. The approvement must have taken place before plea pleaded; 4 Bla. Com. 330.

Certain men sent into the several counties to increase the farms (rents) of hundreds and *wapentakes*, which formerly were let at a certain value to the sheriffs. Cowel.

Sheriffs are called the king's approvers. Termes de la Ley.

Approvers in the Marches were those who had license to sell and purchase beasts there.

APPURTENANCES. Things belonging to another thing as principal, and which pass as incident to the principal thing. 10 Pet. 25; Angell, Wat. C. 7th ed. § 153 *a*; 1 S. & R. 169; 5 *id.* 110; Cro. Jac. 121; 1 P. Wms. 603; Cro. Jac. 526; 2 Coke 32; Co. Litt. 5 *b*, 56 *a*, *b*; 1 Plowd. 171; 2 Saund. 401, n. 2; 1 B. & P. 371; 1 Cr. & M. 439; 4 Ad. & E. 761; 2 Nev. & M. 517; 74 Pa. 25. See 13 Am. Dec. 657.

The word has a technical signification, and, when strictly considered, is employed in leases for the purpose of including any easements or servitudes used or enjoyed with the demised premises. When thus used, to constitute an appurtenance there must exist a propriety of relation between the principal or dominant subject and the accessory or adjunct, which is to be ascertained by considering whether they so agree

in nature or quality as to be capable of union without incongruity ; 53 N. H. 508.

Thus, if a house and land be conveyed, everything passes which is necessary to the full enjoyment thereof and which is in use as incident or appurtenant thereto ; 1 Sumn. 492. Under this term are included the curtilage ; 2 Bla. Com. 17 ; a right of way, 4 Ad. & E. 749 ; water-courses and secondary easements, under some circumstances ; Angell, Wat. C. 7th ed. § 153 *a* ; a turbary, 3 Salk. 40 ; and generally, anything necessary to the enjoyment of a thing ; 4 Kent 468, n. ; 81 N. Y. 557 ; 55 *id.* 98; but it is the general rule that land cannot pass as appurtenant to land ; 49 Barb. 501 ; 10 Pet. 25 ; 2 Murph. 341 ; but it may be *aliter* to give effect to the intent of a will ; 9 Pick. 293 ; and in Pennsylvania where first purchasers of 5000 acres from the proprietary obtained city lots, incident to their purchase, it was held that the lots passed as appurtenant to a grant of 5000 acres ; 4 Yeates 142 ; also flats pass as appurtenant to the fast land on a river front ; 18 W. N. C. (Pa.) 73 ; and the land covered by the water-power will pass as appurtenant to a saw-mill ; 74 Pa. 25. See also 5 Pa. 126 ; 110 Pa. 370.

The mere use of the term "appurtenances," without more, will not pass a right of way established over one portion of land merely for convenience of the owner, it not being a way of necessity ; 68 N. Y. 62 ; s. c. 23 Am. Rep. 149.

If a house is blown down, a new one erected there shall have the old appurtenances; 4 Coke 86. The word appurtenances in a deed will not usually pass any corporeal real property, but only incorporeal easements, or rights and privileges ; Co. Litt. 121 ; 8 B. & C. 150 ; 6 Bingh. 150 ; 1 Chit. Pr. 153, 4 ; 2 Washb. R. P. 317, 327 ; 3 *id.* 418. See APPENDANT.

Appurtenances of a ship include whatever is on board a ship for the objects of the voyage and adventure in which she is engaged, belonging to her owner. Ballast was held no appurtenance ; 1 Leon. 46. Boats and cable are such ; 17 Mass. 405 ; also, a rudder and cordage, 5 B. & Ald. 942 ; 1 Dods. Adm. 278 ; fishing-stores, 1 Hagg. Adm. 109 ; chronometers, 6 Jur. 910 ; see 15 Me. 421. For a full and able discussion of the subject of appurtenances to a ship, see 1 Pars. Marit. Law 71–74 ; see 2 Sawy. 201.

APPURTENANT. Belonging to ; pertaining to.

The thing appurtenant must be of an inferior nature to the thing to which it is appurtenant ; 2 Bla. Com. 19 ; 1 Plowd. 170 ; 1 Sumn. 21 ; 41 Md. 523. A right of common may be appurtenant, as when it is annexed to lands in other lordships, or is of beasts not generally commonable ; 2 Bla. Com. 33. Such can be claimed only by immemorial usage and prescription.

APUD ACTA (Lat.). Among the recorded acts. This was one of the verbal appeals (so called by the French commentators), and was obtained by simply saying, *appello.*

AQUA (Lat.). Water. It is a rule that water belongs to the land which it covers when it is stationary. *Aqua cedit solo* (water follows the soil) ; 2 Bla. Com. 18 ; Co. Litt. 4.

But the owner of running water cannot obstruct the flow to the injury of an inheritance below him. *Aqua currit et currere debet* (water runs, and ought to run) ; 3 Kent 439 ; 26 Pa. 413 ; 2 Washb. R. P. 340.

AQUÆ DUCTUS. In Civil Law. A servitude which consists in the right to carry water by means of pipes or conduits over or through the estate of another. Dig. 8. 3. 1 ; Inst. 2. 3 ; Lalaure, *Des Serv.* c. 5, p. 23.

AQUÆ HAUSTUS. In Civil Law. A servitude which consists in the right to draw water from the fountain, pool, or spring of another. Inst. 2. 3. 2; Dig. 8. 3. 1. 1.

AQUÆ IMMITTENDÆ. In Civil Law. A servitude which frequently occurs among neighbors.

It is the right which the owner of a house, built in such a manner as to be surrounded with other buildings, so that it has no outlet for its waters, has to cast water out of his windows on his neighbor's roof, court, or soil. Lalaure, *Des Serv.* 23. It is recognized in the common law as an easement of drip ; 15 Barb. 95 ; Gale & Whatley, Easements. See EASEMENTS.

AQUAGIUM (Lat.). A water-course. Cowel.

Canals or ditches through marshes. Spelman. A signal placed in the *aquagium* to indicate the height of water therein. Spelman.

AQUATIC RIGHTS. Rights which individuals have in water.

ARALIA (Lat. *arare*). Land fit for the plough. Denoting the character of land, rather than its condition. Spelman. Kindred in meaning *arare*, to plough ; *arator*, a ploughman ; *aratrum terræ*, as much land as could be cultivated by a single *arator ; araturia*, land fit for cultivation.

ARBITER. A person bound to decide according to the rules of law and equity, as distinguished from an arbitrator, who may proceed wholly at his own discretion, so that it be according to the judgment of a sound man. Cowel.

This distinction between arbiters and arbitrators is not observed in modern law. Russell, Arbitrator 112. See ARBITRATOR.

See, generally, Morse, Arb. 99.

One appointed by the prætor to decide by the equity of the case, as distinguished from the *judex*, who followed the law. Calvinus, Lex.

One chosen by the parties to decide the dispute ; an arbitrator. Bell, Dict.

ARBITRAMENT AND AWARD. A plea to an action brought for the same cause which had been submitted to arbitration and on which an award had been made. Watson, Arb. 256.

ARBITRARY PUNISHMENT. In Practice. That punishment which is left to the decision of the judge, in distinction from those defined by statute.

ARBITRATION (Lat. *arbitratio*). In Practice. The investigation and determination of a matter or matters of difference between contending parties, by one or more unofficial persons, chosen by the parties, and called arbitrators, or referees. Worcester, Dict. ; 3 Bla. Com. 16.

Compulsory arbitration is that which takes place when the consent of one of the parties is enforced by statutory provisions.

Voluntary arbitration is that which takes place by mutual and free consent of the parties.

It usually takes place in pursuance of an agreement (commonly in writing) between the parties, termed a submission ; and the determination of the arbitrators or referee is called an award ; see SUBMISSION ; AWARD ; but a parol submission is good at common law ; 62 Mich. 157.

A submission to arbitration made pending an action thereon, operates as a discontinuance of the suit ; 76 Cal. 378 ; and it is a bar to any future action thereon ; 129 Ind. 185. If the submission is not made under an order of court, the award cannot be made a judgment of the court unless it be by consent ; 97 N. C. 39.

At common law it was either *in pais*,—that is, by simple agreement of the parties, —or by the intervention of a court of law or equity. The latter was called arbitration by rule of court ; 3 Bla. Com. 16.

Besides arbitration at common law, there exists arbitration, in England as well as the United States, under various statutes, to which reference is made for local peculiarities.

Most of them are founded on the 9 & 10 Will. III. c. 15, and 3 & 4 Will. IV. ch. 42, § 49, by which it is allowed to refer a matter in dispute, not then in court, to arbitrators, and agree that the submission be made a rule of court. This agreement, being proved on the oath of one of the witnesses thereto, is enforced as if it had been made at first under a rule of court ; 3 Bla. Com. 18 ; Kyd, Aw. 22. Particular reference may be made to the statutes of Pennsylvania, in which state the legislation on the subject of arbitration has been extensive and peculiar.

Any matter may be determined by arbitration which the parties may adjust by agreement, or which may be the subject of a suit at law. Crimes, however, and perhaps actions (*qui tam*) on penal statutes by common informers, cannot be made the subject of adjustment and composition by arbitration. See SUBMISSION.

Any person who is capable of making a valid and binding contract with regard to the subject may, in general, be a party to a reference or arbitration. Every one is so far, and only so far, bound by the award as he would be by an agreement of the same kind made directly by him. For example, the submission of a minor is not void, but voidable. See SUBMISSION.

At common law it is entirely voluntary, and depends upon the agreement of the parties, to waive the right of trial in court by a jury.

An agreement for arbitration at the request of either party is not a defence to suit where no arbitration has been demanded ; 25 Neb. 505.

A submission to arbitration is subject to revocation before an award ; 126 Ill. 72 ; 35 Fed. Rep. 22 ; 139 Mass. 463 ; 3 Story 800 ; 91 Pa. 232 ; and it is also revoked by the death of one of the parties ; 36 Fed. Rep. 408.

In Pennsylvania, however, there exist compulsory arbitrations. Either party in a civil suit or action, or his attorney, may enter at the prothonotary's office a rule of reference, wherein he shall declare his determination to have arbitrators chosen on a day certain, to be mentioned therein, not exceeding thirty days, for the trial of all matters in variance in the suit between the parties. A copy of this rule is served on the opposite party.

On the day appointed, they meet at the prothonotary's and endeavor to agree upon arbitrators. If they cannot, the prothonotary makes out a list, on which are inscribed the names of a number of citizens, and the parties alternately strike, each, one of them from the list, beginning with the plaintiff, until only the number agreed upon, or fixed by the prothonotary, are left who are to be the arbitrators. A time of meeting is then agreed upon, or appointed by the prothonotary if the parties cannot agree ; at which time the arbitrators, having been sworn or affirmed justly and equitably to try all matters in variance submitted to them, proceed to hear and decide the case. Their award is filed in the office of the prothonotary, and has the effect of a judgment, subject, however, to appeal, which may be entered at any time within twenty days from the filing of such award. Act of 16th June, 1836 ; Pamphl. Law 715 ; see, also, act of 1874.

This is somewhat similar to the arbitrations of the Romans. There the prætor selected, from a list of citizens made for the purpose, one or more persons, who were authorized to decide all suits submitted to them, and which had been brought before him. The authority which the prætor gave them conferred on them a public character, and their judgments were without appeal. Toullier, *Droit Civ. Fr.* liv. 3, t. 3, c. 4, n. 820.

See, generally, ARBITRATOR ; SUBMISSION ; AWARD.

Consult Caldwell ; Stephens ; Watson, Arbitration ; Russell, Arbitrator ; Billings ; Kyd ; Loring ; Reed, Awards ; Bacon, Abridgment ; Morse, Arb.

For arbitration between nations, see INTERNATIONAL ARBITRATION.

For arbitration of labor disputes, see LABOR ARBITRATION.

ARBITRATOR. In Practice. A private extraordinary judge, to whose decision matters in controversy are referred by consent of the parties. Worcester, Dict.

Referee is of frequent modern use as a synonym of arbitrator, but is in its origin of broader signification and less accurate than arbitrator.

Appointment. Usually, a single arbitrator is agreed upon, or the parties each appoint one, with a stipulation that, if they do not agree, another person, called an umpire, named, or to be selected by the arbitrators, shall be called in, to whom

the matter is to be referred; Cald. Arb. 99; 9 B. & C. 624; 3 B. & A. 248; 5 B. & Ad. 488; 9 Ad. & E 699; 6 Harr. & J. 403; 17 Johns. 405; 2 M'Cord 279; 4 Rand. 275; 15 Vt. 548; 2 Bibb 88; 4 Dall. 471; 9 Ind. 150; 61 Hun 625; 9 Wall. 76. In general, any objection to the appointment of an arbitrator or umpire will be waived by attending before him; 2 Eng. L. & Eq. 284; 9 Ad. & E. 679; 1 Jac. & W. 511; 3 Ind. 277; 9 Pa. 254, 487; 10 B. Monr. 536; one who goes to trial before a referee without requiring an oath waives the oath; 97 U. S. 581; 58 Hun 608; 7 Cush. 247.

Any person selected may be an arbitrator, notwithstanding natural incapacity or legal disability, as infancy, coverture, or lunacy; Wats. Arb. 71; Russ. Arb. 107; Viner, Abr. *Arbitration*, A, 2; 8 Dowl. 879; 1 Pet. 228; 7 W. & S. 142; 26 Miss. 127; *contra*, Comyns, Dig. *Abatement*, B, C; West, Symb. *Compromise*, p. 164; Brooke, Abr.; 11 Q. B. 7; or disqualification on account of interest, provided it be known to the parties at the time of making the submission; 9 Bingh. 672; 3 Vern. Ch. 251; 1 Jac. & W. 511; 1 Cai. 147; 1 Bibb 148; 14 Conn. 26; 26 Miss. 127; 27 Me. 251; 2 E. D. Smith 32. In the civil law the rule was otherwise; Domat, Civ. Law, § 1112, D. 9. 1. In 123 Mass. 190, the award of an arbitrator, who had been counsel in a former case for the party in whose favor he found, was held valid, although the fact was not known to the other party; and so of an arbitrator, who knew one of the parties intimately, and had heard his version of the facts before, and expressed an opinion thereon; 123 Mass. 129; or the parties to a contract may submit their differences to an employé of one of them and his decision shall be final as between them; 24 Fla. 560. The fact that the referee was a stockholder of the company will not render the submission invalid; 112 Mo. 463.

The proceedings. Arbitrators proceed on the reference as judges, not as agents of the parties appointing them; 1 Ves. Ch. 226; 9 *id.* 69. They should give notice of the time and place of proceeding to the parties interested; 3 Atk. 529; 8 Md. 208; 6 Harr. & J. 403; 3 Gill 31; 24 Miss. 346; 23 Wend. 628; 12 Metc. Mass. 293; 1 Dall. 81; 17 Conn. 309; 2 N. H. 97; 6 Vt. 636; 3 Rand. 2; Hard. 46; 32 Me. 455, 513; 126 Ill. 250; 64 Cal. 102; 8 Pet. 178; 55 Iowa 722. They should all conduct the investigation together, and should sign the award in each other's presence; 4 Me. 468; 28 Ill. 53; 35 Me. 281; 129 Mass. 345; 23 Barb. 304; but a majority is held sufficient; 1 Wash. 448; 11 Johns. 402; 3 R. I. 192; 30 Pa. 384; 2 Dutch. 175; 9 Ind. 150; 14 B. Monr. 292; 21 Ga. 1; 148 Mass. 367. An award by two of three arbitrators is binding; 84 Va. 800; 86 Ky. 23; *contra*, 76 Iowa 187.

In investigating matters in dispute, they are allowed the greatest latitude; 9 Bingh. 679; 1 B. & P. 91; 1 Sandf. 681; 1 Dall. 161; 6 Pick. 148; 10 Vt. 79; 2 Bay 370; 1 Bail. 46. But see 1 Halst. 386; 1 Wash. Va. 193; 4 Cush. 111; 2 Johns. Cas. 224; 1 Binn. 458. They are judges both of law and of fact, and are not bound by the rules of practice adopted by the courts; 1 Ves. Ch. 369; 1 Price 81; 13 *id.* 533; 1 Swanst. 58; 1 Taunt. 52, n.; 6 *id.* 255; 2 B. & Ald. 692; 3 *id.* 239; 4 Ad. & E. 347; 17 How. 344; 2 Gall. 61; 7 Metc. Mass. 316, 486; 36 Me. 19, 108; 2 Johns. Ch. 276, 368; 5 Md. 353; 19 Pa. 431; 21 Vt. 99, 250; 25 Conn. 66; 16 Ill. 34, 99; 12 Gratt. 554; 7 Ind. 49; 2 Cal. 64, 122; 23 Miss. 272; 98 N. Y. 388; 79 N. C. 360; 79 Ky. 211; 60 N. H. 76. Thus, the witnesses were not sworn in Hill & Den. 110; 28 Vt. 776. They may decide *ex æquo et bono*, and need not follow the law; the award will be set aside only when it appears that they meant to be governed by the law but have mistaken it; 3 East 18, 351; 2 C. B. 705; 2 Gall. 61; 1 Dall. 487; 6 Pick. 148; 6 Metc. Mass. 131; 21 Vt. 250; 4 N. H. 357; 1 Hall 598. See 19 Mo. 373; 109 N. C. 103; but if they decide a matter honestly and fairly according to their judgment, the award will not be set aside because they decide the facts erroneously, or were mistaken in the law they applied to them, or decide on an erroneous theory; 40 Minn. 164; 57 Conn. 105; 70 Md. 405; 75 Ia. 285; 17 How. 344.

Under submissions *in pais*, the attendance of witnesses and the production of papers was entirely voluntary at common law; 1 Dowl. & L. 676; 2 Sim. & S. 418; 2 C. & P. 550. It was otherwise when made under a rule of court. Various statutes in England and the United States now provide for compelling attendance.

Duties and powers of. Arbitrators cannot delegate their authority; it is a personal trust; Morse, Arb. & Aw. 166; Cro. Eliz. 726; 6 C. B. 258; 4 Dall. 71; 7 S. & R. 228; 1 Wash. C. C. 448; 82 Va. 601; 24 Pa. 411; 99 Mass. 459. The power ceases with the publication of the award; 9 Mo. 30; and death after publication and before delivery does not vitiate it; 21 Ga. 1. They cannot be compelled to make an award; in which respect the common law differs from the Roman; Story, Eq. Jur. § 1457; Kyd, Aw. 2d ed. 100; or to disclose the grounds of their judgment; 3 Atk. 644; 7 S. & R. 448; 5 Md. 253; 19 Mo. 373.

An arbitrator may retain the award till paid for his services, but cannot maintain assumpsit in England without an express promise; 4 Esp. 47; 2 M. & G. 847, 870; 3 Q. B. 466, 928. But see 1 Gow. 7; 1 B. & P. 93. In the United States he may, however; 1 Den. 188; 29 N. H. 48.

A submission to arbitration by one of several parties without the consent of the others, whether by rule of court or otherwise, is illegal and void; 36 Fed. Rep. 408.

The powers and duties of arbitrators are now regulated very fully by statute, both in England and the United States. See SUBMISSION, and also ARBITRATION; Morse, Arb. 99.

ARBITRIUM (Lat.). Decision; award; judgment.

For some cases the law does not prescribe an exact rule, but leaves them to the judgment of sound

men ; or in the language of Grotius, *lex non exacte definit, sed arbitrio boni viri permittit;* 1 Bla. Com. 61. The decision of an arbiter is *arbitrium*, as the etymology indicates ; and the word denotes, in the passage cited, the decision of a man of good judgment who is not controlled by technical rules of law, but is at liberty to adapt the general principles of justice to the peculiar circumstances of the case.

ARBOR (Lat.). A tree ; a plant ; something larger than an herb; a general term including vines, osiers, and even reeds. The mast of a ship. Brissonius. Timber. Ainsworth ; Calvinus, Lex.

Arbor civilis. A genealogical tree. Coke, Inst.

A common form of showing genealogies is by means of a tree representing the different *branches* of the family. Many of the terms in the law of descent are figurative, and derived hence. Such a tree is called, also, *arbor consanguinitatis.*

ARCARIUS (Lat. *arca*). A treasurer ; one who keeps the public money. Spelman, Gloss.

ARCHAIONOMIA. The name of a collection of Saxon laws published during the reign of the English Queen Elizabeth, in the Saxon language, with a Latin version by Mr. Lambard. Dr. Wilkins enlarged this collection in his work entitled Leges Anglo-Saxonicæ, containing all the Saxon laws extant, together with those ascribed to Edward the Confessor, in Latin ; those of William the Conqueror, in Norman and Latin ; and of Henry I., Stephen, and Henry II., in Latin.

ARCHBISHOP. In Ecclesiastical Law. The chief of the clergy of a whole province.

He has the inspection of the bishops of that province, as well as of the inferior clergy, and may deprive them on notorious cause. The archbishop has also his own diocese, in which he exercises episcopal jurisdiction, as in his province he exercises archiepiscopal authority ; 1 Bla. Com. 380 ; 1 Ld. Raym. 541.

ARCHDEACON. In Ecclesiastical Law. A ministerial officer subordinate to the bishop.

In the primitive church, the archdeacons were employed by the bishop in the more servile duties of collecting and distributing alms and offerings. Afterwards they became, in effect, "eyes to the overseers of the Church ;" Cowel.

His jurisdiction is ecclesiastical, and immediately subordinate to that of the bishop throughout the whole or a part of the diocese. He is a ministerial officer ; 1 Bla. Com. 383.

ARCHDEACON'S COURT. In English Law. The lowest court of ecclesiastical jurisdiction in England.

It is held before a person appointed by the archdeacon, called his official. Its jurisdiction is limited to ecclesiastical causes arising within the archdeaconry. It had until recently, also, jurisdiction of matters of probate and granting administrations. In ordinary cases, its jurisdiction is concurrent with that of the Bishop's Court ; but in some instances cases must be commenced in this court. In all cases, an appeal lies to the Bishop's Court ; 24 Hen. VIII. c. 12 ; 3 Bla. Com. 64.

ARCHES COURT. See COURT OF ARCHES.

ARCHIVES (*archivum arcibum*). The Rolls ; any place where ancient records, charters, and evidences are kept. In libraries, the private depositary. Cowel ; Spelman, Gloss.

The records need not be ancient to constitute the place of keeping them the Archives.

ARCHIVIST. One to whose care the archives have been confided.

ARCTA ET SALVA CUSTODIA (Lat.). In safe and close custody or keeping.

When a defendant is arrested on a *capias ad satisfaciendum* (*ca. sa.*), he is to be kept *arcta et salva custodia ;* 3 Bla. Com. 415.

AREA. An enclosed yard or opening in a house; an open place adjoining to a house. 1 Chit. Pr. 176.

ARE CHARGED. Words which, applied to the estate of a covenantor, as distinguished from " he will charge," create a clear charge upon the covenantor's lands. A. & E. Enc. of Law ; 2 Ball & B. 223.

ARENALES. In Spanish Law. Sandy beaches.

ARENTARE (Lat.). To rent ; to let out at a certain rent. Cowel.

Arentatio. A renting.

ARGENTARII (Lat. *argentum*). Moneylenders.

Called, also, *nummularii* (from *nummus*, coin) *mensarii* (lenders by the month). They were so called whether living in Rome or in the country towns, and had their shops or tables in the forum. *Argentarius* is the singular. *Argentarium* denotes the instrument of the loan, approaching in sense to our *note* or *bond.*

Argeniarius miles was the servant or porter who carried the money from the lower to the upper treasury to be tested. Spelman, Gloss.

ARGENTUM ALBUM (Lat.). Unstamped silver ; bullion. Spelman, Gloss. ; Cowel.

ARGENTUM DEI (Lat.). God's money; God's penny ; money given as earnest in making a bargain. Cowel.

ARGUMENT. Proof or the means of proving, or inducing belief ; a course or process of reasoning ; an address to a jury or a court ; Anderson's Dict. Law. An effort to establish belief by a course of reasoning.

ARGUMENT AB INCONVENIENTI. An argument arising from the inconvenience which the opposite construction of the law would create.

It is to have effect only in a case where the law is doubtful : where the law is certain, such an argument is of no force. Bacon, Abr. *Baron and feme H.*

ARGUMENTATIVE. By way of reasoning.

A plea must be (among other things) direct and positive, and not argumentative ; 3 Bla. Com. 308 ; Steph. Pl. Andrew's ed. § 201 ; McK. Pl. 24.

ARIBANNUM. A fine for not setting out to join the army in obedience to the summons of the king.

ARIMANNI (Lat.). The possessors of lands holden or derived from their lords. Clients joined to some lord for protection. By some, said to be soldiers holding lands from a lord; but the term is also applied to women and slaves. Spelman, Gloss.

ARISTOCRACY. A government in which a class of men rules supreme.

Aristotle classified governments according to the person or persons in whom the supreme power is vested: in monarchies or kingdoms, in which one rules supreme; in aristocracies, in which a class of men rules supreme; and in democracies, in which the people at large, the multitude, rule. The term aristocracy is derived from the Greek word αριστος, which, although finally treated as the superlative of αγαθος, good, originally meant the strongest, the most powerful; and in the compound term aristocracy it meant those who wielded the greatest power and had the greatest influence,—the privileged ones. The aristocracies in ancient Greece were, in many cases, governments arrogated by violence. If the number of ruling aristocrats was very small, the government was called an oligarchy. Aristotle says that in democracies the "demagogues lead the people to place themselves above the laws, and divide the people, by constantly speaking against the rich; and in oligarchies the rulers always speak in the interest of the rich. At present," he says, "the rulers, in some oligarchies, take an oath, 'And I will be hostile to the people, and advise, as much as is in my power, what may be injurious to them.'" (Politics, v. ch. 9.) There are circumstances which may make an aristocracy unavoidable; but it has always this inherent deficiency, that the body of aristocrats, being set apart from the people indeed, yet not sufficiently so, as the monarch is (who, besides, being but one, must needs rely on the classes beneath him), shows itself severe and harsh so soon as the people become a substantial portion of the community. The struggle between the aristocratic and the democratic element is a prominent feature of the middle ages; and at a later period it is equally remarkable that the crown, in almost every country of the European continent, waged war, generally with the assistance of the commonalty, with the privileged class, or aristocracy. The real aristocracy is that type of government which has nearly entirely vanished from our cis-Caucasian race; although the aristocratic element is found, like the democratic element, in various degrees, in most of the existing governments. The term aristocracy is at present frequently used for the body of privileged persons in the government of any institution,—for instance, in the church. In the first French Revolution, Aristocrat came to mean any person not belonging to the levellers, and whom the latter desired to pull down. The modern French communists use the slang term Aristo for aristocrat. The most complete and consistently developed aristocracy in history was the Republic of Venice,—a government considered by many early publicists as a model: it illustrated, however, in an eminent degree, the fear and consequent severity inherent in aristocracies. See Government; Absolutism; Monarchy.

ARISTO-DEMOCRACY. A form of government where the power is divided between the great men of the nation and the people.

ARIZONA. One of the territories of the United States.

This region was first visited by the Spanish in 1526, and was afterwards explored under the direction of the viceroy of Mexico in 1540; nothing was done, however, towards settling the country until the year 1580, when a military post was established by the Spanish on the site of the present city of Tucson. Under the untiring efforts of the Jesuits, an unbroken line of settlements sprung up from Tucson to the Sonora line, the northern boundary of Mexico, a distance of about one hundred miles; but owing to the frequent attacks of the Indians, and the Mexican revolution of 1821, these settlements were abandoned. The first United States settlers were persons on their way to California in 1849. The United States acquired, by the treaty of Guadalupe Hidalgo, Feb. 2, 1848, a large extent of country from Mexico, including California and the adjacent territories, and by the Gadsden purchase, Dec. 30, 1853, another large tract south of the former. Until 1863, the territory of New Mexico included Arizona and also about 12,225 acres, which were detached and included in Nevada. Arizona was organized as a separate territory by the act of congress of Feb. 24, 1863, U. S. Stat. at Large, 664. By this act, the territory embraces "all that part of the territory of New Mexico situated west of a line running due south, from the point where the southwest corner of the territory of Colorado joins the northern boundary of the territory of New Mexico, to the southern boundary of the territory of New Mexico." The frame of government is substantially the same as that of New Mexico, and the laws of New Mexico are substantially extended to Arizona. See New Mexico.

By the Organic Act of Arizona, it is provided that the government thereby authorized shall consist of an executive, legislative, and judicial power. The executive power shall be vested in a governor. The legislative power shall consist of a council of nine members, and a house of representatives of eighteen. The judicial power shall be vested in a supreme court, to consist of three judges, and such inferior courts as the legislative council may by law prescribe; there shall also be a secretary, a marshal, a district attorney, and a surveyor-general for said territory, who, together with the governor and judges of the supreme court, shall be appointed by the president, by and with the advice and consent of the senate, and the term of office for each, the manner of their appointment, and the powers, duties, and the compensation of the governor, legislative assembly, judges of the supreme court, secretary, marshal, district attorney, and surveyor-general aforesaid, with their clerks, draughtsmen, deputies, and sergeant-at-arms, shall be such as are conferred upon the same officers by the act organizing the territorial government of New Mexico, which subordinate officers shall be appointed in the same manner, and not exceed in number those created by said act; and acts amendatory thereto, together with all legislative enactments of the territory of New Mexico not inconsistent with the provisions of this act, were thereby extended to and continued in force, in the said territory of Arizona, until repealed or amended by future legislation.

No session of the legislature can exceed forty days. The legislative power of the territory extends to all rightful subjects of legislation, not inconsistent with the constitution and laws of the United States, or the Organic Act. All laws passed by the legislative assembly must be submitted to congress, and if disapproved are null and of no effect; Organic Act, sec. 7. The legislature shall meet on the third Monday of January, A. D. 1895, and bi-enuially thereafter on that day; Acts of 1893, p. 54.

The *Executive* power is vested in a governor, who must reside in the territory, and who shall hold office four years, and until his successor shall be appointed and qualified, unless sooner removed by the president of the United States.

Besides the *Supreme Court* the legislature has established the *District Court*, *Probate Court*, and *Justice's Courts;* there are three district courts, each presided over by one of the judges of the supreme court assigned for that purpose. Their original jurisdiction extends to all civil cases exceeding one hundred dollars, and to all criminal cases not otherwise provided for, and to all cases involving real property, and issues from the probate court. The appellate jurisdiction from inferior courts is vested in this court. Writs of error and appeals from the supreme court to the supreme court of the United States are allowed in the same manner as from the circuit courts of the United States, when the sum in controversy exceeds $1000, and upon cases of habeas corpus. The district courts have the same jurisdiction as the circuit and district courts of the United States, subject to writs of error and appeal to the supreme court of the territory.

ARKANSAS. One of the United states of America; being the twelfth admitted to the Union.

It was formed of a part of the Louisiana territory, purchased of France by the United States, by treaty of April 30, 1803, and from that time until 1812 it formed part of the Louisiana Territory; from 1812 to 1819 it was part of the Missouri Territory. By act

of congress of March 2, 1819, a separate territorial government was established for Arkansas; 3 Stat. L. 493. It was admitted to the Union by act of congress of June, 1836, and the first constitution of the state was adopted on the 30th January, 1836. The state passed an ordinance of secession, May 6, 1861. It was restored to the Union under the reconstruction acts of Congress, June 22, 1867. The constitution of March 13, 1868, representing the reconstruction legislation of the period, made extensive changes in the state organization, and was superseded in 1874 by the adoption of another which more nearly resembled that existing before the war. This was ratified by a popular vote on the 13th October, 1874, and went into effect October 30, 1874.

THE LEGISLATIVE DEPARTMENT.—The *Senate* is to consist of not less than thirty nor more than thirty-five members, chosen every four years by the qualified electors of their respective districts. The senators must be citizens of the United States, must have resided in the state two years, and must be twenty-five years of age. The senators at their first meeting were divided by lot into two classes, in order that one class might be elected every two years.

The *House of Representatives* is to consist of one hundred members. Each county existing at the time of the adoption of the constitution is entitled to one representative, and the remainder are to be apportioned among the several counties according to the number of adult male inhabitants, upon a ratio of two thousand, until the number of representatives amounts to one hundred, when the ratio shall be increased.

The general assembly meets biennially, and can remain in session only sixty days, unless by a two-thirds vote the session is extended.

Either house may propose constitutional amendments, and, if approved by a majority of the members elected to each house, shall be entered on the journals, and submitted to the people at the next general election for ratification. Not more than three amendments can be submitted at once.

THE EXECUTIVE DEPARTMENT.—The executive department consists of the governor, secretary of state, treasurer of state, auditor of state, attorney-general, commissioner of state lands, and superintendent of public instruction. The governor is elected for a term of two years at each general election. He must be a citizen of the United States, at least thirty years of age, and must have resided in the state seven years. The person receiving the highest number of votes is to be the governor, and in case of a tie, he is to be elected by a joint vote of the general assembly.

In case of the death, absence, or other disability of the governor, the president of the senate performs the duties of the office.

The other members of the executive department are elected at the same time and in the same manner as the governor.

THE JUDICIAL DEPARTMENT.—The supreme court is composed of one Chief Justice and four associate justices. The supreme court has appellate jurisdiction only, which is co-extensive with the state. It has a superintending control over inferior courts, and has power to issue the necessary remedial writs, and to hear and determine the same.

When any supreme judge is disqualified to sit in any case, the governor appoints a special judge to take his place.

The circuit courts are composed of judges of whom one is elected in each judicial circuit.

The circuit courts have jurisdiction of all civil and criminal cases, the exclusive jurisdiction of which is not vested in some other court provided for by this constitution. They have a superintending control over all inferior courts, and may issue such writs as may be necessary to carry their powers into effect.

Until the establishment of separate courts of chancery, the circuit courts have jurisdiction in matters of equity.

The county court consists of one judge, except that all the justices of the peace in the county sit with the county judge when the court is engaged in making appropriations and levying taxes.

The county court has exclusive jurisdiction of all matters relating to the internal improvement and local concerns of the county.

The county judge is also the judge of the probate court, and has exclusive jurisdiction of all matters relating to the estates of deceased persons, lunatics, and minors.

Appeals lie from the county and probate courts and from justices of the peace to the circuit court.

Justices of the peace are elected at each general election for the term of two years.

The chancery court of Pulaski county is continued in existence, and has all the jurisdiction of a court of equity in the county. It has also jurisdiction to enforce the liens on real estate bank lands throughout the state. Chancery courts are also established in certain counties.

The courts of common pleas of Lonake and Monroe counties have jurisdiction of certain civil suits in which the sum in controversy does not exceed $1000. There is also a court of common pleas for Hot Springs county, Nevada county, and Clark county.

MISCELLANEOUS PROVISIONS.—No county or municipal corporation can become a stockholder in any company, or lend its credit to any such company.

Corporations must be formed under general laws.

The proper pronunciation of the name of the state is declared to be "in three syllables, with the final 's' silent, the 'a' in each syllable with the Italian sound, and the accent on the first and last syllable," etc. Acts, 1881, 216.

ARLES. Earnest.

Used in Yorkshire in the phrase *Arles-penny*. Cowel. In Scotland it has the same signification. Bell, Dict.

ARM OF THE SEA. A portion of the sea projecting inland, in which the tide ebbs and flows.

It includes bays, roads, creeks, coves, ports, and rivers where the water flows and reflows. An arm of the sea is considered as extending as far into the interior of a country as the water of fresh rivers is propelled backward by the ingress and pressure of the tide; Angell, Tide Wat. 2d ed. 73; 7 Pet. 324; 2 Dougl. 441; 6 Clark & F. 628; Olc Adm. 18. Arms of the sea, so closely embraced by land that a man standing on one shore can reasonably discern with the naked eye objects and what is done on the opposite shore, are within county limits; Bish. Cr. L. § 146; 2 East, P. C. 805; Russ. & R. 243. Lord Coke said (Owen 122) that the admiral has no jurisdiction when a man may see from one side to another. This was followed by Cockburn, C. J., in Reg. *v.* Keyn. L. R. 2 Ex. 164, 168. See CREEK; HAVEN; NAVIGABLE; PORT; RELICTION; RIVER; ROAD.

ARMED. Furnished with weapons of offence or defence; furnished with the means of security or protection. Webster's Dict.

The fact that there was on board a vessel but one musket, a few ounces of powder, and a few balls, would not make her an armed vessel; 2 Cra. 121.

ARMIGER (Lat.). An armor-bearer; an esquire. A title of dignity belonging to gentlemen authorized to bear arms. Kennett, Paroch. Antiq.; Cowel.

In its earlier meaning, a servant who carried the arms of a knight. Spelman, Gloss.

A tenant by scutage; a servant or valet; applied, also to the higher servants in convents. Spelman, Gloss; Wishaw.

ARMISTICE. A cessation of hostilities between belligerent nations for a considerable time.

It is either partial and local, or general.

It differs from a mere suspension of arms, which takes place to enable the two armies to bury their dead, their chiefs to hold conferences or pourparlers, and the like. Vattel, *Droit des Gens*, l. 3, c. 16, § 233. The terms truce and armistice are sometimes used in the same sense. See TRUCE.

ARMS. Any thing that a man wears for his defence, or takes in his hands, or uses in his anger, to cast at or strike at another. Co. Litt. 161 *b*, 162 *a*; Cromp. Just. P. 65; Cunning. Dict.

The constitution of the United States, Amend. art. 2, declares that, "a well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." This is said to be not a right granted by the constitution, and not dependent upon that instrument for its existence. The amendment means no more than that this right shall not be infringed by congress; it restricts the powers of the national government, leaving all matters of police regulations, for the protection of the people, to the states; 92 U. S. 553.

An act forbidding the carrying of pistols, dirks, etc., is not repugnant to this article; the "arms" referred to are the arms of a soldier, etc.; 35 Tex. 473. A statute prohibiting the wearing of concealed deadly weapons is constitutional; 77 Pa. 470; 3 Heisk. 165; 53 Ga. 472; 31 Ark. 455; 7 Blackf. 572; 31 Ala. 387; *contra*, 2 Litt. 90. See Story, Const. 5th ed. § 1895; Rawle, Const. 125.

One who carries a pistol concealed in a satchel supported and carried by a strap over his shoulder, is guilty of carrying a concealed weapon about his person, although the satchel is locked and the key is in his pocket; 94 Ala. 79; 86 Ga. 255. The fact that one carries a concealed weapon for the purpose of selling it does not excuse his act; 19 S. E. Rep. N. C. 364; nor does the fact that he has repaired it and is returning it in his pocket; 68 Miss. 347; *contra*, 39 Mo. App. 47. The carrying of a pistol in the pocket for target practice does not constitute the offence of carrying a concealed weapon; 39 Mo. App. 127.

Signs of arms, or drawings, painted on shields, banners, and the like. Heraldic bearings.

The arms of the United States are described in the resolution of congress of June 20, 1782.

ARMY. A large force of armed men designed and organized for military service on land.

The term "army" or "armies" has never been used by congress to include the navy or marines; 2 Sawy. 205.

ARPENNUS. A measure of land of uncertain amount. It was called arpent also. Spelman, Gloss.; Cowel.

In French Law. A measure of different amount in each of the sixty-four provinces. Guyot, Répert. *Arpenteur*.

The measure was adopted in Louisiana; 6 Pet. 763.

ARPENT. A quantity of land containing a French acre; 4 Hall, L. J. 518.

ARPENTATOR. A measurer or surveyor of land.

ARRA. In Civil Law. Earnest; evidence of a completed bargain.

Used of a contract of marriage, as well as any other. Spelled, also, *Arrha*, *Arræ*; Calvinus Lex.

ARRAIGN. To call a prisoner to the bar of the court to answer the matter charged in the indictment. 2 Hale, Pl. Cr. 216. To set in order. An assize may be arraigned; Littleton, § 242; 3 Mod. 273; *Termes de la Ley*; Cowel.

ARRAIGNMENT. In Criminal Practice. Calling the defendant to the bar of the court, to answer the accusation contained in the indictment.

The *first* step in the proceeding consists in calling the defendant to the bar by his name, and commanding him to hold up his hand.

This is done for the purpose of completely identifying the prisoner as the person named in the indictment. The holding up his hand is not, however, indispensable; for if the prisoner should refuse to do so, he may be identified by any admission that he is the person intended; 1 W. Bla. 33. See Archb. Cr. Pl. 128.

The *second* step is the reading the indictment to the accused person.

This is done to enable him fully to understand the charge to be produced against him. The mode in which it is read is, after saying, "A B, hold up your hand," to proceed, "you stand indicted by the name of A B, late of, etc., for that you, on, etc.," and then go through the whole of the indictment.

The *third* step is to ask the prisoner, "How say you (A B), are you guilty, or not guilty?"

Upon this, if the prisoner confesses the charge, and it appears to the satisfaction of the judge that he rightly comprehends the effect of his plea, the confession is recorded, and nothing further is done till judgment. If, on the contrary, he answers, "Not guilty," that plea is entered for him, and the clerk or attorney-general replies that he is guilty; when an issue is formed; 1 Mass. 95; see 4 Bla. Com. c. xxv. The holding up of the hand is no longer obligatory in England, though still maintained in some of the United States with the qualification that if the defendant refuses to hold up his hand, but confesses that he is the person named, it is enough; Whart. Cr. Pl. & Pr. 9th ed. § 699. In cases where arraignment of the defendant is required, a failure to arraign is fatal; 54 Ind. 159; 31 Mich. 471; 3 Pinn. (Wis.) 367; 1 Tex. Ap. 408; 52 Cal. 480. See *contra*, 12 Kan. 550. In cases of a mistrial (58 Ga. 25), or removal to another court (39 Md. 355), there need not be a fresh arraignment.

If the defendant, when called upon, makes no answer, and it is a matter of doubt whether or not he is mute of malice, the court may direct a jury to be forthwith impanelled and sworn, to try whether the prisoner is mute of malice or *ex visitatione Dei*; and such jury may consist of any twelve men who may happen to be present. If a person is found to be mute *ex visitatione Dei*, the court in its discretion will use such means as may be sufficient to enable the defendant to understand the charge and make his answer; and if this is found impracticable, a plea of not guilty will be entered, and the trial proceed. But if the jury return a verdict that he is mute fraudulently and wilfully, the court will pass sentence as upon a conviction; 1 Mass. 103; 10 Metc. Mass. 222; Archb. Cr. Pl. 129; Carringt. Cr. Law 57; 3 C. & K. 121; Rosc. Cr. Ev. 8th ed. 199. See the case of a deaf person who could not be induced to plead; 1 Leach, Cr. Cas. 451; of a person deaf and dumb; 1 Leach, Cr. Cas. 102; 14 Mass. 207; 7 C. & P. 503; 6 Cox, Cr. Cas. 386; 3 C. & K. 328; 1 Honst. Del. Cr. Cas. 291.

ARRAMEUR. An ancient officer of a port, whose business was to load and unload vessels.

There were formerly, in several ports of Guyenne, certain officers, called *arrameurs*, or stowers, who were master-carpenters by profession, and were

paid by the merchants, who loaded the ship. Their business was to dispose right, and stow closely, all goods in casks, bales, boxes, bundles, or otherwise; to balance both sides, to fill up the vacant spaces, and manage everything to the best advantage. It was not but that the greatest part of the ship's crew understood this as well as these stowers, but they would not meddle with it, nor undertake it, to avoid falling under the merchant's displeasure, or being accountable for any ill accident that might happen by that means. There were also *sacquiers*, who were very ancient officers, as may be seen in the Theodosian code, *Unica de Scaccariis Portus Romæ*, lib. 14. Their business was to load and unload vessels loaded with salt, corn, or fish, to prevent the ship's crew defrauding the merchant by false tale, or cheating him of his merchandise otherwise; 1 Pet. Adm. App. xxv.

ARRANGEMENT. The natural meaning of the world is "setting in order." 1 El. & Bl. 540.

ARRANGEMENT, DEED OF. A term used in England to express an assignment for the benefit of creditors.

ARRAS. In Spanish Law. The donation which the husband makes to his wife, by reason or on account of marriage, and in consideration of the *dote*, or portion, which he receives from her. Aso & Man. Inst. b. 1, t. 7, c. 3.

The property contributed by the husband *ad sustinenda onera matrimonii* (for bearing the expenses).

The husband is under no obligation to give arras; but it is a donation purely voluntary. He is not permitted to give in *arras* more than a tenth of his property. The *arras* is the exclusive property of the wife, subject to the husband's usufruct during his life; Burge, Confl. Laws 417.

ARRAY. In Practice. The whole body of jurors summoned to attend a court, as they are *arrayed* or arranged on the panel. See CHALLENGES; Dane, Abr. Index; 1 Chit. Cr. Law 536; Comyns, Dig. *Challenge*, B.

ARREARAGES. Arrears.

ARREARS (Fr.). The remainder of an account or sum of money in the hands of an accountant. Any money due and unpaid at a given time. Cowel; Spelman, Gloss.

"In arrear" means overdue and unpaid. 64 Miss. 157.

ARRECT. To accuse. *Arrectati*, those accused or suspected.

ARREST (Fr. *arrêter*, to stay, to stop, to detain). To deprive a person of his liberty by legal authority. The seizing a person and detaining him in the custody of the law. See Baldw. 234.

As ordinarily used, the terms arrest and attachment coincide in meaning to some extent; though in strictness, as a distinction, an arrest may be said to be the act resulting from the service of an attachment. And in the more extended sense which is sometimes given to attachment, including the act of taking, it would seem to differ from arrest in that it is more peculiarly applicable to a taking of property, while *arrest* is more commonly used in speaking of persons.

The terms are, however, often interchanged when peaking of the taking a man by virtue of legal authority. Arrest is also applied in some instances to a seizure and detention of personal chattels, especially of ships and vessels; but this use of the term is not common in modern law.

In Civil Practice. The apprehension of a person by virtue of a lawful authority to answer the demand against him in a civil action.

One of the means which the law gives the creditor to secure the person of his debtor while the suit is pending, or to compel him to give security for his appearance after judgment; La. Civ. Code art. 211. Acts which amount to a taking into custody are necessary to constitute an arrest; but there need be no actual force or manual touching the body: it is enough if the party be within the power of the officer and submit to the arrest; Cas. *temp.* Hardw. 301; 5 B. & P. 271; Bull. N. P. 62; 2 N. H. 318; 8 Dana 190; 3 Harr. Del. 416; 1 Harp. 453; 8 Me. 127; 1 Wend. 215; 21 Ala. 240; 20 Ga. 369; 2 Blackf. 294; but mere words without submission are not sufficient; 2 Hale, Pl. Cr. 129; 13 Ark. 79; 13 Ired. 448. 102 N. C. 129.

Whom to be made by. It must be made by an officer having proper authority. This is, in the United States, the sheriff, or one of his deputies, general or special (see United States Digest, *Sheriff*, and the statutes of the various states), or by a mere assistant of the officer, if he be so near as to be considered as acting, though he do not actually make the arrest; Cowp. 65.

The process of the United States courts is executed by a marshal. As to the power of the sergeant-at-arms of a legislative body to arrest for contempt or other cause, see 1 Kent 236, and notes; Bost. Law Rep. May, 1860. An order of the United States House of Representatives declaring a witness before one of its committees in contempt for not answering certain questions, and ordering his arrest and imprisonment, is void and affords no defence to the sergeant-at-arms in an action for false imprisonment against him; 103 U. S. 168, q. v. for a full discussion of the subject and review of the cases.

Who is liable to. All persons found within the jurisdiction are liable to arrest, with the exception of certain specified classes, including *ambassadors* and their servants, 1 B. & C. 554; 3 D. & R. 25, 833; 4 Sandf. 619; 4 Dall. 331; *attorneys at law; barristers* attending court or on circuit, 1 H. Bla. 636; see 19 Ga. 608; 1 Phila. 217; 8 Sim. 377; 16 Ves. 412; 18 Johns 52; *bail* attending court as such, 1 H. Bla. 636; 1 Maule & S. 638; *bankrupts* until the time for surrender is passed, and under some other circumstances, 8 Term 475, 534; 2 Ben. 38; *bishops* (but not in U. S.); *consuls-general*, 9 East 447; though doubtful, and the privilege does not extend to consuls; 1 Taunt. 106; 3 Maule & S. 284; 6 Ben. 556; *clergymen*, while performing divine service; Bacon, Abr. *Trespass; electors* attending a public election; 3 Conn. 537; *executors* sued on the testator's liability; *heirs* sued as such; *hundredors* sued as such; *insolvent debtors* lawfully discharged; 3 Maule & S. 595; 19 Pick. 260; and see 4 Taunt. 631; 5 Watts 141; 7 Metc Mass. 257; not when sued on subsequent liabilities or promises, 6 Taunt. 563; see 4 Harr. Del. 240; *Irish peers*, stat. 39 & 40

Geo. III. c. 67, § 4; *judges* on process from their own court, 8 Johns. 381; 1 Halst. 419; but see 6 N. J. L. 419; *marshal* of the King's Bench; *members* of congress and state legislatures while attending the respective assemblies to which they belong; 4 Dall. 341; 4 Day 133; 2 Bay 406; 3 Gratt. 237; 1 Pa. 85, 115; 2 Johns. Cas. 222; 8 R. I. 453; *militia* men while engaged in the performance of military duty; *officers* of the army and militia, to some extent; 4 Taunt. 557; but see 8 Term, 105; 1 Dall. 295; 3 Ga. 397; 16 Iowa 600; 40 N. Y. 133; *parties* to a suit attending court; 11 East 439; Coxe 142; 2 Va. Cas. 381; 4 Dall. 387; 6 Mass. 245, 264; 12 Ill. 61; 5 Rich. 523; 1 Wash. C. C. 186; 1 Pet. C. C. 41; see 1 Brev. N. C. 177; 29 Ga. 217; 5 Cra. 677; including a court of insolvency, 2 Marsh. 57; 6 Taunt. 336; 1 V. & B. 316; 5 Gray 538; a reference, 1 Cai. 115; 1 Rich. 194; the *former president* of a foreign republic while residing in one of the U. S.; 7 Hun 596; but a party arrested on a criminal charge, and discharged on bail, may be arrested on civil process before he leaves the court room; 73 N. C. 394; *soldiers*, 8 Dana 190; 3 Ga. 397; *sovereigns*, including, undoubtedly, governors of the states; *the Warden of the Fleet; witnesses* attending a judicial tribunal; 3 B. & Ald. 252; 7 Johns. 538; 3 Harr. Del. 517; by legal compulsion, 6 Mass. 264; 9 S. & R. 147; 6 Cal. 32; 3 Cow. 381; 2 Penn. N. J. 516; see 4 T. B. Monr. 540; *women*, Wright, Ohio 455; but see 2 Abb. N. C. 193; 13 N. Y. 1; and perhaps other classes, under local statutes; *married women*, on suits arising from contracts, 1 Term 486; 6 *id.* 451; 7 Taunt. 55; but the privilege may be forfeited by her conduct, 1 B. & P. 8; 5 *id.* 380; and the grounds of these early decisions are necessarily affected by the modern statutes permitting married women to contract and sue and be sued as if *sole*, but although the Pennsylvania act of 1887 in section 2 authorizes her so to be sued on her contract and for all torts, it has been held that a married woman is notwithstanding that section privileged from arrest under a *capias;* 2 W. N. C. (Pa.) 274. Reference must be had in many of the above cases to statutes for modifications of the privilege. In all cases where the privilege attaches in consideration of an attendance at a specified place in a certain character, it includes the stay and a reasonable time for going and returning; 2 W. Bla. 1113; 4 Dall. 329; 2 Johns. Cas. 222; 6 Blackf. 278; 3 Harr. Del. 517; 1 Wash. 186; but not including delays in the way; 3 B. & Ald. 252; 4 Dall. 329; or deviations; 19 Pick. 260. A person brought from one state into another under federal process in an extradition proceeding, and discharged therefrom, cannot be arrested under civil process until he has reasonable time to return to the state from which he came; 41 Fed. Rep. 472.

Where and when it may be made. An arrest may be made in any place, except in the actual or constructive presence of court, and the defendant's own house; 4 Bla. Com. 288; 6 Taunt. 246; Cowp. 1 (*contra*, 73 N. C. 394); and even there the officer may break inner doors to find the defendant when the outer door is open; 5 Johns. 352; 8 Taunt. 250; Cowp. 2. See 10 Wend. 300. It cannot be made on Sunday or any public holiday; Stat. 29 Car. II. c. 7; *contra*, 6 Blackf. 447.

An officer with a proper writ may lawfully stop a train to arrest the railroad engineer running it; 20 Ohio L. J. 464; 60 Vt. 588.

Discharge from arrest on mesne process may be obtained by giving sufficient bail, which the officer is bound to take; 1 Bingh. 103; 3 Maule & S. 283; 6 Term 355; 15 East 320; but when the arrest is on final process, giving bail does not authorize a discharge.

If the defendant otherwise withdraw himself from arrest, or if the officer discharge him, without authority, it is an *escape;* and the sheriff is liable to the plaintiff. See ESCAPE. If the party is withdrawn forcibly from the custody of the officer by third persons, it is a *rescue*. See RESCUE.

Extended facilities are offered to poor debtors to obtain a discharge under the statutes of most if not all of the states of the United States. In consequence, except in cases of apprehended fraud, as in the concealment of property or an intention to abscond, arrests are infrequently made. See, as to excepted cases, 19 Conn. 540; 28 Me. 45.

Generally. An unauthorized arrest, as under process materially irregular or informal; 26 N. H. 268; 6 Barb. 654; 5 Ired. 72; 3 H. & M'H. 113; 3 Yerg. 392; 36 Me. 366; 2 R. I. 436; 1 Conn. 40; 13 Mass. 286; see 20 Vt. 321; or process issuing from a court which has no general jurisdiction of the subject-matter; 10 Coke 68; 2 Wils. 275, 384; 10 B. & C. 28; 8 Q. B. 1020; 1 Gray 1; 4 Conn. 107; 1 Ill. 18; 7 Ala. 518; 2 Fla. 171; 3 Dev. 471; 4 B. Monr. 230; 21 N. H. 262; 9 Ga. 73; 37 Me. 130; 3 Cra. 448; 1 Curt. C. C. 311; and see 5 Wend. 170; 16 Barb. 268; 5 N. Y. 381; 3 Binn. 215; is void; but if the failure of jurisdiction be as to person, place, or process, it must appear on the warrant, to have this effect; Bull. N. P. 83; 5 Wend. 175; 3 Barb. 17; 12 Vt. 661; 6 Ill. 401; 1 Rich. 147; 2 J. J. Marsh. 44; 1 Conn. 40; 6 Blackf. 249, 344; 3 Munf. 458; 13 Mo. 171; 3 Binn. 38; 8 Metc. Mass. 326; 1 R. I. 464; 1 Mood. 281; 3 Burr. 1766; 1 W. Bla. 555. The arrest of the wrong person; 2 Scott N. S. 86; 1 M. & G. 775; 2 Taunt. 400; 8 N. H. 406; 4 Wend. 555; 9 *id.* 319; renders the officer liable for a trespass to the party arrested. See 1 Bennett & H. Lead. Crim. Cas. 180–184.

In Criminal Cases. The apprehending or detaining of the person in order to be forthcoming to answer an alleged or suspected crime.

The word *arrest* is said to be more properly used in civil cases, and *apprehension* in criminal. Thus, a man is arrested under a *capias ad respondendum*, and apprehended under a warrant charging him with larceny.

Who may make. The person to whom the warrant is addressed is the proper person in case a warrant has been issued, whether he be described by name; Salk. 176; 24 Wend. 418; 2 Ired. 201; or by his office; 1 B. & C. 288; 2 D. & R. 444; 7 Exch. 827; 6 Barb. 654. See 1 Mass. 488. But, if the authority of the warrant is insufficient, he may be liable as a trespasser. See *supra*. A known officer need not show a warrant in making an arrest, but a special officer must if it is demanded; 100 N. C. 423.

Any peace officer, as a justice of the peace, 1 Hale, Pl. Cr. 86; sheriff, 1 Saund. 77; 1 Taunt. 46; coroner, 4 Bla. Com. 292; constable, 32 Eng. L. & Eq. 783; 36 N. H. 246; or watchman, 3 Taunt. 14; 3 Campb. 430; may without a warrant arrest any person committing a felony in his presence; 6 Binn. 318; Sullivan, Lect. 402; 3 Hawkins, Pl. Cr. 164; 71 Ill. 78; 75 Mo. 231; 17 Ga. 194; or committing a breach of the peace, during its continuance or immediately afterwards; 1 C. & P. 40; 32 Eng. L. & Eq. 186; 3 Wend. 384; 1 Root, Conn. 66; 2 Nott. & M'C. 475; 1 Pet. C. C. 390; or if he is sufficiently near to hear what is said and the sound of the blows, although he cannot see for the darkness; 107 N. C. 812. 30 Ga. 430; 11 Ohio St. 550; 70 N. C. 10; 61 Pa. 352; or even to prevent the commission; and such officer may arrest any one whom he reasonably suspects of having committed a felony, whether a felony has actually been committed or not; 3 Campb. 420; 5 Cush. 281; 6 Humphr. 53; 6 Binn. 316; 3 Wend. 350; 1 N. H. 54; whether acting on his own knowledge or facts communicated by others; 6 B. & C. 635; but not unless the offence amount to a felony; 73 Ill. 78; 5 Exch. 378; 5 Cush. 281; 11 *id.* 246, 415. See Russ. & R. 329; 85 Ky. 123. But a constable cannot arrest for an ordinary misdemeanor without a warrant, unless present at the time of the offence; 50 N. J. L. 189; 54 N. Y. Super. Ct. 330; 61 Mich. 445; 154 Mass. 25; 44 Mo. App. 513. As to the power to make arrest without a warrant, see 30 Cent. Law J. 356, note. See FELONY.

A private person who is present when a felony is committed, 1 Mood. 93; 3 Wend. 353; 12 Ga. 293; or during the commission of a breach of the peace; 10 C. & F. 28; 25 Vt. 261; or sees another in the act of carrying away property he has stolen; 36 Fed. Rep. 168; may and should arrest the felon, and may upon reasonable suspicion that the person arrested is the felon, if a felony has been committed; 4 Taunt. 34, 35; 1 Price, Exch. 525; 45 Fed. Rep. 851; but in defence to an action he must allege and prove the offence to have been committed; 1 M. & W. 516; 6 C. & P. 684, 723; 3 Wend. 353; 5 Cush. 281; and also that he had reasonable grounds for suspecting the person arrested; 3 Campb. 35; 2 Q. B. 169; 1 Eng. L. & Eq. 566; 25 *id.* 550; 6 Barb. 84; 9 Pa. 137; 6 Binn. 316; 6 Blackf. 406; 18 Ala. 195; 5 Humphr. 357; 12 Pick. 324; 4 Wash. C. C. 82. And see 3 Strobh. 546; 8 W. & S. 308; 2 C. & P. 361, 565; 1 Benn. & H. L. Cas. 143-7; 73 Ill. 100. As to arrest to prevent the commission of crimes, see 2 B. & P. 260; 9 C. & P. 262. Where a private party attempts to make an arrest for riot on the order of a justice after offenders have dispersed, he becomes a trespasser and may be resisted; 107 N. C. 948. A private detective, in pursuit of a fugitive from justice in another state, cannot arrest without a warrant by merely procuring a policeman to make the arrest; 35 Fed. Rep. 116; nor can such detective forcibly detain the defendant to await a legal order of arrest; 10 N. Y. Sup. 449. As to arrest by hue and cry, see HUE AND CRY. As to arrest by military officers, see 7 How. 1.

Who liable to. Any person is liable to arrest for crime, except ambassadors and their servants; 3 Mass. 197; 27 Vt. 762; 7 Wall. 483.

No legal arrest of a voter can be made on election day for cause relating to his suffrage; 38 Fed. Rep. 103.

When and where it may be made. An arrest may be made at night as well as by day; and for treason, felony, breach of the peace, or generally for an indictable offence, on Sunday as well as on other days; 16 M. & W. 172; 13 Mass. 547; 24 Me. 158. And the officer may break open doors even of the criminal's own house; 10 Cush. 501; 14 B. Monr. 305 (even to arrest a person therein, not the owner; 120 Mass. 190); although he must first demand admission and be refused after giving notice of his business; Russell on Cr. 840; 15 Gray 74; 1 Root 134; as may a private person in fresh pursuit, under circumstances which authorize him to make an arrest; 4 Bla. Com. 293.

In must be made within the jurisdiction of the court under whose authority the officer acts; 1 Hill, N. Y. 377; 2 Cra. 187; 8 Vt. 194; 3 Harr. Del. 416; and see 4 Maule & S. 361; 1 B. & C. 288; and jurisdiction for this purpose can be extended to foreign countries only by virtue of treaties or express laws of those countries; 1 Bish. Cr. Law § 598; Wheat. Int. Law, 3d Eng. ed. § 113; 10 S. & R. 125; 12 Vt. 631; 1 W. & M. 66; 1 Barb. 248; 1 Park. Crim. 108, 429. And see, as between the states of the United States, 5 How. 215; 5 Metc. Mass. 536; 4 Day 121; R. M. Charlt. 120; 2 Humphr. 258. As to arrest in a different county; 41 Ind. 181. As to what constitutes an arrest; 2 Thomp. & C. 224; 100 Mass. 79; 21 Ala. 240; 50 Vt. 728; 22 Mich. 266.

Manner of making. An officer authorized to make an arrest, whether by warrant or from the circumstances, may use necessary force; 2 Bish, Cr. Law 37; 9 Port. Ala. 195; 3 Harr. Del. 568; 24 Me. 158; 16 Barb. 268; 4 Cush. 60; 7 Blackf. 64; 2 Ired. 52; 4 B. & C. 596; 43 Tex. 93 (but he may not strike except in self-defence); he may kill the felon if he cannot otherwise be taken; see 7 C. & P. 140; 2 Mood. & R. 39; 73 Ill. 78; see 1 Hugh. 560; and so may a private person in making an arrest which he is *en-*

joined to make ; 4 Bla. Com. 293 ; and if the officer or private person is killed, in such case it is murder. In making an arrest for misdemeanor, an officer can kill or inflict bodily harm upon the person only when he is placed in like danger ; 11 Ky. L. Rep. 67 ; 55 Ark. 502. Reading a warrant and directing the defendant to appear, is not an arrest ; 82 Ill. 485 ; but see 76 Tex. 141. Arresting the body and exhibiting the process is enough ; 50 Vt. 728.

When an offender is not resisting but fleeing, an officer in making an arrest for a misdemeanor has no right to kill or shoot, although he may do so in case of felony ; 85 Ky. 480.

See JUSTIFICATION.

ARREST OF JUDGMENT. In Practice. The act of a court by which the judges refuse to give judgment, because upon the face of the record it appears that the plaintiff is not entitled to it.

A motion for arrest of judgment must be grounded on some objection arising on the face of the record itself ; 44 La. Ann. 969 ; 45 Ill. App. 511 ; and no defect in the evidence or irregularity at the trial can be urged in this stage of the proceedings. But any want of sufficient certainty in the indictment, as in the statement of time or place (where material), of the person against whom the offence was committed, or of the facts and circumstances constituting the offence, or otherwise, which is not aided by the verdict, is a ground for arresting the judgment. In criminal cases, an arrest of judgment is founded on exceptions to the indictment. In civil cases whatever is alleged in arrest of judgment must be such matter as would on demurrer have been sufficient to overturn the action or plea. In the applicability of the rule there is no difference between civil and criminal cases ; 60 Pa. 367. Although the defendant himself omits to make any motion in arrest of judgment, the court, if, on a review of the case, it is satisfied that the defendant has not been found guilty of any offence in law, will of itself arrest the judgment ; 1 East 146. Where a statute upon which an indictment is founded was repealed after the finding of the indictment, but before plea pleaded, the court arrested the judgment ; 18 Q. B. 761 ; Dearsl. 3. See also 8 Ad. & E. 496 ; 1 Russ. & R. 429 ; 11 Pick. 350 ; 12 Cush. 501. If the judgment is arrested, all the proceedings are set aside, and judgment of acquittal is given ; but this will be no bar to a new indictment ; Comyns. Dig. *Indictment*, N. ; 1 Bish. Cr. Law 998.

Where a judgment rendered has been reversed, and a new trial granted, which is had upon the same indictment in the same court, a motion in arrest of judgment on the ground of a former acquittal of a higher offence charged in the indictment, is good where such facts appear in the record ; 12 So. Rep. (Fla.) 525.

ARRESTANDIS BONIS NE DISSIPENTUR. In English Law. A writ for him whose cattle or goods, being taken during a controversy, are likely to be wasted and consumed.

ARRESTEE. In Scotch Law. He in whose hands a debt, or property in his possession, has been arrested by a regular arrestment.

If, in contempt of the arrestment, he make payment of the sum or deliver the goods arrested to the common debtor, he is not only liable criminally for breach of the arrestment, but he must pay the debt again to the arrester ; Erskine, Inst. 3. 6. 6.

ARRESTER. In Scotch Law. One who sues out and obtains an arrestment of his debtor's goods or movable obligations. Erskine, Inst. 3. 6. 1.

ARRESTMENT. In Scotch Law. Securing a criminal's person till trial, or that of a debtor till he give security *judicio sisti*. The order of a judge, by which he who is debtor in a movable obligation to the arrester's debtor is prohibited to make payment or delivery till the debt due to the arrester be paid or secured. Erskine, Inst. 3. 6. 1 ; 1. 2. 12.

Where arrestment proceeds on a depending action it may be loosed by the common debtor's giving security to the arrester for his debt, in the event it shall be found due ; Erskine, Inst. 3. 6. 7.

ARRET (Fr.). A judgment, sentence, or decree of a court of competent jurisdiction.

The term is derived from the French law, and is used in Canada and Louisiana.

Saisie arrêt is an attachment of property in the hands of a third person. La. Code Pr. art. 209 ; 2 Low. C. 77 ; 5 *id.* 198, 218.

ARRETTED (*arrectatus*, i. e. *ad rectum vocatus*).

Convened before a judge and charged with a crime.

Ad rectum malefactorem is, according to Bracton, to have a malefactor forthcoming to be put on his trial.

Imputed or laid to one's charge ; as, no folly may be *arretted* to any one under age. Bracton, l. 3, tr. 2, c. 10 ; Cunningham, Dict.

ARRHÆ. Money or other valuable things given by the buyer to the seller, for the purpose of evidencing the contract ; earnest.

There are two kinds of arrhæ : one kind given when a contract has only been proposed ; the other when a sale has actually taken place. Those which are given when a bargain has been merely proposed, before it has been concluded, form the matter of the contract, by which he who gives the arrhæ consents and agrees to lose them, and to transfer the title to them in the opposite party, in case he should refuse to complete the proposed bargain ; and the receiver of arrhæ is obliged on his part to return double the amount to the giver of them in case he should fail to complete his part of the contract ; Pothier, *Contr. de Vente*, n. 498. After the contract of sale has been completed, the purchaser usually gives arrhæ as evidence that the contract has been perfected. Arrhæ are therefore defined *quod ante pretium datur, et fidem fecit contractus, facti totiusque pecuniæ solvendæ*. *Id.* n. 506 ; Cod. 4. 45. 2.

ARRIAGE AND CARRIAGE. Services of an indefinite amount formerly exacted from tenants under the Scotch law. Bell, Dict.

ARRIER BAN. A second summons to join the lord, addressed to those who had neglected the first. A summons of the inferiors or vassals of the lord. Spelman, Gloss.

To be distinguished from *aribannum*.

ARRIERE FIEF (Fr.). An inferior fee granted out of a superior.

ARRIVE. To come to a particular place; to reach a particular or certain place. See cases in Leake, Contr., and in Abb. Dict.; 1 Brock. 411; 2 Cush. 439; 8 B. & C. 119; 5 Mason 132; 9 How. 372.

ARROGATION. The adoption of a person *sui juris*. 1 Brown, Civ. Law 119; Dig. 1. 7. 5; Inst. 1. 11. 3.

ARSER IN LE MAIN. (Burning in the hand.) The punishment inflicted on those who received the benefit of clergy. *Termes de la Ley.*

ARSON (Lat. *ardere*, to burn). The malicious burning of the house of another. Co. 3d Inst. 66; Bish. Cr. L. § 415; 4 Bla. Com. 220; 2 Pick. 320; 16 Cush. 479; 7 Gratt. 619; 9 Ala. 175; 7 Blackf. 168; 1 Leach, Cr. Cas. 218; 51 Cal. 319; 12 Bush 243; Ch. Cr. Law 226; but it is not arson to demolish the house first and then burn the material; 25 Tex. App. 199.

In some states by statute there are degrees of arson. The house, or some part of it, however small, must be consumed by fire; 9 C. & P. 45; 16 Mass. 105; 5 Ired. 350. Where the house is simply scorched or smoked and the fire is not communicated to the building the crime of arson is not complete; 30 Tex. App. 346. The question of burning is one of fact for the jury; 1 Mood. Cr. Cas. 398; 5 Cush. 427.

It must be *another's* house; 1 Bish. Cr. Law § 389; but *aliter* under the N. H. statute; 51 N. H. 176; but if a man set fire to his own house with a view to burn his neighbor's, and does so, it is, at least, a great misdemeanor; 1 Hale, Pl. Cr. 568; 2 East, Pl. Cr. 1027; W. Jones 351; 2 Pick. 325; 34 Me. 428; 2 N. & M'C. 36; 8 Gratt. 624; 5 B. & Ad. 27. See 1 Park. Cr. Cas. 560; 2 Johns. 105; 7 Blackf. 168; 32 Vt. 58. If he sets fire to a schoolhouse with the intention of burning an adjoining dwelling, which actually happens, he is guilty of arson; 29 S. W. Rep. (Ky.) 221.

The *house* of another must be burned, to constitute arson at common law; but the term "house" comprehends not only the very mansion-house, but all out-houses which are parcel thereof, though not contiguous to it, nor under the same roof, such as the barn, stable, cow-house, sheep-house, dairy-house, mill-house, and the like, being within the curtilage, or same common fence, as the mansion itself; 4 C. & P. 245; 20 Conn. 245; 16 Johns. 203; 3 Ired. 570; 3 Rich. 242; 5 Whart. 427; Cl. Cr. Law 221; 4 Leigh 683; 4 Call 109; 88 N. C. 656; 71 N. Y. 561; 26 Ohio St. 420. And it has also been said that the burning of a barn, though no part of the mansion, if it has corn or hay in it, is felony at common law; 1 Hale, P. C. 567; 4 C. & P. 245; 5 W. & S. 385; *contra*, 81 Ill. 565. In Massachusetts, the statute refers to the dwelling-house strictly; 10 Cush. 478. Where a prisoner set fire to his cell, in order to effect an escape, held, not arson; 18 Johns. 115; but see 1 Whart. Cr. L. 9th ed. § 829; 8 Call 109; 49 Ala. 30; 2 Idaho 1182; 32 Tex. Cr. R. 534. The burning must have been both malicious and wilful; Roscoe, Cr. Ev. 8th ed. 289; 2 East, Pl. Cr. 1019, 1031; 1 Bishop, Cr. L. § 259; 28 Miss. 100; 68 *id.* 339. And generally, if the act is proved to have been done wilfully, it may be inferred to have been done maliciously, unless the contrary is proved; 1 Russ. & R. Cr. Cas. 26; Cl. Cr. Law 229. On a charge of arson for setting fire to a mill, an intent to injure or defraud the mill-owners will be conclusively inferred from the wilful act of firing; 1 Russ. & R. Cr. Cas. 207; 2 B. & C. 264. But this doctrine can only arise where the act is wilful, and therefore, if the fire appears to be the result of accident, the party who is the cause of it will not be liable; 53 Ga. 33; 47 Ill. 533.

In some states by statute a wife may be guilty of arson by burning a husband's property; 1 Ind. App. 146.

It is a felony at common law, and originally punishable with death; Co. 3d Inst. 66; 2 East, Pl. Cr. 1015; 5 W. & S. 385; but this is otherwise, to a considerable extent, by statute; 8 Rich. S. C. 276; 4 Dev. 305; 4 Call 109; 5 Cra. C. C. 73. If homicide result, the act is murder; 1 Green, N. J. 361; 1 Bish. Cr. Law 361. See CRIMES.

It is not an indictable offence at common law to burn one's own house to defraud insurers; 1 Whart. Cr. L. 9th ed. § 843; otherwise in some states by statute; 51 N. H. 176; 19 N. Y. 537; 32 Cal. 160.

ARSURA. The trial of money by heating it after it was coined. Now obsolete.

ART. A principle put in practice and applied to some art, machine, manufacture, or composition of matter. 4 Mas. 1; see Act of Cong. July 8, 1870.

Copper-plate printing on the back of a bank-note is an art for which a patent may be granted; 4 Wash. C. C. 9; see, also, 1 Fisher 133; 7 Wall. 295; 15 How. 267; as to "lost arts," 10 How. 477.

ART AND PART. In Scotch Law. The offence committed by one who aids and assists the commission of a crime, but who is not the principal or chief actor in its actual commission. An accessary. A principal in the second degree. Paterson, Comp.

A person may be guilty, art and part, either by giving advice or counsel to commit the crime; or by giving warrant or mandate to commit it; or by actually assisting the criminal in the execution.

In the more atrocious crimes, it seems agreed that the adviser is equally punishable with the criminal, and that, in the slighter offences, the circumstances arising from the adviser's lesser age, the jocular or careless manner of giving the advice, etc., may be received as pleas for softening the punishment.

One who gives a mandate to commit a crime, as he is the first spring of the action, seems more guilty than the person employed as the instrument in executing it.

Assistance may be given to the committer of a crime, not only in the actual execution, but previous to it, by furnishing him, with a criminal intent, with poison, arms, or other means of perpetrating it. That sort of assistance which is not given until after the criminal act, and which is commonly called abetting, though it be itself criminal, does not infer art and part of the principal crime; Erskine, Inst. 4. 4. 10.

ARTICLES (Lat. *articulus, artus*, a joint). Divisions of a written or printed document or agreement.

A specification of distinct matters agreed upon or established by authority or requiring judicial action.

The fundamental idea of an article is that of an object comprising some integral part of a complex whole. See Worcester, Dict. The term may be applied, for example, to a single complete question in a series of interrogatories; the statement of the undertakings and liabilities of the various parties to an agreement in any given event, where several contingencies are provided for in the same agreement; a statement of a variety of powers secured to a branch of government by a constitution; a statement of particular regulations in reference to one general subject of legislation in a system of laws; and in many other instances resembling these in principle. It is also used in the plural of the subject made up of these separate and related articles, as, articles of agreement, articles of war, the different divisions generally having, however, some relation to each other, though not necessarily a dependence upon each other.

In Chancery Practice. A formal written statement of objections to the credibility of witnesses in a cause in chancery, filed by a party to the proceedings after the depositions have been taken and published.

The object of articles is to enable the party filing them to introduce evidence to discredit the witnesses to whom the objections apply, where it is too late to do so in any other manner; 1 Dan. Ch. Pr. 6th Am. ed. *957; and to apprize the party whose witnesses are objected to of the nature of the objections, that he may be prepared to meet them; 1 Dan. Ch. Pr. 6th Am. ed. *958.

Upon filing the articles, a special order is obtained to take evidence; 2 Dick. Ch. 532; which is sparingly to be granted; 1 Beam. Ord. 187.

The interrogatories must be so shaped as not to call for evidence which applies directly to facts in issue in the case; 2 Sumn. 316, 605; 3 Johns. Ch. 558; 10 Ves. Ch. 49. The objections can be taken only to the credit and not to the competency of the witnesses, 3 Atk. 643; 3 Johns. Ch. 558; and the court are to hear all the evidence read and judge of its value; 2 Ves. Ch. 219. See, generally, 1 Dan. Ch. Pr. 959, 10 Ves. Ch. 49, 2 Ves. & B. 267; 1 Sim. & S. 467.

In Ecclesiastical Law. A complaint in the form of a libel exhibited to an ecclesiastical court.

In Scotch Law. Matters; business. Bell, Dict.

ARTICLES OF AGREEMENT. A written memorandum of the terms of an agreement.

They may relate either to real or personal estate, or both, and if in proper form will create an equitable estate or trust such that a specific performance may be had in equity.

The instrument should contain a clear and explicit statement of the *names of the parties*, with their additions for purposes of distinction, as well as a designation as parties of the first, second, etc., part; *the subject-matter* of the contract, including the time, place, and more important details of the manner of performance; *the promises* to be performed by each party; *the date*, which should be truly stated. It should be signed by the parties or their agents. When signed by an agent, the proper form is, A B, by his agent [or attorney], C D.

ARTICLES APPROBATORY. In Scotch Law. That part of the proceedings which corresponds to the answer to the charge in an English bill in chancery. Paterson, Comp.

ARTICLES OF CONFEDERATION. The title of the compact which was made by the thirteen original states of the United States of America. Story, Const. 215, 223.

The full title was "Articles of Confederation and perpetual union between the states of New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia." It was adopted and went into force on the first day of March, 1781, and remained as the supreme law until the first Wednesday of March, 1789; 5 Wheat. 420.

The accompanying analysis of this important instrument is copied from Judge Story's Commentaries on the Constitution of the United States, book 2, c. 3.

The style of the confederacy was, by the first article, declared to be, "The United States of America." The second article declared that each state retained its sovereignty, freedom, and independence, and every power, jurisdiction, and right which was not by this confederation *expressly* delegated to the United States, in congress assembled. The third article declared that the states severally entered into a firm league of friendship with each other, for their common defence, the security of their liberties, and their mutual and general welfare; binding themselves to assist each other against all force offered to or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever. The fourth article declared that the free inhabitants of each of the states (vagabonds and fugitives from justice excepted) should be entitled to all the privileges of free citizens in the several states; that the people of each state should have free ingress and regress to and from any other state, and should enjoy all the privileges of trade and commerce, subject to the same duties and restrictions as the inhabitants; that fugitives from justice should, upon the demand of the executive of the state from which they fled, be delivered up; and that full faith and credit should be given, in each of the states, to the records, acts, and judicial proceedings of the courts and magistrates of every other state.

Having thus provided for the security and intercourse of the states, the next article (5th) provided for the organization of a general congress, declaring that delegates should be chosen in such manner as the legislature of each state should direct; to meet in congress on the first Monday in every year, with a power, reserved to each state, to recall any or all of the delegates, and to send others in their stead. No state was to be represented in congress by less than two nor more than seven members. No delegate was eligible for more than three in any term of six years; and no delegate was capable of holding office of emolument under the United States. Each state was to maintain its own delegates, and, in determining questions in congress,

was to have one vote. Freedom of speech and debate in congress was not to be impeached or questioned in any other place; and the members were to be protected from arrest and imprisonment during the time of their going to and from and attendance on congress, except for treason, felony, or breach of the peace.

By subsequent articles, congress was invested with the sole and exclusive right and power of determining on peace and war, unless in case of an invasion of a state by enemies, or an imminent danger of an invasion by Indians; of sending and receiving ambassadors; entering into treaties and alliances, under certain limitations as to treaties of commerce; of establishing rules for deciding all cases of capture on land and water, and for the division and appropriation of prizes taken by the land or naval forces, in the service of the United States; of granting letters of marque and reprisal in times of peace; of appointing courts for the trial of piracies and felonies committed on the high seas; and of establishing courts for receiving and finally determining appeals in all cases of captures.

Congress was also invested with power to decide in the last resort, on appeal, all disputes and differences between two or more states concerning boundary, jurisdiction, or any other cause whatsoever; and the mode of exercising that authority was specially prescribed. And all controversies concerning the private right of soil, claimed under different grants of two or more states before the settlement of their jurisdiction, were to be finally determined in the same manner, upon the petition of either of the grantees. But no state was to be deprived of territory for the benefit of the United States.

Congress was also invested with the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or that of the United States; of fixing the standard of weights and measures throughout the United States; of regulating the trade and managing all affairs with the Indians, not members of any of the states, provided that the legislative right of any state within its own limits should not be infringed or violated; of establishing and regulating post-offices from one state to another, and exacting postage to defray the expenses; of appointing all officers of the land forces in the service of the United States, except regimental officers; of appointing all officers of the naval forces, and commissioning all officers whatsoever in the service of the United States; and of making rules for the government and regulation of the land and naval forces, and directing their operations.

Congress was also invested with authority to appoint a committee of the states to sit in the recess of congress, and to consist of one delegate from each state, and other committees and civil officers, to manage the general affairs under their direction; to appoint one of their number to preside, but no person was to serve in the office of president more than one year in the term of three years; to ascertain the necessary sums for the public service, and to appropriate the same for defraying the public expenses; to borrow money and emit bills on credit of the United States; to build and equip a navy; to agree upon the number of land forces, and make requisitions upon each state for its quota, in proportion to the number of white inhabitants in such state. The legislatures of each state were to appoint the regimental officers, raise the men, and clothe, arm, and equip them at the expense of the United States.

Congress was also invested with power to adjourn for any time not exceeding six months, and to any place within the United States; and provision was made for the publication of its journal, and for entering the yeas and nays thereon when desired by any delegate.

Such were the powers confided in congress. But even these were greatly restricted in their exercise; for it was expressly provided that congress should never engage in a war; nor grant letters of marque or reprisal in time of peace; nor enter into any treaties or alliances; nor coin money or regulate the value thereof; nor ascertain the sums or expenses necessary for the defence and welfare of the United States; nor emit bills; nor borrow money on the credit of the United States; nor appropriate money; nor agree upon the number of vessels of war to be built, or purchased, or the number of land or sea forces to be raised; nor appoint a commander-in-chief of the army or navy; unless nine states should assent to the same. And no question on any other point, except for adjourning from day to day, was to be determined, except by vote of the majority of the states.

The committee of the states, or any nine of them, were authorized in the recess of congress to exercise such powers as congress, with the assent of nine states, should think it expedient to vest them with, except powers for the exercise of which, by the articles of confederation, the assent of nine states was required, which could not be thus delegated.

It was further provided that all bills of credit, moneys borrowed, and debts contracted by or under the authority of congress before the confederation, should be a charge against the United States; that when land forces were raised by any state for the common defence, all officers of or under the rank of colonel should be appointed by the legislature of the state, or in such manner as the state should direct; and all vacancies should be filled up in the same manner; that all charges of war, and all other expenses for the common defence or general welfare, should be defrayed out of a common treasury, which should be supplied by the several states, in proportion to the value of the land within each state granted or surveyed, and the buildings and improvements thereon, to be estimated according to the mode prescribed by congress; and the taxes for that proportion were to be laid and levied by the legislatures of the states within the time agreed upon by congress.

Certain prohibitions were laid upon the exercise of powers by the respective states. No state, without the consent of the United States, could send an embassy to, or receive an embassy from, or enter into any treaty with any king, prince, or state; nor could any person holding any office under the United States, or any of them, accept any present, emolument, office, or title from any foreign king, prince, or state; nor could congress itself grant any title of nobility. No two states could enter into any treaty, confederation, or alliance with each other, without the consent of congress. No state could lay any imposts or duties which might interfere with any proposed treaties. No vessels of war were to be kept up by any state in time of peace, except deemed necessary by congress for its defence or trade; nor any body of forces, except as should be deemed requisite by congress to garrison its forts and necessary for its defence. But every state was required always to keep up a well-regulated and disciplined militia, sufficiently armed and accoutred, and to be provided with suitable field-pieces, and tents, and arms, and ammunition, and camp equipage. No state could engage in war without the consent of congress, unless actually invaded by enemies or in danger of invasion by the Indians. Nor could any state grant commissions to any ships of war, nor letters of marque and reprisal, except after a declaration of war by congress, unless such state were infested by pirates, and then subject to the determination of congress. No state could prevent the removal of any property imported into any state to any other state, of which the owner was an inhabitant. And no imposition, duties, or restriction could be laid by any state on the property of the United States or of either of them.

There was also provision made for the admission of Canada into the Union, and of other colonies, with the assent of nine states. And it was finally declared that every state should abide by the determinations of congress on all questions submitted to it by the confederation; that the articles should be inviolably observed by every state; that the union should be perpetual; and that no alterations should be made in any of the articles, unless agreed to by congress and confirmed by the legislatures of every state.

ARTICLES OF IMPEACHMENT.

A written articulate allegation of the causes for impeachment. See 9 Am. & Eng. Encyc. of Law 951.

They are called by Blackstone a kind of bills of indictment, and perform the same office which an indictment does in a common criminal case. They do not usually pursue the strict form and accuracy of an indictment, but are sometimes quite general in the form of the allegations. Woodd. Lect. 605; Sto. Const. 5th ed. §§ 807; Com. Dig. *Parliament*, L. 21; Foster, Cr. L. 389. They should, however, contain so much certainty as to enable a party to put himself on the proper defence, and in case of an acquittal to avail himself of it as a bar to another impeachment. Additional articles may perhaps be exhib-

ited at any stage of the proceedings; Rawle, Const. 216.

The answer to articles of impeachment, need not observe great strictness of form; and it may contain arguments as well as facts. It is usual to give a full and particular answer to each article of the accusation; Story, Const. 5th ed. § 810; Jeff. Man. § 53. See IMPEACHMENT.

ARTICLES IMPROBATORY. In Scotch Law. Articulate averments setting forth the facts relied upon. Bell, Dict.

That part of the proceedings which corresponds to the charge in our English bill in chancery to set aside a deed. Paterson, Comp. The answer is called articles approbatory.

ARTICLES OF PARTNERSHIP. A written agreement by which the parties enter into a partnership upon the conditions therein mentioned.

These are to be distinguishd from agreements to enter into a partnership at a future time. By articles of partnership a partnership is actually established; while an agreement for a partnership is merely a contract, which may be taken advantage of in a manner similar to other contracts. Where an agreement to enter into a partnership is broken, an action lies *at law* to recover damages; and *equity*, in some cases, to prevent frauds or manifestly mischievous consequences, will enforce specific performance; Story, Partn. § 109; 3 Atk. 383; 1 Swanst. 513, n.; Lindl. Partn. 2d Am. ed. *475 *et seq.*; 17 Beav. 294; but not when the partnership may be immediately dissolved; 9 Ves, Ch. 360. Specific performance was decreed in 40 Miss. 488; 5 Munf. 492; and refused in 4 Md. 60. See 8 Beav. 129; 30 *id.* 376.

The instrument should contain *the names* of the contracting parties severally set out; the *agreement* that the parties do by the instrument enter into a partnership, expressed in such terms as to distinguish it from a covenant to enter into partnership at a subsequent time; the *date*, and necessary *stipulations*, some of the more common of which follow.

The *commencement* of the partnership should be expressly provided for. The date of the articles is the time, when no other time is fixed by them; 5 B. & C. 108; Lindl. Part. 2d Am. ed. *201, *412; 31 Ala. 123; 20 Me. 413; 10 Paige 82; if not dated, parol evidence is admissible to show that they were not intended to take effect at the time of their execution; 17 C. B. 625.

The *duration* of the partnership should be stated. It may be for life, for a limited period of time, or for a limited number of adventures. When a term is fixed, it endures until that period has elapsed; when no term or limitation is fixed, the partnership may be dissolved at the will of either partner; 17 Ves. 298; 3 Ross. L. C. Com. Law, 611; 51 Ind. 478; 76 N. Y. 373; Lindl. Partn. 2d Am. ed. *121, *413; see 150 Pa. 20. Dissolution follows immediately and inevitably on the death of a partner; Pars. Partn. § 342; 31 Minn. 186; but provision may be made for the succession of the executors or administrators or a child or children of a deceased partner to his place and rights; 2 How. 560; 8 Am. L. Rev. 641; 12 La. Ann. 626; 9 Ves. Ch. 500; 7 Pet. 586. Where a provision is made for a succession by appointment, and the partner dies without appointing, his executors or administrators may continue the partnership or not, at their option; 1 McClel. & Y. 579; Coll. Ch. 157. A continuance of the partnership beyond the period fixed for its termination, in the absence of circumstances showing intent, will be implied to be upon the basis of the old articles; 5 Mas. 176, 185; 15 Ves. Ch. 218; 1 Moll. Ch. 466; but it will be considered as at will, and not as renewed for a further definite period; 17 Ves. 307.

Persons dealing with a partnership are not bound by any stipulation as to its dissolution or continuance, unless they have actual notice before completing contracts with the firm; 78 Ga. 168; 148 Mass. 498.

The *nature* of the business and the *place* of carrying it on should be very carefully and exactly specified. Courts of equity will grant an injunction when one or more of the partners attempt, against the wishes of one or more of them, to extend such business beyond the provision contained in the articles; Story, Partn. § 193; Lindl. Partn. 2d Am. ed. *412; 32 N. H. 9; 4 Johns. Ch. 573; Pars. Partn. § 149.

The *name* of the firm should be ascertained. The members of the partnership are required to use the name thus agreed upon, and a departure from it will make them individually liable to third persons or to their partners, in particular cases; Lindl. Partn. 2d Am. ed. *413; 2 Jac. & W. 266; 9 Ad. & E. 314; Story, Partn. §§ 102, 136, 142, 202; 45 Barb. 269.

The *management* of the business, or of some particular branch of it, is frequently intrusted by stipulation to one partner, and such partner will be protected in his rights by equity; Story, Partn. §§ 172, 182, 193, 202; and see La. Civ. Code art. 2838; Pothier, *Société*, n. 71; Dig. 14, 1, 1, 13; Pothier, Pand. 14, 1, 4; or it may be to a majority of the partners, and should be where they are numerous. See PARTNERS.

The *manner* of furnishing capital and stock should be provided for. When a partner is required to furnish his proportion of the stock at stated periods, or pay by instalments, he will, where there are no stipulations to the contrary, be considered a debtor to the firm; Story, Partn. § 203; 1 Swanst. 89. As to the fulfilment of some conditions precedent by a partner, such as the payment of so much capital, etc., see Lindl. Partn. 2d Am. ed. *416; 1 Wms. Saund. 320 *a*. Sometimes a provision is inserted that real estate and fixtures belonging to the firm shall be considered, as between the partners, not as partnership but as several property; 1 App. Cas. 181; 42 Ark. 390; 76 Ind. 157; 36 N. J. Eq. 569. In cases of bankruptcy, this property will be treated as the separate property of the partners; Collyer, Partn. 6th ed. §§ 905, 909; 5 Ves. 189; 3 Madd. 63.

The *apportionment* of profits and losses should be provided for. The law distributes these equally, in the absence of controlling circumstances, without regard to the capital furnished by each; Pars. Part. 172; Story,

Partn. 24; 3 Kent 28; 6 Wend. 263. But see 7 Bligh 432; 5 Wils. & S. 16; 20 Beav. 98; 15 Ohio 399.

Very frequently the articles provide for the division of profits and determine the proportion in which each partner takes his share. There is nothing to prevent their making any bargain on this subject that they see fit to make; Pars. Partn. § 172.

Periodical accounts of the property of the partnership may be stipulated for. These, when settled, are at least *primâ facie* evidence of the facts they contain; 7 Sim. 239. It is proper to stipulate that an account settled shall be conclusive; Lindl. Partn. 2d Am. ed. *420, *421.

The *expulsion* of a partner for gross misconduct, bankruptcy, or other specified causes may be provided for; and the provision will govern, when the case occurs. See 10 Hare 493; L. R. 9 Ex. 190; Pars. Partn. 169, n; 28 Pa. 304.

A *settlement* of the affairs of the partnership should always be provided for. It is generally accomplished in one of the three following ways: *first*, by turning all the assets into cash, and, after paying all the liabilities of the partnership, dividing such money in proportion to the several interests of the parties; or, *second*, by providing that one or more of the partners shall be entitled to purchase the shares of the others at a valuation; 20 Beav. 442; or, *third*, that all the property of the partnership shall be appraised, and that after paying the partnership debts it shall be divided in the proper proportions. The first of these modes is adopted by courts of equity in the absence of express stipulations; Lindl. Partn. 2d Am. ed. (Ewell) *429, *430; Story, Partn. § 207; 8 Sim. 529; but see 6 Madd. 146; 3 Hare 581. Where partnership accounts have been fully settled, an express promise by one to pay the balance due to another is not necessary; 78 Cal. 225.

Submission of disputes to arbitration is provided for frequently, but such a clause is nugatory, as no action will lie for a breach; Story, Partn. § 215; and (except in England, under Com. L. Proc. Act, 1854) it is no defence to an action relative to the matter to be referred. Pars. Partn. 170; see Lindl. Partn. 2d Am. ed. (Ewell) *451. Where the settlement of partnership accounts is made by arbitrators without fraud, it will not be disturbed; 13 S. W. Rep. (Ky.) 109.

The article should be executed by the parties, but need not be under seal. See PARTIES; PARTNERS; PARTNERSHIP.

ARTICLES OF THE PEACE. A complaint made before a court of competent jurisdiction by one who has just cause to fear that an injury to his person or property is about to be committed or caused by the party complained of, alleging the causes of his belief, and asking the protection of the court.

The object of articles is to compel the party complained of to find sureties of the peace. This will be granted when the articles are on oath; 1 Str. 527; 12 Mod. 243; 12 Ad. & E. 599; unless the articles on their face are false; 2 Burr. 806; 3 *id.* 1922; or are offered under suspicious circumstances; 2 Str. 835; 1 W. Bla. 233. Their truth cannot be controverted by affidavit or otherwise; but exception may be taken to their sufficiency, or affidavits for reduction of the amount of bail tendered; 2 Str. 1202; 13 East 171.

ARTICLES OF ROUP. In Scotch Law. The conditions under which property is offered for sale at auction. Paterson, Comp.

ARTICLES OF SET. In Scotch Law. An agreement for a lease. Paterson, Comp.

ARTICLES OF WAR. The code of laws established for the government of the army.

The term is used in this sense both in England and the United States. The term also includes the code established for the government of the navy. See Rev. Stat. U. S. § 1342, as to the army, and § 1624, as to the navy; MARTIAL LAW.

ARTICULATE ADJUDICATION. In Scotch Law. Separate adjudication for each of several claims of a creditor.

It is so made in order that a mistake in accumulating one debt need not affect the proceedings on other claims which are correctly accumulated.

ARTIFICER. One who buys goods in order to reduce them by his own art, or industry, into other forms, and then to sell them. 3 T. B. Mon. 335.

The term applies to those who are actually and personally engaged or employed to do mechanical work or the like, and not to those taking contracts for labor to be done by others; 7 El. & Bl. 135.

ARTIFICIAL. Having its existence in the given manner by virtue of or in consideration only of the law.

Artificial person. A body, company, or corporation considered in law as an individual.

ARURA. Day's work at ploughing.

AS (Lat.). A pound.

It was composed of twelve ounces. The parts were reckoned (as may be seen in the law, *Servum de hæredibus*, Inst. lib. xiii. *Pandect*) as follows: *uncia*, 1 ounce; *sextans*, 2 ounces; *triens*, 3 ounces; *quadrans*, 4 ounces; *quincunx*, 5 ounces; *semis*, 6 ounces; *septunx*, 7 ounces; *bes*, 8 ounces; *dodrans*, 9 ounces; *dextans*, 10 ounces; *deunx*, 11 ounces.

The whole of a thing; *solidum quid.*

Thus, *as* signified the whole of an inheritance: so that an heir *ex asse* was an heir of the whole inheritance. An heir *ex triente*, *ex semisse*, *ex besse*, *ex deunce*, was an heir of *one-third*, *one-half*, *two-thirds*, or *eleven-twelfths*.

ASCENDANTS (Lat. *ascendere*, to ascend, to go up to, to climb up to). Those from whom a person is descended, or from whom he derives his birth, however remote they may be.

Every one has two ascendants at the first degree, his father and mother; four at the second degree, his paternal grandfather and grandmother, and his maternal grandfather and grandmother; eight at the third. Thus, in going up we ascend by various lines, which fork at every generation. By this prog-

ress sixteen ascendants are found at the fourth degree; thirty-two, at the fifth; sixty-four, at the sixth; one hundred and twenty-eight, at the seventh, and so on. By this progressive increase, a person has at the twenty-fifth generation thirty-three million five hundred and fifty-four thousand four hundred and thirty-two ascendants. But, as many of the ascendants of a person have descended from the same ancestor, the lines which were forked reunite to the first common ancestor, from whom the other descends; and this multiplication, thus frequently interrupted by the common ancestors, may be reduced to a few persons.

ASCRIPTITIUS. One enrolled; foreigners who have been enrolled. Among the Romans, ascriptitii were foreigners who had been naturalized, and who had in general the same rights as natives. Nov. 22, c. 17; Cod. 11, 47. *Ascriptitii* is the plural.

ASPHYXIA. In Medical Jurisprudence. Suspended animation produced by non-conversion of the venous blood of the lungs into arterial.

This term applies to the situation of persons who have been asphyxiated by submersion or drowning; by breathing mephitic gas; by suspension or strangulation. In a legal point of view, it is always proper to ascertain whether the person who has thus been deprived of his senses is the victim of another, whether the injury has been caused by accident, or whether it is the act of the sufferer himself. See 1 Hamilton, Leg. Med. 113, 120; 1 Wh. & St. Med. Jur. 534.

ASPORTATION (Lat. *asportatio*). The act of carrying a thing away; the removing a thing from one place to another.

ASSASSINATION. Murder committed for hire, without provocation or cause of resentment given to the murderer by the person upon whom the crime is committed. Erskine, Inst. b. 4, t. 4, n. 45.

A murder committed treacherously, with advantage of time, place, or other circumstances.

ASSAULT. An unlawful offer or attempt with force or violence to do a corporeal hurt to another.

Force unlawfully directed or applied to the person of another under such circumstances as to cause a well-founded apprehension of immediate peril. Bish. Cr. Law 548.

Aggravated assault is one committed with the intention of committing some additional crime. *Simple assault* is one committed with no intention to do any other injury.

Assault is generally coupled with battery, and for the excellent practical reason that they generally go together; but the assault is rather the initiation or offer to commit the act of which the battery is the consummation. An assault is included in every battery; 1 Hawk. Pl. Cr. c. 62, § 1.

Where a person is only *assaulted*, still the form of the declaration is the same as where there has been a *battery*, "that the defendant assaulted, and beat, bruised, and wounded the plaintiff;" 1 Saund. 6th ed. 14 *a*. The word "ill-treated" is frequently inserted: and if the assaulting and ill-treating are justified in the plea, although the beating, bruising, and wounding are not, yet it is held that the plea amounts to a justification of the battery; 7 Taunt. 689; 1 J. B. Moore 420. So where the plaintiff declared, in trespass, for assaulting him, seizing and laying hold of him, and imprisoning him, and the defendant pleaded a justification under a writ of capias, it was held, that the plea admitted a battery; 3 M. & W. 28. But where in trespass for assaulting the plaintiff, and throwing water upon him, and also wetting and damaging his clothes, the defendant pleaded a justification as to assaulting the plaintiff and wetting and damaging his clothes, it was held, that, though the declaration alleged a battery, yet the matter justified by the plea did not amount to a battery; 8 Ad. & E. 602; 3 Nev. & P. 564.

Any act causing a well-founded apprehension of immediate peril from a force already partially or fully put in motion is an assault; 4 C. & P. 349; 9 *id.* 483, 626; 110 Mass. 407; 1 Ired. 125, 375; 11 *id.* 475; 1 S. & R. 347; 3 Strobh. 137; 9 Ala. 79; 2 Wash. C. C. 435; unless justifiable. But if justifiable, then it is not necessarily either a battery or an assault. Whether the act, therefore, in any particular case is an assault and battery, or a gentle imposition of hands, or application of force, depends upon the question whether there was justifiable cause. If, therefore, the evidence fails to show the act to have been unjustifiable, or leaves that question in doubt, the criminal act is not proved, and the party charged is entitled to an acquittal; 2 Metc. Mass. 24, 25; 1 Gray 63, 64. Any threatening gesture, showing in itself, or by words accompanying it, an immediate intention coupled with ability to commit a battery, is an assault; 25 Tex. App. 244; 85 Ala. 11; 43 Mich. 527; 1 Wash. 435; but an approach with gesticulations and menaces was held not an assault; 88 Va. 1017; words are not legal provocation to justify an assault and battery; 17 S. E. Rep. (S. C.) 691; 64 Vt. 212. It is an assault where one strikes at another with a stick without hitting him; 1 Hawk. Pl. Cr. 110. Shooting into a crowd is an assault upon each member of the crowd; 49 Ark. 156; an officer is guilty of an assault in shooting at a fleeing prisoner, who had been arrested for misdemeanor, whether he intended to hit the prisoner or not; 106 N. C. 728.

If a master take indecent liberties with a female scholar, without her consent, though she does not resist, it is an assault; R. & R. Cr. Cas. 130; 6 Cox, Cr. Cas. 64; 9 C. & P. 722; 6 Tex. App. 249. So, if a medical practitioner unnecessarily strips a female patient naked, under the pretence that he cannot otherwise judge of her illness, it is an assault, if he assisted to take off her clothes; 1 Moody 19; 1 Lew. 11. Where a medical man had connection with a girl fourteen years of age, under the pretence that he was thereby treating her medically for the complaint for which he was attending her, she making no resistance solely from the *bonâ fide* belief that such was the case, it was held that he was properly convicted of an assault; 1 Den. Cr. Cas. 580; 4 Cox, Cr. Cas. 220; Templ. & M. 218. But an attempt to commit the misdemeanor of having carnal knowledge of a girl between ten and twelve years old, is not an assault, by reason of the consent of the girl; 8 C. & P. 574, 589; 9 *id.* 213; 2 Mood. 123; 7 Cox, Cr. Cas. 145. And see 1 Den. Cr. Cas. 377; 2 C. & K. 957; 3 Cox, Cr. Cas. 266. But it has been held that one may be convicted of an assault upon the person of a girl under ten years of age with intent to commit a

rape, whether she consented or resisted; 70 Cal. 467. One is not guilty of an assault if he takes hold of a woman's hand and puts his arm around her shoulder, unless he does so without her consent or with an intent to injure her; 21 Tex. App. 454. One is guilty of assault and battery who delivers to another a thing to be eaten, knowing that it contains a foreign substance and concealing the fact, if the other, in ignorance, eats it and is injured; 114 Mass. 203; but see 2 Mood. & R. 531; 2 C. & K. 912; 1 Cox, Cr. Cas. 281; 50 Barb. 128. An unlawful imprisonment is also an assault; 1 Hawk. Pl. Cr. c. 62, § 1. A negligent attack may be an assault; Whart. Cr. L. 9th ed. § 603, n. See Steph. Dig. Cr. L. 5th ed. § 243.

A teacher has a right to punish his pupils for misbehavior; but this punishment must be reasonable and proportioned to the gravity of the pupil's misconduct; and must be inflicted in the honest performance of the teacher's duty, not with the mere intent of gratifying his private ill-will or malice. If it is unreasonable and excessive, is inflicted with an improper weapon, or is disproportioned to the offence for which it is inflicted, the teacher will be guilty of an assault; 113 Ind. 276; 19 N. C. 365; 113 N. C. 635; s. c. 18 S. E. Rep. 256; 23 S. E. Rep. (N. C.) 431; 25 S. W. Rep. (Tex.) 125. The punishment must be for some specific offence which the pupil has committed, and which he knows he is punished for; 50 Ia. 145. If a person over the age of twenty-one voluntarily attends school, he thereby waives any privilege which his age confers, and may be punished for misbehavior as any other pupils; 45 Ia. 248. A teacher has no right, however, to punish a child for neglecting or refusing to study certain branches from which the parents of the child have requested that it might be excused, or which they have forbidden it to pursue, if those facts are known to the teacher. The proper remedy in such a case is to exclude the pupil from the school; 50 Ia. 145; 35 Wis. 59.

The teacher has in his favor the presumption that he has only done his duty, in addition to the general presumption of innocence; 113 Ind. 276; 50 Ia. 145; and in determining the reasonableness of the punishment, the judgment of the teacher as to what was required by the situation should have weight, as in the case of a parent under similar circumstances. The reasonableness must, therefore, be determined upon the facts of each particular case; 113 Ind. 276. When a proper weapon has been used, the character of the chastisement, as regards its cruelty or excess, must be determined by considering the nature of the offence for which it was inflicted, the age, physical and mental condition, as well as the personal attributes of the pupil, and the deportment of the teacher; 113 Ind. 276; 14 Tex. App. 61; and since the legitimate object of chastisement is to inflict punishment by the pain which it causes, as well as the degradation it implies, it does not follow that chastisement was cruel or excessive because pain was caused or abrasions of the skin resulted from the use of a switch by the teacher; 113 Ind. 276.

A teacher will be liable for prosecution, if he inflict such punishment as produces or threatens lasting mischief, or if he inflict punishment, not in the honest performance of duty, but under the pretext of duty to gratify malice; 19 N. C. 365; 23 S. E. Rep. (N. C.) 431. But a charge to the jury that "malice means bad temper, high temper, quick temper; and if the injury was inflicted from malice, as above defined, then they should convict the defendant," is erroneous; for malice may exist without temper, and may not exist although the act be done while under the influence of temper, bad, high or quick. General malice, or malice against all mankind, "is wickedness, a disposition to do wrong, a black and diabolical heart, regardless of social duty, and fatally bent on mischief." Particular malice is "ill-will, grudge, a desire to be revenged on a particular person." This distinction should be explained to the jury, and the term "malice" should be accurately defined; 23 S. E. Rep. (N. C.) 431. See BATTERY; CORRECTION.

ASSAY. See ANNUAL ASSAY.

ASSAY OFFICE. An establishment, or department, in which the manipulations attending the assay of bullion and coins are conducted.

Assay offices are established at New York, Boise City, Idaho, and Charlotte, North Carolina (R. S. §§ 3495 *et seq.*); and also at Helena, Mont. (18 Stat. L. 45), and St. Louis, Mo. (21 Stat. L. 322). Sec. 3553 provides that the business of the United States assay office at New York shall be in all respects similar to that of the mints, except that bars only, and not coin, shall be manufactured therein; and no metals shall be purchased for minor coinage. All bullion intended by the depositor to be converted into coins of the United States, and silver bullion purchased for coinage, when assayed, parted, and refined, and its net value certified, shall be transferred to the mint at Philadelphia, under such directions as shall be made by the Secretary of the Treasury, at the expense of the contingent fund of the mint, and shall be there coined, and the proceeds returned to the assay office.

Sec. 3558 provides that the business of the mint of the United States at Denver, while conducted as an assay office, that of the United States assay office at Boise City, and that of any other assay offices hereafter established, shall be confined to the receipt of gold and silver bullion, for melting and assaying, to be returned to depositors of the same, in bars, with the weight and fineness stamped thereon.

The assay office is also subject to the laws and regulations applied to the mint; R. S. § 3562.

ASSECURARE (Lat.). To assure; to make secure by pledges, or any solemn interposition of faith. Spelman, Gloss.; Cowel.

ASSECURATION. In European Law. Assurance; insurance of a vessel, freight, or cargo. Opposition to the decree of Grenoble. Ferrière.

ASSECURATOR. An insurer.

ASSEDATION. In Scotch Law. An old term, used indiscriminately to signify a lease or feu-right. Bell's Dict.; Erskine, Inst. lib. 2, tit. 6, § 20.

ASSEMBLY. The meeting of a number of persons in the same place.

Political assemblies are those required by the constitution and laws: for example, the general assembly, which includes the senate and house of representatives. The meeting of the electors of the president and vice-president of the United States may also be called an assembly.

Popular assemblies are those where the people meet to deliberate upon their rights: these are guaranteed by the constitution. U. S. Const. Amend. art 1.

Unlawful assembly is the meeting of three or more persons to do an unlawful act, although they may not carry their purpose into execution. Cl. Cr. Law. 341.

It differs from a riot or rout, because in each of the latter cases there is some act done besides the simple meeting. See 1 Ired. 30; 9 C. & P. 91, 431; 5 *id.* 154; 1 Bish. Cr. Law § 535; 2 *id.* §§ 1256, 1259.

ASSENT. Approval of something done. An undertaking to do something in compliance with a request.

In strictness, *assent* is to be distinguished from *consent*, which denotes a willingness that something about to be done, be done; *acceptance*, compliance with, or receipt of, something offered; *ratification*, rendering valid something done without authority; and *approval*, an expression of satisfaction with some act done for the benefit of another beside the party approving. But in practice the term is often used in the sense of acceptance and approval. Thus, an offer is said to be assented to, although properly an offer and acceptance complete an agreement. It is apprehended that this confusion has arisen from the fact that a request, assent, and concurrence of the party requesting complete a contract as fully as an offer and acceptance. Thus, it is said there must be a request on one side, and assent on the other, in every contract; 5 Bingh. N. C. 75; and this assent becomes a promise enforceable by the party requesting, when he has done anything to entitle him to the right. Assent thus becomes in reality (so far as it is *assent* merely, and not *acceptance*) an offer made in response to a request. Assent and approval, as applied to acts of parliament and of congress, have become confounded, from the fact that the bills of parliament were originally requests from parliament to the king. See 1 Bla. Com. 183.

Express assent is that which is openly declared. *Implied assent* is that which is presumed by law.

Unless express dissent is shown, acceptance of what it is for a person's benefit to take, is presumed, as in the case of a conveyance of land; 2 Ventr. 201; 3 Mod. 296; 3 Lev. 284; 3 B. & Ald. 31; 1 Binn. 502; 5 S. & R. 523; 14 *id.* 296; 12 Mass. 461; 2 Hayw. 234; 4 Day 395; 20 Johns. 184; 15 Wend. 656; 4 Halst. 161; 6 Vt. 411; the assent (or acceptance) of the grantee to the delivery of a deed by a person other than the grantor, vests the title in him from the time of the delivery by the grantor to that third person; 9 Mass. 307; 8 Metc. Mass. 436; 9 Ill. 176; 5 N. H. 71; 4 Day 66; 20 Johns. 187; 2 Ired. Eq. 557; 5 B. & C. 671; a devise which draws after it no charge or risk of loss, is presumed to have been accepted by the devisee; 17 Mass. 73; 3 Munf. 345; 4 *id.* 332; 8 Watts 9. See 1 Wash. C. C. 70.

Assent must be to the same thing done or offered in the same sense; 1 Sumn. C. C. 218; 3 Johns. 534; 7 *id.* 470; 18 Ala. 605; 3 Cal. 147; 4 Wheat. 225; 5 M. & W. 575; it must comprehend the whole of the proposition, must be exactly equal to its extent and provisions, and must not qualify them by any new matter; 5 M. & W. 535; 4 Whart. 369; 3 Wend. 459; 11 N. Y. 441; 1 Metc. Mass. 93; 1 Pars. Contr. 400.

In general, when an assignment is made to one for the benefit of creditors, the assent of the assignee will be presumed; 1 Binn. 502, 518; 6 W. & S. 339; 8 Leigh 272, 281. But see 24 Wend. 280; 12 Wis. 243.

ASSESS. To rate or fix the proportion which every person has to pay of any particular tax.

To tax.

To adjust the shares of a contribution by several towards a common beneficial object according to the benefit received.

To fix the value of; to fix the amount of.

ASSESSMENT. Determining the value of a man's property or occupation for the purpose of levying a tax.

Determining the share of a tax to be paid by each individual.

Laying a tax.

Adjusting the shares of a contribution by several towards a common beneficial object according to the benefit received.

The term is used in this latter sense in New York, distinguishing some kinds of local taxation, whereby a peculiar benefit arises to the parties, from general taxation; 11 Johns. 77; 3 Wend. 263; 4 Hill 76; 4 N. Y. 419.

Of Damages. Fixing the amount of damages to which the prevailing party in a suit is entitled.

It may be done by the court through its proper officer, the clerk or prothonotary, where the assessment is a mere matter of calculation, but must be by a jury in other cases. See DAMAGES.

In Insurance. An apportionment made in general average upon the various articles and interests at risk, according to their value at the time and place of being in safety, for contribution for damage and sacrifices purposely made, and expenses incurred for escape from impending common peril. 2 Phill. Ins. c. xv.

It is also made upon premium notes given by the members of mutual fire insurance companies, constituting their capital, and being a substitute for the investment of the paid up stock of a stock company; the liability to such assessments being regulated

by the charter and the by-laws; May, Ins. § 549; Beach, Ins. Law 10; 14 Barb. 374; 9 Cush. 140; 13 Minn. 135; 36 N. H. 252; 15 Abb. Pr. 66; 136 Pa. 499. A member of a mutual insurance company, who has paid something on a premium note, can be assessed for further losses to the face of the note only; 82 Wis. 488. The right to assess is strictly construed, the notes being merely conditional promises to pay; 40 Mo. 39; 19 Ia. 502; 23 Barb. 656; May, Ins. § 557.

ASSESSORS. Those appointed to make assessments.

In Civil and Scotch Law. Persons skilled in law, selected to advise the judges of the inferior courts. Bell, Dict.; Dig. 1. 22; Cod. 1. 51.

ASSETS (Fr. *assez*, enough).

All the stock in trade, cash, and all available property belonging to a merchant or company.

The property in the hands of an heir, executor, administrator, or trustee, which is legally or equitably chargeable with the obligations which such heir, executor, administrator, or other trustee is, as such, required to discharge.

Assets enter mains. Assets in hand. Such property as at once comes to the executor or other trustee, for the purpose of satisfying claims against him as such. *Termes de la Ley.*

Equitable assets. Such as can be reached only by the aid of a court of equity, and which are to be divided, *pari passu*, among all the creditors; 2 Fonblanque 401; Willis, Trust. 118.

Legal assets. Such as constitute the fund for the payment of debts according to their legal priority.

Assets per descent. That portion of the ancestor's estate which descends to the heir, and which is sufficient to charge him, as far as it goes, with the specialty debts of his ancestors; 2 Williams, Ex. 7th Am. ed. *1553.

Personal assets. Goods and personal chattels to which the executor or administrator is entitled.

Real assets. Such as descend to the heir, as an estate in fee-simple.

In the United States, generally, by statute, all the property of the deceased, real and personal, is liable for his debts, and, in equity, is to be applied as follows, when no statute prescribes a different order of application, exhausting all the assets of each class before proceeding to the next: *First*, the personal estate not specifically bequeathed; *second*, real estate devised or ordered to be sold for the payment of debts; *third*, real estate descended but not charged with debts; *fourth*, real estate devised, charged generally with the payment of debts; *fifth*, general pecuniary legacies *pro rata; sixth*, real estate devised, not charged with debts; 4 Kent 421; 2 Wh. & T. Lead. Cas. 72.

With regard to the distinction between realty and personalty in this respect, growing crops go to the administrator; 7 Mass. 34; 6 N. Y. 597; 135 Ill. 257; he is entitled to a crop of cotton, the cultivation of which was practically completed at intestate's death, although it was harvested and sold by the heirs; 95 Ala. 304. See 96 Ala. 536; so do nurseries, though not trees in general; 1 Metc. Mass. 423; 4 Cush. 380; as do bricks in a kiln; 22 Pick. 110; so do buildings held as personal property by consent of the land-owner; 9 Gill & J. 171; so do chattels real, as interests for years and mortgages; and hence the administrator must bring the action if the mortgagor die before foreclosing; 3 A. K. Marsh. 249; so does rent, provided the intestate dies before it is due; oil produced after testator's death and accruing as royalty, being the consideration for the lease, is not of the corpus but a part of the income of the estate; 138 Pa. 606. Fixtures go to the heir; 2 Smith, Lead. Cas. 99; 11 H. & G. 114; 2 Pet. 137; 6 Me. 167; 20 Wend. 628; 9 Conn. 67. And see FIXTURES as to what are fixtures. In copyrights and patents the administrator has right enough to get them extended and beyond the customary time; 4 How. 646, 712. When realty is personalty as between executor and legatees, see 78 Hun 186. Where land is sold in partition, and one dies before the proceeds are distributed, his share passes as personalty to his administrator; 54 Mo. App. 286. Land which an executor is directed to sell is personalty; 6 Ves. 520; 8 Ves. 547; 161 Pa. 444; but a naked discretionary power of sale will not work a conversion until it is exercised; 136 Pa. 14; 160 *id.* 65; 160 *id.* 441. Where the right of eminent domain has been exercised it converts the land into personalty in Pennsylvania; 3 D. R. Pa. 187; but not in New Jersey; 29 Atl. Rep. (N. J.) 592. The wife's paraphernalia he cannot take from her, in England, for the benefit of the children and heirs, but he may for that of creditors. In the United States, generally, the wearing apparel of widows and minors is retained by them, and is not assets. So among things reserved is the widow's quarantine, *i. e.* forty days of food and clothing; 5 N. H. 495; 10 Pick. 430. In Pennsylvania, a statute gives the widow and children $300 for their support in preference even to creditors.

Where the assets consist of two or more funds, and at law a part of the creditors can resort to either fund, but the others can resort to one only, courts of equity exercise the authority to marshal (as it is called) the assets, and by compelling the more favored creditors to exhaust first the fund upon which they have the exclusive claim, or, if they have been satisfied without the observance of this rule, by permitting the others to stand in their place, thus enable such others to receive more complete satisfaction; Bisph. Eq. 343; 1 Story, Eq. Jur. §§ 558 *et seq.*; Williams, Exec. 7th Am. ed. *1585; 4 Johns. Ch. 17; 1 P. Wms. 679; 1 Ves. Ch. 312; 5 Cra. 35; 1 Johns. Ch. 412; 19 Ga. 513; 1 Wis. 43.

A claim against the United States is not

a local asset in the district of Columbia; 27 Ct. of Cl. 529.

See MARSHALLING OF ASSETS. See, generally, Williams, Ex.; Toller, Ex.; 2 Bla. Com. 510, 511; 3 Viner, Abr. 141; 11 *id.* 239; Gordon, Decedents; Ram, Assets.

ASSEVERATION. The proof which a man gives of the truth of what he says, by appealing to his conscience as a witness.

It differs from an oath in this, that by the latter he appeals to God as a witness of the truth of what he says, and invokes him, as the avenger of falsehood and perfidy, to punish him if he speak not the truth. See AFFIRMATION; OATH.

ASSIGN. To make or set over to another. Cowel; 2 Bla. Com. 326; 5 Johns. 391.

To appoint; to select; to allot. 3 Bla. Com. 58.

To set forth; to point out; as, to assign errors. Fitzherbert, Nat. Brev. 19.

ASSIGNATION. In Scotch Law. Assignment, which see.

ASSIGNEE. One to whom an assignment has been made.

Assignee in fact is one to whom an assignment has been made in fact by the party having the right.

Assignee in law is one in whom the law vests the right: as, an executor or administrator. See ASSIGNMENT.

ASSIGNMENT (Law Lat. *assignatio*, from *assigno*,—*ad* and *signum*,—to mark for; to appoint to one; to appropriate to).

In Contracts. A transfer or making over to another of the whole of any property, real or personal, in possession or in action, or of any estate or right therein.

A transfer by writing, as distinguished from one by delivery.

The transfer of the interest one has in *lands* and *tenements*, and more particularly applied to the unexpired residue of a term or estate for life or years; Cruise, Dig. tit. xxxii. (Deed) c. vii. § 15; 2 Woodd. Lect. 170, 171; 1 Steph. Com. 11th ed. 507. The deed by which the transfer is made is also called an assignment; Comyns, Dig.; Bacon, Abr.; Viner, Abr.; La. Civ. Code, art. 2612; Angell, Assign.; 1 Am. Lead. Cas. 78, 85; 4 Cruise, Dig. 160.

What may be assigned. Every demand connected with a right of property, real or personal, is assignable. Every estate and interest in lands and tenements may be assigned, as also every present and certain estate or interest in incorporeal hereditaments, even though the interest be future, including *a term of years* to commence at a subsequent period; for the interest is vested *in præsenti*, though only to take effect *in futuro;* Perkins s. 91; Co. Litt. 46 *b*; *rent* to grow due (but not that in arrear, 8 Cow. 206); *a right of entry* where the breach of the condition *ipso facto* terminates the estate; 2 G. & J. 173; 4 Pick. 1; *a right to betterments;* 9 Me. 62; the *right to cut trees*, which have been sold on the grantor's land; Hob. 173; 1 Greenl. Ev. § 27; Cruise, Dig. tit. 1, § 45, n.; 7 N. H. 522; 6 Me. 81, 260; 18 Pick. 569; 9 Leigh 548; 11 Ad. & E. 34; a cause of action for cutting timber on another's land; 46 Wis. 118; *a right in lands* which may be perfected by *occupation;* 4 Yerg. 1; 1 Cooke 67. But no right of entry or re-entry can be assigned; 2 Yerg. 84; Littleton § 347; 2 Johns. 1; 1 Cra. 423; 1 Dev. & B. 319; nor *a naked power;* though it is otherwise where it is coupled with an interest; 2 Mod. 317.

To make an assignment valid at law, the subject of it must have an existence, actual or potential, at the time of the assignment; 7 Ohio St. 432; 15 Mees. & W. 110; 13 Metc. 17; 42 Ala. 255. But courts of equity will support an assignment not only of interests in action and contingency, but of things which have no present, actual, or potential existence, but rest in mere possibility only; 2 Story, Eq. Jur. 13th ed. §§ 1040 *b*, 1055; Fearne, Cont. Rem. 527; 20 Johns. 380; as an heir's possibility of inheritance; 4 Sneed 258; see 1 Ch. Rep. 29; 33 N. J. Eq. 614; 91 Pa. 96; 5 Wheat. 283. The assignment of personal property is chiefly interesting in regard to choses in action and as to its effect in cases of insolvency and bankruptcy. Assignments by debtors for the benefit of creditors are regulated by statute in nearly all the states of the United States. See collection of statutes in Moses, Insolv. Laws. A chose in action cannot be transferred at common law: 10 Co. 48; Litt. 266 *a;* Chit. Bills 6; Comyns, Dig. *Chancery* (2 H); 3 Cow. 623; 2 Johns. 1; 15 Mass. 388; 1 Cra. 367; 5 Wis. 17; 5 Halst. 20. But the assignee may sue in the assignor's name, and the assignment will be considered valid in equity. See *infra.*

In equity, as well as law, some choses in action are not assignable: for example, *an officer's pay*, or commission; 2 Anstr. 533; 1 Ball. & B. Ch. 387; 1 Swanst. 74; 3 Turn. & R. 459; see 13 Mass. 290; 15 Ves. Ch. 139; or *the salary of a judge;* 10 Humphr. 342; 5 Moore, P. C. C. 219; or *claims for fishing* or other bounties from the government; or *rights of action for fraud* or tort as a right of action for *assault;* or in *trover;* 12 Wend. 297 (*aliter* of a right of action in *replevin;* 24 Barb. 382); or *of the sale of fish not yet caught;* 108 Mass. 350; *a cause of action for deceit is assignable;* 44 Mo. App. 338; and it seems that all rights of action which *would survive* to the personal representatives, may be assigned; 22 Barb. 110; 7 How. 492; 34 Pa. 299; 44 N. H. 424; 7 Misc. Rep. 663; so if a right of action against a common carrier for not delivering goods; 44 N. H. 424; or for injury to goods; 87 Va. 185. An assignment of wages to be earned in the future will be upheld in equity; 80 Me. 367; but see 1 Gray 105; 2 Pa. Co. C. Rep. 465; but the assignment by a master in chancery of his unearned fees is void; 36 Fed. Rep. 147; as is the assignment by an executor of his fees before they are ascertained and fixed; 141 N. Y. 9. A cause of action for *malicious prosecution* is not assignable even

after verdict; 22 Cal. 174; 1 Pet. 193, 213; 3 E. D. Smith, 246; 22 Barb. 110; 3 Litt. 41; 9 S. & R. 244; 6 Madd. 59; 2 M. & K. 592; nor is a right to recover damages for false imprisonment; 47 Minn. 557; nor any *rights pendente lite*. Nor can *personal trusts* be assigned; 127 U. S. 379; as the *right of a master* in his apprentice; 11 B. Monr. 60; 8 Mass. 299; 8 N. H. 472; or *the duties of a testamentary guardian*; 12 N. H. 437; 1 Hill, N. Y. 375; nor a *contract* for the performance of *personal services*; 4 Litt. 9. An invention may be sold by parol; 120 N. Y. 213; every patent or interest therein is assignable; Rev. St. U. S. § 4898; an assignment of a contingent remainder for a valuable consideration, while void in law, is enforceable in equity; 110 N. C. 6. In the assignment of a chose in action it is essential that it be delivered; 84 Va. 731; a partial assignment of choses in action is good in equity, although the legal title remains in the assignor; 69 Tex. 625; the assignment of a fractional part of a claim is good, where the party who is to pay does not object; 151 Mass. 199; 142 *id.* 366.

The assignment of bills of exchange and promissory notes by general or special endorsement constitutes an exception to the law of transfer of choses in action. When negotiable (*i. e.*, made payable to order), they were made transferable by the statute of 3 & 4 Anne; they may then be transferred by endorsement; the holder can sue in his own name, and the equitable defences which might have existed between the promisor and the original promisee are cut off; Chit. Bills, Perkins' ed. 1854, 8, 11, 235, 239, n. (3) and cases cited; 11 Barb. 637, 639; Burrill, Ass. 2d ed. 3, nn. 1, 2; 26 Miss. 577; Hard. 562; where a payee endorses a note to third party adding a guaranty of payment, the contract and guaranty are assignable; 43 Minn. 466. The assignee of a bill of lading has only such rights as the consignee would have had; 81 Ga. 792; an assignee stands in the place of his assignor and takes simply his assignor's rights; 71 Md. 200.

The most extensive class of assignments are the general assignments in trust made by insolvent and other debtors for the payment of their debts. In most of the states of the United States these are regulated by state statutes.

The right of an insolvent debtor to make an assignment for the benefit of his creditors exists at common law, independent of statute, and when good in the state where executed is good in every state; 66 Tex. 372. Where the assignment is valid under the laws of one state it will pass a debt to the assignor due under contract made there with a citizen of another state, though the assignment is void in such other state; 19 Abb. N. C. 399.

An assignment takes effect upon delivery; 160 Pa. 466.

A debtor making an assignment for the benefit of his creditors may legally choose his own trustees, and the title passes out of him to them; 21 Barb. 65; 1 Binn. 514; 18 Ark. 85, 123; 24 Conn. 180; 1 Sand. Ch. 253. The assent of creditors will ordinarily be presumed; 29 Ala. N. S. 112; 4 Mass. 183, 206; 8 Pick. 113; 2 Conn. 633; 9 S. & R. 244; 8 Me. 411.

In some states the statutes provide that the assignment shall be for the benefit of all creditors equally, in others preferences are legal. Independently of bankrupt and insolvent laws, or laws forbidding preferences, priorities and preferences in favor of particular creditors are allowed. Such preference is not considered inequitable, nor is a stipulation that the creditors taking under it shall release and discharge the debtor from all further claims; 4 Mass. 206; 41 Me. 277; 9 Ind. 88; 4 Wash. C. C. 232; 13 S. & R. 132; 4 Zabr. 162; 2 Cal. 107; 16 Ill. 435; 17 Ga. 430; 2 Paine 180; 15 Johns. 571; 11 Wend. 187; 7 Md. 88, 381; 29 Ala. 266; 5 N. H. 113; 11 Wheat. 78; 8 Conn. 505; 26 Miss. 423; 6 Fla. 62; 6 R. I. 328; 1 Am. L. Cas. 71; 110 Pa. 156; 133 U. S. 670; 123 N. Y. 544; 58 Hun 602; 43 Fed. Rep. 716. See PREFERENCES.

How made. It used to be held that the instrument of assignment must be of as high a character and nature as the instrument transferred; but now a parol (usually written) assignment may transfer a deed, if the deed be at the same time delivered; 1 Dev. 354; 2 Jones 224; 13 Mass. 304; 15 *id.* 481; 26 Me. 234, 448; 17 Johns. 284, 292; 19 *id.* 342; 1 E. D. Smith 414; 5 Ad. & E. 107; 4 Taunt. 326; 1 Ves. Sen. Ch. 332, 348; 2 *id.* 6; 1 Madd. Ch. 53; 1 Harr. & J. 114, 274; 2 Ohio 56, 221; 11 Tex. 273; 26 Ala. N. S. 292. When the transfer of personal chattels is made by an instrument as formal as that required in the assignment of an interest in lands, it is commonly called a *bill of sale* (which see); 2 Steph. Com. 11th. ed. 59. See as to the distinction, 5 W. & S. 36. In most cases, however, personal chattels are transferred by mere note or memorandum, or, as in the case of negotiable paper, by mere endorsement; 3 E. D. Smith 555; 6 Cal. 247; 28 Miss. 56; 15 Ark. 491.

The *proper technical* and *operative* words in assignment are "assign, transfer, and set over;" but "give, grant, bargain, and sell," or any other words which show the intent of the parties to make a complete transfer, will work an assignment; Watkins, Conv., Preston ed. b. 2, c. ix.; 13 Sim. 469; 31 Beav. 351; 1 Ves. 331; 20 Mo. 577.

No consideration is necessary to support the assignment of a term; 1 Mod. 263; 3 Munf. 556; 2 E. D. Smith 469. Now, by the statute of frauds, all assignments of chattels *real* must be made by deed or note in writing, signed by the assigning party or his agent thereunto lawfully authorized by writing; 1 B. & P. 270. If a tenant assigns the whole or a part of an estate for a part of the term, it is a sub-lease, and not an assignment; 1 Gray 325; 2 Paige, Ch. 68; 2 Ohio 369; 1 Washb. R. P. 5th ed. *327.

Effect of. During the continuance of the assignment, the assignee is liable on all covenants running with the land, but may rid himself of such continuing liability by transfer to a mere beggar; 2 H. Bla. 133; 5 Coke 16; Ans. Contr. 232; 1 B. & P. 21; 2 Bridgman Eq. Dig. 138; 1 Vern. Ch. 87; 2 *id.* 103; 8 Ves. Ch. 95; 1 Sch. & L. 310; 1 Ball & B. 238; Dougl. 56, 183; (but a conveyance to an irresponsible person to avoid paying a ground-rent accruing on the land conveyed held not to release the original covenantor; 54 Pa. 30). By the assignment of a right all its accessories pass with it: for example, the collateral security, or a lien on property, which the assignor of a bond had, will pass with it when assigned; 1 Stockt. 592; 5 Litt. 248; 4 B. Monr. 529; 1 Pa. 454, 280; 9 Cow. 747; 2 Yerg. 84; 29 Iowa 339; 68 N. C. 225; 13 Mass. 204; 18 Pa. 294; 40 N. Y. 181; 16 Ill. 457. So, also, what belongs to the thing by the right of accession is assigned with it; 7 Johns. Cas. 90; 6 Pick. 360; 31 N. H. 562.

An assignee for the benefit of creditors takes the property assigned subject to all existing valid liens and equities against the assignor; 20 Oreg. 517.

The assignee of a chose in action in a court of law must bring the action in the name of the assignor in whose place he stands; and everything which might have been shown in defence against the assignor may be used against the assignee; 18 Eng. L. & Eq. 82; 42 Me. 221; 6 Ga. 119; 15 Barb. 506; 3 N. H. 82, 539; 2 Wash. Va. 233; 5 Mass. 201, 214; 10 Cush. 92; 28 Miss. 488; 13 Ill. 486; 1 Stockt. 146; 7 Conn. 399; 4 Litt. 435; 9 Ala. 60; 2 Cra. 342; 1 Wheat. 236; 2 Pa. 361, 463; 1 Bay 173; 1 M'Cord 219; 5 Mas. 215; 1 Paine 525; 3 McLean 147; 3 Hayw. 199; 1 Humphr. 155; 11 Md. 251; 1 Bisph. Eq. 223; but in many states the assignee of a chose in action may sue in his own name; 23 Wis. 267; 30 N. Y. 83; 46 Mo. 603; 11 Ohio 374; 9 Iowa 100; 7 Black 522; it is no objection to suit by an assignee of an account in his name that no consideration for the assignment is shown; 99 Mo. 102; and where a party assigns her interest in a suit for negligence to her attorneys by way of security, there is no reason why suit should be carried on in her name; 78 Mich. 681. In a court of equity the assignee may sue in his own name, but he can only go into equity when his remedy at law fails; 1 Ves. Ch. 331, 409; 1 Yo. & C. 481; 1 Pick. 485; 4 Rand. 392; 30 Me. 419; 2 Johns. Ch. 441; 8 Wheat. 268. Such an assignment is considered as a declaration of trust; 10 Humphr. 342; 3 P. Will. 199; 5 Pet. 597; 1 Wheat. 235; see 5 Paige, Ch. 539; 6 Cra. 335; but all the equitable defences exist; 1 Binn. 429; 8 Wheat. 268. It has been held that the assignee of a chose in action does not take it subject to equities of third persons of which he had no notice; 44 Ill. App. 516.

A valid assignment of a policy of insurance in the broadest legal sense, by consent of the underwriters, by statute, or otherwise, vests in the assignee all the rights of the assignor, legal and equitable, including that of action; but the instrument, not being negotiable in its character, is assignable only in equity, and not even so, if it has, as it sometimes has, a condition to the contrary; 3 Md. 244, 341; 8 Cush. 393; 10 *id.* 350; 28 Barb. 116; 17 N. Y. 391; 25 Ala. N. S. 353; 30 N. H. 231; 3 Sneed 565; 42 Me. 221; 26 Conn. 165; 31 Pa. 438; 18 Eng. L. & Eq. 427; 22 *id.* 590; 93 Mich. 184. Where the policy does not provide that an assignment without the consent of the company renders it void, a parol assignment is valid; 57 Hun 589. Upon transfer of a policy, in case of loss, the assignee may in some states maintain action in his own name; 105 N. C. 283; but this is usually when there is a statutory provision; and if there be none suit must be in the name of the assignor; 3 Kent, Com. 261; 1 Binn. 429. In marine policies, custom seems to have established a rule different from that of the common law, and to have made the policies transferable with the subject matter of insurance; May, Ins. § 377.

Assignments are peculiarly the objects of equity jurisdiction; 2 Bligh 171, 189; 9 B. & C. 300; 7 Wheat. 556; 4 Johns. Cas. 529, 205, 119, 129; and *bona fide* assignments will in most cases be upheld in equity courts; 8 Me. 17; Paine 525; 1 Wash. C. C. 424; 14 S. & R. 137; T. U. P. Charlt. 230; 12 Johns. 343; but champerty and maintenance, and the purchase of lawsuits, are inquired into and restrained in equity as in law, and fraud will defeat an assignment. By some of the state statutes regulating assignments, the assignee may bring an action in his own name in a court of law, but the equities in defence are not excluded. See 6 Ohio 271; 6 Yerg. 572; 3 Dana 142; 2 Pet. 239; 1 Miss. 69.

All assignments and transfers of any claim upon the United States, or of any part or share thereof, or interest therein, whatever may be the consideration therefor, are null and void, unless freely made after the allowance of such claim, the ascertainment of the amount due, and the issuance of a warrant for the payment thereof; § 3477 Rev. Stat. But this does not apply to the passing of such claims to heirs, devisees, or assignees in bankruptcy; 97 U. S. 392.

For inalienability of choses in action see 3 Harv. Law Rev. 337; as to assignment of government claims; 24 Amer. Law Rev. 442.

ASSIGNMENT OF DOWER. The act by which the share of a widow in her deceased husband's real estate is ascertained and set apart to her.

The assignment may be made *in pais* by the heir or his guardian, or the devisee or other persons seized of the lands subject to dower; 2 Penning. 521; 19 N. H. 240; 23 Pick. 80, 88; 4 Ala. N. S. 160; 4 Me. 67; 2 Ind. 388; Tudor, Lead. Cas. 51; or it may be made after a course of judicial proceedings, where a voluntary assignment is refused. In this case the assignment will be

made by the sheriff, who will set off her share by metes and bounds; 2 Bla. Com. 136; 1 Washb. R. P. 229. The assignment should be made within forty days after the death of the husband, during which time the widow shall remain in her husband's mansion-house. See 20 Ala. N. S. 662; 7 T. B. Monr. 337; 5 Conn. 462; 1 Washb. R. P. 222, n. 227. The share of the widow is usually one-third of all the real estate of which the husband has been seized during coverture; and no writing or livery is necessary in a valid assignment, the dowress being *in*, according to the view of the law, of the seisin of her husband. The assignment of dower in a house may be of so many rooms, instead of a third part of the house; 88 Va. 529. The remedy of the widow, when the heir or guardian refuses to assign dower, is by a writ of dower *unde nihil habet;* 4 Kent 63. A conveyance by a widow of her right of dower before it has been allotted does not vest the legal title in the grantee, and she is a necessary party to enforce the allotment; 16 S. E. Rep. (S. C.) 416; see 109 N. C. 674. If the guardian of a minor heir assign more than he ought, the heir on coming of age may have the writ of admeasurement of dower; 2 Ind. 336; 1 Pick. 314; Co. Litt. 34, 35; Fitzh. Nat. Br. 148; Finch 314; Stat. Westm. 2 (13 Edw. I.) c. 7; 1 Washb. R. P. 222–250; 1 Kent 63, 69.

ASSIGNMENT OF ERRORS. In Practice. The statement of the case of the plaintiff in error, on a writ of error, setting forth the errors complained of.

It corresponds with the declaration in an ordinary action; 2 Tidd, Pr. 1168; 3 Steph. Com. 11th ed. 623. All the errors of which the plaintiff complains should be set forth and assigned in distinct terms, so that the defendant may plead to them; 18 Ala. 186; 15 Conn. 83; 4 Miss. 77.

The ruling of a trial court must be specified in the assignment, in order to question it on appeal; 131 Ind. 468; as where no errors are assigned in the record, no question is presented for the appellate court for review; 44 Ill. App. 293; 35 *id.* 571; 146 Pa. 61; 1 Colo. App. 323; 126 Ind. 544.

ASSIGNOR. One who makes an assignment; one who transfers property to another.

In general, the assignor can limit the operation of his assignment, and impose whatever condition he may think proper; but when he makes a general assignment in trust for the use of his creditors, he can impose no condition whatever which will deprive them of any right; 14 Pick. 123; 15 Johns. 151; 7 Cow. 735; nor any condition forbidden by law, as giving preference when the law forbids it.

ASSIGNS. Assignees; those to whom property shall have been transferred. Now seldom used except in the phrase, in deeds, "heirs, administrators, and assigns;" 8 R. I. 36.

ASSISA (Lat. *assidere*). A kind of jury or inquest. *Assisa vertitur in juratum.* The assize has been turned into a jury.

A writ: as, an assize of *novel disseisin*, assize of common pasture.

An ordinance: as, *assisa panis.* Spelman, Gloss.; Littleton § 234; 3 Sharsw. Bla. Com. 402.

A fixed specific time, sum, or quantity. A tribute; tax fixed by law; a fine. Spelman, Gloss.

Assisa armorum. A statute ordering the keeping arms.

Assisa cadere. To be nonsuited. Cowel; 3 Bla. Com. 402.

Assisa continuanda. A writ for the continuation of the assize to allow the production of papers. Reg. Orig. 217.

Assisa de foresta. Assize of the forest, which see.

Assisa mortis d'ancestoris. Assize of *mort d'ancestor*, which see.

Assisa panis et cerevisiæ. Assize of bread and ale; a statute regulating the weight and measure of these articles.

Assisa proroganda. A writ to stay proceedings where one of the parties is engaged in a suit of the king. Reg. Orig. 208.

Assisa ultimæ præsentationis. Assize of *darrein presentment*, q. v.

Assisa venalium. Statutes regulating the sale of certain articles. Spelman, Gloss.

ASSISORS. In Scotch Law. Jurors.

ASSISTANCE, WRIT OF. See WRIT OF ASSISTANCE.

ASSIZE (Lat. *assidere*, to sit by or near, through the Fr. *assisa*, a session).

In English Law. A writ directed to the sheriff for the recovery of immovable property, corporeal or incorporeal. Cowel; Littleton § 234.

The action or proceedings in court based upon such a writ. Magna Charta c. 12; Stat. 13 Edw. I. (Westm. 2) c. 25; 3 Bla. Com. 57, 252; Sellon, Pract. Introd. xii.

Such actions were to be tried by special courts, of which the judicial officers were justices of assize. See COURTS OF ASSIZE AND NISI PRIUS. This form of remedy is said to have been introduced by the parliament of Northampton (or Nottingham, A. D. 1176), for the purpose of trying titles to land in a more certain and expeditious manner before commissioners appointed by the crown than before the suitors in the county court of the king's justiciars in the Aula Regis. The action is properly a mixed action, whereby the plaintiff recovers his land and damages for the injury sustained by the disseisin. The value of the action as a means for the recovery of land led to its general adoption for that purpose, those who had suffered injury not really amounting to a disseisin alleging a disseisin to entitle themselves to the remedy. The scope of the remedy was also extended so as to allow the recovery of incorporeal hereditaments, as franchises, estovers, etc. It gave place to the action of ejectment, and is now abolished, having been previously almost, if not quite, entirely disused. Stat. 3 & 4 Will. IV. c. 27, § 36. Stearns, Real Act. 187.

A jury summoned by virtue of a writ of assize.

Such juries were said to be either *magna* (grand), consisting of sixteen members and serving to determine the right of property, or *parva* (petit), consisting of twelve and serving to determine the right to possession. Mirror of Just. lib. 2.

This sense is said by Littleton and Blackstone to

be the original meaning of the word; Littleton § 234; 3 Bla. Com. 185. Coke explains it as denoting originally a *session* of justices; and this explanation is sanctioned by the etymology of the word. Co. Litt. 153 *b*. It seems, however, to have been early used in all the senses here given. The recognitors of assize (the jurors) had the power of deciding, upon their own knowledge, without the examination of witnesses, where the issue was joined on the very point of the assize; but collateral matters were tried either by a jury or by the recognitors acting as a jury, in which latter case it was said to be turned into a jury (*assisa vertitur in juratum*). Booth, Real Act. 213; Stearns, Real Act. 187; 3 Bla. Com. 402. The term is no longer used, in England, to denote a jury.

The verdict or judgment of the jurors or recognitors of assize; 3 Bla. Com. 57, 59.

A court composed of an assembly of knights and other substantial men, with the baron or justice, in a certain place, at an appointed time. Grand Coutum. cc. 24, 25.

An ordinance or statute. Littleton § 234; Reg. Orig. 239. Anything reduced to a certainty in respect to number, quantity, quality, weight, measure, etc. 2 Bla. Com. 42; Cowel; Spelman, Gloss. *Assisa*. See the articles immediately following.

In Scotch Law. The jury, consisting of fifteen men, in criminal cases tried in the court of justiciary. Paterson, Comp.; Bell, Dict.

ASSIZE OF DARREIN PRESENTMENT. A writ of assize which formerly lay when a man or his ancestors under whom he claimed presented a clerk to a benefice, who was instituted, and afterwards upon the next avoidance, a stranger presented a clerk and thereby disturbed the real patron. 3 Sharsw. Bla. Com. 245; Stat. 13 Edw. I. (Westm. 2) c. 5. It has given way to the remedy by *quare impedit*.

ASSIZE OF FRESH FORCE. A writ of assize which lay where the disseisin had been committed within forty days. Fitzh. Nat. Brev. 7.

ASSIZE OF MORT D'ANCESTOR. A writ of assize which lay to recover possession of lands against an abator or his alienee.

It lay where the ancestor from whom the claimant derived title died seised; Cowel; Spelman, Gloss.; 3 Bla. Com. 185.

ASSIZE OF NOVEL DISSEISIN. A writ of assize which lay where the claimant had been lately disseised. The action must have been brought subsequent to the next preceding session of the eyre or circuit of justices, which took place once in seven years; Co. Litt. 153; Booth, Real Act. 210.

ASSIZE OF NUISANCE. A writ of assize which lay where a nuisance had been committed to the complainant's freehold.

The complainant alleged some particular fact done which worked an injury to his freehold (*ad nocumentum liberi tenementi sui*), and, if successful, recovered judgment for the abatement of the nuisance and also for damages; Fitzh. Nat. Brev. 183; 3 Bla. Com. 221; 9 Co. 55; Tr. & Ha. Pr. 1776.

ASSIZE OF U'TRUM. A writ of assize which lay for a parson to recover lands which his predecessor had improperly allowed the church to be deprived of. 3 Bla. Com. 257.

ASSIZES. Sessions of the justices or commissioners of assize.

These assizes are held twice in each year in each of the various shires of England, with some exceptions, by virtue of several commissions, for the trial of matters of fact in issue in both civil and criminal cases. They still retain the ancient name in popular language, though the commission of assize is no longer issued. 3 Steph. Com. 11th ed. 373. See ASSIZE; NISI PRIUS; COMMISSION OF ASSIZE; COURTS OF ASSIZE AND NISI PRIUS.

ASSIZES DE JERUSALEM. A code of feudal law prepared at a general assembly of lords after the conquest of Jerusalem, A. D. 1099.

It was compiled principally from the laws and customs of France. It was reduced to form by Jean d'Iblin, *Comte de Japhe et Ascalon*, about the year 1290. 1 Fournel, *Hist. des. Av.* 49; 2 Dupin, *Prof. des Av.* 674; Steph. Pl. Andr. ed. App. xi.

ASSOCIATE. An officer in each of the superior courts of common law in England whose duty it was to keep the records of his court, to attend its *nisi prius* sittings, and to enter the verdict, make up the *postea*, and deliver the record to the party entitled thereto. Abbott, Law Dict.

A person associated with the judges and clerk of assize in commission of general jail delivery. Mozley & W. Dict.

The term is frequently used of the judges of appellate courts, other than the presiding judge or chief justice.

ASSOCIATION (Lat. *ad*, to, and *sociare*—from *socius*, a companion).

The act of a number of persons in uniting together for some purpose.

The persons so joining.

In the United States this term is used to signify a body of persons united without a charter, but upon the methods and forms used by incorporated bodies for the prosecution of some enterprise; Abbott, L. Dict.

In English Law. A writ directing certain persons (usually the clerk and his subordinate officers) to associate themselves with the justices and sergeants for the purpose of taking the assizes. 3 Bla. Com. 59.

ASSOIL (spelled also *assoile*, *assoilyie*). To set free; to deliver from excommunication. Stat. 1 Hen. IV. c. 7; Cowel.

ASSUMPSIT (Lat. *assumere*, to assume, to undertake; *assumpsit*, he has undertaken).

In Contracts. An undertaking, either express or implied, to perform a parol agreement. 1 Lilly, Reg. 132.

Express assumpsit is an undertaking made orally, by writing not under seal, or by matter of record, to perform an act or to pay a sum of money to another.

Implied assumpsit is an undertaking presumed in law to have been made by a party, from his conduct, although he has not made any express promise.

The law presumes such an undertaking to have been made, on the ground that everybody is supposed to have undertaken to do what is, in point of law, just and right; 2 Burr. 1008; L. J. 11 C. P. 100; 8 C. B. 545; Leake, Contr. 75; 5 Ind. App. 183. Such an undertaking is never implied where the party has made an express promise; 2 Term 100; 10 Mass. 192; 20 Am. Jur. 7; nor ordinarily against the express declaration of the party to be charged, 1 Me. 125; 13 Pick. 165; nor will it be implied unless there be a request or assent by the defendant shown; 20 N. H. 490; 1 Greenl. Ev. § 107; though such request or assent may be inferred from the nature of the transaction; 1 Dowl. & L. 984; 15 Conn. 52; 28 Vt. 401; 2 Dutch. 49; or from the silent acquiescence of the defendant; 22 Am. Jur. 2; 14 Johns. 378; 2 Blatchf. 343; or even contrary to fact on the ground of legal obligation; 1 H. Bla. 90; 3 Campb. 298; 6 Mod. 171; 14 Mass. 227; 4 Me. 258; 20 Am. Jur. 9; 13 Johns. 480; no promise to pay is implied from a mere use of personal property with the permission of the owner; 1 Ariz. 240; and to recover for the use of one's name as an indorser, there must at least be proof of a contract therefor; 141 Pa. 58.

In Practice. A form of action which lies for the recovery of damages for the non-performance of a parol or simple contract; 7 Term 351; 3 Johns. Cas. 60.

It differs from *debt*, since the amount claimed need not be liquidated (see DEBT), and from *covenant*, since it does not require a contract under seal to support it. See COVENANT. See 4 Coke 91; 4 Burr. 1008; 14 Pick. 428; 2 Metc. 181. Assumpsit is one of the class of actions called actions upon the case, and in the older books is called action upon the case upon assumpsit. Comyns, Dig.

Special assumpsit is an action of assumpsit brought upon an express contract or promise.

General assumpsit is an action of assumpsit brought upon the promise or contract implied by law in certain cases. See 2 Sm. Lead. Cas. 14; Tr. & Ha. Pr. 1490.

The action should be brought by the party from whom the consideration moved; 1 Ventr. 318; 3 B. & P. 149, n; 14 East 582; 4 B. & C. 664; 3 Pick. 83, 92; 8 Johns. 58; 1 Pet. C. C. 169; or by the person for whose benefit it was paid; 15 Me. 285, 443; 1 Rich. S. C. 268; 5 Blackf. 179; 17 Ala. 333; against the party who made the undertaking; suing the principal to recall money paid to the agent. See 4 Burr. 1984; 1 Sumn. 277, 317. It lies for a corporation; 2 Lev. 252; 1 Campb. 466; and against it, in the United States; 7 Cra. 297; 12 Wheat. 68; 17 N. Y. 449; 30 Mo. 452; 9 Tex. 69; 8 Pick. 178; 14 Johns. 118; 2 Bay 109; 1 Ark. 180; 3 Halst. 182; 3 S. & R. 117; but not in England formerly (because a corporation could not contract by parol), unless by express authority of some legislative act, or in actions on negotiable paper; 1 Chit. Pl. *119; 4 Bingh. 77; but now corporations are liable in many cases on contracts not sealed, and generally in executed contracts, up to the extent of the benefit received; 6 A. & E. 846; L. R. 10 C. P. 409; Brice, Ultra Vires, 3d ed. 693.

Assumpsit will lie at the suit of a third party on a contract made in his favor in most of the United States; 93 U. S. 143; 85 Pa. 235 (but see 3 *id.* 330); 20 N. Y. 258 (but see 69 N. Y. 280); 85 Ill. 279; 43 Wis. 319. *Contra*, 107 Mass. 39; 15 N. H. 129. See discussion in 15 Am. L. Rev. 231, and 4 N. J. L. J. 197.

A promise or undertaking on the part of the defendant, either expressly made by him or implied by the law from his actions, constitutes the gist of the action. A sufficient consideration for the promise must be averred and shown; 21 Am. Jur. 258, 283; though it may be implied by the law; 7 Johns. 29, 321; 14 Pick. 210; as in case of negotiable promissory notes and bills, where a consideration is presumed to exist till its absence is shown; 6 Vt. 165; and see Story, Pr. Notes.

The action lies for—

Money had and received to the plaintiff's use, including all cases where one has money, or that which the parties have agreed to treat as money; 1 Greenl. Ev. § 117; 2 N. H. 333; 6 Cow. 297; 8 Gill & J. 333; 89 Ga. 799; 127 Mass. 476; 62 Ala. 46; 96 Ind. 253; in his hands which in equity and good conscience he is bound to pay over, including bank-notes; 13 East 20, 130; 17 Mass. 560; 7 Cow. 662; 32 Ala. 523; promissory notes; 9 Pick. 293; 16 Me. 285; 7 Johns. 132; 11 N. H. 218; 6 Blackf. 378; notes payable in specific articles; 7 Wend. 311; and some kinds of evidences of debt; 3 Campb. 199; 8 Wend. 641; 17 Mass. 560; 4 Pick. 71; but not goods, except under special agreement; 1 East 1; 7 S. & R. 246; 3 B. & P. 559; 1 Y. & J. 380; 1 Dougl. 117; whether delivered to the defendant for a particular purpose to which he refuses to apply it; 3 Price 68; 3 Day 252; 4 Cow. 607; 1 D. Chipm. 101; 1 Harr. Del. 446; see 2 Bingh. 7; 17 Mass. 575; or obtained by him through fraud; 1 Salk. 28; 4 Mass. 488; 4 Conn. 350; 30 Vt. 277; 4 Ind. 43; or by tortious seizure and conversion of the plaintiff's property; 10 Pick. 161; and see Cowp. 414; 1 Campb. 285; 8 Bingh. 43; or by duress, imposition, or undue advantage or other involuntary and wrongful payment; 6 Q. B. 276; 3 N. H. 508; 20 Johns. 290; 7 Me. 135; 12 Pick. 206; 26 Barb. 23; 4 Ind. 43; 24 Conn. 88; 10 Pet. 137; 28 Vt. 370; see 2 Jac. & W. 249; or for a security which turns out to be a forgery, under some circumstances; 3 B. & C. 428; 26 Conn. 23; 30 Pa. 527; 4 Ohio St. 628; or paid under a mistake of facts; 9 Bingh. 647; 15 Mass. 208; 1 Wend. 355; 6 Yerg. 483; 26 Barb. 423; 4 Gray 388; see 2 Term 648; 15 Me. 45; 20 Wend. 174; 18 B. Monr. 793; or upon a consideration which has failed; 3 B. & P. 181; 17 Mass. 1; 2 Johns. 455; 20 *id.* 24; 9 Cal. 338; 4 Gill & J. 463; 13 S. & R. 259; 4 Conn. 350; 10 Ind. 172;

15 Tex. 224; see 18 B. Monr. 523; or under an agreement which has been rescinded without partial performance; 2 C. & P. 514; 1 Vt. 159; 30 *id.* 432; 5 Ohio 286; 15 Mass. 319; 5 Johns. 85; Mart. & Y. 20, 203; 2 N. & M'C. 65; 20 N. H. 102; or on common counts for breach of warranty upon the ground that the money was paid without consideration; 74 Mich. 318; or the owner of stolen money may recover the amount against one with whom it was deposited by the thief, who, after notice, pays it to a third person; 127 Pa. 284; interest paid by mistake on judgment which did not bear interest is recoverable back; 84 Ky. 462; or where a factor disobeys instructions and sells grain, deposits made by principal may be recovered; 114 Ill. 196; or to recover purchase money under void contract for sale of lands; 49 Mo. App. 361; or to recover money advanced as prepayment of services to be rendered under contract, where contract is not performed; 58 Hun 611; or where one receives money for a specific purpose, but to which he does not apply it, keeping it for himself; 55 Hun 505.

Money paid for the use of another, including negotiable securites; 4 Pick. 4 4; 3 N. H. 366; 3 Johns. 206; 5 Rawle 91, 98; 2 Vt. 213; 6 Me. 331; see 7 Me. 355; 1 Wend. 424; 7 S. & R. 238; 11 Johns. 464; where the plaintiff can show a previous request; 20 N. H. 490; or subsequent assent; 12 Mass. 11; 1 Greenl. Ev. § 113; 53 Conn. 175; 39 Mo. App. 376; or that he paid it for a reasonable cause, and not officiously; 5 Esp. 171; 8 Term 310; 3 M. & W. 607; 16 Mass. 40; 93 Cal. 372, 376; 2 Bosw. 516; 14 Q. B. D. 811; L. R. 3 C. P. 38; Keen. Qua. Cont. 388; but a mere voluntary payment of another's debt will not make the person paying his creditor; 1 N. Y. 472; 1 Gill & J. 433, 497; 5 Cow. 603; 3 Ala. 500; 4 N. H. 138; 20 *id.* 490.

Money lent, including negotiable securities of such a character as to be essentially money; 11 Jur. 157, 289; 6 Mass. 189; 15 Pick. 212; 7 Wend. 311; 3 Gill & J. 369; 11 N. H. 218; 18 Me. 296; 3 J. J. Marsh. 37; 21 Ga. 384; see 10 Johns. 418; 1 Hawks 195; 9 Ohio 5; 16 M. & W. 449; actually loaned by the plaintiff to the defendant himself; 1 Dane, Abr. 196.

Money found to be due upon an account stated, called an *insimul computassent*, for the balance so found to be due, without regard to the nature of the evidences of the original debt; 3 B. & C. 196; 4 Price 260; 12 Johns. 227; 6 Mass. 358; 6 Metc. Mass. 137; 7 Watts 100; 11 Leigh 471; 10 N. H. 532; 149 Pa. 207.

Goods sold and delivered either in accordance with a previous request; 9 Conn. 379; 6 Harr. & J. 273; 1 Bosw. 417; 32 Pa. 506; 35 N. H. 477; 28 Vt. 666; 138 Pa. 346; or where the defendant receives and uses them; 6 J. J. Marsh. 441; 12 Mass. 185; 41 Me. 565; although tortiously; 3 N. H. 334; 1 Mo. 430, 643. See 5 Pick. 285; TROVER.

Work performed; 11 Mass. 37; 19 Ark. 671; 1 Hempst. 240; 94 Ala. 194; 42 Conn. 226; 97 N. Y. 293; and materials furnished; 7 Pick. 181; with the knowledge of the defendant; 20 Johns. 28; 1 M'Cord 22; 19 Ark. 671; so that he derives benefit therefrom; 27 Mo. 308; 11 Ired. 84; whether there be an express contract or not. Also, where there is an express promise to pay for extra work, although the contract requires that the estimate should be in writing; 96 Ala. 348. As to whether anything can be recovered where the contract is to work a specified time and the labor is performed during a portion of that time only, see 29 Vt. 219; 25 Conn. 188; 6 Ohio St. 505; 1 Sneed 622; 24 Barb. 174; 23 Mo. 228. Services performed by relatives for one in his lifetime, but in the absence of an express or implied contract for payment, cannot be recovered for after his death; 31 Ill. App. 340. One may recover for work and material on an implied assumpsit although the work is destroyed before its completion; 153 Mass. 517.

Use and occupation of the plaintiff's premises under a parol contract express or implied; 7 J. J. Marsh. 6; 13 Johns. 240; 4 Day 28; 11 Pick. 1; 4 Hen. & M. 161; 3 Harr. N. J. 214; 1 How. 153; 30 Vt. 277; 31 Ala. N. S. 412; 41 Me. 446; 3 Cal. 196; 4 Gray 329; but not if it be tortious; 2 N. & M'C. 156; 3 S. & R. 500; 10 Gill & J. 149; 6 N. H. 298; 14 Ohio 244; 10 Vt. 502; see 20 Me. 525; 76 Ala. 394; 80 Mo. 199; or where defendant enters under a contract for a deed; 6 Johns. 46; 3 Conn. 203; 4 Ala. 294; 7 Pick. 301; 2 Dana 295. The relation of landlord and tenant must exist expressly or impliedly; 1 Dutch. 293; 6 Ind. 412; 19 Ga. 313.

And in many other cases, as, for instance, for a breach of promise of marriage; 2 Mass. 73; 2 Overt. 233; to recover the purchase-money for land sold; 14 Johns. 162, 210; 20 *id.* 338; 3 M'Cord 421; and, specially, upon wagers; 2 Chit. Pl. 114; feigned issues; 2 Chit. Pl. 116; upon foreign judgments; 11 East 124; 3 Term 493; 8 Mass. 273; 5 Johns. 132; but not on a judgment obtained in a sister state; 1 Bibb 361; 19 Johns. 162; 11 Me 94; 14 Vt. 92; 2 Rawle 431; and see 2 Brev. N. C. 99; money due under an award; 9 Mass. 198; 21 Pick. 247; where the defendant has obtained possession of the plaintiff's property by a tort for which trespass or case would lie; 10 Pick. 161; 3 Dutch. 43; 5 Harr. Del. 38; 21 Ga. 526; or, having rightful possession, has tortiously sold the property; 12 Pick. 452, 120; 1 J. J. Marsh. 543; 3 Watts 277; 3 Dana 552; 1 N. H. 151; 4 Call 451; 2 Gill & J. 326; 3 Wis. 649; or converted it to his own beneficial use; 4 Term 211; 3 M. & S. 191; 13 Mass. 454; 7 Pick. 133; 1 N. H. 451; 29 Ala. 332; 41 Me. 565; 1 Hempst. 240; 3 Sneed 454; 3 Ia. 599; or where a sheriff pays money to subsequent lienor by order of court, which order is subsequently reversed, the attaching creditor may recover of the lienor; 132 N. Y. 363; or where one purchases a bond relying on the seller's recommendation that

it is good, when in fact it is worthless; 86 Mich. 261.

The action may be brought for a sum specified in the promise of the defendant, or for the definite amount of money ascertained by computation to be due, or for as much as the services, etc., were worth (called a *quantum meruit*), or for the value of the goods, etc. (called a *quantum valebant*). The value of services performed under a contract void by the statute of frauds is recoverable on *quantum meruit;* 20 Nev. 168; 40 Kans. 367; a city is liable for water supplied after termination of the contract; 110 N. C. 449; one hired to do work, but who is wrongfully stopped, may recover on *quantum meruit* what the labor is worth, regardless of its value to the other party; 82 Mich. 263.

The *form* of the action, whether general or special, depends upon the nature of the undertaking of the parties, whether it be express or implied, and upon other circumstances. In many cases where there has been an express agreement between the parties, the plaintiff may neglect the special contract and sue in general assumpsit. He may do this: *first*, where the contract is executed; 4 B. & P. 355; 5 B. & C. 628; 18 Johns. 451; 19 Pick. 496; 11 Wheat. 237; 3 T. B. Monr. 405; 7 Vt. 228; 5 Harr. & G. 45; 3 M'Cord 421; 18 Ga. 364; and is for the payment of money; 2 Munf. 344; 1 J. J. Marsh. 394; 3 T. B. Monr. 405; 1 Bibb 395; 4 Gray 292; though if a time be fixed for its payment, not until the expiration of that time; 1 Stark. 229; *second*, where the contract, though only partially executed, has been abandoned by mutual consent; 7 Term 181; 12 Johns. 274; 16 Wend. 632; 16 Me. 283; 11 Rich. S. C. 52; 7 Cal. 150; see 29 Pa. 82; or extinguished and rescinded by some act of the defendant; 11 Me 317; 2 Blackf. 167; 20 N. H. 457; see 4 Cra. 239; *third*, where that which the plaintiff has done has been performed under a special agreement, but not in the time or manner agreed, but yet has been beneficial to the defendant and has been accepted and enjoyed by him; 1 Bingh. 34; 13 Johns. 94; 14 Mass. 282; 5 Gill & J. 240; 8 Yerg. 411; 12 Vt. 625; 23 Mo. 228; 3 Ind. 59, 72; 5 Mich. 449; 3 Ia. 90; 3 Wis. 323. See 1 Greenl. Ev. § 104; 2 Sm. Lead. Cas. 14; 31 Pa. 218.

A surety who has paid money for his principal may recover upon the common counts, though he holds a special agreement of indemnity from the principal; 1 Pick. 118. But in general, except as herein stated, if there be a special agreement, special assumpsit must be brought thereon; 14 B. Monr. 177; 22 Barb. 239; 2 Wis. 34; 14 Tex. 414.

The declaration should state the contract in terms, in case of a special assumpsit; but, in general, assumpsit contains only a general recital of consideration, promise, and breach. Several of the common counts are frequently used to describe the same cause of action. Damages should be laid in a sufficient amount to cover the real amount of the claims; see 4 Pick. 194; 2 Const. S. C. 339; 4 Munf. 95; 2 N. H. 289; 1 Ill. 286; 4 Johns. 280; 5 S. & R. 519; 6 Conn. 176; 2 Bibb 429; 43 Vt. 195; 23 W. Va. 617.

Non assumpsit is the usual plea under which the defendant may give in evidence most matters of defence; Com. Dig. *Pleader* (2 G, 1). Under that plea it may be shown that no such promise as alleged was made or is implied, or that the promise if made was void *ab initio;* but defences which from their nature admit a promise and set up a subsequent performance or avoidance as, e. g, payment, set off, statute of limitations should be pleaded specially, in the absence of statutory definition of the effect of the general plea, which exists in many states. Where there are several defendants, they cannot plead the general issue severally; 6 Mass. 444; nor the same plea in bar severally; 13 Mass. 152. The plea of not guilty is defective, but is cured by verdict; 8 S. & R. 541; 4 Call 451.

See, generally, Bacon, Abr.; Comyns, Dig., *Action upon the case upon assumpit;* Dane, Abr.; Viner, Abr.; 1 Chit. Pl.; Lawes, Assump.; 1 Greenl. Ev.; Lawson, Encyc. of Pl.; & Pr.; Sm. Lead. Cas., note to Lampleigh v. Braithwaite; COVENANT; DEBT; JUDGMENT.

ASSURANCE. **In Conveyancing.** Any instrument which confirms the title to an estate.

Legal evidence of the transfer of property. 2 Bla. Com. 294.

The term *assurances* includes, in an enlarged sense, all instruments which dispose of property, whether they be the grants of private persons, or not; such are fines and recoveries, and private acts of the legislature. Eunom. Dial. 2, s. 5.

In Commercial Law. Insurance.

ASSURED. A person who has been insured by some insurance company, or underwriter, against losses or perils mentioned in the policy of insurance.

The party whom the underwriters agree to indemnify in case of loss; 1 Phill. Ins. sect. 2. He is sometimes designated in maritime insurance by description, and not by name, as in a policy "for whom it may concern;" 3 Rich. Eq. 274; 40 Me. 181; 6 Gray 192; 27 Pa. 268; 33 N. H. 9; 12 Md. 315.

ASSURER. An insurer; an underwriter.

ASSYTHEMENT. **In Scotch Law.** Damages awarded to the relative of a murdered person from the guilty party, who has not been convicted and punished. Paterson, Comp.

The action to recover it lies for the personal representatives; 26 Scott. Jur. 156; and may be brought by collateral relations; 27 Scott. Jur. 450.

ASTRICT. **In Scotch Law.** To assign to a particular mill.

Used of lands the occupants of which were bound to grind at a certain mill. Bell, Dict.; Paterson, Comp. n. 290; Erskine, Inst. 2, 9, 18, 32.

ASTRIHILTET. **In Saxon Law.** A penalty for a wrong done by one in the king's

peace. The offender was to replace the damage twofold. Spelman, Gloss.

ASYLUM. See NEUTRALITY.

ATAMITA (Lat.). **In Civil Law.** A great-great-great-grandfather's sister.

ATAVUNCULUS (Lat.). **In Civil Law.** A great-great-great-grandfather's brother.

ATAVUS. In Civil Law. The male ascendant in the fifth degree.

ATHA. In Saxon Law. (Spelled also *Atta, Athe, Atte.*) An oath. Cowel; Spelman, Gloss.

Athes, or *Athaa*, a power or privilege of exacting and administering an oath in certain cases. Cowel; Blount.

ATHEIST. One who denies or does not believe in the existence of a God.

Such persons are, at common law, incapable of giving testimony under oath, and, therefore, incompetent witnesses. Bull. N. P. 292. See 1 Atk. Ch. 21; 2 Cow. 431, 433, n.; 5 Mas. 18; 13 Vt. 362; 17 Ill. 541. To render a witness competent, there must be superadded a belief that there will be a punishment for swearing falsely, either in this world or the next; 14 Mass. 184; 1 Greenl. Ev. § 370; Tayl. Ev. 1175. See 7 Conn. 66; 18 Johns. 98; 17 Wend. 460; 2 W. & S. 262; 26 Pa. 274; 10 Ohio 121. The disability resulting from atheism has been wholly or partly removed in many of the states of the United States; 1 Greenl. Ev. § 369, n. See, generally, 1 Sm. L. Cas. 737.

ATILIUM (Lat.). Tackle; the rigging of a ship; plough-tackle. Spelman, Gloss.

ATMATERTERA (Lat.). **In Civil Law.** A great-great-great-grandmother's sister.

ATTACHMENT. Taking into the custody of the law the person or property of one already before the court, or of one whom it is sought to bring before it.

A writ for the accomplishment of this purpose. This is the more common sense of the word.

It is in its nature, but not strictly, a proceeding *in rem;* since that only is a proceeding *in rem* in which the process is to be served on the thing itself, and the mere possession of the thing, by the service of process and making proclamation, authorizes the court to decide upon it without notice to any individual whatever; Drake, Att. § 4 *a*; 39 Pa. 50; 55 Mo. 128.

Of Persons. A writ issued by a court of record, commanding the sheriff to bring before it a person who has been guilty of contempt of court, either in neglect or abuse of its process or of subordinate powers; 3 Bla. Com. 280; 4 *id.* 283; or disregard of its authority in refusing to do what is enjoined; 1 Term 266; or by openly insulting the court; Saund. Pl. Cr. 73 *b*; 4 Bla. Com. 283; 3 *id.* 17. It is to some extent in the nature of a criminal process; Stra. 441. See 5 Halst. 63; 1 Cow. 121, n.; 1 Term 266; Cowp. 594; Willes 292.

Of Property. A writ issued at the institution or during the progress of an action, commanding the sheriff or other proper officer to attach the property, rights, credits, or effects of the defendant to satisfy the demands of the plaintiff.

In General.

The original design of this writ was to secure the appearance of one who had disregarded the original summons, by taking possession of his property as a pledge; 3 Bla. Com. 280.

By an extension of this principle, in the New England states, property attached remains in the custody of the law after an appearance, until final judgment in the suit. See 7 Mass. 127.

In some states attachments are distinguished as foreign and domestic,—the former issued against a non-resident of the state, the latter against a resident. Where this distinction is preserved, the foreign attachment enures solely to the benefit of the party suing it out; while the avails of the domestic attachment may be shared by other creditors, who come into court and present their claims for that purpose.

It is a distinct characteristic of the whole system of remedy by attachment, that it is—except in some states where it is authorized in chancery—a special remedy at *law*, belonging exclusively to a court of law, and to be resorted to and pursued in conformity with the terms of the law conferring it; and where from any cause the remedy by attachment is not full and complete, a court of equity has no power to pass any order to aid or perfect it; Drake, Att. § 4.

In the New England states the attachment of the defendant's property, rights, and credits is an incident of the summons in all actions *ex contractu*. This is called Trustee Process, *q. v.* Elsewhere throughout the country the writ issues only upon cause shown by affidavit. And in most of the states its issue must be preceded by the execution by or on behalf of the plaintiff of a cautionary bond to pay the defendant all damage he may sustain by reason of the attachment. The grounds upon which the writ may be obtained vary in the different states. Wherever an affidavit is required as the basis of the attachment, it must verify the plaintiff's cause of action, and also the existence of some one or more of the grounds of attachment prescribed by the local statute as authorizing the issue of the writ.

The remedy by attachment is allowed in general only to a *creditor*. In some states, under special statutory provisions, damages arising *ex delicto* may be sued for by attachment; but the almost universal rule is otherwise. The claim of an attaching creditor, however, need not be so certain as to fall within the technical definition of a debt, or as to be susceptible of liquidation without the intervention of a jury. It is sufficient if the demand arise on contract, and that the contract furnish a standard by which the amount due could be so clearly ascertained as to enable the plaintiff to aver it in his affidavit, or the jury by their verdict to find it; 3 Cai. 323; 2 Wash. C. C. 382; 8 Gill 192; 1 Leigh 285; 11 Ala. 941; 4 Mart. La. 517; 2 Ark. 415; 3 Ind. 374; 3 Mich. 277.

In somes states an attachment may, under peculiar circumstances, issue upon a debt not yet due and payable; but in such cases the debt must possess an actual character to become due *in futuro*, and not be merely possible and dependent on a contingency, which may never happen; 15 Ala. 455; 13 La. 62; 1 Handy 442. An attachment can be sued out in equity against an absconding debtor by the accommodation maker of a negotiable note not yet due; 37 W. Va. 847.

Corporations, like natural persons, may be proceeded against by attachment; 9 N. H. 394; 15 S. & R. 173; 1 Rob. Va. 573; 47 Ga. 676; 14 La. 415; 4 Humphr. 369; 9 Mo. 421; 8 Porter 404; 22 Ill. 9. It will lie against a corporation for the conversion of its own stock; 3 Misc. Rep. 66.

Representative persons, such as heirs, executors, administrators, trustees, and others, claiming merely by right of representation, are not liable to be proceeded against, as such, by attachment; 1 Johns. Cas. 372; 4 Day 87; 3 Halst. 179; 3 Green, N. J. 183; 2 Dall. 73, 97; 1 Harp. 125; 23 Ala. 369; 1 Mart. La. 202, 380; 1 Cra. 352, 439; 41 Barb. 45; 32 Ga. 356; 38 La. Ann. 9; 11 R. I. 286.

The levy of an attachment does not change the estate of the defendant in the property attached; 1 Pick. 485; 3 McLean 354; 1 Rob. La. 443; 32 Me. 233; 6 Humphr. 151; 1 Swan 208; 3 B. Monr. 579. Nor does the attaching plaintiff acquire any property thereby; 1 Pick. 485; 3 Brev. S. C. 23; 2 S. & R. 221; 2 Harr. & J. 96; 9 N. H. 488; 2 Penning. 997. Nor can he acquire through his attachment any higher or better rights to the property attached than the defendant had when the attachment was levied, unless he can show some fraud or collusion by which his rights are impaired; 31 Me. 177.

The levy of an attachment constitutes a lien on the property or credits attached; 1 M'Cord 480; 8 Miss. 658; 16 Pick. 264; 10 Johns. 129; 3 Ark. 509; 17 Conn. 278; 14 Pa. 326; 12 Leigh 406; 10 Gratt. 284; 59 Ala. 311; 2 La. Ann. 311; 11 Humphr. 569; Cooke, Tenn. 254; 1 Swan 208; 1 Ind. 296; 7 Ill. 468; 23 Me. 60; 14 N. H. 509; 1 Zabr. 214; 21 Vt. 599, 620; 37 *id.* 345; 1 Day 117; 23 Mo. 85; 15 Ia. 141; 7 Colo. 107; 33 Tex. 297. But, as the whole office of an attachment is to seize and hold property until it can be subjected to execution, this lien is of no value unless the plaintiff obtain judgment against the defendant and proceed to subject the property to execution.

Where two or more separate attachments are levied simultaneously on the same property, they will be entitled each to an aliquot part of the proceeds of the property; 19 Pick. 544; 1 Cow. 215; 3 Monr. 201; 67 Me. 28; 53 Vt. 305; 17 N. H. 438; see 4 Humphr. 113; 26 Pa. 351; 3 Dev. L. 265. Where several attachments are levied successively on the same property, a junior attaching creditor may impeach a senior attachment, or judgment thereon, for fraud; 7 N. H. 594; 24 *id.* 384; 4 Rich. S. C. 561; 6 Gratt. 96; 3 Ga. 140; 4 Abb. Pr. 393; 3 Mich. 531; but not on account of irregularities; 3 M'Cord 201, 345; 4 Rich. S. C. 561; 2 Bail. 209; 9 Mo. 393; 5 Pick. 503; 13 Barb. 412; 9 La. Ann. 8.

By the levy of an attachment upon personalty the officer acquires a special property therein, which continues so long as he remains liable therefor, either to have it forthcoming to satisfy the plaintiff's demand, or to return it to the owner upon the attachment being dissolved, but no longer; 6 Johns. 195; 15 Mass. 310; 1 N. H. 289; 36 Me. 322; 28 Vt. 546; 6 Nev. 136; 2 Saunders 47; 1 Black 101; 47 N. H. 164; 76 Me. 434. For any violation of his possession, while his liability for the property continues, he may maintain trover, trespass, and replevin; 9 Mass. 104; 1 Pick. 232, 389; 5 Vt. 181; 23 N. H. 46; 2 Me. 270; 3 Foster 46; 28 Mo. App. 69.

As it would often subject an officer to great inconvenience and trouble to keep attached property in his possession, he is allowed in the New England states and New York to deliver it over, during the pendency of the suit, to some responsible person, who will give an accountable receipt for it, and who is usually styled a receipter or bailee, and whose possession is regarded as that of the officer, and, therefore, as not discharging the lien of the attachment. This practice is not authorized by statute, but has been so long in vogue in the states where it prevails as to have become a part of their systems, and to have given rise to a large mass of judicial decisions; Drake, Att. § 344.

In many states provisions exist, authorizing the defendant to retain possession of the attached property by executing a bond with sureties for the delivery thereof, either to satisfy the execution which the plaintiff may obtain in the cause, or when and where the court may direct. This bond, like the bailment of attached property, does not discharge the lien of the attachment; 20 Miss. 622; 6 Ala. N. S. 45; 7 Mo. 411; 7 Ill. 468; 10 Pet. 400; 10 Humphr. 434. Property thus bonded cannot be seized under another attachment, or under a junior execution; 6 Ala. N. S. 45; 7 B. Monr. 651; 4 La. 304.

Provisions also exist in many states for the dissolution of an attachment by the defendant's giving bond and security for the payment of such judgment as the plaintiff may recover. This is, in effect, merely Special Bail. From the time it is given, the cause ceases to be one of attachment, and proceeds as if it had been instituted by summons; 2 Bibb 221; 7 Ill. 468; 3 M'Cord 347; 19 Ga. 436; Drake, Att. § 312.

An attachment is dissolved by a final judgment for the defendant; 4 Mass. 99; 23 Pick. 465; 2 Aik. 299; 2 G. Greene 505; 3 *id.* 157. It may be dissolved, on motion, on account of defects in the plaintiff's proceedings, apparent on their face; but not for defects which are not so apparent; 17 Miss. 516. Every such motion must precede a plea to the merits; 2 Dev. & B. 502; Harp. 38, 156; 7 Mart. La. 368; 4 Jones, N.

C. 241; 26 Ala. N. S. 670; 75 *id.* 339; 66 Miss. 161; 48 Pa. 161. The death of the defendant *pendente lite* is held in some states to dissolve the attachment; 7 Mo. 421; 5 Cranch 507; 7 R. I. 72; 11 *id.* 621; 7 La. Ann. 39; 63 Ala. 414; 72 *id.* 151 (but not after judgment; 4 S. & R. 557). And so the civil death of a corporation; 8 W. & S. 207; 11 Ala. N. S. 472. Not so, however, the bankruptcy of the defendant; 21 Vt. 599; 23 Me. 60; 14 N. H. 509; 15 *id.* 227; 10 Metc. Mass. 320; 1 Zabr. 214; 18 Miss. 348; 93 Ill. 77.

In those states where under a summons property may be attached if the plaintiff so directs, the defendant has no means of defeating the attachment except by defeating the action; but in some states, where an attachment does not issue except upon stated grounds, provision is made for the defendant's contesting the validity of the alleged grounds; while in other states it is held that he may do so, as a matter of right, without statutory authority; 3 Caines 257; 7 Barb. N. Y. 656; 12 *id.* 265; 1 Dall. 165; 1 Yeates 277; 1 Green, N. J. 131, 250; 3 Harr. & M'H. 535; 2 Nott & M'C. 130; 3 Sneed 536; 6 Blackf. 232; 1 Ill. App. 25.

As by custom of London.

This writ reached the effects of the defendant in the hands of third persons. Its effect is simply to arrest the payment of a debt due the defendant, to him, and to compel its payment to the plaintiff, or else to reach personal property in the hands of a third person. It is known in England and in most of the states of the United States as *garnishment*, or the garnishee process; but in some, as the trustee process and factorizing, with the same characteristics. As affects the garnishees, it is in reality a suit by the defendant in the plaintiff's name; 22 Ala. N. S. 831; Hempst. 662.

Garnishment is an effectual attachment of the defendant's effects in the garnishee's hands; 6 Cra. 187; 8 Mass. 436; 14 N. H. 129; Busb. 3; 5 Ala. N. S. 514; 21 Miss. 284; 6 Ark. 391; 4 McLean 535; 41 Kan. 297, 596. It is essentially a legal remedy; and through it equities cannot be settled between the defendant and the garnishee; 5 Ala. N. S. 442; 71 *id.* 26; 13 Vt. 129; 15 Ill. 89; 75 *id.* 544; 7 R. I. 15; 120 Mass. 86; 62 Mo. 17. The plaintiff, through it, acquires no greater rights against the garnishee than the defendant has, except in cases of fraud; and he can hold the garnishee only so long as he has, in the attachment suit, a right to enforce his claim against the defendant; 3 Ala. 132; 1 Litt. 274; 35 Conn. 310; 13 R. I. 518; 83 Ill. 55; 5 Pet. 641. No judgment can be rendered against the garnishee until judgment against the defendant shall have been recovered; 3 Ala. N. S. 114; 5 Mart. N. S. La. 307; 14 La. Ann. 374; 23 Ga. 186; 41 Vt. 50; 19 Mo. 71.

The basis of a garnishee's liability is either an indebtedness to the defendant, or the possession of personal property of the defendant capable of being seized and sold under execution: 7 Mass. 438; 3 Me. 47; 2 N. H. 93; 9 Vt. 295; 11 Ala. N. S. 273. And to be a subject of garnishment, the claim must be one for which the principal defendant can maintain an action at law, if due at the time or to become due thereafter; 62 Mich. 316; 23 Neb. 56. The existence of such indebtedness, or the possession of such property, must be shown affirmatively, either by the garnishee's answer or by evidence *aliunde;* 9 Cush. 530; 1 Dutch. 625; 2 Iowa 154; 9 Ind. 537; 21 Mo. 30. The demand of the defendant against the garnishee, which will justify a judgment in favor of the plaintiff against the garnishee, must be such as would sustain an action of debt, or *indebitatus assumpsit;* 27 Ala. N. S. 414.

A non-resident of the state in which the attachment is obtained cannot be held as garnishee, unless he have in that state property of the defendant's in his hands, or be bound to pay the defendant money, or to deliver him goods, at some particular place in that state; 10 Mass. 343; 21 Pick. 263; 6 N. H. 497; 6 Vt. 614; 4 Abb. Pr. 72; 2 Cra. 622; 33 Me. 414; 57 Vt. 627; 13 R. I. 196; 33 Mo. 110. A debt may be attached in any state where the debtor can be found if the law of the forum authorize attachments; 50 Minn. 405.

No person deriving his authority from the law, and obliged to execute it according to the rules of the law, can be charged as garnishee in respect of any money or property held by him in virtue of that authority; 8 Mass. 246. Hence it has been held that an administrator cannot, in respect of moneys in his hand as such, be charged as garnishee of a creditor of his intestate; 11 Me. 185; 2 Harr. Del. 349; 5 Ark. 55, 188; unless he have been, by a proper tribunal, adjudged and ordered to pay a certain sum to such creditor; 5 N. H. 374; 3 Harr. Del. 267; 10 Mo. 374. Nor is an executor chargeable as garnishee in respect of a legacy bequeathed by his testator; 7 Mass. 271; 1 Conn. 385; 3 N. H. 67; 2 Whart. 332; 4 Mass. 443. Nor is a guardian; 4 Metc. Mass. 486; 6 N. H. 399. Nor is a sheriff, in respect of money collected by him under process; 3 Mass. 289; 7 Gill & J. 421; 1 Bland, Ch. 443; 1 Murph. 47; 2 Spear 34, 378; 2 Ala. N. S. 253; 1 Swan 208; 9 Mo. 378; 3 Cal. 363; 4 Me. 532; or where it was taken from a prisoner for safekeeping; 18 S. W. Rep. (Tex.) 195; this is not so, however, in some states; 92 Ala. 102; 31 Neb. 811. Nor is a clerk of a court, in respect of money in his hands officially; 1 Dall. 354; 2 Hayw. 171; 3 Ired. 365; 7 Humphr. 132; 7 Gill & J. 421; 3 Hill, S. C. 12; Bail. Eq. 360. It is attachable under trustee process when his only duty is to pay the money to the defendant; 60 Vt. 531. Nor is a trustee of an insolvent, or an assignee of a bankrupt; 5 Mass. 183; 7 Gill & J. 421. Nor is a government disbursing officer; 7 Mass. 259; 3 Pa. 368; 7 T. B. Monr. 439; 3 Sneed 379; 4 How. 20.

A debt not due may be attached in the hands of the garnishee, but he cannot be required to pay the same until it becomes due; 6 Me. 263; 1 Yeates 255; 4 Mass. 235; 1 Harr. & J. 536; 3 Murph. 256; 1 Ala. N. S. 396; 17 Ark. 492.

The defendant in an action of tort cannot be garnished before the recovery of final judgment; 80 Ga. 595. When the wages of a fisherman are to be paid within thirty days after the arrival of the vessel in port, they are liable to garnishment though the thirty days have not expired; 47 Fed. Rep. 912.

In most of the states, the garnishee responds to the proceedings against him by a sworn answer to interrogatories propounded to him; which in some states is held to be conclusive as to his liability, but generally may be controverted and disproved, though in the absence of contradictory evidence always taken to be true. In order to charge the garnishee upon his answer alone, there must be in it a clear admission of a debt due to, or the possession of money or other attachable property of, the defendant; 2 Miles 243; 22 Ga. 52; 2 Ala. 9; 6 La. Ann. 122; 19 Miss. 348; 7 Humphr. 112; 3 Wis. 300; 2 Greene 125; 12 Ill. 358; 2 Cra. 543; 9 Cush. 530; 1 Dutch. 625; 9 Ind. 537; 21 Mo. 30.

Whatever defence the garnishee could set up against an action by the defendant for the debt in respect of which it is sought to charge the garnishee, he may set up in bar of a judgment against him as a garnishee. If his debt to the defendant be barred by the statute of limitation, he may take advantage of the statute; 2 Humphr. 137; 10 Mo. 557; 9 Pick. 144; 37 Pa. 491; 44 Mo. 85; 120 U. S. 506; 14 Colo. 54. He may set up a failure of consideration; Wright 724; 2 Const. S. C. 456; 1 Murph. 468; 7 Watts 12; and may plead a set-off against the defendant; 7 Pick. 166; 25 N. H. 369; 19 Vt. 644.

If by a court having jurisdiction a judgment be rendered against a garnishee, and he satisfy the same under execution, it is a full defence to an action by the defendant against him for the property or debt in respect of which he was charged as garnishee; though the judgment may have been irregular, and reversible on error; 3 B. Monr. 502; 4 Zabr. 674; 12 Ill. 358; 1 Ia. 86; 2 Ala. 180; 23 Vt. 516; 32 Pa. 412; 25 Ill. 63.

An attachment plaintiff may be sued for a malicious attachment; and the action will be governed by the principles of the common law applicable to actions for malicious prosecution; 1 Dill. 589; 12 Fed. Rep. 266; 3 Call 446; 17 Mass. 190; 9 Conn. 309; 1 Penning. 631; 4 W. & S. 201; 9 Ohio 103; 4 Humphr. 169; 3 Hawks 545; 9 Rob. La. 418; 14 Tex. 662; 34 Ala. 336; 36 *id.* 710; 30 Wis. 356.

See Drake, Att.; Wade, Att.

ATTACHMENT OF PRIVILEGE. **In English Law.** A process by which a man, by virtue of his privilege, calls another to litigate in that court to which he himself belongs, and who has the privilege to answer there.

A writ issued to apprehend a person in a privileged place. *Termes de la Ley.*

ATTAINDER. That extinction of civil rights and capacities which takes place whenever a person who has committed treason or felony receives sentence of death for his crime. 1 Steph. Com. 408; 1 Bish. Cr. L. § 641.

Attainder by confession is either by pleading guilty at the bar before the judges, and not putting one's self on one's trial by a jury, or before the coroner in sanctuary, when, in ancient times, the offender was obliged to abjure the realm.

Attainder by verdict is when the prisoner at the bar pleads not guilty to the indictment, and is pronounced guilty by the verdict of the jury.

Attainder by process or *outlawry* is when the party flies, and is subsequently outlawed. Coke, Litt. 391.

The effect of attainder upon a felon is, in general terms, that all his estate, real and personal, is forfeited; that his blood is corrupted, and so nothing passes by inheritance to, from, or through him; 1 Wms. Saund. 361, n.; 6 Coke 63 *a*, 68 *b*; 2 Rob. Eccl. 547; 22 Eng. L. & Eq. 598; that he cannot sue in a court of justice; Co. Litt. 130 *a*. See 2 Gabbett, Cr. Law; 1 Bish. Cr. Law, § 641.

In England, by statute 33 & 34 Vict. c. 23, attainder upon conviction, with consequent corruption of blood, forfeiture, or escheat, is abolished.

In the United States, the doctrine of attainder is now scarcely known, although during and shortly after the Revolution acts of attainder were passed by several of the states. The passage of such bills is expressly forbidden by the constitution.

Under the Confiscation Act of July 17, 1862, which imposed the penalty of confiscation of property as a punishment for treason and rebellion, all that could be sold was a right to the property seized, terminating with the life of the person for whose offence it was seized; 9 Wall. 339.

ATTAINT. Attainted, stained, or blackened.

A writ which lies to inquire whether a jury of twelve men gave a false verdict. Bracton, l. 4. tr. 1, c. 134; Fleta, l. 5, c. 22, § 8.

This latter was a trial by jury of twenty-four men empanelled to try the goodness of a former verdict. 3 Bla. Com. 351; 3 Gilbert, Ev. Lofft. ed. 1146. See ASSIZE.

ATTEMPT (Lat. *ad*, to, *tentare*, to strive, to stretch).

In Criminal Law. An endeavor to accomplish a crime carried beyond mere preparation, but falling short of execution of the ultimate design in any part of it. 5 Cush. 367; 26 Ga. 493.

An intent to do a particular criminal thing combined with an act which falls short of the thing intended. 1 Bish. Cr. Law § 728; 14 Ga. 55; 14 Ala. N. S. 411 56 Barb. 126; 49 Miss. 685.

If one tries to pick a pocket, he is guilty of an attempt to steal, without any proof as to whether there was anything in the

pocket; 24 Q. B. Div. 357; 61 Law J. Mag. Cas. 116; 123 N. Y. 254.

To constitute an attempt, there must be an intent to commit some act which would be indictable, if done, either from its own character or that of its natural and probable consequences; 3 Harr. Del. 571; 18 Ala. N. S. 532; 1 Park. Cr. Cas. 327; 9 Humphr. 455; 9 C. & P. 518; 8 *id.* 541; 1 Crawf. & D. 156, 186; 1 Bish. Cr. Law § 731; Clark Cr. Law 104, 111; an act apparently adapted to produce the result intended; Whart. Cr. L. § 182; 11 Ala. 57; 12 Pick. 173; 5 Cush. 365; 18 Ohio 32; 65 N. C. 334; 32 Ind. 220; 4 Wash. C. C. 733; 2 Va. Cas. 356; 6 C. & P. 403; 9 *id.* 79, 483; 1 Leach 19 (though some cases require a complete adaptation; 1 Bish. Cr. L. 749); an act immediately and directly tending to the execution of the principal crime, and committed by the prisoner under such circumstances that he has the power of carrying his intention into execution; 1 F. & F. 511; including solicitations of another; 2 East 5; 4 Hill, N. Y. 133; 7 Conn. 216, 266; 3 Pick. 26; 2 Dall. 384; but mere solicitation, not directed to the procurement of some specific crime, is not an attempt; Whart. Cr. L. 179; see Clark, Cr. Law 115; and the crime intended must be at least a misdemeanor; 1 Crawf. & D. 149; 1 C. & M. 661, n.; 1 Dall. 39. An abandoned attempt, there being no outside cause prompting the abandonment, is not indictable; Whart. Cr. L. § 137.

In England an indictment has been upheld upon a criminal intent coupled with an act (procuring dies for counterfeiting) which fell short of an attempt under their statute; 33 E. L. & E. 533. See 1 Bish. Cr. L. § 724.

An attempt to commit a crime was not in itself a crime, in the early common law.

ATTENDANT. One who owes a duty or service to another, or in some sort depends upon him. Termes de la Ley.

ATTENDANT TERMS. Long leases or mortgages so arranged as to protect the title of the owner.

Thus, to raise a portion for younger children, it was quite common to make a mortgage to trustees. The powers of these trustees were generally to take possession of the estate, or to sell a part of the term if the portions were not duly paid. If the deed did not become *ipso facto* void, upon payment of the portion, a release was necessary from the trustees to discharge the mortgage. If this was not given, the term became an outstanding satisfied term. The purchaser from the heir then procured an assignment of the term to trustees for his benefit, which then became a satisfied term to attend the inheritance, or an attendant term. These terms were held attendant by the courts, also, without any assignment, and operated to defeat intermediate alienations to some extent. There were other ways of creating outstanding terms besides the method by mortgage; but the effect and general operation of all these were essentially the same. By reason of the want of notice, by means of registration, of the making of charges, mortgages, and conveyances of lands, this mode of protecting an innocent purchaser by means of an outstanding term to attend the inheritance came to be very general prior to the 8 & 9 Vict. c. 112, § 2, which abolished all such terms as soon as satisfied. 1 Washb. R. P. 311; 4 Kent 86-93.

ATTENTAT. Any thing whatsoever wrongfully innovated or attempted in the suit by the judge *a quo*, pending an appeal. Used in the civil and canon law; 1 Add. Eccl. 22, note; Ayliffe, Parerg. 100.

ATTERMINARE (Lat.). To put off to a succeeding term; to prolong the time of payment of a debt. Stat. Westm. 2, c. 4; Cowel; Blount.

ATTERMINING. The granting a time or term for the payment of a debt.

ATTERMOIEMENT. In Canon Law. A making terms; a composition, as with creditors. 7 Low. C. 272, 306.

ATTESTATION (Lat. *ad*, to, *testari*, to witness).

The act of witnessing an instrument in writing, at the request of the party making the same, and subscribing it as a witness. 3 P. Wms. 254; 2 Ves. Ch. 454; 3 A. K. Marsh. 146; 17 Pick. 373.

Deeds, at common law, do not require attestation in order to be valid; 2 Bla. Com. 307; 3 Dane, Abr. 354; 12 Metc. 15; 3 Washb. R. P. 572; 7 Allen 149; and there are several states where at common law it was not necessary; 1 S. & R. 73; 1 Hayw. 205; 13 Ala. 321; 12 Metc. 157. In many of the states there are statutory requirements on the subject, and where such exist they must be strictly complied with. One witness is necessary in Idaho, Maryland, Nebraska, Nevada (if signed by mark only), New York (as to delivery), North Carolina, Utah, and Wyoming, and in Mississippi one is sufficient; 17 Miss. 325; two are required in Connecticut, Florida, Kentucky, Michigan, Minnesota, New Hampshire, Ohio, Oregon, South Carolina, Vermont, Washington, and Wisconsin; and also in Georgia, one being the officer taking the acknowledgment; and in Louisiana, two male witnesses besides the officer; and in Tennessee, Texas, and Virginia two are required if there be no acknowledgment. In Maine and Massachusetts one witness is required when there is no acknowledgment, and in Alabama, one when the signature is by mark. In Arkansas, California, Colorado, Illinois, Indiana, Iowa, Kansas, Missouri, Montana, New Jersey, North Dakota, Pennsylvania, Rhode Island, South Dakota, and West Virginia, no witness is required. In Delaware and the District of Columbia there is no statute, but by almost if not absolutely unvarying custom there is at least one witness. In the Territories there is no legislation requiring it, but it is generally safe to have two witnesses, one being the officer taking the acknowledgment, when it is not practicable to consult local statutes. See 8 Conn. 289; 2 A. K. Marsh. 429; 13 N. H. 38; 6 Wheat. 527; 1 McLean 520; 5 Ohio 119; M'Mull. 373; 8 Minn. 525; 11 Minn. 443; 2 Greenl. Ev. § 275, n.; 4 Kent 457. The requisites are not the same in all cases as against the grantor and as against purchasers; 2 A. K. Marsh. 529. See 3 N. H. 38; 13 *id.* 38.

The attesting witness need not see the

grantor write his name: if he sign in the presence of the grantor, and at his request, it is sufficient; Jar. Wills 87–91; 2 B. & P. 217.

Wills must be attested by *competent* or *credible* witnesses; 2 Greenl. Ev. § 691; 9 Pick. 350; 1 Burr. 414; 4 Burn. Eccl. Law 116; who must subscribe their names attesting in the presence of the testator: 7 Harr. & J. 61; 3 Harr. & M'H. 457; 1 Leigh 6; 1 Maule & S. 294; 2 Curt. Eccl. 320; 3 *id.* 118; Carth. 79; 2 Greenl. Ev. § 678; 84 Ala. 53; 114 Mo. 536. And see 13 Gray 103; 12 Cush. 342; 1 Ves. Ch. 11; 2 Washb. R. P. 682; but he need not sign in their presence; 64 Md. 138; 91 Tenn. 183. The term "presence" in a statute requiring the subscription of witnesses to a will to be made in the presence of the testator, means "conscious presence;" 85 Va. 546. In the attestation of wills devising land, *three* witnesses are requisite in Connecticut, Georgia, Maine, Massachusetts, New Hampshire, South Carolina, Vermont and District of Columbia; *two* are sufficient in Alabama, Arkansas, California, Colorado, Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New York, North Carolina, North Dakota, Ohio, Oregon, Rhode Island, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, Wyoming, Arizona, Indian Territory, New Mexico, and Oklahoma. In Louisiana, for a will not executed before a notary, there must be five witnesses of the place of probate or seven of other places. No subscribing witnesses are required in Pennsylvania except in the case of wills making gifts to charity.

A person may attest a will by making his mark, although the person who writes his name fails to sign his own name as a witness to the mark; 51 Ark. 48. Persons signing as witnesses must do so after the testator has signed the will; 87 Ga. 379. If a will is signed by only two witnesses where three are required as to realty, it is inoperative as to the realty but valid as to the personalty; 32 Fla. 18.

ATTESTATION CLAUSE. That clause wherein the witnesses certify that the instrument has been executed before them, and the manner of the execution of the same.

The usual attestation clause to a will is in the following formula, to-wit: "Signed, sealed, published, and declared by the above-named A B, as and for his last will and testament, in the presence of us, who have hereunto subscribed our names as the witnesses thereto, in the presence of the said testator and of each other." That of deeds is generally in these words: "Sealed and delivered in the presence of us."

ATTESTING WITNESS. One who, upon being required by the parties to an instrument, signs his name to it to prove it, and for the purpose of identification. 3 Campb. 232; 115 Mass. 599.

ATTORN. To turn over; to transfer to another money or goods; to assign to some particular use or service. Kennett, Paroch. Antiq. 283.

Used of the part taken by the tenant in a transfer of lands: 2 Bla. Com. 288; Littleton § 551. Now used of assent to such a transfer; 1 Washb. R. P. 28. The lord could not alien his land without the consent of the tenant, nor could the tenant assign without the consent of his lord; 2 Bla. Com. 27; 1 Spence, Eq. Jur. 137; 1 Washb. R. P. 28, n. Attornment is abolished by various statutes; 1 Washb. R. P. 396; Wms. R. P. 238, 366.

A tenant cannot attorn to another than his landlord, and become tenant of the former, without first surrendering possession to the person under whom he holds; 78 Ga. 142.

To transfer services or homage.

Used of a lord's transferring the homage and service of his tenant to a new lord. Bract. 81, 82; 1 Sullivan, Lect. 227.

ATTORNEY. One put in the place, turn, or stead of another, to manage his affairs; one who manages the affairs of another by direction of his principal. Spelman, Gloss.; *Termes de la Ley.*

One who acts for another by virtue of an appointment by the latter. Attorneys are of various kinds.

Attorney in fact. A person to whom the authority of another, who is called the constituent, is by him lawfully delegated.

This term is employed to designate persons who act under a special agency, or a special letter of attorney, so that they are appointed *in factum*, for the deed, or special act to be performed; but in a more extended sense it includes all other agents employed in any business, or to do any act or acts *in pais* for another. Bacon, Abr. *Attorney;* Story, Ag. § 25.

All persons who are capable of acting for themselves, and even those who are disqualified from acting in their own capacity, if they have sufficient understanding, as infants of a proper age, and femes coverts, may act as attorneys of others; Co. Litt. 52 *a*; 1 Esp. 142; 2 *id.* 511.

Attorney-at-law. An officer in a court of justice, who is employed by a party in a cause to manage the same for him.

Appearance by an attorney has been allowed in England from the time of the earliest records of the courts of that country. They are mentioned in Glanville, Bracton, Fleta, and Britton; and a case turning upon the party's right to appear by attorney is reported; Y. B. 17 Edw. III. p. 8, case 23. In France such appearances were first allowed by letters patent of Philip le Bel, A. D. 1290; 1 Fournel, *Hist. des Avocats*, 42, 92; 2 Loizel. *Coutumes* 14. It results from the nature of their functions, and of their duties, as well to the court as to the client, that no one can, even by consent, be the attorney of both the litigating parties in the same controversy; Farr. 47. The name of attorney is given to those officers who practise in courts of common law; solicitors, in courts of equity; and proctors, in courts of admiralty and in the English ecclesiastical courts.

It is an encroachment upon the judiciary for the legislature to declare that a court shall admit attorneys in specified cases, such admissions being judicial and not legislative questions; 123 Pa. 527.

As a general rule the eligibility of persons to hold the position of attorney-at-law is settled by local legislation or by rule of court. It has been held that, excepting where permitted by special statute, women cannot act as attorneys-at-law in the various states; 55 Ill. 535; 16 Wall. 130; and the supreme court of the United States will not issue a mandamus to compel a

state court to admit a woman to practise law before such court, upon the ground that she has been denied a privilege or immunity belonging to her as a citizen of the United States, in contravention of the constitution; 154 U. S. 116; but the general trend of authority now is that women may be admitted to practise as attorneys; 134 Ind. 665; 29 Atl. (N. H.) 559; 3 D. R. (Pa.) 299; but any woman of good standing at the bar of the supreme court of any state or territory or of the District of Columbia for three years, and of good moral character, may become a member of the bar of the supreme court of the U. S.; Act Feb. 15, 1879. In North Carolina, unnaturalized foreigners cannot be licensed as attorneys; 3 Hawks 355; Weeks, Att. at Law 79, note.

The business of attorneys is to carry on the practical and formal parts of the suit; 1 Kent 307. See, as to their powers, 2 Supp. to Ves. Jr. 241, 254; 3 Chit. Bla. Com. 23, 338; Bacon, Abr. *Attorney;* 3 Pa. 74; 3 Wils. 374; 16 S. & R. 368; 14 *id.* 307; 7 Cra. 452; 1 Pa. 264. In general, the agreement of an attorney-at-law, within the scope of his employment, binds his client; 1 Salk. 86; as, to amend the record, 1 Binn. 75; to refer a cause, 1 Dall. 164; 6 Binn. 101; 7 Cra. 436; 3 Taunt. 486; not to sue out a writ of error, 1 H. Bla. 21, 23; 2 Saund. 71 *a, b*; 1 Term 388; to strike off a *non pros.*, 1 Binn. 469; to waive a judgment by default, 1 Archb. Pr. 26; or waive a jury trial; 99 N. C. 58. But the act must be within the scope of his authority. He cannot, for example, without special authority, purchase lands for the client at sheriff's sale; 2 S. & R. 21; 11 Johns. 464; or extend the time for payment of money to release a judgment in ejectment, entered by consent; 127 Pa. 71; or compromise a claim; 122 Pa. 1; 47 Mo. App. 1; or satisfy a judgment for less than is due; 66 Tex. 336.

In the absence of fraud, the client is concluded by the acts, and even by the omissions, of his attorney; 23 Tex. 109; 14 Minn. 333; 22 Cal. 200; Weeks, Att. at Law 375.

In general, he has all the powers exercised by the forms and usages of the court in which the suit is pending; Weeks, Att. at Law 374.

The principal duties of an attorney are—to be true to the court and to his client; to manage the business of his client with care, skill, and integrity; 4 Burr. 2061; 1 B. & Ald. 202; 2 Wils. 325; 1 Bingh. 347; Mech. Ag. 824; to keep his client informed as to the state of his business; to keep his secrets confided to him as such. And he is privileged from disclosing such secrets when called as a witness; Tayl. Ev. 782; 29 Vt. 701; 4 Mich. 414; 16 N. Y. 180; 21 Ga. 201; 40 E. L. & Eq. 353; 38 Me. 581. See CLIENT; CONFIDENTIAL COMMUNICATION. His first duty is the administration of justice, and his duty to his client is subordinate to that; 36 Fed. Rep. 242. If an attorney while employed by one side secretly seeks employment on the other side, promising to give information acquired during such employment, he will be disbarred; 38 Fed. Rep. 24; but an attorney who learns from his client, in a professional consultation, or in any other manner, that the latter intends to commit a crime, it seems, is bound by a higher duty to society and to the party to be affected to disclose it; 52 Conn. 323.

For a violation of his duties an action will, in general, lie; 3 Cal. 308; 2 Greenl. Ev. §§ 145, 146; and in some cases he may be punished by attachment. Official misconduct may be inquired into in a summary manner, and the name of the offender stricken from the roll; 18 B. Monr. 472; 13 Wall. 333; 17 Am. Dec. 194. Consult 4 Wall. 333.

An attorney is not an insurer of the result in a case in which he is employed, and only ordinary care and diligence can be required of him; 73 Mich. 331. The authority of an attorney is revoked by the death of the client, and he cannot proceed further in the cause without a new retainer from the proper representative; 96 Mo. 303; 78 Cal. 99.

An attorney is entitled to two kinds of liens for his fees, one upon the papers of his client in his possession, called a retaining lien, and the other upon a judgment or fund recovered, called a charging lien; 112 N. Y. 157; 128 Ill. 631; 76 Ga. 639. See 85 Tenn. 506; 137 N. Y. 605. See LIEN; CHAMPERTY.

ATTORNEY'S CERTIFICATE. In English Law. A certificate of the commissioners of stamps that the attorney therein named has paid the annual duty. This must be renewed yearly; and the penalty for practising without such certificate is fifty pounds; Stat. 37 Geo. III. c. 90, §§ 26, 28, 30. See also 7 & 8 Vict. c. 73, §§ 21–26; 16 & 17 Vict. c. 63.

ATTORNEY-GENERAL. In English Law. A great officer, under the king, made by letters patent, whose office is to exhibit informations and prosecute for the crown in matters criminal; to file bills in the exchequer in any matter concerning the king's revenue. Others may bring bills against the king's attorney; 3 Bla. Com. 27; *Termes de la Ley.*

In American Law. In each state there is an attorney-general, or similar officer, who appears for the people, as in England the attorney-general appears for the crown.

ATTORNEY-GENERAL OF THE UNITED STATES. An officer appointed by the president.

His duties are to prosecute and conduct all suits in the supreme court in which the United States shall be concerned, and give his advice upon questions of law when required by the president, or when requested by the heads of any of the departments, touching matters that concern their departments; Act of 24th Sept. 1789. He is a member of the cabinet and under the act of congress of Jan. 19, 1886, U. S. Rev. Stat. 1 Supp. 487, is the fourth in succession, after the vice-president, to the office of president in case of a vacancy.

ATTORNMENT. See ATTORN.

AU BESOIN. (Fr. in case of need. "*Au besoin chez Messieurs —— à ——.*" "In case of need, apply to Messrs. —— at ——").

A phrase used in the direction of a bill of exchange, pointing out the person to whom application may be made for payment in case of failure or refusal of the drawee to pay; Story, Bills § 65.

AUBAINE. See DROIT D'AUBAINE.

AUCTION. A public sale of property to the highest bidder. See 212 Am. L. Reg. U. S. 1; 19 Cent. L. J. 247; 11 Ir. L. Times 643; Bateman, Auct.

The manner of conducting an auction is immaterial, whether it be by public outcry or by any other manner. The essential part is the selection of a purchaser from a number of bidders. In a case where a woman continued silent during the whole time of the sale, but when any one bid she gave him a glass of brandy, and, when the sale broke up, the person who received the last glass of brandy was taken into a private room and he was declared to be the purchaser, this was adjudged to be an auction; 1 Dowl. Bailm. 115.

Auctions are generally conducted by persons licensed for that purpose. A bidder may be employed by the owner, if it be done *bonâ fide* and to prevent a sacrifice of the property under a given price; 1 Hall 655; 19 Mo. 420; 11 Paige, Ch. 431; 3 Stor. 622; 37 Fed. Rep. 125; but where bidding is fictitious, and by combination with the owner to mislead the judgment and inflame the zeal of others, it would be a fraudulent and void sale; Poll. Contr. 539; 8 How. 134; 3 Stor. 611; 11 Ill. 254; 2 Dev. 126; 3 Metc. Mass. 384; 3 Gilm. 529. But see 2 Kent 539, where this subject is considered. And see 6 J. B. Moore 316; 3 B. & B. 116; 3 Bingh. 368; 15 M. & W. 367; 13 La. 287; 23 N. H. 360; 6 Ired. Eq. 278, 430; 14 Pa. 446. Unfair conduct on the part of the purchaser will avoid the sale; 6 J. B. Moore 216; 3 B. & B. 116; 3 Stor. 623; 20 Mo. 290; 2 Dev. 126. See 3 Gilm. 529; 11 Paige, Ch. 431; 7 Ala. N. S. 189; 25 Pa. 413; 49 Mo. 536; 25 Ill. 173. Where a buyer addressed the company assembled at an auction and persuaded them that they ought not to bid against him, the purchase by such buyer was held void; 3 B. & B. 116. Where a sale is "without reserve" neither the vendor nor any one on his behalf can bid, and the property must go to the highest bidder; 15 M. & W. 367; see 23 N. H. 360. Error in description of real estate sold will avoid the sale if it be material; 4 Bingh. N. C. 463; 8 C. & P. 469; 1 Y. & C. 658; 3 Jones & L. 506; but an immaterial variation merely gives a case for deduction from the amount of purchase-money; 2 Kent 437; 6 Johns. 38; 11 *id.* 525; 2 Bay 11; 3 Cra. 270. A bid may be retracted by the auctioneer or the bidder before acceptance has been signified; 3 Term 148; 4 Bingh. 653; 6 Hare 443; 28 L. J. Q B. 18; Benj. Sales § 270. Sales at auction are within the Statute of Frauds; 2 B. & C. 945; 7 East 558; 2 Pick. 63; 43 Me. 158; 6 Cal. 75; 3 Duer (N. Y.) 395; Black. S. 2.

In Lousiana a bid made at an auction sale, although formally accepted, is not a complete sale, but only a promise of sale, which gives a right of action for breach or a claim for specific performance; 45 La. Ann. 108; elsewhere, it is complete, at common law. See Bateman, Auctions 180.

AUCTIONARIUS (Lat.). A seller; a regrator; a retailer; one who bought and sold; an auctioneer, in the modern sense. Spelman, Gloss. One who buys poor, old, worn-out things to sell again at a greater price. Du Cange.

AUCTIONEER. A person authorized by law to sell the goods of others at public sale; one who conducts a public sale or auction; 5 Mass. 505; 19 Pick. 482. He is the agent of the seller; Ans. Contr. 346; 3 Term 148; 2 Rich. 464; 1 Pars. Contr. 418; 3 Cra. 251; and of the buyer, for some purposes at least; 4 Ad. & E. 792; 7 East 558; 3 Ves. & B. 57; 4 Johns. Ch. 659; 16 Wend. 28; 4 Me. 1, 258; 6 Leigh 16; 2 Kent 539; 21 Gratt. 678; 43 Vt. 653; 23 Mo. 423; up to the moment of sale he is agent for the vendor exclusively; it is only when the bidder becomes the purchaser that the agency for the buyer begins; Benj. Sales § 270. He is the agent of both parties at a public sale within the Statute of Frauds; 7 East 558; 7 Taunt. 38; 11 Ohio 109; 43 Vt. 655; Benj. Sales § 268; but not if he sells goods at a private sale; 1 H. & C. 484. The memorandum must be made at the time of the sale; 53 Me. 394; 5 Mas. 414. An auctioneer employed to sell goods in his possession ordinarily has authority to receive payment for them, but if he acts as a mere crier or broker for a principal who retains possession, he would not have such authority; Benj. Sales § 741. He has a special property in the goods, and may bring an action for the price; 1 H. Bla. 81; 7 Taunt. 237; 19 Ark. 566; 5 S. & R. 19; 1 Ril. S. C. 287; 16 Johns. 1; 1 E. D. Sm. 590; see 5 M. & W. 645; 3 C. & P. 352; 5 B. & Ad. 568; and has a lien upon them for the charges of the sale, his commission, and the auction-duty; 15 Mo. 184; 2 Kent 536. He must obtain the best price he fairly can, and is responsible for damages arising from a failure to pursue the regular course of business, or from a want of skill; 3 B. & Ald. 616; Cowp. 395; 2 Wils. 325; and where he sells goods as the property of one not the owner, is liable for their value to the real owner; 7 Taunt. 237; 20 Wend. 21; 22 *id.* 285; 5 Mo. 323; and if he sells goods with notice that they were obtained by fraud of another, he is liable to the real owner; 57 Fed. Rep. 685. And see 2 Harr. Del. 179. For false representation or breach of contract, the vendee of land sold at auction has a right of action against the vendor as well as the auctioneer to recover a deposit paid at the time of sale; 19 N. Y. Sup. 224.

AUCTOR. In Roman Law. An auctioneer.

In auction sales, a spear was fixed upright in the forum, beside which the seller took his stand; hence goods thus sold were said to be sold *sub hasta* (under the spear). The catalogue of goods was on tablets called *auctionariæ*.

AUDIENCE (Lat. *audire*, to hear). A hearing.

It is usual for the executive of a country to whom a minister has been sent, to give such minister an audience. And after a minister has been recalled, an *audience of leave* usually takes place.

AUDIENCE COURT. In English Law. A court belonging to the archbishop of Canterbury, and held by him in his palace for the transaction of matters of form only, as the confirmation of bishops, elections, consecrations, and the like. This court has the same authority with the court of arches, but is of inferior dignity and antiquity. The dean of the arches is the official auditor of the audience. The archbishop of York has also his audience court. *Termes de la Ley.*

AUDITA QUERELA (Lat.).

In Practice. A form of action which lies for a defendant to recall or prevent an execution, on account of some matter occurring after judgment amounting to a discharge, and which could not have been, and cannot be, taken advantage of otherwise. 12 Mass. 268. If in a justice's suit the defendant is out of the state at the time of the service of the writ and remains away until after the return day and has no notice of suit, judgment by default may be set aside by *audita querela;* 65 Vt. 158; but not unless the action was on its face appealable; 66 Vt. 616.

It is a regular suit, in which the parties appear and plead; 17 Johns. 484; 12 Vt. 56, 435; 30 *id.* 420; 8 Miss. 103; 12 Wall. 305; and in which damages may be recovered if execution was issued improperly; Brooke, Abr. *Damages* 38; but the writ must be allowed in open court, and is not of itself a *supersedeas;* 2 Johns. 227; 9 Phila. 125.

It is a remedial process, equitable in its nature, based upon facts, and not upon the erroneous judgments or acts of the court; 2 Wms. Saund. 148, n.; 10 Mass. 103; 14 *id.* 448; 17 *id.* 159; 1 Aik. 363; 24 Vt. 211; 2 Johns. Cas. 227; 1 Overt. 425. And see 7 Gray 206.

It lies where an execution against A has been taken out on a judgment acknowledged by B without authority, in A's name; Fitzh. Nat. Brev. 233; and see Cro. Eliz. 233; and generally for any matters which work a discharge occurring after judgment entered; Cro. Car. 443; 2 Root 178; 10 Pick. 439; 25 Me. 304; see 5 Coke 86 *b*; and for matters occurring before judgment which the defendant could not plead through want of notice or through collusion or fraud of the plaintiff; 4 Mass. 485; 5 Rand. 639; 2 Johns. Cas. 258; 1 W. N. C. 304.

It may be brought after the day on which judgment might have been entered, although it has not been; 1 Rolle, Abr. 306, 431, pl. 10; 1 Mod. 111; either before or after execution has issued; Kirb. 187.

It does not lie for matter which might have been, or which may be, taken advantage of by a writ of error; 1 Vt. 433; 10 *id.* 87; in answer to a *scire facias* of the plaintiff; 1 Salk. 264; nor where there is or has been a remedy by plea or otherwise; T. Raym. 89; 12 Mass. 270; 13 *id.* 453; 11 Cush. 35; 6 Vt. 243; 12 Wall. 305; see 17 Mass. 158; nor where there has been an agreement to accept a smaller sum in payment of a larger debt, while any part of the agreement continues executory; 48 Pa. 477; nor to show that a confessed judgment was to be collateral security only; 9 Phila. 125; nor where a judgment is erroneous in part without a tender of the legal part of the judgment; 66 Vt. 675; nor against the commonwealth; 8 Phila. 237.

In modern practice it is usual to grant the same relief upon motion which might be obtained by *audita querela;* 4 Johns. 191; 11 S. & R. 274; and in some of the states the remedy by motion has entirely superseded the ancient remedy; 5 Rand. 639; 2 Hill, S. C. 298; 6 Humphr. 210; 18 Ala. 778; 13 B. Monr. 256; 3 Mo. 129; 8 S. & R. 239; while in others *audita querela* is of frequent use as a remedy recognized by statute; 17 Vt. 118; 66 Vt. 616, 675; 7 Gray 206; 9 Allen 572.

AUDITOR (Lat. *audire*, to hear). An officer of the government, whose duty it is to examine the accounts of officers who have received and disbursed public moneys by lawful authority.

In Practice. An officer of the court, assigned to state the items of debit and credit between the parties in a suit where accounts are in question, and exhibit the balance. 1 Metc. 218.

They may be appointed by courts either of law or equity. They are appointed at common law in actions of account; Bacon, Abr. *Accompt*, F; and in many of the states in other actions, under statute regulations; 6 Pick. 193; 14 N. H. 427; 3 R. I. 60.

Appearing before an auditor and examining witnesses without objection constitutes a waiver of the necessity of the auditor's taking an oath before entering on his duties; 134 Ill. 247; 97 U. S. 581; 22 Hun 125. An order of reference is proper where an accounting is necessary and the questions of law involved have been disposed of; 63 Hun 633. Where a trial has been commenced before a jury and the defendant consents to an accounting and the discharge of the jury, he cannot afterwards object to the order of reference because it requires the auditor to pass on disputed questions of law and fact; 28 N. E. Rep. (Ill.) 743.

They have authority to hear testimony; 4 Pick. 283; 5 Metc. Mass. 373; 5 Vt. 363; 2 Bland, Ch. 45; 17 Conn. 1; 69 Me. 568; 60 *id.* 325; in their discretion, 27 N. H. 244, in some states, to examine witnesses under oath; 6 N. H. 508; 11 *id.* 501; 38 *id.* 418; 1 Bland, Ch. 463; to examine books; 19 Pick. 81; 17 Conn. 1; see 14 Vt. 214; and

other vouchers of accounts; 11 Metc. Mass. 297.

The auditor's report must state a special account; 4 Yeates 514; 2 Root 12; 4 Wash. C. C. 42; 45 Pa. 67; 13 Vt. 141; 14 N. H. 427; giving items allowed and disallowed; 5 Vt. 70; 1 Ark. 355; 15 Tex. 7; but it is sufficient if it refer to the account; 2 South. 791; but see 27 Vt. 673; and are to report exceptions to their decision of questions taken before them to the court; 2 South. 791; 5 Vt. 546; 5 Binn. 433; and exceptions must be taken before them; 4 Cra. 308; 5 Vt. 546; 7 Pet. 625; 1 Miss. 43; 15 Tex. 7; 22 Barb. 39; 24 Miss. 83; 37 Ala. 394; 59 Ga. 567; unless apparent on the face of the report; 5 Cra. 313. See 19 Pa. 221.

In some jurisdictions, the report of auditors is final as to facts; Kirb. 353; 2 Vt. 369; 1 Miss. 43; 13 Pa. 188; 5 R. I. 338; 15 Tex. 7; 40 Me. 337; unless impeached for fraud, misconduct, or very evident error; 5 Pa. 413; 71 *id.* 25; 40 Me. 337; but subject to any examination of the principles of law in which they proceeded; 2 Day 116. In others it is held *prima facie* correct; 12 Mass. 412; 6 Gray 376; 1 La. Ann. 380; 14 N. H. 427; 21 *id.* 188; and evidence may be introduced to show its incorrectness; 1 La. Ann. 380; 24 Miss. 83; 13 Ark. 609; see 103 Pa. 603; 24 Conn. 584; and in others it is held to be of no effect till sanctioned by the court; 1 Bland, Ch. 463; 12 Ill. 111.

When the auditor's report is set aside in whole or in part, it may be referred back; 4 B. Monr. 71; 4 Pick. 283; 5 Vt. 363; 26 *id.* 722; 1 Litt. 124; 12 Ill. 111; 24 N. H. 198; 71 N. C. 370; 59 Wis. 48; 34 Hun 582; or may be rectified by the court; 1 Smedes & M. 543; 7 Colo. 79; or accepted if the party in favor of whom the wrong decision was made remits the item.

Where the report is referred back to the auditor, the whole case is reopened, and all parties are bound to take notice; 76 Pa. 30; see 26 Vt. 722; 62 Mo. 202.

Where two or more are appointed, all must act; 20 Conn. 331; unless the parties consent that a part act for all; 1 Tyl. 407.

AUGMENTATION. The increase arising to the crown's revenues from the suppression of monasteries and religious houses and the appropriation of their lands and revenues.

A court erected by Henry VIII., which was invested with the power of determining suits and controversies relating to monasteries and abbey lands.

The court was dissolved in the reign of Mary, but the office of augmentations remained long after; Cowel.

A share of the great tithes temporarily granted to the vicars by the appropriators, and made perpetual by statute 29 Car. II. c. 8.

The word is used in a similar sense in the Canadian law.

AULA REGIA (called frequently *Aula Regis*). The king's hall or palace.

In English Law. A court established in England by William the Conqueror in his own hall.

It was the "great universal" court of the kingdom; from the dismemberment of which are derived the present four *superior courts* in England, viz.: the High Court of Chancery, and the three *superior courts of common law*, to-wit, The Queen's Bench, Common Pleas, and Exchequer. It was composed of the king's great officers of state resident in his palace and usually attendant on his person; such as the lord high constable and lord marescal (who chiefly presided in matters of honor and of arms), the lord high steward and lord great chamberlain, the steward of the household, the lord chancellor (whose peculiar duty it was to keep the king's seal, and examine all such writs, grants, and letters as were to pass under that authority), and the lord high treasurer, who was the principal adviser in all matters relating to the revenue. These high officers were assisted by certain persons learned in the laws, who were called the king's justiciars or justices, and by the greater barons of parliament, all of whom had a seat in the *aula regia*, and formed a kind of court of appeal, or rather of advice in matters of great moment and difficulty. These, in their several departments, transacted all secular business, both civil and criminal, and all matters of the revenue; and over all presided one special magistrate, called the chief justiciar, or *capitolis justiciarius totius Angliæ*, who was also the principal minister of state, the second man in the kingdom, and, by virtue of his office, guardian of the realm in the king's absence. This court was bound to follow the king's household in all his expeditions; on which account the trial of common causes in it was found very burdensome to the people, and accordingly the 11th chapter of *Magna Charta* enacted that "*communia placita non sequantur curiam regis, sed teneantur in aliquo certo loco*," which certain place was established in Westminster Hall (where the *aula regis* originally sat, when the king resided in that city), and there it has ever since continued, under the name of Court of Common Pleas, or Common Bench. It was under the reign of Edward I. that the other several officers of the chief justiciar were subdivided and broken into distinct courts of judicature. A court of chivalry, to regulate the king's domestic servants, and an august tribunal for the trial of delinquent peers, were erected; while the barons reserved to themselves in parliament the right of reviewing the sentences of the other courts in the last resort; but the distribution of common justice between man and man was arranged by giving to the court of chancery jurisdiction to issue all original writs under the great seal to other courts; the exchequer to manage the king's revenue, the common pleas to determine all causes between private subjects, and the court of king's bench retaining all the jurisdiction not cantoned out to the other courts, and particularly the sole cognizance of pleas of the crown, or criminal causes. 3 Steph. Com. 397-400, 405; 3 Bla. Com. 38-40; Bracton, l. 3, tr. 1, c. 7; Fleta, Abr. 2, cc. 2, 3; Gilbert, Hist. C. Pleas, Introd. 18; 1 Reeve, Hist. Eng. Law 48.

AUNCEL WEIGHT. An ancient manner of weighing by means of a beam held in the hand. *Termes de la Ley;* Cowel.

AUNT. The sister of one's father or mother: she is a relation in the third degree. See 2 Comyn, Dig. 474; Dane, Abr. c. 126, a. 3, § 4.

AUSTRALIA (formerly called New Holland).

It was first visited by the Spanish and Dutch in the early part of the seventeenth century, but the first authentic discovery through which it was made known to the world was by Captain Jonas Cook, who sailed along the whole eastern coast in 1770. A settlement was made in 1788 at Sydney in Port Jackson. In 1851 gold was discovered and the population increased rapidly, until it developed into several powerful states, which, although nominally dependencies of Great Britain, and constituting some of her most important possessions, are practically autonomous and self-governing. Australia proper is an island continent, divided into six colonies, viz.: New

South Wales, Queensland, South Australia, Tasmania, Victoria, and Western Australia. Their governments consist of governors appointed by the crown, and legislatures consisting of two houses, a council, and an assembly. The members of the assembly are elected by the people in all, as are also the members of the council, except in Queensland and New South Wales, in which they are appointed by the crown. Efforts have been made for many years to form a federal government for the Australian colonies upon the same general lines as those of the Dominion of Canada, but thus far it has not been accomplished. On April 9, 1891, a convention adopted a proposed federal constitution for Australia, subject to ratification both by the individual colonies and by the imperial parliament; by it the commonwealth of Australia was to be united under a governor-general appointed by the crown. Each of the separate colonies was to be known as a state having its own legislature, but they would unite to form a parliament for the whole commonwealth, consisting of a senate and a house of representatives, the latter chosen by direct election and the former by the parliaments of the separate states. This plan has not yet been carried into effect, but the agitation of the subject has continued, and an act has been agreed upon by four of the six colonies, having for its object the election of a convention to propose a federal constitution for the ratification of the people of the several colonies. The chief difficulty in the adoption of such a federation arises from the dissimilarity of the colonies in climate, population, and fiscal policy, and the reluctance of each to surrender the absolute control of its own internal affairs, which has been fostered by the freedom accorded to them by the imperial government.

AUSTRIA-HUNGARY. An empire in the southern central portion of Europe.

Since 1867 it has consisted of Austria and Hungary united under one hereditary sovereign, a common army and navy and diplomacy controlled by the Delegations, a body of 120 members, one-half representing the legislature of Austria and one-half that of Hungary, the upper house of each country returning 20 and the lower house 40 delegates. Ordinarily the delegates sit and vote in two chambers, their jurisdiction being limited to foreign affairs, common finances, and war. The legislature of Austria consists of the Provincial Diets representing the provinces and the Reichsrath, which consists of an upper house composed of princes of the imperial family, nobles, ecclesiastics, and 120 life members nominated by the Emperor; also a lower house of 353 members, elected. There is a ministry of nine members.

The legislature of Hungary is conjointly in the King and the Diet or Reichstag. This consists of an upper house or house of magnates, including hereditary peers, ecclesiastics and fifty life peers appointed by the Crown and other special representatives, and the lower house elected by the people to the number of 453. There is a ministry of nine, including a president. The supreme court of Austria sits at Vienna, that of Hungary at Buda-Pesth. An administrative court, a high court of justice, and a court of *cassation* also sit at Vienna. There are courts of second instance in the larger cities and circuit courts at most of the principal towns throughout the Empire.

AUTER. Another. See AUTER ACTION PENDANT.

AUTER ACTION PENDANT (L. Fr. another action pending).

In Pleading. A plea that another action is already pending.

This plea may be made either at law or in equity; 1 Chit. Pl. 393; Story, Eq. Pl. § 736.

The second suit must be for the same cause; 2 Dick. 611; 5 Cal. 48; 8 *id.* 207; 2 Dutch. 461; 18 Ga. 604; 25 Penn. 314; 26 Vt. 673; 4 Blackf. 156; 100 Ind. 416; but a writ of error may abate a suit on the judgment; 2 Johns. Cas. 312; and if in equity, for the same purpose; 2 M. & C. Ch. 602; see 1 Conn. 154; and in the same right; Story, Eq. Pl. § 739. The criterion by which to decide whether two suits are for the same cause of action is, whether the evidence, properly admissible in the one, will support the other; 5 Cr. C. C. 393. See 13 Wall. 679.

The suits must be such that the same judgment may be rendered in both; 17 Pick. 510; 19 *id.* 523. They must be between the same parties; 26 Ala. N. S. 720; 13 B. Monr. 197; 18 Vt. 138; 5 Tex. 127; in person or interest; 21 N. H. 570; 1 Grant, Cas. 359; 2 Bail. 362; 2 J. J. Marsh. 281. The parties need not be precisely the same; 5 Wis. 151.

A suit for labor is not abated by a subsequent proceeding *in rem* to enforce a lien; 4 Ill. 201. See 1 B. Monr. 257. A suit in trespass is temporarily barred by a previous proceeding *in rem* to enforce a forfeiture under laws of U. S.; 3 Wheat. 314.

The prior action must have been in a domestic court; 4 Ves. Ch. 357; 1 S. & S. 491; 9 Johns. 231; 12 *id.* 9; 2 Curt. C. C. 559; 22 Conn. 485; 8 Tex. 351; 13 Ill. 486; 92 U. S. 548; 69 Ill. 655; 18 N. H. 123; see 10 Pick. 470; 3 M'Cord 338; 44 Pa. 326; 9 Dana 422; 86 Ga. 676; but a foreign attachment against the same subject-matter may be shown; 5 Johns. 101; 9 *id.* 221; 7 Ala. N. S. 151; 1 Pa. 442; 5 Litt. 349; see 8 Mass. 456; 7 Vt. 124; 1 Hall 137; 3 Misc. Rep. 325; 50 Minn. 405; but it will not avail where there was no appearance in the attachment suit or no personal service on the party attached; 138 N. Y. 209; and of the same character; 22 Eng. L. & Eq. 62; 10 Ala. N. S. 887; Story, Eq. Pl. 736; thus a suit at law is no ban to one in equity; 8 B. Monr. 428; 56 Pa. 413; 27 Cal. 104; nor is the pendency of a bill in equity a bar to an action at law; 156 Mass. 418; 16 Vt. 234; unless there be concurrent jurisdiction; 22 Law Rep. 74; but the plaintiff may elect, and equity will enjoin him from proceeding at law if he elect to proceed in equity; 2 Dan. Ch. Pr. § 4; Story, Eq. Pl. § 742; Bisp. Eq. § 363; but he will not be required to elect in such case, unless the suit at law is for the same cause, and the remedy at law is co-extensive, and equally beneficial with the remedy in equity; 22 N. H. 29. A suit in the circuit court having jurisdiction will abate a suit in the state court, if in the same state; 12 Johns. 99; and so will a suit in a state court abate one in a U. S. circuit court; 4 McLean 233; but not unless jurisdiction is shown; 1 Curt. C. C. 494; 3 McLean 221; 3 Sumn. 165; and not unless the suit is pending for the same cause, and between the same parties, in the same state in which the circuit court is sitting; 93 U. S. 548; 4 Dill. 524; 111 N. Y. 644.

The pendency of another suit for the same equitable relief, in another court of co-ordinate jurisdiction, is a bar to a motion for an injunction; 27 Pa. 380; and such pendency may be pleaded in abatement of an action at common law for the same cause; 76 Pa. 481.

In general, the plea must be in abatement; 1 Grant, Cas. 359; 20 Ill. 637; 5 Wis. 151; 3 McLean 221; 93 Ala. 614; 88 Ga. 294; 156 Mass. 418; 15 Ga. 276; but

in a penal action at the suit of a common informer, the priority of a former suit for the same penalty in the name of a third person may be pleaded in bar, because the party who first sued is entitled to the penalty; 1 Chit. Pl. 443; 1 Pa. 442; 2 J. J. Marsh. 281.

It must be pleaded in abatement of the subsequent action in order of time; 1 Wheat. 215; 20 Ill. 637; 5 Wis. 151; 1 Hempst. 708; 3 Gilm. 498; 17 Pick. 510; 19 *id.* 13; 21 Wend. 339.

It must show an action pending or judgment obtained at the time of the plea; 2 Dutch. 461; 11 Tex. 259; 1 Mich. 254; but it is sufficient to show it pending when the second suit was commenced; 5 Mass. 79; 1 *id.* 495; 2 N. H. 36; 3 Rawle 320; the court first acquiring concurrent jurisdiction retains it to the exclusion of the other; 84 Va. 612; when both suits are commenced at the same time, the pendency of each may be pleaded in abatement of the other, and both be defeated; 9 N. H. 545; 8 Conn. 71; 3 Wend. 258; 4 Halst. 58; 7 Vt. 124; 68 Hun 155; and the plaintiff cannot avoid such a plea by discontinuing the first action subsequently to the plea; 1 Salk. 329; 2 Ld. Raym. 1014; 5 Mass. 174; 3 Dana 157; *contra*, 1 Johns. Cas. 397; 26 Vt. 673; 15 Ga. 270; 49 Iowa, 183; 62 Penn. 112; 117 Mo. 530. And a prior suit discontinued before plea pleaded in the subsequent one will not abate such suit; 13 B. Monr. 197; 7 Ala. N. S. 601; 45 Minn. 102; nor will it if a nonsuit is entered *nunc pro tunc*, to make it of a date before the commencement of the second action; 102 U. S. 290. It may be pleaded in abatement of the action in the inferior court, and must aver appearance, or at least service of process; 1 Vern. 318. Suing out a writ is said to be sufficient at common law; 1 Hempst. 218; 7 Ala. N. S. 601. See LIS PENDENS.

It must be shown that the court entertaining the first suit has jurisdiction; 17 Ala. N. S. 430; 22 N. H. 21; 1 Curt. C. C. 494. It is a sufficient defence to an action that the plaintiff has pleaded the identical claim on which the action was brought as a set-off in a pending suit brought by the defendant; 154 Pa. 111.

It must be proved by the defendant by record evidence; 1 Hempst. 213; 22 N. H. 21; 2 *id.* 361; 17 Ala. 469; 5 Mass. 174; 1 Cr. C. C. 288; see 52 Mo. App. 301. It is said that if the first suit be so defective that no recovery can be had, it will not abate the second; 15 Ga. 270; 5 Tex. 127; 20 Conn. 510; 1 Root, Conn. 353; 21 Vt. 362; 3 Pa. 434; 8 Mass. 456.

A prior indictment pending does not abate a second for the same offence; 5 Ind. 533; 3 Cush. 279; Thach. Cr. Cas. 513. See 1 Hawks 78.

When a defendant is arrested pending a former suit or action in which he was held to bail, he will not, in general, be held to bail if the second suit be for the same cause of action; Graham, Pr. 98; Troubat & H. Pr. 44; 4 Yeates 206; under special circumstances, in the discretion of the court, a second arrest will be allowed; 2 Miles 99, 100, 141; 14 Johns. 347. Pendency of one attachment will abate a second in the same county; 15 Miss. 333.

See, generally, Gould, Stephen, and Chitty on Pleading; Story, Mitford, and Beames on Equity Pleading; Bacon, Abr. *Abatement*, *Bail in Civil Cases*.

AUTER DROIT. In right of another.

AUTHENTIC ACT. In Civil Law. An act which has been executed before a notary or other public officer authorized to execute such functions, or which is testified by a public seal, or has been rendered public by the authority of a competent magistrate, or which is certified as being a copy of a public register. Nov. 73, c. 2; Cod. 752, 6. 4. 21; Dig. 22. 4.

An act which has been executed before a notary public or other officer authorized to execute such functions, in presence of two witnesses, free, male, and aged at least fourteen years; or of three witnesses, if the party be blind. La. Civ. Code, art. 2231. If the party does not know how to sign, the notary must cause him to affix his mark to the instrument. La. Civ. Code, art. 2231. The authentic act is full proof of the agreement contained in it, against the contracting parties and their heirs or assigns, unless it be declared and proved to be a forgery. *Id.* art. 2233. See Merlin, *Répert.*

AUTHENTICATION. In Practice. A proper or legal attestation.

Acts done with a view of causing an instrument to be known and identified.

Under the constitution of the United States, congress has power to provide a method of authenticating copies of the records of a state with a view to their production as evidence in other states. For the various statutes on the subject, see FOREIGN JUDGMENT; RECORDS.

AUTHENTICS. A collection of the Novels of Justinian, made by an unknown person.

They are *entire*, and are distinguished by their name from the epitome made by Julian. See 1 Mackeldey, Civ. Law § 72.

A collection of extracts made from the Novels by a lawyer named Irnier, and which he inserted in the code at the places to which they refer. These extracts have the reputation of not being correct. Merlin, *Répert. Authentique.*

AUTHOR (Lat. *auctor*, from *augere*, to increase, to produce).

One who produces, by his own intellectual labor applied to the materials of his composition, an arrangement or compilation new in itself. 2 Blatchf. 39.

When a person has conceived the design of a work, and has employed others to execute it, the creation of the work may be so far due to his mind as to make him the author; 7 C. B. N. S. 268; but he is not an author who merely suggests the subject, and has no share in the design or execution of the work; 17 C. B. 432; Drone, Copyright 236. See COPYRIGHT.

AUTHORITIES. Enactments and opinions relied upon as establishing or declaring the rule of law which is to be applied in any case.

The opinion of a court, or of counsel, or of a text-writer upon any question, is usually fortified by a citation of authorities. In respect to their general relative weight, authorities are entitled to precedence in the order in which they are here treated.

The authority of the constitution and of the statutes and municipal ordinances are paramount; and if there is any conflict among these the constitution controls, and courts declare a statute or ordinance which conflicts with the former to be so far forth of no authority. See CONSTITUTIONAL LAW; STATUTES.

The decisions of courts of justice upon similar cases are the authorities to which most frequent resort is to be had; and although in theory these are subordinate to the first class, in practice they do continually explain, enlarge, or limit the provisions of enactments, and thus in effect largely modify them. The word authorities is frequently used in a restricted sense to designate citations of this class. See 23 A. & E. Encyc. of Law 19; Chamberlain, *Stare Decisis*.

An authority may be of any degree of weight, from that of absolute conclusiveness down to the faintest presumption. As to the considerations which affect the weight of an adjudged case as an authority, see PRECEDENT; OPINION.

The opinions of legal writers. Of the vast number of treatises and commentaries which we have, comparatively few are esteemed as authorities. A very large number are in reality but little more than digests of the adjudged cases arranged in treatise form, and find their chief utility as manuals of reference. Hence it has been remarked that when we find an opinion in a text-writer upon any particular point, we must consider it not merely as the opinion of the author, but as the supposed result of the authorities to which he refers; and if on examination of those authorities they are found not to establish it, his opinion is disregarded; 3 B.& P. 301. Where, however, the writer declares his own opinion as founded upon principle, the learning and ability of the writer, together with the extent to which the reasons he assigns commend themselves to the reader, determine the weight of his opinion. A distinction has been made between writers who have and who have not held judicial station; Ram, Judgments 93. But this, though it may be borne in mind in estimating the learning and ability of an author, is not a just test of his authority. See 3 Term 64, 241.

The opinions of writers on moral science, and the codes and laws of ancient and foreign nations, are resorted to in the absence of more immediate authority, by way of ascertaining those principles which have commended themselves to legislators and philosophers in all ages. See CODE. Lord Coke's saying that common opinion is good authority in law, Co. Litt. 186 *a*, is not understood as referring to a mere speculative opinion in the community as to what the law upon a particular subject is; but to an opinion which has been frequently acted upon, and for a great length of time, by those whose duty it is to administer the law, and upon which course of action important individual rights have been acquired or depend; 3 Barb. Ch. 528, 577. As to the mode of citing authorities, see ABBREVIATIONS; CITATION OF AUTHORITIES.

AUTHORITY. In Contracts. The lawful delegation of power by one person to another.

Authority coupled with an interest is an authority given to an agent for a valuable consideration, or which forms part of a security.

Express authority is that given explicitly, either in writing or verbally.

General authority is that which authorizes the agent to do everything connected with a particular business. Story, Ag. § 17.

It empowers him to bind his employer by all acts within the scope of his employment; and it cannot be limited by any private order or direction not known to the party dealing with him. Paley, Ag. 199, 200, 201.

Limited authority is that where the agent is bound by precise instructions.

Special authority is that which is confined to an individual transaction; Story, Ag. § 19; 15 East 400, 408; 6 Cow. 354.

Such an authority does not bind the employer, unless it is strictly pursued; for it is the business of the party dealing with the agent to examine his authority; and therefore, if there be any qualification or express restriction annexed to it, it must be observed; otherwise, the principal is discharged; Paley, Ag. 202.

Naked authority is that where the principal delegates the power to the agent wholly for the benefit of the former.

A naked authority may be revoked; an authority coupled with an interest is irrevocable.

Unlimited authority is that where the agent is left to pursue his own discretion.

Authority by law. An agency may be created by law, as in those cases where the law authorizes a wife to pledge her husband's credit, even against his will, it creates a compulsory agency, and her request is his request; Mechem, Ag. § 82; 134 Mass. 418.

Delegation of. An authority may be delegated by deed for any purpose whatever; for whenever an authority by parol would be sufficient, one by deed will be equally so. When the authority is to do something which must be performed through the medium of a deed, then the authority must also be by deed, and executed with all the forms necessary to render the instrument perfect; unless, indeed, the principal be present, and verbally or impliedly authorize the agent to fix his name to the deed; as, if a man be authorized to convey a tract of land, the letter of attorney must be by deed; Whart. Ag. § 48; Paley, Ag., Lloyd ed. 157; Story, Ag. §§ 48, 51; 65 N. C. 688; 14 S. & R. 331; 2 Pick. 345; 5 Mass. 11; 1

Wend. 424; 12 *id.* 525; 67 Ill. 161; 11 Ohio 223; 46 Mich. 610; 72 Ind. 48. But a written authority is not required to authorize an agent to sign an unsealed paper, or a contract in writing not under seal, even where a statute makes it necessary that the contract, in order to bind the party, shall be in writing, unless the statute positively requires that the authority shall also be in writing; Paley, Ag., Lloyd ed. 161; 2 Kent 613, 614; Story, Ag. § 50; 1 Chitty, Com. Law 213; Mech. Ag. 311: 6 Ves. Ch. 250; 8 Ired. 74; 29 Mo. 439; 13 N. Y. 587; 21 Mich. 374; 44 N. J. L. 126; 67 Ala. 336; 84 Ill. 263; 65 N. C. 688.

For most purposes, the authority may be either in writing not under seal, or verbally, or by the mere employment of the agent; or it may be implied from the conduct of the employer in sanctioning the credit given to a person acting in his name; Paley, Ag. 2, 161. The exigencies of commercial affairs render such an appointment indispensable; Story, Ag. § 47; Dig. 3. 3. 1. 1; Pothier, *Pand.* 3. 3. n. 3; Domat 1. 15, § 1, art. 5; 3 Chitty, Com. Law 5, 194, 195; 7 Term 350. The authority given must have been possessed by the person who delegates it, or it will be void; and it must be of a thing lawful, and be otherwise capable of being delegated, or it will not justify the person to whom it is given; Dig. 102; Keilw. 83; 5 Coke 80. The authority may be conferred merely by letter; 86 Mo. 178; 99 U. S. 668; 17 Ill. 441.

An authority is to be so construed as to include not only all the necessary and proper means of executing it with effect, but also all the various means which are justified or allowed by the usages of trade; Story, Ag. §§ 58, 60; 6 S. & R. 146; 10 Wend. 218; 11 Ill. 177.

Exercise of. An agent who has bare power or authority from another to do an act must execute it himself, and cannot delegate his authority to a sub-agent; for the confidence being personal, it cannot be assigned to a stranger; Story, Ag. § 13; Mech. Ag. 184–197; 2 Kent 633. But the principal may, in direct terms, authorize his agent to delegate the whole or any portion of his authority to another. Or the power to appoint a sub-agent may be implied, either from the terms of the original authority, from the ordinary custom of trade, or from the fact that it is indispensable in order to accomplish the end; Paley, Ag., Dunlop ed. 175; Story, Ag. § 14; 9 Ves. Ch. 234, 251, 252. See DELEGATION.

When the authority is particular, it must, in general, be strictly pursued, or it will be void, unless the variance be merely circumstantial; Co. Litt. 49 *b*, 181 *b*, 303 *b*; 6 Term 591; 2 H. Bla. 623. As if it be to do an act upon condition, and the agent does it absolutely, it is void; and *vice versa.* If a person do less than the authority committed to him, the act is void; but if he does that which he is authorized, and more, it is good for that which is warranted, and void for the rest. Both of these rules, however, may have many exceptions and limitations; Paley, Ag. 178, 179. An authority given by the act of the principal to two or more persons cannot be executed by one, though one die or refuse; Paley, Ag. 177; Co. Litt. 112 *b*, 181 *b*; unless coupled with an interest; Mechem, Ag. § 77; 61 N. Y. 317; 57 Ill. 180; it being in such case construed strictly, and understood to be joint and not several; Story, Ag. § 42; 3 Pick. 232; 6 *id.* 198; 6 Johns. 39; 23 Wend. 324; 10 Vt. 532; 12 N. H. 226; 9 W. & S. 56. And an authority given to three *jointly and severally* is not, in general, well executed by two; but it must be done by one, or by all; Co. Litt. 181 *b*; Bacon, Abr. *Authority*, C; 1 B. & P. 229, 234; 3 Term 592. Where authority is conferred upon two or more agents, to represent their principal, the agency will be presumed to be joint, and it can be performed by them only jointly, when no intent appears that it may be otherwise executed; Mechem, Ag. § 77; 25 Iowa 115; 12 Mass. 185; 57 Ill. 180; 53 N. Y. 114. These rules apply to an authority of a private nature, saving in commercial transactions, which form an exception. Where, however, the authority is of a public nature, it may be executed by a majority; 24 Pick. 13; 9 Watts 466; 9 S. & R. 99.

As to the form to be observed in the execution of an authority, where an agent is authorized to make a contract for his principal in writing, it must, in general, be personally signed by him; Story, Ag. § 146; 1 Y. & J. 387; 9 Mer. 235, 251, 252. It is a rule that an act done under a power of attorney must be done in the name of the person who gives the power, and not merely in the attorney's name, though the latter be described as attorney in the instrument; Story, Ag. § 147; 11 Mass. 27, 29; 16 Pick. 347, 350; 7 Wend. 68; 10 *id.* 87, 271; 9 N. H. 263, 269, 270. But it matters not in what words this is done, if it sufficiently appear to be in the name of the principal. "For A B" (the principal), "C D" (the attorney), has been held to be sufficient; Story, Ag. § 153; 6 B. Monr. 612; 3 Blackf. 55; 7 Cush. 215. The strict rule of law in this respect applies, however, only to sealed instruments; and the rule is further modified, even in such cases, where the seal is not essential to the validity of the instrument; Story, Ag. §§ 148, 154; 8 Pick. 56; 17 Pet. 161. An authority must be executed within the period to which it is limited; 4 Campb. 279; Russell, Fact. & Brok. 315.

Destruction of. In general, an authority is revocable from its nature, unless it is given for a valuable consideration, or is part of a security, or coupled with an interest; Story, Ag. §§ 476, 477; 2 Kent 643; 2 Mass. 244, 342; 32 Cal. 609; 73 Ala. 372; 56 Vt. 467; 58 Md. 226; 63 Pa. 97; Mechem, Ag. § 204. An authority to sell on commission is not coupled with an interest but is revocable; 73 Ala. 372; 86 Ill. 142; 53 Pa. 266; and the fact that an authority is expressed as being irrevocable will not make it so; 73 Ala. 372; 86 Ill. 142; 53

Pa. 266; 70 Cal. 296; 58 Md. 226. It may generally be revoked at any moment before the actual exercise of it; Story, Ag. §§ 463, 465; and although the agent is appointed under seal, it has been held that his authority may be revoked by parol; Story, Ag. § 463; 8 Ired. Law 74; 6 Pick. 198. The revocation may be express, as by the direct countermand of the principal, or it may be implied. The death of the principal determines the authority; 50 Miss. 353; 46 Vt. 728; 32 Ala. 404; 25 Ind. 182. See AGENCY.

The authority may be renounced by the agent before any part of it is executed, or when it is in part executed; but in either case, if the agency is founded on a valuable consideration, the agent, by renouncing it, makes himself liable for the damages which his principal may sustain thereby; Story, Ag. § 478; Story, Bailm. § 202; Mechem, Ag. § 233. If by the express terms of the commission the authority of the agent be limited to a certain period, it will manifestly cease so soon as that period has expired. The authority of the agent is *ipso facto* determined by the completion of the purpose for which it was given. If the agency is indefinite in duration, the agent may, upon giving reasonable notice, sever the relation at any stage without liability to the principal; Mechem, Ag. § 233; 37 Mich. 481; 46 Pa. 426.

See, generally, 3 Viner, Abr. 416; Bacon, Abr.; 1 Salk. 95; Comyns, Dig. this title and the titles there referred to; 1 Rolle, Abr. 330; 2 *id.* 9; Wharton, Agency; Mechem, Agency; ATTORNEY, AGENCY, AGENT, PRINCIPAL.

In Governmental Law. The right and power which an officer has, in the exercise of a public function, to compel obedience to his lawful commands. A judge, for example, has authority to enforce obedience to his lawful orders.

AUTOCRACY. A government where the power of the monarch is unlimited by law.

AUTONOMY (Greek, *αὐτονομία*). The state of independence.

The autonomos was he who lived according to his own laws,—who was free. The term was chiefly used of communities or states, and meant those which were independent of others. It was introduced into the English language by the divines of the seventeenth century, when it and its translation —self-government—were chiefly used in a theological sense. Gradually its translation received a political meaning, in which it is now employed almost exclusively. Of late the word autonomy has been revived in diplomatic language in Europe, meaning independence, the negation of a state of political influence from without or foreign powers. See Lieber, Civ. Lib.

AUTREFOIS ACQUIT (Fr. formerly acquitted).

In Criminal Pleading. A plea made by a defendant indicted for a crime or misdemeanor, that he has formerly been tried and acquitted of the same offence.

The constitution of the United States, Amend. art. 5, provides that no person shall be subject for the same offence to be put twice in jeopardy of life or limb. This is simply a re-enactment of the common-law provision. The same provision is to be found in the constitution of almost all if not of every state in the Union, and if not in the constitution the same principles are probably declared by legislative act; so that they must be regarded as fundamental doctrines in every state; 2 Kent 12. See 5 How. 410; 9 Wheat. 579; 2 Gall. 364; 2 Sumn. 19; 2 McLean 114; 4 Wash. C. C. 408; 9 Mass. 494; 2 Pick. 521; 2 Johns. Cas. 301; 18 Johns. 187; 5 Litt. 240; 1 Miss. 184; 4 Halst. 256. See, however, 6 S. & R. 577; 1 Hayw. 241; 13 Yerg. 532; 16 Ala. 188; Whart. Crim. Pl. § 490.

The court, however, must have been competent, having jurisdiction and the proceedings regular; Whart. Cr. Pl. § 438; 29 Tex. App. 48; 91 Ky. 200; but see 89 Ala. 172.

To be a bar, the acquittal must have been on trial; 5 Rand. 669; 11 N. H. 156; 4 Blackf. 156; 6 Mo. 645; 5 Harr. Del. 488; 14 Tex. 260; see 1 Hayw. 241; 14 Ohio 295; and by verdict of a jury on a valid indictment; 4 Bla. Com. 335; 1 Johns. 66; 1 Va. Cas. 312; 6 Ala. 341; 4 Mo. 376; 26 Pa. 513; 6 Md. 400; 39 Mo App. 187. In Pennsylvania and some other states, the discharge of a jury, even in a capital case, before verdict, except in case of absolute necessity, will support the plea; 3 Rawle 498; 80 N. C. 377; but the prisoner's consent to the discharge of a previous jury is a sufficient answer; 15 Pa. 468. In the United States courts and in some states, the separation of the jury when it takes place in the exercise of a sound discretion is no bar to a second trial; Whart. Cr. Pl. § 499; Clark, Cr. Law 373; 126 Ind. 71; 142 U. S. 148; as where the jury is discharged because of the sickness of a juror; 85 Cal. 383; 2 N. D. 521; see 91 Ga. 831; or because they failed to agree; 144 U. S. 263; 111 N. C. 695.

There must be an acquittal of the offence charged in law and in fact; 1 Va. Cas. 188, 288; 5 Rand. 669; 13 Mass. 457; 2 *id.* 172; 29 Pa. 323; 6 Cal. 543; 82 Wis. 571; but an acquittal is conclusive; 6 Humphr. 410; 3 Cush. 212; 16 Conn. 54; 7 Ga. 422; 8 Blackf. 533; 3 Brev. 421; 6 Mo. 644; 7 Ark. 169; 1 Bail. 651; 2 Halst. 172; 11 Miss. 751; 3 Tex. 118; 1 Denio 207. See 1 N. H. 257. If a *nolle prosequi* is entered without the prisoner's consent after issue is joined and the jury sworn, it is a bar to a subsequent indictment for the same offence; 85 Ga. 570; but the jeopardy does not begin until the jury is sworn, prior to that a *nol. pros.* may be entered without prejudice; 43 La. Ann. 514; a *nol. pros.* of two of three indictments is no bar to a prosecution under the third; 91 Ala. 25. In Missouri the conviction of murder in the second degree, under an indictment for murder in the first degree, constitutes no bar to trial and conviction for murder in the first degree, upon new trial, when first verdict has been set aside; 89 Mo. 312.

Proceedings by state tribunals are no bar to court-martial instituted by the military authorities of the United States; 3 Opin. Atty.-Genl. 750; 6 *id.* 413; but a judgment of conviction by a military court, established by law in an insurgent state, is a bar to a subsequent prosecution by a state court for the same offence; 97 U. S. 509.

The plea must set out the former record, and show the identity of the offence and of the person by proper averments; Hawk. Pl. Cr. b. 2, c. 36; 1 Chit. Cr. L. 462; 16 Ark. 568; 24 Conn. 57; 6 Dana 295; 5 Rand. 669; 17 Pick. 400.

The true test by which the question, whether a plea of *autrefois acquit* or *autrefois convict* is a sufficient bar in any particular case, may be tried is, whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first; 1 Bish. Cr. L. 1012–1047; 2 Leach 708; 1 B. & B. 473; 3 B. & C. 502; 2 Conn. 54; 12 Pick. 504; 13 La. Ann. 243; 45 *id.* 936. Thus, if a prisoner indicted for burglariously breaking and entering a house and stealing therein certain goods of A is acquitted, he cannot plead this acquittal in bar of a subsequent indictment for burglariously breaking and entering the same house and stealing other goods of B. Per Buller, J., 2 Leach 718, 719; 21 Tex. App. 406.

The plea of *autrefois acquit* involves questions of mixed law and fact, and is properly referred to the jury when not demurrable on its face; 45 La. Ann. 936.

The plea in the celebrated case of Regina *v.* Bird, 5 Cox, Cr. Cas. 12; Templ. & M. 438; 2 Den. Cr. Cas. 234, is of peculiar value as a precedent. See Train & H. Prec. Ind. 481; 32 Cent. Law J. 406.

AUTREFOIS ATTAINT (Fr. formerly attainted). **In Criminal Pleading.** A plea that the defendant has been attainted for one felony, and cannot, therefore, be criminally prosecuted for another; 4 Bla. Com. 336; 12 Mod. 109; R. & R. 268. This is not a good plea in bar in the United States, nor in England in modern law; 1 Bish. Cr. L. § 692; 3 Chit. Cr. L. 464; Stat. 7 & 8 Geo. IV. c. 28, § 4. See Mart. & Y. 122; 10 Ala. 475; 1 Bay 334.

AUTREFOIS CONVICT (Fr. formerly convicted). **In Criminal Pleading.** A plea made by a defendant indicted for a crime or misdemeanor, that he has formerly been tried and convicted of the same.

This plea is substantially the same in form as the plea of *autrefois acquit*, and is grounded on the same principle, viz.: that no man's life or liberty shall be twice put in jeopardy for the same offence; Whart. Cr. Pl. § 435; 1 Bish. Cr. Law §§ 651–680; 1 Green, N. J. 362; 1 McLean 429; 7 Ala. 610; 2 Swan 493; 43 Wis. 395.

A plea of *autrefois convict*, which shows that the judgment on the former indictment has been reversed for error in the judgment, is not a good bar to another indictment for the same offence; Cooley's Const. Lim. 326–328; 1 Ariz. 56; 10 Mart. 549; 64 Cal. 260; 112 N. C. 857; otherwise, if the reversal were not for insufficiency in the indictment nor for error at the trial, but for matter subsequent, and *dehors* both the conviction and the judgment; 25 N. Y. 407; 26 *id.* 167. A prior conviction by judgment before a justice of the peace, and a performance of the sentence pursuant to the judgment, constitute a bar to an indictment for the same offence, although the complaint on which the justice proceeded was so defective that his judgment might have been reversed for error; 3 Metc. Mass. 328; 8 *id.* 532. Where a person has been convicted for failing to support his wife and being disorderly, it is no bar to a second prosecution on a similar charge, where at the time of the second offence he was not in prison on account of his first sentence; 126 N. Y. 647. Where one has been convicted of an assault but discharged without sentence on giving security for good behavior, he cannot afterwards be convicted on an indictment for the same assault; 24 Q. B. Div. 423. See AUTREFOIS ACQUIT.

AUTER VIE. The life of another; a tenant *pur auter vie* is one holding during or for the life of another. 2 Bla. Com. 120.

AUXILIUM (Lat.). An aid; tribute or services paid by the tenant to his lord. *Auxilium ad filium militem faciendum, vel ad filiam maritandam.* (An aid for making the lord's son a knight, or for marrying his daughter.) Fitzh. Nat. Brev. 62.

AUXILIUM CURIÆ. An order of the court summoning one party, at the suit and request of another, to appear and warrant something. Kennett, Par. Ant. 477.

AUXILIUM REGIS. A subsidy paid to the king. Spelman.

AUXILIUM VICE COMITI. An ancient duty paid to sheriffs. Cowel; Whishaw.

AVAILABLE. Capable of being used; valid or advantageous. As to available means, see 13 N. Y. 218.

AVAIL OF MARRIAGE. In Scotch Law. A certain sum due by the heir of a deceased ward vassal, when the heir became of marriageable age. Erskine, Inst. l. 2, t. 5, § 18.

AVAILS. Profits or proceeds, as the avails of a sale at auction. Webst. Dict.

With reference to wills it applies to the proceeds of an estate after the debts have been paid; 34 N. Y. 201; 3 *id.* 276.

AVAL. In Canadian Law. An act of suretyship or guarantee on a promissory note. 1 Low. C. 221; 9 *id.* 360.

AVARIA, AVARIE. Average; the loss and damage suffered in the course of a navigation. Pothier, *Marit. Louage* 105.

AVENTURE. A mischance causing the death of a man, as by drowning, or being killed suddenly without felony. Co. Litt. 391; Whishaw.

AVER. To assert. See AVERMENT.

To make or prove true; to verify.

The defendant will offer to *aver*. Cowel; Co. Litt. 362 *b*.

Cattle of any kind. Cowel, *Averia;* Kelham.

Aver et tenir. To have and to hold.

Aver corn. A rent reserved to religious houses, to be paid in corn. Corn drawn by the tenant's cattle. Cowel.

Aver-land. Land ploughed by the tenant for the proper use of the lord of the soil. Blount.

Aver-penny. Money paid to the king's averages to be free therefrom. *Termes de la Ley.*

Aver-silver. A rent formerly so called. Cowel.

AVERAGE. In Insurance. Is general, particular, or petty.

GENERAL AVERAGE (also called gross) consists of expense purposely incurred, sacrifice made, or damage sustained for the common safety of the vessel, freight, and cargo, or the two of them, at risk, and is to be contributed for by the several interests in the proportion of their respective values exposed to the common danger, and ultimately surviving, including the amount of expense, sacrifice, or damage so incurred in the contributory value; 2 Phill. Ins. § 1269 *et seq.;* and see *Code de Com.* tit. xi.; Aluzet, *Trait. des Av.* cxx.; 2 Curt. C. C. 59; 9 Cush. 415; 73 Pa. 98; 9 Wall. 203; Bailey, Gen. Av.; 2 Pars. Mar. Law, ch. xi.; Stevens, Av.; Benecke, Av.; Pothier, Av.; *Lex Rhodia*, Dig. 14. 2. 1. General average is recoverable for loss by jettison; 19 C. B. N. S. 563; for ship's stores used to fire the donkey-engine which worked the pumps; 7 L. R. Exch. 39; 2 Q. B. D. 91, 295; and for damage to a cargo caused by pouring on water to extinguish a fire; 8 Q. B.D. 653; 46 Fed. Rep. 297; 53 *id.* 270; 59 *id.* 161.

Indemnity for general average loss is usually stipulated for in policies against the risks in navigation, subject, however, to divers modifications and conditions; 2 Phill. Ins. §§ 1275, 1279, 1408, 1409. Under maritime policies in the ordinary form, underwriters are liable for the contributions made by the insured subject for loss by jettison of cargo, sacrifice of cables, anchors, sails, spars, and boats, expense of temporary repairs, voluntary stranding, compromise with pirates, delay for the purpose of refitting; 2 Phill. Ins. c. xv. sect. ii.; 1 Pars. Ship. & Adm. 351. The general rule for the adjustment of general average is, that the amount made good in respect of property sacrificed is brought in as contributing rateably with the property preserved so that the former pays the same proportion of general average as the latter; Loundes, Gen. Av. p. 291.

Insurance is not a part of the owner's interest in a ship, and in case of general average, for the purpose of increasing the fund to be distributed; the insurance received by him should not be added to the value of what was saved; 52 Fed. Rep. 320; 118 U. S. 468; *id.* 507, 520.

Average particular (also called partial loss) is a loss on the ship, cargo, or freight, to be borne by the owner of the subject on which it happens, and is so called in distinction from general average; and, if not total, it is also called a partial loss; 2 Phill. Ins. c. xvi.; Stevens, pt. 1, c. 2; Arnould, Mar. Ins. 953; *Code de Com.* l. 2, t. 11, a. 403; Pothier, Ass. 115; Benecke & S. Av., Phill. ed. 341.

It is insured against in marine policies in the usual forms on ship, cargo, or freight, when the action of peril is extraordinary, and the damage is not mere wear or tear; and, on the ship, covers loss by sails split or blown away, masts sprung, cables parted, spars carried away, planks started, change of shape by strain, loss of boat, breaking of sheathing or upper works or timbers, damage by lightning or fire, by collision or stranding, or in defence against pirates or enemies, or by hostile or piratical plunder; 2 Phill. Ins. c. xvi.; 21 Pick. 456; 11 *id.* 90; 7 *id.* 159; 7 C. & P. 597; 3 *id.* 323; 1 Conn. 239; 9 Mart. 276; 18 La. 77; 5 Ohio 306; 6 *id.* 70, 456; 3 Cranch 218; 1 Cow. 265; 4 *id.* 222; 5 *id.* 63; 4 Wend. 255; 11 Johns. 315.

Particular average on freight may be by loss of the ship, or the cargo, so that full freight cannot be earned; but not if the goods, though damaged, could have been carried on to the port of destination; 2 Phill. Ins. c. xvi. sect. iii.; 9 *id.* 21; 15 Mass. 341; 23 Pick. 405; 2 McLean 423; 1 Story 342; 2 Gill 410; 12 Johns. 107; 18 *id.* 205, 208; 1 Binn. 547.

Particular average on goods is usually adjusted at the port of delivery on the basis of the value at which they are insured, viz.: the value at the place of shipment, unless it is otherwise stipulated in the policy; 2 Phill. Ins. §§ 145, 146; 2 Wash. C. C. 136; 2 Burr. 1167; 2 East 58; 12 *id.* 639; 3 B. & P. 308; 3 Johns. Ch. 217; 4 Wend. 45; 1 Caines 543; 1 Hall 619; 20 Pa. 312; 36 E. L. & Eq. 198; 3 Taunt. 162. See SALVAGE; LOSS.

A particular average on profits is, by the English custom, adjusted upon the basis of the profits which would have been realized at the port of destination. In the United States the adjustment is usually at the same rate as on the goods the profits on which are the subject of the insurance; 2 Phill. Ins. §§ 1773, 1774; 2 Pars. Ins. 399; 2 Johns. Cas. 36; 3 Day 108; 1 Johns. 433; 3 Pet. 222; 1 Sumn. 451; 8 Miss. 63; 1 S. & R. 115; 6 R. I. 47.

PETTY AVERAGE consists of small charges which were formerly assessed upon the cargo, viz.; pilotage, towage, light-money, beaconage, anchorage, bridge-toll, quarantine, pier-money. Le Guidon, c. 5, a. 13; Weyt, de A. 3, 4; Weskett, art. Petty Av.; 2 Phill. Ins. § 1269, n. 1; 2 Arnould, Mar. Ins. 927.

The doctrine of general average which has obtained in maritime insurance is not applicable to fire insurance; May on Ins. § 421 *a*.

AVERIA (Lat.). Cattle; working cattle.

Averia carucæ (draft-cattle) are exempt from distress; 3 Bla. Com. 9; 4 Term 566.

AVERIIS CAPTIS IN WITHERNAM. In English Law. A writ which lies in favor of a man whose cattle have been unlawfully taken by another, and driven out of the country where they were taken, so that they cannot be replevied.

It issues against the wrong-doer to take his cattle for the plaintiff's use. *Reg. Brev.* 82.

AVERMENT. In Pleading. A positive statement of facts, as opposed to an argumentative or inferential one. Cowp. 683; Bacon, Abr. *Pleas*, B.

Averments were formerly said to be general and particular; but only particular averments are found in modern pleading. 1 Chit. Pl. 277.

Particular averments are the assertions of particular facts.

There must be an averment of every substantive material fact on which the party relies, so that it may be replied to by the opposite party.

Negative averments are those in which a negative is asserted.

Generally, under the rules of pleading, the party asserting the affirmative must prove it; but an averment of illegitimacy, 2 Selwyn, Nisi P. 709, or criminal neglect of duty, must be proven; 2 Gall. 498; 19 Johns. 345; 1 Mass. 54; 10 East 211; 3 Campb. 10; 3 B. & P. 302; 1 Greenl. Ev. § 80.

Immaterial and *impertinent averments* (which are synonymous, 5 D. & R. 209) are those which need not be made, and, if made, need not be proved. The allegation of deceit in the seller of goods in an action on the warranty is such an averment; 2 East 446; 17 Johns. 92.

Unnecessary averments are statements of matters which need not be alleged, but which, if alleged, must be proved. Carth. 200.

General averments are almost always of the same form. The most common form of making particular averments is in express and direct words, for example: And the party *avers*, or *in fact saith*, or *although*, or *because*, or *with this that*, or *being*, etc. But they need not be in these words; for any words which necessarily imply the matter intended to be averred are sufficient.

See, in general, 3 Viner, Abr. 357; Bacon, Abr. *Pleas*, B, 4; Comyns, Dig. *Pleader*, C, 50, C, 67, 68, 69, 70; 1 Wms. Saund. 235 *a*, n. 8; 3 *id.* 352, n. 3; 1 Chit. Pl. 308; Archb. Civ. Pl. 163.

AVERSIO (Lat.). An averting; a turning away. A sale in gross or in bulk.

Letting a house altogether, instead of in chambers; 4 Kent 517.

Aversio periculi. A turning away of peril. Used of a contract of insurance; 3 Kent 263.

AVERUM (Lat.). Goods; property. A beast of burden. Spelman, Gloss.

AVET. In Scotch Law. To abet or assist. Tomlin, Dict.

AVIATICUS (Lat.). In Civil Law. A grandson.

AVIZANDUM. In Scotch Law. To make *avizandum* with a process is to take it from the public court to the private consideration of the judge. Bell, Dict.

AVOIDANCE. A making void, useless, or empty.

In Ecclesiastical Law. It exists when a benefice becomes vacant for want of an incumbent.

In Pleading. Repelling or excluding the conclusions or implications arising from the admission of the truth of the allegations of the opposite party. See CONFESSION and AVOIDANCE.

AVOIRDUPOIS (Fr.). The name of a system of weight.

This kind of weight is so named in distinction from the Troy weight. One pound avoirdupois contains seven thousand grains Troy; that is, fourteen ounces, eleven pennyweights, and sixteen grains Troy; a pound avoirdupois contains sixteen ounces; and an ounce sixteen drachms. Thirty-two cubic feet of pure spring-water, at the temperature of fifty-six degrees of Fahrenheit's thermometer, make a ton of two thousand pounds avoirdupois, or two thousand two hundred and forty pounds net weight. Dane, Abr. c. 211, art. 12, § 6. The avoirdupois ounce is less than the Troy ounce in the proportion of 72 to 79; though the pound is greater. Encyc. Amer. *Avoirdupois.* For the derivation of this phrase, see Barrington, Stat. 206. See the Report of Secretary of State of the United States to the Senate, February 22, 1821, pp. 44, 72, 76, 79, 81, 87, for a learned exposition of the whole subject.

AVOUCHER. See VOUCHER.

AVOW. In Practice. To acknowledge the commission of an act and claim that it was done with right. 3 Bla. Com. 150.

To make an avowry. For example, when replevin is brought for a thing distrained, and the party taking claims that he had a right to make the distress, he is said to avow. See Fleta, l. 1, c. 4, § 4; Cunningham, Dict.; AVOWRY; JUSTIFICATION.

AVOWANT. One who makes an avowry.

AVOWEE. In Ecclesiastical Law. An advocate of a church benefice.

AVOWRY. In Pleading. The answer of the defendant in an action of replevin brought to recover property taken in distress, in which he acknowledges the taking, and, setting forth the cause thereof, claims a right in himself or his wife to do so. Lawes, Pl. 35.

A justification is made where the defendant shows that the plaintiff had no property by showing either that it was the defendant's or some third person's, or where he shows that he took it by a right which was sufficient at the time of taking though not subsisting at the time of answer. The avowry admits the property to have been the plaintiff's, and shows a right which had then accrued, and still subsists, to make such caption. See Gilbert, Distr. 176–178; 2 W. Jones 25.

An avowry is sometimes said to be in the nature of an action or of a declaration, so that privity of estate is necessary; Co. Litt. 320 *a*; 1 S. & R. 170. There is no general issue upon an avowry: and it cannot be traversed cumulatively; 5 S. & R.

frequently provides the time and manner of making and publishing the award. It may be by parol (oral or written), or by deed; 3 Bulstr. 311; 20 Vt. 189. It should be signed by *all* the arbitrators in the presence of each other; 54 Fed. Rep. 439; 76 Ia. 187. See 44 Ill. App. 638; 47 N. J. Eq. 532; *contra*, 84 Va. 800; 86 Ky. 23. Where the submission requires the concurrence of the three arbitrators, recovery cannot be had where but two sign, though the third says it is right, but refuses to sign; 148 Pa. 372. See ARBITRATOR.

An award will be sustained by a liberal construction, *ut res magis valeat quam pereat*; 2 N. H. 126; 2 Pick. 534; 4 Wis. 181; 8 Md. 208; 8 Ind. 310; 17 Ill. 477; 29 Pa. 251; Reed Aw. 170.

Effect of. An award is a final and conclusive judgment between the parties on all the matters referred by the submission; 107 N. C. 156; 113 Mass. 235; 57 Ind. 221; 60 N. H. 278; 59 Pa. 379. It transfers property as much as the verdict of a jury, and will prevent the operation of the statute of limitations; 3 Bla. Com. 16; Morse, Arb. Law 487; 1 Freem. Ch. 410; 4 Ohio 310; 5 Cow. 383; 15 S. & R. 166; 1 Cam. & N. 93. See 65 Vt. 178. A parol award following a parol submission will have the same effect as an agreement of the same form directly between the parties; 37 Me. 72; 15 Wend. 99; 27 Vt. 241; 16 Ill. 34; 5 Ind. 220; 1 Ala. 278; 6 Litt. 264; 2 Coxe 369; 7 Cra. 171.

The right of real property cannot thus pass by mere award; but no doubt an arbitrator may award a conveyance or release of land and require deeds, and it will be a breach of agreement and arbitration bond to refuse compliance; and a court of equity will sometimes enforce this specifically; 1 Ld. Raym. 115; 3 East 15; 6 Pick. 148; 4 Dall. 120; 16 Vt. 450, 592; 15 Johns. 197; 2 Caines 320; 4 Rawle 411, 430; 11 Conn. 240; 18 Me. 251; 28 Ala. N. S. 475; 71 N. C. 492; 47 N. H. 305. Where there is a controversy as to the claims embraced within a mortgage, and the award merely fixes the amount due, it does not vest the legal title to the mortgaged property in the mortgagor; 97 Ala. 615.

Arbitrament and award may be regularly pleaded at common law or equity to an action concerning the same subject-matter, and will bar the action; Watson, Arb. 256; 12 N. Y. 9; 41 Me. 355. To an action on the award at common law, in general, nothing can be pleaded *dehors* the award; not even fraud; 23 Barb. 187; 28 Vt. 81, 776; *contra*, 9 Cush. 560. Where an action has been referred under rule of court and the reference fails, the action proceeds.

Enforcement of. An award may be enforced by an action at law, which is the only remedy for disobedience when the submission is not made a rule of court, and no statute provides a special mode of enforcement; 6 Ves. 815; 19 *id.* 431; 5 B. & Ald. 507; 4 B. & C. 103; 1 D. & R. 106; 3 C. B. 745. Assumpsit lies when the submission is not under seal; 33 N. H. 27; and *debt* on an award of money and on an arbitration bond; 18 Ill. 437; *covenant* where the submission is by deed for breach of any part of the award, and *case* for the non-performance of the duty awarded. *Equity* will enforce specific performance when all remedy fails at common law; Com. Dig. *Chancery*, 2 K; Story, Eq. Jur. § 1458; Morse, Arb. 603; 2 Hare 198; 4 Johns. Ch. 405; 4 Ill. 453; 3 P. Wms. 137; 1 Brown, P. C. 411. But see 1 T. & R. 187; 5 Ves. 846.

An award under a rule of court may be enforced by the court issuing execution upon it as if it were a verdict of a jury, or by attachment for contempt; 7 East 607; 1 Stra. 593. By the various state statutes regulating arbitrations, awards, where submission is made before a magistrate, may be enforced and judgment rendered thereon.

Amendment and setting aside. A court has no power to alter or amend an award; 1 Dutch. 130; 5 Cal. 179; 12 N. Y. 9; 41 Me. 355; 109 N. C. 103; but may recommit to the referee in some cases; 11 Tex. 18; 39 Me. 105; 26 Vt. 361; 18 Can. S. C. R. 338.

An award will not be disturbed except for very cogent reasons. It will be set aside for *misconduct*, corruption, or irregularity of the arbitrator, which has or may have injured one of the parties; 2 Eng. L. & Eq. 184; 5 B. & Ad. 488; 1 Hill & D. 103; 13 Gratt. 535; 14 Tex. 56; 28 Pa. 514; 29 Vt. 72; it will not be set aside because one of the arbitrators was a relative; 59 Hun 617; so where one, after publishing his award, admits that it had been improperly obtained from him; [1891] 1 Ch. 558; it will be set aside for *error* in fact, or in attempting to follow the law, apparent on the face of the award; see *supra*, ARBITRATOR; for *uncertainty* or inconsistency; for an *exceeding* of his authority by the arbitrator; 22 Pick. 417; 4 Denio 191; where it is made solely at the direction of one of the parties and not upon the arbitrator's own judgment; 44 Fed. Rep. 151; when it is *not final* and conclusive, without reserve; when it is a *nullity;* when a party or witness has *been at fault*, or has made a mistake; or when the arbitrator acknowledges that he has made a mistake or error in his decision.

Where arbitrators have once made an award they are *functus officio* and cannot afterwards make a second award, though the first was void because of defects; 134 N. Y. 85; 137 *id.* 290.

Equity has jurisdiction to set aside an award, on any of the enumerated grounds, when the submission cannot be made a rule of a common-law court.

In general, in awards under statutory provisions, as well as in those under rules of court, questions of law may be reserved for the opinion of the court, and facts and evidence reported for their opinion and decision.

AWAY-GOING CROP. A crop sown before the expiration of a tenancy, which cannot ripen until after its expiration, to

377. Alienation cannot be replied to it without notice; for the tenure is deemed to exist for the purposes of an avowry till notice be given of the alienation; Hamm. Part. 131.

The object of an avowry is to secure the return of the property, that it may remain as a pledge; see 2 W. Jones 25; and to this extent it makes the defendant a plaintiff. It may be made for rents, services, tolls; 3 Dev. 478; for cattle taken, damage feasant, and for heriots, and for such rights wherever they exist. See Gilbert, Distr. 176 *et seq.*; 1 Chit. Pl. 4:6; Comyns, Dig. *Pleader*, 3 K.

AVOWTERER. In English Law. An adulterer with whom a married woman continues in adultery. *Termes de la Ley.*

AVOWTRY. In English Law. The crime of adultery.

AVULSION (Lat. *avellere*, to tear away). The removal of a considerable quantity of soil from the land of one man, and its deposit upon or annexation to the land of another, suddenly and by the perceptible action of water. 2 Washb. R. P. 452.

In such case the property belongs to the first owner. Bract. 221; Hargr. Tract. *de Jure Mar.*; Schultes, Aq. Rights 115; 28 Wkly. L. Bull. (Ohio) 104; 40 Neb. 792.

AVUNCULUS. In Civil Law. A mother's brother; 2 Bla. Com. 230.

AWAIT. To lay in wait; to waylay.

AWARD (Law Latin, *awarda*, *awardum*, Old French, *agarda* from *à garder*, to keep, preserve, to be guarded, or kept: so called because it is imposed on the parties to be observed or kept by them. Spelman, Gloss.).

The judgment or decision of arbitrators, or referees, on a matter submitted to them.

The writing containing such judgment. Cowel; *Termes de la Ley*; Jenk. 137; Billings, Aw. 119; Watson, Arb. 174; Russell, Arb. 234.

Requisites of. To be conclusive, the award should be consonant with and follow the submission, and affect only the parties to the submission; otherwise, it is an assumption of power, and not binding; Lutw. 530 (Onyons *v.* Cheese); Stra. 903; Rep. Finch 141; 24 E. L. & Eq. 346; 8 Beav. 361; 13 Johns. 27, 268; 17 Vt. 9; 3 N. H. 82; 13 Mass. 396; 11 Cush. 37; 18 Me. 251; 40 *id.* 194; 25 Conn. 71; 3 Harr. Del. 22; 5 Pa. 274; 12 Gill & J. 156, 456; Litt. 83; 13 Miss. 172; 25 Ala. 351; 7 Cra. 599. See 11 Johns. 61; 1 Call 500; 7 Pa. 134; 50 N. J. Eq. 103; 27 Ill. 374. Where it exceeds the terms of the submission, it is not void, where the judge on confirmation excludes as much as is incompetent; 36 S. C. 80; but it is so where damages are allowed in a lump sum, in which are included matters not submitted to them; 21 N. E. Rep. (N. Y.) 398.

It must be final and certain; Morse, Arb. 383; 5 Ad. & E. 147; 2 S. & S. 130; 3 S. & R. 340; 2 Pa. 206; 9 Johns. 43; 22 Wend. 125; 4 Cush. 317, 396; 13 Vt. 53; 40 Me. 194; 2 Green, N. J. 333; 4 Md. Ch. Dec. 199; 1 Gilm. 92; 2 Patt. & H. 442; 3 Ohio 266; 5 Blackf. 128; 4 *id.* 489; 1 Ired. 466; 3 Cal. 431; 1 Ark. 206; 4 Ill. 428; 75 *id.* 24; 2 Fla. 157; 13 Miss. 712; 53 *id.* 587; 2 M'Cord 279; 5 Wheat. 394; 12 *id.* 377; 62 Hun 568; 50 N. Y. 228; 74 *id.* 108; 64 N. C. 332; 103 Mass. 167; 54 Ala. 78; and see 4 Conn. 50; 6 Johns. 39; 6 Mass. 46; conclusively adjudicating *all* the matters submitted; 6 Md. 135; 1 M'Mull. 302; 2 Cal. 299; 5 Wall. 419; 83 Me. 71; and stating the decision in such language as to leave no doubt of the arbitrator's intention, or the nature and extent of the duties imposed by it on the parties; 2 Cal. 299, and cases above. An award reserving the determination of future disputes; 6 Md. 135; an award directing a bond without naming a penalty; 5 Coke 77; Rolle, Abr. *Arbitration* 2, 4; an award that one shall give security for the performance of some act or payment of money, without specifying the kind of security, are invalid; Viner, Abr. *Arbit.* 2, 12; Bacon, Abr. *Arbit.* E. 11, and cases above. So is one that finds that a party is entitled to receive his final payment and fails to ascertain the amount; 134 N. Y. 85.

It must be possible to be performed, and must not direct anything to be done which is contrary to law; 1 Ch. Cas. 87; 2 B. & Ald. 528; Kirb. 253; 1 Dall. 364; 4 *id.* 298; 4 Gill & J. 298; 13 Johns. 264; 99 Mass. 585. It will be void if it direct a party to pay a sum of money at a day past, or direct him to commit a trespass, felony, or an act which would subject him to an action; 2 Chit. 594; 1 M. & W. 572; or if it be of things nugatory and offering no advantage to either of the parties; 6 J. B. Moore 713.

It must be without palpable or apparent mistake; 2 Gall. 61; 3 B. & P. 371; 1 Dall. 487; 6 Metc. 131. For if the arbitrator acknowledges that he made a mistake, or if an error (in computation, for instance) is apparent on the face of the award, it will not be good; 4 Zabr. 647; 2 Stockt. 45; 2 Dutch. 130; 32 N. H. 289; 11 Cush. 549; 18 Barb. 344; 2 Johns. Ch. 399; 27 Vt. 241; 8 Md. 208; 4 Cal. 345; 5 *id.* 430; 115 Mass. 40; 77 Ill. 515; 12 R. I. 324; for, although an arbitrator may decide contrary to law, yet if the award attempts to follow the law, but fails to do so from the mistake of the arbitrator, it will be void; 3 Md. 353; 15 Ill. 421; 26 Vt. 416, 630; 4 N. J. 647; 17 How. 344.

An award may be in part good and in part void, in which case it will be enforced so far as valid, if the good part is separable from the bad; 10 Mod. 204; 12 *id.* 587; Cro. Jac. 664; 8 Taunt. 697; 1 Wend. 326; 5 Cow. 197; 13 Johns. 264; 2 Caines 235; 1 Me. 300; 42 *id.* 83; 7 Mass. 399; 19 Pick. 300; 11 Cush. 37; 6 Green, N. J. 247; 1 Rand. 449; 1 Hen. & M. 67; Hard. 318; 5 Dana 492; 26 Vt. 345; 2 Swan 213; 2 Cal. 74; 4 Ind. 248; 6 Harr. & J. 10; 5 Wheat. 394; 50 N. J. Eq. 103.

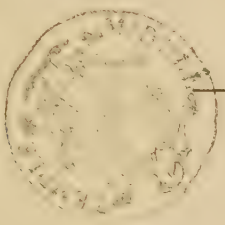
As to *form*, the award should, in general, follow the terms of the submission, which

which, however, the tenant is entitled. Broom, Max. 306. See EMBLEMENTS.

AWM. An ancient measure used in measuring Rhenish wines. *Termes de la Ley.* Its value varied in the different cities. Spelled also *Aume.* Cowel.

AYANT CAUSE. In French Law. This term, which is used in Louisiana, signifies one to whom a right has been assigned, either by will, gift, sale, exchange, or the like; an assignee. An *ayant cause* differs from an heir who acquires the right by inheritance. 8 Toullier, n. 245.

AYUNTAMIENTO. In Spanish Law. A congress of persons; the municipal council of a city or town. 1 White, Rec. 416; 12 Pet. 442, notes.



B.

B. The second letter of the alphabet.

It is used to denote the second page of a folio, and also as an abbreviation. See A; ABBREVIATIONS.

BABY ACT. A term of reproach originally applied to the disability of infancy when pleaded by an adult in bar of recovery upon a contract made while he was under age, but extends to any plea of the statute of limitations. Anderson's Dict. L.

BACK-BOND. A bond of indemnification given to a surety.

In Scotch Law. A declaration of trust; a defeasance; a bond given by one who is apparently absolute owner, so as to reduce his right to that of a trustee or holder of a bond and disposition in security. Paterson, Comp.

BACK-WATER. That water in a stream which, in consequence of some obstruction below, is detained or checked in its course, or re-flows.

The term is usually employed to designate the water which is turned *back*, by a dam erected in the stream below, upon the wheel of a mill above, so as to retard its revolution.

Every riparian proprietor is entitled to the benefit of the water in its natural state. Another such proprietor has no right to alter the level of the water, either where it *enters* or where it *leaves* his property. If he claims either to throw the water back above, or to diminish the quantity which is to descend below, he must, in order to maintain his claim, either prove an actual grant or license from the proprietors affected by his operations, or an uninterrupted enjoyment for twenty years. If he cannot maintain his claim in either of these ways, he is liable to an action on the case for damages in favor of the injured party, or to a suit in equity for an injunction to restrain his unlawful use of the water; 1 Sim. & S. 190, 203; 1 B. & Ad. 258, 874; 9 Coke 59; 1 Wils. 178; 6 East 203; 5 Gray 460; 11 Metc. Mass. 517; 25 Pa. 519; 1 Rawle 218; 7 W. & S. 9; 4 Day 244; 24 Conn. 15; 7 Cow. 266; 2 Johns. Ch. 162; 5 N. H. 232; 62 *id.* 447; 2 Gilm. 285; 27 La. An. 501; 74 N. C. 501; 4 Ill. 432; 3 Green, N. J. 116; 3 Vt. 308; 4 Eng. L. & Eq. 265; 4 Mas. 400 (per Story, J.); 56 Me. 197; 77 Ga. 809. But he must show some actual, appreciable damage; 1 Rich. S. C. 444; 11 *id.* 153; *contra*, 4 Ga. 241; 42 Pa. 67. See 2 Scam. 67.

A riparian owner who obstructs a stream, impeding the usual flow of water or that caused by ordinary freshets and causing land to be overflowed, becomes liable; 155 Pa. 523. Where a railroad maintains a dam which causes water to overflow adjacent land, it is liable, although the dam was originally constructed by the county under authority of the legislature; 112 Mo. 6. At common law a railroad company must construct and maintain its road across a watercourse so as not to injure adjacent lands; 43 Ill. App. 78; 157 Pa. 622.

An action on the case to recover damages for flowing land is local, and must, therefore, be brought in the county where the land lies; 25 N. H. 525; 23 Wend. 484; 2 East 497.

In Massachusetts and some other of the states, acts have been passed giving to the owners of mills the right to flow the adjoining lands, if necessary to the working of their mills, subject only to such damages as shall be ascertained by the particular process prescribed, which process is substituted for all other judicial remedies; Angell, Wat. Cour. c. ix.; 12 Pick. 467; 4 Cush. 245; 4 Gray 581; 5 Ired. 333; 11 Ala. 472; 39 Me. 246; 42 *id.* 150; 3 Wis. 603; 86 Ky. 44. These statutes, however, confer no authority to flow back upon existing mills; 22 Pick. 312; 23 *id.* 216. See DAMAGES; INUNDATION; WATERCOURSE.

BACKADATION. A consideration given to keep back the delivery of stock when the price is lower for time than for ready money. Wharton, Dict. 2d Lond. ed.; Lewis, Stocks, etc. Sometimes called *Backwardation.*

BACKBEREND (Sax.). Bearing upon the back or about the person.

Applied to a thief taken with the stolen property in his immediate possession, Bracton, l. 3, tr. 2, c. 32. Used with *handhabend*, having in the hand.

BACKING. Indorsement. Indorsement by a magistrate.

Backing a warrant becomes necessary when it is desired to serve it in a county other than that in which it was first issued. In such a case the indorsement of a magistrate of the new county authorizes its service there as fully as if first issued in that county. The custom prevails in England, Scotland, and some of the United States. See 2 N. Y. Rev. Stat. 590, § 5; 2 Rob. Mag. Assist. 572.

BACKSIDE. A yard at the back part of or behind a house, and belonging thereto.

The term was formerly much used both in conveyances and in pleading, but is now of infrequent occurrence except in conveyances which repeat an ancient description. Chitty, Pr. 177; 2 Ld. Raym. 1399.

BACKWARDATION. See BACKADATION.

BAD. Vicious, evil, wanting in good qualities; the reverse of good. See 127 Mass. 487; 4 Wend. 537.

BADGE. A mark or sign worn by some persons, or placed upon certain things, for the purpose of designation.

Some public officers, as watchmen, policemen, and the like, are required to wear badges that they may be readily known. It is used figuratively when we say, possession of personal property by the seller is a badge of fraud.

BADGE OF FRAUD. A term used relatively to the law of fraudulent conveyances made to hinder and defraud creditors. It is defined as a fact tending to throw suspicion upon a transaction, and calling for an explanation. Bump, Fr. Conv. 31.

When such a fact appears, its effect is to require more persuasive proof of the payment of the consideration and the good faith of the parties than would ordinarily be required; 11 Ala. 207. It is not fraud of itself, but evidence to establish a fraudulent intent; 5 Fla. 305; 13 Wis. 495.

The following have been held to be badges of fraud: *indebtedness* on the part of the grantor; 23 How. 477; 29 Iowa 161; 7 Cow. 301; 25 Pa. 509; 26 Ark. 20; the *expectation* of a suit; 17 Iowa 498; 42 Tex. 116; 28 Md. 565; 62 Pa. 62; 24 Wis. 410; *false recitals* in the deed; 18 Vt. 460; 26 N. Y. 378; *inadequacy* of consideration; 54 Ill. 269; 14 Johns. 493; 27 Miss. 167; 10 N. J. Eq. 323; 24 Ind. 228; 52 N. Y. 274; 23 Tex. 77; 65 Pa. 456; 70 Me. 258; 23 N. J. Eq. 14; 59 Mo. 537; 8 Wall. 362; 34 Miss. 576; 12 Wend. 41; *false statement* of the *consideration;* 26 N. Y. 378; 64 N. C. 374; 8 Dana 103; *secrecy;* 5 Fla. 9; 20 How. 448; 42 Mo. 551; 21 Barb. 85; *concealment* of the deed, not recording it and leaving it in the hands of the grantor; 14 Johns. 493; 44 Pa. 43; 12 Blatch. 256; 17 B. Monr. 779; 30 Mich.; *failure to record* a mortgage by agreement; 30 N. E. Rep. (Ind.) 952; 69 Miss. 687; a *secret trust* between the grantor and grantee; 3 Coke 80; 7 Watts 434; 16 N. J. Eq. 299; *retention of possession* of land by the grantor; 7 Cow. 301; 23 How. 477; 42 Mo. 551; 31 Me. 93; 6 Wall. 78; 17 Cal. 327; 51 Ga. 18; mere delay to record a deed executed for a good consideration by an insolvent to his son, where there is no evidence that the son knew of the insolvency, is not a badge of fraud; 81 Wis. 142; but *in general* anything in the transaction out of the usual course of such transactions is held to be such, 13 La. Ann. 595; Bump, Fr. Conv. 50.

BAGGAGE. Such articles of apparel, ornament, etc., as are in daily use by travellers, for convenience, comfort, or recreation. "It includes whatever the passenger takes with him for his personal use or convenience according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or ultimate purpose of the journey;" per Cockburn, C. J., in L. R. 6 Q. B. 612; only such articles of necessity or convenience as are generally carried by passengers for their personal use; 3 Ohio Dec. 192; 6 Misc. Rep. 388.

It was formerly held that carriers are not liable, as common carriers, for baggage unless a distinct price was paid for its carriage; 1 Salk. 2821; and see 3 H. & C. 135; but the rule is now otherwise in England and America; L. R. 6 Q. B. 612; 19 Wend. 281; 26 *id.* 591; 19 Ill. 556; 6 Ohio 358.

This term has been held to include jewelry carried as baggage, and which formed a part of female attire, the plaintiff being on a journey with his family; 4 Bingh. 218; 3 Pa. 451. A watch, carried in one's trunk, is proper baggage; 10 Ohio 145; 1 Newb. 494; but see 9 Humphr. 621; 18 Mass. 275; the surgical instruments of an army surgeon; 12 Wall. 262; valuable laces carried by a foreign woman of rank, for which the jury found in $10,000 damages; 100 U. S. 24; one revolver, but not two; 56 Ill. 212; an opera glass; 33 Ind. 379; bedding of a poor man moving with his family; 35 Vt. 604; 4 Misc. Rep. 266; such articles as are ordinarily carried by travellers in valises; 42 Mo. App. 134; but not money, even to a reasonable amount; 6 Hill, N. Y. 586; 22 Ill. 278; intended for trade, business, or investment, or for transportation, and not intended for the passenger while travelling; 70 Cal. 169; Civil Code Cal. § 2181; *contra*, 98 Mass. 371; nor samples of merchandise; 13 C. B. N. S. 818; 98 Mass. 83; 6 Hill, N. Y. 586; 59 Hun 625; 66 *id.* 456; 126 Mass. 121; 35 Ohio St. 541; 52 Kan. 398; nor jewelry bought for presents; 4 Bosw. 225; 85 Cal. 329; nor for a stock of jewelry carried by a salesman to be sold (checked, without saying anything as to its contents, and there being nothing to indicate its contents, and railroad company's agent having checked it without inquiries); 148 U. S. 627; nor a feather-bed not intended for use on the journey; 106 Mass. 146; nor a lawyer's papers and bank notes to be used by him in conducting a case; 19 C. B. N. S. 321; nor trunks containing stage properties, costumes, paraphernalia, and advertising matters of a theatrical company, unless accepted as baggage, but the carrier, though

without fault, is liable for the destruction of the trunks where its agent checked them as baggage with full knowledge that they contained, besides personal apparel, stage costumes and properties; 26 Pac. R. 230; S. C. 20 Oreg. 392. Books for reading or amusement; 6 Ind. 242; a harness-maker's tools, valued at ten dollars; and a rifle; 10 How. Pr. 330; 14 Pa. 129; and a rifle, revolver, two gold chains, two gold rings, and a silver pencil case; 32 Up. Can. Q. B. 66; and a carpet; 41 Mo. 503; are considered baggage. An illustrated catalogue, the individual property of a travelling salesman, prepared by himself, at his own expense, necessary for his convenience and use in his business, and carried with him on his trips, is personal baggage, and a recovery for it may be had against one engaged in transferring baggage from depots to hotels, through whose fault a valise containing the catalogue was lost; 121 Ind. 226.

But if a carrier know that merchandise is included among baggage, and do not object, he is liable to the same extent as for other goods taken in the due course of his business; 3 E. D. Smith 571; 8 Exch. 30; but he must have actual knowledge; 13 C. B. N. S. 818; L. R. 6 Q. B. 612; 73 Ill. 348; 41 Miss. 671; 52 N. Y. 429; 29 S. W. Rep. 196. See 72 Hun 5. And see COMMON CARRIERS.

Where a passenger on second-class car delivered a dog to baggage-master and declined to pay for carrying it; at the plaintiff's destination, the baggage-master refused to deliver the dog, without the payment of a sum of money, and it was carried past the destination and lost, by the negligence of the baggage-master, it was *Held*, that plaintiff could recover because of his ignorance of a rule as to a payment for conveying his dog on the train; 10 S. W. Rep. 282.

Under Code Iowa, §§ 1308, 2184, the limitation of the liability of a railroad company for wearing apparel in a passenger's baggage to the value of $100, by a provision printed in the ticket, is ineffectual, and where the contract for transportation is made in another state, to be executed in Iowa, it will be presumed, in the absence of proof to the contrary, that the law of that state is to the same effect; 49 N. W. Rep. 77; a provision in the ticket, limiting liability for loss of baggage to $100, where goods of the value of $300 were stolen from the baggage while in company's possession, did not relate to loss or damage from any particular cause, but to the amount of loss only, and the jury were entitled to find negligence on the part of the railroad company, and they were liable for the full amount lost; 30 N. E. Rep. (Ind.) 424. Baggage carried by a woman, not a pauper, coming from Germany to the United States, consisting of clothing for herself and her two children, together with some bed feathers and covering of the value of $285, is reasonable in quantity and value, and therefore a provision in the transportation ticket, limiting the carrier's liability for loss of baggage to $50, is invalid, and will not defeat a recovery for loss of such baggage; 4 Misc. Rep. 266.

A baggage check merely indicating designation of baggage beyond terminus of issuing carrier's route does not prove a contract to carry to such destination; 13 Misc. Rep. 32. The issuance of a baggage check by a carrier to a passenger is not a contract by the carrier to deliver the baggage at such a point, but simply a means of identification of the baggage at the end of the route; 66 Hun 202.

BAIL (Fr. *bailler*, to deliver).

In Practice. Those persons who become sureties for the appearance of the defendant in court.

To deliver the defendant to persons who, in the manner prescribed by law, become securities for his appearance in court.

To become bail for another.

The word is used both as a substantive and a verb, though more frequently as a substantive, and in civil cases, at least, in the first sense given above. In its more ancient signification, the word includes the delivery of property, real or personal, by one person to another. Bail in actions was first introduced in favor of defendants, to mitigate the hardships imposed upon them while in the custody of the sheriff under arrest, the security thus offered standing to the sheriff in the place of the body of the defendant. Taking bail was made compulsory upon the sheriffs by the statute 23 Hen. VI. c. 9, and the privilege of the defendant was rendered more valuable and secure by successive statutes, until by statute 12 Geo. I. c. 29, made perpetual by 21 Geo. II. c. 3, and 19 Geo. III. c. 70, it was provided that arrests should not be made unless the plaintiff make *affidavit* as to the amount due, and this amount be endorsed on the writ; and for this sum and no more the sheriff might require bail.

In the King's Bench, bail above and below were both exacted as a condition of releasing the defendant from the *custody* in which he was held from the time of his arrest till his final discharge in the suit. In the Common Bench, however, the origin of bail above seems to have been different, as the *capias* on which bail might be demanded was of effect only to bring the defendant to court, and after appearance he was theoretically in *attendance*, but not in *custody*. The failure to file such bail as the emergency requires, although no arrest may have been made, is, in general, equivalent to a default.

In some of the states the defendant when arrested gives bail by bond to the sheriff, conditioned to appear and answer to the plaintiff and abide the judgment and not to avoid, which thus answers the purpose of bail above and below; 1 Me. 326; 1 N. H. 172; 2 *id.* 360; 2 Mass. 484; 13 *id.* 94; 2 N. & M'C. 569; 2 Hill, So. C. 336; 4 Dev. 40; 18 Ga. 314. And see 2 South. 811. In criminal law the term is used frequently in the second sense given, and is allowed except in cases where the defendant is charged with the commission of the more heinous crimes.

Bail above. Sureties who bind themselves either to satisfy the plaintiff his debt and costs, or to surrender the defendant into custody, provided judgment be against him in the action and he fail to do so; Sellon, Pr. 137.

Bail to the action. Bail above.

Bail below. Sureties who bind themselves to the sheriff to secure the defendant's appearance, or his putting in bail to the action on the return-day of the writ. It may be demanded by the sheriff whenever he has arrested a defendant on a bailable process, as a prerequisite to releasing the defendant.

Civil bail. That taken in civil actions.

Common bail. Fictitious sureties formally entered in the proper office of the court.

It is a kind of bail above, similar in form to special bail, but having fictitious persons, John Doe and Richard Roe, as sureties. Filing common bail is tantamount to entering an appearance. 3 Bla. Com. c. xix.

Special bail. Responsible sureties who undertake as bail above.

Requisites of. A person to become bail must, in England, be a freeholder or housekeeper; 2 Chitt. Bail 96; 5 Taunt. 174; Lofft 148; must be *subject to process* of the court, and not privileged from arrest either temporarily or permanently; 4 Taunt. 249; 1 D. & R. 127; 15 Johns. 535; 20 *id.* 129; Kirb. 209; see 3 Rich S. C. 49; must be *competent* to enter into a *contract;* must be *able to pay* the amount for which he becomes responsible, but the property may be real or personal if held in his own right; 2 Chit. Bail 97; 11 Price 158; and liable to ordinary legal process; 4 Burr. 2526. And see 1 Chit. 286, n.; 2 How. Pr. 105; 19 Wend. 132.

Persons not excepted to as appearance bail cannot be objected to as bail above; 1 Hen. & M. 22; and bail, if of sufficient ability, should not be refused on account of the personal character or opinions of the party proposed; 4 Q. B. 468; 1 B. & H. Lead. Cr. Cas. 236.

When it may be given or required. In civil actions the defendant may give bail in all cases where he has been arrested; Petersd. B. 17, 37; 7 Johns. 137; and bail below, even, may be demanded in some cases where no arrest is made; 1 Harr. & J. 538; 2 M'Cord 250; but where a statute forbids the taking of bail, an order of court authorizing it will not entitle a party thereto or make it valid; 31 Ill. App. 594.

Bail above is required under some restrictions in many of the states in all actions for considerable amounts; 2 M'Cord 385; either *common;* 2 Yeates 429; 1 Spenc. 494; 13 Ill. 551; which may be filed by the plaintiff, and judgment taken by default against the defendant if he neglects to file proper bail, after a certain period; 8 Johns. 359; 4 Cow. 61; 2 South. 684; 4 Wash. C. C. 127; or *special,* which is to be filed of course in some species of action and may be demanded in others; 1 M'Cord 472; 17 Mass. 176; 1 Yeates 280; 13 Johns. 305, 425; 1 Wend. 303; 4 H. & M'H. 155; 2 Brev. 218; but in many cases only upon special cause shown; Coxe 277; 3 Halst. 311; 2 Caines 47; 1 Browne, Pa. 297; 3 Binn. 283; 4 Rand. 152.

The existence of a debt and the amount due; 8 S. & R. 61; 2 Whart. 499; 1 Mo. 346; 1 Leigh 476; 1 Penning. 46; 1 Blackf. 112; 2 Johns. Cas. 105; 3 Ga. 128; 10 Mo. 273; in an action for debt, and, in some forms of action, other circumstances must be shown by affidavit to prevent a discharge on common bail; 5 Halst. 831; 7 Cow. 518; 1 Barb. 247; 1 Blackf. 112; 8 Leigh 411; 16 Ohio 304; 13 Ga. 357; see 1 Pet. C. C. 352; 2 Wash. C. C. 198; 4 *id.* 325. It is a general rule that a defendant who has been once held to bail in a civil case cannot be held a second time for the same cause of action; Tidd, Pr. 184; 8 Ves. Ch. 594; 4 Yeates 206; 2 Rich. S. C. 336; but this rule does not apply where the second holding is in another state; 14 Johns. 346; 2 Cow. 626; 3 N. H. 43; 2 Dall. 330; 4 M'Cord 485. See 1 Halst. 131. And see also 1 Dall. 188; 2 Wash. C. C. 157; 1 Pet. C. C. 404; 3 Conn. 523; 3 Gill & J. 54; as to the effect of a discharge in insolvency.

In criminal cases the defendant may in general claim to be set at liberty upon giving bail, except when charged with the commission of a capital offence; 4 Bla. Com. 297; 6 Mo. 640; 59 *id.* 599; 1 M'Mull. 456; 3 Strobh. 272; 18 Ala. 390; 96 *id.* 110; 9 Dana 38; 9 Ark. 222. See 87 Mich. 497; 57 Miss. 39; 34 La. Ann. 61; 79 Ind. 600. One charged with murder should not be discharged on habeas corpus, unless the evidence before the committing magistrate was so insufficient that a verdict thereon requiring capital punishment would be set aside; 64 Cal. 152; 83 Ala. 114; 86 *id.* 620; 65 Miss. 187; and even in capital offences a defendant may be bailed in the discretion of the court, in the absence of constitutional or statutory provisions to the contrary; 6 Gratt. 705; 11 Leigh 665; 19 Ohio 139; 8 Barb. 158; 19 Ala. N. S. 561; 1 Cal. 9; 30 Miss. 673; 16 Mass. 423; 8 B. Monr. 3. Except under extraordinary circumstances, one convicted of felony will not be admitted to bail pending an appeal; 89 Cal. 79; 60 Barb. 480; 40 Tex. 451; 24 Ga. 391. Where one is indicted for a capital offence, the burden rests on him to show that the proof of his guilt is not evident, on an application for bail; 31 Tex. Crim. R. 422.

For any crime or offence against the United States, not punishable by death, any justice or judge of the United States, or commissioner of a circuit court to take bail, or any chancellor, judge of the supreme or superior court, or first judge of any court of common pleas, or mayor of any city of any state, or any justice of the peace or magistrate of any state, where the offender may be found, may take bail; Act Sept. 24, 1789, § 33, Mar. 2, 1793, § 4; and, after commitment by a justice of the supreme or judge of district court of the United States, any judge of the supreme or superior court of any state (there being no judge of the United States in the district to take such bail) may admit the person to bail if he offer it.

When the punishment by the laws of the United States is death, bail can be taken only by the supreme or circuit court, or by a judge of the district court of the United States.

As to the principle on which bail is granted or refused in cases of capital offences in the Queen's Bench, see 1 E. & B. 1, 8; Dearsl. Cr. Cas. 51, 60.

The proceedings attendant on giving bail are substantially the same in England and all the states of the United States. An ap-

plication is made to the proper officer, 4 Rand. 498, and the bond or the names of the bail proposed filed in the proper office, and notice is given to the opposite party, who must except within a limited time, or the bail justify and are approved. If exception is taken, notice is given, a hearing takes place, the bail must *justify*, and will then be approved unless the other party oppose successfully; in which case other bail must be added or substituted. A formal application is, in many cases, dispensed with, but a notification is given at the time of filing to the opposite party, and, unless exceptions are made and notice given within a limited time, the bail justify and are approved. If the sum in which the defendant is held is too large, he may apply for mitigation of bail.

The bail are said to enter into a recognizance when the obligation is one of record, which it is when government or the defendant is the obligee; when the sheriff is the obligee, it is called a bail bond. See BAIL BOND; RECOGNIZANCE.

Unless authorized by statute, it is illegal for an officer or magistrate to receive money in lieu of bail for the appearance of a person accused of a crime; 49 Ohio St. 257.

Mitigation of excessive bail may be obtained by simple application to the court; 13 Johns. 425; 1 Wend. 107; 3 Yeates 83; and in other modes; 17 Mass. 116; 1 N. H. 374. Exacting excessive bail is against the constitution of the United States, and was a misdemeanor at common law; U. S. Const. Amend. art. 8; 1 Brev. 14; 4 Cranch 518.

The liability of bail is limited by the bond; 9 Pet. 329; 2 Va. Cas. 334; 5 Watts 539; 2 N. J. 533; by the *ac etiam;* 1 Cow. 601; see 5 Conn. 588; 5 Watts 539; by the amount for which judgment is rendered; 2 Speers 664; and special circumstances in some cases; 1 N. & M'C. 64; 1 M'Cord 123; 4 *id.* 315; 2 Hill, S. C. 336. And see BAIL BOND; RECOGNIZANCE.

The powers of the bail over the defendant are very extensive. As they are supposed to have the custody of the defendant, they may, when armed with the bail piece, arrest him, though out of the jurisdiction of the court where they became bail, and in a different state; 1 Baldw. 578; 3 Conn. 84, 421; 8 Pick. 138; 7 Johns. 145; 109 N. C. 775; may take him while attending court as a suitor, or at any time, even on Sunday; 4 Yeates 123; 4 Conn. 170; may break open a door if necessary; 7 Johns. 145; 4 Conn. 166; may command the assistance of the sheriff and his officers; 8 Pick. 138; and may depute their power to others; 3 Harr. 568. Where the defendant has been surrendered by his sureties pending an appeal, a reasonable time and opportunity should be given him to get another bond; 112 Mo. 231.

To refuse or delay to bail any person is an offence against the liberty of the subject, both at common law and by statute, but does not entitle the person refused to an action unless malice be shown; 4 Q. B. 468; 13 *id.* 240; 1 N. H. 374.

In Canadian Law. A lease. See Merlin, Répert. *Bail.*

Bail emphyteotique. A lease for years, with a right to prolong indefinitely: 5 Low. C. 381. It is equivalent to an alienation; 6 Low. C. 58.

BAIL BOND. In Practice. A specialty by which the defendant and other persons become bound to the sheriff in a penal sum proportioned to the damages claimed in the action, and which is conditioned for the due appearance of such defendant to answer to the legal process therein described, and by which the sheriff has been commanded to arrest him.

The defendant usually binds himself as principal with two sureties; but sometimes the bail alone bind themselves as principals, and sometimes also one surety is accepted by the sheriff. The bail bond may be said to stand in the place of the defendant so far as the sheriff is concerned, and, if properly taken, furnishes the sheriff a complete answer to the requirement of the writ, directing him to take and produce the body of the defendant. A bail bond is given to the sheriff, and can be taken only where he has custody of the defendant on process other than final, and is thus distinguished from recognizance, which see.

The sheriff can take the bond only when he has custody of the defendant's body on process other than final.

When a bail bond, with sufficient securities and properly prepared, is tendered to the sheriff, he must take it and discharge the defendant; Stat. 23 Hen. VI. c. 10, § 5.

The *requisites* of a bail bond are that it should be under seal; 1 Term 418; 7 *id.* 109; 2 Hayw. 16; 3 T. B. Monr. 80; 6 Rand. 101; should be to the sheriff by the name of the office; 1 Term 422; 4 M'Cord 175; 1 Ill. 51; 4 Bibb 505; 4 Gray 300; conditioned in such manner that performance is possible; 3 Lev. 74; 3 Campb. 181; 1 South. 319; for a proper amount; 2 Va. Cas. 334; 2 Penning. 707; for the defendant's appearance at the place and day named in the writ; 1 Term 418; 1 Ala. 289; 4 Me. 10; 4 Halst. 97; 2 Munf. 448; 2 Brev. 394; see BAIL; and should describe the action in which the defendant is arrested with sufficient accuracy to distinguish it; Hard. 501; 10 Mass. 20; 5 *id.* 542; 9 Watts 43; but need not disclose the nature of the suit; 6 Term 702. A bail bond which fails to specify the charge which the principal is to answer is void and the defect cannot be remedied by testimony; 58 Hun 368. The sureties must be two or more in number to relieve the sheriff; 2 Bingh. 227; 9 Mass. 482; 12 *id.* 129; 1 Wend. 108; see 5 Rich. S. C. 347; and he may insist upon three, or even more, subject to statutory provisions on the subject; 5 M. & S. 223; but the bond will be binding if only one be taken; 2 Metc. Mass. 490; 8 Johns. 358; 2 Over. 178; 2 Pick. 284; Petersd. B. 264.

Putting in bail to the action; 5 Burr. 2683, and waiver of his right to such bail by the plaintiff; 5 S. & R. 419; 11 *id.* 9; 7 Ohio 210; 4 Johns. 185; 6 Rand. 165; 2 Day 199; or a surrender of the person of

the defendant, constitute a performance or excuse from the performance of the condition of the bond; 1 B. & P. 326; 1 Baldw. 148; 1 Johns. Cas. 329, 334; 9 S. & R. 24; 14 Mass. 115; 2 Strobh. 439; 6 Ark. 219; see 4 Wash. C. C. 317, 333; 109 N. C. 775; as do many other matters which may be classed as changes in the circumstances of the defendant abating the suit; Dougl. 45; 1 N. & M'C. 215; 2 Mass. 485; 1 Over. 224; including a discharge in insolvency; 2 Bail. S. C. 492; 1 Harr. & J. 156; 2 Johns. Cas. 403; 2 Mass. 481; 1 Harr. N. J. 367, 466; 3 Gill & J. 64; see 1 Pet. C. C. 484; 4 Wash. C. C. 317; matters arising from the negligence of the plaintiff; 2 East 305; 2 B. & P. 558; 6 Term 363; or from irregularities in proceeding against the defendant; 2 Tidd, Pr. 1182; 3 Bla. Com. 292; 3 Yeates 389; 4 Yerg. 181; 1 Green, N. J. 209; 1 Harr. Del. 134. Where the recognizance is for the appearance of a prisoner, and he does appear and pleads guilty, it cannot be forfeited for failure to appear subsequently to answer the sentence; 44 Mo. App. 375.

In those states in which the bail bond is conditioned to abide the judgment of the court as well as to appear, some of the acts above mentioned will not constitute performance. See RECOGNIZANCE. The plaintiff may demand from the sheriff an assignment of the bail bond, and may sue on it for his own benefit; Stat. 4 Anne, c. 16, § 20; Watson, Sher. 99; 1 Sellon, Pr. 126, 174; 6 S. & R. 545; 2 Jones, N. C. 353; see 3 Munf. 121; unless he has waived his right so to do; 1 Caines 55; or has had all the advantages he would have gained by entry of special bail; 4 Binn. 344; 2 S. & R. 284. See 1 P. A. Bro. 238, 250.

As to the court in which suit must be brought, see 4 M'Cord 370; 1 Hill, S. C. 604; 13 Johns. 424; 9 *id.* 80; 6 S. & R. 543; 1 Ga. 315.

The remedy is by *scire facias* in Massachusetts, New Hampshire, North Carolina, South Carolina, Tennessee, Texas, and Vermont; 15 Pick. 339; 2 N. H. 359; 2 Hayw. 223; 9 Yerg. 223; 2 Brev. 84, 318; 21 Vt. 409; 22 *id.* 249; 6 Tex. 337. The United States is not restricted to the remedies provided by the laws of a state in enforcing a forfeited bond taken in a criminal case, but may proceed according to the common law; 54 Fed. Rep. 221. See JUSTIFICATION.

BAIL COURT (now called the Practice Court). **In English Law.** A court auxiliary to the court of Queen's Bench at Westminster, wherein points connected more particularly with pleading and practice were argued and determined.

It heard and determined ordinary matters, and disposed of common motions; Holthouse, Law Dict.; Wharton, Law Dict. 2d Lond. ed. It has been abolished.

BAIL PIECE. A certicate given by a judge or the clerk of a court, or other person authorized to keep the record, in which it is certified that the bail became bail for the defendant in a certain sum and in a particular case. It was the practice, formerly, to write these certificates upon small pieces of parchment, in the following form:—

In the court of ————, of the Term of ————, in the year of our Lord ——,

City and County of ————, ss.

Theunis Thew is delivered to bail, upon the taking of his body, to Jacobus Vanzant, of the city of ——, merchant, and to John Doe, of the same city, yeoman.

SMITH, JR. *Attor'y for Deft.* } At the suit of PHILIP CARSWELL.

Taken and acknowledged the — day of —, A. D. ——, before me. D. H.

See 3 Bla. Com. App.; 1 Sellon, Pr. 139.

BAILABLE ACTION. An action in which the defendant is entitled to be discharged from arrest only upon giving bond to answer.

BAILABLE PROCESS. Process under which the sheriff is directed to arrest the defendant and is required by law to discharge him upon his tendering suitable bail as security for his appearance. A *capias ad respondendum* is bailable; not so a *capias ad satisfaciendum*.

BAILEE. In Contracts. One to whom goods are bailed; the party to whom personal property is delivered under a contract of bailment.

His duties are to act in good faith, and perform his undertaking, in respect to the property intrusted to him, with the diligence and care required by the nature of his engagement.

When the bailee alone receives benefit from the bailment, as where he borrows goods or chattels for use, he is bound to exercise extraordinary care and diligence in preserving them from loss or injury; Story, Bailm. § 237; 2 Pars. Contr. 95; 37 N. Y. 234; 37 Ill. 250; 27 Mo. 549; but he is not an insurer; 9 C. & P. 383; see 44 Barb. 442.

When the bailment is mutually beneficial to the parties, as where goods or chattels are hired or pledged to secure a debt, the bailee is bound to exercise ordinary diligence and care in preserving the property; Edw. Bailm. § 234; 42 Ala. 145; 58 Me. 275; 3 Brewst. 9; 6 Cal. 643.

When the bailee receives no benefit from the bailment, as where he accepts goods, chattels, or money to keep without recompense, or undertakes gratuitously the performance of some commission in regard to them, he is answerable only for the use of the ordinary care which he bestows upon his own property of a similar nature; Edw. Bailm. § 43. See 17 Mass. 479; 14 S. & R. 275; it has been held that such a bailee would be liable only for gross neglect or fraud; 40 Miss. 472; 23 Ark. 61; 57 Pa. 247; 7 Cow. 278; 34 Neb. 426; 154 Pa. 296. The case must have relation to the nature of the property bailed; 2 Stra. 1099; 1 Mas. 132; 1 Sneed 248. Where a gratuitous bailee of corporate stock without authority delivers it to the company, which converts the same to its use, he is liable for its value; 87 Mich. 209.

These differing degrees of negligence have been doubted. See BAILMENT.

The bailee is bound to redeliver or return the property, according to the nature of his engagement, as soon as the purpose for which it was bailed shall have been accomplished. Nothing will excuse the bailee from delivery to his bailor, except by showing that the property was taken from him by law, or by one having a paramount title, or that the bailor's title had terminated; 36 N. Y. 47, 403; 18 Vt. 186; 35 Barb. 191.

He cannot dispute his bailor's title; Edw. Bailm. § 73; 6 Mackey 255; 29 Mo. App. 233; nor can he convey title as against the bailor, although the purchaser believes him to be the true owner; 46 Mo. App. 313.

The bailee has a special property in the goods or chattels intrusted to him, sufficient to enable him to defend them by suit against all persons but the rightful owner. The depositary and mandatary acting gratuitously, and the finder of lost property, have this right; Edw. Bailm. § 245; 12 Johns. 147.

A bailee with a mere naked authority, having a right to remuneration for his trouble, but coupled with no other interest, may support trespass for any injury amounting to a trespass done while he was in the actual possession of the thing; Edw. Bailm. 37; 13 Wend. 63; 35 Me. 55; 46 N. Y. 291. A bailee may recover in trover for goods wrongfully converted by a third person; 47 Ill. App. 87.

A bailee for work, labor, and services, such as a mechanic or artisan who receives chattels or materials to be repaired or manufactured, has a lien upon the property for his services; 2 Pars. Contr. 145, 146; 3 *id.* 270–273; 6 Denio 628; 10 Wend. 318; 15 Mass. 242. Other bailees, innkeepers, common carriers, and warehousemen, also, have a lien for their charges.

See also Schouler, Bailm.; Coggs *v.* Bernard, Sm. Lead. Cas; BAILMENT.

BAILIE. In Scotch Law. An officer appointed to give infeftment.

In certain cases it is the duty of the sheriff, as king's bailie, to act: generally, any one may be made bailie, by filling in his name in the precept of sasine.

A magistrate possessing a limited criminal and civil jurisdiction. Bell, Dict.

BAILIFF. A person to whom some authority, care, guardianship, or jurisdiction is delivered, committed, or intrusted. Spelman, Gloss.

A sheriff's officer or deputy. 1 Bla. Com. 344.

A magistrate, who formerly administered justice in the parliaments or courts of France, answering to the English sheriffs as mentioned by Bracton.

There are still bailiffs of particular towns in England; as, the bailiff of Dover Castle, etc.; otherwise, bailiffs are now only officers or stewards, etc.; as, *bailiffs of liberties*, appointed by every lord within his liberty, to serve writs, etc.; *bailiffs errant or itinerant*, appointed to go about the country for the same purpose; *sheriff's bailiffs*, sheriff's officers to execute writs; these are also called *bound bailiffs*, because they are usually bound in a bond to the sheriff for the due execution of their office; *bailiffs of court-baron*, to summon the court, etc.; *bailiffs of husbandry*, appointed by private persons to collect their rents and manage their estates; *water bailiffs*, officers in port towns for searching ships, gathering tolls, etc. Bacon, Abr.

A person acting in a ministerial capacity who has by delivery the custody and administration of lands or goods for the benefit of the owner or bailor, and is liable to render an account thereof. Co. Litt. 271; 2 Leon. 245; Story, Eq. Jur. § 446; 25 Conn. 149.

The word is derived from the old French *bailler*, to deliver, and originally implied the delivery of real estate, as of land, woods, a house, a part of the fish in a pond; Ow. 20; 2 Leon. 194; Keilw. 114 *a*, *b*; 37 Edw. III. c. 7; 10 Hen. VII. c. 30; but was afterwards extended to goods and chattels. Every bailiff is a receiver, but every receiver is not a bailiff. Hence it is a good plea that the defendant never was receiver, but as bailiff. 18 Edw. III. 16. See Cro. Eliz. 82, 83; 2 And. 62, 96; Fitzh. Nat. Br. 134 F; 8 Coke 43 *a*, *b*.

From a bailiff are required administration, care, management, skill. He is, therefore, entitled to allowance for the expense of administration, and for all things done in his office according to his own judgment without the special direction of his principal, and also for casual things done in the common course of business; 1 Rolle, Abr. 125, §§ 1, 7; Co. Litt. 89 *a*; Com. Dig. E, 12; Brooke, Abr. *Acc.* 18; but not for things foreign to his office; Brooke, Abr. *Acc.* 26, 88; Plowd. 282 *b*, 14; Com. Dig *Acc.* E, 13; Co. Litt. 172. Whereas a mere receiver, or a receiver who is not also a bailiff, is not entitled to allowance for any expenses; Brooke, Abr. *Acc.* 18; 1 Rolle, Abr. 119; Com. Dig. E, 13; 1 Dall. 340.

A bailiff may appear and plead for his principal in an assize; "and his plea commences" thus: "J. S., bailiff of T. N., comes," etc., not "T. N., by his bailiff J. S., comes," etc. Co. 2d Inst. 415; Keilw. 117 *b*. As to what matters he may plead, see Co. 2d Inst. 414.

BAILIWICK. The jurisdiction of a sheriff or bailiff. 1 Bla. Com. 344.

A liberty or exclusive jurisdiction which was exempted from the sheriff of the county, and over which the lord appointed a bailiff, with such powers within his precinct as the under-sheriff exercised under the sheriff of the county. Whishaw, Lex.

BAILLEW DE FONDS. In Canadian Law. The unpaid vendor of real estate.

His claim is subordinate to that of a subsequent hypothecary creditor claiming under a conveyance of prior registration; 1 Low. C. 1, 6; but is preferred to that of the physician for services during the last sickness; 9 Low. C. 497. See 7 Low. C. 468; 9 *id.* 182; 10 *id.* 379.

BAILLI. In Old French Law. One to whom judicial authority was assigned or delivered by a superior; Black, L. Dict.

BAILMENT (Fr. *bailler*, to put into the hands of; to deliver).

A delivery of something of a personal

nature by one party to another, to be held according to the purpose or object of the delivery, and to be returned or delivered over when that purpose is accomplished. Prof. Joel Parker, MS. Lect. Dane Law School, 1851.

The right to hold may terminate, and a duty of restoration may arise, before the accomplishment of the purpose; but that does not necessarily enter into the definition, because such duty of restoration was not the original purpose of the delivery, but arises upon a subsequent contingency. The party delivering the thing is called the bailor; the party receiving it, the bailee.

Various attempts have been made to give a precise definition of this term, upon some of which there have been elaborate criticisms, see Story, Bailm. 4th ed. § 2, n. 1, exemplifying the maxim, "*Omnis definitio in lege periculosa est*;" but the one above given is concise, and sufficient for a general definition.

Some of these definitions are here given as illustrating the elements considered necessary to a bailment by the different authors cited.

A delivery of a thing in trust for some special object or purpose, and upon a contract, express or implied, to conform to the object or purpose of the trust. Story, Bailm. § 2. See Merlin, *Répert. Bail.*

A delivery of goods in trust upon a contract, either expressed or implied, that the trust shall be faithfully executed on the part of the bailee. 2 Bla. Com. 451. See *id.* 395.

A delivery of goods in trust upon a contract, expressed or implied, that the trust shall be duly executed, and the goods restored by the bailee as soon as the purposes of the bailment shall be answered. 2 Kent 559.

A delivery of goods on a condition, express or implied, that they shall be restored by the bailee to the bailor, or according to his directions, as soon as the purpose for which they are bailed shall be answered. Jones, Bailm. 1.

A delivery of goods in trust on a contract, either expressed or implied, that the trust shall be duly executed, and the goods redelivered as soon as the time or use for which they were bailed shall have elapsed or be performed. Jones, Bailm. 117.

According to Story, the contract does not necessarily imply an undertaking to redeliver the goods; and the first definition of Jones here given would seem to allow of a similar conclusion. On the other hand, Blackstone, although his definition does not include the return, speaks of it in all his examples of bailments as a duty of the bailee; and Kent says that the application of the term to cases in which no return or delivery or redelivery to the owner or his agent is contemplated, is extending the definition of the term beyond its ordinary acceptation in the English law. A consignment to a factor would be a bailment for sale, according to Story; while according to Kent it would not be included under the term bailment.

Sir William Jones has divided bailments into five sorts, namely: *depositum*, or deposit; *mandatum*, or commission without recompense; *commodatum*, or loan for use without pay; *pignori acceptum*, or pawn; *locatum*, or hiring, which is always with reward. This last is subdivided into *locatio rei*, or hiring, by which the hirer gains a temporary use of the thing; *locatio operis faciendi*, when something is to be done to the thing delivered; *locatio operis mercium vehendarum*, when the thing is merely to be carried from one place to another. Jones, Bailm. 36. See these several titles.

A better general division, however, for practical purposes, is into three kinds. *First*, those bailments which are for the benefit of the bailor, or of some person whom he represents. *Second*, those for the benefit of the bailee, or some person represented by him. *Third*, those which are for the benefit of both parties.

There are three degrees of care and diligence required of the bailee, and three degrees of the negligence for which he is responsible, according to the purpose and object of the bailment, as shown in those three classes; and the class serves to designate the degree of care, and of the negligence for which he is responsible. Thus, in the first class the bailee is required to exercise only slight care, and is responsible, of course, only for gross neglect. In the second he is required to exercise great care, and is responsible even for slight neglect. In the third he is required to exercise ordinary care, and is responsible for ordinary neglect. See BAILEE.

There is a supplementary class, founded upon the policy of the law, in which the bailee is responsible for loss without any neglect on his part, being as it were, with certain exceptions, an insurer of the safety of the thing bailed. Prof. Joel Parker, MS. Lect. Dane Law School, 1851.

It has been held in some cases that there are, properly speaking, no degrees of negligence (though the above distinctions have been generally maintained in the cases; Edw. Bailm. § 61); 11 M. & W. 113; 16 How. 474; 24 N. Y. 207; L. R. 1 C. P. 612; see 5 Am. L. Rev. 38, and Edw. Bailm. § 6.

When a person receives the goods of another to keep without recompense, and he acts in good faith, keeping them as his own, he is not answerable for their loss or injury. As he derives no benefit from the bailment, he is responsible only for bad faith or gross negligence; Edw. Bailm. § 43; Schoul. Bailm. 35; 99 Mass. 605; 2 Ad. & E. 256; 81 Pa. 95; 28 Ohio 388; 17 Mass. 479; 11 Mart. La. 462; 38 Me. 55; 3 Mas. 132, n.; 2 C. B. 877; 4 N. & M. 170; 34 Neb. 426; 89 Mo. 240. See Story, Bailm. § 64; 6 C. Rob. Adm. 316; 97 U. S. 92; 87 Mich. 209; 31 W. Va. 858; 15 La. Ann. 280; 35 Mo. 487; 90 N. C. 493. But this obligation may be enlarged or decreased by a special acceptance; 2 Kent 565; Story, Bailm. § 33; Willes 118; 2 Ld. Raym. 910; 3 Hill, N. Y. 9; 17 Barb. 515; and a spontaneous offer on the part of the bailee increases the amount of care required of him; 2 Kent 565. Knowledge by the bailee of the character of the goods; Jones, Bailm. 38; and by the bailor of the manner in which the bailee will keep them; 38 Me. 55; are important circumstances.

A bank (National or otherwise) accustomed to keep securities, whether authorized to do so by its charter or not, is liable for their loss by gross carelessness; 100 U. S. 699; 79 Pa. 106; 26 Iowa 562; 69 Mass. 605; 58 Ga. 369; 17 Mass. 479; 148 Ill. 179; 137 U. S. 604; see 60 N. Y. 278; *contra*, 50 Vt. 389. A National Bank has power under the act of congress to receive such deposits; 100 U. S. 699.

So when a person receives an article and undertakes gratuitously some commission in respect to it, as to carry it from one place to another, he is only liable for its injury or loss through his gross negligence. It is enough if he keep or carry it as he does his own property; 6 C. Rob. Adm.

141; 3 Mas. 132; 6 N. H. 587; 1 Const. S. C. 117; Edw. Bailm. § 78 *et seq.*, and cases above. A treasurer of an association who receives no compensation is only liable for gross negligence in paying out funds as he is a gratuitous bailee; 154 Pa. 296.

As to the amount of skill such bailee must possess and exercise, see 2 Kent 509; Story, Bailm. § 174; 8 B. Monr. 415; 11 Wend. 25; 7 Mart. 460; 3 Fla. 27; 11 M. & W. 113; and more skill may be required in cases of voluntary offers or special undertakings; 2 Kent 573.

The borrower, on the other hand, who receives the entire benefit of the bailment, must use extraordinary diligence in taking care of the thing borrowed, and is responsible for even the slightest neglect; Edw. Bailm. § 135; 2 Pars. Contr. 115; 7 La. 253; 27 N. Y. 234; 2 Ld. Raym. 909; 27 Mo. 549; 5 Dana 173; 4 N. M. 170. See 37 Ill. 250; 78 *id.* 40.

He must apply it only to the very purpose for which it was borrowed; 2 Ld. Raym. 915; Story, Bailm. § 232; cannot permit any other person to use it; 1 Mod. 210; 5 Ind. 546; 16 Johns. 76; cannot keep it beyond the time limited; 5 Mass. 104; and cannot keep it as a pledge for demands otherwise arising against the bailor; 2 Kent 574. See 9 C. & P. 383; 32 Ia. 161.

In the third class of bailments under the division here adopted, the benefits derived from the contract are reciprocal: it is advantageous to both parties. In the case of a pledge given on a loan of money or to secure the payment of a debt, the one party gains a credit and the other security by the contract. And in a bailment for hire, one party acquires the use of the thing bailed and the other the price paid therefor: the advantage is mutual. So in a bailment for labor and services, as when one person delivers materials to another to be manufactured, the bailee is paid for his services and the owner receives back his property enhanced in value by the process of manufacture. In these and like cases the parties stand upon an equal footing: there is a perfect mutuality between them. And therefore the bailee can only be held responsible for the use of ordinary care and common prudence in the preservation of the property bailed; Edw. Bailm. § 384; 13 Johns. 211; 9 Wend. 60; 5 Bingh. 217; 4 Dana 217; 21 Tex. 148; 6 Ga. 213; 10 Cush. 117. See 150 Pa. 91. A bailee for hire is supposed to take such care of property as a reasonably prudent man would of his own; 139 Ill. 41. See HIRE; PLEDGE.

The common law does not recognize the rule of the civil law that the bailor for hire is bound to keep the thing in repair, and in the absence of provision the question as to which party is bound to repair depends largely on custom and usage; 50 Fed. Rep. 857.

The depositary or mandatary has a right to the possession as against everybody but the true owner; Story, Bailm. § 93: 6 Whart. 418; 12 Ired. 74; 4 E. L. & Eq. 438; see 12 Pa. 229; but is excused if he delivers it to the person who gave it to him, supposing him the true owner; 17 Ala. 216; and may maintain an action against a wrong-doer; 1 B. & Ald. 59; 2 B & Ad. 817; 37 Minn. 54. A borrower has no property in the thing borrowed, but may protect his possession by an action against the wrong-doer; 2 Bingh. 173; 7 Cow. 752. As to the property in case of a pledge, see PLEDGE.

In bailments for storage, for hire, the bailee acquires a right to defend the property as against third parties and strangers, and is answerable for loss or injury occasioned through his failure to exercise ordinary care. See TRESPASS; TROVER.

As to the lien of warehousemen and wharfingers for their charges on the goods stored with them, see LIEN, and Edw. Bailm. § 350.

The hire of things for use transfers a special property in them for the use agreed upon. The price paid is the consideration for the use: so that the hirer becomes the temporary proprietor of the things bailed, and has the right to detain them from the general owner for the term or use stipulated for. It is a contract of letting for hire, analogous to a lease of real estate for a given term. Edw. Bailm. § 325. See HIRE.

In a general sense, the hire of labor and services is the essence of every species of bailment in which a compensation is to be paid for care and attention or labor bestowed upon the things bailed. The contracts of warehousemen, carriers, forwarding and commission merchants, factors, and other agents who receive goods to deliver, carry, keep, forward, or sell, are all of this nature, and involve a hiring of services. In a more limited sense, a bailment for labor and services is a contract by which materials are delivered to an artisan, mechanic, or manufacturer to be made or wrought into some new form. The title to the property here remains in the party delivering the goods, and the workman acquires a lien upon them for his services bestowed upon the property. Cloth delivered to a tailor to be made up into a garment, a gem or plate delivered to a jeweller to be set or engraved, a watch to be repaired, may be taken as illustrations of the contract. The owner, who does not part with his title, may come and take his property after the work has been done; but the workman has his lien upon it for his reasonable compensation.

The duties and liabilities of common carriers and innkeepers, under the contract implied by law, are regulated upon principles of public policy, and are usually considered by themselves; 5 Bingh. 217; 3 Hill 488. See those titles.

Consult Jones, Edwards, Schouler, Story, on Bailments; 2 Kent; Parsons, Contracts; note to Coggs *v.* Bernard, Sm. Lead. Cas.; 2 A. & E. Encyc. 40. See LIEN.

As to warehouse receipts, see that title.

BAILOR. He who bails a thing to another.

The bailor must act with good faith towards the bailee; Story, Bailm. §§ 74, 76, 77; permit him to enjoy the thing bailed according to contract; and in some bailments, as hiring, warrant the title and possession of the thing hired, and, probably, keep it in suitable order and repair for the purpose of the bailment; Story, Bailm. §§ 388–392.

BAIR-MAN. **In Scotch Law.** A poor insolvent debtor.

BAIRN'S PART. See LEGITIM. **In Scotch Law.** Children's part; a third part of the defunct's free movables, debts deducted, if the wife survive, and a half if there be no relict.

BAITING. To bait is to attack with violence; to provoke and harass. 2 A. & E. Encyc. 63; L. R. 9 Q. B. 380.

BALÆNA. A large fish, called by Blackstone a whale. Of this the king had the head and the queen the tail as a perquisite whenever one was taken on the coast of England. Prynne, Ann. Reg. 127; 1 Bla. Com. 221.

BALANCE. The amount which remains due by one of two persons, who have been dealing together, to the other, after the settlement of their accounts.

In the case of mutual debts, the balance only can be recovered by the assignee of an insolvent or the executor of a deceased person. But this mutuality must have existed at the time of the assignment by the insolvent, or at the death of the testator.

It is often used in the sense of residue or remainder; 23 S. C. 269; 3 Ired. 155.

The term *general balance* is sometimes used to signify the difference which is due to a party claiming a lien on goods in his hands for work or labor done, or money expended in relation to those and other goods of the debtor; 3 B. & P. 485; 3 Esp. 268; 45 Mo. 573.

The phrase "net balance" as applied to the proceeds of the sale of stock means in commercial usage the balance of the proceeds after deducting the expenses incident to the sale; 71 Pa. 74.

BALANCE SHEET. A statement made by merchants and others to show the true state of a particular business. A balance sheet should exhibit all the balances of debits and credits, also the value of merchandise, and the result of the whole.

BALDIO. **In Spanish Law.** Vacant land having no particular owner, and usually abandoned to the public for the purposes of pasture. The word is supposed to be derived from the Arabic *Balt*, signifying a thing of little value. For the legislation on the subject, see Escriche, Dicc. Raz.

BALE. A quantity or pack of goods or merchandise, wrapped or packed in cloth and tightly corded. Wharton.

A bale of cotton means a bale compressed so as to occupy less space than if in a bag. 2 Car. & P. 525.

BALIUS. **In Civil Law.** A teacher; one who has the care of youth; a tutor; a guardian. Du Cange, *Bajultis;* Spelman, Gloss.

BALIVA (spelled also *Balliva*). Equivalent to *Balivatus*. *Balivia*, a bailiwick; the jurisdiction of a sheriff; the whole district within which the trust of the sheriff was to be executed. Cowel. Occurring in the return of the sheriff, *non est inventus in balliva mea* (he has not been found in my bailiwick); afterwards abreviated to the simple *non est inventus;* 3 Bla. Com. 283.

BALIVO AMOVENDO (L. Lat. for removing a bailiff). A writ to remove a bailiff out of his office.

BALLAST. That which is used for trimming a ship to bring it down to a draft of water proper and safe for sailing. 13 Wall. 674.

BALLASTAGE. A toll paid for the privilege of taking up ballast from the bottom of the port. This arises from the property in the soil; 2 Chitty, Comm. Law 16.

BALLOT. Originally a ball used in voting; hence, a piece of paper, or other thing used for the same purpose; whole amount of votes cast.

The act of voting by balls or tickets. Webster.

A ballot or ticket is a single piece of paper containing the names of the candidates and the offices for which they are running; 28 Cal. 136. See ELECTION.

BALNEARII (Lat.). Those who stole the clothes of bathers in the public baths. 4 Bla. Com. 239; Calvinus, Lex.

BAN. **In Old English and Civil Law.** A proclamation; a public notice; the announcement of an intended marriage. Cowel. An excommunication; a curse, publicly pronounced. A proclamation of silence made by a crier in court before the meeting of champions in combat. Cowel. A statute, edict, or command; a fine, or penalty.

An open field; the outskirts of a village; a territory endowed with certain privileges.

A summons; as *erriere ban*. Spelman, Gloss.

In French Law. The right of announcing the time of moving, reaping, and gathering the vintage, exercised by certain seignorial lords. Guyot, *Rép. Univ.*

BANALITY. **In Canadian Law.** The right by virtue of which a lord subjects his vassals to grind at his mill, bake at his oven, etc. Used also of the region within which this right applied. Guyot, *Rép. Univ.* It prevents the erection of a mill within the seignorial limits; 1 Low. C. 31; whether steam or water; 3 Low. C. 1.

BANC (Fr. bench). The seat of judgment; as, *banc le roy*, the king's bench; *banc le common pleas*, the bench of common pleas.

The meeting of all the judges, or such as may form a quorum, as distinguished from sittings at *Nisi Prius*: as, "the court sit in *banc*." Cowel. In England, under 33 Vict. c. 6, § 4, any of the superior courts may hold sittings *in banc* in two divisions at the same time, and may be assisted by the judges of the other courts. Mozeley & Wh. Law Dict. See BANK.

BANCI NARRATORES. In Old English Law. Advocates; countors; serjeants. Applied to advocates in the common pleas courts. 1 Bla. Com. 24; Cowel.

BANCUS (Lat.). A bench; the seat or bench of justice; a stall or table on which goods are exposed for sale. Often used for the court itself.

A full bench, when all the judges are present. Cowel; Spelman, Gloss.

The English court of common pleas was formerly called *Bancus*. Viner, Abr. *Courts* (M). See BENCH; COMMON BENCH.

BANCUS REGINÆ (Lat.). The Queen's Bench.

BANCUS REGIS (Lat.). The king's bench; the supreme tribunal of the king after parliament. 3 Bla. Com. 41.

In banco regis, in or before the court of king's bench.

The king has several times sat in his own person on the bench in this court, and all the proceedings are said to be *coram rege ipso* (before the king himself). Still, James I. was not allowed to deliver an opinion although sitting *in banco regis*. Viner, Abr. *Courts* (H L); 3 Bla. Com. 41; Co. Litt. 71 C.

BANDIT. A man outlawed; one under ban.

BANE. A malefactor. Bracton, l. 1, t. 8, c. 1.

BANISHMENT. In Criminal Law. A punishment inflicted upon criminals, by compelling them to quit a city, place, or country for a specified period of time, or for life. See 4 Dall. 14.

BANK (Anglicized form of *bancus*, a bench). The bench of justice.

Sittings in bank (or *banc*). An official meeting of four of the judges of a common-law court. Wharton, Lex. 2d Lond. ed.

Used of a court sitting for the determination of law points, as distinguished from *nisi prius* sittings to determine facts; 3 Bla. Com. 28, n.

Bank le Roy. The king's bench. Finch, 198.

In Commercial Law. A place for the deposit of money.

An institution, generally incorporated, authorized to receive deposits of money, to lend money, and to issue promissory notes, —usually known by the name of bank notes, —or to perform some one or more of these functions. See 15 N. Y. 166; 79 *id.* 440; 15 Johns. 358; 3 Wall. 295; 12 Mich. 389.

It was the custom of the early money-changers to transact their business in public places, at the doors of churches, at markets, and, among the Jews, in the temple (Mark xi. 15). They used tables or benches for their convenience in counting and assorting their coins. The table so used was called *banche*, and the traders themselves, bankers or benchers. In times still more ancient, their benches were called *cambii*, and they themselves were called *cambiators*. Du Cange, *Cambii*.

Banks are said to be of three kinds, viz, ; of *deposit*, of *discount*, and of *circulation*, they generally exercise all these functions; 17 Wall. 118. See NATIONAL BANKS.

BANK ACCOUNT. A fund which merchants, traders, and others have deposited into the common cash of some bank, to be drawn out by checks from time to time as the owner or depositor may require.

The statement of the amount deposited and drawn, which is kept in duplicate, one in the depositor's bank book and the other in the books of the bank.

BANK NOTE. A promissory note, payable on demand to the bearer, made and issued by a person or persons acting as bankers and authorized by law to issue such notes. The definition is confined to notes issued by incorporated banks in 2 Dan. Neg. Inst. § 1664. See 2 Pars. Bills & N. 88. Bank bills and bank notes are equivalent terms, even in criminal cases; 4 Gray 416. The power thus to issue is not inherent or essential in banking business, and is not necessarily implied from the conference of a general power to do banking business. It must be distinctly, and in terms conferred in the incorporating act, or it will not be enjoyed. Morse, Banking, c. viii.; 11 Op. Att.-Gen. 334.

For many purposes they are not looked upon as common promissory notes, and as such mere evidences of debt, or security for money. In the ordinary transactions of business they are recognized by general consent as cash. The business of issuing them being regulated by law, a certain credit attaches to them, that renders them a convenient substitute for money; 2 Hill, N. Y. 241; 1 *id.* 13.

The practice is, therefore, to use them as money; and they are a good tender, unless objected to; 9 Pick. 542; 19 Johns. 322; 8 Ohio 169; 11 Me. 475; 5 Yerg. 199; 6 Ala. N. S. 226; 3 T. R. 554; 7 *id.* 64; 5 Dowl. & R. 289. See 3 Halst. 172; 4 N. H. 296; 4 Dev. & B. 435. They pass under the word "money" in a will, and, generally speaking, they are treated as cash; 19 Johns. 115; 7 *id.* 476; 6 Hill, N. Y. 340; but see 29 Ind. 495, as to their receipt by a sheriff in payment of an execution. When payment is made in bank notes, they are treated as cash and receipts are given as for cash; 1 Ohio 189, 524; 15 Pick. 177; 5 G. & J. 158; 3 Hawks 328; 5 J. J. Marsh. 643; 12 Johns. 200; 1 Sch. & L. 318, 319; 1 Rop. Leg. 3; 28 Gratt. 605; 1 Burr. 452. It has been held that the payment of a debt in bank notes discharges the debt; 1 W. & S. 92; 11 Ala. 280; 2 Dan. Neg. Inst. § 1676; 1 Gratt. 359. See 13 Wend. 101; 11 Vt. 516; 9 N. H. 365; 2 Hill, S. C. 509; but not when

the payer knew the bank was insolvent. The weight of authority is against the doctrine of the extinguishment of a debt by the delivery of bank notes which are not paid, when duly presented, in reasonable time. But it is undoubtedly the duty of the person receiving them to present them for payment as soon as possible ; 2 Pars. Bills & N. 94 ; 14 Wend. N. Y. 9 ; 11 Vt. 516 ; 9 N. H. 365 ; 10 Wheat. 333 ; 6 Mass. 182 ; 18 Barb. 545 ; 10 Ohio St. 188 ; 22 Me. 88 ; 7 Wis. 185 ; 6 B. & C. 373.

Bank notes are governed by the rules applicable to other negotiable paper. They are assignable by delivery ; Rep. *t.* Hard. 53 ; Dougl. 236. The holder of a note is entitled to payment, and cannot be affected by the fraud of a former holder, unless he is proved privy to the fraud ; 1 Burr. 452 ; 4 Rawle 185 ; 10 Cush. 488 ; 2 Dan. Neg. Instr. § 1680 ; 32 Conn. 278. The *bonâ fide* holder who has received them for value is protected in their possession even against a real owner from whom they have been stolen. Payment in forged bank notes is a nullity ; 7 Leigh 617 ; 2 Hawks 326 ; 3 Pa. 330 ; 5 Conn. 71 ; but the taker of such must give prompt notice that they are counterfeit, and offer to return them ; 11 Ill. 137. But where the bank itself receives notes purporting to be its own, and they are forged, it is otherwise ; 10 Wheat. 333. See 6 B. & C. 373. If a note be cut in two for transmission by mail, and one half be lost, the *bonâ fide* holder of the other half can recover the whole amount of the note ; 6 Wend. 378 ; 6 Munf. 166 ; 4 Rand. 186 ; Dan. Neg. Inst. § 1696.

At common law, as choses in action, bank notes could not be taken in execution ; Hardw. Cases 53 ; 1 Archb. Pr. 258 ; 9 Cro. Eliz. 746. The statute laws of the several states, or custom, have modified the common law in this respect, and in many of them they can be taken on execution ; 4 N. H. 198 ; 15 Pick. 173 ; 20 *id.* 352 ; 35 Vt. 430. This is the case in New York ; but they are not to be sold ; 10 Barb. 157, 596. Consult Story, Bills ; Story, Notes ; Parsons, Notes and Bills ; Byles, Bills ; 2 Dan. Neg. Instr. ; Bigelow, Neg. Instr. ; note to Miller & Race, Sm. Lead. Cas.

BANKABLE. In Mercantile Law. Bank notes, checks, and other securities for money received as cash by the banks in the place where the word is used.

In the United States, the notes issued by the national banks have taken the place of those formerly issued by banks incorporated under state laws. The circulation of these notes being secured by United States bonds, deposited with the treasurer of the United States, they are received as bankable money in all the states without regard to the locality of the bank issuing them. See Act June 3, 1864, U. S. Rev. Stat. § 5133 ; 8 Wall. 533.

BANKER'S NOTE. A promissory note given by a private banker or banking institution, not incorporate, but resembling a bank note in all other respects. 6 Mod. 29 ; 3 Chit. Comm. Law 590 ; 1 Leigh, N. P. 338.

BANKRUPT. Originally and strictly, a trader who secretes himself or does certain other acts tending to defraud his creditors. 2 Bla. Com. 471.

A broken-up or ruined trader. 3 Stor. 453.

By modern usage, an insolvent person.

A person who has done or suffered to be done some act which is by law declared to be an act of bankruptcy.

The word is from the Italian *banca rota*, the custom being in the middle ages to break the benches or counters of merchants who failed to pay their debts. Voltaire, Dict. Phil. *voc. sig.* Banqueroute, Saint Bennet Dict. Faillète.

In the English law there were two characteristics which distinguished bankrupts from insolvents : the former must have been a *trader* and the object of the proceedings *against*, not *by*, him. Originally the bankrupt was considered a criminal ; 2 Bla. Com. 471 ; and the proceedings were only against fraudulent traders ; but this distinction has been abolished by the later English bankruptcy acts, although in some respects traders and non-traders continued to be put on a different footing ; Mozl. & W. Law Dict. As used in American law, the distinction between a bankrupt and an insolvent is not generally regarded. Act of Congress of March 2, 1867, and Act of June 22, 1874 (both now repealed). On the continent of Europe the distinction between bankrupt and insolvent still exists ; Holtz. Encyc. *voc. sig.* Bankerott. Under the constitution of the United States the Federal government has power to pass a uniform bankrupt law. The meaning of bankrupt as used in the constitution was not the technical early English one, but was commensurate with insolvent ; 5 Hill, N. Y. 317. In the first bankrupt law of Apr. 4, 1800, repealed Dec. 19, 1803, the word bankrupt was used in the old English sense. The distinction, however, became less observed ; Marshall, C. J., in 4 Wheat. 122 ; 2 Kent 390 ; and was finally abandoned and broken down by the act of Aug. 19, 1841, which was a union of both species of laws, including "all persons whatsoever." The constitutionality of the voluntary part of the act was much contested, but was fully sustained ; 5 Hill, N. Y. 317 ; 4 N. Y. 283. (For the reasons assigned *contra*, see 5 Hill, N. Y. 327.)

The only substantial difference between a strictly bankrupt law and an insolvent law lies in the circumstance that the former affords relief upon the application of the creditor, and the latter upon the application of the debtor. In the general character of the remedy there is no difference, however much the modes by which the remedy may be administered may vary. But even in the respect named there is no difference in this instance. The act of congress (1867) was both a bankrupt act and an insolvent act by definition, for it afforded relief upon the application of either the debtor or the creditor, under the heads of voluntary and involuntary bankruptcy ; 37 Cal. 222.

A state has authority to pass a bankrupt law, provided such law does not impair the

obligation of contracts, and provided there be no act of congress in force to establish a uniform system of bankruptcy, conflicting with such law; 4 Wheat. 209; 12 Wheat. 213.

A state bankrupt law so far as it attempts to discharge the contract is unconstitutional; 4 Wheat. 209; *id.* 122; 6 Wheat. 131; whether passed before or after the debt was created; 4 Wheat. 209; or where the suit was in a state of which both parties were citizens, and in which they resided until suit, and where the contract was made; 6 Wheat. 131; but a bankrupt or insolvent law of a state which discharges the person of the debtor and his further acquisitions of property is valid, though a discharge under it cannot be pleaded in bar of an action by a citizen of another state in the courts of the U. S. or of any other state; 12 Wheat. 213. Every state law is a bankrupt law in substance and fact, that causes to be distributed by a tribunal the property of a debtor among his creditors; and it is especially such if it causes the debtor to be discharged from his contracts, so far as it can do so; 1 How. 265 and note. When the U. S. statute is in effect also an insolvent law acting upon the same persons and cases as the state insolvent law, the latter is suspended when the U. S. statute goes into operation; 1 How. 265; 2 Sto. 326; but if the state court has acquired jurisdiction under a state statute, and is actually settling the debts and distributing the assets of the insolvent before or at the date at which the Federal law takes effect, it may proceed to a final conclusion of the case; 4 Metc. Mass. 401; 37 Cal. 208.

The act (R. S. § 5132) providing for the punishment of the offence of obtaining goods under false pretences, if the guilty party has proceedings in bankruptcy commenced against him within three months thereafter, is inoperative to render such act an offence, because it is an attempt to make an offence by subsequent act that which was not such at the time it was committed; 95 U. S. 670. See INSOLVENCY.

BANKRUPT LAWS. Laws relating to bankruptcy.

The English Bankrupt Laws, which originated with the statute 34 & 35 Henry VIII. c. 4, were first mainly directed against the criminal frauds of traders. The bankrupt was treated as a criminal offender; and, formerly, the not duly surrendering his property under a commission of bankruptcy, when summoned, was a capital felony. The bankrupt laws are now, and have for some time past been, regarded as a connected system of civil legislation, having the double object of enforcing a complete discovery and equitable distribution of the property of an insolvent trader, and of conferring on the trader the reciprocal advantage of security of person and a discharge from all claims of his creditors. By the General Bankrupt Act (6 Geo. IV. c. 16) the former statutes were consolidated and many important alterations introduced. A subsequent statute, 1 & 2 Will. IV. c. 56, changed the mode of proceeding by constituting a Court of Bankruptcy, and removing the jurisdiction of bankrupt cases in the first instance from the Court of Chancery to that of Bankruptcy, reserving only an appeal from that court to the lord chancellor as to matters of law and equity and questions of evidence; and other important alterations were introduced. This statute was followed by the 5 & 6 Will. IV. c. 29, and by the 5 & 6 Vict. c. 122, which further modified the law and the organization of the courts. The numerous statutes relating to bankruptcy were again consolidated by the Bankrupt Law Consolidation Act (1849); and this was amended in a few particulars by the 15 & 16 Vict. c. 77, and by the Bankruptcy Act, 1854. A further amendment of the law of bankruptcy, known as the "Bankrupt Act, 1861," 24 & 25 Vict. c. 134, abolished the Court for the Relief of Insolvent Debtors, and transferred its jurisdiction to the Court of Bankruptcy. By this act, non-traders were made subject to the law of bankruptcy. By the "Bankruptcy Amendment Act, 1868," 31 & 32 Vict. c. 104, further changes were made. This has been followed by the "Bankruptcy Act, 1869," 32 & 33 Vict. c. 71, which comprises all the statute law relating to bankrupts, except the provisions for the punishment of fraudulent debtors, which are contained in the Debtors' Act, 1869, 32 & 33 Vict. c. 62. Robson, Bank. These acts have been amended and consolidated by the Bankruptcy Act, 1883, and its various amendments. See 1 Chitty, Eng. Stat. tit. Bankruptcy.

The French Bankrupt Law (law of 1838, still in force) declares that all traders who stop payment are in a state of insolvency. Traders are required immediately to register the fact that they have stopped payment in the Tribunal of Commerce, and file their balance sheet; and a decree of insolvency is declared by the tribunal upon the trader's declaration or on application of creditors. Prior voluntary conveyances and mortgages, pledges, etc., for antecedent debts are void, and all subsequent deeds to those having notice are voidable. The former French law (Code of 1807) is still important, as being the basis of the system in many other continental nations, and it is an excellent treatise on the subject.

Bankrupt laws were passed in the United States in 1800, 1841, and 1867, but repealed after a brief existence, the last act by Act of June 7, 1878. The act of July 1, 1898, passed after this title was printed, will be found in Vol. 2, appendix.

BANKRUPTCY. The state or condition of a bankrupt. See INSOLVENCY.

BANLEUCA. A certain space surrounding towns or cities, distinguished by peculiar privileges. Spelman, Gloss. It is the same as the French *banlieue.*

BANLIEU. In Canadian Law. See BANLEUCA.

BANNERET. A degree of honor next after a baron's, when conferred by the king; otherwise, it ranks after a baronet. 1 Bla. Com. 403.

BANNITUS. One outlawed or banished. Calvinus, Lex.

BANNS OF MATRIMONY. Public notice or proclamation of a matrimonial contract, and the intended celebration of the marriage of the parties in pursuance of such contract, to the end that persons objecting to the same may have an opportunity to declare such objections before the marriage is solemnized. Cowel; 1 Bla. Com. 439; Pothier, *Du Mariage* p. 2, c. 2.

BANNUM. A ban.

BAR. To Actions. A perpetual destruction of the action of the plaintiff.

It is the *exceptio peremptoria* of the ancient authors. Co, Litt. 303 *b*; Steph. Pl. App. xxviii. It is always a perpetual destruction of the *particular action* to which it is a *bar*, *Doctrina Plac.* xxiii. § 1, p. 129; and it is set up only by a plea to the action, or in chief. But it does not always operate as a permanent obstacle to the plaintiff's right of action. He may have good cause for an action, though not for the action which he has brought; so that, although that particular action, or any one like it in nature and based on the same allegations, is forever barred by a well-pleaded bar, and a decision thereon

in the defendant's favor, yet where the plaintiff's difficulty really is that he has misconceived his action, and advantage thereof be taken under the general issue (which is in bar), he may still bring his proper action for the same cause; Gould, Pl. c. v. § 137; 6 Coke 7, 8. Nor is final judgment on a demurrer, in such a case, a bar to the proper action, subsequently brought; Gould, Pl. c. ix. § 46. And where a plaintiff in one action fails on demurrer, from the omission of an essential allegation in his declaration, which allegation is supplied in the second suit, the judgment in the first is no bar to the second; for the merits shown in the second declaration were not decided in the first; Gould, Pl. c. ix. § 45; c. v. § 158.

Another instance of what is called a temporary bar is a plea (by executor, etc.) of *plene administravit*, which is a bar until it appears that more goods come into his hands, and then it ceases to be a bar to that suit, if true before its final determination, or to a new suit of the same nature: *Doctrina Plac.* c. xxiii. § 1, p. 130; 4 East 508.

Where a person is bound in any action, real or personal, by judgment on demurrer, confession, or verdict, he is barred, that is, debarred, as to that or any other action of the like nature or degree, from the same thing forever. But the *effect* of such a bar is different in personal and real actions.

In personal actions, as in debt or account, trover, replevin, and for torts generally (and *all* personal actions), a recovery by the plaintiff is a perpetual bar to another action for the same matter. He has had one recovery; *Doctr. Plac.* c. lxviii. § 1, p. 412. So where a defendant has judgment against the plaintiff, it is a perpetual bar to another action of *like nature* for the same cause (*like nature* being here used to save the cases of misconceived action or an omitted averment, where, as above stated, the bar is *not* perpetual). And inasmuch as, in personal actions, all are of the *same degree*, a plaintiff against whom judgment has passed cannot, for the subject thereof, have an action of a *higher nature:* therefore he generally has in such actions no remedy (no manner of avoiding the bar of such a judgment) except by taking the proper steps to *reverse* the very judgment itself (by writ of error, or by appeal, as the case may be), and thus taking away the bar by taking away the judgment; 6 Coke 7, 8. (For occasional exceptions to this rule, see authorities above cited.)

In real actions, if the plaintiff be barred as above by judgment on a verdict, demurrer, confession, etc., he may still have an action of a higher nature, and try the same right again; Lawes, Plead. 39, 40; Stearns, Real Act. See, generally, Bacon, Abr. *Abatement*, n.; *Plea in bar;* 3 East 346–366.

In Practice. A particular part of the court-room.

As thus applied, and secondarily in various ways, it takes its name from the actual bar, or enclosing rail, which originally divided the bench from the rest of the court-room, as well as from that bar, or rail, which then divided, and now divides, the space including the bench, and the place which lawyers occupy in attending on and conducting trials, from the body of the court-room.

Those who are authorized to appear before the court and conduct the trial of causes.

Those who, as advocates or counsellors, appeared as *speakers* in court, were said to be "called to the bar," that is, called to appear in presence of the court, as *barristers*, or persons who stay or attend at the bar of court. Richardson, Dict. *Barrister.* By a natural transition, a secondary use of the word was applied to *the persons* who were so called, and the advocates were, as a class, called "the bar." And in this country, since attorneys, as well as counsellors, appear in court to conduct causes, the members of the legal profession, generally, are called the bar, and in this sense are employed the terms "members of the bar" and "admission to the bar."

The court, in its strictest sense, sitting in *full term.*

Thus, a civil case of great consequence was not left to be tried at *nisi prius*, but was tried at the "bar of the court itself," at Westminister; 3 Bla. Com. 352. So a criminal trial for a capital offence was had "at bar," 4 *id.* 351; and in this sense the term at bar is still used. It is also used in this sense, with a shade of difference (as not distinguishing *nisi prius* from full term, but as applied to *any* term of the court), when a person indicted for crime is called "the prisoner at the bar," or is said to stand at the bar to plead to the indictment. See Merlin, *Répert. Barreau;* 1 Dupin, *Prof. d'Av.* 451.

In Contracts. An obstacle or opposition. Thus, relationship within the prohibited degrees, or the fact that a person is already married, is a *bar* to marriage.

BAR ASSOCIATIONS. Associations of members of the bar have been organized in a majority of the states and territories, and similar associations exist in many of the counties in various states, especially in Pennsylvania, where they are chiefly Library Associations. The oldest association of the kind is the Law Association of Philadelphia, organized in 1802. The American Bar Association, to which all members of the bar of the United States in good standing who have been such for at least five years are eligible, was organized at Saratoga, New York, in August, 1878, and has held annual meetings ever since. The National Bar Association, based upon representation from state and local associations, was organized in May, 1888, and held its last meeting in December, 1891.

A list of State and County Bar Associations is printed in the Annual Report of the American Bar Association, and a list of the State and Territorial Associations is given in the monthly issue of "the American Lawyer," New York.

BAR FEE. In English Law. A fee taken by the sheriff, time out of mind, for every prisoner who is acquitted. Bacon, Abr. *Extortion.* Abolished by stats. 14 Geo. III. c. 26; 55 Geo. III. c. 50; 8 & 9 Vict. c. 114.

BARBICANAGE. Money paid to support a barbican or watch-tower.

BARE. Naked; absence of a covering; unaccompanied. A bare trustee is one whose trust is to convey, and the time has arrived for a conveyance by him; or a trustee to whose office no duties were originally attached, or who, although such duties were originally attached to his office, would, on the requisition of his *cestuis que trust*, be compellable in equity to convey the estate to them or by their direction; 1 Ch. Div. 281.

BARGAIN. It signifies a contract or agreement between two parties, the one to sell goods or lands, and the other to buy them. 5 Mass. 358.

BARGAIN AND SALE. A contract or bargain by the owner of land, in consideration of money or its equivalent paid, to sell land to another person, called the bargainee, whereupon a use arises in favor of the latter, to whom the seisin is transferred by force of the statute of uses. 2 Washb. R. P. 128; Bisp. Eq. 419.

Upon principles of equity any agreement, supported by a valuable consideration, to the effect that an estate or interest in land should be conveyed, as it might be specially enforced in the court of chancery, was held to entitle the purchaser to the use or beneficial ownership according to the terms and intent of the agreement, without any legal conveyance; and accordingly the vendor was held to be or stand seised to the use of the purchaser. Such transaction, as creating a use executed by the statute, became technically known as a *bargain and sale.* As a bargain and sale thus would have been effectual to convey a legal estate under the statute by mere force of the agreement without any writing or formality, it was thought expedient to add some formal conditions to the operation of the statute upon it; and it was enacted by a statute of the same session of parliament, 27 Hen. VIII. c. 16, to the effect that no estate of *freehold* shall pass by reason only of a bargain and sale, unless made by *writing indented, sealed,* and *enrolled* in manner and place therein provided. This statute applied only to estates of freehold, and a use for a term of years might still be created within the statute of uses by mere bargain and sale without deed or enrolment. Leake, Land Laws 108.

This is a very common form of conveyance in the United States. In consequence of the consideration paid, and the bargain made by the vendor, of which the conveyance was evidence, a use was raised at once in the bargainee. To this use the statute of uses transferred and annexed the seisin, whereby a complete estate became vested in the bargainee; 2 Washb. R. P. 128 *et seq.*

All things, for the most part, that may be granted by any deed may be granted by bargain and sale, and an estate may be created in fee, for life, or for years; 2 Coke 54; Dy. 309.

There must have been a valuable consideration; 5 Ired. 30; 7 Vt. 522; 13 B. Monr. 30; 9 Ala. 410; 1 Harr. & J. 527; 1 W. & S. 395; 16 Johns. 515; Cro. Car. 529; 1 Cruise, Dig. 107; Tiedem. R. P. § 776; but its adequacy is immaterial; thus a rent of one peppercorn was held sufficient; 2 Mod. 249. See Leake, Land Laws 109; the consideration need not be expressed; 10 Johns. 639. See Washb. R. P.; 1 Sandf. Ch. 259; 19 Wend. 339; 7 Vt. 522; 68 Pa. 460; 102 Mass. 533; 1 Mo. 553; 2 Over. 261.

The proper and technical words to denote a bargain and sale are *bargain and sell;* Mitch. R. P. 425; but any other words that are sufficient to raise a use upon a valuable consideration are sufficient; 2 Wood, Conv. 15; as, for example, *make over and grant;* 3 Johns. 484; *release and assign;* 8 Barb. 463. See 2 Washb. R. P. 620; Shepp. Touchst. 222.

An estate *in futuro* may be conveyed by deed of bargain and sale; 9 Wend. 611; 4 H. & N. 277; 52 Me. 141; 34 N. H. 460; 102 Mass. 533; 10 Pa. 348; 20 Johns. 87; 28 S. C. 125; 83 Ga. 587; *contra,* 27 Pick. 376; 18 *id.* 397; 32 Me. 329; 2 Washb. R. P. *417; but not at common law; note to Doe *v.* Tranmar, 2 Sm. Lead. Cas. 473, where the cases are discussed.

Consult Gilbert on Uses, Sugden's edition; Washb. R. P.; Greenl. Cruise, Dig.; Tiedem. R. P.

BARGAINEE. The grantee of an estate in a deed of bargain and sale. The person to whom property is tendered in a bargain.

BARGAINOR. The person who makes a bargain; he who is to deliver the property and receive the consideration.

BARGE. Lighters or a flat bottom boat for loading or unloading ships; or a boat used for pleasure. See 5 Fed. Rep. 813; 42 N. C. Q. B. 307.

BARLEY. A species of grain. See 4 C. & P. 552; 14 Mo. 9.

BARO. A man, whether slave or free. *Si quis homicidium perpetraverit in barone libro seu servo,* if any one shall have perpetrated a murder upon any man, slave or free. A freeman or freedman; a strong man; a hired soldier; a vassal; a feudal client.

Those who held of the king immediately were called barons of the king.

A man of dignity and rank; a knight.

A magnate in the church.

A judge in the exchequer (*baro scaccarii*).

The first-born child.

A husband.

The word is said by Spelman to have been used more frequently in its latter sense; Spelman, Gloss.

It is quite easy to trace the history of *baro,* from meaning simply man, to its various derived significations. Denoting a man, one who possessed the manly qualities of courage and strength would be desirable as a soldier, or might misuse them as a robber. One who possessed them in an eminent degree would be *the* man; and hence *baro,* in its sense of a title of dignity or honor, particularly applicable in a warlike age to the best soldier. See, generally, Bacon, Abr.; Comyns, Dig.; Spelman, Gloss. *Baro.*

BARON. A general title of nobility. 1 Bla. Com. 398; a particular title of nobility, next to that of viscount. A judge of the exchequer. Cowel; 1 Bla. Com. 44.

A husband.

In this sense it occurs in the phrase *baron et feme* (husband and wife); 1 Bla. Com. 432; and this is the only sense in which it is used in the American law, and even in this sense it is now but seldom found.

A freeman.

It has essentially the same meanings as *Baro,* which see.

BARON ET FEMME. Man and woman; husband and wife.

It is doubtful if the words had originally in this phrase more meaning than man and woman. The vulgar use of *man* and *woman* for husband and wife suggests the change of meaning which might naturally occur from man and woman to husband and wife. Spelman, Gloss.; 1 Bla. Com. 442.

BARONET. An English title of dignity. It is an hereditary dignity, descendible, but not a title of nobility. It is of very early use. Spelman, Gloss.; 1 Bla. Com. 403.

BARONS OF THE CINQUE PORTS. See CINQUE PORTS.

BARONS OF THE EXCHEQUER. The judges of the exchequer. See EXCHEQUER.

BARONY. The dignity of a baron; a species of tenure; the territory or lands held by a baron. Spelman, Gloss.

BARRATOR. One who commits barratry.

BARRATRY (Fr. *barat, barraterie,* robbery, deceit, fraud). Sometimes written Barretry. Bla. Com.

In Criminal Law. The offence of frequently exciting and stirring up quarrels and suits, either at law or otherwise. 4 Bla. Com. 134; Co. Litt. 368; 8 W. 36 *b*.

An indictment for this offence must charge the offender with being a common barrator; 1 Sid. 282; Train & H. Prec. 55; and the proof must show at least three instances of offending; 15 Mass. 227; 1 Cush. 2, 3; 1 Bail. 379; 52 Pa. 243; 55 Cal. 126; 51 Barb. 580.

An attorney is not liable to indictment for maintaining another in a groundless action: 1 Bail. 379. See 2 Bish. Cr. Law § 63; 2 *id.* §§ 57-61; 9 Cow. 587; 15 Mass. 229; 11 Pick. 432; 13 *id.* 362; 1 Bail. 379; 2 Saund. 308 and note.

The purchase of a single claim, with the intention of suing upon it, does not amount to barratry; to constitute the offence there must be a practice of fomenting suits; Chase's Bla. Com. 905, n. 7; 51 Barb. 580.

In Maritime Law and Insurance. An unlawful or fraudulent act, or very gross and culpable negligence, of the master or mariners of a vessel in violation of their duty as such, and directly prejudicial to the owner, and without his consent; Roccus, h. t.; Abbott, Ship. 167, n.; Pars. Mar. L. 239 *et seq.*; 2 Stra. 581; 2 Ld. Raym. 349; 7 Term 505; 2 Caines 67, 222; 1 Johns. 229; 13 *id.* 451; 2 Binn. 274; 8 Cra. 139; 9 Allen 217; 5 Day 1; 3 Wheat. 163; 4 Dall. 294; 2 M. & S. 172; 5 B. & Ald. 597; 1 Campb. 434; 2 Cush. 511; 3 Pet. 230. It is said that the term implies an intentional injury; it does not embrace cases of negligence; 4 Daly 1. A part owner of a ship who is its master may be guilty of barratry towards his co-owners; 82 Me. 363; 62 Hun 4. It extends, in addition to grosser cases of barratry, to the following:—sailing out of a port without paying port dues, whereby the cargo is forfeited; 6 Term 379; disregarding an embargo; 1 Term 127; or a blockade; 6 Taunt. 375; and when a master was directed to make purchases, and went into an enemy's settlement to trade (though it could be done there to better advantage), whereby the ship was seized, it was held barratry; L. R. 1 Q. B. 162; even though he thought thereby to benefit the owner. When a master is entitled to use his discretion, his conduct will not constitute barratry, unless he goes against his better judgment; 1 Stark. 240. See L. R. 3 C. P. 476. The grossest barratries, as piratically or feloniously seizing or running away with the vessel or cargo, or voluntarily delivering the vessel into the hands of pirates, or mutiny, are capital offences by the laws of the United States; Act of Congress, April 30, 1790, 1; Story's Laws U. S. 84. Barratry is one of the risks usually insured against in marine insurance; 3 Kent, Lacy's ed. 305, n. 50. See INSURABLE INTEREST.

BARREL. A measure of capacity, equal to thirty-six gallons.

BARREN MONEY. A debt which bears no interest.

BARRENNESS. The incapacity to produce a child.

This, when arising from impotence which existed at the time the relation was entered into, is a cause for dissolving a marriage; 1 Foderé, Méd. Leg. § 254.

BARRISTER. In English Law. A counsellor admitted to plead at the bar.

Inner barrister. A serjeant or queen's counsel who pleads within the bar. See BENCHER.

Outer or *Utter barrister.* One who pleads without the bar. See UTTER BARRISTER.

Vacation barrister. A counsellor newly called to the bar, who is to attend for several long vacations the exercises of the house.

In the old books, barristers are called *apprentices, apprentitii ad legem,* or *ad barras* (from which the term barrister was derived), being looked upon as learners, and not qualified until they obtain the degree of serjeant. Edmund Plowden, the author of the Commentaries, a volume of elaborate reports in the reigns of Edward VI., Mary, Philip and Mary, and Elizabeth, describes himself as an apprentice of the common law. See generally, Weeks on Attys. § 29.

BARTER. A contract by which parties exchange goods for goods.

It differs from a sale in that a barter is always of goods for goods; a sale is of goods for money, or for money and goods. In a sale there is a fixed price; in a barter there is not. See Benj. Sales 1; 4 Biss. 123; 12 Bush 241; 37 Ark. 418.

There must be delivery of goods to complete the contract.

If an insurance be made upon returns from a country where trade is carried on by barter, the valuation of the goods in return shall be made on the cost of those given in barter, adding all charges; Weskett, Ins. 42. See 3 B. & Ald. 616; 3 Campb. 351; Cowp. 118; 1 Dougl. 24, n.; 4 B. & P. 151; Troplong, *De l'Echange.*

BARTON. In Old English Law. The demesne land of a manor; a farm distinct from the mansion.

BAS CHEVALIERS. Knights by tenure of a base military fee, as distinguished from bannerets, who were the chief or superior knights. Kennett, Paroch. Ant.; Blount.

BASE FEE. A fee which has a qualification annexed to it, and which must be determined whenever the annexed qualification requires.

A grant to A and his heirs, tenants of Dale, continues *only* while they are such tenants; 2 Bla. Com. 109. See 94 Ill. 93.

The proprietor of such a fee has all the rights of the owner of a fee-simple until his estate is determined. Plowd. 557; 1 Washb. R. P. 62; 1 Prest. Est. 431; Co. Litt. 1 *b*.

BASE SERVICES. Such services as were unworthy to be performed by the nobler men, and were performed by the peasants and those of servile rank. 2 Bla. Com. 62; 1 Washb. R. P. 25.

BASILICA. An abridgment of the Corpus Juris Civilis of Justinian, translated into Greek and first published in the ninth century.

The emperor Basilius, finding the Corpus Juris Civilis of Justinian too long and obscure, resolved to abridge it, and under his auspices the work was commenced A. D. 867, and proceeded to the fortieth book, which at his death remained unfinished. His son and successor, Leo Philosophus, continued the work, and published it, in sixty books, about the year 880. Constantine Porphyro-genitus, younger brother of Leo, revised the work, rearranged it, and republished it, A. D. 947. From that time the laws of Justinian cease I to have any force in the eastern empire, and the Basilica were the foundation of the law observed there till Constantine XIII., the last of the Greek emperors, under whom, in 1453, Constantinople was taken by Mahomet the Turk, who put an end to the empire and its laws. Histoire de la Jurisprudence; Étienne, Intr. à l'Etude du Droit Romain, § 53. The Basilica were translated into Latin by J. Cujas (Cujacius), Professor of Law in the University of Bourges, and published at Lyons, 22d of January, 1566, in one folio volume.

BASTARD (*bas* or *bast*, abject, low, base, *aerd*, nature).

One born of an illicit connection, and before the lawful marriage of its parents.

One begotten and born out of lawful wedlock. 2 Kent 208.

One born of an illicit union. La Civ. Code, art. 29, 199.

The second definition, which is substantially the same as Blackstone's, is open to the objection that it does not include with sufficient certainty those cases where children are born during wedlock but are not the children of the mother's husband.

The term is said to include those born of parties under disability to contract marriage, as slaves; 30 Tex. 115.

A child is a bastard if born before the marriage of his parents, but he is not a bastard if born after marriage, although begotten before; 1 Bla. Com. 455, 456; 8 East 210; 13 Ired. 502. By the civil law and by the statute law of many of the states, a subsequent marriage of the parents legitimates children born prior thereto. The rule prevails substantially in Arkansas, Alabama, Georgia, Illinois, Indiana, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Mississippi, Missouri, New Hampshire, Ohio, Pennsylvania, Texas, Vermont, and Virginia, with somewhat varying provisions in the different states; 2 Kent 210; but under the common law this is not so; 85 Ins. 397; 129 Mass. 243. See HEIR.

A child is a bastard if born during coverture under such circumstances as to make it impossible that the husband of his mother can be his father; Nich. Adult. Bast. 249; 19 Mart. La. 548; Hard. 479; 6 How. 550; 4 Term 356; 2 M. & K. 349; 78 N. C. 439; 43 Miss. 392; 32 N. J. Eq. 277; 38 Pa. 439; 23 N. Y. 90; but in England the presumption of legitimacy holds if the husband had any opportunity of sexual access during the natural period of gestation, and the question for the jury is not was the husband the father, but could he have been; 1 Broom & H. Com. 562; and such is the rule in the United States; 1 Barb. Ch. 375; 29 Pa. 420; 62 Wis. 512; Chase's Bla. Com. 172, n. 13. It is, however, held that a strong moral impossibility, or such improbability as to be beyond a reasonable doubt, is sufficient: 2 Brock. 256; 3 Paige, Ch. 139; 15 Ga. 160; 13 Ired. 502. The presumption of legitimacy of a child born in wedlock is so strong that it cannot be overcome by proof of the adultery of the wife while cohabiting with her husband, much less by the mere admission of the adulterer; 83 Me. 23. As to who may be admitted to prove non-access, see 3 E. L. & Eq. 100; 2 Munf. 442; 15 Barb. 286; 15 N. H. 45; 29 Pa. 420. See 1 Burge, Col. Law 57; 1 Bla. Com. 458; Gardner Peerage Case, Le Marchant's report; 5 C. & F. 163; 12 La. Ann. 853. Neither husband nor wife are competent for this purpose; 60 Wis. 583; 75 Pa. 436; 70 N. C. 262; 44 N. H. 587; 1 Q. B. 444; 5 Ad. & E. 180.

A child is a bastard if born beyond a competent time after the coverture has determined; Co. Litt. 123 *b*; Hargrave & B. note; 2 Kent 210.

The principal right which a bastard child has is that of maintenance from his parents; 1 Bla. Com. 458; La. Civ. Code § 254; (though not from his father at common law; Schoul. Dom. Rel. *384); which may be secured by the public officers who would be charged with the support of the child, by a peculiar process, or in some cases by the mother; 2 Kent 215. A bastard has no inheritable blood at common law; but he may take by devise if described by the name he has gained by reputation; 1 Ves. & B. 423; 3 Dana 233; 4 Pick. 93; 4 Des. 434. See 5 Ves. Ch. 530. In many of the states, by statute, bastards can inherit from and transmit to their mothers real and personal estate under some modifications; 2 Kent 213; Schoul. Dom. Rel. *381; 82 Tex. 18; see 112 Ill. 234; 82 Ind. 519; and in Utah it can inherit from its father; 137 U. S. 682. Whether a person claiming an inheritance in real estate is the lawful child of the last owner is to be determined by the *lex rei sitæ*; 129 Mass. 243.

Nearly all of the states have statutory provisions relative to bastardy proceedings and as to the liability of the father criminally as well as to the care of the child.

In bastardy proceedings, evidence of improper relations of the prosecutrix with other men than the defendant, but not during the period of gestation, is incompetent; 34 Ill. App. 40; 80 Iowa 555; 33 Neb. 358.

Bastardy complaints are civil actions; 85 Me. 285; they abate on the death of the respondent before trial and during the pendency of the proceedings; 85 Me. 224. See HEIR.

BASTARD EIGNE. Bastard elder.

By the old English law, when a man had a bastard son, and he afterwards married the mother, and by her had a legitimate son, the first was called a bastard eigné, or, as it is now spelled, aîné, and the second son was called puisné, or since born, or sometimes he was called mulier puisné. See 2 Bla. Com. 248.

BASTARDA. A female bastard. Calvinus, Lex.

BASTARDY. The offence of begetting a bastard child. The condition of a bastard.

BASTARDY PROCESS. The statutory mode of proceeding against the putative father of a bastard to secure a proper maintenance for the bastard.

BASTON. In Old English Law. A staff or club.

In some old English statutes the servants or officers of the wardens of the fleet are so called, because they attended the king's courts with a red staff.

BATTEL. See WAGER OF BATTEL.

BATTERY. Any unlawful beating, or other wrongful physical violence or constraint, inflicted on a human being without his consent. 2 Bish. Cr. L. § 71; Clark, Cr. L. 199; 17 Ala. 540; 9 N. H. 491.

It is an unlawful touching the person of another by the aggressor himself, or any other substance put in motion by him; 43 Ind. 153. The slightest touching of another in anger is a battery; 60 Ga. 511.

It must be either wilfully committed, or proceed from want of due care; Stra. 596; Plowd. 19; 3 Wend. 391. Hence an injury, be it ever so small, done to the person of another in an angry, spiteful, rude, or insolent manner, 9 Pick. 1, as by spitting in his face, 6 Mod. 172, or on his body, 1 Swint. 597, or any way touching him in anger, 1 Russell, Cr. 751; 17 Tex. 515; or throwing water on him, 3 N. & P. 564, or violently jostling him, see 4 H. & N. 481, or where one riding a bicycle recklessly runs against a person standing with his back partially towards him, when by the exercise of slight care it could be avoided; 117 Ind. 450, is a battery in the eye of the law; 1 Hawk. Pl. Cr. 263. See 1 Selwyn, N. P. 33. And anything attached to the person partakes of its inviolability: if, therefore, A strikes a cane in the hands of B, it is a battery; 1 Dall. 114; 1 Pa. 380; 1 Hill, S. C. 46; 4 Denio 453; 4 Wash. C. C. 534; 1 Baldw. 600. Whether striking a horse is striking the driver, see 43 Ind. 146.

A battery may be justified on various accounts.

As a salutary mode of correction. A parent may correct his child (though if done to excess, it is battery; 121 Mass. 66; 54 Ga. 281; 62 Ill. 354); a guardian his ward; 43 Tex. 167; a master his apprentice; 24 Edw. IV.; 4 Gray 36; 2 Dev. & B. 365; a teacher his scholar, within reason; 45 Iowa 248; 68 N. C. 322; 40 Barb. 541; 37 N. E. Rep. (Ind.) 558; and a superior officer, one under his command; Keilw. 136; Buller, N. P. 19; Bee, Adm. 161; 1 Bay 3; 14 Johns. 119; 15 Mass. 365. And see Cowp. 173; 15 Mass. 347; 3 C. & K. 142; but a master, ordinarily, not his servant; 1 Ashm. 267; 6 Tex App. 133; and the mate of a steamboat has no legal right to enforce his orders by beating one of the crew; 35 Fed. Rep. 152. See ASSAULT; BEAT.

As a means of preserving the peace, in the exercise of an office, under process of court, and in aid of an authority at law. See ARREST.

As a necessary means of defence of the person against the plaintiff's assaults in the following instances: in defence of himself, his wife, 3 Salk. 46, his child, and his servant, Ow. 150 (but see 1 Salk. 407); but he is not justified in using force against a man to prevent his wife leaving him at the persuasion of such other; 98 N. C. 685. So, likewise, a person may defend any member of his family against an assault as he could himself, the wife may justify a battery in defending her husband, the child its parent, and the servant his master; 3 Salk. 46; 114 Mass. 295; 62 Ill. 354; 18 Mich. 314; 25 Gratt. 837; 22 W. Va. 800; 30 Miss. 619; Webb, Poll. Torts, 255 and note. In these situations, the party need not wait until a blow has been given; for then he might come too late, and be disabled from warding off a second stroke or from protecting the person assailed. Care, however, must be taken that the battery do not exceed the bounds of necessary defence and protection; for it is only permitted as a means to avert an impending evil which might otherwise overwhelm the party and not as a punishment or retaliation for the injurious attempt; Stra. 593; 1 Const. S. C. 34; 4 Vt. 629; 4 J. J. Marsh. 578; 2 Whart. Cr. Law § 618; Poll. Torts 255. The degree of force necessary to repel an assault will naturally depend upon, and be proportioned to, the violence of the assailant; but with this limitation any degree is justifiable; 1 Ld. Raym. 177; 11 Humphr. 200; 2 N. Y. 193; 1 Ohio St. 66; 23 Ala. 17, 28; 14 B. Monr. 614; 16 Ill. 17; 5 Ga. 85.

Evidence justifying an assault and battery is not admissible under a general denial; 160 Mass. 296.

A battery may likewise be justified in the necessary defence of one's property; 12 Vt. 437; 69 N. Y. 101. If the plaintiff is in the act of entering peaceably upon the defendant's land, or, having entered, is discovered, not committing violence, a request to depart is necessary in the first instance; 2 Salk. 641; 80 Ill. 92; see 121 Mass. 309; 99 Cal. 481; and if the plaintiff refuses, the defendant may then, and not till then,

gently lay hands upon the plaintiff to remove him from the close, and for this purpose may use, if necessary, any degree of force short of striking the plaintiff, as by thrusting him off; Skinn. 28. See 24 Neb. 235. If the plaintiff resists, the defendant may oppose force to force; 8 Term 78; 2 Metc. 23; 1 C. & P. 6. But if the plaintiff is in the act of forcibly entering upon the land, or, having entered, is discovered subverting the soil, cutting down a tree, or the like, 2 Salk. 641, a previous request is unnecessary, and the defendant may immediately lay hands upon the plaintiff; 8 Term 78. A man may justify a battery in defence of his *personal* property without a previous request, if another forcibly attempt to take away such property; 2 Salk. 641. One from whom property has been wrongfully taken may regain the momentarily interrupted possession by the use of reasonable force, especially after demanding possession; 148 Mass. 529. As to the rights of railroad superintendents over the station-houses of the company in this respect, see 7 Metc. 596; 12 *id.* 482; 4 Cush. 608; 6 Cox, Cr. Cas. 461.

BATTURE (Fr. shoals, shallows). An elevation of the bed of a river *under* the surface of the water; but it is sometimes used to signify the same elevation when it has risen *above* the surface. 6 Mart. La. 19, 216. See 18 La. R. 123; 33 La. Ann. 551.

The term battures is applied principally to certain portions of the bed of the river Mississippi, which are left dry when the water is low, and are covered again, either in whole or in part, by the annual swells.

BAWDY-HOUSE. A house of ill-fame, kept for the resort and unlawful commerce of lewd people of both sexes. 5 Ired. 603.

It must be reputed of ill-fame; 17 Conn. 467; but see 4 Cra. 338, 372; 64 Me. 529; 29 Wis. 435; may be a single room; 1 Salk. 382; 2 Ld. Raym. 1197; 46 N. H. 61; 31 Conn. 172; and more than one woman must live or resort there; 5 Ired. 603. It need not be kept for lucre; 21 N. H. 345; 97 Mass. 225; 18 Vt. 70. Such a house is a common nuisance; 1 Russell, Cr. 299; Bacon, Abr. *Nuisances;* and the keeper may be indicted, and, if a married woman, either alone or with her husband; 1 Bish. Crim. L. 500 (2); 1 Metc. 151. One who assists in establishing such a house is guilty of an indictable misdemeanor; 2 B. Monr. 417; including a lessor who has knowledge; 3 Pick. 26; 6 Gill 425; see 29 Mich. 269; 50 Mo. 535. A charge of keeping a bawdy-house is actionable, because it is an offence which is indictable at common law as a common nuisance; 13 Johns. 275; 5 M. & W. 249; and exemplary damages may be allowed against a person permitting it to be kept upon his property; 71 Tex. 765. The reputation of the house and its visitors is sufficient proof; 17 Fla. 183. A single act of lewdness by defendant with a man in her house will not make it a house of prostitution; 75 Mich. 127; nor is it a crime to let rooms to prostitutes for quiet and decent occupation, or to permit a house to be visited by disreputable people for proper and innocent purposes; 15 R. I. 24.

BAY. An enclosure, or other contrivance, to keep in the water for the supply of a mill, so that the water may be able to drive the wheels of such mill. Stat. 27 Eliz. c. 19. (This is generally called a forebay.)

A bending or curving of the shore of the sea or of a lake, so as to form a more or less inclosed body of water. 14 N. H. 477.

BAY WINDOW. A window projecting from the wall of a building so as to form a recess or bay within and, properly speaking, rising from the ground or basement, with straight sides only; but the term is also ordinarily applied to such projecting windows with curved sides, properly called bow windows, and also to projecting windows supported from the building, above the ground, properly called oriel windows.

The footways of streets being under municipal control, the authorities may determine the extent to which the sidewalks may be obstructed by such projections beyond the building line; 136 Pa. 519; s. c. 27 W. N. C. 5; their erection will not be enjoined by a court of equity if it appear that they will cause no appreciable injury, either by the finding of the master to that effect; *id.;* or from the affidavits submitted on an application by the attorney general to prevent the erection as a public nuisance; 5 Del. Ch. 499. Equity will not interfere in such cases at suit of a private person; 1 W. N. C. (Pa.) 529; 4 *id.* 10; but will at suit of the attorney general to prevent the erection of bay windows extending over the street; 10 W. N. C. (Pa.) 10; 39 Leg. Int. 108; and a second story bay window is a nuisance and will be restrained; 100 Pa. 182.

BAYOU. A stream which is the outlet of a swamp near the sea. Applied to the creeks in the lowlands lying on the Gulf of Mexico.

BEACONAGE. Money paid for the maintenance of a beacon. Comyns, Dig. *Navigation* (H).

BEADLE (Sax. *beodan*, to bid). A church servant chosen by the vestry, whose business it is to attend the vestry, to give notice of its meetings, to execute its orders, to attend upon inquests, and to assist the constables. See BEDEL.

BEARER. One who bears or carries a thing.

If a bill or note be made payable to bearer, it will pass by delivery only, without indorsement; and whoever fairly acquires a right to it may maintain an action against the drawer or acceptor.

It has been decided that the bearer of a bank note, payable to bearer, is not an assignee of a chose in action within the eleventh section of the judiciary act of 1789, c. 20, limiting the jurisdiction of the circuit court; 3 Mas. 308.

BEARERS. Such as bear down or oppress others; maintainers.

BEARING DATE. Words frequently used in pleading and conveyancing to introduce the date which has been put upon an instrument.

When in a declaration the plaintiff alleges that the defendant *made* his promissory note on such a day, he will not be considered as having alleged that it *bore date* on that day, so as to cause a variance between the declaration and the note produced bearing a different date; 2 Greenl. Ev. § 160; 2 Dowl. & L. 759.

BEAST. Any four-footed animal which may be used for labor, food, or sport; as opposed to man; any irrational animal. Webst. A cow is a beast; 6 Humph. 285; and so is a horse; 8 Bush 587; and a hog; 10 Iowa 115; but a dog was held not to be; 1 Minn. 292; but see 133 Mass. 241.

BEASTS OF THE CHASE. Properly, the buck, doe, fox, martin, and roe, but in a common and legal sense extending likewise to all the beasts of the forest, which beside the others are reckoned to be the hind, hare, bear, and wolf, and, in a word, all wild beasts of venery or hunting. Co. Litt. 233; 2 Bla. Com. 39.

BEASTS OF THE FOREST. See BEASTS OF THE CHASE.

BEASTS OF THE WARREN. Hares, coneys, and roes. Co. Litt. 233; 2 Bla. Com. 39.

BEAT OR BEATING. To strike or hit repeatedly, as with blows.

To beat, in a legal sense, is not merely to whip, wound, or hurt, but includes any unlawful imposition of the hand or arm. The slightest touching of another in anger is a battery. 60 Ga. 511.

The beating of a horse by a man refers to the infliction of blows; 101 Mass. 35. See BATTERY.

BEAUPLEADER (L. Fr. fair pleading). A writ of prohibition directed to the sheriff or another, directing him not to take a fine for beaupleader.

There was anciently a fine imposed called a fine for beaupleader, which is explained by Coke to have been originally imposed for bad pleading. Coke, 2d Inst. 123. It was set at the will of the judge of the court, and reduced to certainty by consent, and annually paid. Comyns, Dig. *prerogative* (D. 52). The statute of Marlebridge (52 Hen. III.) c. 11, enacts, that neither in the circuit of justices, nor in counties, hundreds, or courts-baron, any fines shall be taken for *fair pleading*; namely, for not pleading fairly or aptly to the purpose. Upon this statute this writ was ordained, directed to the sheriff, bailiff, or him who shall demand the fine; and it is a prohibition or command not to do it; New Nat. Brev. 596; Fitzh. Nat. Brev. 270 *a*; Hall, Hist. Comm. Law, c. 7. Mr. Reeve explains it as a fine paid for the privilege of a fair hearing; 2 Reeve, Eng. Law 70. This latter view would perhaps derive some confirmation from the connection in point of time of this statute with Magna Charta, and the resemblance which the custom bore to the other customs against which the clause in the charter of *nulli vendemus, etc.*, was directed. See Comyns, Dig. *Prerogative* (D, 51, 52); Cowel; Coke, 2d Inst. 122, 123; Crabb, Eng. Law 150.

BED. The channel of a stream; the part between the banks worn by the regular flow of the water. See 13 How. 426.

The phrase divorce from *bed* and *board*, contains a legal use of the word synonymous with its popular use.

BEDEL. In English Law. A crier or messenger of court, who summons men to appear and answer therein. Cowel. An inferior officer in a parish or liberty.

A subordinate officer of a university who walked with a mace before one of the officers on ceremonial occasions and performed other minor duties ordinarily.

A herald to make public proclamations. Cent. Dict.

The more usual spelling is BEADLE, *q. v.*

BEDELARY. The jurisdiction of a *bedel*, as a bailiwick is the jurisdiction of a bailiff. Co. Litt. 234 *b*; Cowel.

BEDEREPE. A service which certain tenants were anciently bound to perform, as to reap their landlord's corn at harvest. Said by Whishaw to be still in existence in some parts of England. Blount; Cowel; Whishaw.

BEEF. This word is used frequently to mean an animal of the cow species and not beef prepared for market. A beef or one beef is an expression frequently used to designate an animal fit for use as beef, instead of designating it as a steer, a heifer, an ox, or a cow. 40 Tex. 135.

BEER. A malt liquor of the lighter sort and differs from ordinary beer or ales, not so much in its ingredients as in its processes of fermentation.

A court will take judicial cognizance, without evidence, that lager beer is a malt liquor; 11 R. I. 592; 55 Ala. 160; *contra*, 24 Fla. 363.

BEES are animals *feræ naturæ* while unreclaimed; 3 Binn. 546; 13 Miss. 333. See Inst. 2. 1. 14; Dig. 41. 1. 5. 2; 7 Johns. 16; 2 Bla. Com. 392. If while so unreclaimed they take up their abode in a tree, they belong to the owner of the soil, but not so if reclaimed and they can be identified; 15 Wend. 550. See 1 Cow. 243; 2 Dev. 162.

BEGGAR. One who obtains his livelihood by asking alms. The laws of several of the states punish begging as an offence. See TRAMP.

BEGOTTEN. "To be begotten" means the same as "begotten," embracing all those whom the parent shall have begotten during his life, *quos procreaverit*. 1 Maule & S. 135; 1 S. & R. 377.

BEHALF. Benefit, support, defence, or advantage.

BEHAVIOR. Manner of having, holding, or keeping one's self; carriage of one's self, with respect to propriety, morals, and the requirements of law. Surety to be of good behavior is a larger requirement than surety to keep the peace; Dalton c. 122; 4 Burns, Just. 355.

BEHETRIA (Arabic, without nobility or lordship).

In Spanish Law. Lands situated in districts and manors in which the inhabitants had the right to select their own lords.

Behetrias were of two kinds: *Behetrias de entre parientes*, when the choice was restricted to a relation of the deceased lord; and *Behetrias de mar a mar*, when the choice was unrestricted.

The lord, when elected, enjoyed various privileges, called *Yantar*, *Conducho*, *Martiniego*, *Marzadga*, *Infurcion*, etc., which see. These contributions were intended for his maintenance, the construction of his dwelling, the support of his family and his followers, etc.; Escriche, Dicc. Raz.; Sempere y Guarinos, *Vinculos y Mayarazgos*, p. 67, etc. See also on this subject *Fuero Viejo de Castilla*, b. 1, tit. 8; *Las Partidas*, tit. 25, p. 4; *El Ordenamiento de Acalá* in different laws in tit. 32. See likewise book 6, tit. 1, of the *Novisima Recopilacion*.

BEHOOF (Sax.). Use; service; profit; advantage. In occurs in conveyances.

BELGIUM. The government of Belgium is a limited constitutional monarchy, women and their descendants being excluded from the succession. In default of male heirs, the king may, with the consent of the chambers, nominate his successor. There is a responsible ministry. The legislature is vested in the king and two chambers. The chamber of representatives are elected by universal suffrage. The senate consists of 76 members who are also elected. The chambers can be prorogued and dissolved by the king, and they meet annually and must sit for at least 40 days. The judicial system is in the main similar to that of France.

BELIEF. Conviction of the mind, arising not from actual perception or knowledge, but by way of inference, or from evidence received or information derived from others.

Belief may evidently be stronger or weaker according to the weight of evidence adduced in favor of the proposition to which belief is granted or refused; 4 S. & R. 137; 1 Greenl. Ev. §§ 7–13. See 1 Stark. Ev. 41; 2 Powell, Mortg. 555; 1 Ves. Ch. 95; 12 *id.* 80; Dy. 53; 2 W. Bla. 881; 8 Watts 406; 38 Ind. 504; 9 Gray 274; 9 Cal. 62; 10 Pet. 171.

BELLIGERENCY. The condition of a people who are recognized to be a *de facto* state or government and to be making war for their independence. Before they can be recognized as belligerents they must have some sort of political organization and be carrying on what in international law is regarded as legal war. There must be an armed struggle between two political bodies, each of which exercises *de facto* authority over persons within a determined territory, and commands an army which is prepared to observe the ordinary laws of war. It is not enough that the insurgents have an army; they must have an organized civil authority directing the army.

The exact point at which revolt or insurrection becomes belligerency is often extremely difficult to determine; and belligerents are not usually recognized by nations unless they have some strong reason or necessity for doing so, either because the territory where the belligerency is supposed to exist is contiguous to their own, or because the conflict is in some way affecting their commerce or the rights of their citizens. Thus in 1875 President Grant refused to recognize the Cubans as belligerents, although they had been maintaining hostilities for eight years, because they had no real and palpable political organization manifest to the world, and because, being possessed of no seaport, their contest was solely on land and without the slightest effect upon commerce; Whart. Dig. Int. Law 406. One of the most serious results of recognizing belligerency is that it frees the parent country from all responsibility for what takes place within the insurgent lines; Dana's Wheaton, note 15, page 35.

When revolutionists have no organized political government and it becomes necessary to recognize them in some way so as to avoid dealing with them as pirates or to warn citizens from taking part with them, it has been supposed that they could be recognized as insurgents, and this would create in the law a new heading of insurgency as a milder form of belligerency. The distinction, however, has not been fully recognized in international law; 33 Albany Law Journal 125. See Dana's Wheaton, note 15; Calvo, *Droit Int.* 4th ed. vol. 1, p. 238; Hall's International Law, 3d ed. p. 31; Walker's Science of International Law, p. 115; Wharton's Digest of International Law, vol. 1, p. 383; 4 American State Papers, Foreign Relations 1. See INSURGENTS.

BELLIGERENT. Actually at war. 44 Ill. 142.

Applied to nations; Wheaton, Int. Law 380 *et seq.*; 1 Kent 89.

It is not necessary that there should be war between separate and independent powers. The parties to a civil war may be belligerents; 37 N. Y. 178. See WAR; BELLIGERENCY.

BELOW. Inferior; preliminary. The court below is the court from which a cause has been removed. See BAIL.

BENCH. A tribunal for the administration of justice.

The judges taken collectively, as distinguished from counsellors and advocates, who are called the bar.

The term, indicating originally the seat of the judges, came to denote the body of judges taken collectively, and also the tribunal itself. The *jus banci*, says Spelman, properly belongs to the king's judges, who administer justice in the last resort. The judges of the inferior courts, as of the barons, are deemed to judge *plano pede*, and are such as are called in the civil law *pedanei judices*, or by the Greeks χαμαιδικασται, that is *humi judicantes*. The Greeks called the seats of their higher judges βηματα, and of their inferior judges βαθρα. The Romans used the word *sellæ* and *tribunalia* to designate the seats of their higher judges, and *subsellia* to designate those of the lower. See Spelman, Gloss. *Bancus*; 1 Reeve, Eng. Law 40, 4th ed.

"The court of common pleas in England was formerly called *Bancus*, the Bench, as distinguished from *Bancus Regis*, the King's Bench. It was also called *Communis Bancus*, the Common Bench; and this title is still retained by the reporters of the decisions in the court of Common Pleas. Mention is made in the Magna Charta '*de justiciariis nostris*

de Banco,' which all men know to be the justices of the court of Common Pleas, commonly called the Common Bench, or the Bench." Viner, Abr. *Courts* (n. 2).

BENCH WARRANT. An order issued by or from a bench, for the attachment or arrest of a person. It may issue either in case of a contempt, or where an indictment has been found.

BENCHER. A senior in the Inns of Court, intrusted with their government or direction.

The benchers have the absolute and irresponsible power of punishing a barrister guilty of misconduct, by either admonishing or rebuking him, by prohibiting him from dining in the hall, or even by expelling him from the bar, called disbarring. They might also refuse admission to a student, or reject his call to the bar. Wharton, Lex.

BENEFICE. An ecclesiastical preferment.

In its more extended sense, it includes any such preferment; in a more limited sense, it applies to rectories and vicarages only. See BENEFICIUM.

BENEFICIAL INTEREST. Profit, benefit, or advantage resulting from a contract, or the ownership of an estate as distinct from the legal ownership or control.

A *cestui que trust* has the beneficial interest in a trust estate while the trustee has the legal estate. If A makes a contract with B to pay C a sum of money, C has the beneficial interest in the contract.

BENEFICIAL POWER. It is used in New York and has for its object the donee of the power, and is to be executed solely for his benefit, in contradistinction to *trust powers*, which have for their object persons other than the donee and are to be executed solely for their benefit. 73 N. Y. 234.

BENEFICIAL SOCIETIES. Voluntary associations for mutual assistance in time of need and sickness, and for the care of families of deceased members. Niblack, Ben. Soc. and Accid. Ins. These associations are the successors of the ancient guilds and form in substance a very effective system of co-operative life insurance. The payment to the beneficiary is not a gift, but a right arising from the contract of membership, and when the conditions of membership have been fulfilled may be enforced at law; *id.* ch. xxvi.; and the suspension of a subordinate lodge will not defeat a recovery unless legally done; 173 Pa. 302.

BENEFICIARY. A term suggested by Judge Story as a substitute for *cestue que trust*, and adopted to some extent. 1 Story, Eq. Jur. § 321.

In Insurance. The person named in the policy to whom the insurance is payable upon the happening of the event insured against.

BENEFICIO PRIMO (more fully *beneficio primo ecclesiastico habendo*). A writ directed from the king to the chancellor, commanding him to bestow the benefice which shall first fall in the king's gift, above or under a certain value, upon a particular and certain person. *Reg. Orig.* 307.

BENEFICIUM (Lat. *beneficere*). A portion of land or other immovable thing granted by a lord to his followers for their stipend or maintenance.

A general term applied to ecclesiastical livings. 4 Bla. Com. 107; Cowel.

In the early feudal times, grants were made to continue only during the pleasure of the grantor, which were called *munera*; but soon afterwards these grants were made for life, and then they assumed the name of *beneficia*. Dalrymple, Feud. Pr. 199. Pomponius Laetus, as cited by Hotoman, *De Feudis*, c. 2, says, "That it was an ancient custom, revived by the Emperor Constantine, to give lands and villas to those generals, prefects, and tribunes who had grown old in enlarging the empire, to supply their necessities as long as they lived, which they called *parochial* parishes, etc. But between (*feuda*) fiefs or feuds and (*parochias*) parishes there was this difference, that the latter were given to old men, veterans, etc., who, as they deserved well of the republic, were sustained the rest of their life (*publico beneficio*) by the public benefaction; or, if any war afterwards arose, they were called out not so much as soldiers as leaders (*magistri militum*). Feuds (*feuda*), on the other hand, were usually given to robust young men who could sustain the labors of war. In later times, the word *parochia* was appropriated exclusively to ecclesiastical persons, while the word *beneficium* (*militare*) continued to be used in reference to military fiefs or fees.

In Civil Law. Any favor or privilege.

BENEFICIUM CLERICALE. Benefit of clergy, which see.

BENEFICIUM COMPETENTIÆ. In Scotch Law. The privilege of retaining a competence belonging to the obligor in a gratuitous obligation. Such a claim constitutes a good defence in part to an action on the bond. Paterson, Comp.

In Civil Law. The right which an insolvent debtor had, among the Romans, on making cession of his property for the benefit of his creditors, to retain what was required for him to live honestly according to his condition. 7 Toullier, n. 258.

BENEFICIUM DIVISIONIS. In Scotch and Civil Law. A privilege whereby a co-surety may insist upon paying only his share of the debt along with the other sureties. In Scotch law this is lost if the cautioners (sureties) bind themselves "conjunctly and severally." Erskine, Inst. lib. 3, tit. 3, § 63.

BENEFICIUM ORDINIS. In Scotch and Civil Law. The privilege of the surety allowing him to require that the creditor shall take complete legal proceedings against the debtor to exhaust him before he calls upon the surety. 1 Bell, Com. 347.

BENEFIT. Profit, fruit, or advantage.

The acceptance of the benefits of a contract or agreement estops a party from denying its validity; 102 Mo. 149; 139 Pa. 198; 151 Mass. 324; 62 Hun 269; 131 Ind. 23; 94 Mich. 429; 52 Fed. Rep. 627; 100 U. S. 55.

BENEFIT ASSOCIATION. See BENEFICIAL SOCIETIES; INSURANCE.

BENEFIT OF CESSION. In Civil Law. The release of a debtor from future imprisonment for his debts, which the law operates in his favor upon the surrender of his property for the benefit of his creditors. Pothier, *Procéd. Civ.* 5 *ième* part. c. 2, § 1.

This was something like a discharge under the insolvent laws, which releases the person of the debtor, but not the goods he may acquire afterwards. See BANKRUPT; CESSIO BONORUM; INSOLVENT.

BENEFIT OF CLERGY. In English Law. An exemption of the punishment of death which the laws impose on the commission of certain crimes, on the culprit demanding it. By modern statutes, benefit of clergy was rather a substitution of a more mild punishment for the punishment of death.

A clergyman was exempt from capital punishment *toties quoties*, as often as from acquired habit, or otherwise, he repeated the same species of offence; the laity, provided they could read, were exempted only for a first offence: for a second, though of an entirely different nature, they were hanged. Among the laity, however, there was this distinction: peers and peeresses were discharged for their first fault without reading, or any punishment at all; commoners, if of the male sex and readers, were branded in the hand. Women commoners had no benefit of clergy. It occasionally happened, in offences committed jointly by a man and a woman, that the law of gavelkind was parodied—

"The woman to the bough,
The man to the plough."

Kelyng reports, "At the Lent Assizes for Winchester (18 Car. II.) the clerk appointed by the bishop to give clergy to the prisoners, being to give it to an old thief, I directed him to deal clearly with me, and not to say *legit* in case he could not read; and thereupon he delivered the book to him, and I perceived the prisoner never looked on the book at all: and yet the bishop's clerk, upon the demand of '*legit ?* or *non legit ?*' answered '*legit.*' And thereupon I told him I doubted he was mistaken, and had the question again put to him; whereupon he answered again, something angrily, '*legit.*' Then I bid the clerk of assizes not to record it, and I told the parson that he was not the judge whether the culprit could read or no, but a ministerial officer to make a true report to the court; and so I caused the prisoner to be brought near, and delivered him the book, when he confessed that he could not read. Whereupon I told the parson that he had unpreached more that day than he could preach up again in many days, and I fined him five marks." An instance of humanity is mentioned by Donne, of a culprit convicted of a non-clergyable offence prompting a convict for a clergyable one in reading his *neck-verse*. In the very curious collection of *prolegomena* to Coryat's Crudities are commendatory lines by Inigo Jones. The famous architect wrote,

"Whoever on *this* book with scorn would look,
May he at sessions crave, and want *his* book."

This section is taken from Ruins of Time exemplified in Hale's Pleas of the Crown, by Amos, p. 24. And see, further, 1 Salk. 61.

If a clerk in holy orders committed a crime in the thirteeth century he could not be tried for it in a lay court. At the request of his bishop he was handed over for trial to the ecclesiastial court. This court might imprison for life but could not draw a drop of blood. Degradation was the usual punishment. Not only the higher ecclesiastics but those in minor orders stood outside the criminal law. The king's justices reduced the practice to an illogical absurdity. They required no proof of a person's sacred character; to read a line in a book was sufficient, and the same verse was said to be used on each prisoner; 1 Soc. Eng. 297. It was Ps. li. 1, *Miserere mei, Deus;* called the "neck-verse."

Benefit of clergy was afterwards granted, not only to the clergy, as was formerly the case, but to all persons. The benefit of clergy seems never to have been extended to the crime of high treason, nor to have embraced misdemeanors inferior to felony. It has been usually acknowledged as belonging to the common law of most of the United States; 1 Bish. Cr. L. 938. See 1 Chit. Cr. L. 667; 4 Bla. Com. ch. 28; 1 Bish. Cr. Law § 936. But this privilege is now abolished in England, by stat. 7 & 8 Geo. IV. c. 28, s. 6.

By the act of congress of April 30, 1790, it is provided, § 30, that the benefit of clergy shall not be used or allowed upon conviction of any crime for which, by any statute of the United States, the punishment is, or shall be declared to be, death.

BENEFIT OF DISCUSSION. In Civil Law. The right which a surety has to cause the property of the principal debtor to be applied in satisfaction of the obligation in the first instance. La. Civ. Code, arts. 3014–3020.

BENEFIT OF DIVISION. In Civil Law. The right of one of several joint sureties, when sued alone, to have the whole obligation apportioned amongst the solvent sureties, so that he need pay but his share. La. Civ. Code, arts. 3014–3020.

BENEFIT OF INVENTORY. In Civil Law. The privilege which the heir obtains of being liable for the charges and debts of the succession, only to the value of the effects of the succession, by causing an inventory of these effects within the time and manner prescribed by law. La. Civ. Code, art. 1025; Pothier, *des Success.* c. 3, s. 3, a. 2. See also Paterson, Comp. as to the Scotch law upon this subject.

BENEVOLENCE. A voluntary gratuity given by the subjects to the king. Cowel.

Benevolences were first granted to Edward IV.; but under subsequent monarchs they became anything but voluntary gifts, and in the Petition of Rights (3 Car. I.) it is made an article that no benevolence shall be extorted without the consent of parliament.

The illegal claim and collection of these benevolences was one of the prominently alleged causes of the rebellion of 1640. 1 Bla. Com. 140; 4 *id.* 436; Cowel.

BEQUEATH. To give personal property by will to another. 13 Barb. 106. The word may be construed *devise*, so as to pass real estate; Wigram, Wills 11; or *devise and* bequeath; 119 Mass. 525; 36 Me. 216; 13 Barb. 109.

BEQUEST. A gift by will of personal property. See DEVISE.

BERCARIA. A sheep-fold. A tan-house or heath-house, where barks or rinds of trees are laid to tan. Domesday; Co. Litt. 56.

BERCARIUS, BERCATOR. A shepherd.

BESAILE, BESAYLE. The great-grandfather, *proavus.* 1 Bla. Com. 186.

BEST EVIDENCE. Means the best evidence of which the nature of the case admits, not the highest or strongest evidence which the nature of the thing to be proved admits of: *e. g.* a copy of a deed is not the best evidence: the deed itself is better. Gilbert, Ev. 15; Stark. Ev. 437; Tayl. Ev. 365; 1 Greenl. Ev., Lewis, ed. § 82; 65 Me. 467; 2 Campb. 605; 1 Pet. 591; 7 *id.* 100; 145 Pa. 418; 15 Q. B. 782. See 33 Mich. 53.

The rule requiring the best evidence to be produced is to be understood of the best *legal* evidence; 2 S. & R. 34; 3 Bla. Com. 368, note 10, by Christian. It is relaxed in some cases, as *e. g.* where the words or the act of the opposite party avow the fact to be proved. A tavern-keeper's sign avows his occupation: taking of tithes avows the clerical character. 2 S. & R. 440; 1 Saund. Pl. 49. And see 1 Greenl. Ev. §§ 82, 83; 1 Bish. Cr. Pr. § 1080.

Letterpress copies of letters are the best secondary evidence of their contents; 87 Cal. 409. Where a note and the deed of trust given to secure it differ in describing the payee of the note, the note will prevail as evidence over the deed of trust; 108 Mo. 336.

BESTIALITY. It is a connection between a human being and a brute of the opposite sex. Buggery seems to include both sodomy and bestiality; 10 Ind. 356. See SODOMY.

BETROTHMENT. A contract between a man and a woman, by which they agree that at a future time they will marry together.

The contract must be mutual; the promise of the one must be the consideration for the promise of the other. It must be obligatory on both parties at the same instant, so that each may have an action upon it, or it will bind neither; 1 Salk. 24; Carth. 467; 5 Mod. 411; 1 Freem. 95; 3 Kebl. 148; Co. Litt. 79 *a*, *b*.

The parties must be able to contract. If either be married at the time of betrothment, the contract is void; but the married party cannot take advantage of his own wrong, and set up a marriage or previous engagement as an answer to the action for the breach of the contract, because this disability proceeds from the defendant's own act; 1 Ld. Raym. 387; 3 Inst. 89; 1 Sid. 112; 1 Bla. Com. 432.

The performance of this engagement, or completion of the marriage, must be accomplished within a reasonable time. Either party may, therefore, call upon the other to fulfil the engagement, and, in case of refusal or neglect to do so within a reasonable time after request made, may treat the betrothment as at an end, and bring action for the breach of the contract; 2 C. & P. 631. For a breach of the betrothment without a just cause, an action on the case may be maintained for the recovery of damages. It may be maintained by either party; Carth. 467; 1 Salk. 24.

BETTER EQUITY. The right which, in a court of equity, a second incumbrancer has who has taken securities against subsequent dealings to his prejudice, which a prior incumbrancer neglected to take although he had an opportunity. 1 Chanc. Prec. 470, n.; 4 Rawle 144.

BETTERMENTS. Improvements made to an estate. It signifies such improvements as have been made to the estate which render it better than mere repairs. 11 Me. 482; 23 *id.* 110; 24 *id.* 192; 13 Ohio 308; 10 Yerg. Tenn. 477; 13 Vt. 533; 17 *id.* 109. The term is also applied to denote the additional value which an estate acquires in consequence of some public improvement, as laying out or widening a street, etc. To entitle one to betterments depends upon his *bona fide* supposition that he bought the title in fee; 31 Vt. 300; 64 *id.* 527.

The measure of the value of betterments is not their actual cost, but the enhanced value they impart to the land, without reference to the fact that they were not desired by the true owner or could not profitably be used by him; 98 N. C. 526.

BETTING. The act of making a wager; a species of gambling.

A bet or wager is ordinarily an agreement between two or more that a sum of money or some valuable thing, in contributing which all agreeing take part, shall become the property of one or some of them, on the happening in the future of an event at the present uncertain; 81 N. Y. 539.

The states, generally, make this a crime and have statutes providing for the punishment of betting on cards, horse-races, cocking-mains and the like.

BETWEEN. In the intermediate space of, without regard to distance; from one to another; belonging to two as a mutual relation.

The words "between A. & B." in a deed excludes the termini mentioned therein; 1 Mass. 93, but see 31 N. J. L. 212.

"Between" when properly predicable of time is intermediate. "Between two days" was exclusive of both; 16 Barb. 352. See 12 Iowa 186.

BEYOND SEA. Out of the kingdom of England; out of the state; out of the United States.

"Beyond seas" means, generally, without the jurisdiction of the state or government in which the question arises; 1 Show. 91; 32 E. L. & Eq. 84; 3 Cra. 174; 3 Wheat. 341; 1 H. & M'H. 350; 14 Pet. 141; 2 McCord 331; 13 N. H. 79; 24 Conn. 432; 52 N. H. 41; 6 Allen 423.

The courts of Pennsylvania have decided that the phrase means "out of the United States;" 9 S. & R. 288. The same construction has been given to it in Missouri, Illinois, Michigan, Iowa, and North Carolina; 1 Dev. 16; 97 U. S. 638; 20 Mo. 530; 2 Greene (Ia.) 602; 24 Ill. 169. In Massachusetts, Maryland, Georgia, New Hampshire, Indiana, Ohio, Alabama, Arkansas,

and South Carolina, it has been decided to mean out of the state; 1 Pick. 263; 1 Harr. & J. 350; 2 M'Cord 331; 3 Bibb 510; 3 Wheat. 541; 14 Pet. 141; 3 Cra. 173; 13 N. H. 86; 8 Blackf. 515; 6 Ohio 126; 23 Ala. 486; 8 Ark. 489. See also 1 Johns. Cas. 76; and to this effect is the very uniform current of authorities.

In the various statutes of limitation the term "out of the state" is now generally used. And the United States courts adopt and follow the decisions of the respective states upon the interpretation of their respective laws; 11 Wheat. 361. What constitutes absence out of the state within the meaning of the statute is wholly undeterminable by any rule to be drawn from the decisions. It seems to be agreed that temporary absence is not enough; but what is a temporary absence is by no means agreed. Ang. Lim. § 200, n. Any place in Ireland was held to be "beyond the sea," under 21 Jac. I. c. 16; Show. 91; but this is changed by stat. 3 & 4 William IV. c. 27, which enacted that no part of the United Kingdom of Great Britain and Ireland, nor of the Channel Islands, should be deemed to be beyond seas within the meaning of the acts of limitation.

BIAS. A particular influential power which sways the judgment; the inclination or propensity of the mind towards a particular object.

Justice requires that the judge should have no bias for or against any individual, and that his mind should be perfectly free to act as the law requires.

There is, however, one kind of bias which the courts suffer to influence them in their judgments: it is a bias favorable to a class of cases, or persons, as distinguished from an individual case or person. A few examples will explain this. A bias is felt on account of convenience; 1 Ves. Sen. 13, 14; 3 Atk. 524. It is also felt in favor of the heir at law, as when there is an heir on one side and a mere volunteer on the other; Willes 570; 1 W. Bla. 256; Ambl. 645; 1 Ball & B. 309; 1 Wils. 310. On the other hand, the court leans against double portions for children; M'Clell. 356; 13 Price 599; against double provisions, and double satisfactions; 3 Atk. 421; and against forfeitures; 3 Term 172. As to jurors, see 2 Ga. 173; 12 Ga. 444. See, 1 Burr. 419.

BIBLE. See SCHOOLS.

BICYCLE. A two-wheeled vehicle propelled by the rider.

Riding a bicycle in the ordinary manner on the public highway for convenience, business, or pleasure is lawful. The highway is intended for public use, and a person driving a horse thereon has no rights superior to a person riding a bicycle; 58 Minn. 555. A bicycle is a vehicle and is entitled to the rights of the road equally with a carriage or other vehicle. 120 Ind. 46; 117 *id.* 450; and a person riding a bicycle on the highway at such a pace as to injure passers by may be convicted of furiously driving a carriage under act 5 & 6 Wm. IV. c. 50, s. 78; L. R. 4 Q. B. Div. 228. They are vehicles, and may be lawfully used upon streets; their proper place is the roadway, rather than the sidewalk; and their use may be regulated by the legislature; 24 A. & E. Encyc. 119; 18 A. & E. Corp. Cas. 514; 47 Alb. L. J. 404; 29 Cent. L. J. 412; 33 East, L. J. 263; 16 R. I. 371; their riders must pay toll; 167 Pa. 582; they may be left standing in the street while the owner is calling at a residence or place of business, as any other vehicle may; 3 D. R. (Pa.) 811; 4 *id.* 409.

Riding a bicycle in the middle of the highway at a speed of fifteen miles an hour and within twenty-five feet of horses going in an opposite direction is not negligence which will render the rider of the bicycle liable for injury caused to the occupants of the carriage by the horses taking fright; but it must be shown that the acts done by the rider of the bicycle were done at a time or in a manner or under circumstances which show a disregard of the rights of others; 120 Ind. 46.

By the Indiana act of 1881 riding a bicycle upon the public sidewalk is unlawful and the rider is liable for an injury inflicted upon a foot-passenger, although the act was unintentional. One who rudely and in such a reckless manner as to show a disregard of the consequences rides his bicycle against a person standing on the sidewalk is liable as for an assault and battery, the intent being implied; 117 Ind. 450. At the Lewes Assizes in England one convicted of recklessly riding a bicycle was sentenced to four months hard labor; Reg. *v.* Parker, cited in 30 Leg. Adviser (Ill.) 699.

Statutes have been passed in most of the states declaring bicycles vehicles, and that they have the same rights on the highway as other vehicles. In Vermont, Connecticut, and other states acts have been passed which make it unlawful to ride bicycles on the sidewalk.

In Pennsylvania it was held that the act of 1889, which declared that bicycles were vehicles and had the same rights as vehicles on the highway and were subject to the same restrictions, made riding a bicycle on the sidewalk a misdemeanor under an earlier act under which the malicious riding or driving of any horse on the sidewalk is a criminal offence; 170 Pa. 40.

An innkeeper is liable for damages where a bicycle belonging to a guest is stolen from the yard of the inn; 28 Ir. L. T. & S. J. 297.

In Ohio by statute it is unlawful to remove any bicycle left unprotected or to deface or injure a bicycle in any way; act, April 27, 1893.

By a New York act of 1896 railroads are obliged to carry bicycles free of charge when the owner travels on the same train and pays his own fare.

In Texas (1891) and New Jersey (1890) acts have been passed for the incorporation of bicycle clubs. As to whether a bicycle is a

vehicle or not within the meaning of a life insurance policy, see 102 Law Times 252.

See, generally, 51 Leg. Int. Pa. 300, 352, 358, 424. See also 47 Alb. L. J. 404; 33 Cent. L. J. 262; Elliot, Roads and Streets 635; 26 Ir. L. T. & S. J. 480.

BID. An offer to pay a specified price for an article about to be sold at auction.

An offer to perform a contract for work and labor or supplying materials at a specified price.

BIDDER. One who offers to pay a specified price for an article offered for sale at a public auction; 11 Ill. 254; or one who offers to perform a contract for work and labor, or supplying materials at a specified price.

The bidder has a right to expressly withdraw his bid at any time before it is accepted, which acceptance is generally manifested by knocking down the hammer; Benj. Sales 50, 73; 3 Term 148; 3 Johns. Cas. 29; 6 Johns. 194; Sugd. Vend. 29; Bab. Auct. 30, 42; see 38 Me. 302; 2 Rich. S. C. 464; 4 Bing. 653; or the bid may be withdrawn by implication, as by an adjournment of the sale before the article under the hammer is knocked down; 6 Pa. 486; 8 *id.* 408.

The bidder is required to act in good faith, and any combination between him and others, to prevent a fair competition, would avoid the sale made to himself; 3 B. & B. 116; 5 Rich. S. C. 541; 88 Ga. 696; 23 N. H. 360; 8 How. 134. But there is nothing illegal in two or more persons agreeing together to purchase a property at sheriff's sale, fixing a certain price which they are willing to give, and appointing one of their number to be the bidder; 6 W. & S. 122; 3 Gilm. 529; 11 Paige, Ch. 431; 15 How. 494; 3 Stor. 623.

In Pennsylvania the writ of mandamus will not lie to compel city authorities to award a contract to the lowest bidder, where, in the exercise of their discretion, they have decided that the faithful performance of the contract requires a judgment and skill which he does not possess, notwithstanding his pecuniary ability to furnish good security; 82 Pa. 343. See AUCTIONS.

BIENNIALLY. In a statute this term signifies not duration of time, but a period for the happening of an event; 9 Hun 573.

BIENS (Fr. goods). Property of every description, except estates of freehold and inheritance. Sugd. Vend. 495; Co. Litt. 119 *b*; Dane, Abr.

In the French law, this term includes all kinds of property, real and personal. Biens are divided into *biens meubles*, movable property; and *biens immeubles*, immovable property. The distinction between movable and immovable property is recognized by them, and gives rise, in the civil as well as in the common law, to many important distinctions as to rights and remedies. Story, Confl. Laws, § 13, note 1.

BIGAMUS. In Civil Law. One who had been twice married, whether both wives were alive at the same time or not. One who had married a widow.

Especially used in ecclesiastical matters as a reason for denying benefit of the clergy. *Termes de la Ley.*

BIGAMY. The wilfully contracting a second marriage when the contracting party knows that the first is still subsisting.

The state of a man who has two wives, or of a woman who has two husbands, living at the same time.

When the man has more than two wives, or the woman more than two husbands, living at the same time, then the party is said to have committed polygamy; but the name of bigamy is more frequently given to this offence in legal proceedings. 1 Russell, Cr. 187.

According to the canonists, bigamy is threefold, viz.: (*vera, interpretativa et similitudinaria*) real, interpretative, and similitudinary. The first consisted in marrying two wives successively (virgins they may be), or in once marrying a widow; the second consisted, not in a repeated marriage, but in marrying v. g. *meretricem vel ab alio corruptam*) a harlot; the third arose from two marriages, indeed, but the one metaphorical or spiritual, the other carnal. This last was confined to persons initiated in sacred orders, or under the vow of continence. Deferriere's Tract. Juris Canon. tit. xxi. See also Bacon, Abr. *Marriage.*

In England this crime is punishable by the stat. 24 & 25 Vict. c. 100, § 57, which makes the offence felony; but it exempts from punishment the party whose husband or wife shall continue to remain absent for seven years before the second marriage without being heard from, and persons who shall have been legally divorced. The statutory provisions in the United States against bigamy or polygamy are in general similar to, and copied from, the statute of 1 Jac. I. c. 11, which was supplied by the act of 24 & 25 Vict. c. 100, excepting as to the punishment. The several exceptions to this statute are also nearly the same in the American statutes; but the punishment of the offence is different in many of the states; 2 Kent 69.

Bigamy and polygamy are crimes by the laws of all civilized and Christian countries, and the First Amendment to the constitution declaring that congress shall make no law respecting the establishment of religion or forbidding the free exercise thereof, was never intended to be a protection against legislation for the punishment of such crimes; 133 U. S. 333.

If a woman, who has a husband living, marries another person, she is punishable, though her husband has voluntarily withdrawn from her and remained absent and unheard of for any term of time less than seven years, and though she honestly believes, at the time of her second marriage, that he is dead; 7 Metc. 472. See a discussion of this case by Mr. Bishop, in which he dissents from its ruling, in 4 So. L. J. (N. S.). 153; Clark, Cr. L. 311. Also, 12 Am. L. Rev. 471. The same rule applies also to the marriage of the husband, where he believes the wife to be dead; 62 Ala. 141; 13 Bush 318. The same rule now obtains in England, after some conflict of opinion; 14 Cox C. C. 45; but *quære*, if her belief were founded on positive evidence; Steph. Dig. Cr. Law, art. 34, n. 9. On the trial of a woman for bigamy whose first husband had been absent from her for more than

seven years, the jury found that they had no evidence that at the time of her second marriage she knew that he was alive, but that she had the means of acquiring knowledge of that fact had she chosen to make use of them. It was held that upon this finding the conviction could not be supported; 1 Dearsl. & B. Cr. Cas. 98. If a man is prosecuted for bigamy, his first wife cannot be called to prove her marriage with the defendant; T. Raym. 1; 44 Ala. 24; 15 Low. Can. J. 21; nor it seems even to prove that the first marriage was invalid; 4 Up. Can. Q. B. 588; but see as to this last point, 2 Whart. Cr. L. § 1709. The first marriage may be proved by the admissions of the prisoner; 103 U. S. 304; 46 Ind. 175. And see 1 Park. Cr. Cas. 378. When the first marriage is proved to the satisfaction of the court, the second husband is admissible as a witness for or against the defendant; Whart. Cr. Ev. § 397; 3 Ired. 346; 12 Minn. 476; 4 Up. Can. (Q. B.) 588; 103 U. S. 304. Admissions of a prior marriage in a foreign country are sufficient without proof of cohabitation or other corroborating circumstances to establish the marriage; 110 N. C. 500.

It is no defence that polygamy is a religious belief; 1 Utah 226; 98 U. S. 145; 103 U. S. 304.

Where the first marriage was made abroad, it must be shown to have been valid where made; 5 Mich. 349. Reputation and cohabitation are not sufficient to establish the fact of the first marriage; 1 Park. Cr. Cas. 378. If the second marriage be in a foreign state, it is not bigamy; 2 Park. Cr. Cas. 195; except by statute; 36 E. L. & Eq. 614. The second marriage need not be a valid one; 1 C. & K. 144. Where the first marriage was not performed according to the statute and there is no evidence of subsequent cohabitation of the parties the second marriage is not bigamy; 85 Mich. 123.

For discussion of cases and authorities see 33 Cent. L. J. 394.

BILAN. A book in which bankers, merchants, and traders write a statement of all they owe and all that is due to them. A balance sheet. 3 Mart. La. N. S. 446. The term is used in Louisiana, and is derived from the French. 5 *id.* 158.

BILATERAL CONTRACT. A contract in which both the contracting parties are bound to fulfil obligations reciprocally towards each other. *Leç. Elém.* § 781. See CONTRACT.

BILGED. The state of a ship in which water is freely admitted through holes and breaches made in the planks of the bottom, occasioned by injuries, whether the ship's timbers are broken or not. 3 Mas. 39.

BILINE. Collateral.

BILINGUIS. Using two languages.

A term formerly applied to juries half of one nation and half of another. Plowd. 2.

BILL (Lat. *billa*).

In Chancery Practice. A complaint in writing addressed to the chancellor, or judges of the court exercising chancery jurisdiction, containing the names of the parties to the suit, both complainant and defendant, a statement of the facts on which the complainant relies, and the allegations which he makes, with an averment that the acts complained of are contrary to equity, and a prayer for relief and proper process.

Its office in a chancery suit is the same as a declaration in an action at law, a libel in a court of admiralty, or an allegation in the spiritual courts.

A bill formerly consisted of nine parts, which contained *the address*, to the chancellor, court, or judge acting as such; *the names* of the plaintiffs and their descriptions, but the statement of the parties in this part of the bill merely is not sufficient; 2 Ves. & B. 327; *the statement* of the plaintiff's case, called *the stating part*, which should contain a distinct though general statement of every material fact to which the plaintiff means to offer evidence; 1 Brown, Ch. 94; 3 Swanst. 472; 3 P. Wms. 276; 2 Atk. 96; 1 Vern. 483; 11 Ves. Ch. 240; 2 Hare 264; 6 Johns. 565; 1 Woodb. & M. 34; Story, Eq. Pl. § 265 *a; a general charge* of confederacy; *the allegations* of the defendant's pretences, and charges in evidence of them; *the clause* of jurisdiction and an averment that the acts complained of are contrary to equity; *a prayer* that the defendant may *answer* the interrogatories, usually called the interrogating part; *the prayer for relief; the prayer for process;* 2 Madd. 166; 4 Halst. Ch. 143; 1 Mitf. Eq. Pl. 41; Beach, Mod. Eq. Pr. 87.

By the twenty-first of the Rules of Practice for the Courts of Equity of the United States, it is provided that the plaintiff in his bill shall be at liberty to omit, at his option, the part which is usually called the common confederacy clause of the bill, averring a confederacy between the defendants to injure or defraud the plaintiff; also what is commonly called the charging part of the bill, setting forth the matters or excuses which the defendant is supposed to intend to set up by way of defence to the bill; also what is commonly called the jurisdiction clause of the bill, that the acts complained of are contrary to equity, and that the defendant is without any remedy at law. By the rule the 4th, 5th, and 6th parts of the bill as above stated are dispensed with. And see Story, Eq. Pl. § 29. And this seems to be now the more common practice, except where fraud and combination are to be specifically charged; 27 N. H. 506. By the repeal, at December Term, 1850, of Equity Rule 40 of the United States Supreme Court the interrogating part of the bill was dispensed with, and thereafter it has been "unnecessary to interrogate a defendant specially and particularly upon any statement in the bill, unless the complainant wishes to obtain a discovery." In practice the bill

in the United States courts as now commonly used is substantially the old English form with the omissions thus permitted by these rules. In England and in most, if not all, of the States, including those having a separate court of chancery, the formal style of the old English bill has fallen entirely into disuse. The form used and generally provided for by rule of court, is a concise and consecutive statement of the plaintiff's case in numbered paragraphs, stripped of technical phrases and verbiage, concluding with prayers, consecutively numbered, for answer, for account, if incidental or appropriate to the relief sought, for the special relief sought, as payment of sums found due, specific performance, etc., for injunction, if required, for other relief, and for process.

The bill must be signed by counsel; 4 C. E. Green 180; Equity Rule 24, U. S. S. C.; 1 Dan. Ch. Pr. *312; and the facts contained therein, so far as known to the complainant, must in some cases be supported by affidavit annexed to the bill; Story, Eq. Pl. § 47; 2 Edw. Ch. 190; 1 Dan. Ch. Pr. *392; these are cases where some preliminary relief is required or bills praying for the production of documents, incident to relief at law, or for relief in equity on a lost instrument; *id.* *393 and cases cited in notes; so, bills to perpetuate testimony must have an affidavit of the circumstances under which the testimony is likely to be lost; *id.* *394, n. 3; and bills of interpleader must have an affidavit of no collusion; *id.* *394, n. 4. A bill filed by a corporation need not be under seal; 1 Md. Ch. Dec. 371; 4 Halst. Ch. 136; 37 W. Va. 92; so also of a bill brought by a municipal corporation; 20 L. R. A. 161.

A bill filed by a woman need not show whether she is married or single; 13 So. Rep. (Ala.) 426.

Bills are said to be original, not original, or in the nature of original bills.

Original bills are those which do, and which do not, pray for relief. Story, Eq. Pl. § 17.

Those which pray for relief are either *bills* praying the decree or order touching some right claimed by the party exhibiting the bill, in opposition to some right, real or supposed, claimed by the party against whom the bill is exhibited, or touching some wrong done in violation of the plaintiff's right, which is the most common kind of bill; Mitf. Eq. Pl., Jerem. ed. 34–37; 1 Dan. Ch. Pr. 305 *et seq.*

Those which do not pray for relief are either to perpetuate testimony; to examine witnesses *de bene esse;* or for discovery.

Bills not original are either supplemental; of *revivor;* or of *revivor and supplement.*

Those of revivor and supplement are either a *cross bill;* a *bill of review;* a *bill to impeach* a decree; *to suspend* the operation, or *avoid the decree* for subsequent matter; *to carry a decree* into effect; *or partaking* of the qualities of some one or all of them. See Mitf. Eq. Pl. 35–37; Story, Eq. Pl. §§ 18–21. Beach Mod. Eq. Pr.

For an account of these bills, consult the various titles.

As a Contract. An obligation; a deed, whereby the obligor acknowledges himself to owe unto the obligee a certain sum of money or some other thing, in which, besides the names of the parties, are to be considered the sum or thing due, the time, place, and manner of payment or delivery thereof. It may be indented or poll, and with or without a penalty. West, Symb. §§ 100, 101.

This signification came to include all contracts evidenced by writing, whether specialties or parol, but is no longer in use except in phrases, such as bill payable, bill of lading.

In Legislation. A special act passed by the legislature in the exercise of a quasi judicial power. Thus, bills of attainder, bills of pains and penalties, are spoken of. See BILL OF ATTAINDER; BILL OF PAINS AND PENALTIES.

The draft of a law submitted to the consideration of a legislative body for its adoption; 26 Pa. 450. By the constitution of the United States, all bills for raising revenue must originate in the house of representatives; but the senate may propose or concur with amendments as on other bills. Every bill, before it becomes a law, must be approved by the president of the United States, or within ten days returned, with his objections, to the house in which it originated. Two-thirds of each house may then enact it into a law. Similar provisions are copied in the constitutions of most of the states; U. S. Const. art 1, § 7. As to the mode of passing bills in congress, see Sheph. Const. 94; 2 Story, Const. § 893.

In Mercantile Law. The creditor's written statement of his claim, specifying the items.

It differs from an account stated in this, that a bill is the creditor's statement; an account stated is a statement which has been assented to by both parties.

In England it has been held that a bill thus rendered is conclusive against the party making it out against an increase of charge on any of the items contained in it; and strong evidence as to items; 1 B. & P. 49. But in New York it has been held that merely presenting a bill, no payment or agreement as to the amount being shown, does not conclude the party from suing for a larger sum; 16 N. Y. 389.

BILL OF ADVENTURE. A writing signed by a merchant, ship-owner, or master to testify that goods shipped on board a certain vessel are at the venture of another person, he himself being answerable only for the produce.

BILL OF ADVOCATION. In Scotch Law.

A petition in writing, by which a party to a cause applies to the supreme court to call the action out of the inferior court to itself.

BILL TO CARRY A DECREE INTO EXECUTION. In Equity Practice.

One which is filed when, from the neglect of parties or some other cause, it may become impossible to carry a decree into execution without the further decree of the court. Hinde, Ch. Pr. 68; Story, Eq. Pl. § 429.

BILL OF CERTIORARI. In Equity Practice. One praying for a writ of certiorari to remove a cause from an inferior court of equity; Cooper, Eq. 44. Such a bill must state the proceedings in the inferior court, and the incompetency of such court by suggestion of the reason why justice is not likely to be done—as distances of witnesses, lack of jurisdiction, etc.,—and must pray a writ of certiorari to remove the record and the cause to the superior court. Wyatt, Pr. Reg. 82; Harrison, Ch. Pr. 49; Story, Eq. Pl. § 298. It is rarely used in the United States.

BILL CHAMBER. In Scotch Law. A department of the court of session in which petitions for suspension, interdict, etc., are entertained. It is equivalent to sittings in chambers in the English and American practice. Paterson, Comp.

BILL OF CONFORMITY. In Equity Practice. One filed by an executor or administrator, who finds the affairs of the deceased so much involved that he cannot safely administer the estate except under the direction of a court of chancery. This bill is filed against the creditors, generally, for the purpose of having all their claims adjusted, and procuring a final decree settling the order of payment of the assets. 1 Story, Eq. Jur. 440.

BILL OF COSTS. In Practice. A statement of the items which form the total amount of the costs of a suit or action. It must be taxed by the proper officer of the court, and is demandable as a matter of right before the payment of the costs. See COSTS; TAXING COSTS.

BILL OF CREDIT. Paper issued by the authority of a state on the faith of the state, and designed to circulate as money. 11 Pet. 257.

Promissory notes or bills issued by a state government, exclusively, on the credit of the state, and intended to circulate through the community for its ordinary purposes as money, redeemable at a future day, and for the payment of which the faith of the state is pledged; 4 Kent 408.

The constitution of the United States provides that no state shall emit bills of credit, or make anything but gold and silver coin a tender in payment of debts. U. S. Const. art. 1, § 10. This prohibition, it seems, does not apply to bills issued by a bank owned by the state but having a specific capital set apart; Cooley, Const. Lim. 84; 2 M'Cord 12; 4 Ark. 44; 11 Pet. 257; 13 How. 12; but see 4 Pet. 410; 2 Ill. 87; nor does it apply to notes issued by corporations or individuals which are not made legal tender; 4 Kent 408; nor to coupons on state bonds, receivable for taxes and negotiable, but not intended to circulate as money; 114 U. S. 270. But it does apply to a state warrant containing a direct promise to pay the bearer the amount stated on its face, and which is intended to circulate as money; 49 Ark. 554. As to the power of usurping governments to bind the public faith for the redemption of notes issued by a revolutionary power, see 35 Ga. 330.

In Mercantile Law. A letter sent by an agent or other person to a merchant, desiring him to give credit to the bearer for goods or money. Comyns, Dig *Merchant*, F, 3; 3 Burr. 1667; 13 Miss. 491; 4 Ark. 44; R. M. Charlt. 151.

BILL OF DEBT. An ancient term including promissory notes and bonds for the payment of money. Comyns, Dig. *Merchant*, F, 2.

BILL OF DISCOVERY. In Equity Practice. One which prays for the discovery of facts resting within the knowledge of the person against whom the bill is exhibited, or of deeds, writings, or other things in his custody or power. Hinde, Ch. Pr. 20; Blake, Chanc. Pract. 37.

It does not seek for relief in consequence of the discovery (and this constitutes its characteristic feature), though it may ask for a stay of proceedings till discovery is made; 2 Story, Eq. Jur. § 1483; Bisph. Eq. § 557; and such relief as does not require a hearing before the court, it is said, may be part of the prayer; Eden, Inj. 78; 19 Ves. Ch. 376; 4 Madd. 247; 5 *id.* 218; 1 Sch. & L. 316; 1 Sim. & S. 83.

It is commonly used in aid of the jurisdiction of a court of law, to enable the party who prosecutes or defends a suit at law to obtain a discovery of the facts which are material to such prosecution or defence; Hare, Discov. 119; 9 Paige, Ch. 580, 622, 637; 2 Dan. Ch. Pr. 1556; Langd. Eq. Pl. § 167. A defendant in equity may obtain the same relief by a cross bill; Langd. Eq. Pl. § 128.

The plaintiff must be entitled to the discovery he seeks, and can only have a discovery of what is necessary for his own title, as of deeds he claims under, and not to pry into that of the defendant; 2 Ves. Ch. 445. See Mitf. Eq. Pl. 52; Cooper, Eq. Pl. 58; 1 Madd. Ch. Pr. 196; Beach, Mod. Eq. Pr. 90, 335. See Hare; Wigram, Disc. It will not lie in Texas to compel a judgment debtor to disclose assets on which execution may be levied; 86 Tex. 386.

There has been much controversy as to whether the defendant is entitled to discovery to aid him in preparing his answer; Langd. Eq. Pl. § 129.

The bill must show a present and vested title and interest in the plaintiff, and what that title and interest are; 8 Metc. 395; 1 Vern. 105; Story, Eq. Jur. § 1490; 3 Ves. Sen. 247; 7 Ired. Eq. 239; with reasonable certainty; 3 Ves. 343; must state a case which will constitute a just ground for a suit or a defence at law; 3 Johns. Ch. 47; 2 Paige, Ch. 601; 1 Bro. Ch. 96; 3 *id.* 155; 13 Ves. Ch. 240; must describe the deeds and acts with reasonable certainty; 3 Ves.

Ch. 343; 17 Ala. N. S. 794; Story, Eq. Pl. § 320; must state that a suit is brought, or about to be, and the nature thereof must be given with reasonable certainty; 5 Madd. 18; 8 Ves. Ch. 398; must show that the defendant has some interest; 1 Ves. & B. 550; 3 Barb. Ch. 484; and, where the right arises from privity of estate, what that privity is; Mitf. Eq. Pl., Jeremy ed. 189; it must show that the matter is material, and how; 9 Paige, Ch. 188, 580, 622; 3 Rich. Eq. 148; and must set forth the particulars of the discovery sought; 2 Caines, Cas. 296; 1 Y. & J. 577. And see Story, Eq. Pl. § 17. Adverse examination before trial of a defendant will not be permitted for the purpose of discovering a cause of action; 3 Misc. Rep. 514. A defendant is not bound to make response to interrogatories in the body of a reply to his answer; 18 S. W. Rep. (Ky.) 1034. And see Story, Eq. Pl. § 17.

A bill asking for discovery but waiving answer under oath is not demurrable for want of an affidavit and cannot be treated as a bill for discovery; 15 R. I. 341; if the oath has been waived, the defendant is not excused from answering, but he loses the benefit of his own declarations while his admissions are evidence against him; 41 Fed. Rep. 369.

It will not lie in aid of a criminal prosecution, a mandamus, or suit for a penalty; 2 Ves. Ch. 398; 2 Paige, Ch. 399; Story, Eq. Jur. § 1494; Hare, Disc. 116; 1 Pom. Eq. Jur. § 197.

BILL OF EXCEPTIONS. A written statement of objections to the decision of a court upon a point of law, made by a party to the cause, and properly certified by the judge or court who made the decision.

The object of a bill of exceptions is to put the decision objected to upon record for the information of the court having cognizance of the cause in error. Bills of exceptions were authorized by statute Westm. 2d (13 Edw. I.), c. 31, the principles of which have been adopted in all the states of the Union, though the statute has been held to be superseded in some, by their own statutes. It provides for compelling the judges to sign such bills, and for securing the insertion of the exceptions upon the record. They may be brought by either plaintiff or defendant. Bills of exceptions have been abolished in England by the "Supreme Court of Judicature Act, 1873," 36 and 37 Vict. c. 66.

In what cases. In the trial of civil causes, wherever the court, in making a decision, is supposed by the counsel against whom the decision is made to have mistaken the law, such counsel may tender exceptions to the ruling, and require the judge to authenticate the bill; 3 Bla. Com. 372; 3 Cra. 300; 7 Gill & J. 335; 24 Me. 420; 3 Jones N. C. 185; 19 N. H. 372; see 154 Pa. 582; including the receiving improper and the rejecting proper evidence; 1 Ill. 162; 9 Mo. 166; 6 Gray 479; 17 Tex. 62; 41 Me. 149; and a failure to call the attention of the jury to material matter of evidence, after request; 2 Cow. 479; and including a refusal to charge the jury in a case proper for a charge; 4 Cra. 60, 62; 2 Aik. 115; 2 Blatchf. 1; 5 Gray 101; but not including a failure to charge the jury on points of law when not requested; 151 U. S. 73; 2 Pet. 15; 6 Wend. 274; 1 Halst. 132; 2 Blatchf. 1; 11 Cush. 123; 38 Me. 227; and including a refusal to order a special verdict in some cases; 1 Call 105. It can be taken to the action or want of proper action of the trial court, upon any proceeding in the progress of the trial from its commencement to its conclusion and when properly presented can be considered by the court on writ of error; 149 U. S. 67.

An exception cannot be taken to the decision of the court upon matters resting in its discretion; 34 Me. 300; 13 Vt. 459; 6 Wend. 277; 4 Pick. 302; 17 Ill. 339; 8 Miss. 164; 19 Vt. 457; 41 *id.* 611; 20 N. H. 131; 5 R. I. 138; nor upon any theory announced by the court, unless such be expressed in particular language; 149 U. S. 17; nor for the refusal of a non-suit; 77 Pa. 20; nor where the record shows a fatal error, as want of jurisdiction; 78 Mo. 172; nor, generally, in cases where there is a right of appeal; 4 Pick. 93; 10 *id.* 34; 13 Vt. 430; 1 Me. 291. See 19 Pick. 191; though the practice in some states is otherwise.

In *criminal* cases, at common law, judges are not required to authenticate exceptions; 1 Chitty, C. L. 622; 13 Johns. 90; 20 Barb. 567; 1 Va. Cas. 264; 2 Watts 285; 2 Sumn. 19; 16 Ala. 187; but statutory provisions have been made in several states authorizing the taking of exceptions in criminal cases; Graham, Pr. 768, n.; 1 Leigh 598; 14 Pick. 370; 20 Barb. 567; 7 Ohio 214; 2 Dutch. 463; 5 Mich. 36; 29 Pa. 429.

When to be taken. The bill must be tendered at the time the decision is made; 9 Johns. 345; 5 N. H. 336; 2 Me. 336; 5 Watts 69; 6 J. J. Marsh. 247; 2 Harr. N. J. 291; 2 Ark. 14; 8 Mo. 234, 656; 21 Ala. 351; 2 Miss. 572; 12 La. Ann. 113; 4 Ia. 504; 4 Tex. 170; and it must, in general, be taken before the jury have delivered their verdict; 8 S. & R. 211; 10 Johns. 312; 5 T. B. Monr. 177; 11 N. H. 251; 9 Mo. 291, 355; 3 Ind. 107; 17 Ill. 166; 25 Tex. App. 557; 100 N. C. 519. See 7 Wend. 34; 9 Conn. 545.

In the circuit court of appeals no exceptions to rulings at a trial will be considered, unless taken at the trial, embodied in a bill of exceptions, presented to the judge at the same term or at a time allowed by rule of court made at the term, or by a standing rule of court, or by consent of the parties, and except under extraordinary circumstances must be allowed and filed with the clerk during the same term; 56 Fed. Rep. 188. See 150 U. S. 156; 149 *id.* 262.

In practice, however, the point is merely noted at the time, and the bill is afterwards settled; Bull. N. P. 315; T. Raym. 405; 11 S. & R. 270; 5 N. H. 336; 3 Cow. 32; 5 Miss. 272; 2 Swan 77; 21 Mo. 122; see 13 Ill. 664; 3 A. K. Marsh. 360; 1 Ala. 66; 2 Dutch. 463; but in general before the close of the term of court; 3 Humphr. 372; 8 Mo. 727; 1 W. & S. 480; 6 How. 260; see 18 Ala. 441; 9 Ill. 443; 5 Ohio St. 51; and

then must appear on its face to have been signed at the trial; 9 Wheat. 651; 2 Sumn. 19; 6 Wend. 268; 3 Ark. 451. A bill may be sealed by the judge after the record has been removed, and even after the expiration of his term; 1 Iowa 364. See 4 Pick. 228; 7 Mo. 250. If presented to and signed by a judge after the close of term, and the record does not show any order or consent so to do, the supreme court will affirm the judgment; 149 U. S. 262.

Formal proceedings. The bill must be signed by the judge or a majority of the judges who tried the cause; 8 Cow. 746; 3 Hen. & M. 219; 4 J. J. Marsh. 543; 2 Me. 336; 2 Ala. 269; Wright, Ohio 73; 29 Vt. 187; 22 Ga. 168; upon notice of time and place when and where it is to be done; Bull. N. P. 316; 8 Cow. 766; 1 Ind. 389; 2 Ga. 211, 262. As to the course to be pursued in case of the death of the judge before authentication, see 7 D. & L. 252; 2 Duer 607; 44 Ill. App. 515; 80 Wis. 148. Where the bill is presented for signature within the prescribed time, one will not be prejudiced by the refusal or neglect of the judge to sign it within the prescribed time; 129 Ill. 123; 41 Mich. 726. The bill need not be sealed; U. S. Rev. Stat. § 953; but must be signed by the judge, and the initials "A. B." are not the signature of the judge and do not constitute a sufficient authentication; 125 U. S. 240.

Facts not appearing on the bill are not presumed; 11 Ala. 29; 4 Monr. 126; 5 Rand. 666; 3 Rawle 101; 1 Pick. 37; 2 Miss. 315; 5 Fla. 457; 7 Cra. 270. See 146 U. S. 325. For decisions as to the requisite statements of fact and law, see 1 Aik. 210; 3 Jones, N. C. 407; 2 Harr. & J. 376; 2 Leigh 340; 4 Hen. & M. 270; 5 Ala. 71; 29 Ala. N. S. 322; 7 Ohio St. 22; 20 Ga. 135; 4 Mich. 478; 4 Ia. 349; 17 Ill. 234; 22 Mo. 321; 2 Pet. 15; 7 Cra. 270; 4 How. 4.

Effect of. The bill when sealed is conclusive evidence as to the facts therein stated as between the parties; 3 Burr. 1765; 3 Dall. 38; 6 Wend. 276; in the suit to which it relates, but no further; 23 Miss. 156; see 1 T. B. Monr. 6; and all objections not appearing by the bill are excluded; 8 East 280; 2 Binn. 168; 7 Halst. 160; 1 Pick. 37; 14 *id.* 370; 10 Wend. 254; 2 Me. 337; 25 *id.* 79; 1 Leigh 86; 10 Conn. 146; 6 W. & S. 343; 8 Miss. 671; 12 Gill & J. 64; 10 Vt. 255; 7 Mo. 288; 11 Wheat. 199; 3 How. 553; 75 Ia. 669. And see 17 Ala. 689; 2 Ark. 506; 10 Yerg. 499; 30 Vt. 233. But see 4 Hen. & M. 200. In the absence of a bill of exceptions pointing out the alleged errors, the appellate court will not revise the instructions unless fundamentally erroneous; 25 Tex. App. 602, *607. An exception to conclusions of law admits the findings of fact; 115 Ind. 560; 117 *id.* 188.

It draws in question only the points to which the exception is taken; 5 Johns. 467; 1 Green, N. J. 216; 10 Conn. 75, 146. It does not of itself operate as a stay of proceedings; 18 Wend. 509; 19 Ga. 588. See 5 Hill, N. Y. 510.

A stipulation, if it can be understood, may answer in place of a bill of exceptions; 73 Wis. 557.

If the judge's rulings and the grounds of objection thereto appear of record, the right of the party excepting is fully preserved without the retention of a bill; 40 La. Ann. 809. If the judge has certified and filed the record containing the evidence, exceptions, and charge, he is not compelled to sign a second or separate bill for the party excepting; 161 Pa. 320. Where the error is apparent upon the record it need not be presented by a bill of particulars; 141 U. S. 616.

BILL OF EXCHANGE. A written order from one person to another, directing the person to whom it is addressed to pay to a third person a certain sum of money therein named. Byles, Bills 1.

An open (that is unsealed) letter addressed by one person to another directing him, in effect, to pay, absolutely and at all events, a certain sum of money therein named, to a third person, or to any other to whom that third person may order it to be paid, or it may be payable to bearer or to the drawer himself. 1 Dan. Neg. Inst. 26.

A bill of exchange may be negotiable or non-negotiable. If negotiable, it may be transferred either before or after acceptance.

The person making the bill, called the drawer, is said to draw upon the person to whom it is directed, and undertakes impliedly to pay the amount with certain costs if he refuse to comply with the command. The drawee is not liable on the bill till after acceptance, and then becomes liable as principal to the extent of the terms of the acceptance; while the drawer becomes liable to the payee and indorsees conditionally upon the failure of the acceptor to pay. The liabilities between indorsers and indorsees are subject to the same rules as those of indorsers and indorsees on promissory notes. Regularly, the drawee is the person to become acceptor; but other parties may accept, under special circumstances.

A *foreign* bill of exchange is one of which the drawer and drawee are residents of countries foreign to each other. In this respect the states of the United States are held foreign as to each other; 10 Pet. 572; 12 Pick. 483; 15 Wend. 527; 3 A. K. Marsh. 488; 1 Hill, S. C. 44; 4 Leigh 37; 15 Me. 136; 49 Ala. 242, 266; 8 Dana 133; 9 N. H. 558; 4 Wash. C. C. 148; 133 U. S. 433; 112 *id.* 696; 41 Me. 302; 1 Dan. Neg. Inst. § 9. But see *contra*, 5 Johns. 384, and see 6 Mass. 162.

An *inland* bill is one of which the drawer and drawee are residents of the same state or country; 25 Miss. 143. As to whether a bill is considered as foreign or inland when made partly in one place and partly in another, see 5 Taunt. 529; 8 *id.* 679; Gow 56; 1 Maule & S. 87. Defined by statute 19 & 20 Vict. c. 97, § 7.

The distinction between inland and foreign bills becomes important with reference to the question whether protest and notice are to be given in case of non-acceptance. See 3 Kent 95; PROTEST.

The *parties* to a bill of exchange are the drawer, the drawee, the acceptor, and the payee. Other persons connected with a bill in case of a transfer as parties to the transfer are the indorser, indorsee, and holder.

See those titles. It sometimes happens that one or more of the apparent parties to a bill are fictitious persons. The rights of a *bonâ fide* holder are not thereby prejudiced where the payee and indorser are fictitious; 2 H. Bla. 78; 3 Term 174, 481; 1 Campb. 130; 19 Ves. Ch. 311; 40 N. H. 26; Benj. Chal. Dig. § 85; or even where the drawer and payee are both fictitious; 10 B. &. C. 468; and all the various parties need not be different persons; 18 Ala. 76; 1 Story 22. The qualifications of parties who are to be made liable by the making or transfer of bills are the same as in case of other contracts. See PARTIES; FICTITIOUS PAYEE.

The bill must be *written;* 1 Pardessus, 344; 2 Stra. 955. See 58 Tex. 636.

It should be properly *dated*, both as to place and time of making; Beawes, *Lex Merc.* pl. 3; 2 Pardessus, n. 333; 1 B. & C. 398. But it is not essential to the validity of a bill; 1 Dan. Neg. Inst. § 82; 32 Me. 524; Story, Bills § 37; 30 Vt. 11; 7 Cow. 337. If not dated, it will be considered as dated at the time it was made; 32 Ind. 375; 71 N. Y. 441; 25 Mo. App. 174. Bills are sometimes ante or post-dated for convenience; 8 S. & R. 425; 91 Pa. 315; 33 La. Ann. 1461; 24 Hun 281.

The *superscription* of the sum for which the bill is payable will aid an omission in the bill, but is not indispensable; 2 East Pl. Cr. 951; 1 R. I. 398; 10 Q. B. Div. 30; 98 Mass. 12.

The *time* of payment should be expressed; but if no time is mentioned it is considered as payable on demand; 2 B. & C. 157; 51 Me. 376; 25 Mo. App. 174; 81 *id.* 278; 146 Mass. 22; 110 Pa. 318; 72 Ga. 25; L. R. 3 Q. B. 573. In Massachusetts it must be payable at a definite time or at such a time as can be made definite upon election of the holder; 119 Mass. 137; 133 *id.* 151.

The *place* of payment may be prescribed by the drawer; Beawes, *Lex Merc.* pl. 3; 8 C. B. 433; or by the acceptor on his acceptance; Chitty, Bills 172; 3 Jur. 34; 7 Barb. 652; but is not as a general practice, in which last case the bill is considered as payable and to be presented at the usual place of business of the drawee, 11 Pa. 456, at his residence, where it was made, or to him personally anywhere; 10 B. & C. 4; M. & M. 381; 4 C. & P. 35; 39 Ohio St. 67.

Such an *order* or request to pay must be made as demands a right, and not as asks a favor; M. & M. 171; and it must be absolute, and not contingent; 1 R. & R. 193; 2 B. & Ald. 417; 5 Term. 482; 4 Wend. 275; 11 Mass. 14; 13 Ala. 205; 3 Halst. 262; 6 J. J. Marsh. 170; 1 Ohio 272; 9 Miss. 393; 5 Ark. 401; 1 La. Ann. 48; 10 Tex. 155. Mere civility in the terms does not alter the legal effect of the instrument.

The word *pay* is not necessary; *deliver* is equally operative; 2 Ld. Raym. 1397; 8 Mod. 364; as well as other words; 9 C. B. 570; but they must be words requiring *payment;* 10 Ad. & E. 98: "*il vous plaira de praye*" is, in France, the proper language of a bill; Pailliet, Man. 841.

Each of the duplicate or triplicate (as the case may be) bills of a set of foreign exchange contains a provision that the particular bill is to be paid only if the others remain at the time unpaid; see 2 Pardessus, n. 342; and all the parts of the set constitute but one bill; 7 Johns. 42; 2 Dall. 134. A bill should *designate the payee;* 26 E. L. & Eq. 404; 36 *id.* 165; 11 Barb. 241; 13 Ga. 55; 30 Miss. 122; 16 Ill. 169; and see 1 E. D. Smith, 1; 8 Ind. 18; but when no payee is designated, the holder by indorsement may fill the blank with his own name; 2 Maule & S. 90; 4 Campb. 97; see 6 Ala. N. S. 86; and if payable to the bearer it is sufficient; 3 Burr. 1526.

To make it negotiable, it must be payable to the order of the payee or to the bearer, or must contain other equivalent and operative words of transfer; Ld. Raym. 1545; 6 Term 123; 9 B. & C. 409; 1 D. & C. 275; 1 Dall. 194; 3 Caines 137; 2 Gill 348; 1 Harr. Del. 32; 3 Humphr. 612; 1 Ga. 236; 1 Ohio 272; 29 Pa. 530; otherwise in some states of the United States by statute, and in Scotland; 10 B. Monr. 286; 1 Bell, Com. 401. See 83 Ill. 218. But in England and the United States negotiability is not essential to the validity of a bill; 3 Kent 78; Big. Bills & N. 12; 6 Term 123; 6 Taunt. 328; 9 Johns. 217; 10 Gill & J. 299; 31 Pa. 506; 9 Wall. 544; though it is otherwise in France; Code de Comm. art. 110, 188; 2 Pardessus, n. 339. The fact that the bill provides that it shall bear interest from date in case of failure to pay at maturity, will not affect its negotiability as the rule that it must be for a sum certain applies to the principal and not interest; 44 Mo. App. 129; nor a provision that a higher rate of interest shall be paid after default; 62 N. W. Rep. (S. D.) 958; nor will its negotiability be affected by a stipulation in it to pay a reasonable attorney's fee; 11 Mont. 285; 38 Ill. App. 305; 63 N. W. Rep. (Nebr.) 37; 32 Pac. Rep. (Or.) 763; *contra*, 58 Mo. App. 667; 61 N. W. Rep. (N. D.) 473; 84 Pa. 407; 92 *id.* 227.

The *sum* for which the bill is drawn should be written in full in the body of the instrument, as the words in the body govern in case of doubt; 5 Bingh. N. C. 425; 8 Blackf. 144; 1 R. I. 398; the marginal figures are not a part of the contract, but a mere memorandum; 1 R. I. 398; 98 Mass. 12.

The amount must be fixed and certain, and not contingent; 2 Salk. 375; 2 Miles 442; 59 Ia. 345; 13 Phila. 473; 52 Mich. 525; 99 U. S. 446. It must be payable in money, and not in merchandise; 7 Johns. 321, 461; 4 Cow. 452; 11 Me. 398; 6 N. H. 159; 7 Conn. 110; 1 N. & M'C. 254; 3 Ark. 72; 8 B. Monr. 168; 36 Barb. 307; see 7 Miss. 52; and is not negotiable if payable in bank bills or in *currency* or other substitutes for legal money of similar denominations; 2 McLean 10; 3 Wend. 71; 7 Hill N. Y. 359; 11 Vt. 268; 3 Humphr. 171; 7 Mo. 595; 5 Ark. 481; 13 *id.* 12; 2 Rose 225; 10 S. & R. 94; 14 Pet. 293; 42 Ala. 108; held otherwise in 15 Ohio 118; 17 Miss. 457; 9 Mo. 697; 6 Ark. 255; 1 Tex. 13, 246, 503; 4 Ala. N. S. 88, 140; 123 U. S. 112; 61 Md. 309.

It is not necessary, however, that the money should be current in the place of payment, or where the bill is drawn; it may be in the money of any country whatever; 27 Mich. 193; 23 Wend. 71; 12 Fed. Rep. 478; 1 Dan. Neg. Inst. § 58. But it is necessary that the instrument should express the specific denomination of money when payable in the money of a foreign country, in order that the courts may be able to ascertain its equivalent value; otherwise it is not negotiable; 1 Dan. Neg. Inst. § 58. As to bills payable in Confederate money, see 8 Wall. 12; 19 *id.* 548; 94 U. S. 434; and that title.

Value received is often inserted, but is not of any use in a negotiable bill; 2 McLean 213; 3 Metc. Mass. 363; 15 Me. 131; 3 Rich. S. C. 413; 5 Wheat. 277; 4 Fla. 47; 31 Pa. 506; 34 Vt. 402; 3 M. & S. 351.

A *direction* to place to the account of some one, drawer, drawee, or third person, is often added, but is unnecessary; Comyns, Dig. *Merchant*, F, 5; 1 B. & C. 398.

As per advice, inserted in a bill, deprives the drawee of authority to pay the bill until advised; Chitty, Bills 162.

It should be *subscribed* by the drawer, though it is sufficient if his name appear in the body of the instrument; 2 Ld. Raym. 1376; 1 Iowa 231; 27 Ala. N. S. 515; see 12 Barb. 27; and should be *addressed* to the drawee by the Christian name and surname, or by the full style of the firm; 2 Pardessus, n. 335; Beawes, *Lex Merc.* pl. 3; Chitty, Bills 186.

Provision may be made by the drawer, and inserted as a part of the bill, for applying to another person, for a return without protest, or for limiting the damages for re-exchange, expense, etc., in case of the failure or refusal of the drawee to accept or to pay; Chitty, Bills 188.

A *bona fide* holder of a bill negotiated before maturity merely as a security for an antecedent debt is not affected, without notice, by equities or defences between the original parties; 102 U. S. 14.

A certificate, made and payable in a state out of a particular fund, and purporting to be the obligation of a municipal corporation, is not governed by the law merchant, and is open in the hands of subsequent holders to the same defences as existed against the original payee; 155 U. S. 513.

See INDORSEMENT; INDORSER; INDORSEE; ACCEPTANCE; PROTEST; DAMAGES.

Consult Bayley; Byles; Chitty; Cunningham; Edwards; Kyd; Marius; Parsons; Pothier; Story on Bills; Big. Neg. Instr.; Daniels, Neg. Instruments; 3 Kent 75; 1 Ves. Jr. 86, 514, Supp.; Merlin, *Répert. Lettre et Billet de Change.*

BILL FOR FORECLOSURE. **In Equity Practice.** One which is filed by a mortgagee against the mortgagor, for the purpose of having the estate sold, thereby to obtain the sum mortgaged on the premises, with interest and costs. 1 Madd. Ch. Pr. 528. See FORECLOSURE.

BILL OF GROSS ADVENTURE. **In French Maritime Law.** Any written instrument which contains a contract of bottomry, respondentia, or any other kind of maritime loan. There is no corresponding English term. Hall, Marit. Loans 182, n. See BOTTOMRY; GROSS ADVENTURE; RESPONDENTIA.

BILL OF HEALTH. **In Commercial Law.** A certificate, properly authenticated, that a certain ship or vessel therein named comes from a place where no contagious distempers prevail, and that none of the crew at the time of her departure were infected with any such distemper.

It is generally found on board ships coming from the Levant, or from the coasts of Barbary where the plague prevails; 1 Marsh. Ins. 408; and is necessary whenever a ship sails from a suspected port, or where it is required at the port of destination; Holt 167; 1 Bell, Comm. 5th ed. 553.

In Scotch Law. An application of a person in custody to be discharged on account of ill health. Where the health of a prisoner requires it, he may be indulged, under proper regulations, with such a degree of liberty as may be necessary to restore him; 2 Bell, Com. 5th ed. 549; Paterson, Comp. § 1129.

BILL IMPEACHING A DECREE FOR FRAUD. **In Equity Practice.** This must be an original bill, which may be filed without leave of court; 1 Sch. & L. 355; 2 *id.* 576; 1 Ves. Ch. 120; 3 Bro. Ch. 74; 1 T. & R. 178.

It must state the decree, the proceedings which led to it, and the ground on which it is impeached; Story, Eq. Pl. § 428.

The effect of the bill, if the prayer be granted, is to restore the parties to their former situation, whatever their rights. See Story, Eq. Pl. § 426 Mitf. Eq. Pl. 84.

BILL OF INDICTMENT. **In Practice.** A written accusation of one or more persons of a crime or misdemeanor, lawfully presented to a grand jury. If twelve or more members of the jury are satisfied that the accused ought to be tried, the return is made, A true bill; but when no sufficient ground is shown for putting the accused on trial, a return is made, Not a true bill, or, Not found; formerly, *Ignoramus*, and this phrase is still sometimes used. See TRUE BILL.

BILL OF INFORMATION. **In Equity Practice.** One which is instituted by the attorney-general or other proper officer in behalf of the state or of those whose rights are the objects of its care and protection. It is usually termed simply an information, or information in equity.

If the suit immediately concerns the right of the state, the information is generally exhibited without a relator. If it does not immediately concern those rights, it is conducted at the instance and under the immediate direction of some person whose name is inserted in the information and is termed the relator. In case a relator is

concerned, the officers of the state are not further concerned than as they are instructed and advised by those whose rights the state is called upon to protect and establish. In such case the attorney-general simply determines *in limine* whether the suit is one proper to be instituted in his name, and the subsequent proceedings are usually conducted by the solicitor of the relator at the cost of the latter. Blake, Ch. Pl. 50. See Harrison, Ch. Pr. 151; Mitf. Eq. Pl. (by Tyler) 196; INFORMATION.

BILL OF INTERPLEADER. In Equity Practice. One in which the person exhibiting it claims no right in opposition to the rights claimed by the persons against whom the bill is exhibited, but prays the decree of the court touching the rights of those persons, for the safety of the person exhibiting the bill. Cooper, Eq. Plead. 43; Mitf. Eq. Pl. 32; 24 Barb. 154; 19 Ga. 513.

An interpleader is a proceeding in equity for the relief of a party against whom there are, at law, separate and conflicting claims, whether in suit or not, for the same debt, duty, or thing, and where a recovery by one of the claimants will not, at law, protect the party against a recovery for the same debt or duty by the other claimant. It is out of this latter circumstance that the equity to relief arises; *per* Bates, Ch., 3 Del. Ch. 165, 176; 2 Paige 209; and where the facts present a proper case for an interpleader, equity will not entertain a bill simply to restrain one of the parties claiming the fund in controversy from prosecuting his claims until the other party has failed to establish his claim; 3 Del. Ch. 165; but leave will be granted to amend by making it a bill of interpleader by adding proper parties, bringing the fund into court, and filing the affidavit denying collusion; *id.*

A bill exhibited by a third person, who, not knowing to whom he ought of right to render a debt or duty or pay his rent, fears he may be hurt by some of the claimants, and therefore prays that they may interplead, so that the court may judge to whom the thing belongs, and he be thereby safe on the payment; Pract. Reg. 78; Harrison, Ch. Pr. 45; Edwards, Inj. 393; Beach, Mod. Eq. Pr. 147; 2 Paige, Ch. 199, 570; 6 Johns. Ch. 445; 3 Jones, N. C. 83; 125 Ind. 523; 29 Mo. App. 1.

A bill of the former character may, in general, be brought by one who has in his possession property to which two or more lay claim; 31 N. H. 354; 24 Barb. 154; 11 Ga. 103; 23 Conn. 544; 12 Gratt. 117; 15 Ark. 389; 18 Mo. 380; 63 Hun 634; 72 *id.* 638; 47 Mo. App. 336; 24 Q. B. Div. 275.

Such a bill must contain the plaintiff's statement of his rights, negativing any interest in the thing in controversy; 3 Story, Eq. Jur. § 821; and see 3 Sandf. Ch. 571; but showing a clear title to maintain the bill; 3 Madd. 277; 5 *id.* 47; and also the claims of the opposing parties; 4 Paige, Ch. 384; 8 *id.* 339; 7 Hare 57; 49 Mo. App. 608; that the adverse title of the claimants is derived from a common source is sufficient; 118 N. Y. 648; must have annexed to it the affidavit of the plaintiff that there is no collusion between him and either of the parties; 31 N. H. 354; must contain an offer to bring money into court if any is due, the bill being demurrable, if there is failure, unless it is offered or else actually produced; Mitf. Eq. Pl. 49; Barton, Suit in Eq. 47, n. 1; 17 Civil Proc. R. 448; must show that there are persons in being capable of interpleading and setting up opposing claims; 18 Ves. Ch. 377; it is also demurrable if upon its face it shows that one of the defendants has no claim to the debt due from the complainant; 61 Fed. Rep. 401.

These proceedings should not be brought except when there is no other way for one to protect himself, and in order to maintain the action, it is necessary to show that the plaintiff has not acted in a partisan manner as between the claimants; 83 Wis. 64.

It should pray that the defendants set forth their several titles, and interplead, settle, and adjust their demands between themselves. It also generally prays an injunction to restrain the proceedings of the claimants, or either of them, at law; and in this case the bill should offer to bring the money into court; and the court will not, in general, act upon this part of the prayer unless the money be actually brought into court; Beach, Mod. Eq. Pr. 144; 4 Paige, Ch. 384; 6 Johns. Ch. 445.

In the absence of statutes, such a bill does not ordinarily lie, except where there is privity of some sort between all the parties, and where the claim by all is of the same nature and character; 7 Sim. 391; 3 Beav. 579; Story, Eq. Jur. § 807; 24 Vt. 639; 2 Ind. 469. The granting of an order of interpleader is within the judicial discretion; 2 Misc. Rep. 441.

The decree for interpleader may be obtained after a hearing is reached, in the usual manner; 1 T. & R. 30; 4 Bro. Ch. 297; 2 Paige Ch. 570; or without a hearing, if the defendants do not deny the statements of the bill; 16 Ves. Ch. 203; Story, Eq. Pl. § 297 *a*.

A bill in the nature of a bill of interpleader will lie in many cases by a party in interest to ascertain and establish his own rights, where there are other conflicting rights between third persons; Story, Eq. Pl. § 297 *b*; 2 Paige, Ch. 199; 3 Jones, N. C. 83.

In a bill of interpleader the complainant being indifferent between the parties, the duty of his solicitor is ended as such, when the bill is filed and he has no interest in the decree except that the bill shall be adjudged to be properly filed. The solicitor may then appear for one of the parties, but only by leave of the court, which will be granted only upon consideration of the special circumstances of the facts of the case and the conclusion that the case is a proper one for granting the leave; 4 Del. Ch. 534, note; 2 *id.* 297; and see 7 Allen 72. See INTERPLEADER.

BILL OF LADING. In Common

Law. The written evidence of a contract for the carriage and delivery of goods sent by sea for a certain freight. Loughborough, J., 1 H. Bla. 359. See Leggett, Bills of Lading.

A written acknowledgment of the receipt of certain goods and an agreement for a consideration to transport and to deliver the same at a specified place to a person therein named or his order. See Porter, Bills of Lading. See also 14 Wall. 596.

It is at once a receipt and a contract; 122 U. S. 79; Schouler, Pers. Prop. 408.

A memorandum or acknowledgment in writing, signed by the captain or master of a ship or other vessel, that he has received in good order on board of his ship or vessel, therein named, at the place therein mentioned, certain goods therein specified, which he promises to deliver in like good order (the dangers of the sea excepted) at the place therein appointed for the delivery of the same, to the consignee therein named, or to his assigns, he or they paying freight for the same; 1 Term 745; Abb. Sh. 216; Code de Comm. art. 281.

A similar acknowledgment made by a carrier by land.

A through bill of lading is one where a railroad contracts to transport over its own line for a certain distance carloads of merchandise or stock, there to deliver the same to its connecting lines to be transported to the place of destination at a fixed rate per car-load for the whole distance; 16 S. W. Rep. (Tex.) 775.

It should contain the name of the shipper or consignor; the name of the consignee; the names of the vessel and her master; the places of shipment and destination; the price of the freight, and, in the margin, the marks and numbers of the things shipped. Jacobsen, Sea Laws.

Though it is not necessary that the shipper should sign the bill of lading, yet if its terms restrict the carrier's common-law liability, his assent thereto must be shown. This assent need not be express, it is sufficiently indicated by an acceptance of the bill of lading containing the restrictions; Port. B. of L. 157; 36 Conn. 63; 1 Fed. Rep. 232; 16 Mich. 79; 21 Wis. 152; 45 Iowa 476. Where the bill contains a clause limiting the liability of each connecting road to loss or injury suffered while on its line, and is accepted by the shipper, there is a limitation of the liability which binds all the parties, although the shipper could not read, and did not know of the limitation in the bill; 89 Ala. 376; 107 Mo. 475; 103 *id.* 433. See 78 Ala. 597.

It is usually made in three or more original parts, one of which is sent to the consignee with the goods, one or more others are sent to him by different conveyances, one is retained by the merchant or shipper, and one should be retained by the master. Abbott, Shipp. 217; 2 Dan. Neg. Inst. § 1735. Where one is marked "original" and the other "duplicate," the latter is in effect an original; 82 Tex. 195.

It is regarded as so much merchandise; 101 U. S. 557. At common law it is *quasi* negotiable; 44 Conn. 579; 1 T. R. 63; 1 Sm. L. C. 1048; and in many of the states is made so by statute.

It is also assignable by endorsement, whereby the assignee becomes entitled to the goods subject to the shipper's right of stoppage in transitu, in some cases, and to various liens; Port. B. of L. 438; 65 Fed. Rep. 848. See Liens; Stoppage in Transitu.

But the assignee obtains by such assignment only the title of his assignor, and the negotiability is mostly the quality of transferability by endorsement and delivery which enables the rightful assignee to sue in his own name; 101 U. S. 557; 57 Ga. 110; 115 Mass. 224; 44 Mo. App. 498. It is only negotiable so far that the owner may transfer it by endorsement or assignment so as to vest the legal title in the assignee; 86 Ky. 176.

It is considered to partake of the character of a written contract, and also of that of a receipt. In so far as it admits the character, quality, or condition of the goods at the time they were received by the carrier, it is a mere receipt, and the carrier may explain or contradict it by parol; but as respects the agreement to carry and deliver, it is a contract, and must be construed according to its terms; 6 Mass. 422; 3 N. Y. 322; 9 *id.* 529; 25 Barb. 16; 1 Abb. Adm. 209, 397. The shipowners are estopped to deny that the quantity of goods mentioned therein was received; 19 Q. B. D. 333; 1 C. & E. 207; but they are not bound by a bill of lading reciting that goods have been received for shipment, if none such have been received; 10 C. B. 665; 16 C. B. 103; 2 L. R. Exch. 267; 2 L. R. Sc. 128; 105 U. S. 7; 3 Allen 103; 22 Ohio 118; 44 Md. 11; 52 Mo. 380; *contra*, 20 Kans. 519; 10 Neb. 556; 65 N. Y. 111. See, also, The Delaware, 14 Wall. 596. Where a bill of lading is given, and accepted without objection, it is the real contract by which the mutual obligations of the parties is to be governed and not any prior agreement; 43 Fed. Rep. 681.

Under the admiralty law of the United States, contracts of affreightment, entered into with the master in good faith and within the apparent scope of his authority as master, bind the vessel to the merchandise for the performance of such contracts in respect to the property shipped on board, irrespective of the ownership of the vessel, and whether the master be the agent of the general or special owner; but bills of lading for property not shipped, and designed to be instruments of fraud, create no lien on the interest of the general owner, although the special owner was the perpetrator of the fraud; 18 How. 182. And see 19 How. 82; 2 West. L. Monthly 456. Mr. Justice Clifford held that a vessel was liable *in rem* for the loss of goods caused by the explosion of the boiler of a lighter employed by the master in conveying goods to the vessel; 23 Bost. Law R. 277.

A clean bill of lading is one which con-

tains nothing in the margin qualifying the words in the bill of lading itself; 61 Law T. 330. Under a "clean" bill of lading in the usual form (viz., one having no stipulation that the goods shipped are to be carried on deck), there is a contract implied that the goods shall be carried under the deck; and parol evidence to the contrary will not be received; 14 Wend. 26; 3 Gray 97. But evidence of a well-known and long-established usage is admissible, and will justify the carriage of goods in that manner; Ware 322.

Exceptions in a bill of lading are to be construed most strongly against the shipowner. As between the shipowner and the shipper, the bill of lading only can be considered as the contract; 157 U. S. 124.

BILL TO MARSHAL ASSETS. See ASSETS.

BILL TO MARSHAL SECURITIES. See MARSHALLING SECURITIES.

BILL IN NATURE OF A BILL IN REVIEW. In Equity Practice. One which is brought by a person not bound by a decree, praying that the same may be examined and reversed; as where a decree is made against a person who has no interest at all in the matter in dispute, or had not an interest sufficient to render the decree against him binding upon some person claiming after him.

Relief may be obtained against error in the decree by a bill in the nature of a bill of review. This bill in its frame resembles a bill of review except that, instead of praying that the former decree may be reviewed and reversed, it prays that the cause may be heard with respect to the new matter made the subject of the supplemental bill, at the same time that it is reheard upon the original bill, and that the plaintiff may have such relief as the nature of the case made by the supplemental bill may require; 1 Harrison, Ch. Pr. 145.

BILL IN NATURE OF A BILL OF REVIVOR. In Equity Practice. One which is filed when the death of a party, whose interest is not determined by his death, is attended with such a transmission of his interest that the title to it, as well as the person entitled, may be litigated in the court of chancery. In the case of a devise of real estate, the suit is not permitted to be continued by bill of revivor; 1 Chanc. Cas. 123, 174; 3 Chanc. Rep. 39; Mosel. 44.

In such cases, an original bill, upon which the title may be litigated, must be filed, and this bill will have so far the effect of a bill of revivor that if the title of the representative by the act of the deceased party is established, the same benefit may be had of the proceedings upon the former bill as if the suit had been continued by bill of revivor; 1 Vern. 427; 2 *id.* 548, 672; 2 Brown, P. C. 529; 1 Eq. Cas. Abr. 88; Mitf. Eq. Pl. 71.

BILL IN NATURE OF A SUPPLEMENTAL BILL. In Equity Practice. One which is filed when the interest of the plaintiff or defendant, suing or defending, wholly determines, and the same property becomes vested in another person not claiming under him. Hinde, Ch. Pr. 71.

The principal difference between this and a supplemental bill seems to be that a supplemental bill is applicable to such cases only where the same parties or the same interests remain before the court; whereas an original bill in the nature of a supplemental bill is properly applicable where new parties, with new interests arising from events occurring since the institution of the suit, are brought before the court; Cooper, Eq. Pl. 75; Story, Eq. Pl. § 345. For the exact distinction between a bill of review and a supplemental bill in the nature of a bill of review, see 2 Phill. Ch. 705; 1 Macn. & G. 397; 1 Hall & T. 437.

BILL FOR A NEW TRIAL. In Equity Practice. One filed in a court of equity, praying for an injunction after a judgment at law when there is any fact which renders it against conscience to execute such judgment, and of which the injured party could not avail himself in a court of law, or, if he could, was prevented by fraud or accident, unmixed with any fault or negligence of himself or his agents. Mitford, Eq. Pl. 131; 2 Story Eq. Pl. § 887. Bills of this description are not now generally countenanced; 1 Johns. Ch. 432; 6 *id.* 479.

BILL OBLIGATORY. A bond absolute for the payment of money. It is called also a single bill, and differs from a promissory note only in having a seal; 2 S. & R. 115. See Read, Pl. 236; West, Symb.

BILL OF PAINS AND PENALTIES. A special act of the legislature which inflicts a punishment less than death upon persons supposed to be guilty of high offences, such as treason and felony, without any conviction in the ordinary course of judicial proceedings. 2 Woodd. Lect. 625. It differs from a bill of attainder in this, that the punishment inflicted by the latter is death. The clause in the constitution prohibiting bills of attainder includes bills of pains and penalties; Story, Const. § 1338; Hare, Am. Con. L. 549; 4 Wall. 323; 35 Ga. 285. See 6 Cra. 138.

BILL OF PARCELS. An account containing in detail the names of the items which compose a parcel or package of goods. It is usually transmitted with the goods to the purchaser, in order that if any mistake has been made it may be corrected.

BILL OF PARTICULARS. In Practice. A detailed informal statement of a plaintiff's cause of action, or of the defendant's set-off. It is an account of the items of the claim, and shows the manner in which they arose.

The plaintiff is required, under statutory provisions, which vary widely in the different states, to file a bill of particulars, either in connection with his declaration; 2 Penning. 636; 3 Pick. 449; 1 Gray 466; 4 Rand. 488; 11 Conn. 302; 4 Miss. 46; 1 Speers 298; Dudl. 16; 2 Iowa 595; 67 Hun 649; see 125 Ind. 323; or subsequently to it, upon request of the other party; 2 Bail. 416; 4 Dana 219; 5 Ark. 197; 3 Ill. 217; 5 Blackf. 316; 3 McLean 289; 1 Cal. 437; upon an order of the court, in some cases; 3 Johns. 248; 19 *id.* 268; 1 N. J. 436; 76 Hun 434; in others, without such order.

He need not give particulars of matters which he does not seek to recover; 4 Exch.

486; nor of payments admitted; 4 Abb. Pr. 289. See 6 Dowl. & L. 656.

The plaintiff is concluded by the bill when filed; 9 Gill 146; and where he gives notice at the trial that he intends to rely only upon the count for an account stated, the notice operates as an amendment of the pleadings and an abandonment of the bill of particulars; 141 Ill. 442.

The defendant, in giving notice or pleading set-off, must give a bill of particulars; failing to do which, he will be precluded from giving any evidence in support of it at the trial; 17 Wend. 20; 7 Blackf. 462; 8 Gratt. 557.

The court may order the defendant to file a bill of particulars where he alleges matter by way of counterclaim; 64 Hun 632; where he interposes the defence of payment it will not be required; 60 Hun 582.

The bill must be as full and specific as the nature of the case admits in respect to all matters as to which the adverse party ought to have information; 16 M. & W. 773; but need not be as special as a count on a special contract. The object is to prevent surprise; 9 Pet. 541; 5 Wend. 51; 5 Ark. 197. See 3 Pick. 449; 5 Pa. 41. If the bill is not sufficiently explicit, application should be made to the court for a more specific one, as the objection cannot be made on the trial; 90 Mich. 432; 51 Minn. 512.

It is not error to refuse to strike out part of a bill of particulars; 129 Ind. 359.

According to ancient practice, a defect in a pleading in a divorce suit may in some states, and in England, be cured by filing a bill of particulars; but this will not supply the want of a more definite allegation; 12 P. D. 19; 4 Swab. & T. 63; 64 Pa. 470; 77 Pa. 31; 107 Mass. 329; 33 Ill. 206; 25 Vt. 713. This is not proper under the Code system, however; and has been abandoned in the Code states, except New York; 39 Minn. 370. See 61 N. Y. 398; 17 N. Y. Supp. 195; 12 Misc. Rep. 457.

BILL PAYABLE. In Mercantile Law. A bill of exchange accepted, or a promissory note made, by a merchant, whereby he has engaged to pay money. It is so called as being payable by him. An account is usually kept of such bills in a book with that title, and also in the ledger. See Parsons, Notes and Bills.

BILL OF PEACE. In Equity Practice. One which is filed when a person has a right which may be controverted by various persons, at different times, and by different actions.

In such a case, the court will prevent a multiplicity of suits by directing an issue to determine the right, and ultimately grant an injunction; 1 Madd. Ch. Pr. 166; Blake, Ch. Pr. 48; 2 Story, Eq. Jur. § 852; 2 Johns. Ch. 281; 8 Cra. 426; L. R. 2 Ch. 8; Bisph. Eq. 415. Such a bill cannot usually be maintained until the right of the complainant has been established at law; Bisph. Eq. § 417; and it must be filed on behalf of all who are interested in establishing the right; *id.*

Another species of bill of peace may be brought when the plaintiff, after repeated and satisfactory trials, has established his right at law, and is still in danger of new attempts to controvert it. In order to quiet the possession of the plaintiff, and to suppress future litigation, courts of equity, under such circumstances, will interfere, and grant a perpetual injunction; 2 Johns. Ch. 281; 8 Cra. 462; Mitf. Eq. 143; Eden, Inj. 356; 56 Mo. 407; 5 Ohio 522. A bill will lie to enjoin a defendant from interfering with plaintiff's tenants; 25 Md. 153. A bill to quiet title can be filed only by a party in possession, against a defendant who has been ineffectually seeking to establish a legal title by repeated actions of ejectment; and as a prerequisite to such bill it is necessary that the plaintiff's title should have been established by at least one successful trial at law; 155 U. S. 314. See a full discussion in 20 Am. L. Reg. (N. S.) 561.

BILL PENAL. In Contracts. A written obligation by which a debtor acknowledges himself indebted in a certain sum, and binds himself for the payment thereof, in a larger sum.

Bonds with conditions have superseded such bills in modern practice; Steph. Pl. 265, n. They are sometimes called bills obligatory, and are properly so called; but every bill obligatory is not a bill penal; Comyns, Dig. *Obligations*, D; Cro. Car. 515. See 2 Ventr. 106, 198.

BILL TO PERPETUATE TESTIMONY. In Equity Practice. One which is brought to secure the testimony of witnesses with reference to some matter which is not in litigation, but is liable to become so.

It differs from a bill to take testimony *de bene esse*, inasmuch as the latter is sustainable only when there is a suit already depending; it is demurrable if it contain a prayer for relief; 1 Dick. Ch. 98; 2 P. Wms. 162; 2 Ves. Ch. 497; 2 Madd. 37. And see 1 Sch. & L. 316.

It must show the subject-matter touching which the plaintiff is desirous of giving evidence; Rep. *temp.* Finch 391; 4 Madd. 8, 10; that the plaintiff has a positive interest in the subject-matter, which may be endangered if the testimony in support of it be lost, as a mere expectancy, however strong, is not sufficient; 6 Ves. Ch. 260; 1 Vern. 105; 15 Ves. Ch. 136; Mitford, Eq. Pl. 51; Cooper, Eq. Pl. 52; 3 J. J. Marsh. 260; Beach, Mod. Eq. Pr. 150; that the defendant has, or pretends to have, or that he claims, an interest to contest the title of the plaintiff in the subject-matter of the proposed testimony; Cooper, Pl. 56; Story, Eq. Pl. § 302; and some ground of necessity for perpetuating the evidence; Story, Eq. Pl. § 303; Mitf. Eq. Pl. 52, 148, n.; Cooper, Eq. Pl. 53. See 20 Ga. 777; 1 Dick. 14.

The bill should describe the right in which it is brought with reasonable certainty, so as to point the proper interrogations on both sides to the true merits of the controversy; 1 Vern. 312; Cooper, Eq. Pl. 56; and should pray leave to examine the witnesses touch-

ing the matter stated, to the end that their testimony may be preserved and perpetuated; Mitf. Eq. Pl. 52.

BILL OF PRIVILEGE. In English Law. The form of proceeding against an attorney of the court, who is not liable to arrest. Brooke, Abr. *Bille;* 12 Mod. 163.

It is considered a privilege for the benefit of clients; 4 Burr. 2113; 2 Wils. 44; Dougl. 381; and is said to be confined to such as practise; 2 Maule & S. 605. But see 1 Bos. & P. 4; 2 Lutw. 1667. See, generally, 3 Sharsw. Bla. Com. 289, n.

BILL OF PROOF. In English Practice. The claim made by a third person to the subject-matter in dispute between the parties to a suit in the court of the mayor of London. 2 Chitty, Pr. 492; 1 Marsh. 233.

BILL TO QUIET POSSESSION AND TITLE. In Equity Practice. Also called a bill to remove a cloud in title, and though sometimes classed with bills *quia timet* or for the cancellation of void instruments, they may be resorted to in other cases when the complainant's title is clear and there is a cloud to be removed; 131 U. S. 352; 62 Vt. 411; 81 Ill. 424; the latter may be said to exist whenever in ejectment by the holder of the adverse title any evidence would be required to defeat a recovery; 25 Fla. 53.

Whenever a deed or other instrument exists which may be vexatiously or injuriously used against a party, after the evidence to impeach or invalidate it is lost, or which may throw a cloud or suspicion over his title or interest, and he cannot immediately protect or maintain his right by any course of proceedings at law, a court of equity will afford relief by directing the instrument to be delivered up and cancelled, or by making any other decree which justice and the rights of the parties may require; 5 Allen 602; 113 Pa. 510; 2 Story, Eq. § 694.

Equity will entertain a bill to adjust the claims, or to settle the priorities of conflicting claimants, where there is thereby created a cloud over the title, which would prevent the sale of the land at a fair market price; Big. Eq. 236; to restrain the collection of an illegal tax; *ibid.;* to set aside deeds, etc., which may operate as a cloud upon the legal title of the owner; whether they be void or voidable, and whether the character of the instrument appears on its face or not; 33 Miss. 292; 6 Pet. 95; but it has been recently held that equity will not interfere to remove an alleged cloud upon title to land, if the instrument or proceeding constituting such alleged cloud is absolutely void upon its face, so that no extrinsic evidence is necessary to show its invalidity; nor if the instrument or proceeding is not thus void on its face, but the party claiming, in order to enforce it, must necessarily offer evidence which will inevitably show its invalidity; 158 U. S. 375.

In a suit brought in the circuit court of the United States, to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, an order may be made upon a defendant not residing in the district or found therein, and not appearing *gratis*, to appear and answer, plead or demur by a certain day; 18 Stat. L. 472, c. 137, § 8; 131 U. S. 352; but such suit will affect only the property concerned; *id.* See BILL OF PEACE; BILLS QUIA TIMET.

BILL QUIA TIMET. In Equity Practice. A bill to guard against possible future injuries and to conserve present rights from possible destruction or serious impairment. The limits of the application of the remedy are not clearly defined, but it rests on the principle of relieving the party and his title from some claim or liability which may, if enforced, entail serious loss. Such a bill may be filed when a person is entitled to property of a personal nature after another's death, and has reason to apprehend it may be destroyed by the present possessor; or when he is apprehensive of being subjected to a future inconvenience, probable, or even possible, to happen or be occasioned by the neglect, inadvertence, or culpability of another; or when he seeks to be relieved against an invalid title, claim, or incumbrance which has been created by the act of another. See 3 Daniell, Ch. Pr. 1961, n. Another illustration of the application of the remedy is in case of a counterbond; although the surety is not troubled for the money, after it becomes payable, a decree for its payment may be had against the principal, or when a trustee has incurred liability as the holder of shares for another under a covenant of indemnity, against liability; L. R. 7 Ch. 395.

Upon a proper case being made out, the court will, in one case, secure the property for the use of the party (which is the object of the bill), by compelling the person in possession of it to give a proper security against any subsequent disposition or wilful destruction; and, in the other case, they will quiet the party's apprehension of future inconvenience, by removing the causes which may lead to it; 1 Madd. Ch. Pr. 218; 2 Story, Eq. Jur. §§ 825, 851. See 9 Gratt. 398; 11 Ga. 570; 8 Tex. 337; 2 Md. Ch. Dec. 157, 442; 4 Edw. Ch. 228; Bisph. Eq. 568; BILL TO QUIET POSSESSION and TITLE; BILL QUIA TIMET; BILL OF PEACE.

BILL RECEIVABLE. In Mercantile Law. A promissory note, bill of exchange, or other written security for money payable at a future day, which a merchant holds. So called because the amounts for which they are given are receivable by the merchant. They are entered in a book so called, and are charged to an account in the ledger under the same title, to which account the cash, when received, is credited. See Pars. N. & B.

BILL OF REVIEW. In Equity Practice. One which is brought to have a decree of the court reviewed, altered, or reversed.

It is only brought after enrolment; 1 Ch. Cas. 54; 3 P. Will. 371; 5 Rich. Eq, 421; 1 Story, Eq. Pl. § 403; and is thus distinguished from a bill in the nature of a bill in review, or a supplemental bill in the nature of a bill in review; 5 Mas. 303; 2 Sandf. Ch. 70; Gilbert, For. Rom. c. 10, p. 182.

It must be brought either for error in point of law; 2 Johns. Ch. 488; Cooper, Eq. Pl. 89; or for some new matter of fact, relevant to the case, discovered since publication passed in the cause, and which could not, with reasonable diligence, have been discovered before; 7 Fed. Rep. 533; 22 Wall. 60; 95 U. S. 99; 2 Johns. Ch. 488; see 3 Johns. 124; 1 Hempst. 118; 27 Vt. 638; 25 Miss. 207; or to correct an error apparent on the face of a decree in the original suit; where there are no disputed questions of fact; 97 Ala. 451; and it is in apt time if filed within two months after entry of the decree; 145 Ill. 433. It cannot be filed without leave of court; 6 Rich. Eq. 364; which is not granted as of course; 1 Jones, Eq. 10. It will not lie where the original decree has been affirmed on appeal; 53 Fed. Rep. 854; or where the new evidence merely confirms facts already proved or tends to impeach witnesses already examined; 89 Va. 885. Nor will it lie for assignees of plaintiff in the original suit; 89 Va. 524.

Where one proceeds to a decree after discovering facts on which a new claim is founded, he cannot afterwards file a supplemental bill in the nature of a bill of review on such new facts; 42 Ill. App. 664.

BILL OF REVIVOR. In Equity Practice. One which is brought to continue a suit which has abated before its final consummation, as, for example, by death, or marriage of a female plaintiff.

It must be brought by the proper representatives of the person deceased, with reference to the property which is the subject-matter; 4 Sim. 318; 2 Paige, Ch. 358; Story, Eq. Pl. § 354.

BILL OF REVIVOR AND SUPPLEMENT. In Equity Practice. One which is a compound of a supplemental bill and bill of revivor, and not only continues the suit, which has abated by the death of the plaintiff, or the like, but supplies any defects in the original bill arising from subsequent events, so as to entitle the party to relief on the whole merits of his case. 5 Johns. Ch. 334; Mitf. Eq. Pl. 32, 74; Beach, Mod. Eq. Pr. 515; 13 Ves. 161; 36 N. H. 141; 3 Paige 204.

BILL OF RIGHTS. A formal and public declaration of popular rights and liberties. The English Bill of Rights is a statute passed in 1689, affirming and asserting certain rights of the British people. See Hallam, Hist. See 1 Bla. Com. 128. In the United States, such bills have been incorporated with the constutions of many of the states; *id.*, Chase's note 3; 2 Kent, Lect. xxiv.

BILL OF SALE. In Contracts. A written agreement under seal, by which one person transfers his right to or interest in goods and personal chattels to another.

It is in frequent use in the transfer of personal property, especially that of which immediate possesson is not or cannot be given.

In England a bill of sale of a ship at sea or out of the country is called a *grand bill of sale*; but no distinction is recognized in this country between grand and ordinary bills of sale; 4 Mass. 661. The effect of a bill of sale is to transfer the property in the thing sold.

By the maritime law, the transfer of a ship must generally be evidenced by a bill of sale; 1 Mas. 306; and by act of congress, every sale or transfer of a registered ship to a citizen of the United States must be accompanied by a bill of sale, setting forth, at length, the certificate of registry; Rev. Stat. U. S. § 4170. Where the bill is insufficient under the statute, the executor of the seller can be compelled to reform it; 17 R. I. 454. And this bill of sale is not valid except between the parties or those having actual notice, unless recorded; Rev. Stat. § 4192.

A contract to sell, accompanied by delivery of possession, is, however, sufficient; 16 Mass. 336; 8 Pick. 86; 16 *id.* 401; 7 Johns. 308. See 4 Johns. 54; 4 Mas. 515; 1 Wash. C. C. 226; 16 Pet. 215; 47 Mo. App. 262.

Bills of sale are regulated in England by the BILLS OF SALE ACT, 41 & 42 Vict. c. 31, and its amendments, 45 & 46 Vict. c. 43; 53 & 54 Vict. c. 53; 54 & 55 Vict. c. 35. See 1 Chitty, Eng. Stat.

BILL OF SIGHT. A written description of goods, supposed to be inaccurate, but made as nearly exact as possible, furnished by an importer or his agent to the proper officer of the customs, to procure a landing and inspection of the goods. It was allowed by an English statute where the merchant is ignorant of the real quantity and quality of goods consigned to him, so as to be unable to make a proper entry of them.

BILL, SINGLE. In Contracts. A written unconditional promise by one or more persons to pay to another person or other persons, therein named, a sum of money at a time therein specified. It is usually under seal, and may then be called a bill obligatory; 2 S. & R. 115. It has no condition attached, and is not given in a penal sum; Comyns, Dig. *Obligation*, C. See 3 Hawks. 10, 465.

BILL OF SUFFERANCE. In English Law. A license granted to a merchant, permitting him to trade from one English port to another without paying customs.

BILL TO SUSPEND A DECREE. In Equity Practice. One brought to avoid or suspend a decree under special circumstances. See 1 Ch. Cas. 3, 61; 2 *id.* 8; Mitf. Eq. Pl. 85, 86.

BILL TO TAKE TESTIMONY DE BENE ESSE. In Equity Practice. One which is brought to take the testimony of witnesses to a fact material to the prosecution of a suit at law which is actually commenced, where there is good cause to

fear that the testimony may otherwise be lost before the time of trial. See 1 S. & S. 83; 2 Story, Eq. Jur. § 1813, n.; 13 Ves. 56.

It lies, in general, where witnesses are aged or infirm; Cooper, Eq. Pl. 57; Ambl. 65; 13 Ves. Ch. 56, 261; propose to leave the country; 2 Dick. 454; Story, Eq. Pl. § 308; or there is but a single witness to a fact; 1 P. Wms. 97; 2 Dick. 648.

The one at whose instance the deposition is taken has no control over it, and if he directs the commissioner to withhold it because he is surprised by the testimony, the court will order its return; 44 Fed. Rep. 246.

BILLA VERA (Lat.). A true bill.

In Practice. The form of words indorsed on a bill of indictment, when proceedings were conducted in Latin, to indicate the opinion of the grand jury that the person therein accused ought to be tried. See TRUE BILL.

BILLA CASSETUR (Lat. that the bill be quashed or made void). A plea in abatement concluded, when the pleadings were in Latin, *quod billa cassetur* (that the bill be quashed). 3 Bla. Com. 303; Grah. Pr. 611.

BILLA EXCAMBII. A bill of exchange.

BILLA EXONERATIONIS. A bill of lading.

BILLET DE CHANGE. In French Law. A contract to furnish a bill of exchange. A contract to pay the value of a bill of exchange already furnished. Guyot, *Répert. Univ.*

Where a person intends to furnish a bill of exchange (*lettre de change*), and is not quite prepared to do so, he gives a *billet de change*, which is a contract to furnish a *lettre de change* at a future time. Guyot, *Répert. Univ.*; Story, Bills § 2.

BINDING OUT. A term applied to the contract of apprenticeship.

The contract must be by deed, to which the infant, as well as the parent or guardian, must be a party, or the infant will not be bound; 8 East 25; 3 B. & Ald. 584; 8 Johns. 328; 2 Yerg. 546; 4 Leigh 493; 4 Blackf. 437; 12 N. H. 438. See also 18 Conn. 337; 13 Barb. 286; 10 S. & R. 416; 1 Mass. 172; 1 Vt. 69; 1 Ashm. 267; 1 Mas. 78.

BINDING OVER. The act by which a magistrate or court hold to bail a party accused of a crime or misdemeanor.

The binding over may be to appear at a court having jurisdiction of the offence charged, to answer, or to be of good behavior, or to keep the peace.

BIPARTITE. Of two parts. This term is used in conveyancing; as, this indenture bipartite, between A, of the one part, and B, of the other part.

BIRRETUM, BIRRETUS. A cap or coif used formerly in England by judges and sergeants at law. Spelman, Gloss.; Cunningham, Law Dict.

BIRTH. The act of being wholly brought into the world.

The conditions of live birth are not satisfied when a part only of the body is born. The whole body must be brought into the world and detached from that of the mother, and after this event the child must be alive; 5 C. & P. 329; 7 *id.* 814. The circulating system must also be changed, and the child must have an independent circulation; 5 C. & P. 539; 9 *id.* 154; Tayl. Med. Jur. 591.

But it is not necessary that there should have been a separation of the umbilical cord. That may still connect the child with its mother, and yet the killing of it will constitute murder; 7 C. & P. 814; 9 *id.* 25. See 1 Beck, Med. Jur. 478; 1 Chit. Med. Jur. 438; GESTATION; LIFE.

BISAILE. See BESAILE.

BISHOP. In England, an ecclesiastical officer, who is the chief of the clergy of his diocese, and is the next in rank to an archbishop. A bishop is a corporation sole. 1 Bla. Com. 469. In the United States it is the title of a high ecclesiastical officer in the Roman Catholic, Protestant Episcopal and Methodist Episcopal and some other churches. In the first two he is the head of a diocese.

BISHOP'S COURT. In English Law. An ecclesiastical court held in the cathedral of each diocese, the judge of which is the bishop's chancellor.

BISHOPRIC. In Ecclesiastical Law. The extent of country over which a bishop has jurisdiction; a see; a diocese.

BISSEXTILE. The day which is added every fourth year to the month of February, in order to make the year agree with the course of the sun.

By statute 21 Hen. III., the 28th and 29th of February count together as one day. This statute is in force in some of the U. S.; 43 Ind. 35; 4 Pa. 515. See 10 Cent. L. J. 158.

It is called *bissextile*, because in the Roman calendar it was fixed on the *sixth* day before the calends of March (which answers to the twenty-fourth day of February), and this day was counted *twice:* the first was called *bissextus prior*, and the other *bissextus posterior;* but the latter was properly called bissextile or intercalary day.

BITCH. This word, when applied to a woman, does not, in its common acceptation, import whoredom in any of its forms, and therefore is not slanderous; 50 Ind. 336; 20 Wis. 252.

BLACK ACRE. A term used by the old writers to distinguish one parcel of land from another, to avoid ambiguity, as well as the inconvenience of a full description.

It is a mere name of convenience, adopted, as "A" and "B" are, to distinguish persons, for things under like circumstances.

BLACK ACT. In English Law. The act of parliament; 9 Geo. II. c. 22.

This act was passed for the punishment of certain marauders who committed great

outrages disguised and with faces blackened. It was repealed by 7 & 8 Geo. IV. c. 11. See 4 Sharsw. Bla. Com. 245. It is held not to be a part of the common law in Georgie; T. U. P. Charlt. 167.

BLACK BOOK OF THE ADMIRALTY. An ancient book compiled in the reign of Edward III. It has always been deemed of the highest authority in matters concerning the admiralty. It contains the laws of Oleron, at large; a view of the crimes and offences cognizable in the admiralty; ordinances and commentaries on matters of prize and maritime torts, injuries, and contracts; 2 Gall. 404. It is said by Selden to be not more ancient than the reign of Henry VI. Selden, *de Laud. Leg. Ang.* c. 32. By other writers it is said to have been composed earlier. It has been republished (1871) by the British government, with an introduction by Sir Travers Twiss.

BLACK BOOK OF THE EXCHEQUER. The name of a book kept in the English exchequer, containing a collection of treaties, conventions, charters, etc.

BLACK MAIL. Rents reserved, payable in work, grain, and the like.

Such rents were called black mail (*reditus nigri*) in distinction from white rents (*blanche firmes*), which were rents paid in silver.

A yearly payment made for security and protection to those bands of marauders who infested the borders of England and Scotland about the middle of the sixteenth century and laid the inhabitants under contribution. Hume, Hist. Eng. vol. i. 473; vol. ii. App. No. 8; Cowel.

In common parlance, the term is equivalent to, and synonymous with, extortion—the exaction of money, either for the performance of a duty, the prevention of an injury, or the exercise of an influence. It supposes the service to be unlawful, and the payment involuntary. Not unfrequently it is extorted by threats, or by operating upon the fears or the credulity, or by promises to conceal, or offers to expose the weaknesses, the follies, or the crimes of the victim. 17 Abb. Pr. 226.

Threats by defendant to accuse another of a crime, with intent, himself, to commit the crime of extortion, accompanied by success in obtaining money from that other.

That such other person was endeavoring to induce defendant to receive money, for the purpose of accusing him of extortion, and so could not have been moved by fear, will not prevent his conviction for an attempt at extortion; 144 N. Y. 119; under an act declaring it a crime to threaten a person with a criminal prosecution, for the purpose of extorting money, it is immaterial that the person making the threats believed that the person threatened had committed the crime; 75 Hun 26; where threats of prosecution for perjury were made maliciously and with intent to compel the one threatened to do an act against his will, the offence is complete; and it is immaterial whether the one threatened was guilty of perjury; 61 N. W. R. (Mich.) 13. In a prosecution under an act providing for the punishment of one who, for the purposes of extortion, sends a letter expressing or implying, or adapted to imply, any threat, and the letter threatens to make a charge against the person to whom it is sent, the truth or falsity of the charge is immaterial; 95 Cal. 640; the act making it an offence to accuse one of crime "with intent to extort or gain any chattel, money, or valuable security, or any pecuniary advantage whatsoever," does not cover the case of an owner who demands a reasonable compensation for property criminally destroyed, and accompanies his demand with a threat to accuse the defendant of the crime, and, where the owner of property so destroyed is indicted for extortion, it is error to charge that it is immaterial whether the accusation made by him was true or false; 47 Ohio St. 556. A charge of soliciting sexual intercourse with the wife of another is a charge of immoral conduct, which, if true, would tend to disgrace one and subject him to the contempt of society, and threatening to make such charge is black mail; 24 N. E. R. (Ind.) 342.

A conviction on indictment under Iowa Code § 3871, relating to the offence of making malicious threats with intent to extort money, cannot be sustained by evidence that defendant, a constable, had a search warrant for the premises of the complaining witnesses; that he notified them of the fact, and signified his willingness, for a bribe, to refrain from making search, that the witnesses accordingly gave him money, and that he assured them the matter would be dropped; 76 Ia. 189.

On a trial for maliciously threatening to accuse another of burning a building, with intent to extort money, evidence of the truth of the charge is inadmissible on the question of malice or of intent, or to impeach the prosecuting witness; 18 N. E. R. (Mass.) 577.

BLACK RENTS. Rents reserved in work, grain, or baser money than silver. Whishaw.

BLADA. Growing crops of grain. Spelman, Gloss. Any annual crop. Cowel. Used of crops, either growing or gathered. Reg. Orig. 94 *b*; Coke, 2d Inst. 81.

BLANC SEIGN. It is a paper signed at the bottom by him who intends to bind himself, give acquittance, or compromise at the discretion of the person whom he entrusts with such *blanc seign*, giving him power to fill it with what he may think proper, according to agreement. This power is personal and dies with the attorney. 6 Mart. (La.) 718.

BLANCH HOLDING. In Scotch Law. A tenure by which land is held.

The duty is generally a trifling one, as a peppercorn. It may happen, however, that the duty is of greater value; and then the distinction received in practice is founded on the nature of the duty. Stair.

Inst. sec. iii. lib. 3, § 33. See Paterson, Comp. 15; 2 Bla. Com. 42.

BLANCHE FIRME. A rent reserved, payable in silver.

BLANK. A space left in a writing, to be filled up with one or more words to complete the sense.

When a blank is left in a written agreement which need not have been reduced to writing, and would have been equally binding whether written or unwritten, it is presumed, in an action for the non-performance of the contract, parol evidence might be admitted to explain the blank. And where a written instrument which was made professedly to record a fact is produced as evidence of that fact which it purports to record, and a blank appears in a material part, the omission may be supplied by other proof; 1 Phil. Ev. 475; 1 Wils. 215; 7 Vt. 522; 6 *id.* 411. Hence a blank left in an award for a name was allowed to be supplied by parol proof; 2 Dall. 180. But where a creditor signs a deed of composition, leaving the amount of his debt in blank, he binds himself to all existing debts; 1 B. & Ald.

It is said that a blank may be filled by consent of the parties and the instrument remain valid; Cro. Eliz. 626; 1 Ventr. 185; 11 M. & W. 468; 1 Me. 34; 5 Mass. 538; 19 Johns. 396; 21 Oreg. 211; though not, it is said, where the blank is in a part material to the operation of the instrument as an instrument of the character which it purports to be; 6 M. & W. 200; 2 Dev. 379; 1 Yerg. 69; 2 N. & M'C. 125; 1 Ohio 365; 6 Gill & J. 250; 2 Brock. 64; 1 Greenl. Ev. 567; at least, without a new execution; 2 Pars. Cont. 8th ed. *724. But see 17 S. & R. 438; 22 Pa. 12; 7 Cow. 484; 22 Wend. 348; 2 Ala. 517; 2 Dana 142; 4 M'Cord 239; 2 Wash. Va. 164; 9 Cra. 28; 4 Bingh. 123. If a blank is left in a policy of insurance for the name of the place of destination of a ship, it will avoid the policy; Molloy, b. 2, c. 7, s. 14; Park. Ins. 22; Wesk. Ins. 42. See cases in note to 10 Am. Rep. 268.

Leaving blanks in a note and chattel mortgage as to the amount and the delivery of the instruments in that condition, create an agency in the receiver to fill them in the manner contemplated by the maker; 50 Mo. App. 190. As between the parties to a deed it is not void because it did not contain the grantee's name when acknowledged, if it was afterwards written in by the grantor; 50 N. J. Eq. 177.

A transfer of shares by deed executed in blank, as to the name of the purchaser, or the number of the shares, is void in England, though sanctioned by the usage of the stock exchange; 4 D. & J. 559; 2 H. & C. 175. But the rule is otherwise in New York, Pennsylvania, Massachusetts, and Connecticut; 20 Wend. 91; 22 *id.* 348; 50 Pa. 67 (but see 38 Pa. 98); 103 Mass. 306; 30 Conn. 274. See the subject discussed in Lewis on Stocks 50. As to blanks in notes, see 33 Am. Rep. 130.

BLANK BAR. See COMMON BAR.

BLANK INDORSEMENT. An indorsement which does not mention the name of the person in whose favor it is made.

Such an indorsement is generally effected by writing the indorser's name merely on the back of the bill; Chit. Bills 170. A note so indorsed is transferable by delivery merely, so long as the indorsement continues blank; and its negotiability cannot be restricted by subsequent special indorsements; 1 Esp. 180; Peake 225; 15 Pa. 268. See 3 Campb. 339; 1 Pars. Contr. 8th ed. *241; INDORSEMENT.

BLANKET POLICY. In Insurance. A policy which contemplates that the risk is shifting, fluctuating, or varying, and is applied to a class of property, rather than to any particular article or thing: Black, Dict; 1 Wood, Ins. § 40. See 93 U. S. 541.

BLASPHEMY. In Criminal Law. To attribute to God that which is contrary to his nature, and does not belong to him, and to deny what does. A false reflection uttered with a malicious design of reviling God. Emlyn's Pref. to vol. 8, St. Tr.; 20 Pick. 244.

An impious or profane speaking of God or of sacred things; reproachful, contemptuous, or irreverent words uttered impiously against God or religion. Blasphemy cognizable by common law is defined by Blackstone to be "denying the being or providence of God, contumelious reproaches of our Saviour Christ, profane scoffing at the Holy Scripture, or exposing it to contempt or ridicule;" by Kent as "maliciously reviling God or religion."

In general blasphemy may be described as consisting in speaking evil of the Deity with an impious purpose to derogate from the divine majesty, and to alienate the minds of others from the love and reverence of God. It is purposely using words concerning God calculated and designed to impair and destroy the reverence, respect, and confidence due to him as the intelligent creator, governor, and judge of the world. It embraces the idea of detraction, when used towards the Supreme Being; as "calumny" usually carries the same idea when applied to an individual. It is a wilful and malicious attempt to lessen men's reverence of God by denying his existence, or his attributes as an intelligent creator, governor, and judge of men, and to prevent their having confidence in him as such; 20 Pick. 211, 212, per Shaw, C. J.

The offence of publishing a blasphemous libel, and the crime of blasphemy, are in many respects technically distinct, and may be differently charged; yet the same act may, and often does, constitute both. The latter consists in blaspheming the holy name of God, by denying, cursing, or contumeliously reproaching God, his creation, government, or final judging of the world; and this may be done by language orally uttered, which would not be a libel. But it is not the less blasphemy if the same thing be done by language written, printed, and published; although when done in this form it also constitutes the offence of libel; 20 Pick. 213, per Shaw, C. J.; Heard, Lib. & Sl. § 336.

In most of the United States, statutes have been enacted against this offence;

but these statutes are not understood in all cases to have abrogated the common law; the rule being that where the statute does not vary the class and character of an offence, but only authorizes a particular mode of proceeding and of punishment, the sanction is cumulative and the common law is not taken away. And it has been decided that neither these statutes nor the common-law doctrine is repugnant to the constitutions of those states in which the question has arisen; Heard, Lib. & Sl. § 343; 20 Pick. 206; 11 S. & R. 394; 8 Johns. 290; 4 Sandf. 156; 2 Harr. Del. 553; 2 How. 127.

In England, all blasphemies against God, the Christian religion, the Holy Scriptures, and malicious revilings of the established church, are punishable by indictment; 1 East, Pl. Cr. 3; 1 Bish. Cr. L. 498; 5 Jur. 529. See 7 Cox, Cr. Cas. 79; 1 B. & C. 26; 2 Lew. 237.

In France, before the 25th of September, 1791, it was a blasphemy, also, to speak against the holy virgin and the saints, to deny one's faith, to speak with impiety of holy things, and to swear by things sacred; Merlin, *Répert.* The law relating to blasphemy in that country was repealed by the code of 25th of September, 1791; and its present penal code, art. 262, enacts that any person who, by words or gestures shall commit any outrage upon objects of public worship, in the places designed or actually employed for the performance of its rites, or shall assault or insult the ministers of such worship in the exercise of their functions, shall be fined from sixteen to five hundred francs, and be imprisoned for a period not less than fifteen days nor more than six months.

The civil law forbade the crime of blasphemy; such, for example, as to swear by the hair of the head of God; and it punished its violation with death. *Si enim contra homines factæ blasphemiæ impunitæ non relinquuntur, multo magis qui ipsum Deum blasphemant digni sunt supplicia sustinere.* (For if slander against men is not left unpunished, much more do those deserve punishment who blaspheme God.) Nov. 77. 1. § 1.

In Spain it is blasphemy not only to speak against God and his government, but to utter injuries against the Virgin Mary and the saints. *Senen Vilanova y Mañes, Materia Criminal, forense*, Observ. 11, cap. 3, n. 1. See CHRISTIANITY.

BLASTING. A mode of rending rock and other solid substances by means of explosives.

One blasting in a harbor under contract with the United States is not liable for injuries to a house by the pulsations of the air and the vibration of the earth, unless he is negligent; 134 N. Y. 156. Where a railroad in blasting on its own land exercises due care and uses charges of no greater force than necessary, it is not liable for injuries to adjoining property, resulting merely from the incidental jarring; 140 N. Y. 267.

BLIND. The condition of one who is deprived of the faculty of seeing.

Persons who are blind may enter into contracts and make wills like others; Carth. 53; Barnes 19, 23; 3 Leigh 32. When an attesting witness becomes blind, his handwriting may be proved as if he were dead; 1 Starkie, Ev. 341. But before proving his handwriting the witness must be produced, if within the jurisdiction of the court, and examined; 1 Ld. Raym. 734; 1 Mood. & R. 258; 2 *id.* 262.

It is not negligence for a blind man to travel along a highway; 52 N. H. 244. See as to negligence by persons of defective senses, 8 Am. L. Reg. N. S. 513.

BLOCKADE. In International Law. The actual investment of a port or place by a hostile force fully competent, under ordinary circumstances, to cut off all communication therewith, so arranged or disposed as to be able to apply its force to every point of practicable access or approach to the port or place so invested. See Deane, Blockades; Polson, Blockades; Westlake, Blockades.

Nature and character. Blockades may be either military or commercial, or may partake of the nature of both. As military blockades they may partake of the nature of a land or land and sea investment of a besieged city or seaport, or they may consist of a masking of the enemy's fleet by another belligerent fleet in a port or anchorage where commerce does not exist. As commercial blockades, they may consist of operations against an enemy's trade or revenue, either localized at a single important seaport, or as a more comprehensive strategic operation, by which the entire sea frontier of an enemy is placed under blockade; Snow, Lect. Int. Law 148. A blockade, being an operation of war, any government, independent or *de facto*, whose rights as a belligerent are recognized, can institute a blockade as an exercise of those rights.

National sovereignty confers the right of declaring war; and the right which nations at war have of destroying or capturing each other's citizens, subjects, or goods, imposes on neutral nations the obligation not to interfere with the exercise of this right within the rules prescribed by the law of nations. A declaration of a siege or blockade is an act of sovereignty; 1 C. Rob. Adm. 146; but a direct declaration by the sovereign authority of the besieging belligerent is not always requisite; particularly when the blockade is on a distant station; for its officers may have power, either expressly or by implication, to institute such siege or blockade; 6 C. Rob. Adm. 367.

In case of civil war, the government may blockade its own ports; Wheat. Int. Law 365; 3 Binn. 252; 3 Wheat. 365; 7 *id.* 306; 4 Cr. 272; 2 Black 635; 3 Scott 225; 24 Bost. L. Rep. 276, 335.

The act of congress of July 13, 1861, prohibiting all commercial intercourse between the loyal and the revolted states,

was a mere municipal regulation, though familiarly called a blockade; 3 Ware 276.

Efficacy. In international jurisprudence it is a well-settled principle that the blockading force must be present and of sufficient force to be effective, and a mere notification of one belligerent that the port of the other is blockaded, sometimes termed a paper blockade, is not sufficient to establish a legal blockade. A blockade may be made effective by batteries on shore as well as by ships afloat, and, in case of inland ports, may be maintained by batteries commanding the river or inlet by which it may be approached, supported by a naval force sufficient to warn off innocent and capture offending vessels attempting to enter; 2 Wall. 135. In 1856 the declaration of Paris prescribed blockades to be obligatory must be effective, that is to say, maintained by a sufficient force to shut out the access of the enemy's ships and other vessels in reality. The United States, although not a party to this declaration, has upheld the same doctrine since 1781, when, by ordinance of Congress, it was declared that there should be a number of vessels stationed near enough to the port to make the entry apparently dangerous; Journals of Congress, vol. vii. p. 186. By the convention of the Baltic Powers in 1780, and again in 1801, the same doctrine was promulgated, and in 1871, by treaty between Italy and the United States, a clearer and more satisfactory definition of an effective blockade was agreed upon, as follows: "It is expressly declared that such places only shall be considered blockaded as shall be actually invested by naval forces capable of preventing the entrance of neutrals, and so stationed as to create an evident danger on their part to attempt it."

The government of the United States has uniformly insisted that the blockade should be made effective by the presence of a competent force stationed and present at or near the entrance of the port; 1 Kent *145, and the authorities by him cited. And see 1 C. Rob. Adm. 80; 4 *id.* 66; 1 Act. Prize Cas. 64; and Lord Erskine's speech, 8th March, 1808, on the orders in council, 10 Cobbett, Parl. Deb. 949, 950. But "it is not an accidental absence of the blockading force, nor the circumstance of being blown off by wind (if the suspension and the reason of the suspension are known), that will be sufficient in law to remove a blockade;" 1 C. Rob. Adm. 86, 154. But negligence or remissness on the part of the cruisers stationed to maintain the blockade may excuse persons, under certain circumstances, for violating the blockade; 3 C. Rob. Adm. 156; 1 Act. Prize Cas. 59.

Neutrals. To involve a neutral in the consequences of violating the blockade, it is indispensable that he should have due notice of it. This information may be communicated to him in two ways: either actually, by a formal notice from the blockading power, or constructively, by notice to his government, or by the notoriety of the fact; 2 Black 635; 6 C. Rob. Adm. 367; 2 *id.* 110, 128; 1 Act. Prize Cas. 61. Formal notice is not required; any authentic information is sufficient; 1 C. Rob. Adm. 334; 5 *id.* 77, 286; Edw. Adm. 203; 3 Phill. Int. Law 397; 24 Bost. L. Rep. 276; Hall, Int. L. 648; it is a settled rule that a vessel in a blockaded port is presumed to have notice of a blockade as soon as it begins; 2 Black 630.

Generally the mouth of a river, roadstead, or portion of the coast may be blockaded, but if the river is the natural highway by which to reach neutral territory it cannot be thus interfered with. So during the American Civil War the Rio Grande could not be blockaded; Snow, Lect. Int. Law 152.

Breach. A violation may be either by going into the place blockaded, or by coming out of it with a cargo laden after the commencement of the blockade. Also placing himself so near a blockaded port as to be in a condition to slip in without observation, is a violation of the blockade, and raises the presumption of a criminal intent; 6 C. Rob. Adm. 30, 101, 182; 7 Johns. 47; 1 Edw. Adm. 202; 4 Cra. 185; 3 Wall. 83. The sailing for a blockaded port, knowing it to be blockaded, is held by the English prize courts to be such an act as may charge the party with a breach of the blockade; British instructions to their fleet in the West India station, Jan. 5, 1804; and the same doctrine is recognized in the United States; 5 Cra. 335; 9 *id.* 440; 1 Kent *150; 3 Wall. 514; 3 Phill. Int. Law 397; Hall, Int. L. 662; 24 Bost. L. Rep. 276. See 4 Cra. 185; 6 *id.* 29; 2 Johns. Cas. 180, 469; 10 Moore, P. C. 58.

But in the course of long voyages, sailing for a blockaded port, contingently, might be permitted, if inquiry were afterwards made at convenient ports; 6 Cra. 29; 5 Rob. 76; 2 Wash. C. C. 243; but the ordinance of 1781 authorized the condemnation of vesels "destined" to any blockaded port, without any qualification based upon proximity or notice. A neutral vessel in distress may enter a blockaded port; 7 Wall. 354.

Penalty. When the ship has contracted guilt by a breach of the blockade she may be taken at any time before the end of her voyage; but the penalty travels no further than the end of her return voyage; 2 C. Rob. Adm. 128; 3 *id.* 147; 6 Wall. 582. When taken, the ship is confiscated; and the cargo is always, *prima facie*, implicated in the guilt of the owner or master of the ship; and the burden of rebutting the presumption that the vessel was going in for the benefit of the cargo, and with the direction of the owners rests with them; 1 C. Rob. Adm. 67, 130; 3 *id.* 173; 4 *id.* 93; 1 Edw. Adm. 39. See, generally, 2 Bro. Civ. & Adm. Law 314; Chit. Com. L. tit. Blockade; Chitty, L. of N. 128, 147; 1 Kent 143; Marshall, Ins. See also the declaration respecting Maritime Law, signed by the plenipotentiaries of Great Britain, Austria, France, Prussia, Russia, Sardinia, and Turkey, at Paris, April 16, 1856; Appendix to Phill. Int. Law, 3d Eng. ed. 850; Wheat.

Int. Law; Vattel, Law of Nations; Snow, Lect. Int. Law 148; PACIFIC BLOCKADE.

BLOOD. Relationship; stock; family. 1 Roper, Leg. 103; 1 Belt, Suppl. Ves. 365. Kindred. Bacon, Max. Reg. 18.

Brothers and sisters are said to be of the whole blood if they have the same father and mother, and of the half-blood if they have only one parent in common. 5 Whart. 477. See 76 Ill. 166; 15 Ves. 107.

BLOODWIT. An amercement for bloodshed. Cowel. The privilege of taking such amercements. Skene.

A privilege or exemption from paying a fine or amercement assessed for bloodshed. Cowel; Kennett, Paroch. Ant.; *Termes de la Ley.*

BLUE LAWS. A name often applied to severe laws for the regulation of religious and personal conduct in the colonies of Connecticut and New Haven; hence any rigid Sunday laws or religious regulations. The best account of the Blue Laws is by Trumbull, "The True Blue Laws of Connecticut and New Haven, and the False Blue Laws invented by the Rev. Sam'l Peters, etc." The latter reference is to a collection without credit. See also Hinman; Schmucker, Blue Laws; Barker, Hist. & Antiq. of New Haven; Peters, Hist. Conn.; Fiske, Beginnings of New England 238.

BOARDER. One who makes a special contract with another person for food with or without lodging. 7 Cush. 424; 36 Iowa 651. To be distinguished from a guest of an innkeeper; Story, Bailm. § 477; 26 Vt. 343; 26 Ala. N. S. 371; 7 Cush. 417. See Edwards, Bailments § 456.

In a boarding-house, the guest is under an express contract, at a certain rate, for a certain time; but in an inn there is usually no express engagement; the guest, being on his way, is entertained from day to day according to his business, upon an implied contract; 2 E. D. Smith 148; 24 How. Pr. 62; 1 Lans. 484.

BOARD OF SUPERVISORS. A county board of representatives of towns or townships, under a system existing in some states, having charge of the fiscal affairs of the county.

This system originated in the state of New York, and has been adopted in Michigan, Illinois, Wisconsin, and Iowa. The board, when convened, forms a deliberative body, usually acting under parliamentary rules. It performs the same duties and exercises like authority as the COUNTY COMMISSIONERS or BOARD OF CIVIL AUTHORITY in other states. See, generally, Haines's Township Laws of Mich., and Haines's Town Laws of Ill. & Wis.

BOAT. A boat does not pass by the sale of a ship and appurtenances; Molloy, b. 2, c. 1, § 8; Beawes, *Lex Merc.* 56; 2 Root 71; Park. Ins. 8th ed. 126. But see 17 Mass. 405; 2 Marsh. 727. Insurance on a ship covers her boats; 24 Pick. 172; 1 Mann. & R. 392; 1 Pars. Marit. Law 72, n.

BOC (Sax.). A writing; a book. Used of the *land-bocs*, or evidences of title among the Saxons, corresponding to modern deeds. These *bocs* were destroyed by William the Conqueror. 1 Spence, Eq. Jur. 22; 1 Washb. R. P. *17, 21. See 1 Poll. & Maitl. 472, 571; 2 *id.* 12, 86.

BOC HORDE. A place where books, evidences, or writings are kept. Cowel. These were generally in monasteries. 1 Spence, Eq. Jur. 22.

BOC LAND. Allodial lands held by written evidence of title.

Such lands might be granted upon such terms as the owner should see fit, by greater or less estate, to take effect presently, or at a future time, or on the happening of any event. In this respect they differed essentially from feuds. 1 Washb. 5th ed. R. P. *17; 4 Kent 441.

BODY. A person. Used of a natural body, or of an artificial one created by law, as a corporation.

A collection of laws; that is, the embodiment of the laws in one connected statement or collection, called a body of laws.

In practice when the sheriff returns *cepi corpus* to a capias, the plaintiff may obtain a rule, before special bail has been entered, to bring in the body; and this must be done either by committing the defendant or entering special bail. See DEAD BODY.

BODY CORPORATE. A corporation. This is an early and undoubtedly correct term to apply to a corporation. Co. Litt. 250 *a*; Ayliffe, Par. 196; Ang. Corp. § 6.

BOLIVIA. A republic of South America. It has a president who is elected by universal suffrage for four years and a ministry of five members. It has a congress of two houses, both elective. It is divided into seven judicial districts, each having a superior court composed of five members to which is attached an attorney-general. It has district judges, judges of instruction. The supreme court is the highest judicial authority in the republic.

BONA (Lat. *bonus*). Goods; personal property; chattels, real or personal; real property.

Bona et catalla (goods and chattels) includes all kinds of property which a man may possess. In the Roman law it signified every kind of property, real, personal, and mixed; but chiefly it was applied to *real estate*, chattels being distinguished by the words *effects*, *movables*, etc. *Bona* were, however, divided into *bona mobilia* and *bona immobilia*. It is taken in the civil law in nearly the sense of *biens* in the French law. See NULLA BONA.

BONA CONFISCATA. Goods confiscated or forfeited to the imperial *fisc* or treasury. 1 Bla. Com. 299.

BONA FIDES. Good faith, honesty, as distinguished from *mala fides* (bad faith).

Bona fide. In good faith. See PURCHASER FOR VALUE WITHOUT NOTICE.

BONA FORISFACTA. Forfeited goods. 1 Bla. Com. 299.

BONA GUSTURA. Good behavior.

BONA GRATIA. Voluntarily; by mutual consent. Used of a divorce obtained by the agreement of both parties.

BONA MOBILIA. In Civil Law. Movables. Those things which move themselves or can be transported from one place

to another; which are not intended to make a permanent part of a farm, heritage, or building.

BONA NOTABILIA. Chattels or goods of sufficient value to be accounted for.

Where a decedent leaves goods of sufficient amount (*bona notabilia*) in different dioceses, administration is granted by the metropolitan, to prevent the confusion arising from the appointment of many different administrators; 2 Bla. Com. 509; Rolle, Abr. 908; Williams, Ex. 7th ed. The value necessary to constitute property *bona notabilia* has varied at different periods, but was finally established at £5, in 1603.

BONA PATRIA. In Scotch Law. An assize or jury of countrymen or good neighbors. Bell, Dict.

BONA PERITURA. Perishable goods. An executor, administrator, or trustee is bound to use due diligence in disposing of perishable goods, such as fattened cattle, grain, fruit, or any other article which may be worse for keeping; Bacon, Abr. *Executors;* 1 Rolle, Abr. 910; 5 Co. 9; Cro. Eliz. 518; 3 Munf. 288; 1 Beatt. Ch. 5, 14; Dane, Abr. Index. A carrier is in general not liable for injuries to perishable goods occurring without his negligence; 7 L. R. Ch. 573; 1 C. P. D. 423. He may discriminate in favor of such goods, if pressed by a rush of business; 60 Ill. 284; 33 Mich. 6; 20 Wis. 594. See PERISHABLE GOODS.

BONA VACANTIA. Goods to which no one claims a property, as shipwrecks, treasure-trove, etc.; vacant goods.

These *bona vacantia* belonged, under the common law, to the finder, except in certain instances, when they were the property of the king. 1 Sharsw. Bla. Com. 298, n.

BONA WAVIATA. Goods waived or thrown away by a thief in his fright for fear of being apprehended. By common law such goods belonged to the sovereign. 1 Bla. Com. 296.

BOND. An obligation in writing and under seal. 2 S. & R. 502; 11 Ala. 19; 1 Harp. 434; 1 Blackf. 241; 6 Vt. 40; 1 Baldw. 129.

It may be single—*simplex obligatio*—as where the obligor obliges himself, his heirs, executors, and administrators, to pay a certain sum of money to another at a day named, or it may be *conditional* (which is the kind more generally used), that if the obligor does some particular act, the obligation shall be void, or else shall remain in full force, as payment of rent, performance of covenants in a deed, or repayment of a principal sum of money, borrowed of the obligee, with interest, which principal sum is usually one-half of the *penal* sum specified in the bond.

There must be proper parties; and no person can take the benefit of a bond except the parties named therein; Hob. 9; 14 Barb. 59; except, perhaps, in some cases of bonds given for the performance of their duties by certain classes of public officers; 4 Wend. 414; 8 Md. 287; 4 Ohio N. S. 418; 7 Cal. 551; 1 Grant, Cas. 359; 3 Ind. 431. A man cannot be bound to himself even in connection with others; 5 Cow. 688. See 3 Jones, Eq. N. C. 311. But if a bond is given by the treasurer of a corporation to the directors as a class, of which he is one, it is not for that reason invalid; 37 Ill. App. 403. If the bond run to several persons jointly, all must join in suit for a breach, though it be conditioned for the performance of different things for the benefit of each; 2 N. Y. 388.

The instrument must be in writing and sealed; 1 Baldw. 129; 6 Vt. 40; but a sealing sufficient where the bond is made is held sufficient though it might be an insufficient sealing if it had been made where it is sued on; 2 Caines 362. The signature and seal may be in any part of the instrument; 7 Wend. 345. See 69 Miss. 221. An instrument not under seal is not a bond and will not satisfy a statute requiring an appeal bond; 48 Mo. App. 626; although in the body thereof it is recited that the parties there to have set their hands and seals; 25 Fla. 734,

It must be delivered by the party whose bond it is to the other; 13 Md. 1; 5 Gray 440; 11 Ga. 286; 70 Md. 109. See 37 N. H. 306; Bacon, Abr. *Obligations*, C. But the delivery and acceptance may be by attorney; 10 Ind. 1. The date is not considered of the substance of a deed; and therefore a bond which either has no date or an impossible one is still good, provided the real day of its being dated or given, that is, delivered, can be proved; 2 Bla. Com. 304; Comyns, Dig. *Fait*, B, 3; 3 Call. 309. There is a presumption that a deed was executed on the day of its date; Steph. Dig. Ev. Art. 87; 5 Denio 290.

The condition is a vital part of a conditional bond, and generally limits and determines the amount to be paid in case of a breach; 7 Cow. 224; but interest and costs may be added; 12 Johns. 350; 2 Johns. Cas. 340; 1 E. D. Sm. 250; 1 Hempst. 271. The recovery against a surety in a bond for the payment of money is not limited to the penalty, but may exceed it so far as necessary to include interest from the time of the breach. So far as interest is payable by the terms of the contract, and until default made, it is limited by the penalty; but after breach it is recoverable, not on the ground of contract, but as damages, which the law gives for its violation: 18 N. Y. 35. See 124 Pa. 58. The omission from a statutory bond of a clause which does not affect the rights of the parties, and imposes no harder terms upon the obligors, does not invalidate it; 53 Pa. 198.

Where a bond is for the performance of an illegal contract the parties are not bound thereon; 89 Ala. 179.

On the *forfeiture* of the bond, or its becoming single, the whole penalty was formerly recoverable at law; but here the courts of equity interfered, and would not permit a man to take more than in conscience he ought, viz.: his principal, interest, and expenses in case the forfeiture accrued

by non-payment of money borrowed, the damages sustained upon non-performance of covenants, and the like. And the like practice having gained some footing in the courts of law, the statute 4 & 5 Anne, c. 16, at length enacted, in the same spirit of equity, that, in case of a bond conditioned for the payment of money, the payment or tender of the principal sum due with interest and costs, even though the bond were forfeited and a suit commenced thereon, should be a full satisfaction and discharge; 2 Bla. Com. 340.

All of the obligors in a joint bond are presumed to be principals, except such as have opposite their names the word "security;" 82 Va. 751.

If in a bond the obligor *binds himself*, without adding his *heirs, executors, and administrators*, the executors and administrators are bound, but not the heir; Sheppard, Touchst. 369; for the law will not imply the obligation upon the heir; Co. Litt. 209 *a*.

If a bond lie *dormant* for twenty years, it cannot afterwards be recovered; for the law raises a presumption of its having been paid, and the defendant may plead *solvit ad diem* to an action upon it; 1 Burr. 434; 4 *id.* 1963. And in some cases, under particular circumstances, even a less time may found a presumption; 1 Term 271; Cowp. 109. The statute as to the presumption of payment after twenty years is in the nature of a statute of limitations. It is available as a bar to an action to recover on the instrument, but not where the party asks affirmative relief based upon the fact of payment; 12 N. Y. 409; 14 *id.* 477.

Forthcoming Bond. A bond conditioned that a certain article shall be forthcoming at a certain time or when called for.

General Mortgage Bond. A bond secured upon an entire corporate property, parts of which are subject to one or more prior mortages.

Heritable Bond. In Scotch Law, a bond for a sum of money to which is joined a conveyance of land or of heritage, to be held by the creditor in security of the debt.

Income Bonds. Bonds of a corporation the interest of which is payable only when earned and after payment of interest upon prior mortgages.

Lloyd's Bond. A bond issued for work done or goods delivered and bearing interest. This was a device of an English barrister named Lloyd, by which railway and other companies did, in fact, increase their indebtedness without technically violating their charter provisions prohibiting the increase of debt.

Municipal Bond, *q. v.*

Railway Aid Bonds are issued by municipal corporations to aid in the construction of railways. The power to subscribe to the stock of railways, and to issue bonds in pursuance thereof, does not belong to towns, cities, or counties, without special authority of the legislature, and the power of the latter to confer such authority, where the state constitution is silent, has been a much-contested question. The weight of the very numerous decisions is in favor of the power, although in several of the states the constitutions, or amendments thereof, prohibit or restrict the right of municipal corporations to invest in the stock of railway or similar corporations; 21 Pa. 147; 47 *id.* 189; 20 Wall. 655, 660; 92 Ill. 111; 111 Mass. 454, 460; 99 U. S. 86; 102 *id.* 634; 122 *id.* 306; 147 *id.* 91; 148 *id.* 393; 149 *id.* 122; 152 *id.* 473; 154 *id.* 546; 155 *id.* 4; 62 Fed. Rep. 718; 54 *id.* 823; 62 *id.* 775; 63 *id.* 76; 13 Cent. L. J. 297; Dill. Mun. Corp. 4th ed. § 508; Beach, Pub. Corp. 895; Pierce, Railr. 87; and articles in 20 Am. L. Reg. 737; 26 *id.* 209, 608.

The recital in bonds issued by a municipal corporation in payment of a subscription to railroad stock, that they were issued "in pursuance of an act of the legislature . . . and ordinances of the city council . . . passed in pursuance thereof," does not put a *bona fide* purchaser for value upon inquiry as to the terms of the ordinances under which the bonds were issued, nor does it put him on inquiry whether a proper petition of two-thirds of the residents had been presented to the common council before it subscribed for the stock; 161 U. S. 434; and recitals in county bonds, that they are issued in pursuance of an order of the court, etc., as a subscription to the capital stock, estop the county issuing them as against an innocent purchaser from showing that the bonds are void because in fact issued as a donation to the railroad company, whereas the statute only authorized a subscription to its stock; 73 Fed. Rep. 927; where a county, under authority from the state, issued its bonds in payment of a subscription to stock in a railway company, made upon a condition which was never complied with, and which was subsequently waived by the county, and received and held the certificates and paid interest on its bonds and refunded them under legislative authority, the bonds originally issued were held valid in the hands of a *bona fide* holder for value before maturity; 161 U. S. 359; where there is a total want of power to subscribe for such stock and to issue bonds in payment, a municipality cannot estop itself by admissions or by issuing securities in negotiable form, nor even by receiving and enjoying the proceeds of such bonds; *id.;* where a municipality is empowered to subscribe, whether with or without conditions, as it may think fit, and the conditions are such as it chooses to impose, a municipality can waive such self-imposed conditions, provided the waiver is made by the municipality itself and not by its mere agents; *id.*

Straw Bond. A bond upon which is used either the name of fictitious persons or those unable to pay the sum guaranteed; generally applied to insufficient bail bonds, improperly taken, and designated by the term "straw bail."

BONDAGE. A term which has not obtained a juridical use distinct from the

vernacular, in which it is either taken as a synonym with *slavery*, or as applicable to any kind of personal servitude which is involuntary in its continuation.

The propriety of making it a distinct juridical term depends upon the sense given to the word *slavery*. If *slave* be understood to mean, exclusively, a natural person who, in law, is known as an object in respect to which legal persons may have rights of possession or property, as in respect to domestic animals and inanimate things, it is evident that any one who is regarded as a legal person, capable of rights and obligations in other relations, while bound by law to render service to another, is not a slave in the same sense of the word. Such a one stands in a legal relation, being under an obligation correlative to the right of the person who is by law entitled to his service, and, though not an object of property, nor possessed or owned as a chattel or thing, he is a person bound to the other, and may be called a *bondman*, in distinction from a *slave* as above understood. A greater or less number of rights may be attributed to persons bound to render service. Bondage may subsist under many forms. Where the rights attributed are such as can be exhibited in very limited spheres of action only, or are very imperfectly protected, it may be difficult to see wherein the condition, though nominally that of a legal person, differs from chattel slavery. Still, the two conditions have been plainly distinguishable under many legal systems, and even as existing at the same time under one source of law. The Hebrews may have held persons of other nations as slaves of that chattel condition which anciently was recognized by the laws of all Asiatic and European nations; but they held persons of their own nation in bondage only as legal persons capable of rights, while under an obligation to serve. Cobb's Hist. Sketch, ch. 1. When the serfdom of feudal times was first established, the two conditions were coexistent in every part of Europe (*ibid.* ch. 7), though afterwards the bondage of serfdom was for a long period the only form known there until the revival of chattel slavery, by the introduction of negro slaves into European commerce, in the sixteenth century. Every villein under the English law was clearly a legal person capable of some legal rights, whatever might be the nature of his services. Co. Litt. 123 *b*; Coke, 2d Inst. 4, 45. But at the first recognition of negro slavery in the jurisprudence of England and her colonies, the slave was clearly a natural person, known to the law as an object of possession or property for others, having no legal personality, who therefore, in many legal respects, resembled a thing or chattel. It is true that the moral responsibility of the slave and the duty of others to treat him as an accountable human being and not as a domestic animal were always more or less clearly recognized in the criminal jurisprudence. There has always been in his condition a mingling of the qualities of person and of thing, which has led to many legal contradictions. But while no rights or obligations, in relations between him and other natural persons such as might be judicially enforced by or against him, were attributed to him, there was a propriety in distinguishing the condition as *chattel slavery*, even though the term itself implies that there is an essential distinction between such a person and natural things, of which it seems absurd to say that they are either free or not free. The phrases *instar rerum, tanquam bona*, are aptly used by older writers. The bondage of the villein could not be thus characterized; and there is no historical connection between the principles which determined the existence of the one and those which sanctioned the other. The law of English villenage furnished no rules applicable to negro slavery in America. 5 Rand. 680, 683; 2 Hill, Ch. S. C. 390; 9 Ga. 561; 1 Hurd, Law of Freedom and Bondage, cc. 4, 5. Slavery in the colonies was entirely distinct from the condition of those white persons who were held to service for years, which was involuntary in its continuance, though founded in most instances on contract. These persons had legal rights, not only in respect to the community at large, but also in respect to the person to whom they owed service.

In the American slaveholding states before the Civil War, the moral personality of those held in the customary slavery was recognized by jurisprudence and statute to an extent which makes it difficult to say whether, there, slaves were by law regarded as things and not legal persons (though subject to the laws which regulate the title and transfer of property), or whether they were still things and property in the same sense and degree in which they were so formerly. Compare laws and authorities in Cobb's Law of Negro Slavery, ch. iv., v.

The Emancipation Proclamation of January 1, 1863, and the subsequent amendments to the constitution of the United States, have rendered the views entertained by jurists on the subject purely speculative, as slavery has ceased to exist within the borders of the republic.

The Emancipation Proclamation was issued by President Lincoln as commander-in-chief of the army and navy of the United States during the existence of armed rebellion, and by its terms purported to be nothing more than "a fit and necessary war measure for suppressing said rebellion." By virtue of this power, it was therein ordered and declared that all persons held as slaves within certain designated states, and parts of states, were and henceforward should be free, and that the executive government of the United States, including the military and naval authorities thereof, should recognize and maintain the freedom of said persons. The proclamation was not meant to apply to those states or parts of states not in rebellion.

The constitutionality of this measure has been a subject of some doubt, the prevailing opinion being that it could be supported as a war measure alone, and apply where the slaveholding territory was actually subdued by the military power of the United States; 16 Wall. 68. In South Carolina, it has been held that slavery was not abolished by the Emancipation Proclamation, and the same view was sustained in Texas; 13 S. C. Eq. 366; 31 Tex. 504. In Louisiana, 20 La. Ann. 199, and Alabama, 43 Ala. 592, the opposite view is held. But see 44 Ala. 70. In Mississippi the question of the time when slavery was abolished is left open; 43 Miss. 102.

The provisions of Amendment XIII. to the constitution, proclaimed Dec. 18, 1865, may fairly be considered as the definite settlement of the question of slavery in the United States. It declares, "1. Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to its jurisdiction. 2. Congress shall have power to enforce this article by appropriate legislation." See SLAVE.

BONIS NON AMOVENDIS. A writ addressed to the sheriff, when a writ of error has been brought, commanding that the person against whom judgment has been obtained be not suffered to remove his goods till the error be tried and determined. Reg. Orig. 131.

BONO ET MALO. A special writ of jail delivery, which formerly issued of course for each particular prisoner. 4 Bla. Com. 270.

BONUS. A premium paid to a grantor or vendor.

A sum exacted by the state from a corporation as a consideration for granting a charter; in such case it is clearly distinguished from a tax; 21 Wall. 456; 107 Pa. 112.

A consideration given for what is received. Extraordinary profit accruing in the operation of a stock company or private corporation. 10 Ves. Ch. 185; 7 Sim. 634; 2 Spence, Eq. Jur. 569.

An additional premium paid for the use of money beyond the legal interest. 3 Pars. Contr. 8th ed. *114, 150; 24 Conn. 147. It is not a gift or gratuity, but is paid for some services or consideration and is in addition to what would ordinarily be given; 16 Wall. 452.

In its original sense of good, the word was formerly much used. Thus, a jury was to be composed of twelve good men (*boni homines*); 3 Bla. Com. 349; *bonus judex* (a good judge). Co. Litt. 246.

BOOK. A general name given to every literary composition which is printed, but appropriately to a printed composition bound in a volume. See COPYRIGHT.

A manuscript may, under some circumstances, be regarded as a "book;" 17 Pa. C. C. R. 161; 8 L. J. Ch. 105.

BOOK-LAND. In English Law. Land, also called charter-land, which was held by deed under certain rents and fee services, and differed in nothing from free socage land. 2 Bla. Com. 90. See 2 Spelman, English Works 233, tit. *Of Ancient Deeds and Charters;* BOC-LAND.

BOOK OF ACTS. The records of a surrogate's court.

BOOK OF ADJOURNAL. In Scotch Law. The records of the court of justiciary.

BOOK OF RATES. An account or enumeration of the duties or tariffs authorized by parliament. 1 Bla. Com. 316; Jacob, Law Dict.

BOOK OF RESPONSES. In Scotch Law. An account which the director of the Chancery keeps particularly to note a seizure when he gives an order to the sheriff in that part to give it to an heir whose service has been returned to him. Wharton, Lex.

BOOKS. Merchants, traders, and other persons who are desirous of understanding their affairs, and of explaining them when necessary, keep a day-book, a journal, a ledger, a letter-book, an invoice-book, a cash-book, a bill-book, a bank-book, and a check-book. See these several articles.

It is a cause for refusing a discharge under the insolvent laws, in some of the states, that merchants have not kept suitable books.

BOOKS OF SCIENCE. In Evidence. Scientific books, even of received authority, are not admissible in evidence before a jury; 5 C. & P. 73; 1 Gray 337; 8 *id.* 430; 117 Mass. 122; S. C. 19 Am. Rep. 401; 3 Bosw. 18; 2 Carl. 617; 1 Greenl. Ev. § 440, *a*; except to contradict an expert who bases his opinion upon them; 110 Ill. 219; standard medical works with explanation of technicalities are admissible; 2 Ind. 617; 37 Ala. 139; 29 *id.* 558. Counsel may read such books to the jury in their argument; 46 Conn. 330 (two judges dissenting); *contra*, 1 Gray 337; 50 N. H. 159; 44 Cal. 65; 5 Bradw. 481. In 20 Tex. 398 and 1 Chand. 178, it was held that the admission of such evidence was in the discretion of the court. See also 24 Alb. L. J. 266, 284, 357; 26 Am. Law Rev. 390. See 20 Tex. 398; 8 Gray 430; 102 Ind. 529; 67 Cal. 13.

The law of foreign countries may be proved by printed books of statutes, reports, and text writers, as well as by the sworn testimony of experts; so held, in a learned opinion by Lowell, J., in the U. S. C. C. 2 Low. 142. See 14 Hun 400; 163 Pa. 245; 35 S. W. Rep. (Tex.) 1070; *contra*, but without authority, 50 Fed. Rep. 73. A scientific witness may testify to the written foreign law, with or without the text of the law before him; 11 Cl. & F. 85, 114; 8 Q. B. 208. It has been said that foreign law must always be proved by an expert; 2 Phil. Ev. 428; 1 Greenl. Ev. 486, 488; but see Westl. Pr. Int. Law, 3d ed. § 356; but the court may in its discretion require the printed book of law to be produced in order to corroborate the witness; 106 U. S. 546.

BOOM. An enclosure formed upon the surface of a stream or other body of water, by means of spars, for the purpose of collecting or storing logs or timber; 10 Am. & Eng. Corp. Cas. 399; A. & E. Encyc.

BOOM COMPANY. A company formed for the purpose of improving streams for the floating of logs, by means of booms and other contrivances, and for the purpose of running, driving, booming, and rafting logs. 10 Am. & Eng. Corp. Cas. 399; A. & E. Encyc.

BOON-DAYS. Certain days in the year on which copyhold tenants were bound to perform certain services for the lord. Called, also, due-days. Whishaw.

BOOTY. The capture of personal property by a public enemy on land, in contradistinction to prize, which is a capture of such property by such an enemy on the sea.

After booty has been in complete possession of the enemy for twenty-four hours, it becomes absolutely his, without any right of postliminy in favor of the original owner, particularly when it has passed *bona fide* into the hands of a neutral; 1 Kent 110. The right to the booty, Pothier says, belongs to the sovereign; but sometimes the right of the sovereign, or of the public, is transferred to the soldiers, to encourage them; Pothier, *Droit de Propriété*, p. 1, c. 2, a. 1, § 2; 2 Burl. Nat. & Pol. Law, pt. 4, c. 7, n. 12.

BORDAGE. A species of base tenure by which *bordlands* were helds. The tenants were called *bordarii*. These bordarii would seem to have been those tenants of a less servile condition, who had a cottage and land assigned to them on condition of supplying their lord with poultry, eggs, and such small matters for his table. Whishaw; Cowel.

BORDLANDS. The demesnes which the lords keep in their hands for the maintenance of their board or table. Cowel.

BORDLODE. The rent or quantity of food which the *bordarii* paid for their lands. Cowel.

BORG (Sax.). Suretyship.

Borgbriche (violation of a pledge or suretyship) was a fine imposed on the *borg* for property stolen within its limits.

A tithing in which each one became a surety for the others for their good behav-

ior. Spelman, Gloss.; Cowel; 1 Bla. Com. 115.

BORN. See BIRTH.

It is now settled according to the dictates of common sense and humanity, that a child *en ventre sa mère*, for all purposes for his own benefit, is considered as absolutely born; 5 S. & R. 40.

If an infant is born dead or at such an early stage of pregnancy as to be unable to live it is to be considered as never born; 2 Paige, Ch. 35.

BOROUGH. A town; a town of note or importance. Cowel. An ancient town. Littleton § 164. A town which sends burgesses to parliament, whether corporate or not. 1 Bla. Com. 115; Whishaw.

A corporate town that is not a city. 1 M. & G. 1; Cowel. In its more modern English acceptation, it denotes a town or city organized for purposes of government. 3 Steph. Com. 11th ed. 33.

It is impossible to reconcile the meanings of this word given by the various authors cited, except upon the supposition of a change of requirements necessary to constitute a borough at different periods. The only essential circumstance which underlies all the meanings given would seem to be that of a number of citizens bound together for purposes of joint action, varying in the different boroughs, but being either for representation or for municipal government.

In American Law. In Pennsylvania, the term denotes a political division, organized for municipal purposes; and the same is true of Connecticut and New Jersey. Sav. Bor. L. 4; 23 Conn. 128; see also 18 Ohio St. 496; 1 Dill. Mun. Corp. § 41, n.

In Scotch Law. A corporation erected by charter from the crown. Bell, Dict.

BOROUGH COURTS. In English Law. Private courts of limited jurisdiction held in particular districts by prescription, charter, or act of parliament, for the prosecution of petty suits. 19 Geo. III. c. 70; 3 Will. IV. c. 74; 3 Bla. Com. 80.

BOROUGH ENGLISH. A custom prevalent in some parts of England, by which the youngest son inherits the estate in preference to his older brothers. 1 Bla. Com. 75.

The custom is said by Blackstone to have been derived from the Saxons, and to have been so called in distinction from the Norman rule of descent; 2 Bla. Com. 83. A reason for the custom is found in the fact that the elder children were usually provided for during the life of the parent as they grew up, and removed, while the younger son usually remained. See, also, Bacon, Abr.; Comyns, Dig. *Borough English*; *Termes de la Ley*; Cowel. The custom applies to socage lands; 2 Bla. Com. 83.

BORROW. The word is often used in the sense of returning the thing borrowed in species, as to borrow a book, or any other thing to be returned again. But it is evident where money is borrowed the identical money loaned is not to be returned, because if this is so, the borrower would derive no benefit from the loan. In the broad sense of the term it means a contract for the use of money. 13 Neb. 88; 78 N. Y. 177.

BORROWER. He to whom a thing is lent at his request.

In general he has the right to use the thing borrowed, himself, during the time and for the purpose intended between the parties. He is bound to take extraordinary care of the thing borrowed; to use it according to the intention of the lender; to restore it in proper condition at the proper time; Story, Bailm. § 268; Edw. Bailm. 135; 2 Kent 446. See BAILMENT.

BOSCAGE. That food which wood and trees yield to cattle.

To be quit of boscage is to be discharged of paying any duty of wind-fall wood in forest; Whishaw; Manwood, For. Laws.

BOSCUS. Wood growing; wood; both high wood or trees, and underwood or coppice. The high wood is properly called *saltus*. Cowel; Spelman, Gloss.; Co. Litt. 5 *a*.

BOTE. A recompense or compensation. The common word *to boot* comes from this word. Cowel. The term is applied as well to making repairs in houses, bridges, etc., as to making a recompense for slaying a man or stealing property. *House bote*, materials which may be taken to repair a house; *hedge bote*, to repair hedges; *brig bote*, to repair bridges; *man bote*, compensation to be paid by a murderer. Bote is known to the English law also under the name of Estover; 1 Washb. R. P. 5th ed. *99; 2 Bla. Com. 35.

BOTTOMRY. In Maritime Law. A contract in the nature of a mortgage, by which the owner of a ship, or the master, as his agent, borrows money for the use of the ship, and for a specified voyage, or for a definite period, pledges the ship (or the keel or *bottom* of the ship, *pars pro toto*) as a security for its repayment, with maritime or extraordinary interest on account of the marine risks to be borne by the lender; it being stipulated that if the ship be lost in the course of the specified voyage, or during the limited time by any of the perils enumerated in the contract, the lender shall also lose his money. 2 Hagg. Adm. 48; 2 Sumn. 157; Abb. Sh. 13th ed. 152.

Bottomry differs materially from an ordinary loan. Upon a simple loan the money is wholly at the risk of the borrower, and must be repaid at all events. But in bottomry, the money, to the extent of the enumerated perils, is at the risk of the lender during the voyage on which it is loaned, or for the period specified. Upon an ordinary loan only the usual legal rate of interest can be reserved; but upon *bottomry* and *respondentia* loans any rate of interest, not grossly extortionate, which may be agreed upon, may be legally contracted for.

When the loan is not made upon the ship, but on the goods laden on board and which are to be sold or exchanged in the course of the voyage, the borrower's personal *responsibility* is deemed the principal security for the performance of the contract, which is therefore called respondentia, which see. And in a loan upon respondentia the lender must be paid his principal and interest though the ship perish, provided the goods are saved. In most other respects the contracts of *bottomry* and of *respondentia* stand substantially upon the same footing. See further, 10 Jur. 845; 4 Thornt. 285, 512; 2 W. Rob. Adm. 83-85; 3 Mas. 225.

Bottomry bonds may be given by a master

appointed by the charterers of the ship, by masters necessarily substituted or appointed abroad, or by the mate who has become master, as *hæres necessarius*, on the death of the appointed master. 1 Dod. 278; 3 Hagg. Adm. 18; 3 Sumn. 246. But while in a port in which the owners, or one of them, or a recognized agent of the owners, reside, the master, as such, has no authority to make contracts affecting the ship, and a bottomry bond executed under such circumstances is void; 1 Wash. C. C. 49; 22 Eng. L. & Eq. 623; 31 L. J. Adm. 81. Unless, it has been held in an English case, he has no means of communicating with the owners; 1 Dod. 273. See 7 Moore's P. C. C. 398. The master has authority to hypothecate the vessel only in a foreign port; but in the jurisprudence of the United States all maritime ports, other than those of the state where the vessel belongs, are foreign to the vessel; 1 Cliff. 308; 1 Blatch. & H. 66, 90.

The owner of the vessel may borrow upon bottomry in the vessel's home port, and whether she is in port or at sea; and it is not necessary to the validity of a bond made by the owner that the money borrowed should be advanced for the necessities of the vessel or her voyage; 1 Pars. Ins. 210; 2 Sumn. 157; 1 Paine 671; 2 Dods. Ad. R. 461. But it may well be doubted, whether when money is thus borrowed by the owner for purposes other than necessities or uses of the ship, and a bottomry bond in the usual form is given, a court of admiralty has jurisdiction to enforce the lien; Bee 348. As a contract made and to be performed on land, and having no necessary connection with the business of navigation, it is probable that it would not now be deemed a maritime contract, but would take effect and be enforced as a common-law mortgage. See Abb. Shipp. 13th ed. 152, and Perkins's notes; 1 Wash. C. C. 293; 20 How. 393; Bee 433; 1 Swab. 269. But see 1 Paine 671; 1 Pet. Adm. 295.

If the bond be executed by the master of the vessel, it will be upheld and enforced only upon proof that there was a necessity for the loan, and also for pledging the credit of the ship; as the authority of the master to borrow money on the credit of the vessel rests upon the necessity of the case, and only exists under such circumstances of necessity as would induce a prudent owner to hypothecate his ship to raise money for her use; 3 Hagg. Adm. 66, 74; 3 Sumn. 228; 1 Wheat. 96; 1 Paine 671; Abb. Sh. 13th ed. 168; Bee 120. His authority is not confined, however, to such repairs and supplies as are absolutely and indispensably necessary, but includes also all such as are reasonably fit and proper for the ship and the voyage; 1 Pars. Ins. 215; 10 Wall. 192, 204; 9 *id.* 129; 17 *id.* 666.

If the master could have obtained the necessary supplies or funds on the personal credit of himself or of his owner, and this fact was known to the lender, the bond will be held invalid; 3 Wash. 290; 3 Sumn. 257. And if the master borrows on bottomry without apparent necessity, or when the owner is known to be accessible enough to be consulted upon the emergency, the bond is void, and the lender can look only to the personal responsibility of the master; 3 W. Rob. Adm. 243, 265. For the fact that the advances were necessary, and were made on the security of the vessel, is not, in any instance, to be presumed; 3 Wash. C. C. 290. And moneys advanced to the master without inquiry as to the necessity of the advance, or seeing to the proper application, have been disallowed; 33 Eng. L. & Eq. 602. It may be given after the advances have been made, in pursuance of a prior agreement; 8 Pet. 538. If given for a larger sum than the actual advances, in fraud of the owners or underwriters, it vitiates the bond and avoids the bottomry lien even for the sum actually advanced; 18 How. 63; 1 Curt. C. C. 341. See 1 Wheat. 96; 8 Pet. 538.

The contract of bottomry is usually in form a bond (termed a bottomry bond) conditioned for the repayment of the money lent, with the interest agreed upon, if the ship safely accomplishes the specified voyage or completes in safety the period limited by the contract; 2 Sumn. 157. See 36 Fed. Rep. 919. Sometimes it is in that of a bill of sale, and sometimes in a different shape; but it should always specify the principal lent and the rate of maritime interest agreed upon; the names of the lender and borrower; the names of the vessel and of her master; the subject on which the loan is effected, whether of the ship alone, or of the ship and freight; whether the loan is for an entire or specific voyage or for a limited period, and for what voyage or for what space of time; the risks the lender is contented to bear; and the period of repayment. It is negotiable; 5 C. Rob. Adm. 102; 1 Newb. Adm. 514; 5 Jur. N. S. 632. Where the bond covers "the vessel, her tackle, apparel, furniture, and freight as per charter-party," demurrage previously earned is not freight; 157 Mass. 132.

In case a highly extortionate or wholly unjustifiable rate of interest be stipulated for in a bottomry bond, courts of admiralty will enforce the bond for only the amount fairly due, and will not allow the lender to recover an unconscionable rate of interest. But in mitigating an exorbitant rate of interest they will proceed with great caution. For the course pursued where the amount of interest was accidentally omitted, see 1 Swab. 240. Fraud will induce a court of equity to set aside a bottomry bond, in England; 8 Sim. 358; 3 M. & C. 451, 453, n.

Where the express contract of bottomry is void for fraud, no recovery can be had, on the ground of an implied contract and lien of advances actually made; 1 Curt. C. C. 340; 18 How. 63. But a bottomry bond may be good in part and bad in part; 3 Mas. 255; Ware 249; Olc. 55. And it has been held in England that fraud of the owner or mortgagor of a vessel, which might render the voyage illegal, does not invalidate a bottomry bond to a *bonâ fide* lender; L. R. 1 Adm. & Ec. 13.

Not only the ship, her tackle, apparel, and furniture (and the freight, if specifically pledged), are liable for the debt in case the voyage or period is completed in safety, but the borrower is also, in that event, personally responsible. See 2 Bla. Com. 457; Marsh. Ins. b. 2, c. 1; Code de Comm. art. 311; 157 Mass. 132. But only, it would seem, in cases in which such responsibility has been especially made a condition of the bond; 6 Am. L. Rev. 763; 48 Barb. 269.

The borrower on bottomry is affected by the doctrines of seaworthiness and deviation; 3 Kent 360; Phillips, Ins. sec. 988, 989; and if, before or after the risk on the bottomry bond has commenced, the voyage or adventure is voluntarily broken up by the borrower, in any manner whatsoever, whether by a voluntary abandonment of the voyage or adventure, or by a deviation or otherwise, the maritime risks terminate, and the bond becomes presently payable; 2 Sumn. 157; 3 Kent 360. But maritime interest is not recoverable if the risk has not commenced.

But in England and America the established doctrine is that the owners are not personally liable, except to the extent of the fund pledged which has come into their hands; 8 Pet. 538, 554; 1 Hagg. Adm. 1, 13. If the ship or cargo be lost, not by the enumerated perils of the sea, but by the fraud or fault of the borrower or master, the hypothecation bond is forfeited and must be paid.

The risks assumed by the lender are usually such as are enumerated in the ordinary policies of marine insurance. If the ship be wholly lost in consequence of these risks, the lender, as before stated, loses his money; but the doctrine of constructive total loss does not apply to bottomry contracts; 1 Arn. Ins. 115; 1 Maule & S. 30; 9 Eng. L. & Eq. 553; 22 L. T. R. Ex. 371; 2 Alb. L. J. 92; 3 Story 465. See 13 C. B. 442; 1 Low. 390.

It is usual in bottomry bonds to provide that, in case of damage to the ship (not amounting to a total loss) by any of the enumerated perils, the lender shall bear his proportion of the loss, viz.: an amount which will bear the same proportion to the whole damage that the amount lent bears to the whole value of the vessel prior to the damage. Unless the bond contains an express stipulation to that effect, the lender is not entitled to take possession of the ship pledged, even when the debt becomes due; but he may enforce payment of the debt by a proceeding *in rem*, in the admiralty, against the ship; under which she may be arrested, and, in pursuance of a decree of the court, ultimately sold for the payment of the amount due. And this is the ordinary and appropriate remedy of the lender upon bottomry; though he has also, as a general rule, his remedy by action of covenant or debt at common law upon the bond; Tyl. Mar. Loans 782. It was held in Mississippi that state legislatures have no authority to create maritime liens, or confer jurisdiction on state courts to enforce such liens by proceedings *in rem*. Such jurisdiction is exclusively in the courts of admiralty of the United States; 9 Am. L. Reg. N. S. 683; 49 Ala. 436. See 7 Wall. 624.

In entering a decree in admiralty upon a bottomry bond, the true rule is to consider the sum lent and the maritime interest as the principal, and to allow *common interest* on that sum from the time such principal became due; 3 Mas. 255; 2 Arn. Ins. 6th ed. 40, 41. Where money is necessarily taken up on bottomry to defray the expenses of repairing a partial loss, against which the vessel is insured, the underwriter (although he has nothing to do with bottomry bond) is liable to pay his share of the extra expense of obtaining the money, in that mode, for the payment of such expenses; 12 Pet. 378.

The lien or privilege of a bottomry-bond holder, like all other maritime liens, has, ordinarily, preference of all prior and subsequent common-law and statutory liens, and binds all prior interests centering in the ship; 4 Cra. 328. It holds good (if reasonable diligence be exercised in enforcing it) as against subsequent purchasers and common-law incumbrancers; but the lien of a bottomry bond is not indelible, and, like other admiralty liens, may be lost by unreasonable delay in asserting it, if the rights of purchasers or incumbrancers have intervened; 9 Wheat. 409; 16 Bost. L. Rep. 264; 17 *id.* 93, and authorities there cited; 2 W. & M. 48; 1 Swab. 269; 1 Cliff. 308; 5 Rob. Adm. 94. The lien extends to the fund recoverable for the ship's tortious destruction; 59 Fed. Rep. 621. The rules under which courts of admiralty marshal assets claimed to be applicable to the payment of bottomry and other maritime liens and of common-law and statutory liens, will be more properly and fully considered in the article Maritime Liens, which see. But it is proper here to state that, as between the holders of two bottomry bonds upon the same vessel in respect to different voyages, the later one, as a general rule, is entitled to priority of payment out of the proceeds of the vessel; 1 Dod. 201; Olc. 55; 17 Bost. L. Rep. 93; 1 Paine 671.

Seamen have a lien, prior to that of the holder of the bottomry bond, for their wages for the voyage upon which the bottomry is founded, or any subsequent voyage; but the owners are also personally liable for such wages, and if the bottomry-bond holder is compelled to discharge the seamen's lien, he has a resulting right to compensation over against the owners, and has been held to have a lien upon the proceeds of the ship for his reimbursement; 8 Pet. 538; 1 Abb. Adm. 150; 1 Hagg. Adm. 62. And see 1 Swab. 261; 1 Dod. 40; 4 Cranch 328.

Under the laws of the United States, bottomry bonds are only *quasi* negotiable, and except in cases subject to the principle of equitable estoppel, the indorsee takes only the payee's right; 37 Fed. Rep. 436.

The act of congress of July 29, 1850, declaring bills of sale, mortgages, hypotheca-

tions, and conveyances of vessels invalid against persons other than the grantor or mortgagor, his heirs and devisees, not having actual notice thereof, unless recorded in the office of the collector of the customs where such vessel is registered or enrolled, expressly provided that the lien by bottomry on any vessel, created during her voyage by a loan of money or materials necessary to repair or enable such vessel to prosecute a voyage, shall not lose its priority or be in any way affected by the provisions of that act. See Pars. Mar. Law; Abbott, Shipping, with Story and Perkins's notes; Hall's translation of Emerigon's Essay on Maritime Loans, with the Appendix; Tyler, Usury (pt. iii. Mar. Loans); Marsh. Ins. book 2; 3 Kent 49; 8 Pet. 538; 1 Hagg. Adm. 179; 2 Pet. Adm. 295; 54 Fed. Rep. 188.

BOUGHT NOTE. A written memorandum of a sale, delivered, by the broker who effects the sale, to the vendee; Story, Ag. § 28; 11 Ad. & E. 589; 8 M. & W. 834.

Bought and sold notes are made out usually at the same time, the former being delivered to the vendee, the latter to the vendor. When the broker has not exceeded his authority, both parties are bound thereby; 4 Esp. 114; 2 Campb. 337; 1 C. & P. 388; 5 B. & C. 436; 6 *id.* 117; 1 Bell, Com. 4th ed. 347, 477. Where the same broker acts for both parties, the notes must correspond; 1 Holt, N. P. 172; 5 B. & C. 436; 4 Q. B. 737; 17 *id.* 103; 3 Wend. 459; 2 Sandf. 133. The broker, as to this part of the transaction, is agent for both parties; 2 H. & N. 210; 16 Gray 442; 71 Pa. 69. Whether a memorandum in the broker's books will cure a disagreement, see 9 M. & W. 802; 1 M. & R. 368; 17 Q. B. 115; 1 H. & N. 484; but it is said to be the better opinion that the signed entry in the broker's book constitutes the real contract between the parties; Whart, Ag. § 720; Mech. Ag. 932; 1 C. P. D. 777; 20 L. J. Q. B. 529; 9 M. & W. 802; but it may be shown that the entry was in excess of the broker's authority; 4 L. R. Ir. 94; that the bought and sold notes do not constitute the contract, see 17 Q. B. 115. Where there is a variance between the bought and sold notes, and no entry of the transaction, there is no contract; Whart Ag. § 721; 17 Q. B. 115. A bought note will take the case out of the Statute of Frauds, if there is no variance; 16 C. B. N. S. 11. See a full discussion in Benj. Sales § 276; Tiedman, Sales § 79.

BOUND BAILIFF. A sheriff's officer, who serves writs and makes arrests. He is so called because bound to the sheriff for the due execution of his office; 1 Bla. Com. 345.

BOUNDARY. Any separation, natural or artificial, which marks the confines or line of two contiguous estates. 3 Toullier, n. 171.

The term is applied to include the objects placed or existing at the angles of the bounding lines, as well as those which extend along the lines of separation.

A *natural* boundary is a natural object remaining where it was placed by nature.

A river or stream is a natural boundary, and the centre line of the stream is the line; 12 Johns. 252; 6 Cow. 579; 1 Rand. 417; 3 *id.* 33; 4 Pick. 268; 1 Halst. 1; 4 Mas. 349; 9 N. H. 461; 1 Tayl. 136; 11 Miss. 366; 5 Harr. & J. 195, 245; 154 Mass. 270. And see 2 Conn. 481; 17 Johns. 195; 4 Ill. 510; 3 Ohio 495; 4 Pick. 199; 14 S. & R. 71; 11 Ala. 436; 4 Mo. 343; 1 M'Cord 580; 11 Ohio 138; 1 Whart. 124; 63 Pa. 210; where a natural pond is the boundary, the line is the natural shore; but where an artificial pond, the thread of the stream; 13 Pick. 261; 9 N. H. 461; 10 Me. 224; 13 *id.* 198; 16 *id.* 257; 62 *id.* 38; 45 Mo. App. 335; 134 N. Y. 355; 61 N. W. Rep. (Iowa) 250; where a meandered lake, the middle thereof; 61 N. W. Rep. (S. D.) 479; where the seashore, the line is at low water mark; 2 Johns. 362; 5 Gray 335; 13 *id.* 254; 2 Wall. 587; 133 N. Y. 227. So where one of the great lakes is the boundary; 34 Ohio St. 492; or a navigable lake; see 50 Minn. 438. A grant of land bounded by navigable tide-water carries no title to land below high water mark; 63 Hun 169.

Where land is bounded by the sea, and the latter suddenly recedes, leaving considerable space uncovered, this new land, under the royal prerogative, becomes the property of the king. But if the dereliction be gradual, and by imperceptible degrees, then the land gained belongs to the adjacent owner, for *de minimis non curat lex*; 2 Bla. Com. 262; 3 Barn. & C. 91, and cases cited. Similarly, where a stream forming the boundary between two owners *gradually* changes its course, it continues to mark the line; but if the change be sudden and immediate, the boundary remains in the old channel; 2 Bla. Com. 262; 3 Tex. App. 323; 26 Ohio St. 40; 4 Neb. 437; 11 Wall. 395.

An *artificial* boundary is one erected by man.

The ownership, in case of such boundaries, must, of course, turn mainly upon circumstances peculiar to each case; 5 Taunt. 20; 3 *id.* 138; 8 B. & C. 259; generally extending to the centre; 4 Hill, N. Y. 369; 6 Conn. 471. A tree standing directly on the line is the joint property of both proprietors; 12 N. H. 454; otherwise, where it only stands so near that the roots penetrate; 1 M. & M. 112; 2 Rolle 141; 2 Greenl. Ev. § 617. Land bounded on a highway extends to the centre-line, though a private street; 8 Cush. 595; 1 Sandf. 323, 344; 26 Pa. 223; 87 Tenn. 522; 86 Ky. 101; 64 Hun 632; unless the description excludes the highway; 15 Johns. 454; 11 Conn. 60; 1 Allen 443; 3 Washb. R. P. 5th ed. *635.

Boundaries are frequently denoted by monuments fixed at the angles. In such case the connecting lines are always presumed to be straight, unless described to be otherwise; 16 Pick. 235; 6 T. B. Monr. 179; 3 Ohio 382; 1 McL. 519; 2 Washb. R. P. 5th ed. *632. A practical surveyor may testify whether, in his opinion, certain marks on trees, piles of stones, or other marks on the ground were intended as monuments of boundaries; 10 Weekly Notes of Cases (Pa.) 321.

The following is the order of marshalling boundaries: *first*, the highest regard is had to natural boundaries; 100 N. C. 212; 75 Iowa 365; 121 Pa. 537; 35 Fed. Rep. 248; 71 Md. 9; 69 Tex. 445; *second*, to lines actually run and corners marked at the time of the grant; *third*, if the lines and courses of an adjoining tract are called for, the lines will be extended, if they are sufficiently established, and no other departure from the deed is required, preference being given to marked lines; *fourth*, to courses and distances; 1 Greenl. Ev. § 301, n.; 49 Minn. 268. See 3 Murph. 82; 4 Hen. & M. 125; 6 Wheat. 582; 8 Me. 61; 1 McL. 518; 3 Rob. La. 171; 8 Pa. 154; 85 *id.* 117; 38 W. Va. 1; 145 Ill. 98.

Courses and distances give way to monuments, but they must be of a permanent character, and the place where they are at the time of the conveyance must be satisfactorily located; 79 Cal. 54; 92 *id.* 623; 91 Mich. 29; 106 Mo. 231. When a description in a deed by metes and bounds conflicts with a description by reference to plats, the former governs; 76 Ia. 652.

Parol evidence is often admissible to identify and ascertain the locality of monuments called for by a description; 13 Pick. 267; 19 *id.* 445; and where the description is ambiguous, the practical construction given by the parties may be shown; 1 Metc. Mass. 378; 7 Pick. 274. Common reputation may be admitted to identify monuments, especially if of a public or quasi-public nature; 2 Washb. R. P. 5th ed. *636; 1 Greenl. Ev. § 145; Tayl. Ev. 144; 1 Hawks 116; 1 McL. 45, 518; 10 N. H. 43; 2 A. K. Marsh. 158; 9 Dana 322, 465; 1 Dev. 340; 6 Pet. 341; 8 Leigh 697; 3 Ohio 282. And see 10 S. & R. 281; 10 Johns. 377; 7 Gray 174; 5 E. & B. 166; 6 Litt. 9; 50 Tex. 371; 73 Mich. 259; 49 Minn. 268; 92 Cal. 623. On a conflict of boundaries between deeds from the same person, the one that was first executed controls; 10 Ky. L. Rep. 960. Where there are two conflicting monuments, and one corresponds with the courses and distances, that one should be taken and the other rejected as surplusage; 118 Mo. 349.

The determination of the boundaries of the states of the Union is placed by the constitution in the supreme court of the United States; 12 Pet. 657; 4 How. 591; 11 Wall. 39. This position was taken by that court against the opinion of Chief Justice Taney, who held that a controversy between states, or between individuals, in relation to the boundaries of a state, falls within the province of the court where the suit is brought to try a right of property in the soil, or any other right which is properly the subject of *judicial* cognizance and decision; but not a contest for rights of sovereignty and jurisdiction between states over any particular territory. This he held to be a *political* question; 12 Pet. 752. All the cases of boundary disputes between states which arose prior to the constitution and were tried under the articles of confederation, by courts specially constituted by Congress, are collected in 131 U. S. App. II. See UNITED STATES COURTS.

Consult, generally, Washb. R. P.; 1 Greenl. Ev. §§ 145, 301; 28 A. L. Reg. 546.

BOUNDED TREE. A tree marking or standing at the corner of a field or estate.

BOUNTY. An additional benefit conferred upon, or a compensation paid to, a class of persons.

It differs from a reward, which is usually applied to a sum paid for the performance of some specific act to some person or persons. It may or may not be part of a contract. Thus, the bounty offered a soldier would seem to be part of the consideration for his services. The bounty paid to fishermen is not a consideration for any contract, however. See 8 Allen 80; 27 Md. 320; 39 How. Pr. 481.

A premium offered or given to induce men to enlist into the public service. 39 How. Pr. 481.

BOUWERYE. A farm.

BOUWMASTER. A farmer.

BOVATA TERRÆ. As much land as one ox can cultivate. Said by some to be thirteen, by others eighteen, acres in extent. Skene; Spelman, Gloss.; Co. Litt. 5 *a*.

BOYCOTT. A confederation, generally secret, of many persons, whose intent is to injure another by preventing any and all persons from doing business with him through fear of incurring the displeasure, persecution, and vengeance of the conspirators. 84 Va. 940; 11 Va. Law Jour. 329.

The term seems to have been derived from an incident that occurred in Ireland. Captain Boycott, an Englishman, who was agent of Lord Earne and a farmer of Lough Mask, served notices upon the lord's tenants, and they in turn, with the surrounding population, resolved to have nothing to do with him, and, as far as they could prevent it, not to allow any one else to have. His life appeared to be in danger, and he had to claim police protection. His servants fled from him, and the awful sentence of excommunication could hardly have rendered him more helplessly alone for a time. No one would work for him, and no one would supply him with food. He and his wife were compelled to work in their own fields with the shadows of armed constabulary ever at their heels; Justin MacCarthy's "England under Gladstone." See 35 Alb. L. Jour. 348; 18 L. R. Ir. 430.

A combination to cause a loss to one person by coercing others, against their will, to withdraw from him their beneficial business intercourse, through threats that, unless those others do so, they will cause similar loss to them. Such a combination is unlawful. 15 Q. B. D. 476; 23 Q. B. D. 598; [1892] A. C. 25; [1893] 1 Q. B. 715; 106 Mass. 1; 32 N. J. L. 151; 55 Conn. 46; 147 Mass. 212; 77 Md. 396; 45 Fed. Rep. 135; 54 Fed. Rep. 730; 30 Atl. Rep. (N. J.) 891.

A boycott is not unlawful, unless attended with some act in itself illegal; 54 Minn. 223; 38 Pac. Rep. (Oreg.) 547. Combinations, in the nature of boycotts, which have been held to be unlawful conspiracies are:—to compel a member of a labor union to pay a fine assessed against him for working in a mill with steam machinery by preventing his obtaining employment; 5 Cox, C. C. 162; to obstruct an employer in the conduct of his business; 64 Mich. 252; 10 Cox, C. C. 592; to coerce an employer to conduct his business with reference to apprentices and delinquent members according to the demand of the union, by injuring his business through notices to customers and material men that dealings with him would be followed by similar measures against

them; 23 Wkly. L. B. (Ohio) 48; to prevent the employment of a granite cutter declared by a labor union to be a "scab"; 59 Vt. 273; 32 N. J. L. 151; to compel an employer to discharge non-union men; 55 Ct. 46; 4 N. Y. Crim. Rep. 403; *id.* 429; 5 *id.* 509; to induce employés to leave their employment and prevent others from entering it; 107 Mass. 555; to induce workmen to quit in a body to enforce the demands of a labor union; 30 Fed. Rep. 48; parading in front of a factory with banners to induce workmen to keep away; 147 Mass. 212; gathering around a place of business and following employés to and from work, and collecting about their boarding-places with threats, intimidation, and ridicule; 152 Pa. 595. Such besetting of works is called *picketting*.

Boycotts may be restrained by injunction; 26 Fed. Rep. 803; a violation of which is punishable as a contempt; 64 Fed. Rep. 724; 158 U. S. 564. In several states there are statutes on the subject, some of them merely declaratory of the common law, and others, more drastic, which extend the doctrine to new acts and circumstances; Wis. Laws, 1887, 287; 1895, 240; R. S. 446 *a*; R. I. 242, 40; Me. R. S. 1883, 126, 18; N. Y. P. C. 168; Minn. 6423; Ill. 38, 73; Tenn. 1887, 208, 1; Ga. Code § 4498; Tex. P. C. 279, 289, 295, and 304; La. 1894, 149; Minn. 6423; Mon. P. C. 322; N. J. R. S. p. 261, § 191; p. 1296, § 9; and others cited in Stimson's Handbook of Labor Law.

See, generally, Moses, Strikes; Stimson's Handbook of Labor Law in the U. S.; STRIKES.

BOZERO. On Spanish Law. An advocate; one who pleads the causes of others, either suing or defending. *Las Partidas*, part. 3, tit. v. l. 1–6.

Called also *abogadas*. Amongst other classes of persons excluded from this office are minors under seventeen, the deaf, the dumb, friars, women, and infamous persons. White, New Rec. 274.

BRANCH. A portion of the descendants of a person, who trace their descent to some common ancestor, who is himself a descendant of such person.

The whole of a genealogy is often called the *genealogical tree*; and sometimes it is made to take the form of a tree, which is in the first place divided into as many branches as there are children, afterwards into as many branches as there are grandchildren, then great-grandchildren, etc. If, for example, it be desired to form the genealogical tree of Peter's family, Peter will be made the trunk of the tree; if he has had two children, John and James, their names will be written on the first two branches, which will themselves shoot out into as many smaller branches as John and James have children; from these others proceed, till the whole family is represented on the tree. Thus the origin, the application, and the use of the word branch in genealogy will be at once perceived.

BRANDING. An ancient mode of punishment by inflicting a mark on an offender with a hot iron. It is generally disused in civil law, but is a recognized punishment for some military offences.

It is also used with reference to the marking of cattle for the purpose of identification.

BRANKS. An instrument of punishment formerly made use of in some parts of England for the correction of scolds, which it was said to do so effectually and so very safely that it was looked upon by Dr. Plotts, in his History of Staffordshire, p. 389, "as much to be preferred to the ducking-stool, which not only endangers the health of the party, but also gives the tongue liberty 'twixt every dip, to neither of which is this liable; it brings such a bridle for the tongue as not only quite deprives them of speech, but brings shame for the transgression and humiliation thereupon before it is taken off."

BRAZIL. A republic of South America. The present constitution of the republic of Brazil (1890) is copied in great part from that of the United States. It has a president and vice-president elected through an electoral college for six years, a senate elected by the state legislatures for nine years, and a chamber of deputies elected by the people for three years. It has a supreme federal tribunal of fifteen judges appointed for life and a federal judicial system. It has a federal district for the national capital.

BRASS KNUCKLES. A weapon worn on the hand for the purposes of offence or defence, so made that in hitting with the fist considerable damage is inflicted.

It is called "brass knuckles" because it was originally made of brass. The term is now used as the name of the weapon without reference to the metal of which it is made; 3 Lea 575.

BREACH. In Contracts. The violation of an obligation, engagement, or duty.

A *continuing* breach is one where the condition of things constituting a breach continues during a period of time, or where the acts constituting a breach are repeated at brief intervals; F. Moore 242; Holt 178; 2 Ld. Raym. 1125.

In Pleading. That part of the declaration in which the violation of the defendant's contract is stated.

It is usual in assumpsit to introduce the statement of the particular breach, with the allegation that the defendant, contriving and fraudulently intending craftily and subtilely to deceive and defraud the plaintiff, neglected and refused to perform, or performed, the particular act, contrary to the previous stipulation.

In debt, the breach or cause of action complained of must proceed only for the non-payment of money previously alleged to be payable; and such breach is very similar whether the action be in debt on simple contract, specialty, record, or statute, and is usually of the following form: "Yet the said defendant, although often requested so to do, hath not as yet paid the said sum of —— dollars, above demanded, nor any part thereof, to the said plaintiff, but hath hitherto wholly neglected and refused so to do, to the damage

of the said plaintiff —— dollars, and therefore he brings suit," etc.

The breach must obviously be governed by the nature of the stipulation; it ought to be assigned in the words of the contract, either negatively or affirmatively, or in words which are coextensive with its import and effect; Comyns, Dig. *Pleader*, C, 45–49; 2 Wms. Saund. 181 *b*, *c*; 6 Cra. 127. And see 5 Johns. 168; 8 *id.* 111; 4 Dall. 433; 2 Hen. & M. 446; Steph. Pl., And. ed. 115.

When the contract is in the disjunctive, as on a promise to deliver a horse by a particular day, or to pay a sum of money, the breach ought to be assigned that the defendant did not do the one act nor the other; 1 Sid. 440; Hardr. 320; Comyns, Dig. *Pleader*, C.

BREACH OF CLOSE. Every unwarrantable entry upon the soil of another is a breach of his close; 3 Bla. Com. 209.

BREACH OF COVENANT. A violation of, or a failure to perform the conditions of, a bond or covenant. The remedy is in some cases by a writ of covenant; in others, by an action of debt; 3 Bla. Com. 156.

BREACH OF THE PEACE. A violation of public order; the offence of disturbing the public peace. One guilty of this offence may be held to bail for his good behavior. An act of public indecorum is also a breach of the peace. The remedy for this offence is by indictment.

Persons who go out on a "strike" and then linger about the place of their former employment, hooting at others taking their places, may be bound over to keep the peace; 11 Pa. Co. C. R. 481. One may disturb the peace while on his own premises by the use of violent language to a person lawfully there; 53 Mo. App. 126.

BREACH OF PRISON. An unlawful escape out of prison. This is of itself a misdemeanor; 1 Russell, Cr. 378; 4 Bla. Com. 129; 2 Hawk. Pl. Cr. c. 18, s. 1; 7 Conn. 752. The remedy for this offence is by indictment. See ESCAPE.

BREACH OF PROMISE OF MARRIAGE. See PROMISE OF MARRIAGE.

BREACH OF TRUST. The wilful misappropriation, by a trustee, of a thing which had been lawfully delivered to him in confidence.

The distinction between larceny and a breach of trust is to be found chiefly in the terms or way in which the thing was taken originally into the party's possession; and the rule seems to be, that whenever the article is obtained upon a fair contract not for a mere temporary purpose, or by one who is in the employment of the deliverer, then the subsequent misappropriation is to be considered as an act of breach of trust. This rule is, however, subject to many nice distinctions. 15 S. & R. 93, 97. It has been adjudged that when the owner of goods parts with the *possession* for a particular purpose, and the person who receives them avowedly for that purpose has at the time a fraudulent intention to make use of the possession as a means of convertiug the goods to his own use, and does so convert them, it is larceny; but if the owner part with the *property*, although fraudulent means have been used to obtain it, the act of conversion is not larceny; Alison, Princ. c. 12, p. 354.

In the Year Book 21 Hen. VII. 14, the distinction is thus stated:—"*Pigot.* If I deliver a jewel or money to my servant to keep, and he flees or goes from me with the jewel, is it felony? *Cutler* said, Yes: for so long as he is with me or in my house, that which I have delivered to him is adjudged to be in my possession; as my butler, who has my plate in keeping, if he flees with it, it is felony. Same law, if he who keeps my horse goes away with him. The reason is, they are always in my possession. But if I deliver a horse to my servant to ride to market or the fair, and he flee with him, it is no felony; for he comes lawfully to the possession of the horse by delivery. And so it is if I give him a jewel to carry to London, or to pay one, or to buy a thing, and he flee with it, it is not felony; for it is out of my possession, and he comes lawfully to it. *Pigot.* It can well be; for the master in these cases has an action against him, viz.: Detinue, or Account." See this point fully discussed in Stanford, Pl Cr. lib. 1. See also Year B. Edw. IV. fol. 9; 52 Hen. III. 7; 21 Hen. VII. 15. See BREAKING BULK.

BREAKING. Parting or dividing by force and violence a solid substance, or piercing, penetrating, or bursting through the same.

In cases of burglary and housebreaking, the removal of any part of the house, or of the fastenings provided to secure it, with violence and a felonious intent.

The breaking is actual, as in the above case; or constructive, as when the burglar or housebreaker gains an entry by fraud, conspiracy, or threats; Whart. Cr. L. 759; 2 Russell, Cr. 2; 2 Chit. Cr. L. 1092; 1 Hale, Pl. Cr. 553; Alison, Princ. 282, 291; 68 N. C. 207; 98 *id.* 629; 82 Pa. 306; 85 *id.* 54; 158 Mass. 18; lifting a latch in order to enter a building is a breaking; 82 Iowa 93. In England it has been decided that if the sash of a window be partly open, but not sufficiently so to admit a person, the raising of it so as to admit a person is not a breaking of the house; 1 Mood. 178; followed in 105 Mass. 588. See 98 Mich. 26. No reasons are assigned. It is difficult to conceive, if this case be law, what further opening will amount to a breaking. But see 1 Moody 327, 377; 1 B. & H. Lead. Cr. Cas. 524–540; BURGLARY.

It was doubted, under the ancient common law, whether the breaking out of a dwelling-house in the night-time was a breaking sufficient to constitute burglary. Sir M. Hale thinks that this was not burglary, because *fregit et exivit, non fregit et intravit;* 1 Hale, Pl. Cr. 554; 82 Pa. 324; see 55 Ala. 123. It may, perhaps, be thought that a breaking out is not so alarming as a breaking in, and, indeed, may be a relief to the minds of the inmates; they may exclaim, as Cicero did of Catiline, *Magno me metu liberabis, dummodo inter me atque te murus intersit.* But this breaking was made burglary by the statute 12 Anne, c. 1, § 7 (1713). The getting the head out through a skylight has been held to be a sufficient breaking out of a house to complete the crime of burglary; 1 Jebb 99. The statute of 12 Anne is too recent to be binding as a part of the common law in all of the United States; 2 Bishop, Crim. Law § 99; 1 B. & H. Lead. Cr. Cas. 540–544.

BREAKING BULK. In Criminal

Law. The doctrine of breaking bulk proceeds upon the ground of a determination of the privity of the bailment by the wrongful act of the bailee. Thus, where a carrier had agreed to carry certain bales of goods, which were delivered to him, to Southampton, but carried them to another place, broke open the bales, and took the goods contained in them feloniously and converted them to his own use, the majority of the judges held that if the party had sold the entire bales it would not have been felony; "but as he broke them, and took what was in them, he did it without warrant," and so was guilty of felony; 13 Edw. IV. fol. 9. If a miller steals part of the meal, "although the corn was delivered to him to grind, nevertheless if he steal it it is felony, being taken from the rest;" 1 Rolle, Abr. 73, pl. 16; 1 Pick. 375. This construction involves the absurd consequence of its being felony to steal *part* of a package, but a breach of trust to steal the whole.

In an early case in Massachusetts, it was decided that if a wagon-load of goods, consisting of several packages, is delivered to a common carrier to be transported in a body to a certain place, and he, with a felonious intent, separates one entire package, whether before or after the delivery of the other packages, this is a sufficient breaking of bulk to constitute larceny, without any breaking of the package so separated; 4 Mass. 580. But this decision is in direct conflict with the English cases. Thus, where the master and owner of a ship steals a package out of several packages delivered him to carry, without removing anything from the particular package; 1 Russ. & R. 92; or where a letter-carrier is intrusted with two directed envelopes, each containing a 5*l.* note, and delivers the envelopes, having previously taken out the two notes; 1 Den. Cr. Cas. 215; or where a drover separates one sheep from a flock intrusted to him to drive a certain distance; 1 Jebb 51; this is not a breaking of bulk sufficient to terminate the bailment and to constitute larceny; 2 Bish. Cr. L. 860, 868. The Larceny Act of 1861, 24 & 25 Vict. c. 96, § 3, has met the difficulty of deciding this class of cases in England, by providing that a bailee of any chattel, money, or valuable security, who fraudulently takes the same, although not breaking bulk, shall be guilty of larceny.

BREAKING DOORS. Forcibly removing the fastenings of a house so that a person may enter. See ARREST.

BREATH. In Medical Jurisprudence. The air expelled from the chest at each expiration.

Breathing, though a usual sign of life, is not conclusive that a child was *wholly* born alive; as breathing may take place before the whole delivery of the mother is complete; 5 C. & P. 329. See BIRTH; LIFE; INFANTICIDE.

BREHON LAW. The ancient system of Irish law; so named from the judges, called Brehons, or Breitheamhuin. Its existence has been traced from the earliest period of Irish history down to the time of the Anglo-Norman invasion. It is still a subject of antiquarian research. An outline of the system will be found in Knight's English Cyclopædia, and also in the Penny Cyclopædia. See 4 Encyc. Brit. 252.

BREPHOTROPHI. In Civil Law. Persons appointed to take care of houses destined to receive foundlings. *Clef des Lois Rom. Administrateurs.*

BRETHREN. It is used in the sense of brother.

It may be legitimately used in addressing mixed multitudes, although such use is unusual; it may include a daughter; 1 Rich. Eq. 78.

BRETHREN OF TRINITY HOUSE. See ELDER BRETHREN.

BRETTS AND SCOTTS, LAWS OF THE. A code or system of laws in use among the Celtic tribes of Scotland down to the beginning of the fourteenth century, and then abolished by Edward I. of England. A fragment only is now extant. See Acts of Parl. of Scotland, vol. 1, pp. 299–301, Edin. 1844. It is interesting, like the Brehon laws of Ireland, in a historical point of view.

BREVE (Lat. *breve*, *brevis*, short). A writ. An original writ. Any writ or precept issuing from the king or his courts.

It is the Latin term which in law is translated by "writ." In the Roman law these *brevia* were in the form of letters; and this form was also given to the early English *brevia*, and is retained to some degree in the modern writs. Spelman, Gloss. The name *breve* was given because they stated briefly the matter in question (*rem quæ est breviter narrat*). It was said to be "shaped in conformity to a rule of law" (*formatum ad similitudinem regulæ juris*); because it was requisite that it should state facts against the respondent bringing him within the operation of some rule of law. The whole passage from Bracton is as follows: "*Breve quidem, cum sit formatum ad similitudinem regulæ juris quia breviter et paucis verbis intentionem proferentes exponit, et explanat sicut regula juris, rem quæ est breviter narrat. Non tamen ita breve esse debent, quin rationem et vim intentionis contineat.*" Bracton 413 *b*, § 2. It is spelled *briefe* by Brooke. Each writ soon came to be distinguished by some important word or phrase contained in the brief statement, or from the general subject-matter; and this name was in turn transferred to the form of action, in the prosecution of which the writ (or *breve*) was procured. Stephen, Pl. 9. See WRIT. It is used perhaps more frequently in the plural (*brevia*) than in the singular, especially in speaking of the different classes of writs.

Consult Cowel; Bracton, 108, 413 *b*; Fleta; Fitzherb. Nat. Brev.; Steph. Pl.; Sharsw. Bla. Com.

BREVE INNOMINATUM. A writ containing a general statement only of the cause of action.

BREVE NOMINATUM. A writ containing a statement of the circumstances of the action.

BREVE ORIGINALE. An original writ.

BREVE DE RECTO. A writ of right. The writ of right patent is of the highest nature of any in the law. Cowel; Fitzherb. Nat. Brev.

BREVE TESTATUM. A written memorandum introduced to perpetuate the tenor of the conveyance and investiture of lands. 2 Bla. Com. 307.

It was prepared after the transaction, and depended for its validity upon the testimony of witnesses, as it was not sealed. Spelman, Gloss.

In Scotch Law. A similar memorandum made out at the time of the transfer, attested by the *pares curiæ* and by the seal of the superior. Bell, Dict.

BREVET. In French Law. A warrant granted by government to authorize an individual to do something for his own benefit.

Brevet d'invention. A patent.

In American Law. A commission conferring on a military officer a degree of rank specified in the commission, without, however, conveying a right to receive corresponding pay. See 14 Wall. 552.

BREVIA (Lat.). Writs. The plural of *breve*, which see.

BREVIA ANTICIPANTIA (Lat.). Writs of prevention. See QUIA TIMET.

BREVIA DE CURSU (Lat.). Writs of course. See BREVIA FORMATA.

BREVIA FORMATA (Lat.). Certain writs of approved and established form which were granted of course in actions to which they were applicable, and which could not be changed but by consent of the great council of the realm. Bracton 413 *b*.

All original writs, without which an action could not anciently be commenced, issued from the chancery. Many of these were of ancient and established form, and could not be altered; others admitted of variation by the clerks according to the circumstances of the case. In obtaining a writ, a præcipe was issued by the party demandant, directed to the proper officer in chancery, stating the substance of his claim. If a writ already in existence and enrolled upon the Register was found exactly adapted to the case, it issued as of course (*de cursu*), being copied out by the junior clerks, called *cursitors*. If none was found, a new writ was prepared by the chancellor and subjected to the decision of the grand council, their assent being presumed in some cases if no objection was made. In 1250 it was provided that no new writs should issue except by direct command of the king or the council. The clerks, however, it is supposed, still exercised the liberty of adapting the old forms to cases new only in the *instance*, the council, and its successor (in this respect, at least), parliament, possessing the power to make writs new in principle. The strictness with which the common-law courts, to which the writs were returnable, adhered to the ancient form, gave occasion for the passage of the Stat. Westm. 2, c. 24, providing for the formation of new writs. Those writs which were contained in the Register are generally considered as pre-eminently *brevia formata*.

Consult 1 Reeve, Eng. Law 319; 2 *id.* 203; 1 Spence, Eq. Jur. 226, 239; Woodd. Lect.; 8 Co. Introd.; 9 *id.* Introd.; Co. Litt. 73 *b*, 304; Bract. 105 *b*, 413 *b*; Fleta, lib. 2, c. 2, c. 13; 3 Term 63; 17 S. & R. 194.

BREVIA JUDICIALIA (Lat.). Judicial writs. Subsidiary writs issued from the court during the progress of an action, or in execution of the judgment.

They were said to vary according to the variety of the pleadings and responses of the parties to the action; Bract. 413 *b*; Fleta, lib. 2, c. 13, § 3; Co. Litt. 54 *b*, 73 *b*. The various forms, however, became long since fixed beyond the power of the courts to alter them; 1 Rawle 52. Some of these judicial writs, especially that of *capias*, by a fiction of the issue of an original writ, came to supersede original writs entirely, or nearly so. See ORIGINAL WRIT.

BREVIA MAGISTRALIA. Writs framed by the masters in chancery. They were subject to variation according to the diversity of cases and complaints. Bracton, 413 *b*; Fleta, lib. 2, c. 13, § 4.

BREVIA TESTATA. See BREVE TESTATUM.

BREVIARIUM ALARICIANUM. A compilation made by order of Alaric II. and published for the use of his Roman subjects in the year 506.

It was collected by a committee of sixteen Roman lawyers from the Codex Gregorianus, Hermogenianus, and Theodosianus, some of the later novels, and the writings of Gaius, Paulus, and Papinianus; 1 Mackeldey, Civ. Law § 59.

BREVIATE. An abstract or epitome of a writing. Holthouse.

BREVIBUS ET ROTULIS LIBERANDIS. A writ or mandate directed to a sheriff, commanding him to deliver to his successor the county and the appurtenances, with all the briefs, rolls, remembrances, and other things belonging to his office.

BRIBE. In Criminal Law. The gift or promise, which is accepted, of some advantage as the inducement for some illegal act or omission; or of some illegal emolument, as a consideration for preferring one person to another, in the performance of a legal act.

BRIBERY. In Criminal Law. The receiving or offering any undue reward by or to any person whomsoever, whose ordinary profession or business relates to the administration of public justice, in order to influence his behavior in office, and to incline him to act contrary to his duty and the known rules of honesty and integrity. Co. 3d Inst. 149; 1 Hawk. Pl. Cr. c. 67, s. 2; 4 Bla. Com. 139; 2 Russ. Cr. 122; Clark, Cr. L. 335; 33 N. J. L. 102; 10 Ia. 212.

The term bribery now extends further, and includes the offence of giving a bribe to many other classes of officers; it applies both to the actor and receiver, and extends to voters, cabinet ministers, legislators, sheriffs, and other classes; 2 Whart. Cr. L. § 1858. The offence of the giver and the receiver of the bribe has the same name. For the sake of distinction, that of the former—viz.: the briber—might be properly denominated active bribery; while that of the latter—viz.: the person bribed—might be called passive bribery.

Bribery at elections for members of parliament has always been a crime at common law, and punishable by indictment or information. It still remains so in England,

notwithstanding the stat. 24 Geo. II. c. 14; 3 Burr. 1340, 1589. So is payment or promise of payment for votes at an election of an assistant overseer of a parish; 16 Cox, C. C. 737. To constitute the offence, it is not necessary that the person bribed should in fact vote as solicited to do; 3 Burr. 1236; or even that he should have a right to vote at all; both are entirely immaterial; 3 Burr. 1590; 33 N. J. 102.

Bribery of an office-holder, accomplished or attempted, is made a felony in the person giving or offering the bribe in New York, Pennsylvania, Maryland, West Virginia, Arkansas, Texas, Colorado, Alabama, Florida, and Louisiana; and in the following states it is a felony in the office-holder to receive or offer to receive a bribe viz.:— New York, Maryland, West Virginia, Arkansas, Texas, Nevada, and Louisiana.

An attempt to bribe, though unsuccessful, has been holden to be criminal, and the offender may be indicted; 2 Dall. 384; 4 Burr. 2500; Co. 3d Inst. 147; 2 Campb. 229; 2 Wash.Va. 88; 33 N. J. L. 102; 1 Va. Cas. 138; 2 *id.* 460; 8 W. N. C. (Pa.) 212. In Illinois a proposal by an officer to receive a bribe, though not bribery, was held to be an indictable misdemeanor at common law; 21 Am. L. Reg. 617 (with note by Judge Redfield); s. c. 65 Ill. 58. Keeping open house for the entertainment of the members of the legislature is not bribery; 97 Mich. 136.

On the trial of an officer for bribery for taking unlawful fees, a corrupt intent must be proved; 107 N. C. 921.

Bribery of a voter consists in the offering of a reward or consideration for his vote or his failure to vote; 32 Vt. 546; 73 Me. 91; 86 Pa. 105; 65 Ill. 58; 70 Mo. 13; 15 Q. B. 870; 1 M. & R. 265.

BRIBOUR. One who pilfers other men's goods; a thief. See Stat. 28 Edw. II. c. 1.

BRIDGE. A structure erected over a river, creek, stream, ditch, ravine, or other place to facilitate the passage thereof; including by the term both arches and abutments. 3 Harr. N. J. 108; 15 Vt. 438; 55 Ga. 609. A railway viaduct, designed only for the passage of engines and cars, is not a "bridge," within the statutory meaning of that word; 1 Wall. 116. See 7 Nev. 294; 40 N. J. L. 305.

Bridges are either public or private. Public bridges are such as form a part of the highway, common, according to their character as foot, horse, or carriage bridges, to the public generally, with or without toll; 2 East 342; though their use may be limited to particular occasions, as to seasons of flood or frost; 2 Maule & S. 262; 4 Camph. 189. They are established either by legislative authority or by dedication.

By legislative authority. By the Great Charter (9 Hen. III. c. 15), in England, no town or freeman can be compelled to make new bridges where never any were before, but by act of parliament. Under such act, they may be erected and maintained by corporations chartered for the purpose, or by counties, or in whatever other mode may be prescribed; Woolrych, Ways 196. In this country it is the practice to charter companies for the same purpose, with the right to take tolls for their reimbursement; 4 Pick. 341; or to erect bridges at the state's expense; or by general statutes to impose the duty of erection and maintenance upon towns, counties, or districts; 2 W. & S. 495; 5 Gratt. 241; 2 Ohio 508; 23 Conn. 416; 14 B. Monr. 92; 5 Cal. 426; 1 Mass. 153; 12 N. Y. 52; 2 N. H. 513; 59 Me. 80; 85 Pa. 163; 78 *id.* 457; 47 N. J. Law 89. For their erection the state may take private property, upon making compensation, as in case of other highways; Ang. Highw. § 81; the rule of damages for land so taken being not its mere value for agricultural purposes, but its value for a bridge site, minus the benefits derived to the owner from the erection; 17 Ga. 30. The right to erect a bridge upon the land of another may also be acquired by mere parol license, which, when acted upon, becomes irrevocable; 11 N. H. 102; 14 Ga. 1. But see 4 R. I. 47. The franchise of a toll bridge or ferry may be taken, like other property, for a free bridge; 6 How. 507; 23 Pick. 360; 4 Gray 474; 28 N. H. 195; and, when vested in a town or other public corporation, may be so taken without compensation; 10 How. 511.

A new bridge may be erected, under legislative authority, so near an older bridge or ferry as to impair or destroy its value, without compensation, unless the older franchise be protected by the terms of its grant; 11 Pet. 420; 7 Pick. 344; 6 Paige, Ch. 554; 1 Barb. Ch. 547; 3 Sandf. Ch. 625; 8 Bush 31; 2 Dill. 332; 21 Can. S. C. R. 456; 3 Wall. 51; but, unless authorized by statute, a new bridge so erected is unlawful, and may be enjoined as a nuisance; 3 Bla. Com. 218, 219; 4 Term 566; 2 Cr. M. & R. 432; 6 Cal. 590; 3 Wend. 610; 3 Ala. 211; 11 Pet. 261, Story, J.; and if the older franchise, vested in an individual or private corporation, be protected, or be exclusive within given limits, by the terms of its grant, the erection of a new bridge or ferry, even under legislative authority, is unconstitutional, as an act impairing the obligations of contract; 7 N. H. 35; 17 Conn. 40; 10 Ala. N. S. 37. See 21 Can. S. C. R. 456. The entire expense of a bridge erected within a particular town or district may be assessed upon the inhabitants of such town or district; 10 Ill. 405; 23 Conn. 416. The absolute control of navigable streams in the United States is vested in congress; Miller, Const. U. S. 457; but in the absence of legislation by congress a state has the right to erect a bridge over a navigable river within its own limits; 3 Wall. 713; 4 Pick. 460; 1 N. H. 467; 5 McL. 425; 35 Me. 325; 22 Conn. 198; 27 Pa. 303; 15 Wend. 113; and so may a county; 12 Pa. Co. Ct. R. 669; although in exercising this right, care must be taken to interrupt navigation as little as possible; 43 Me. 198; 3 Hill 621; 22 Eng. L. & Eq. 240; 4 Harr. Del. 544; 4 Ind. 36; 2 Gray 339; 6 McL. 70, 209.

The erection of a bridge entirely within a state across a navigable river running partly within and partly without the state is not a matter so directly connected with interstate commerce as to be under the exclusive control of congress, and in the absence of congressional action the state has authority to regulate the same; 53 Fed. Rep. 16.

A state has no power to fix tolls on a bridge connecting it with another state, thereby regulating charges on interstate commerce without the consent of congress or the concurrence of such other state. The chief justice and three associate justices concurred on the ground that concurrent acts of the state incorporating the bridge company and authorizing it to fix tolls constituted a contract between the corporation and both states which could not be altered by one state without the consent of the other; 154 U. S. 204, 224. The power of erecting a bridge, and taking tolls thereon, over a navigable river forming the boundary between two states, can only be conferred by the concurrent legislation of both; 13 N. J. Eq. 46; 17 N. H. 200.

A bridge is no less a means of commercial intercourse than a navigable stream, and the state power may properly determine whether the interruption to commerce occasioned by the bridge be not more than compensated by the facilities which it affords. And if the bridge be authorized in good faith by a state, the Federal courts are not bound to enjoin it. However, congress, since its power to regulate commerce is supreme, may interpose whenever it may see fit, by general or special laws, and may prevent the building of a bridge, or cause the removal of one already erected; 3 Wall. 713, 782; 2 Wall. 403; 4 Blatchf. 74, 395; 10 Wall. 454; or it may authorize the erection of a bridge over a navigable river, although it may partially obstruct the free navigation; 76 N. Y. 475. So railroads, having become the principal instruments of commerce, were as much under the control of congress as navigable streams, and a railroad bridge might be authorized by congress; 1 Woolw. 150; which has power directly or through a corporation created for the purpose to construct bridges over navigable waters between states, for the purpose of interstate commerce by land; 153 U. S. 525; the bridge across East River between New York and Brooklyn is authorized by acts of New York and of congress and cannot be declared to be a public nuisance, even though it may injuriously affect the business of a warehouseman on the banks of the river above the bridge; 109 U. S. 385. See also on the subject at large Miller, Const. U. S. Lect. ix. For any unnecessary interruption the proprietors of the bridge will be liable in damages to the persons specially injured thereby, or to have the bridge abated as a nuisance, by injunction, though not by indictment; such bridge, although authorized by state laws, being in contravention of rights secured by acts of congress regulating commerce; 13 How. 518; 1 W. & M. 401; 5 McL. 425; 6 *id.* 70, 237.

Dedication. The dedication of bridges depends upon the same principles as the dedication of highways, except that their acceptance will not be presumed from mere use, until they are proved to be of public utility; Ang. Highw. 3d ed. § 164; Thomp. Highw. 55; 5 Burr. 2594; 2 W. Bla. 685; 2 N. H. 513; 18 Pick. 312; 23 Wend. 466; 3 M. & S. 526. See 84 Ill. 279; 22 Kan. 438; HIGHWAYS.

Reparation. At common law, all public bridges are *primâ facie* reparable by the inhabitants of the county, without distinction of foot, horse, or carriage bridges, unless they can show that others are bound to repair particular bridges; 13 East 95; 2 *id.* 342; 14 E. L. & Eq. 116; Bacon, Abr. *Bridges*, p. 533; 5 Burr. 2594. In this country, the common law not prevailing, the duty of repair is imposed by statute, generally, upon towns or counties; 9 Conn. 32; 2 N. H. 513; 12 N. Y. 52; 60 Ind. 580; 77 Pa. 317; 6 Ill. 567; 15 Vt. 438; 3 Ired. 402; 13 Pick. 60; 59 Me. 80; 3 Oreg. 424; 130 Mass. 528; 108 *id.* 128; 110 Mass. 565; or chartered cities; 17 Minn. 308; 47 Iowa 348; except that bridges owned by corporations or individuals are reparable by their proprietors; 4 Pick. 341; 1 Spenc. 323; 6 Johns. 90; 24 Conn. 491; and that where the necessity for a bridge is created by the act of an individual or corporation in cutting a canal, ditch, or railway through a highway, it is the duty of the author of such necessity to make and repair the bridge; 6 Mass. 458; 23 Wend. 446; 14 *id.* 58; 66 N. C. 287; 85 Pa. 336; 35 Wis. 679; where a bridge is rebuilt at county expense, but over which it has no control or care and on which it expends no money thereafter, it does not become liable to maintain or repair it; 71 Mich. 572. The parties chargeable must constantly keep the bridge in such repair as will make it safe and convenient for the service for which it is required; Hawk. Pl. Cr. c. 77, s. 1; 9 Dana 403; 6 Johns. 189; 1 Aik. 74; 8 Vt. 189; 23 Wend. 254. See 85 Ill. 439; 47 Iowa 348; 68 Pa. 408; 13 Hun 293; 38 Vt. 666.

Remedies for non-reparation. If the parties chargeable with the duty of repairing, neglect so to do, they are liable to indictment; Hawk. Pl. Cr. c. 77, s. 1; Ang. Highw. § 275; 1 Hill, N. Y. 50; 28 N. H. 195; 9 Pick. 142; 3 Ired. 411; Thomp. Highw. 306. It has also been held that they may be compelled by mandamus to repair; 5 Call 548, 556; 1 Hill 50; 14 B. Monr. 92; 3 Zabr. 214. But see 12 A. & E. 427; 3 Campb. 222; 39 Kan. 700. If a corporation be charged with the duty by charter, they may be proceeded against by *quo warranto* for the forfeiture of their franchise; 23 Wend. 254; or by action on the case for damages in favor of any person specially injured by reason of their neglect; 1 Spenc. 323; 18 Conn. 32; 6 Johns. 90; 6 Vt. 496; 6 N. H. 147; 4 Pick. 341; 2 Ind. App. 311. And a similar action is given by

statute, in many states, against public bodies chargeable with repair; 14 Conn. 475; 10 N. H. 130; Ang. Highw. 3d ed. § 286 *et seq.*; 133 Ind. 39. A city is liable to an action for damages caused by a failure to maintain a bridge as required by law; 38 Fed. Rep. 202. In Georgia counties are not liable for injuries from defects in free bridges or ferries; 77 Ga. 249.

Tolls. The law of travel upon bridges is the same as upon highways, except when burdened by tolls. See HIGHWAYS. The payment of tolls can be lawfully enforced only at the gate or toll-house; 15 Me. 402. Where by the charter of a bridge company certain persons are exempted from payment, such exemption is to be liberally construed; 10 Johns. 467; 7 Cow. 33; 2 Murph. 372; 2 Cow. 419; 4 Rich. Eq. 459.

Bridges, when owned by individuals, are real estate; 4 Watts 341; 1 R. I. 165; 74 N. Y. 365; and also when owned by the public; yet the freehold of the soil is in its original owner; Co. 2d Inst. 705. The materials of which they are formed belong to the parties who furnished them, subject to the public right of passage; and when the bridge is taken down or abandoned become the property of those who furnished them; 6 East 154; 6 S. & R. 229.

A *private* bridge is one erected for the use of one or more private persons. Such a bridge will not be considered a public bridge although it may be occasionally used by the public; 12 East 203–4; 3 Sandf. Ch. 625; 1 Rolle, Abr. 368, *Bridges*, pl. 2; 2 Inst. 701; 1 Salk. 359. The builder of a private bridge over a private way is not indictable for neglect to repair, though it be generally used by the public; 3 Hawks 193. See 7 Pick. 344; 11 Pet. 539; 6 Hill 516; 23 Wend. 466. See 5 So. L. Rev. 731.

BRIEF (Lat. *brevis*, L. Fr. *briefe*, short).

In Ecclesiastical Law. A papal rescript sealed with wax. See BULL.

In Practice. A writ. It is found in this sense in the ancient law authors.

An abridged statement of the party's case.

A *trial* brief properly and thoroughly prepared should contain a *statement* of the *names of the parties*, and of their residence and occupation, the character in which they sue and are sued, and wherefore they prosecute or resist the action; an abridgment of all the pleadings; a regular, chronological, and methodical *statement* of the *facts*, in plain common language; a *summary* of the *points* or *questions* in issue, and of the proof which is to support such issues, mentioning specially the names of the witnesses by which the facts are to be proved, or, if there be written evidence, an abstract of such evidence; the *personal character* of the witnesses, whether the moral character is good or bad, whether they are naturally timid or over-zealous, whether firm or wavering; of the *evidence* of the *opposite party*, if known, and such facts as are adapted to oppose, confute, or repel it.

This statement should be perspicuous and concise. The object of a brief is to inform the person who tries the case of the facts important for him to know, to present his case properly where it has been prepared by another person—as is the general practice in England, and to some extent in this country—or as an aid to the memory of the person trying a case when he has prepared it himself.

A brief on *error or appeal* is a legal argument upon the questions which the record brings before the appellate court. These are written or printed and vary somewhat according to the purposes they are to subserve.

The rules of most of the appellate courts require the filing of printed briefs for the use of the court and opposing counsel at a time designated for each side before hearing. In the rules of the supreme court and circuit court of appeals of the United States the brief is required to contain a concise statement of the case, a specification of errors relied on, including the substance of evidence, the admission or rejection of which is to be reviewed, or any extract from a charge excepted to, and a brief of argument exhibiting clearly the points of law or fact to be discussed, with proper reference to the record or the authorities relied upon. When a statute is cited, so much as is relied on should be printed at length. Such a brief will generally be sufficient to answer the requirements of any of the courts in the several states whose rules require printed briefs.

BRIEF OF TITLE. In Practice. An abridged and orderly statement of all matters affecting the title to a certain portion of real estate.

It should give the effective parts of all patents, deeds, indentures, agreements, records, and papers relating to such estate, with sufficient fulness to disclose their full effect, and should mention incumbrances existing, whether acquired by deed or use. All the documents of title should be arranged in chronological order, noticing particularly in regard to deeds, the date, names of parties, consideration, description of the property, and covenants. See 1 Chit. Pr. 304, 463; 14 Am. L. Reg. N. S. 529. See ABSTRACT OF TITLE.

BRIGBOTE (Sax.). A contribution to repair a bridge.

BRINGING MONEY INTO COURT. The act of depositing money in the hands of the proper officer of the court for the purpose of satisfying a debt or duty, or of an interpleader. See PAYMENT INTO COURT.

BRITISH COLUMBIA. A province of the Dominion of Canada. It is governed by a lieutenant-governor, an executive council of five, and an assembly of 27 members. The seat of government is Victoria. Justice is administered by a chief justice and four puisne judges.

BROCAGE. The wages or commissions of a broker. His occupation is also sometimes called brocage.

BROCARIUS, BROCATOR. A broker; a middle-man between buyer and seller; the agent of both transacting parties. Used in the old Scotch and English law. Bell, Dict.; Cowel.

BROCELLA. A thicket, or covert, of bushes and brushwood. *Browse* is said to be derived hence. Cowel.

BROKERAGE. The trade or occupation of a broker; the commissions paid to a broker for his services.

BROKERS. Those who are engaged for others in the negotiation of contracts relative to property, with the custody of which they have no concern. Paley, Agency 13. See Comyns, Dig. *Merchant*, C.

A broker is, for some purposes, treated as the agent of both parties; but, in the first place, he is deemed the agent only of the person by whom he is originally employed, and does not become the agent of the other until the bargain or contract has been definitely settled, as to the terms, between the principals, when he becomes the agent of both parties for the purpose of executing the bought and sold notes; Paley, Ag, Lloyd ed. 171, note p.; 1 Y. & J. 387; 13 Metc. 363; Whart. Ag. § 715: 71 Pa. 69; 5 B. & Ald. 333; 27 Me. 362; 33 Wis. 668; 32 La. Ann. 210.

A commission merchant differs from a broker in that he may buy and sell in his own name without disclosing his principal, while the broker can only buy or sell in the name of his principal. A commission merchant has a lien upon the goods for his charges, advances, and commissions, while the broker has no control of the property and is only responsible for bad faith; 38 Fed. Rep. 635.

Bill and Note Brokers negotiate the purchase and sale of bills of exchange and promissory notes.

They are paid a commission by the seller of the securities; and it is not their custom to disclose the names of their principals. There is an implied warranty that what they sell is what they represent it to be; and should a bill or note sold by them turn out to be a forgery, they are held to be responsible; but it would appear that by showing a payment over to their principals, or other special circumstances attending the transaction proving that it would be inequitable to hold them responsible, they will be discharged; Edw. Fact. & Bro. § 10; 5 R. I. 218; *contra*, 29 Me. 434; 4 Duer 79.

Exchange Brokers negotiate bills of exchange drawn on foreign countries, or on other places in this country.

It is sometimes part of the business of exchange brokers to buy and sell uncurrent bank notes and gold and silver coins, as well as drafts and checks drawn or payable in other cities; although, as they do this at their own risk and for their own profit, it is difficult to see the reason for calling them brokers. The term is often thus erroneously applied to all persons doing a money business.

Insurance Brokers procure insurance, and negotiate between insurers and insured.

Merchandise Brokers negotiate the sale of merchandise without having possession or control of it, as factors have.

Pawnbrokers lend money in small sums, on the security of personal property, generally at usurious rates of interest. They are licensed by the authorities, and excepted from the operation of the usury laws.

Real Estate Brokers. Those who negotiate the sale or purchase of real property. They are a numerous class, and, in addition to the above duty, sometimes procure loans on mortgage security, collect rents, and attend to the letting and leasing of houses and lands.

Ship Brokers negotiate the purchase and sale of ships, and the business of freighting vessels. Like other brokers, they receive a commission from the seller only.

Stock Brokers. Those employed to buy and sell shares of stocks in incorporated companies, and the indebtedness of governments.

In the larger cities, the stock brokers are associated together under the name of the *Board of Brokers*. See STOCK EXCHANGE. This Board is an association admission to membership in which is guarded with jealous care. Membership is forfeited for default in carrying out contracts, and rules are prescribed for the conduct of the business, which are enforced on all members. The purchases and sales are made at sessions of the Board, and are all officially recorded and published by an officer of the association. Stock brokers charge commission to both the buyers and sellers of stocks.

See Story, Ag. § 28; Malynes, *Lex Merc.* 143; Liverm. Ag.; Chit. Com. Law; Whart. Ag.; Benj. Sales; Lewis, Stock Exchange; Bid. Stock Brokers; Mechem, Ag.

BROTHEL. A bawdy-house; a common habitation of prostitutes.

Such places have always been deemed common nuisances in the United States, and the keepers of them may be fined and imprisoned. Till the time of Henry VIII. they were licensed in England, but that prince suppressed them. See Coke, 2d Inst. 205; BAWDY-HOUSE. For the history of these pernicious places, see Merlin, *Rép. mot. Bordel;* Parent Duchatellet, *De la Prostitution dans la Ville de Paris.* c, 5, § 1; *Histoire de la Législation sur les Femmes publiques*, etc., par M. Sabatier.

BROTHER. He who is born from the same father and mother with another, or from one of them only.

Brothers are of the whole blood when they are born of the same father and mother, and of the half-blood when they are the issue of one of them only. In the civil law, when they are the children of the same father and mother, they are called *brothers germain;* when they descend from the same father but not the same mother, they are *consanguine brothers;* when they are the issue of the same mother, but not the same father, they are *uterine brothers.* A *half-brother* is one who is born of the same father or mother, but not of both; one born of the same parents before they were married, a *left-sided brother;* and a bastard born of the same father or mother is called a *natural brother.* See BLOOD; HALF-BLOOD; LINE; Merlin, *Répert. Frère; Dict. de Jurisp. Frère;* Code 3. 28. 27; Nov. 84, præf.; Dane, Abr. Index; 44 U. C. Q. B. 536; 3 Mas. 398; 2 Pet. 58; 52 N. Y. 67.

To obtain a conviction of the crime of incest, under a statute forbidding the marriage of brother and sister, it is not necessary to show legitimacy of birth; 34 Ia. 547.

BROTHER-IN-LAW. The brother of a wife, or the husband of a sister.

There is no *relationship*, in the former case, between the husband and the brother-in-law, nor in the latter, between the brother and the husband of the sister: there is only *affinity* between them. See Vaugh. 302, 329.

BRUISE. **In Medical Jurisprudence.** An injury done with violence to the person, without breaking the skin: it is nearly synonymous with *contusion (q. v.)*. 1 Ch. Pr. 38. See 4 C. & P. 381, 487, 558, 565.

BUBBLE ACT. The name given to the statute 6 Geo. I. c. 18, which was passed in 1719, and was intended "for restraining several extravagant and unwarrantable

practices therein mentioned." See 2 P. Wms. 219.

BUGGERY. See SODOMY.

BUILDING. An edifice, erected by art, and fixed upon or over the soil, composed of stone, brick, marble, wood, or other proper substance, connected together, and designed for use in the position in which it is so fixed. Every building is an accessory to the soil, and is therefore real estate: it belongs to the owner of the soil; Cruise, Dig. tit. 1, s. 46; but a building placed on another's land by his permission is the personal estate of the builder; 2 Bla. Com. 17.

BUILDING ASSOCIATIONS. Co-operative associations, usually incorporated, established for the purpose of accumulating and loaning money to their members upon real estate security. It is usual for the members to make monthly payments upon each share of stock, and for those who borrow money from the association to make such payments in addition to interest on the sum borrowed. When the stock, by successive payments and the accumulation of interest, has reached par, the mortgages given by borrowing members are cancelled, and the non-borrowing members receive in cash the par of their stock. See Endlich, Build. Assoc.; Wrigl. Build. Assoc.

A stockholder who actively or passively concurs in the management of the affairs of a building association must bear his share of the losses during his membership resulting from such management; 20 D. C. 455.

In considering the question of usury in a loan from a building association, payments made by the borrower as dues are not to be considered as interest, as such payments are made in order to acquire an interest in the property of the association and not for the use of money; 52 Fed. Rep. 618; a premium bid for a loan cannot be allowed as a cloak for usury; 86 Tex. 476.

Fines imposed for default in payment of dues and interest cannot be collected by foreclosure of a mortgage given to secure payment of an amount borrowed, unless it has been agreed that this may be done; 51 N. J. Eq. 272.

BULK. Merchandise which is neither counted, weighed, nor measured.

A sale by bulk is a sale of a quantity of goods such as they are, without measuring, counting, or weighing. La. Civ. Code, art. 3522, n. 6.

BULL. A letter from the pope of Rome, written on parchment, to which is attached a leaden seal impressed with the images of Saint Peter and Saint Paul.

There are three kinds of apostolical rescripts—the *brief*, the *signature*, and the *bull*; which last is most commonly used in legal matters. Bulls may be compared to the edicts and letters-patents of secular princes: when the bull grants a favor, the seal is attached by means of silken strings; and when to direct execution to be performed, with flax cords. Bulls are written in Latin, in a round and Gothic hand. Ayliffe, Par. 132; Ayliffe, Pand. 21; Merlin, *Répert.*

BULLETIN. An official account of public transactions on matters of importance. In France, it is the registry of the laws.

BULLION. The term bullion is commonly applied to uncoined gold and silver, in the mass or lump.

It includes, *first*, grains of gold, whether large or small, the former being called lumps, or nuggets, the latter, gold dust; *second*, amalgams, in which quicksilver has been used as an agent to collect or segregate the metals; silver thus collected, and from which the quicksilver has been expelled by pressure and heat, is called *plata pura*; *third*, bars and cakes; *fourth*, plate, in which is included all articles for household purposes made of gold or silver; *fifth*, jewelry, or personal ornaments, composed of gold or silver, or both. The term bullion also includes—*sixth*, foreign coins; for, as foreign coins are not a legal tender, or, in other words, not *money*, it follows that they are only pieces of gold or silver at the mint. Such coins, when received on deposit, are treated as other deposits of gold or silver; they are weighed, and their fineness is ascertained by assay, and their value determined by their weight and fineness.

When bullion is brought to the mint for coinage, it is received by the superintendent. From the weight of the bullion and the report of the assayer, he computes the value of each deposit and also the amount of the charges or deductions, of all which he gives a detailed memorandum to the depositor, together with a certificate of the net amount of the deposit which is countersigned by the assayer. When the coins or bars which are the equivalent of any deposit of bullion are ready for delivery, they are paid to the depositor or his order by the superintendent; and the payments shall be made, if demanded, in the order in which the bullion shall have been brought to the mint, and in the denomination of coins delivered, the treasurer shall comply with the wishes of the depositor, unless when impracticable or inconvenient to do so. Act of Congress, Feb. 12, 1873, c. 131, § 45; Rev. Stat. U. S. § 3506, 3529. By act of Feb. 12, 1873, c. 131, § 66 (Rev. Stat. U. S. 3495), the different mints of the United States are those of Philadelphia, San Francisco, New Orleans, Carson, and Denver; the assay offices are at New York, Boise City, Idaho, Charlotte, North Carolina, Helena, Montana, and St. Louis.

The business of the assay office in New York is in all respects similar to that of the mints, except that bars only and not coin are manufactured therein, and no metal is purchased for minor coinage; Act of Feb. 12, 1873, Rev. Stat. U. S. § 3553; that of other assay offices is confined to the receipt of gold and silver bullion for melting and assaying, to be returned to the depositors in bars with weight and fineness stamped thereon; Rev. Stat. § 3558.

BULLION FUND. A deposit of pub-

lic money at the mint and its branches. The object of this fund is to enable the mint to make returns of coins to private depositors of bullion without waiting until such bullion is actually coined. If the bullion fund is sufficiently large, depositors are paid as soon as their bullion is melted and assayed and the value ascertained. It thus enables the mint to have a stock of coin on hand to pay depositors in advance. Such bullion becomes the property of the government, and, being subsequently coined, is available as a means of prompt payment to other depositors ; Act of June 22, 1874, Rev. Stat. U. S. § 3545.

BUNDLE. To sleep on the same bed without undressing ; applied to the custom of a man and woman, especially lovers, thus sleeping. A. & E. Ency. See 2 Cai. 219 ; 3 Clark (Pa. L. J. Rep.) 169.

BUOY. A piece of wood, or an empty barrel, or other thing, moored at a particular place and floating on the water, to show the place where it is shallow, to mark the channel, or to indicate the danger there is to navigation.

The act of congress approved the 28th September, 1850, enacts "that all buoys along the coasts, in bays, harbors, sounds, or channels, shall be colored and numbered, so that, passing up the coast or sound, or entering the bay, harbor, or channel, red buoys, with even numbers, shall be passed on the starboard hand, black buoys, with uneven numbers, on the port hand, and buoys with red and black stripes on either hand. Buoys in channel-ways to be colored with alternate white and black perpendicular stripes."

BURDEN OF PROOF. The duty of proving the facts in dispute on an issue raised between the parties in a cause. See 16 N. Y. 66 ; 64 Ind. 461 ; 100 Mass. 487.

Burden of proof is to be distinguished from *prima facie* evidence or a *prima facie* case. Generally, when the latter is shown, the duty imposed upon the party having the burden will be satisfied ; but it is not necessarily so ; 6 Cush. 364 ; 11 Metc. 460 ; 22 Ala. 20 ; 7 Blackf. 427 ; 1 Gray 61.

The burden of proof lies upon him who substantially asserts the affirmative of the issue ; 1 Greenl. Ev. § 74 ; Tayl. Ev. 233, 341 ; 7 E. L. & Eq. 508 ; 3 M. & W. 510 ; but where the plaintiff grounds his case on negative allegations, he has the burden ; 1 Term 141 ; 2 M. & S. 395 ; 1 C. & P. 220 ; 5 B. & C. 758 ; 1 Me. 134 ; 2 Pick. 103 ; 100 Mass. 487 ; 141 *id.* 123 ; 1 Greenl. Ev. § 81 ; 107 Ind. 527. As a general rule the burden of proof is upon the plaintiff to establish the facts alleged as the cause of action ; 79 Cal. 77 ; 74 Ia. 670 ; 73 *id.* 649 ; 84 Ala. 88 ; 78 Ga. 641 ; but in certain forms of action the burden may by the pleadings be shifted to the defendant.

In criminal cases, on the twofold ground that a prosecutor must prove every fact necessary to substantiate his charge against a prisoner, and that the law will presume innocence in the absence of convincing evidence to the contrary, the burden of proof, unless shifted by legislative interference, will fall, in criminal proceedings, on the prosecuting party, though in order to convict he must necessarily have recourse to negative evidence ; 1 Tayl. Ev. 8th ed. §§ 113, 371 ; 12 Wheat. 460. The burden of proof is throughout on the government, to make out the whole case ; and when a *prima facie* case is established, the burden of proof is not thereby shifted upon the defendant, and he is not bound to restore himself to that presumption of innocence in which he was at the commencement of the trial ; 1 B. & H. Lead. Cr. Cas. 352 ; 153 Mich. 63 ; 62 Ia. 150 ; 73 Ala. 366 ; 48 Mich. 31. See 9 Metc. 93 ; 2 Gratt. 594 ; 1 Wright, Ohio 20 ; 5 Yerg. 340 ; 16 Miss. 401 ; but as every man is presumed to be sane till the contrary is shown, the burden of establishing the defence of insanity rests upon the defendant ; Whart. Cr. Ev. 9th ed. § 336 ; Bailey, Onus Prob. 148 ; 4 Cra. C. C. 514 ; 7 Gray 583 ; the Pomeroy case in Massachusetts before Gray, J., reported in Whart. Hom. 753, Append. ; 20 Cal. 518 ; 20 Gratt. 860 ; 3 C. & K. 138 ; 76 Pa. 414 ; 53 Mo. 267 ; 26 Ark. 332 ; 47 Cal. 134 ; *contra*, 63 Ala. 307 ; s. c. 35 Am. Rep. 30, and note ; 6 Tex. App. 490 ; 66 Ind. 94 ; 16 N. Y. 58 ; 75 N. Y. 159 ; 88 N. Y. 81 ; 56 Miss. 269 ; 17 Mich. 8 ; 3 Heisk. 348 ; 40 Ill. 352.

In criminal cases, where the defence of insanity is interposed, the question of the burden of proof becomes somewhat complex, and there has resulted some confusion from the tendency of courts to deal with the subject from a restricted point of view. It is technically true as stated that the burden is primarily upon the defendant because of the presumption of sanity. It has, however, been held, in many cases, that, after proof casting doubt upon the sanity of the prisoner, the burden is shifted to the prosecution, which, after all, must show an offence committed as charged and by a person fully responsible for his acts. The true rule probably is that the prosecution may rest on the presumption of sanity, without evidence, until the defence has seriously challenged it, and then upon the whole evidence the burden remains upon the prosecution to satisfy the jury beyond a reasonable doubt, to the benefit of which the prisoner is entitled on this as on every other point ; 160 U. S. 469, where a large number of cases are cited in argument. See also 3 W. & B. Med. Jur. 509, and cases cited in notes, and Guiteau's Case, 10 Fed. Rep. 161.

BUREAU (Fr.). A place where business is transacted.

In the classification of the ministerial officers of government, and the distribution of duties among them, a bureau is understood to be a division of one of the great departments of which the secretaries or chief officers constitute the cabinet.

BURGAGE. A species of tenure, described by old law-writers as but tenure in socage, where the king or other person was lord of an *ancient borough*, in which the tenements were held by a rent certain.

Such boroughs had, and still have, certain peculiar customs connected with the tenure, which distinguished it from the ordinary socage tenure. These customs are known by the name of Borough-Eng-

lish; and they alter the law in respect of descent, as well as of dower, and the power of devising. By it the youngest son inherits the lands of which his father died seised. A widow, in some boroughs, has dower in respect to all the tenements which were her husband's; in others, she has a moiety of her husband's lands so long as she remains unmarried; and with respect to devises, in some places, such lands only can be devised as were acquired by purchase; in others, estates can only be devised for life; 2 Bla. Com. 82; Glanv. b. 7, c. 3; Littleton § 162; Cro. Car. 411; 1 Salk. 243; 2 Ld. Raym. 1024; 1 P. Wms. 63; Fitzh. Nat. Brev. 150; Cro. Eliz. 415.

BURGATOR. One who breaks into houses or enclosed places, as distinguished from one who committed robbery in the open country. Spelman, Gloss. *Burglaria.*

BURGESS. A magistrate of a borough. Blount. An officer who discharges the same duties for a borough that a mayor does for a city. The word is used in this sense in Pennsylvania.

An inhabitant of a town; a freeman; one legally admitted as a member of a corporation. Spelman, Gloss. A qualified voter. 3 Steph. Com. 192. A representative in parliament of a town or borough. 1 Bla. Com. 174.

BURGESS ROLL. A list of those entitled to new rights under the act of 5 & 6 Will. IV. c. 74; 3 Steph. Com. 11th ed. 34, 38.

BURGHMOTE. In Saxon Law. A court of justice held twice a year, or oftener, in a *burg.* All the thanes and free owners above the rank of ceorls were bound to attend without summons. The bishop or lord held the court. Spence, Eq. Jur.

BURGLAR. One who commits burglary.

He that by night breaketh and entereth into the dwelling-house of another. Wilmot, Burgl. 3.

BURGLARIOUSLY. In Pleading. A technical word which must be introduced into an indictment for burglary at common law. The essential words are "feloniously and burglariously broke and entered the dwelling-house in the night-time"; Whart. Cr. Pl. 9th ed. § 265.

No other word at common law will answer the purpose, nor will any circumlocution be sufficient; 4 Co. 39; 5 *id.* 121; Cro. Eliz. 920; Bacon, Abr. *Indictment* (G, C); 35 W. Va. 280. But there is this distinction: when a statute punishes an offence, by its legal designation, without enumerating the acts which constitute it, then it is necessary to use the terms which technically charge the offence named, at common law. But this is not necessary when the statute describes the whole offence, and the indictment charges the crime in the words of the statute. Thus, an indictment which charges the statute crime of burglary is sufficient, without averring that the crime was committed "burglariously;" 4 Metc. 357. See 29 Tex. 47; 64 Hun 72.

BURGLARY. In Criminal Law. The breaking and entering the house of another in the night-time, with intent to commit a felony therein, whether the felony be actually committed or not; Co. 3d Inst. 63; 1 Hale, Pl. Cr. 549; 1 Hawk. Pl. Cr. c. 38, s. 1; 4 Bla. Com. 224; 2 East, Pl. Cr. c. 15, s. 1, 8th ed. 359; 2 Russ. Cr. 2; Rosc. Cr. Ev. 252; 1 Coxe 441; 7 Mass. 247; 1 Whart. Cr. L. 9th ed. § 758; 40 Ala. 334.

In what place a burglary can be committed. It must, in general, be committed in a mansion-house, actually occupied as a dwelling; but if it be left by the owner *animo revertendi*, though no person resides in it in his absence, it is still his mansion; Fost. 77; 3 Rawle 207; 10 Cush. 478. See DWELLING-HOUSE. But burglary may be committed in a church, at common law. And under the statutes of some of the states, it has been held that it could be committed in a store over which were rooms in which the owner lived; 71 N. Y. 561. A shoe-shop in a room connected with the dwelling is a part of it; 98 Mich. 26; a wheat house; 1 Lea 444; a railroad depot; 51 Vt. 287; a stable; 94 Ill. 456; but not a mill-house, seventy-five yards from the owner's dwelling, and not shown to be appurtenant; 3 Cox 581; Co. 3d Inst. 64. It must be the dwelling-house of another person; 2 Bish. Cr. Law § 90; 2 East, Pl. Cr. 502. See 4 Dev. & B. 422; 12 N. H. 42; 1 R. & R. 525; 1 Mood. 42. A storehouse in which a clerk sleeps to protect the property is a dwelling; 90 N. C. 730; 68 *id.* 207; 2 Cra. 21.

At what time it must be committed. The offence must be committed in the night; for in the daytime there can be no burglary; 4 Bla. Com. 224; 1 C. & K. 77; 16 Conn. 32; 10 N. H. 105. For this purpose it is deemed night when by the light of the sun a person cannot clearly discern the face or countenance of another; 1 Hale, Pl. Cr. 550; Co. 3d Inst. 62; Clark, Cr. L. 237; 1 C. & P. 297; 7 Dane, Abr. 134. This rule, it is evident, does not apply to moonlight; 4 Bla. Com. 224; 2 Russ. Cr. 32; 10 N. H. 105; 6 Miss. 20; 111 N. C. 690. The breaking and entering need not be done the same night; 1 R. & R. 417; but it is necessary that the breaking and entering should be in the night-time; for if the breaking be in daylight and the entry in the night, or *vice versa*, it is said, it will not be burglary; 1 Hale, Pl. Cr. 551; 2 Russ. Cr. 32. But *quære*, Wilmot, Burgl. 9. See Comyns, Dig. *Justices*, P, 2; 2 Chit. Cr. Law 1092. In some states by statute the breaking and entering in the daytime with intent to commit a misdemeanor or felony is burglary; 3 Wash. St. 131; 111 Mo. 257.

The means used. There must be both a *breaking* and an *entry* or an *exit.* An *actual breaking* takes place when the burglar breaks or removes any part of the house, or

the fastenings provided for it, with violence; 1 Bish. Cr. Law 91. Breaking a window, taking a pane of glass out, by breaking or bending the nails or other fastenings; 1 C. & P. 300; 9 *id.* 44; 1 R. & R. 341, 499; 1 Leach 406; 52 Ala. 376; cutting and tearing down a netting of twine nailed over an open window; 8 Pick. 354, 384; 36 N. E. Rep. (Ind.) 278; raising a latch, where the door is not otherwise fastened; 1 Stra. 481; 8 C. & P. 747; Coxe 439; 1 Hill, N. Y. 336; 25 Me. 500; 1 Houst. Cr. Cas. 367, 402; 1 Lea 414; 34 Ohio 426; 81 Iowa 93; picking open a lock with a false key; putting back the lock of a door, or the fastening of a window, with an instrument; lowering a window fastened only by a wedge or weight; 1 R. & R. 355, 451; 117 Mo. 395; 52 Ala. 376; or opening a door when not locked or bolted; 77 Ga. 762; *contra*, 13 S. W. Rep. (Tex.) 609; 20 Iowa 413; 34 Ohio St. 426; 22 Mich. 229; 63 Ala. 96; 68 Ill. 271; turning the key when the door is locked in the inside, or unloosing any other fastening which the owner has provided; lifting a trap-door; 1 Mood. 377; but see 4 C. & P. 231; are several instances of actual breaking. But removing a loose plank in a partition wall was held not a breaking; 1 Mass. 476. According to the Scotch law, entering a house by means of the true key, while in the door, or when it had been stolen, is a breaking; Alison, Pr. 284. See 1 Swint. Just. 433. *Constructive breakings* occur when the burglar gains an entry by fraud; 1 Cr. & D. 202; Hob. 62; 18 Ohio 308; 9 Ired. 463; 82 Pa. 306; 85 *id.* 54; by conspiracy or threats; 1 Russ. Cr. Graves ed. 792; 2 *id.* 2; 2 Chit. Cr. Law 1093; 98 N. C. 629. Where one is let into a store in the nighttime on pretence of making a purchase and while in he unbolts a door and admits his accomplice, who secretes himself on the inside and afterwards steals, both may be convicted of breaking and entering; 158 Mass. 18. Where a window is slightly raised in the daytime so as to prevent the bolt from being effectual, it would not prevent the subsequent breaking and entering in the night-time through the window from being burglary; 98 Mich. 26. The breaking of an inner door of the house will be sufficient to constitute a burglary; 1 Hale, Pl. Cr. 553; 1 Stra. 481; 8 C. & P. 747; 1 Hill & D. 63; 2 Bish. Cr. Law § 97; and it is not necessary that such breaking be accompanied with an intention to commit a felony in the very room entered; 5 Pa. 66. It is error to charge that the entry through an open door in the nighttime with intent to steal is burglary; 21 S. W. Rep. (Tex.) 360.

Any, the least *entry*, with the whole or any part of the body, hand, or foot, or with any instrument or weapon, introduced for the purpose of committing a felony, will be sufficient to constitute the offence; Co. 3d Inst. 64; 4 Bla. Com. 227; Bacon, Abr. *Burglary* (B); Comyns, Dig. *Justices*, P, 4; 40 Ala. 334; 50 *id.* 153; 42 Tex. 276; 111 Mass. 395; 44 Mich. 305. Where a person enters a chimney of a storehouse intending to go down such into the store to steal, he is guilty of burglary; 97 Ala. 81. But the introduction of an instrument, in the act of breaking the house, will not be sufficient entry unless it be introduced for the purpose of committing a felony; 1 Leach 406; 1 Mood. 183; 1 Gabb. Cr. Law 174. The whole physical frame need not pass within; 2 Bish. Cr. Law § 92; 1 Gabb. Cr. Law 176. See 1 R. & R. 417; 7 C. & P. 432; 9 *id.* 44; 4 Ala. N. S. 643.

There was, at common law, doubt whether breaking out of a dwelling-house would constitute burglary; 4 Bla. Com. 227; 1 B. & H. Lead. Cr. Cas. 540; but it was declared to be so by stat. 12 Anne, c. 7, § 3, and 7 & 8 Geo. IV. c. 29, § 11. The better opinion seems to be that it was not so at common law; 82 Pa. 324; Whart. Cr. L. 9th ed. § 771; *contra*, 43 Conn. 489; s. c. 21 Am. Rep. 665. As to what acts constitute a breaking out, see 1 Jebb 99; 8 C. & P. 747; 1 Russ. Cr. Graves ed. 792; 1 B. & H. Lead. Cr. Cas. 540–544.

The intention. The intent of the breaking and entry must be felonious; if a felony, however, be committed, the act will be *prima facie* evidence of an intent to commit it; 1 Gabb. Cr. Law 192. See 31 Tex. Cr. R. 359; 42 N. H. 485; 65 Cal. 225. See 6 R. I. 195; 20 Pick. 356; 63 Ala. 143. If the breaking and entry be with an intention to commit a trespass, or other misdemeanor, and nothing further is done, the offence will not be burglary; 7 Mass. 245; 16 Vt. 551; 96 Cal. 239; 1 Hale, Pl. Cr. 560; East, Pl. Cr. 509, 514, 515; 2 Russ. Crimes 33. Consult Bishop, Chitty, Clark, Wharton, Gabbett, Russell, on Criminal Law; Bennett & Heard, Lead. Cr. Cas.; Wilmot, Digest of Burglary.

BURGOMASTER. In Germany, this is the title of an officer who performs the duties of a mayor.

BURIAL. The act of interring the dead.

No burial is lawful unless made in conformity with the local regulations; and when a dead body has been found, it cannot be lawfully buried until the coroner has holden an inquest over it. In England it is the practice for coroners to issue warrants to bury, after a view. The leaving unburied the corpse of a person for whom the defendant is bound to provide Christian burial, as a wife or child, is an indictable misdemeanor, if he is shown to have been of ability to provide such burial. 2 Den. Cr. Cas. 325. See DEAD BODY.

BURLAW COURTS. In Scotch Law. Assemblages of neighbors to elect burlaw men, or those who were to act as rustic judges in determining disputes in their neighborhood. Skene; Bell, Dict.

BURNING. See ACCIDENT; FIRE.

BURNING IN THE HAND. When a layman was admitted to benefit of the clergy he was burned in the hand, "in

the brawn of the left thumb," in order that he might not claim the benefit twice. This practice was finally abolished by stat. 19 Geo. III. c. 74; though before that time the burning was often done with a cold iron; 12 Mod. 448; 4 Bla. Com. 267. See BENEFIT OF CLERGY.

BURYING-GROUND. A place appropriated for depositing the dead; a cemetery. In Massachusetts, burying-grounds cannot be appropriated to roads without the consent of the owners. Mass. Gen. Stat. 244. So in Pennsylvania by acts passed in 1849 and 1861. See CEMETERY.

BUSHEL. The Winchester bushel, established by the 13 Will. III. c. 5 (1701) was made the standard of grain. A cylindrical vessel, eighteen and a half inches in diameter, and eight inches deep inside, contains a bushel; the capacity is 2145.42 cubic inches. The bushel established by the 5 & 6 Geo. IV. c. 74, is to contain 2218.192 cubic inches. This measure has been adopted in many of the United States. In New York the heaped bushel is allowed, containing 2815 cubic inches; in Connecticut, the bushel holds 2198 cubic inches; in Kentucky, 2150⅜; in Indiana, Ohio, Mississippi, and Missouri, it contains 2150.4 cubic inches. Dane, Abr. c. 211, a. 12, s. 4. See the whole subject discussed in report of the Secretary of State of the United States to the Senate, Feb. 22, 1821.

BUSINESS. That which occupies the time, attention, and labor of men for the purpose of livelihood or profit, but it is not necessary that it should be the sole occupation or employment. The doing of a single act pertaining to a particular business will not be considered engaging in or carrying on the business, yet a series of such acts would be so considered. 50 Ala. 130; 23 N. Y. 244.

BUSINESS HOURS. The time of the day during which business is transacted. In respect to the time of presentment and demand of bills and notes, business hours generally range through the whole day down to the hours of rest in the evening, except when the paper is payable at a bank or by a banker; 2 Hill, N. Y. 835. See 15 Me. 67; 17 *id.* 230; Byles, Bills 283.

The term "usual business hours" does not mean the time an employer may require his agent's services, but those of the community generally; 18 Minn. 154.

BUTLERAGE. A certain portion of every cask of wine imported by an alien, which the king's butler was allowed to take.

Called also prisage; 2 Bulstr. 254. Anciently, it might be taken also of wine imported by a subject; 1 Bla. Com. 315; *Termes de la Ley;* Cowel.

BUTT. A measure of capacity, equal to one hundred and eight gallons; also denotes a measure of land. Jac. Dict.; Cowel. See MEASURE.

BUTTALS. The bounding lines of land at the end; abuttals, which see.

BUTTS. The ends or short pieces of arable lands left in ploughing. Cowel.

BUTTS AND BOUND. The lines bounding an estate. The angles or points where these lines change their direction. Cowel; Spelman, Gloss. See ABUTTALS.

BUYING TITLES. The purchase of the rights of a disseisee to lands of which a third person has the possession.

When a deed is made by one who, though having a legal right to land, is at the time of the conveyance disseised, as a general rule of the common law, the sale is void: the law will not permit any person to buy a quarrel, or, as it is commonly termed, a pretended title. Such a conveyance is an offence at common law and by a statute of 32 Hen. VIII. c. 9. This rule has been generally adopted in the United States, and is affirmed by expressed statute in some of the states; 3 Washb. R. P. 5th ed. *596. In the following states the act is unlawful, and the parties are subject to various penalties in the different states: in *Connecticut*, 4 Conn. 575; *Georgia*, 29 Ga. 124; *Indiana*, 23 Ind. 432; 8 Blackf. 366; *Kentucky*, 1 Dana 566; 2 *id.* 374; see 2 Litt. 225, 393; 4 Bibb. 424; *Massachusetts*, 5 Pick. 356; 6 Metc. 407; *Mississippi*, 26 Miss. 599; *New Hampshire*, 12 N. H. 291; *New York*, 24 Wend. 87; see 4 Wend. 474; 7 *id.* 53, 152; 8 *id.* 629; 11 *id.* 442; *North Carolina*, 1 Murph. 114; 4 Dev. 495; *Ohio*, Walker, Am. Law 297, 351; *Vermont*, 6 Vt. 198; see 38 Vt. 204, 553.

By the transaction, the grantor does not lose his estate; 5 Pick. 348; 101 Mass. 179. As to what constitutes adverse possession, see 29 Me. 128.

In *Illinois*, 53 Ill. 279; *Missouri*, Rev. Stat. 119; *Pennsylvania*, 2 Watts 272; *Ohio*, 9 Ohio 96; *Wisconsin*, 14 Wis. 471; *South Carolina*, 12 Rich. 420; *Maine*, Rev. Stat. c. 73, § 1; *Michigan*, 21 Mich. 82; such sales are valid. See CHAMPERTY.

BY. Near, beside, passing in presence, and it also may be used as exclusive. 3 P. & W. 48.

When used descriptively in a grant it does not mean in immediate contact with, but near to the object to which it relates. It is a relative term, meaning, when used in land patents, very unequal and different distances; 6 Gill 121.

BY-BIDDING. Bidding with the connivance or at the request of the vendor of goods by auction, without an intent to purchase, for the purpose of obtaining a higher price than would otherwise be obtained.

By-bidders are also called *puffers*, which see. It has been said that the practice is probably allowable if it be done fairly, with an intention only to prevent a sale at an unduly low price; 6 B. Monr. 630; 11 Paige, Ch. 439; 3 Story 622; 15 M. & W. 371; 1 Pars. Contr. 418; 11 S. & R. 86. A bidder is required to act in good faith and any combination to prevent a fair competition

would avoid the sale; 3 B. & B. 116; 5 Rich. 541; 88 Ga. 696; 23 N. H. 360; 8 How. 153. See BID; AUCTION.

Lord Mansfield held that the employment of a single puffer was a fraud; Cowp. 395; this rule was afterwards relaxed, in equity only, so as to allow a single bidder; 12 Ves. 477. The rule was stated in L. R. 1 Ch. 10, to be, that a single puffer will vitiate a sale in law, but may be allowed in equity; though either at law or in equity, such bidding is permissible upon notice at the sale. By 30 and 31 Vict. c. 48, the rule in equity was declared to be the same as at law. See L. R. 9 Eq. 60. Lord Mansfield's opinion has been followed in Pennsylvania; 14 Pa. 446, per Gibson, C. J., overruling 11 S. & R. 86. In New Hampshire; 23 N. H. 360. In Louisiana; 13 La. 287. In New Jersey it seems that if there is a *bona fide* bid next before that of the buyer, the bidding of puffers will not avoid the sale (so held also in 3 Story 611); but it is intimated that it would be a better rule to forbid puffing; 20 N. J. Eq. 159. Kent favors Lord Mansfield's rule; 2 Kent *540. The employment of a puffer to enhance the price of property sold is a fraud; 17 Hun 373. So held in 8 How. 378. Exceptions to the rule may occur when it does not appear that the buyer paid more than the value of the property or he had determined to bid; 6 Ired. Eq. 430. A purchaser thus misled must restore the property as soon as he discovers the fraud; 33 Penn. 251; 3 Story 611, 631. In 3 Metc. Mass. 384, the validity of the sale is held to depend upon the *animus* with which the puffing is carried on. In Massachusetts where a sale is advertised to be "without reserve" or "positive," the secret employment of by-bidders renders the sale voidable by the buyer; Usher, Sales § 286; 114 Mass. 187. See 11 Irish Law Times 643.

BY BILL. Actions commenced by *capias* instead of by original writ were said to be *by bill*. 3 Bla. Com. 285, 286. See 5 Hill 213.

The usual course of commencing an action in the King's Bench is by a bill of Middlesex. In an action commenced *by bill* it is not necessary to notice the form or nature of the action; 1 Chit. Pl. 283.

BY ESTIMATION. A term used in conveyances. In sales of land it not unfrequently occurs that the property is said to contain a certain number of acres *by estimation*, or so many acres, *more or less*. When these expressions are used, if the land fall short by a small quantity, the purchaser will receive no relief. In one case of this kind, the land fell short two-fifths, and the purchaser received no relief; 2 Freem. 106; 20 Ohio 453; 9 Gill 446; 1 Call 301; 4 Mas. 419; 4 H. & M. 184; 6 Binn. 106; 1 S. & R. 166; 2 Johns. 37; 15 *id.* 471; 2 Mass. 382; 1 Root 528. The meaning of these words has never been precisely ascertained by judicial decision. See Sugden, Vend. 231–236, where he applies the rule to contracts *in fieri*. But this distinction was not accepted in 99 Mass. 234, where it was said that the Americans do not encourage litigation by reason of variation in the quantity of land sold, unless the quantity was of the essence of the contract, and the cases cited under the articles MORE OR LESS; SUBDIVISION.

BY-LAWS. Rules and ordinances made by a corporation for its own government. See 7 Barb. 539.

The power to make by-laws is usually conferred by express terms of the charter creating the corporation. When not expressly granted, it is given by implication, and it is incident to the very existence of a corporation; Brice, *Ultra Vires*, 3d ed. 6; Moraw. Priv. Corp. 491. When there is an express grant, limited to certain cases and for certain purposes, the corporate power of legislation is confined to the objects specified, all others being excluded by implication; 2 P. Wms. 207; Ang. Corp. 177. The power of making by-laws is to be exercised by those persons in whom it is vested by the charter; but if that instrument is silent on that subject, it resides in the members of the corporation at large; 1 Harr. & G. 324; 4 Burr. 2515, 2521; 6 Bro. P. C. 519; 51 Ind. 4; 12 Wend. 183; 17 Mass. 29; 33 N. H. 424; and the power to repeal them also exists; 7 Dowl. & R. 267; 18 Vt. 511; 12 East 22. The office of a by-law is to regulate the conduct and define the duties of the members towards the corporation and among themselves; 99 Mass. 70.

The constitution of the United States, and acts of congress made in conformity to it, the constitution of the state in which a corporation is located, and acts of the legislature constitutionally made, together wtih the common law as there accepted, are of superior force to any by-law; and such by-law, when contrary to either of them, is therefore void whether the charter authorizes the making of such by-law or not; because no legislature can grant power larger than that which it possesses; 7 Cow. 585, 604; 11 Wall. 369; 31 Me. 573; 35 Pa. 151; 24 Wis. 21; 31 Mich. 458; 9 Nev. 325; 1 Q. B. D. 12. By-laws must not be inconsistent with the charter; Green's Brice, *Ultra Vires*, 15.

By-laws must be reasonable; 3 Daly 20; 3 Whart. 228; 2 Mo. App. 96; and not retrospective; 9 Cal. 112; 31 Mich. 458; they bind the members; 43 Me. 192; 76 Ala. 567; 78 N. Y. 179; 70 Ga. 341; 99 Mass. 68; but a by-law void as against strangers or non-assenting members, may be good as a contract against assenting members; 19 Johns. 456; 9 Ala. N. S. 738; 8 Metc. 321. See 24 N. J. Law 440. It has been held that third parties dealing with corporations are not bound to take notice of their by-laws; 12 Cush. 1; 3 Mas. 505; see 1 Woolw. 400; where a distinction was raised between by-laws made by the corporation and those made by the directors, so far as relates to notice to third parties; but, *contra*, 52 Barb. 399.

See, generally, Ang. Corp. c. 9; Beach, Corp.; Green's Brice, *Ultra Vires*; Field,

Corporations ; Morawetz, Corp.; Thompson, Corp.; Spelling, Corp ; Boisot, By-laws ; Bacon, Abr. ; 4 Viner, Abr. 301 ; Dane, Abr. Index ; Comyns, Dig.

BY-LAW MEN. In an ancient deed, certain parties are described as " yeomen and *by-law men* for this present year in Easinguold." 6 Q. B. 60.

They appear to have been men appointed for some purpose of limited authority by the other inhabitants, as the name would suggest, under by-laws of the corporation appointing.

BY THE BYE. In Practice. Without process. A declaration is said to be filed by the bye when it is filed against a party already in the custody of the court under process in another suit. This might have been done, formerly, where the party was under arrest and technically in the custody of the court : and even giving common bail was a sufficient custody in the King's Bench ; 1 Sellon, Pr. 228 ; 1 Tidd. Pr. 419. It is no longer allowed ; Archbold, New Pr. 293.

C.

C. The third letter of the alphabet. It was used among the Romans to denote condemnation, being the initial letter of *condemno*. See **A.**

In Rhode Island as late as 1785 it was branded on the forehead as part of the punishment for counterfeiting ; Anderson, Dict. Law.

C. F. & I. Abbreviations sometimes used in commercial transactions for cost, freight, and insurance. When so used they mean the actual cost of the goods ordered and commission, with the premium of insurance and the freight ; Benj. Sales § 887 ; L. R. 5 Ex. 179.

C. O. D. Collect on delivery. Where goods shipped are thus marked, the carrier in addition to his ordinary liabilities, and responsibilities is to collect the amount specified by the consignor, and for failure to return to him, either the price or the goods, he has a right of action on the contract against the carrier. See 59 Ind. 264; 73 Me. 278 ; 55 Ill. 140 ; 55 N. Y. 206.

These initials have acquired a fixed and determinate meaning, which courts and juries may recognize from their general information ; 73 Me. 278.

CABALLERIA. In Spanish Law. A quantity of land, varying in extent in different provinces. In those parts of the United States which formerly belonged to Spain, it is a lot of one hundred feet front, two hundred feet depth, and equivalent to five peonias. 2 White, New Recop. 49 ; 12 Pet. 444, n. ; Escriche, Dicc. Raz.

CABINET. Certain officers who, taken collectively, form a council or advisory board ; as the cabinet of the president of the United States, which is composed of the secretary of state, the secretary of the treasury, the secretary of the interior, the secretary of war, the secretary of the navy, the secretary of agriculture, the attorney-general, and the postmaster-general.

In case of the removal, death, resignation or inability of both the president and vice-president of the United States, then the members of the cabinet shall act as president until such disability is removed or a president elected, in the following order : the secretary of state, secretary of the treasury, secretary of war, attorney-general, postmaster-general, secretary of the navy, and secretary of the interior ; 24 Stat. L. p. 1.

These officers are the advisers of the president. They are also the heads of their respective departments ; and by the constitution (art. 2, sec. 2) the president may require the opinion in writing of these officers upon any subject relating to the duties of their respective departments. These officers respectively have, under different acts of congress, the power of appointing many inferior officers charged with duties relating to their departments. See Const. art. 2, sec. 2.

The cabinet meets frequently at the executive mansion, by direction of the president. No record of its doings is kept ; and it has, as a body, no legal authority. Its action is advisory merely ; and the president and heads of departments in the execution of their official duties are entitled to disregard the advice of the cabinet and take the responsibility of independent action.

In England, a board of control chosen by the legislature, out of persons whom it trusts and knows, to rule the nation. It is the connecting link between the legislative and the executive powers. The nominal prime minister is chosen by the legislature and the real prime minister for most purposes—the leader of the house of commons—almost without exception is so chosen ; Bagehot, Eng. Const.

The king, under the English constitution, is irresponsible ; or, as the phrase is, the king can do no wrong. The real responsibility of government in that country, therefore, rests with his ministers, who constitute his cabinet. The king may dismiss his ministers if they do not possess his confidence ; but they are seldom dismissed

by the king. They ordinarily resign when they cannot command a majority in favor of their measures in the house of commons.

The first lord of the treasury, the lord chancellor, the principal secretaries of state, and the chancellor of the exchequer, are always of the cabinet; but in regard to the other great officers of state the practice is not uniform, as at times they hold and at others do not hold seats in the cabinet. The British cabinet usually consists of from ten to fifteen persons. See Knight's Pol. Dict. title Cabinet; Bagehot, English Constitution; 1 Bryce, Am. Com. 81.

CACICAZGOS. **In Spanish Law.** Lands held in entail by the caciques in Indian villages in Spanish America.

CADASTRE. The official statement of the quantity and value of real property in any district, made for the purpose of justly apportioning the taxes payable on such property; 12 Pet. 428, n.; 3 Am. St. Pap. 679.

CADERE. (Lat.). To fall; to fail; to end; to terminate.

The word was generally used to denote the termination or failure of a writ, action, complaint, or attempt: as, *cadit actio* (the action fails), *cadit assisa* (the assise abates), *cadere causa* or *a causa* (to lose a cause). Abate will translate *cadere* as often as any other word, the general signification being, as stated, to fail or cease. *Cadere ab actione* (literally, to fall from an action), to fail in an action; *cadere in partem*, to become subject to a division.

To become; to be changed to; *cadit assisa in juratum* (the assize has become a jury). Calvinus, Lex.

CADET. A younger brother. One trained for the army or navy.

CADI. A Turkish civil magistrate.

CADUCA (Lat. *cadere*, to fall).

In Civil Law. An inheritance; an escheat; every thing which falls to the legal heir by descent.

By some writers *bona caduca* are said to be those to which no heir succeeds, equivalent to escheats. Du Cange.

CADUCARY. Relating to or of the nature of escheat, forfeiture or confiscation. 2 Bla. Com. 245; Black, Dict.

CÆSARIAN OPERATION. A surgical operation whereby the fœtus, which can neither make its way into the world by the ordinary and natural passage, nor be extracted by the attempts of art, whether the mother and fœtus be yet alive, or whether either of them be dead, is by a cautious and well-timed operation taken from the mother with a view to save the lives of both, or either of them.

If this operation be performed after the mother's death, the husband cannot be tenant by the curtesy; since his right begins from the birth of the issue, and is consummated by the death of the wife; but if mother and child are saved, then the husband would be entitled after her death. Wharton.

CÆTERORUM. See ADMINISTRATION.

CALEFAGIUM. A right to take fuel yearly. Blount.

CALENDAR. An almanac.

Julius Cæsar ordained that the Roman year should consist of three hundred and sixty-five days, except every fourth year, which should contain three hundred and sixty-six—the additional day to be reckoned by counting the 24th day of February (which was the 6th of the calends of March) twice. See BISSEXTILE. This period of time exceeds the solar year by eleven minutes or therebouts, which amounts to the error of a day in about one hundred and thirty-one years. In 1582 the error amounted to eleven days or more, which was corrected by Pope Gregory. Out of this correction grew the distinction between Old and New Style. The Gregorian or New Style was introduced into England in 1752, the 2d day of September (O. S.) of that year being reckoned as the 14th day of September (N. S.).

A list of causes pending in a court; as court calendar.

In Criminal Law. A list of prisoners, containing their names, the time when they were committed and by whom, and the cause of their commitments,

CALIFORNIA. The eighteenth state admitted to the Union.

In 1534 a Portuguese navigator in the Spanish service discovered the Gulf of California and penetrated into the mainland, but no settlement was made until about a century afterwards, when the Franciscan Fathers planted a mission on the site of San Diego; other settlements soon followed, and in a short time the country was entirely under the control of the priests, who accumulated great wealth. The Spanish power in the territory now constituting California was overthrown by the Mexican revolution in 1822, and the secular government by the priests was abolished. By the treaty of Guadalupe Hidalgo, May 30, 1848, terminating the war between the United States and Mexico, the latter country ceded to the United States for $15,000,000 a large tract of land including the present states of California, Nevada, and Utah, and part of Colorado and Wyoming, and of the present territories of Arizona and New Mexico, and the whole tract was called the territory of New Mexico.

The commanding officer of the U. S. forces exercised the duties of civil governor at first, but June 3, 1849, Brigadier-General Riley, then in command, issued a proclamation for holding an election August 1, 1849, for delegates to a general convention to frame a state constitution.

The convention met at Monterey, Sept. 1, 1849; adopted a constitution on October 10, 1849, which was ratified by a vote of the people, November 13, 1849. At the same time an election was held for governor and other state officers, and two members of congress.

The first legislature met at San Jose, December 15, 1849. General Riley, on December 20, 1849, resigned the administration of civil affairs to the newly elected officers under the constitution, and shortly thereafter two United States senators were elected.

In March, 1850, the senators and representatives submitted to congress the constitution, with a memorial asking the admission of the state into the American Union.

On September 9, 1850, congress passed an act admitting the state into the Union on an equal footing with the original states, and allowing her two representatives in congress until an apportionment according to an actual enumeration of the inhabitants of the United States. The third section of the act provides for the admission, upon the express condition that the people of the state, through their legislation or otherwise, shall never interfere with the primary disposal of the public lands within its limits, and shall not pass any law or do any act whereby the title of the United States to any right to dispose of the same shall be impaired or questioned; and that they shall never lay any tax or assessment of any description whatsoever upon the public domain of the United States, and that in no case shall non-resident proprietors who are citizens of the United States be taxed higher than residents; and

that all the navigable waters within the state shall be common highways, and forever free, as well to the inhabitants of the state as to the citizens of the United States, and without any tax, impost, or duty therefor.

Congress passed an act, March 8, 1851, to ascertain and settle the private land claims in the state of California. By this act a board of commissioners was created, before whom every person claiming lands in California, by virtue of any right or title derived from the Spanish or Mexican governments, was required to present his claim, together with such documentary evidence and testimony of witnesses as he relied upon. From the decision of this board an appeal might be taken to the district court of the United States for the district in which the land was situated. Both the board and the court, on passing on the validity of any claim, were required to be governed by the treaty of Guadalupe Hidalgo, the law of nations, the laws, usages, and customs of the government from which the claim was derived, the principles of equity, and the decisions of the supreme court of the United States.

A large part of the best agricultural lands of the state was claimed under Spanish and Mexican grants. The evidence in support of these grants was in many instances meagre and unsatisfactory, and the amount of litigation arising therefrom was enormous and has not yet wholly ceased. The board of commissioners, having completed its work, went out of existence.

By an act passed September 28, 1850, congress declared all laws of the United States, not locally inapplicable, in force within the State.

The constitution adopted in 1849 was amended November 4, 1856, and September 3, 1862, and on January 1, 1880, was superseded by the present constitution, which had been framed by a convention March 3, 1879, and adopted by popular vote May 7, 1879.

LEGISLATIVE POWER.—The legislative power is vested in a senate and assembly. The sessions of the legislature are biennial, commencing on the first Monday after the first day of January of the odd years.

The senate consists of forty, the assembly of eighty members—chosen by districts. The members of the assembly are elected for two years, of the senate for four years. Stringent provisions are made against lobbying, which is declared a felony.

EXECUTIVE DEPARTMENT.—The governor holds office for four years, and possesses the usual powers.

There are also a lieutenant-governor, secretary of state, controller, treasurer, surveyor-general, and attorney-general, with the usual powers appertaining to those offices, and who are elected at the same time with the governor, and for the same term.

JUDICIAL DEPARTMENT.—The judicial power is vested in the senate, sitting as a court of impeachment; supreme court, a superior court in each county, justices of the peace, and such inferior courts as the legislature may establish in cities and towns.

The supreme court consists of a chief justice and six associate justices, whose term of office is twelve years.

Two Departments are provided for—the chief justice assigning three justices to each department. Each department has power to hear and determine causes, and any three members of the court may pronounce judgment upon causes heard before a department.

The court has appellate jurisdiction in such cases as the superior court has original jurisdiction, and may issue writs of mandamus, certiorari, prohibition, and habeas corpus.

The superior court of each county may consist of one or more judges, as the legislature shall order, whose term of office is six years. There may be as many sessions of any court at once as there are judges thereof. It has original jurisdiction in all cases in equity, and all cases at law involving title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine, and in all other cases in which the demand exclusive of interest amounts to $300.00, and in criminal cases amounting to felony; of actions of forcible entry and detainer, to prevent or abate a nuisance; of proceedings in insolvency; of matters of probate; of divorce and naturalization; and has appellate jurisdiction from justices and other inferior courts in such matters as are provided by law. It may also issue writs of mandamus, etc.

In San Francisco, the superior court consists of twelve judges, who elect from among their number a presiding judge, who distributes the business among the several judges.

A judicial officer who absents himself from the state for sixty days is deemed to have forfeited his office. Before a judge can draw his monthly salary he must make affidavit that no cause remains in his court undecided, which has been submitted for a decision for a period of ninety days.

A judge cannot charge juries with respect to matters of law.

MISCELLANEOUS.—Elaborate provision is made for reaching all property for purposes of taxation, except growing crops, and many subjects usually left to legislative action or discretion are made part of the fundamental law of the state.

One article is devoted to the Chinese, whose presence is declared to be dangerous to the well being of the state. One portion of the article, to-wit, that corporations shall not employ Chinamen, has been declared inoperative, because in conflict with the constitution and treaties of the United States. No Chinese can be employed on any public work.

By the act of March 20, 1891, no Chinese can either land at or remain in any port or place within the state of California, except he be a foreign minister or other officer of the Chinese government or one of their servants, or unless he be a resident of the state at the time of the passage of the act. Cal. Stat., 1891, p. 185.

CALLING THE PLAINTIFF. In Practice. A formal method of causing a nonsuit to be entered.

When a plaintiff perceives that he has not given evidence to maintain his issue, and intends to become nonsuited, he withdraws himself; whereupon the crier is ordered to call the plaintiff, and on his failure to appear he becomes nonsuited. The phrase "let the plaintiff be called," which occurs in some of the earlier state reports, is to be explained by reference to this practice. See 3 Bla. Com. 376; 2 C. & P. 403; 5 Mass. 236; 7 *id.* 257; 4 Wash. C. C. 97.

CALLING TO THE BAR. Conferring the degree or dignity of barrister upon a member of the inns of court. Holthouse, Dict.

CALUMNIÆ JUSJURANDUM (Lat.). The oath against calumny.

Both parties at the beginning of a suit, in certain cases, were obliged to take an oath that the suit was commenced in good faith and in a firm belief that they had a good cause. Bell, Dict. The object was to prevent vexatious and unnecessary suits. It was especially used in divorce cases, though of little practical utility; Bishop, Marr. & Div. § 353; 2 Bish. Marr. Div. & Sep. §§ 264, 265. A somewhat similiar provision is to be found in the requirement made in some states that the defendant shall file an affidavit of merits.

CALUMNIATORS. In Civil Law. Persons who accuse others, whom they know to be innocent, of having committed crimes.

CAMBIO. Exchange.

CAMBIPARTIA. Champerty.

CAMBIPARTICEPS. A champertor.

CAMBIST. A person skilled in exchange; one who deals or trades in promissory notes or bills of exchange; a broker.

CAMBIUM. Change, exchange. Applied in the civil law to exchange of lands, as well as of money or debts. Du Cange.

Cambium reale or *manuale* was the term generally used to denote the technical common-law exchange of lands; *cambium locale, mercantile, or trajec-*

titium, was used to designate the modern mercantile contract of exchange, whereby a man agrees, in consideration of a sum of money paid him in one place, to pay a like sum in another place. Pothier, *de Change*, n. 12; Story, Bills § 2

CAMERA REGIS. In old English law a chamber of the king; a place of peculiar privileges especially in a commercial point of view. The city of London was so called. Year Book, p. 7, Hen. VI. 27; Burrill, Law. Dic.

CAMERA SCACCARII. The Exchequer Chamber. Spelman, Gloss.

CAMERA STELLATA. The Star Chamber.

CAMERARIUS. A chamberlain; a keeper of the public money; a treasurer. Spelman, Gloss. *Cambellarius;* 1 Perr. & D. 243.

CAMINO. In Spanish Law. A road or highway. Las Partidas, pt. 3, tit. 2, l. 6.

CAMPARTUM. A part or portion of a larger field or ground, which would otherwise be in gross or in common. Champerty.

CAMPERTUM. A cornfield; a field of grain. Cowel; Whishaw.

CAMPUM PARTERE. To divide the land. See CHAMPERTY.

CAMPUS (Lat. a field). In old European law an assembly of the people so called from being held in the open air, in some plain capable of containing a large number of persons. 1 Robertson's Charles V. App. n. 38.

In feudal or old English law a field or plain. Burrill, Law Dict.

CANADA. The name given to a confederation of all the British possessions in North America except Newfoundland.

The first explorations of this country, of which any authentic information exists, were by Jacques Cartier, between the years 1534 and 1554, thus giving to France the first claim upon its territory. Great activity was shown during these and the succeeding years on the part of Great Britain and France to acquire territorial jurisdiction on the newly discovered continent, and the division lines between their acquisitions were not very clearly marked. Those of France included Florida in the south and the lands watered by the St. Lawrence in the north, and to it all the name of "New France" was given. In 1603 an expedition for trading purposes was fitted out under the command of Samuel Champlain, whose explorations up the river St. Lawrence and its tributary, the Richelieu River, brought him to the lake which still bears his name.

The viceroyalty of New France was conferred in 1612 upon the Prince de Condé, who made a formal assignment of it in 1619 to Admiral Montmorency, who personally visited the country.

In 1628, under the rule of Cardinal Richelieu in France, the colony was ceded to "La Compagnie de Cents Associes" (The Company of the One Hundred Associates), a trading company, but armed, like the Hudson Bay Company in later years, with full power for the administration of justice in the primitive forms practicable in new countries and with mixed populations.

This company had an unsuccessful career financially, and upon its disorganization, in 1663, Louis XIV. resumed territorial jurisdiction over the colony, and in April of that year published an edict establishing a "Sovereign Council" for the government of Canada, and this council was specially instructed to prepare laws and ordinances for the administration of justice, framed as much as possible upon those then in force in France under the provisions of the "Custom of Paris."

For more than one hundred years all the legal business of the province was determined by this council—in fact, until the conquest by the English in 1759. By the terms of the capitulation, it was stipulated and conceded that the ancient laws of land tenure should continue to subsist, but it was understood that the English criminal and commercial law should be introduced and adopted.

Under this stipulation the law of France, as it existed in 1759, was recognized as the civil law of Canada, and has always since formed the basis of that law—modified, of course, after the subsequent establishment of a representative government in the colony, by the statutory provisions of the colonial parliaments. This result was applicable, however, only to that section of the country which subsequently was called Lower Canada, now the province of Quebec. The portion of the colony since known as the province of Upper Canada (now the province of Ontario) was then unsettled, and being subsequently colonized from Great Britain and her other dependencies, the whole body of law, civil as well as criminal, was based upon that in force in England.

Under the provisions of a statute passed by the imperial parliament of Great Britain in 1774, called "The Quebec Act," a legislative council of twenty-three members was established for the province, with power to enact laws. In 1791, Pitt introduced the bill into the English House of Commons which gave a constitution to Canada and divided it into the two provinces of Upper and Lower Canada. Since then (with the short interregnum from 1837 to 1841), regular parliaments have been held, at which the jurisprudence of the country and the establishment of its courts have been determined by formal acts.

In 1867, the confederation of the different North American dependencies of Great Britain, under the name of the "Dominion of Canada," was consummated by an act of the imperial parliament, at the instance and request of the different provinces, including Upper and Lower Canada (under the names of Ontario and Quebec), New Brunswick, and Nova Scotia, to which have since been added Prince Edward's Island, Manitoba, and British Columbia. The act under which this confederation was established—called The British North American Act—contains the provisions of a written constitution, under which the executive government and authority is declared to be vested in the sovereign of Great Britain, whose powers are deputed to a governor-general, nominated by the imperial government, but whose salary is paid by the Dominion. The form of government is modelled after that of Great Britain. The governor acts under the guidance of a council, nominally selected by himself, but which must be able to command the support of a majority in that branch of parliament which represents the suffrages of the electors.

The Dominion parliament consists of a senate and house of commons: the former numbering from 72 to 78 members, appointed for life. The commons consisted at confederation of 181 members, but because of certain inequalities this has been changed and the house of commons now consists of 213 members distributed as follows: Ontario 92, Quebec 65, Nova Scotia 20, New Brunswick 14, Manitoba 7, British Columbia 6, Prince Edward Island 5, Stat. of Can. 1892, p. 62.

Senators must have a property qualification of at least $4000, in real estate and personal property, and must be residents of the province for which they are appointed; and in the province of Quebec, must either reside or have their property qualification in the division which they are appointed to represent. No property qualification is required for a member of the house of commons. He need not be even a resident of the county which elects him as its representative. The limit of the term for which members of the commons are elected is five years, but a house may be dissolved at any time within that limit by order of the governor general and his council, and new elections held. This is only done when a ministry fail to command a working majority in the house and believe that additional support may be obtained by a new appeal to the suffrages of the electors.

The privileges, immunities, and powers of the senate and house of commons are within the control of the parliament of Canada—that is, of the three united branches—queen (or governor general), senate, and commons.

Any male person twenty-one years of age, a subject of her majesty by birth or naturalization, and not disqualified by law, may vote for members of the legislative assembly, if he be enrolled on the last assessment-roll, as revised, corrected, and in force, as owner, tenant, or occupant of real property of the assessed value of three hundred dollars clear of incumbrances, or of the annual clear value of thirty dollars, situated within the limits of the town or city, for municipal purposes; or as possessed of property to the clear value of two hundred dollars, or clear annual value of twenty dollars, situated within the limits of any township, parish, or place within the limits of such town or city, for representative, but not for municipal purposes; or if enrolled on such roll, in any parish, township, town, village, or place, not within the limits of a town or city entitled to send a member of the legislative assembly as owner, tenant, or occupant of property of the clear assessed value of two hundred dollars, or the clear annual value of twenty dollars, situated in the district in which such town, etc., is included. Judges of all courts holding fixed sessions, and officers of such courts, as sheriffs and the like, under a penalty of two thousand dollars, officers of the customs, returning officers of elections, and all who have been employed by any candidate in assisting or forwarding his election, are prohibited from voting.

It is declared that the free exercise and enjoyment of religious profession and worship without discrimination or preference, so that the same be not made an excuse for acts of licentiousness or a justification of practices inconsistent with the peace and safety of the province, is by the constitution and laws of this province allowed to all her majesty's subjects within the same. Consol. Can. Laws 857.

Each of the provinces has also a separate parliamentary organization for the administration of local affairs, with a lieutenant-governor for each, appointed for a term of five years by the governor-general in council.

THE JUDICIAL POWER.—The administration of the laws differs in the separate provinces. There is, however, a supreme court with ultimate jurisdiction in matters affecting the Dominion and as a final court of appeal from the provincial courts. It consists of a chief justice and five puisne judges, and holds three sessions a year at Ottawa. The exchequer court presided over by the same judges can hold sessions at any town, and is a colonial court of admiralty and exercises admiralty jurisdiction throughout Canada and the waters thereof. Certain local judges of admiralty are created with limited jurisdiction, the appeal from whose decisions lies to the Court of Exchequer, or it may lie direct to the Supreme Court of Canada under certain conditions. Stat. of Canada, 1891.

There are also provincial courts. See titles of the various Provinces, viz.: British Columbia, Manitoba, New Brunswick, North-West Territories, Nova Scotia, Ontario, Prince Edward's Island, and Quebec.

Litigants in cases in the provincial courts, involving amounts exceeding $2500, may appeal either to the supreme court or to the queen in privy council, but the decision, by whichever tribunal selected, is final.

CANAL. An artificial cut or trench in the earth, for conducting and confining water to be used for transportation. See 18 Conn. 394.

Public canals originate under statutes and charters enacted to authorize their construction and to protect and regulate their use. They are in this country constructed and managed either by the state itself, acting through the agency of commissioners, or by companies incorporated for the purpose. These commissioners and companies are armed with authority to appropriate private property for the construction of their canals, in exercising which they are bound to a strict compliance with the statutes by which it is conferred. Where private property is thus taken, it must be paid for in gold and silver; 8 Blackf. 246. Such payment need not precede or be contemporaneous with the taking; 20 Johns. 735; 4 Zabr. 587; 8 Blackf. 266; though, if postponed, the proprietor of the land taken is entitled to interest; 5 Denio 401; 1 Md. Ch. Dec. 248. The following cases relate to the rules to be observed in estimating the amount of damage to be awarded for private property taken or injured by the construction of canals; 7 Blackf. 209; 1 Watts & S. 346; 1 Pa. 462; 15 Barb. 457, 627; 24 *id.* 362; 4 Wend. 647; 1 Spenc. 249; 14 Conn. 146; 16 *id.* 98; 1 Sneed 239; 1 Sumn. 46. A city through which a canal passes cannot construct levees along its banks and recover the cost thereof from the canal company; 45 La. Ann. 6.

After the appropriation of land for a canal, duly made under statute authority, though the title remains in the original owner until he is paid therefor, he cannot sustain an action against the party taking the same for any injury thereto; 19 Barb. 263, 370; 4 Wend. 647; 20 Johns. 735; 7 Johns. Ch. 314; 19 Pa. 456. But if there be a deviation from the statute authority, the statute is no protection against suits by persons injured by such deviation; 4 Denio 356; 1 Sumn. 46; 2 Dow. 519; Coop. Ch. 77. Appraisers appointed to assess damages for land taken have no authority to entertain claims not presented in the mode and within the time prescribed by statute; 9 Barb. 496; 11 N. Y. 314. But though a special remedy for damages be given by a statute authorizing the construction of a canal, the party injured thereby is not barred of his common-law action; 24 Barb. 159; 5 Cow. 163; 16 Conn. 98. But see, to the contrary, 12 Mass. 466; 1 N. H. 339. The legislature has the exclusive power to determine when land may be taken for a canal or other public use, and the courts cannot review its determination in that respect; 9 Barb. 350; 8 Blackf. 266.

In navigating canals, it is the duty of the canal-boats to exercise due care in avoiding collisions, and in affording each other mutual accommodation; and for any injury resulting from the neglect of such care the proprietors of the boats are liable in damages; 1 Sher. & Redf. Neg. 404; 19 Wend. 399; 6 Cow. 698; 1 Pa. 44. The proprietors of the canal will be liable for any injury to canal-boats occasioned by a neglect on their part to keep the canal in proper repair and free from obstructions; 7 Mass. 189; 7 Metc. 276; 13 Gratt. 541; 8 Dana 161; 7 Ind. 462; 20 Barb. 620; 11 A. & E. 223. Where a state exercises control over a canal, it is liable for injuries caused by an officer's negligence in failing to repair bridges over it; 127 N. Y. 397. In regard to the right of the proprietors of canals to tolls, the rule is that they are only entitled to take them as authorized by statute, and that any ambiguity in the terms of the statute must operate in favor of the public; 2 B. & Ad. 792; 2 M. & G. 134; 9 How. 172; 6 Cow. 567; 21 Pa. 131. A canal constructed and maintained at private expense is like a private highway over which the public is permitted to travel, but in which it obtains

no vested right; 95 Mich. 389. For other cases relating to various points arising under statutes in regard to canals, see 8 Blackf. 352; 12 Mass. 403; 7 B. Monr. 160; 4 Zabr. 62, 555; 11 Pa. 202; 1 Gill 222; 17 Barb. 193; 110 N. Y. 232; 22 Ill. App. 159; 55 N. J. Law 178. See Railway.

CANCELLARIA. Chancery; the court of chancery. *Curia cancellaria* is also used in the same sense. See 4 Bla. Com. 46; Cowel.

CANCELLARIUS (Lat.). A chancellor.

In ancient law, a janitor or one who stood at the door of the court and was accustomed to carry out the commands of the judges; afterwards a secretary; a scribe; a notary. Du Cange.

In early English law, the keeper of the king's seal.

The office of chancellor is of Roman origin. He appears at first to have been a chief scribe or secretary, but was afterwards invested with judicial power, and had superintendence over the other officers of the empire. From the Romans the title and office passed to the church; and therefore every bishop of the Catholic church has, to this day, his chancellor, the principal judge of his consistory. In ecclesiastical matters it was the duty of the *cancellarius* to take charge of all matters relating to the books of the church,—acting as librarian; to correct the laws, comparing the various readings, and also to take charge of the seal of the church, affixing it when necessary in the business of the church.

When the modern kingdoms of Europe were established upon the ruins of the empire, almost every state preserved its chancellor, with different jurisdictions and dignities, according to their different constitutions. In all he seems to have had a supervision of all charters, letters, and such other public instruments of the crown as were authenticated in the most solemn manner; and when seals came into use, he had the custody of the public seal.

According to Du Cange it was under the reign of the Merovingian kings in France that the *cancellarii* first obtained the dignity corresponding with that of the English chancellor, and became keepers of the king's seal,

In this latter sense only of keeper of the seal, the word chancellor, derived hence, seems to have been used in the English law; 3 Bla. Com. 46.

The origin of the word has been much disputed; but it seems probable that the meaning assigned by Du Cange is correct, who says that the *cancellarii* were originally the keepers of the gate of the king's tribunal, and who carried out the commands of the judges. Under the civil law their duties were varied, and gave rise to a great variety of names, as *notarius, a notis, abactis, secretarius, a secretis, a cancellis, a responsis*, generally derived from their duties as keepers and correctors of the statutes and decisions of the tribunals.

The transition from keeper of the seal of the church to keeper of the king's seal would be natural and easy in an age when the clergy were the only persons of education sufficient to read the documents to which the seal was to be appended. And this latter sense is the one which has remained and been perpetuated in the English word Chancellor. See Du Cange; Spelman, Gloss.; Spence, Eq. Jur. 78; 3 Bla. Com. 46.

It was an evolution which passed through several stages, the first of which had its origin in the period when the king was actually as well as theoretically the fountain of justice and equity. At first he personally heard their complaints and administered justice to his subjects.

It was, however, after the growth of the population had increased the applications to the king for the redress of grievances to such an extent as to require him to seek assistance, that the officer afterwards called chancellor appeared. He was then a scribe to whom were referred the complaints made, and it was his duty to determine if they should be entertained and the form of writ adapted to the case. Thus what was afterwards the primary duty of the chancellor was devolved upon this officer, called the *referendarius*, and known by this title, according to Selden, during the reign of Ethelbert and subsequent kings to Edred. To separate and protect them from the suitors this officer and his assistants sat by a lattice, the laths of which were called *cancelli*, and to this commentators ascribe the origin of the word *cancellarius*, which was used in the reign of the Confessor and is not clearly traced to an earlier date. At that time little more appears than that he was an officer who issued writs, but during Anglo-Saxon times he seems to have been little more, and the charter of Westminster shows his precedence at that time to have been after two archbishops, nine bishops, and seven abbots, though now the lord chancellor is second only after the royal family. True, it is said by Ingulphus that Edward the Elder appointed Torquatel his chancellor, so that whatever business of the king, spiritual or temporal, required a decision, should be decided by his advice and decree, and, being so decided, the decree should be held irrevocable; Spence, Eq. Jur. 78, n. Nevertheless there does not seem to have been at that period a conception of the office as one maintained for the exercise of judicial functions. According to Pollock and Maitland, "even in Edward I.'s reign it is not in our view a court of justice; it does not hear and determine causes. It was a great secretarial bureau, a home office, a foreign office, and a ministry of justice;" 1 Hist. Eng. Law 172.

But whatever the origin of the title, it is not difficult to apprehend the development of the janitor or keeper of the gate, acting as intermediary between the suitor and the king or judge, into the officer whose judgment was relied on in dealing with the petition, and how the original scribe or *refendarius*, exercising at first clerical functions, but selected for them because it required legal learning to discharge them, gradually developed into the chancellor of modern conception, holding the seal and representing the conscience of the king. The fact that it is an evolution is clear, however obscure and difficult to trace are some of its successive stages. See 4 Co. Inst. 78; Dugdale Orig. Jur. fol. 34; and generally Selden, Discourses; Inderwick, King's Peace; 3 Steph. Com. 346; 1 Poll. & Maitl. 172; 1 Stubbs, Const. Hist. 381; Campbell, Lives of the Lord Chancellors, vol. 1. See CHANCELLOR.

CANCELLATION. The act of crossing out a writing. The manual operation of tearing or destroying a written instrument; 1 Eq. Cas. Abr. 409; Roberts, Wills 367, n.

The statute of frauds provides that the revocation of a will by cancellation must be by the "testator himself, or in his presence and by his direction and consent." This provision is in force in many of the United States; 1 Jarm. Wills, 3d Am. ed. *113 n.; Beach, Wills 98. In order that a revocation may be effected, it must be proved to have been done according to the statute; 25 N. Y. 79; 31 Pa. 246; 66 Mo. 579; 46 Ala. 216; declarations of a testator are not sufficient; 2 W. & S. 455; 26 Md. 95; 2 Johns. 31.

Cancelling a will, *animo revocandi*, is a revocation; and the destruction or obliteration need not be complete; 3 B. & Ald. 489; 2 W. Bla. 1043; 4 Mass. 462; 2 N. & M'C. 472; 5 Conn. 168; 4 S. & R. 567. It must be done *animo revocandi;* Schoul. Wills 384; 62 Ill. 368; 6 Mo. 177; and evidence is admissible to show with what intention the act was done; 7 Johns. 394; 9 Mass. 307; 4 Conn. 550; 8 Vt. 373; 1 N. H. 1; 4 S. & R. 297; 3 Hen. & M. 502; 1 Harr. & M'H. 162; 4 Kent 531; 57 Me. 449; 25 Mich. 505; 2 Rich. 184; 32 Ga. 156. Accidental cancellation is not a revocation; 3 Stockt. 156. Where the first few

lines of a will were cut off, the remainder, which was complete, was admitted to probate; L. R. 2 P. & D. 206. Partial cancellation, with proof of an *animus revocandi*, will revoke a will; 2 Miss. 336; and when more than one-third of the items were cancelled, leaving the remainder unintelligible and repugnant, the will was held to be revoked; 28 Atl. Rep. (Md.) 408. Where the testator wrote on his will "This will is invalid," held a revocation; 2 Conn. 67. Cancellation by an insane man will not revoke a valid will; 54 Barb. 274; 7 Humphr. 92. See 1 Pick. 535; 1 Rich. 80.

In Louisiana it requires a written instrument executed with formalities to revoke a will, hence placing it among waste paper and refusal to receive it after attention was called to it, and an unsuccessful attempt to make a new will, were held to be no cancellation; 47 La. Ann. 329.

There may be a partial obliteration, which works a revocation *pro tanto;* 34 Barb. 140; 123 Mass. 102; 62 Ill. 368; 48 Ohio St. 211; and a careful interlineation is not a cancellation; 55 Pa. 424. A cancellation by pencil is enough: 2 D. & B. 311; 6 Hare 39; L. R. 2 P. & D. 256; 133 Pa. 245. Where a will is found among a testator's papers, torn, there is a presumption of revocation; 41 Vt. 125; 50 Mo. 28; 40 Conn. 587; 11 Wend. 227. Where after a person's death a will is found in an unsealed envelope which had been in his possession up to the time of his death and with lines drawn through his signature, the presumption is that he himself drew the lines for the purpose of revoking the will; 64 Hun 635.

Mere cancellation of a deed does not divest the grantee's title; Devlin, Deeds 300, 305; 9 Pick. 108; 33 Ala. 264; 18 Cal. 49; 4 Conn. 550; 41 Ill. App. 223; even though done before recording; 24 Me. 312; but it might practically have that effect between the parties by estoppel; 50 N. H. 143; or by reason of the destruction of the only evidence of the transaction; 14 Ia. 400; 4 Wis. 12.

On a bill in equity for the re-execution of lost securities, which were held by a decedent in his lifetime and after his death were not found among his papers, a party alleging their destruction or cancellation by the decedent is bound to prove the fact to the satisfaction of the court. The absence of the papers raises no presumption of such destruction or cancellation; nor is mere proof of an intention to destroy or cancel, or of the declaration of such intention, alone sufficient; 2 Del. Ch. 219.

CANDIDATE (Lat. *candidatus*, from *candidus*, white. Said to be from the custom of Roman candidates to clothe themselves in a white tunic).

One who offers himself, or is offered by others, for an office.

One who seeks office is a candidate; it is not necessary that he should have been nominated for it; 112 Pa. 624.

CANON. In Ecclesiastical Law. A prebendary, or member of a chapter. All members of chapters except deans are now entitled *canons*, in England. 2 Steph. Com. 11th ed. 687, n.; 1 Bla. Com. 382.

CANON LAW. A body of ecclesiastical law, which originated in the church of Rome, relating to matters of which that church has or claims jurisdiction.

A canon is a rule of doctrine or of discipline, and is the term generally applied to designate the ordinances of councils and decrees of popes. The position which the canon law obtains beyond the papal dominions depends on the extent to which it is sanctioned or permitted by the government of each country; and hence the system of canon law as it is administered in different countries varies somewhat.

In the wording of a canon it is not enough to admonish or to express disapprobation; its wording must be explicitly permissive or prohibitory, backed by the provision, expressed or admittedly understood, that its infringement will be visited with punishment. Cent. Dict.; The Churchman, lvi. 462.

Though this system of law is of primary importance in Catholic countries alone, it still maintains great influence and transmits many of its peculiar regulations down through the jurisprudence of Protestant countries which were formerly Catholic. Thus, the canon law has been a distinct branch of the profession in the ecclesiastical courts of England for several centuries; but the recent modifications of the jurisdiction of those courts have done much to reduce its independent importance.

The *Corpus Juris Canonici* is drawn from various sources—the opinions of the ancient fathers of the church, the decrees of councils, and the decretal epistles and bulls of the holy see, together with the maxims of the civil law and the teachings of the Scriptures. These sources were first drawn upon for a regular ecclesiastical system about the time of Pope Alexander III., in the middle of the twelfth century, when one Gratian, an Italian monk, animated by the discovery of Justinian's Pandects, collected the ecclesiastical constitutions also into some method in three books, which he entitled *Concordia Discordantium Canonum.* These are generally known as *Decretum Gratiani.*

The subsequent papal decrees to the time of the pontificate of Gregory IX. were collected in much the same method, under the auspices of that pope, about the year 1230, in five books, entitled *Decretalia Gregorii Nonii.* A sixth book was added by Boniface VIII., about the year 1298, which is called *Sextus Decretalium.* The Clementine Constitution, or decrees of Clement V., were in like manner authenticated in 1317 by his successor, John XXII., who also published twenty constitutions of his own, called the *extravagantes Joannis*, so called because they were in addition to, or beyond the boundary of, the former collections, as the additions to the civil law were called Novels. To these have since been added some decrees of later popes, down to the time of Sixtus IV., in five books, called *Extravagantes communes.* And all these together—Gratian's Decrees, Gregory's Decretals, the Sixth Decretals, the Clementine Constitutions, and the Extravagants of John and his successors—form the *Corpus Juris Canonici*, or body of the Roman canon law; 1 Bla. Com. 82; *Encylopédie, Droit Canonique, Droit Public Ecclesiastique;* Dict. de Jur. *Droit Canonique*; Erskine, Inst. b. 1, t. 1. s. 10. See, in general, Ayliffe, Par. Jur. Can. Ang.; Shelford, Marr. & D. 19; Preface to Burn, Eccl. Law, Tyrwhitt ed. 22; Hale, Civ. L. 26; Bell's Case of a Putative Marriage, 203; *Dict. du Droit Canonique;* Stair, Inst. b. 1, t. 1, 7; 1 Poll. & Maitl. 90.

CANONRY. An ecclesiastical benefice attaching to the office of canon. Holthouse, Dict.

CANT. A method of dividing property held in common by two or more per-

sons peculiar to the civil law, and may be avoided by the consent of all of those who are interested, in the same manner that any other contract or agreement may be avoided. 9 Mart. La. 89. See LICITATION.

CANTERBURY, ARCHBISHOP OF. In English Ecclesiastical Law. The primate of all England; the chief ecclesiastical dignitary in the church; his customary privilege is to crown the kings and queens of England. By 25 Hen. VII. c. 21, he has the power of granting dispensations in any case not contrary to the Holy Scriptures and the law of God where the pope used formerly to grant them, which is the foundation of his granting special licenses to marry at any place or time, etc. Wharton.

CANTRED. A hundred, a district containing a hundred villages. Used in Wales in the same sense as hundred in England. Cowel; *Termes de la Ley.*

CANVASS. The act of examining the returns of votes for a public officer. This duty is usually intrusted to certain officers of a state, district, or county, who constitute a board of canvassers. The determination of the board of canvassers of the persons elected to an office is *prima facie* evidence only of their election. A party may go behind the canvass to the ballots, to show the number of votes cast for him. The duties of the canvassers are wholly ministerial; 8 Cow. 102; 20 Wend. 14; 1 Mich. 362; 15 Ill. 492. A canvassing board has no power to go behind the returns and inquire into the legality of the votes; 91 Mich. 438; 36 Neb. 9, 91. In making a recount they have no authority to throw out the vote of a precinct or ward on the ground of fraud, as their power is merely ministerial; 94 Mich. 505. See 5 Misc. Rep. 575.

CANVASSING BOARD. See CANVASS.

CAPACITY. Ability, power, qualification, or competency of persons, natural or artificial, for the performance of civil acts depending on their state or condition as defined or fixed by law; as, the capacity to devise, to bequeath, to grant or convey lands; or to take and hold lands; to make a contract, and the like. 2 Comyns, Dig. 294; Dane, Abr.

CAPAX DOLI (Lat. capable of committing crime). The condition of one who has sufficient mind and understanding to be made responsible for his actions. See DISCRETION.

CAPE. A judicial writ now abolished, touching a plea of lands and tenements. The writs which bear this name are of two kinds—namely, *cape magnum*, or grand cape, and *cape parvum*, or petit cape. The *cape magnum*, was the writ for possession where the tenant failed to appear. The petit cape is so called not so much on account of the smallness of the writ as of the latter; it was the shorter writ issued when the plaintiff prevailed after the tenant had appeared. Fleta, l. 6, c. 55, § 40. For the difference between the form and the use of these writs, see 2 Wms. Saund. 45 *c*, *d*; Fleta, l. 6, c. 55, § 40.

CAPE COLONY. A colony of Great Britain at the southern extremity of Africa. It is a responsible government of which the executive is vested in a governor and council appointed by the Crown. Its legislature has two chambers. The legislative council consisting of 22 members elected for seven years and house of assembly of 76 members elected for five years. The supreme court consists of a chief justice and eight puisne judges. Sessions are held in three places and circuit courts sit in the country districts. The Roman-Dutch law, modified by colonial statute law, is chiefly used.

CAPERS. Vessels of war owned by private persons, and different from ordinary privateers only in size, being smaller. Beawes, *Lex Merc.* 230.

CAPIAS (Lat. *capere*, to take; *capias*, that you take). In Practice. A writ directing the sheriff to take the person of the defendant into custody.

It is a judicial writ, and issued originally only to enforce compliance with the summons of an original writ or with some judgment or decree of the court. It was originally issuable as a part of the original process in a suit only in case of injuries committed by force or with fraud, but was much extended by statutes. See ARREST; BAIL. Being the first word of distinctive significance in the writ, when writs were framed in Latin, it came to denote the whole class of writs by which a defendant's person was to be arrested. It was issuable either by the court of Common Pleas or King's Bench, and bore the seal of the court.

Consult Sellon, Practice, Introd.; Spence, Eq. Jur.; BAIL; BREVE; ARREST; and the titles here following.

CAPIAS AD AUDIENDUM JUDICIUM. In Practice. A writ issued, in a case of misdemeanor, after the defendant has appeared and is found guilty, to bring him to judgment if he isnot present when called. 4 Bla. Com. 368.

CAPIAS AD COMPUTANDUM. In Practice. A writ which issued in the action of account rendered upon the judgment *quod computet*, when the defendant refused to appear in his proper person before the auditors and enter into his account.

According to the ancient practice, the defendant might, after arrest upon this process, be delivered on mainprize, or, in default of finding mainpernors, was committed to the Fleet prison, where the auditors attended upon him to hear and receive his account. The writ is now disused.

Consult Thesaurus Brevium 38, 39, 40; Coke, Entries 46, 47; Rastell, Entries 14 b. 15.

CAPIAS PRO FINE. In Practice. A writ which issued against a defendant who had been fined and did not discharge the fine according to the judgment.

The object of the writ was to arrest a defendant against whom a plaintiff had obtained judgment, and detain him until he paid to the king the fine for

the public misdemeanor, coupled with the remedy for the private injury sustained, in all cases of forcible torts; 11 Coke 43; 5 Mod. 285; falsehood in denying one's own deed; Co. Litt. 131; 8 Coke 60; unjustly claiming property in replevin, or contempt by disobeying the command of the king's writ, or the express prohibition of any statute; 8 Coke 60. It is now abolished; 3 Bla. Com. 398.

CAPIAS AD RESPONDENDUM. **In Practice.** A writ commanding the officer to whom it is directed "to take the body of the defendant and keep the same to answer the plaintiff," etc.

This is the writ of capias which is generally intended by the use of the word capias, and was formerly a writ of great importance. For some account of its use and value, see ARREST; BAIL.

According to the course of the practice at common law, the writ bears teste, in the name of the chief justice, or presiding judge of the court, on some day in term-time, when the judge is supposed to be present, not being Sunday, and is made returnable on a regular return day.

If the writ has been served and the defendant does not give bail, but remains in custody, it is returned C. C. (*cepi corpus*); if he have given bail, it is returned C. C. B. B. (*cepi corpus*, bail bond); if the defendant's appearance have been accepted, the return is, "C. C., and defendant's appearance accepted." See 1 Archb. Pr. 67.

CAPIAS AD SATISFACIENDUM. **In Practice.** A writ directed to the sheriff or coroner, commanding him to take the person therein named and him safely keep so that he may have his body in court on the return day of the writ, to satisfy (*ad satisfaciendum*) the party who has recovered judgment against him.

It is a writ of execution issued after judgment, and might have been issued against a plaintiff against whom judgment was obtained for costs, as well as against the defendant in a personal action. As a rule at common law it lay in all cases where a *capias ad respondendum* lay as a part of the mesne process. Some classes of persons were, however, exempt from arrest on mesne process who were liable to it on final. It was a very common form of execution, until within a few years, in many of the states; but its efficiency has been destroyed by statutes facilitating the discharge of the debtor, in some states, and by statutes prohibiting its issue, in others, except in specified cases. See ARREST; PRIVILEGE. It is commonly known by the abbreviation *ca. sa.*

It is tested on a general teste day, and returnable on a general return day.

It is executed by arresting the defendant and keeping him in custody. He cannot be discharged upon bail or by consent of the sheriff. See ESCAPE. And payment to the sheriff is held in England not to be sufficient to authorize a discharge. He might be discharged by showing irregularities in the writ; 3 D. P. C. 291; 4 *id.* 6.

The return made by the officer is either C. C. & C. (*cepi corpus et committitur*), or N. E. I. (*non est inventus*). The effect of execution by a ca. sa. is to prevent suing out any other process against the lands or goods of the person arrested, at common law; but this is modified by statutes in the modern law. See EXECUTION.

Consult Archbold; Chitty; Sellon, Practice; 3 Bla. Com. 414.

CAPIAS UTLIGATUM. **In Practice.** A writ directing the arrest of an outlaw.

If *general*, it directs the sheriff to arrest the outlaw and bring him before the court on a general return day.

If *special*, it directs the sheriff, in addition, to take possession of the goods and chattels of the outlaw, summoning a jury to determine their value.

It was a part of the process subsequent to the capias, and was issued to compel an appearance where the defendant had absconded and a capias could not be served upon him. The outlawry was readily reversed upon any plausible pretext, upon appearance of a party in person or by attorney, as the object of the writ was then satisfied. The writ issued after an outlawry in a criminal as well as in a civil case. See 3 Bla. Com. 284; 4 *id.* 320.

CAPIAS IN WITHERNAM. **In Practice.** A writ directing the sheriff to take other goods of a distrainor equal in value to a distress which he has formerly taken and still withholds from the owner beyond the reach of process.

When chattels taken by distress were decided to have been wrongfully taken and were by the distrainor *eloigned*, that is, carried out of the county or concealed, the sheriff made such a return. Thereupon this writ issued, thus putting distress against distress.

Goods taken *in withernam* are irrepleviable till the original distress be forthcoming; 3 Bla. Com. 148.

CAPITA (Lat.). Heads, and figuratively entire bodies, whether of persons or animals. Spelman.

An expression of frequent occurrence in laws regulating the distribution of the estates of persons dying intestate. When all the persons entitled to shares in the distribution are of the same degree of kindred to the deceased person (*e. g.* when all are grandchildren), and claim directly from him in their own right, and not through an intermediate relation, they take *per capita*, that is, equal shares, or share and share alike. But when they are of different degrees of kindred (*e. g.* some the children, others the grandchildren or the great-grandchildren of the deceased), those more remote take *per stirpem*, or *per stirpes*, that is, they take respectively the shares their parents (or other relation standing in the same degree with them of the surviving kindred entitled, who are in the nearest degree of kindred to the intestate) would have taken had they respectively survived the intestate. Reeve, Descent, Introd. xxvii.; also, 1 Roper, Leg. 126, 130. See PER CAPITA; PER STIRPES; STIRPES.

CAPITAL. **In Commerce.** The sum of money which a merchant, banker, or trader adventures in any undertaking, or which he contributes to the common stock of a partnership, and also the fund of a trading company. McCulloch; Abb. Dict.

Capital signifies the actual estate, whether in money or property, owned by an individual or corporation; 23 N. Y. 192; it is the fund upon which it transacts its business, which would be liable to its creditors, and in case of insolvency pass to a receiver; 28 Barb. 318; it does not include money borrowed temporarily; 21 Wall. 284. See, also, 31 Conn. 306; 7 Blackf. 295; 5 Blatch. 315; 18 Wend. 605.

Moneyed capital, as used in an act respecting state taxation of national bank stock, includes shares of stock or other interests owned by individuals in all enterprises in

which the capital employed in carrying on its business is money, where the object of the business is the making of profit by its use as money; 121 U. S. 157. It includes money in the hands of an individual invested in loans or other securities; 23 Wall. 480; 121 U. S. 157.

CAPITAL CRIME. One for which the punishment of death is inflicted.

CAPITAL PUNISHMENT. The punishment of death.

The subject of capital punishment has occupied the attention of enlightened men for a long time, particularly since the middle of the last century; and none deserves to be more carefully investigated. The right of punishing its members by society is admitted; but how far this right extends, by the laws of nature or of God, has been much disputed by theoretical writers, although it cannot be denied that most nations, ancient and modern, have deemed capital punishment to be within the scope of the legitimate powers of government. Beccaria contends with zeal that the punishment of death ought not to be inflicted in time of peace, nor at other times, except in cases where the laws can be maintained in no other way. Beccaria, chap. 28.

The ancient method of administering the law was by retribution or the vindication of the law upon the offender, and in England, as late as the reign of Geo. III., there were about two hundred offences punishable by death, among which were cutting down a tree, robbing a rabbit warren, harboring an offender against the revenue acts, stealing in a dwelling-house to the amount of forty shillings, or in a shop, goods to the amount of five shillings, counterfeiting the stamps that were used for the sale of perfumery, etc. Owing to the efforts of Sir Samuel Romilly, and later of Sir James Mackintosh, the old criminal code was succeeded by a new and wiser course of legislation, and since the statute of 1861 there are but four crimes now punishable in England by death. See, also, 2 Poll. & Maitl. 450; CRIMES; EXECUTION.

CAPITAL STOCK. The sum, divided into shares, which is raised by mutual subscription of the members of a corporation. It is said to be the sum upon which calls may be made upon the stockholders, and dividends are to be paid; 1 Sandf. Ch. 280; Beach, Priv. Corp. 116; 4 Zabr. 195; Ang. & A. Corp. §§ 151, 556; 9 Yerg. 490; 18 Wis. 281. The term is used to indicate the amount of capital which the charter provides for, and not the value of the property of the corporation; 23 N. J. L. 195; or the original amount upon which a corporation commences; 3 Rich. 346. See 30 Ark. 693 (*contra*, under an Illinois revenue statute; 83 Ill. 602); the entire sum agreed to be contributed to the enterprise, whether paid in or not; 40 Ga. 98.

It has been held to mean the amount paid in, not the amount subscribed; 52 Penn. 177; 40 La. 98; *contra*, 8 Ga. 486; nor that named in the articles of association; 17 Hun 475. See 1 Thomp. Corp. § 1060. See STOCK.

CAPITALIS JUSTICIARIUS. The chief justiciary; the principal minister of state, and guardian of the realm in the king's absence.

This office originated under William the Conqueror; but its power was greatly diminished by Magna Charta, and finally distributed among several courts by Edward I. Spelman, Gloss.; 3 Bla. Com. 38.

CAPITANEUS. He who held his land or title directly from the king himself.

A commander or ruler over others, either in civil, military, or ecclesiastical matters.

A naval commander. This latter use began A. D. 1264. Spelman, Gloss. *Capitaneus, Admiralius.*

CAPITATION (Lat. *caput*, head). A poll-tax. An imposition yearly laid upon each person.

The constitution of the United States provides that "no capitation or other direct tax shall be laid, unless in proportion to the census, or enumeration, hereinbefore directed to be taken." Art. 1, s. 9, n. 4. See 3 Dall. 171; 5 Wheat. 317.

CAPITE. See IN CAPITE.

CAPITULA. Collections of laws and ordinances drawn up under heads or divisions. Spelman, Gloss.

The term is used in the civil and old English law, and applies to the ecclesiastical law also, meaning chapters or assemblies of ecclesiastical persons. Du Cange.

CAPITULA CORONÆ. Specific and minute schedules, or *capitula itineris.*

CAPITULA ITINERIS. Schedules of inquiry delivered to the justices in eyre before setting out on their circuits, and which were intended to embrace all possible crimes.

CAPITULA DE JUDÆIS. A register of mortgages made to the Jews. 2 Bla. Com. 343; Crabb, Eng. Law 130.

CAPITULARY. In French Law. A collection of laws and ordinances orderly arranged by divisions.

The term is especially applied to the collections of laws made and published by the early French emperors.

The execution of these capitularies was intrusted to the bishops, courts, and *missi regis*; and many copies were made. The best edition of the Capitularies is said by Butler to be that of Baluze, 1677; Co. Litt. 191 *a*, Butler's note 77.

In Ecclesiastical Law. A collection of laws and ordinances orderly arranged by divisions. A book containing the beginning and end of each Gospel which is to be read every day in the ceremony of saying mass. Du Cange.

CAPITULATION. The treaty which determines the conditions under which a fortified place is abandoned to the commanding officer of the army which besieges it.

On surrender by capitulation, all the property of the inhabitants protected by the articles is considered by the law of nations as neutral, and not subject to capture on the high seas by the belligerent or its ally; 2 Dall. 8.

In Civil Law. An agreement by which the prince and the people, or those who have the right of the people, regulate the manner in which the government is to be administered. Wolffius, § 989.

CAPITULUM (Lat.). A leading division of a book or writing; a chapter; a section. Tert. Adv. Jud. 9. 19. Abbreviated, Cap.

CAPITUR PRO FINE. See CAPIAS PRO FINE. See, also, Wharton, Dict.

CAPTAIN (Lat. *capitaneus;* from *caput*, head). The commander of a company of soldiers.

The term is also used of officers in the municipal police in a somewhat similar sense: as, captain of police, captain of the watch.

The master or commander of a merchant-vessel, or a vessel of war.

A subordinate officer having charge of a certain part of a vessel of war.

In the United States, the commander of a merchant-vessel is, in statutes and legal proceedings and language, more generally termed *master*, which title see. In foreign laws and languages he is frequently styled *patron*.

The rank of captain in the United States navy is next above that of commander; and captains are generally appointed from this rank in the order of seniority. The president has the appointing power, subject to the approval and consent of the senate.

CAPTATION. In French Law. The act of one who succeeds in controlling the will of another, so as to become master of it. It is generally taken in a bad sense.

It was formerly applied to the first stage of the hypnotic or mesmeric trance.

Captation takes place by those demonstrations of attachment and friendship, by those assiduous attentions, by those services and officious little presents, which are usual among friends, and by all those means which ordinarily render us agreeable to others. When these attentions are unattended by deceit or fraud, they are perfectly fair, and the captation is lawful; but if, under the mask of friendship, fraud is the object, and means are used to deceive the person with whom you are connected, then the captation is fraudulent, and the acts procured by the captator are void.

CAPTION (Lat. *capere*, to take). A taking, or seizing; an arrest. The word is no longer used in this sense.

The heading of a legal instrument, in which is shown when, where, and by what authority it was taken, found, or executed.

In the English practice, when an inferior court, in obedience to the writ of certiorari, returned an indictment into the king's bench, it was annexed to the caption, then called a schedule, and the caption concluded with stating that "it is presented in manner and form as appears in a certain indictment thereto annexed," and the caption and indictment were returned on separate parchments; 1 Wms. Saund. 309, n. 2.

In some of the states, every indictment has a caption attached to it, and returned by the grand jury as part of their presentment in each particular case; and in this respect a caption differs essentially from that of other tribunals, where the separate indictments are returned without any caption, and the caption is added by the clerk of the court, as a general caption embracing all the indictments found at the term; 3 Gray 454; 4 *id.* 5; 6 Cush. 174.

LETTERS OF CAPTION. **In Scotch Law.** A writ (now obsolete) issued at the instance of a creditor and containing the command that the officer shall take and imprison the debtor until the debt be paid. Cent. Dict.

PROCESS CAPTION. **In Scotch Law.** A summary warrant of incarceration for the purpose of forcing back a process. *id.*

In Criminal Practice. The object of the caption is to give a formal statement of the proceedings, describe the court before which the indictment is found, and the time when and place where it was found; Hall, Int. L. 413; 3 Gray 454; and the jurors by whom it was found; Whart. Cr. Pl. § 91. Thus particulars must be set forth with reasonable certainty; 6 McLean 66; 39 Me. 78; 20 Ala. 33. It must show that the *venire facias* was returned and from whence the jury came; Whart. Cr. Pl. § 91. The caption may be amended in the court in which the indictment was found; 6 McLean 156; 101 Mass. 33; 78 Pa. 122; even in the supreme court: 4 Halst. 357; 2 McCord 301. It is no part of the inment; 3 Gray 454; 37 N. H. 196; 37 N. Y. 117; 24 Ala. 672.

In Depositions. The caption should state the title of the cause, the names of the parties, and at whose instance the depositions are taken; 2 Cra. 123; 34 Me. 208. See 1 Hemp. 701. See Weeks, Depositions.

For some decisions as to the forms and requisites of captions, see 1 Murph. 281; 1 Brev. 169; 8 Yerg. 514; 1 Hawks 354; 6 Mo. 469; 2 Ill. 456; 6 Blackf. 299; 6 Miss. 20.

CAPTIVE. A prisoner of war. Such a person does not by his capture lose his civil rights.

CAPTOR. One who has taken property from an enemy: this term is also employed to designate one who has taken an enemy.

Formerly, goods taken in war were adjudged to belong to the captor; they are now considered to vest primarily in the state or sovereign, and belong to the individual captors only to the extent that the municipal laws provide. Captors are responsible to the owners of the property for all losses and damages, when the capture is tortious and without reasonable cause in the exercise of belligerent rights. But if the capture is originally justifiable, the captors will not be responsible, unless by subsequent misconduct they become trespassers *ab initio;* 1 C. Rob. Adm. 93, 96. See 2 Gall. 374; 1 *id.* 274; 1 Pet. Adm. 116; 1 Mas. 14.

CAPTURE. The taking of property by one belligerent from another.

To make a good capture of a ship, it must be subdued and taken by an enemy in open war, or by way of reprisals, or by a pirate, and with intent to deprive the owner of it.

Goods floating from a wreck are not subject to appropriation by the first taker, and the word capture has no application in such case; 8 Fed. Rep. 232.

Capture may be with intent to possess both ship and cargo, or only to seize the goods of the enemy, or contraband goods, which are on board. The former is the capture of the ship in the proper sense of the word; the latter is only an arrest and detention, without any design to deprive the owner of it. Capture is deemed lawful when made by a declared enemy lawfully commissioned and according to the laws of war, and unlawful, when it is against the rules established by the law of nations; Marsh. Ins. b. 1, c. 12, s. 4. All

captures *jure belli* are made for the government; 10 Wheat. 306; 1 Kent 100. See 1 Curt. C. C. 266.

Capture, in technical language, is a taking by military power; seizure, a taking by civil authority; 35 Ga. 344.

See, generally, 1 Kent 100 *et seq.*; Story, Const. §§ 1168–1177; Wheat. Int. Law, 3d Eng. ed.; Archb. Cr. Pr. & Pl. 235; Phillimore, Int. Law; 2 Caines, Cas. 158; 14 Johns. 227; 6 Mass. 197; 4 Cra. 43; 11 Wheat. 1; 2 How. 210; Paine 129; 6 Wall. 10; 8 C. P. 670; 51 Me. 476; 47 Pa. 187; 11 Ct. of Cl. 456; PRIZE.

CAPUT (Lat. head).

In Civil Law. Status; a person's civil condition.

According to the Roman law, three elements concurred to form the *status* or *caput* of the citizen, namely, liberty, *libertas*, citizenship, *civitas*, and family, *familia*.

Libertas est naturalis facultas ejus quod cuique facere libet, nisi si quid vi aut jure prohibetur. This definition of liberty has been translated by Dr. Cooper, and all the other English translators of the Institutes, as follows: "Freedom, from which we are denominated free, is the natural power of acting as we please, unless prevented by force or by the law." This, although it may be a literal, is certainly not a correct, translation of the text. It is absurd to say that liberty consists in the power of acting as we think proper, so far as not restrained by force; for it is evident that even the slave can do what he chooses, except so far as his volition is controlled by the power exercised over him by his master. The true meaning of the text is "Liberty (from which we are called free) is the power which we derive from nature of acting as we please, except so far as restrained by physical and moral impossibilities." It is obvious that a person is perfectly free though he cannot reach the moon nor stem the current of the Mississippi; and it is equally clear that true freedom is not impaired by the rule of law not to appropriate the property of another to ourselves, or the precept of morality to behave with decency and decorum.

Civitas—the city—reminds us of the celebrated expression, "*civis sum Romanus*," which struck awe and terror into the most barbarous nations. The citizen alone enjoyed the *jus Quiritium*, which extended to the family ties, to property, to inheritance, to wills, to alienations, and to engagements generally. In striking contrast with the *civis* stood the *peregrinus hostis, barbarus*. *Familia*—the family—conveyed very different ideas in the early period of Roman jurisprudence from what it does in modern times. Besides the singular organization of the Roman family, explained under the head of pater familias, the members of the family were bound together by religious rites and sacrifices,—*sacra familiæ*.

The loss of one of these elements produced a change of the *status*, or civil condition; this change might be threefold; the loss of liberty carried with it that of citizenship and family, and was called the *maxima capitis deminutio*; the loss of citizenship did not destroy liberty, but deprived the party of his family, and was denominated *media capitis deminutio*; when there was a change of condition by a loption or abrogation, both liberty and citizenship were preserved, and this produced the *minima capitis deminutio*. But the loss or change of the *status*, whether the great, the less, or the least, was followed by serious consequences: all obligations merely civil were extinguished; those purely natural continued to exist. Gaius says, *Eas obligationes quæ naturalem præstationem habere intelliguntur, palam est capitis deminutione non perire, quia civilis ratio naturalia jura corrumpere non potest.* Usufruct was extinguished by the diminution of the head: *amittitur usufructus capitis deminutione.* D. 3. 6. § 28. It also annulled the testament: "*Testamenta jure facta infirmantur, cum is qui fecerit testamentum capite deminutus sit.*" Gaius 2, § 143. *Capitis deminutio* means that the family, to which the person whose *status* has been lost or changed belongs, has lost a head, or one of its members. See Ratt. Roman Law.

At Common Law. A head.

Caput comitatis (the head of the county). The sheriff; the king. Spelman, Gloss.

A person; a life. The upper part of a town. Cowel. A castle. Spelman, Gloss.

Caput anni. The beginning of the year. Cowel.

CAPUT LUPINUM (Lat.). Having a wolf's head.

Outlaws were anciently said to have *caput lupinum*, and might be killed by any one who met them, if attempting to escape; 4 Bla. Com. 320. In the reign of Edward III. this power was restricted to the sheriff when armed with lawful process; and this power, even, has long since disappeared, the process of outlawry being resorted to merely as a means of compelling an appearance; Co. Litt. 128 *b*; Bla. Com. 284; 1 Reeve's Hist. Eng Law 471.

CAPUTAGIUM. Head-money; the payment of head-money. Spelman, Gloss.; Cowel.

CAR TRUST SECURITIES. A phrase used commercially to indicate a class of investment securities based upon the conditional sale or hire of railroad cars or locomotives to railroad companies with a reservation of title in the vendor or bailor until the property is paid for. See ROLLING STOCK.

CARAT. The weight of four grains, used by jewellers in weighing precious stones. Webster.

CARCAN. In French Law. An instrument of punishment, somewhat resembling a pillory. It sometimes signifies the punishment itself. Biret, Vocab.

CARDINAL. In Ecclesiastical Law. The title given to one of the highest dignitaries of the church of Rome.

Cardinals are next to the pope in dignity: he is elected by them and out of their body. There are cardinal bishops, cardinal priests, and cardinal deacons. See Fleury, *Hist. Ecclés.* liv. xxxv. n. 17, li. n. 19; Thomassin, part ii. liv. i. c. 53, part iv. liv. i. cc. 79, 80; Loiseau, *Traité des Ordres*, c. 3, n. 31; André *Droit Canon*.

CARDS. In Criminal Law. Small rectangular pasteboards, on which are figures of various colors, used for playing certain games. The playing of cards for amusement is not forbidden; nor is gaming for money, at common law; Bish. Stat. Cr. § 504.

Cards are a gambling device; 19 Mo. 377; 12 Wis. 434.

As to POSTAL CARDS, see POSTAGE.

CARE. Charge or oversight; implying responsibility for safety and prosperity. Webst. Dict.

It is used with reference to the degree of care required of bailees and carriers. For the utmost care, see 21 Md. 275; 8 Barb. 368; extraordinary care, 54 Ill. 19; great care, 8 Barb. 368; especial care, 2 Bradw. 116; proper and reasonable care, 23 Ill. 380; 23 Conn. 443; 52 Ala. 606; due care, 11 Ired. L. 640; 10 Allen 532; 10 *id.* 20; ordinary care, 52 N. H. 528; 35 N. Y. 9; 10 R. I. 22; slight care, 17 Cal. 97; 20 N. Y. 65; 8 Ohio St. 1.

CARETA (spelled, also, *Carreta* and *Carecta*). A cart; a cart-load.

In Magna Charta (9 Hen. III. c. 21) it is ordained that no sheriff shall take horses or carts (*careta*) without paying the ancient livery therefor.

CARGO. In Maritime Law. The entire load of a ship or other vessel. Abbott, Shipp.; 1 Dall. 197; Merlin, *Répert.*; 2 Gill & J. 136.

This term is usually applied to *goods* only, and does not include human beings; 1 Phill. Ins. 185; 4 Pick. 429. But in a more extensive and less technical sense it includes persons: thus, we say, A cargo of emigrants. See 7 M. & G. 729, 744; 113 U. S. 49.

CARLISLE TABLES. Life and annuity tables compiled at Carlisle, England, about 1870. Used by actuaries and others. Black, L. Dict.

CARNAL KNOWLEDGE. Sexual connection. 97 Mass. 59; 22 Ohio St. 541. The term is generally, if not exclusively, applied to the act of a male.

In the statutes relating to abuse or carnal knowledge of a female child of tender age, the word abuse includes the words carnally know, and the latter term also includes the former, as there could be no carnal knowledge of such a child by a man capable of committing rape, without injury; 58 Ala. 376.

CARNALLY KNEW. In Pleading. A technical phrase usual in an indictment to charge the defendant with the crime of rape.

According to the early English authorities these words were considered essential; Comyns, Dig. *Indictment*; 1 Ch. Cr. L. 243; 1 Hale, P. C. 632; but Chitty afterwards says that it does not seem so clear; 3 Ch. Cr. L. 812; and the settled opinion seems to be that the words "carnally knew" are included in the term "rapuit" and are therefore unnecessary; 2 Hawk. P. C. c. 25, § 56; 2 Stark. Cr. Pl. 431, n. (*e*); but it is safer not to omit them; *id.*; 1 Ch. Cr. L. 243; 1 East, P. C. 448; 1 Arch. Cr. Pr. & Pl. 8th ed. 999, n. (1); 3 Russell, Cr. 6th. ed. 230. These authorities would apply in states in which the offence is described simply as the crime of rape, but in those states where the crime is designated by the words "did ravish and carnally know" it would on general principles of criminal pleading be safer to use the exact words of the statute. The use of the words "carnally knew" will not supply the omission of the word "ravished"; 1 Hale, P. C. 628, 632; 3 Russell, Cr. 6th ed. 230. See 22 Ohio St. 545; 58 Ala. 378.

CARRIER. One who undertakes to transport goods from one place to another; 2 Pars. Contr. 8th ed. *163.

They are either *common* or *private*. Private carriers incur the responsibility of the exercise of ordinary diligence only, like other bailees for hire; Story, Bailm. § 495; 1 Wend. 272; 1 Hayw. 14; 2 Dana 430; 2 B. & P. 417; 2 C. B. 877. Special carriers of goods are not insurers and are only liable for injuries caused by negligence; 90 Mich. 125. A carrier's liability attaches the moment goods are delivered to him; 46 Mo. App. 574; 56 Ark. 279. See COMMON CARRIERS.

CARRYING AWAY. In Criminal Law. Such a removal or taking into possession of personal property as is required in order to constitute the crime of larceny.

The words "did take and carry away" are a translation of the words *cepit et asportavit*, which were used in indictments when legal processes and records were in the Latin language. But no single word in our language expresses the meaning of *asportavit*. Hence the word "away," or some other word, must be subjoined to the word "carry," to modify its general signification and give it a special and distinctive meaning. 7 Gray 45.

Any removal, however right, of the entire article, which is not attached either to the soil or to any other thing not removed, is sufficient; 2 Bish. Cr. Law § 699; 1 Dearsl. 421; Coxe 439. Thus, to snatch a diamond from a lady's ear, which is instantly dropped among the curls of her hair; 1 Leach 320; to remove sheets from a bed and carry them into an adjoining room; 1 Leach 222, n.; to take plate from a trunk, and lay it on the floor with intent to carry it away; *id.*; to remove a package from one part of a wagon to another, with a view to steal it; 1 Leach 236; have respectively been holden to be felonies. But nothing less than such a severance will be sufficient; 2 East, Pl. Cr. 556; 1 Ry. & M. 14; 4 Bla. Com. 231; 2 Russ. Cr. 96; Clarke, Cr. L. 242, 260.

CARRYING CONCEALED WEAPONS. See ARMS.

CART. A carriage for luggage or burden, with two wheels, as distinguished from a wagon, which has four wheels. Worcester, Dict.; Brande. The vehicle in which criminals are taken to execution. Johnson.

The term has been held to include four-wheeled vehicles, to carry out the intent of a statute; 22 Ala. N. S. 621.

CART BOTE. An allowance to the tenant of wood sufficient for carts and other instruments of husbandry. 2 Bla. Com. 35.

CARTA. A charter, which title see. Any written instrument.

In Spanish Law. A letter; a deed; a power of attorney. *Las Partidas*, pt. 3, t. 18, l. 30.

CARTE BLANCHE. The signature of one or more individuals on a white paper, with a sufficient space left above it to write a note or other writing.

In the course of business, it not unfrequently occurs that, for the sake of convenience, signatures in blank are given with authority to fill them up. These are binding upon the parties. But the blank must be filled up by the very person authorized; 6 Mart. La. 707. See Chit. Bills 70; 2 Pa. 200; BLANK.

CARTEL. An agreement between two belligerent powers for the delivery of pris-

oners or deserters, and also a written challenge to a duel.

Cartel ship. A ship commissioned in time of war to exchange prisoners, or to carry any proposals between hostile powers; she must carry no cargo, ammunition, or implements of war, except a single gun for signals. The conduct of ships of this description cannot be too narrowly watched. The service on which they are sent is so highly important to the interests of humanity that it is peculiarly incumbent on all parties to take care that it should be conducted in such a manner as not to become a subject of jealousy and distrust between the two nations; 4 C. Rob. Adm. 357. See Merlin, *Répert.;* Dane, Abr. c. 40, a. 6, § 7; 1 Kent 68; 3 Phill. Int. Law 161; 1 Pet. C. C. 106; 3 C. Rob. Adm. 141; 6 *id.* 336; 1 Dods. Adm. 60.

CARTMEN. Persons who carry goods and merchandise in carts, either for great or short distances, for hire.

Cartmen who undertake to carry goods for hire as a common employment are common carriers; 3 C. & K. 61; Edw. Bailm. 500; Story, Bailm. § 496. And see 2 Wend. 327; 1 M'Cord 444; 2 Bail. 421; 2 Vt. 93; 1 Murph. 417; Bac. Abr. *Carriers*, A.

CARUCA. A plow. A four-wheeled carriage. A team for a plow, of four oxen abreast.

CARUCAGE. A taxation of land by the *caruca* or *carue*. The act of plowing.

The *caruca* was as much land as a man could cultivate in a year and a day with a single plow (*caruca*). *Carucage*, *carugage*, or *caruage* was the tribute paid for each *caruca* by the *carucarius*, or tenant. Spelman, Gloss.; Cowel.

CARUCATA, CARUCATE, CARVAGE, OR CARVE. A certain quantity of land used as the basis for taxation. A cartload. As much land as may be tilled by a single plow in a year and a day. Skene, *de verb. sig.* A plow land of one hundred acres; Ken. Gloss. The quantity varies in different counties from sixty to one hundred and twenty acres. Whart. Tex. See Littleton, Ten. cclxii.

It may include houses, meadow, woods, etc. It is said by Littleton to be the same as *soca*, but has a much more extended signification. Spelman, Gloss.; Blount; Cowel.

CASE. A question contested before a court of justice. An action or suit at law or in equity. 1 Wheat. 352.

A case arising under a treaty, within U. S. Const. art. 3, § 2; is a suit in which the validity or construction of a treaty of the United States is drawn into question; 2 Sto. Const. § 1647; and under the judiciary act of 1789, § 25, the U. S. supreme court exercises an appellate jurisdiction in such cases decided by a state court only when the decision of the latter is against the title, right, privilege, or exemption set up or claimed by the party seeking to have the decision reviewed; 1 Wheat. 356. The decision of the state court against the claimant must be upon the construction of the treaty; if it rests upon other grounds it is not a case arising under a treaty, and the supreme court is without any jurisdiction; 5 Cra. 544; 11 How. 529; 12 *id.* 111. See also as to cases under treaties; 6 Cra. 286; 3 Wall. 304; 8 *id.* 650; 20 *id.* 522; 29 Ct. of Cl. 62; *id.* 144; *id.* 288; 31 S. W. Rep. (Tex.) 1064.

In Practice. A form of action which lies to recover damages for injuries for which the more ancient forms of action will not lie. Steph. Pl., And. ed. § 52.

Case, or, more fully, action upon the case, or trespass on the case, includes in its widest sense *assumpsit* and *trover*, and distinguishes a class of actions in which the writ is framed according to the special circumstances of the case, from the ancient actions, the writs in which, called *brevia formata*, are collected in the *Registrum Brevium*.

By the common law, and by the statute Westm. 2d, 13 Edw. I. c. 24, if any cause of action arose for which no remedy had been provided, a new writ was to be formed, analogous to those already in existence which were adapted to similar causes of action. The writ of trespass was the original writ most commonly resorted to as a precedent; and in process of time the term trespass seems to have been so extended as to include every species of wrong causing an injury, whether it was *mal*feasance, *mis*feasance, or *non*feasance, apparently for the purpose of enabling an action on the case to be brought in the king's bench. It thus includes actions on the case for breach of a parol undertaking, now called assumpsit (see Assumpsit), and actions based upon a finding and subsequent unlawful conversion of property, now called trover (see Trover), as well as many other actions upon the case which seem to have been derived from other originals than the writ of trespass, as nuisance, deceit, etc.

And, as the action had thus lost the peculiar character of a technical trespass, the name was to a great extent dropped, and actions of this character came to be known as actions on the case.

As used at the present day, *case* is distinguished from *assumpsit* and *covenant*, in that it is not founded upon any contract, express or implied; from *trover*, which lies only for unlawful conversion; from *detinue* and *replevin*, in that it lies only to recover damages; and from *trespass*, in that it lies for injuries committed without force, or for forcible injuries which damage the plaintiff consequentially only, and in other respects. See 3 Reeves, Eng. Law 84; 1 Spence, Eq. Jur. 237; 1 Chit. Pl. 123; 3 Bla. Com. 41; Poll. Tort 645; 5 Term 648.

A similar division existed in the civil law, in which upon nominate contracts an action distinguished by the name of the contract was given. Upon innominate contracts, however, an action *præscriptis verbis* (which lay where the obligation was one already recognized as existing at law, but to which no name had been given), or *in factum* (which was founded on the equity of the particular case), might be brought.

The action lies for:

Torts not committed with force, actual or implied; 2 Ired. 38; 2 Gratt. 366; 20 Vt. 151; 8 Ga. 190; as, for malicious prosecution; 6 Munf. 27, 113; 11 G. & J. 80; 7 B. Monr. 545; 21 Ala. N. S. 491; 30 Mo. App. 524; 92 Mich. 428; 3 Conn. 537; 5 M. & W. 270; see Malicious Prosecution; fraud in purchases and sales; 1 T. B. Monr. 215; 17 Wend. 193; 22; Ala. 501; 3 Cush. 407; 17 Pa. 293; 4 Strobh. 69; 15 Ark. 109; 18 Ill. 299; 92 Mich. 304; conspiracy to defame; 111 Pa. 335.

Torts committed forcibly where the matter affected was *not tangible;* 2 Conn. 529; 2 Vt. 68; as, for obstructing a private way; 14 Johns. 383; 5 H. & J. 467; 18 Pick. 110; 23 Pa. 348; 2 Dutch. 308; disturbing the plaintiff in the use of a pew; 1 Chit. Pl. 43; injury to a franchise.

Torts committed forcibly when the injury is consequential merely, and not immediate;

6 S. & R. 348; 6 H. & J. 230; 4 D. & B. 146; 81 Mich. 21; as, special damage from a public nuisance; Willes 71; 5 Blackf. 35; 1 Rich. S. C. 444; 3 Barb. 42; 3 Cush. 300; 4 McLean 333; 12 Pa. 81; 3 Md. 431; acts done on the defendant's land which by immediate consequence injure the plaintiff; 8 Cush. 595; 8 B. Monr. 453; 35 Me. 271; 2 N. Y. 159, 163; 17 Ohio 489; 12 Ill. 20; 22 Vt. 38; 21 Conn. 213; 3 Md. 431. See 5 Rich. S. C. 583; 59 Ala. 454; 5 Fla. 472; 12 N. J. L. 257.

Injuries to the relative rights; 1 Halst. 322; 1 M'Cord 207; 3 S. & R. 215; 2 Murph. 61; 7 Ala. 169; 6 T. B. Monr. 296; 7 Blackf. 578; 3 Den. 361; enticing away servants and children; 1 Chit. Pl. 137; 4 Litt. 25; 15 Barb. 489; 1 Yeates 586; seduction of a daughter or servant; 5 Me. 546; 2 Greene 520; or wife; 164 Pa. 580. See 6 Munf. 587; 1 Gilm. 33; SEDUCTION ON. Also for criminal conversation with spouse, by husband; 99 Cal. 649; 52 Ill. App. 597; 99 Mich. 250; but not by wife against another woman; 62 N. W. Rep. (Minn.) 438; for alienation of affection of spouse, by husband; 36 Pac. Rep. (Colo.) 609; 29 Atl. (Vt.) 252; or the wife; 40 N. E. Rep. (Ind. App.) 276, 1119; 29 Misc. Rep. 82; 8 Wash. St. 81; 60 N. W. Rep. (Ia.) 202; 62 N. W. Rep. (Mich.) 833. See HUSBAND; WIFE.

Injuries which result from *negligence;* 1 Cush. 475; 23 Me. 371; 1 Den. 91; 2 Ired. 138; 18 Vt. 620; 2 Strobh. 356; 4 Rich. 228; 9 Ark. 85; 24 Miss. 93; 20 Pa. 387; 13 B. Monr. 219; 15 Ill. 366; 3 Ohio St. 172; see 5 Den. 255; 20 Vt. 529; 19 Conn. 507; 29 Me. 307; 2 Mich. 259; though the direct result of actual force; 4 B. & C. 223; 14 Johns. 432; 17 Barb. 94; 3 N. H. 465; 11 Mass. 137; 2 Harr. Del. 443; 2 Ired. 206; 18 Vt. 605; 7 Blackf. 342; 1 R. I. 474; Cooley, Torts 515.

Wrongful acts done under a legal process regularly issuing from a court of competent jurisdiction; 9 Conn. 141; 11 Mass. 500; 6 Me. 421; 2 Litt. 234; 6 Dana 321; 3 G. & J. 377; 13 Ga. 260; 6 Cal. 399; 95 Ala. 213; 276 Ill. 224. See 3 S. & R. 142; 12 *id.* 210.

Wrongful acts committed by the defendant's servant without his order, but for which he is responsible; 3 Cush. 300; 8 Wend. 474; 9 Humphr. 757; 13 B. Monr. 219; 2 Ohio St. 536; 17 Ill. 580.

The infringement of rights given by statute; 15 Conn. 526; 7 Mass. 169; 23 Me. 371; 9 Vt. 411; 2 Woodb. & M. 337.

Injuries committed to property of which the plaintiff has the *reversion* only; 4 Gray 197; 24 Conn. 15; 2 Green 8; 1 Johns. 511; 3 Hawks 246; Busb. 30; 2 Murph. 61; 2 N. H. 430; 5 Pa. 118; 8 *id.* 523; 2 Dougl. 184; 4 Harr. Del. 181; 21 Vt. 108; 1 Dutch. 97, 255; 41 Me. 104; as where property is in the hands of a bailee for hire; 3 East 593; 3 Hawks 246; 8 B. Monr. 515; also where grantor destroys an unrecorded deed placed in his hands for safekeeping by the grantee; 102 N. C. 519.

As to the effect of intention, as distinguishing case from trespass, see 1 M'Mull. 364; 7 Blackf. 342; 4 Den. 464; 4 Barb. 225; 30 Me. 173; 13 Ired. 50; 26 Ala. N. S. 633. In some states the distinction is expressly abolished by statute; 25 Me. 86; 8 Blackf. 119; 3 Sneed 20; 1 Wis. 352.

The declaration must not state the injury to have been committed *vi et armis;* 3 Conn. 64 [yet after verdict the words *vi et armis* (with force and arms) may be rejected as surplusage; Harp. 122]; and should not conclude *contra pacem;* Com. Dig. *Action on the Case* (C, 3).

Damages not resulting necessarily from the acts complained of must be specially stated; 3 Strobh. 373; 32 Me. 578; 5 Cush. 104; 9 Ga. 160; 4 Chandl. Wis. 20. Evidence which shows the injury to be trespass will not support case; 5 Mass. 560; 16 *id.* 451; 3 Johns. 468; 4 Barb. 596; 3 Md. 431. See 2 Rand. 440; 8 Blackf. 119.

The plea of not guilty raises the general issue; 2 Ashm. 150. Under this plea almost any matter may be given in evidence, except the statute of limitations; and the rule is modified in actions for slander and a few other instances; 1 Wms. Saund. 130, n. 1; Willes 20.

The judgment is that the plaintiff recover a sum of money ascertained by a jury for his damages sustained by the commission of the grievances complained of in the declaration; 2 Ired. 221; 18 Vt. 620; 18 Conn. 494; with costs. See, generally, 2 Wait, Act. & Def. ch. xxxiv., as to cases in which this action will lie.

CASE CERTIFIED. Where there is a difference of opinion between the judges of the circuit court, they may certify the question to the supreme court of the United States, but it must be a distinct point or proposition of law so clearly stated that it can be answered without regard to the other issues of law or fact in the case; 128 U. S. 46; 131 *id.* 55, 58. It must not involve the whole case and must be a question of law only; 128 U. S. 426; nor can a case be certified in advance of a regular trial; 131 U. S. 55.

CASE LAW. The body of law created by judicial decisions, as distinguished from law derived from statutory and other sources. See JUDGE-MADE LAW; PRECEDENT.

CASE MADE. A statement of facts in relation to a disputed point of law, agreed to by both parties and submitted to the court *without a preceding action.* This is only found in the Code states. See 99 Ala. 252; 22 S. E. Rep. (N. C.) 9; 39 S. C. 237.

CASE STATED. In Practice. A statement of all the facts of a case, with the names of the witnesses, and a detail of the documents which are to support them. A brief.

An agreement in writing, between a plaintiff and defendant, that the facts in dispute between them are as therein agreed upon and set forth. 3 Whart. 143.

Some process of this kind exists, it is presumed, in all the states, for the purpose of enabling parties who agree upon the facts to dispense with a

formal trial to ascertain what is already known, and secure a decision upon the law involved merely. These agreements are called also agreed cases, cases agreed on, agreed statements, etc. In chancery, also, when a question of mere law comes up, it is referred to the king's bench, or common pleas, upon a case stated for the purpose; 3 Sharsw. Bla. Com. 453, n.; 6 Term 313.

The case stated usually embodies a written statement of the facts in the case consented to by both parties as correct, and submitted to the court by their agreement, that a decision may be rendered upon the court's conclusions of law on the facts stated, without a trial by jury.

The facts being thus ascertained, it is left for the court to decide for which party is the law. As no writ of error lies on a judgment rendered on a case stated; Dane, Abr. c. 137, art. 4, § 7; it is usual in the agreement to insert a clause that the case stated shall be considered in the nature of special verdict. In that case, a writ of error lies on the judgment which may be rendered upon it. But a writ of error will also lie on a judgment on a case stated, when the parties have agreed to it; 8 S. & R. 529; and it is usual to include such a provision.

There must be a pending action, in which the case is stated; 4 D. R. (Pa.) 490; it must state all the facts; and cannot refer to outside documents; 132 Pa. 545; the court must decide on the case stated, not on the report of a master subsequently appointed; 132 Pa. 578; and cannot go outside of the case stated in deciding it; 148 Pa. 282; *id.* 441; 149 Pa. 302; if no right of appeal is reserved, the decision of the court is final; 153 *id.* 625.

Where a controversy is submitted to a court upon a case stated, but which fails to recite that it is submitted for its opinion on the law and judgment, the court is without jurisdiction to render judgment; 77 Md. 412. Where an agreed statement was made by the parties under a mistake of facts, it was a proper subject of amendment; 3 Wash. St. 420.

CASE SYSTEM. A method of teaching or studying the science of the law by a study of the cases historically, or by the inductive method. It was introduced in the Law School of Harvard University in 1869–70 by Christopher C. Langdell, Dane Professor of Law. It is usually based upon printed collections of selected cases arranged historically or chronologically under appropriate titles. The system is not necessarily based upon the exclusive use of cases, but the cases are made the basis of instruction. Text books may be used for the purpose of reference and collateral reading, and are so used by many teachers under this system.

The reasons for the adoption of this system of instruction are given in a paper read before the Section of Legal Education of the American Bar Association in 1894, by Professor W. A. Keener, formerly of Harvard University, now of the Law School of Columbia University:

"1. That law, like other applied sciences, should be studied in its application, if one is to acquire a working knowledge thereof. 2. That this is entirely feasible for the reason that while the adjudged cases are numerous the principles controlling them are comparatively few. 3. That it is by the study of cases that one is to acquire the power of legal reasoning, discrimination and judgment, qualities indispensable to the practising lawyer. 4. That the study of cases best develops the power to analyze and to state clearly and concisely a complicated state of facts, a power which, in no small degree, distinguished the good from the poor and indifferent lawyer. 5. That the system, because of the study of fundamental principles, avoids the danger of producing a mere case lawyer, while it furnishes, because the principles are studied in their application to facts, an effectual preventive of any tendency to mere academic learning. 6. That the student, by the study of cases, not only follows the law in its growth and development, but thereby acquires the habit of legal thought, which can be acquired only by the study of cases, and which must be acquired by him either as a student, or after he has become a practitioner, if he is to attain any success as a lawyer. 7. That it is the best adapted to exciting and holding the interest of the student, and is, therefore, best adapted to making a lasting impression upon his mind. 8. That it is a method distinctly productive of individuality in teaching and of a scientific spirit of investigation, independence, and self-reliance on the part of the student."

Reprinted in 28 Am. L. Rev. 709. See also 2 *id.* 705; 24 *id.* 211; 27 *id.* 801; 2 Harv. L. Rev. 203, 418; 9 *id.* 169; Reports American Bar Association, 1895, 1896.

CASH. That which circulates as money, including bank bills, but not mere bills receivable. The provision of the limited partnership acts requiring "actual cash payment" by the special partner is not complied with by the delivery to the firm of promissory notes, which are received and treated as cash; 5 Allen 91; nor of credits, 62 N. Y. 513; nor of post-dated checks, 69 *id.* 148; though regular checks of third parties, conceded to represent cash, have been allowed; 34 Pa. 344.

Cash price is the price of articles paid for in cash at the time of purchase, in distinction from the barter and credit prices. A sale for cash is a sale for money in hand; 24 N. J. L. 101.

CASH-BOOK. A book in which a merchant enters an account of all the cash he receives or pays. An entry of the same thing ought to be made, under the proper dates, in the journal. The object of the cash-book is to afford a constant facility to ascertain the true state of a man's cash. Pardessus, n. 87.

CASHIER. An officer of a moneyed institution, or of a private person or firm, who is entitled by his office to take care of the cash or money of such institution, person, or firm.

The cashier of a bank is usually intrusted with all the funds of the bank, its notes, bills, and other choses in action, to be used from time to time for the ordinary and extraordinary exigencies of the bank. He usually receives, directly, or through subordinate officers, all moneys and notes of the bank; delivers up all discounted notes and other securities; signs drafts on corresponding banks, and, with the president, the notes payable on demand issued by the bank; and, as an executive officer of the bank, transacts much of its general business. He is the chief executive officer of the bank; Morse, Bank. § 152; and the criterion of his authority is that as an officer he transacts its business but does not regulate and control it; *id.*

He need not be a stockholder; indeed, some bank charters prohibit him from owning stock in the bank. He usually gives security for the faithful discharge of his trusts. It is his duty to make reports to the proper state officer (in banks incorporated under the national bank act to the comptroller of the currency; U. S. R. S. § 5210,) of the condition of the bank, as provided by law; and false statements are punishable, and render the cashier liable for any damage resulting to third parties therefrom; Bank Mag. July, 1860.

In general, the bank is bound by the acts of the cashier within the scope of his authority, express or implied; 1 Pet. 46, 70; 8 Wheat. 300, 361; 10 Wall. 604; 3 Mas. 505; 1 Holmes 396; 1 Ill. 45; 1 T. B. Monr. 179; 62 N. W. Rep. (Mich.) 722. It is bound by the act of the cashier in drawing checks in its name, though with the intent to defraud the bank and apply the proceeds to his own use; 67 Hun 378. He may endorse to himself and sue on a note payable to the bank; 99 Mo. 102. But the bank is not bound by a declaration of the cashier not within the scope of his authority; as if, when a note is about to be discounted by the bank, he tells a person that he will incur no risk nor responsibility by becoming an indorser on such note; 6 Pet. 51; 8 *id.* 12. See 95 U. S. 557; 58 How. Pr. 267; 17 Mass. 1; Story, Ag. § 114; Whart. Ag. § 684; 3 Am. L. Rev. 612; 3 Halst. 1; 12 Wheat. 183; 1 W. & S. 161; 1 Pars. Eq. Cas. 240. He has no authority to accept certificates of the capital stock of an insurance company in payment of a debt due the bank; 37 Neb. 197; 55 *id.* 631.

Where a cashier does acts on behalf of a bank which are not against public policy or criminal, when once executed in whole or part, they are binding on the bank, as it cannot enjoy the benefits and escape the liabilities; 32 Ill. App. 653; and a cashier of a bank has authority to have the paper of the bank rediscounted, in the usual course of business; 62 N. W. Rep. (Mich.) 722; and when the cashier of a bank instituted an action in the name of the bank commenced by capias issued on his affidavit, alleging his connection with the bank, it will be presumed that he has authority to do so; 56 N. W. Rep. 9; s. c. 96 Mich. 426. A banking corporation, whose charter does not otherwise provide, may be represented by its cashier in transactions outside of his ordinary duties, without his authority to do so being in writing, or appearing in the records of the proceedings of the directors, and where the cashier has so acted for a series of years without objection, the bank is estopped to deny his authority; 110 U. S. 7.

He has no authority to bind the bank by a pledge of its credit to secure a discount of his own notes for the benefit of a corporation in which he was a stockholder; 66 Fed. Rep. 691; s. c. 14 C. C. A. 61; nor has he authority to sell property belonging to the bank; 34 Pac. Rep. 403; s. c. 52 Kan. 109; nor has he power to bind the bank to pay the draft of a third person on one of its customers, to be drawn at a future day, when it expects to have a deposit from him sufficient to cover it; 56 Fed. Rep. 959; nor to assign collaterals belonging to himself, which were given to secure a loan to another person for the cashier's benefit; 19 S. E. (Ga.) Rep. 38.

The power of a bank cashier to transfer notes and securities held by the bank can be questioned only by the bank or its representative; 62 N. W. Rep. (Minn.) 398.

In Military Law. To deprive a military officer of his office. See Art. of War art. 14.

CASSARE. To quash; to render void; to break. Du Cange.

CASSATION. In French Law. A decision emanating from the sovereign authority, by which a decree or judgment in the court of last resort is set aside or annulled. See COUR DE CASSATION.

CASSETUR BREVE (Lat. that the writ be quashed). **In Practice.** A judgment sometimes entered against a plaintiff at his request when, in consequence of allegations of the defendant, he can no longer prosecute his suit with effect.

The effect of such entry is to stop proceedings, and exonerate the plaintiff from liability for future costs, leaving him free to sue out new process; 3 Bla. Com. 303. See Gould, Pl. c. 5, § 139; 5 Term 634.

CASTELLAIN, CASTELLANUS. The keeper or captain of a fortified castle; the constable of a castle. Spelman, Gloss.; *Termes de la Ley;* Blount.

CASTELLORUM OPERATIO. In Old English Law. Service or labor done by inferior tenants for the building and upholding of castles and public places of defence.

Towards this some gave their personal service, and others, a contribution of money or goods. This was one branch of the *trinoda necessitas;* 1 Bla. Com. 263; from which no lands could be exempted under the Saxons; though immunity was sometimes allowed after the conquest; Kennett, Paroch. Ant. 114; Cowel.

CASTIGATORY. An engine used to punish women who have been convicted of being common scolds. It is sometimes

called the trebucket, tumbrel, ducking-stool, or cucking-stool. This barbarous punishment has perhaps never been inflicted in the United States; 12 S. & R. 225.

CASTING-VOTE. The privilege which the presiding officer possesses of deciding a question where the body is equally divided. The vice-president of the United States, as president of the senate, has the casting-vote when that body is equally divided, but cannot vote at any other time; Const. I. 3. This is a provision frequently made, though in some cases the presiding officer, after giving his vote with the other members, is allowed to decide the question in case of a tie; 48 Barb. 603.

CASTRATION. In Criminal Law. The act of gelding. When this act is maliciously performed upon a man, it is a mayhem, and punishable as such, although the sufferer consented to it; 2 Bish. Cr. Law §§ 1001, 1008. By the ancient law of England the crime was punished by retaliation, *membrum pro membro;* Co. 3d Inst. 118. It is punished in the United States, generally, by fine and imprisonment. The civil law punished it with death; Dig. 74. 8. 4. 2. For the French law, vide Code Pénal art. 316. The consequences of castration, when complete, are impotence and sterility; 1 Beck, Med. Jur. 72.

CASU CONSIMILI. See CONSIMILI CASU.

CASU PROVISO (Lat. in the case provided for). **In Practice.** A writ of entry framed under the provisions of the statute of Gloucester (6 Edw. I.) c. 7, which lay for the benefit of the reversioner when a tenant in dower aliened in fee or for life.

It seems to have received this name to distinguish it from a similar writ framed under the provisions of the statute Westm. 2d (13 Edw. I.) c. 24, where a tenant by curtesy had alienated as above, and which was known emphatically as the writ *in consimili casu.*

The writ is now practically obsolete. Fitzh. Nat. Brev. 205; Dane, Abr. Index.

CASUAL EJECTOR. In Practice. The person supposed to perform the fictitious ouster of the tenant of the demandant in an action of ejectment. See EJECTMENT.

CASUALTIES OF SUPERIORITY. In Scotch Law. Certain emoluments arising to the superior lord in regard to the tenancy.

They resemble the *incidents* to the feudal tenure at common law. They take precedence of a creditor's claim on the tenant's land and constitute a personal claim also against the vassal. Bell, Dict. They have very generally disappeared. Pat. Comp. 29.

CASUALTY. Inevitable accident. Unforeseen circumstances not to be guarded against by human agency, and in which man takes no part. Story, Bailm. § 240; 1 Pars. Contr. 543; 2 Whart. Negl. 8th ed. *159, 160; Edw. Bailm. 532. See 17 C. B. N. S. 51; 56 Wis. 98.

CASUS FŒDERIS (Lat.). **In International Law.** A case within the stipulations of a treaty.

The question whether, in case of a treaty of alliance, a nation is bound to assist its ally in war against a third nation, is determined in a great measure by the justice or injustice of the war. If manifestly unjust on the part of the ally, it cannot be considered as *casus fœderis.* Grotius, b. 2, c. 25; Vattel, b. 2, c. 12, § 168.

See 1 Kent 49; 3 Cow. 264.

CASUS FORTUITUS (Lat.). An inevitable accident. A loss happening in spite of all human effort and sagacity. 3 Kent 217, 300; Whart. Negl. §§ 113, 553.

It includes such perils of the sea as strokes of lightning, etc. A loss happening through the agency of rats was held an unforeseen, but not an inevitable, accident. 1 Curt. C. C. 148. The happening of a *casus fortuitus* excuses ship-owners from liability for goods conveyed; 3 Kent 216; L. R. 1 C. P. D. 143.

CASUS MAJOR (Lat.). An unusual accident. Story, Bailm. § 240.

CASUS OMISSUS (Lat.). A case which is not provided for. When such cases arise in statutes which are intended to provide for all cases of a given character which may arise, the common law governs; 5 Co. 38; 11 East 1; 2 Binn. 279; 2 Sharsw. Bla. Com. 260; Broom, Max. 46. A *casus omissus* may occur in a contract as well as in a statute; 2 Bla. Com. 260.

CAT. A whip sometimes used for whipping criminals. It consists of nine lashes tied to a handle, and is frequently called cat-o-nine-tails. It is used where the whipping-post is retained as a mode of punishment and was formerly resorted to in the navy.

CATALLA OTIOSA (Lat.). Dead goods, and animals other than beasts of the plow, *averia carucæ*, and sheep. 3 Bla. Com. 9; Bract. 217 *b.*

CATALLUM. A chattel.

The word is used more frequently in the plural, *catalla*, but has then the same signification, denoting all goods, movable or immovable, except such as are in the nature of fees and freeholds. Cowel; Du Cange.

CATANEUS. A tenant *in capite.* A tenant holding immediately of the crown. Spelman, Gloss.

CATCHING BARGAIN. An agreement made with an heir expectant for the purchase of his expectancy at an inadequate price.

In such cases the heir is, in general, entitled to relief in equity, and may have the contract rescinded upon terms of redemption; 1 Vern. 167, 320, n.; 2 Cox 80; 2 Ch. Cas. 136; 1 P. Wms. 312; 1 Cro. Car. 7; 2 Atk. 133; 2 Swanst. 147, and the cases cited in the note; 1 Fonbl. Eq. 140; 1 Belt, Supp. Ves. Jr. 66; 2 *id.* 361; L. R. 8 Ch. Ap. 484; L. R. 10 Eq. 641. It has been said that all persons dealing for a reversionary interest are subject to this rule; but it may be doubted whether the course of de-

cisions authorizes so extensive a conclusion, and whether, in order to constitute a title to relief, the reversioner must not combine the character of heir; 2 Swanst. 148, n. See 1 Ch. Pr. 112, 113, n., 458, 826, 838, 839. A mere hard bargain is not sufficient ground for relief.

The English law on this subject has been so altered by stat. 31 and 32 Vic. c. 4, that, while before that act slight inadequacy of consideration was sufficient to set the contract aside, at present only positive unfairness will be relieved against; Bisph. Eq. § 231, and cases cited. See Chesterfield *v.* Janssen, 1 Lead. Cas. in Eq. 773, and notes. The contract may be for a loan, sale, annuity, or mortgage; 16 Ves. 512; L. R. 10 Ch. Ap. 389; 26 Beav. 644; 47 Mich. 94.

CATCHPOLE. A name formerly given to a sheriff's deputy, or to a constable, or other officer whose duty it is to arrest persons. He was a sort of sergeant. The word is not now in use as an official designation; Minshew.

CATER COUSIN. A very distant relation. Bla. Law Tracts 6.

CATHEDRAL. In Ecclesiastical Law. A tract set apart for the service of the church.

After the establishment of Christianity, the emperors and other great men gave large tracts of land whereon the first places of public worship were erected,—which were called *cathedræ*, cathedrals, *sees*, or seats, from the clergy's residence thereon. And when churches were afterwards built in the country, and the clergy were sent out from the cathedrals to officiate therein, the cathedral or head seat remained to the bishop, with some of the chief of the clergy as his assistants.

CATHOLIC CREDITOR. In Scotch Law. A creditor whose debt is secured on several parts or all of his debtor's property. Such a creditor is bound to take his payment with reference to the rights of the secondary creditors, or, if he disregards their rights, must assign over to them his claims. This rule applies where he collects his debts of a cautioner (surety). Bell, Dict.

CATHOLIC EMANCIPATION ACT. The act 10 Geo. IV. c. 7. This act relieves from disabilities and restores all civil rights to Roman Catholics, except that of holding ecclesiastical offices and certain high state offices. The previous legislation which by gradual stages led up to the final removal of these disabilities is to be found in the acts of 18 Geo. III. c. 60; 31 Geo. III. c. 32; and 43 Geo. IV. c. 7. 2 Steph. Com. 721.

CATTLE. A collective name for domestic quadrupeds generally, including not only the bovine tribe, but horses, asses, mules, sheep, goats, and swine. Web. Dict.; 21 Wall. 299.

A railroad engineer cannot take chances of an animal's getting off the track, where he has an opportunity of avoiding all possibility of an injury; 10 So. Rep. (Miss.) 41. It is immaterial whether the stock was legally at large or not, where the road is not fenced; 5 Ind. App. 86; but where not legally at large and the company is under no legal obligation to fence its road, it will only be responsible for gross, wanton, or wilful negligence in causing injury to stock; 45 Mo. App. 123. See 41 Ill. App. 561. The law does not presume negligence from the mere fact that stock was killed or injured by a railroad company; 49 Fed. Rep. 798. See ANIMAL.

CATTLE GATE. A customary proportionate right of pasture enjoyed in common with others. The right is measured not by the number of cattle to be pastured, but by reference to the rights of others and the whole amount of pasture. 34 E. L. & Eq. 511; 1 Term 137.

CAUSA (Lat.). A cause; a reason.

A condition; a consideration. Used of contracts, and found in this sense in the Scotch law also. Bell, Dict.

A suit; an action pending. Used in this sense in the old English law.

Property. Used thus in the civil law in the sense of *res* (a thing). *Non porcellum, non agnellum nec aliam causam* (not a hog, not a lamb, nor other thing). Du Cange.

By reason of.

Causa proxima. The immediate cause.

Causa remota. A cause operating indirectly by the intervention of other causes.

In its general sense, *causa* denotes anything operating to produce an effect. Thus, it is said, *causa causantis causa est causati* (the cause of the thing causing is the cause of the thing caused). 4 Gray 398; 4 Campb. 284. In law, however, only the direct cause is considered. See 9 Co. 50; 12 Mod. 639; CAUSA PROXIMA NON REMOTA SPECTATUR.

CAUSA JACTITATIONIS MARITAGII (Lat.). A form of action which anciently lay against a party who boasted or gave out that he or she was married to the plaintiff, whereby a common reputation of their marriage might ensue. 3 Bla. Com. 93.

CAUSA MATRIMONII PRÆLOCUTI (Lat.). A writ lying where a woman has given lands to a man in fee-simple with the intention that he shall marry her, and he refuses so to do within a reasonable time, upon suitable request. Cowel. Now obsolete. 3 Bla. Com. 183, n.

CAUSA MORTIS DONATIO. See DONATIO CAUSA MORTIS.

CAUSA PROXIMA NON REMOTA SPECTATUR (Lat.). The direct and not the remote cause is considered.

In many cases important questions arise as to which, in the chain of acts tending to the production of a given state of things, is to be considered the responsible cause. It is not merely distance of place or of causation that renders a cause remote. The cause nearest in the order of causation, without any efficient concurring cause to produce the result, may be considered the direct cause. In the course of decisions of cases in which it is necessary to determine which of several causes is so far responsible for the happening of the act or injury com-

plained of, what is known as the doctrine of proximate cause is constantly resorted to in order to ascertain whether the act, omission, or negligence of the person whom it is sought to hold liable was in law and in fact responsible for the result which is the foundation of the action.

The rule was formulated by Bacon, and his comment on it is often cited: "It were infinite for the law to judge the cause of causes, and their impulsions one of another: therefore it contenteth itself with the immediate cause; and judgeth of acts by that, without looking to any further degree;" Max. Reg. 1. Its subsequent development has resulted rather in its application to new conditions than in deviation from the principle as originally stated. Proximate cause, it may be generally stated, is such adequate and efficient cause as, in the natural order of events, and under the particular circumstances surrounding the case, would necessarily produce the event; and this having been discovered, is to be deemed the true cause, unless some new cause not incidental to, but independent of, the first, shall be found to intervene between it and the first. Sh. & Redf. Neg. § 10; Thomas, J., in 4 Gray 412; Story, J., in 14 Pet. 99; 2 Phil. Ins. § 1097; *id.* § 1131; 82 Ind. 426; 115 *id.* 51; 52 N. H. 528; Webb's Poll. Torts 29. A proximate cause must be the act or omission of a responsible human being, such as in ordinary natural sequence immediately results in the injury; Whart. Neg. § 73: it is a cause which in natural sequence, undisturbed by any independent cause, produces the result complained of; 160 Pa. 359; and the result must be the natural and probable consequence such as ought to have been foreseen as likely to flow from the act complained of; 112 Pa. 574; 147 *id.* 44; 14 Allen 290. The practical consideration which the courts have in view is to find a cause from which a man of ordinary experience and sagacity could foresee that the result might probably ensue; Sh. & Redf. Neg. 9. Negligence for example is not actionable unless it is the proximate cause of the injury complained of, but because it is impossible to trace back the chain of causes indefinitely, the law stops at the first link in the chain of causation and looks to the person who is the proximate cause of the injury; *id.*

For example, where a train was forty-five minutes late when a gust of wind threw it from the track and injured a passenger; it was held that though the train would have escaped the gust of wind had it been on time, yet the accident was neither the natural nor probable consequence of the delay, and only an independent force took advantage of it and the company was not liable to the passenger; 3 Neb. 44. So when a horse hitched to a defective hitching-post was frightened by the running away of another horse, and broke the post and ran over a person in the street, the latter could not recover against the owner of the post for the defect in the post as the cause of the injury; 83 Ill. 347.

The act of a third person intervening will not excuse, if such act ought to have been foreseen; 111 Mass. 136; but where the defendant sold gunpowder to a child, and the parents took charge of it and let the child have some, the sale was held too remote as a cause of injury to the child by an explosion; 103 Mass. 507; on the other hand an injury from a railway accident, having been the direct cause of a diseased condition which resulted in paralysis, was held to be the proximate cause of the latter; 50 N. W. Rep. (Minn.) 927; but where by reason of injury in a collision a passenger became disordered in mind and body and eight months after committed suicide, in a suit for damages against the railroad company it was held that his own act was the proximate cause of his death; 105 U. S. 249.

Consequences which follow in unbroken sequence, without an intervening sufficient cause, from the original wrong, are natural; and for them the original wrongdoer is responsible, even though he could not have foreseen the particular results, provided that by the exercise of ordinary care he might have foreseen that *some* injury would result; Webb's Poll. Torts 36, note and cases cited; 99 N. Y. 158.

In order to displace an apparent efficient cause and to prevent it from being treated as the proximate cause, an intervening event must be wholly independent of the first. If the act in which the defendant is engaged is one which circumstances indicate may be dangerous to others, and the event whose occurrence is necessary to make the act injurious can readily be seen as likely to occur under the circumstances, it will not be considered an independent intervening cause and the defendant is liable; 53 Pa. 436; a woman's illness caused by fright from the shooting of a dog in her presence is not such a consequence as would be supposed naturally to follow the act; 36 Minn. 90.

If two causes operate at the same time to produce a result which might be produced by either, they are concurrent causes, and in such case each is a proximate cause, but if the two are successive and unrelated in their operation, one of them must be proximate and the other remote; 149 Pa. 222. As an illustration of concurrent causes, where lumber was negligently piled, and remained a long time in that condition, and was caused to fall by the negligence of a stranger, the negligence in piling concurring with the negligence of the stranger, was the direct and proximate cause; 41 Cal. 87.

Where the intervening cause which displaces a prior one is the negligence of the party injured it is designated contributory negligence, and where that exists there can be no recovery. But although the subject of contributory negligence has become so important as to constitute a distinct head of the law, it is a phrase, however well established, not free from objection; Poll. Torts, Webb's ed. 569; and the penal theory

on which it is sometimes considered as resting is discarded by the most authoritative writers; *id.;* Whart. Neg. § 300; Camp. Neg. 180. The view which is supported by reason and now likewise fully by authority is that the defence of contributory negligence of the plaintiff finds its true basis in the application above made of the doctrine of proximate cause, and that it is a conclusive answer to the action because it takes its place as the proximate, direct, immediate, or, to use the apt phrase of Pollock, the *decisive* cause of the injury (Torts 573, 575). In the leading English case it was left to the jury to say whether the negligence attributed to the plaintiff "*directly* contributed to the injury;" 2 C. B. N. S. 740; and on appeal the rule was laid down that negligence of the plaintiff would not prevent recovery, unless it were such that without it the injury *would* (not could) not have happened, or "if the defendant might, by the due exercise of care on his part, have avoided the consequences of the neglect or carelessness of the plaintiff;" 5 C. B. N. S. 573. This general view was sustained in a subsequent case by the house of lords and great stress was laid on the evidence that the contributory negligence claimed was the *immediate* cause of the accident; 1 App. Cas. 754; the negligence set up as contributory must in order to constitute a defence *substantially* or *essentially* or *directly* tend to produce the injury, or be an *actual* and *efficient* cause of it; if it remotely contribute, it will not debar the plaintiff from a recovery; 86 Ala. 381; it must have *direct* relation to the act or omission charged against the defendant; 64 Cal. 463. See NEGLIGENCE.

The question as to what is the proximate cause of an injury is ordinarily not one of science or of legal knowledge but of fact for the jury to determine in view of the accompanying circumstances, all of which must be submitted to the jury, who must determine whether the original cause is by continuous operation linked to each successive fact; 90 Pa. 122; 94 U. S. 469; and a finding that the burning of the plaintiff's mill and lumber was the unavoidable consequence of the burning of the defendant's elevator, is in effect a finding that there was no intervening and independent cause between the negligent conduct of defendant and injury to plaintiff; *id.* The doctrine under consideration finds its most frequent application in *fire and marine insurance;* 2 Am. Ins. § 284; 12 East 648; L. R. 4 Q. B. 414; L. R. 4 C. P. 206; L. R. 5 Ex. 204; 8 Cush. 477; 2 Duer 301; 11 N. Y. 9; 16 B. Monr. 427; 32 Pa. 351; 14 How. 351, and in cases of *tort founded on negligence;* 5 C. & P. 190; L. R. 4 C. P. 279; L. R. 8 Q. B. 274; 3 M. & R. 105; 35 N. J. L. 17; 70 Pa. 86; 109 Mass. 277; 1 Sm. L. Cas. 755. See, generally, 4 Am. L. Rev. 201; 4 So. L. Rev. 703; Webb's Poll. Torts 29, 566; Howe, Civ. L. 201.

CAUSA REI (Lat.). **In Civil Law.** Things accessory or appurtenant. All those things which a man would have had if the thing had not been withheld. Du Cange; 1 Mackeldey, Civ. Law 55.

CAUSARE (Lat. to cause). To be engaged in a suit; to litigate; to conduct a cause. Used in the old English and in the civil law.

CAUSATOR (Lat.). A litigant; one who takes the part of the plaintiff or defendant in a suit.

CAUSE (Lat. *causa*). **In Civil Law.** The consideration or motive for making a contract. Dig. 2. 14. 7; Toullier, liv. 3, tit. 3, c. 2, § 4; 1 Abb. 28.

In Pleading. Reason; motive.

In a replication *de injuria*, for example, the plaintiff alleges that the defendant of his own wrong and *without the cause* by him, etc., where the word *cause* comprehends all the facts alleged as an excuse or reason for doing the act. 8 Co. 67; 11 East 451; 1 Chit. Pl. 585.

In Practice. A suit or action. Any question, civil or criminal, contested before a court of justice. Wood, Civ. Law 301. It was held to relate to civil actions only, and not to embrace *quo warranto;* 5 E. & B. 1. See 43 Mo. 254; 3 Q. B. 901.

CAUSE OF ACTION. In Practice. Matter for which an action may be brought.

A cause of action is said to accrue to any person when that person first comes to a right to bring an action. There is, however, an obvious distinction between a cause of action and a right, though a cause of action generally confers a right. Thus, statutes of limitation do not affect the cause of action, but take away the right. A cause of action implies that there is some person in existence who can bring suit and also a person who can lawfully be sued; 40 Ala. 148; 102 Ill. 272. See 28 Barb. 330; 4 Bing. 704; 26 How. Pr. 501.

When a wrong has been committed, or a breach of duty has occurred, the cause of action has accrued, although the claimant may be ignorant of it; 3 B. & Ald. 288, 626; 5 B. & C. 259; 4 C. & P. 127. A cause of action does not accrue until the existence of such a state of things as will enable a person having the proper relations to the property or persons concerned to bring an action; 5 B. & C. 360; 8 D. & R. 346; 4 Bingh. 686.

CAUTIO, CAUTION. In Civil Law. Security given for the performance of any thing. A bond whereby the debtor acknowledges the receipt of money and promises to pay it at a future day.

In French Law. The person entering into an obligation as a surety.

In Scotch Law. A pledge, bond, or other security for the performance of an obligation, or completion of the satisfaction to be obtained by a judicial process. Bell, Dict.

CAUTIO FIDEJUSSORIA. Security by means of bonds or pledges entered into by third parties. Du Cange.

CAUTIO PIGNORATITIA. A pledge by a deposit of goods.

CAUTIO PRO EXPENSIS. Security for costs or expenses.

This term is used among the civilians, Nov. 112, c. 2, and generally on the continent of Europe. In nearly all the countries of Europe, a foreign plaintiff, whether resident or not, is required to give caution *pro expensis:* that is, security for costs. In some states this requisition is modified, and, when such plaintiff has real estate or a commercial or manufacturing establishment within the state, he is not required to give such caution. Fœlix, *Droit Intern. Privé*, n. 106.

CAUTIO USUFRUCTUARIA. Security, which tenants for life give, to preserve the property rented free from waste and injury. Ersk. Inst. 2. 9. 59.

CAUTION JURATORY. Security given by oath. That which a suspender swears is the best he can afford in order to obtain a suspension. Ersk. Pr. 4. 3. 6; Paterson, Comp.

CAUTIONARY BOND. See BOND.

CAUTIONER. A surety; a bondsman. One who binds himself in a bond with the principal for greater security. He is still a cautioner whether the bond be to pay a debt or whether he undertake to produce the person of the party for whom he is bound. Bell, Dict.

CAVEAT (Lat. let him beware). **In Practice.** A notice not to do an act, given to some officer, ministerial or judicial, by a party having an interest in the matter.

It is a formal caution or warning not to do the act mentioned, and is addressed frequently to prevent the admission of wills to probate, the granting letters of administration, etc. See Williams, Ex. 581.

1 Burn, Eccl. Law 19, 263; Nelson, Abr.; Dane, Abr.; Ayliffe, *Parerg.*; 3 Bla. Com. 246; 2 Chit. Pr. 502, note *b*; 3 Redf. Wills 119; 4 Brew. Pr. 3974; Poph. 133; 1 Sid. 371; 3 Binn. 314; 3 Halst. 139.

In Patent Law. A legal notice to the patent office that the caveator claims as inventor, in order to prevent the issue of a patent on a particular device to any other person without notice to the caveator. It gives no advantage to the caveator over any rival claimant, but only secures to him an opportunity to establish his priority of invention.

It is filed in the patent office under statutory regulations; U. S. Rev. Stat. § 4902; and an alien resident for one year, having made oath of his intention to become a citizen, has the same privilege; *id.* The principal object of filing it is to obtain for an inventor time to perfect his invention without the risk of having a patent granted to another person for the same thing.

Upon the filing of such caveat and the payment of the proper fee, the law provides that if application be made within the year for a patent with which the caveat would in any manner interfere, the commissioner shall deposit the drawings, etc., of such application in the confidential archives of his office, and give notice thereof by mail to the person filing the caveat, who, if he would avail himself of his caveat, shall file his description, etc., within three months of the mailing of the notice, with allowance for the usual time of transmission; U. S. Rev. Stat. § 4903.

As to the form of the caveat, it need contain nothing more than simply an intelligible description of any invention which the caveator claims to have made, giving its distinguishing characteristics, with sufficient precision to enable the office to determine whether there is a probable interference, when a subsequent application is filed. It amounts in effect to a notice to the office not to grant a patent for the same thing to another without giving the caveator an opportunity to show his better title to the same. A caveat cannot be withdrawn, but copies may be obtained and any correction or addition must be filed on a separate paper; Rob. Pat. § 445. It is evidence of the date of the invention described, and may be proof that the invention was prior to the time of filing; *id.* § 446; but it does not estop the caveator from the claim that his invention was perfect; *id.* § 446. It is not assignable, but the invention may be transferred and the caveat may be used to identify it; *id.* § 447. A caveator is not concluded by the description of his invention in the caveat; *id.* § 448. See PATENTS,

It is also used to prevent the issue of land patents; 9 Gratt. 508; 1 Wash. 50; 3 Md. 230; and where surveys are returned to the land office, and marked "in dispute," this entry has the effect of a *caveat* against their acceptance; 43 Pa. 197.

CAVEAT EMPTOR (Lat. let the purchaser take care). In every sale of real property, a purchaser's right to relief at law or in equity on account of defects or incumbrances in or upon the property sold depends solely upon the covenants for title which he has received; 2 Sugd. Vend. 425; Co. Litt. 384 *a*, Butl. note; Dougl. 665; 2 Freem. 1; 3 Swanst. 651; 1 Coke 1; 17 Pick. 475; 10 Ga. 311; 1 S. & R. 52; unless there be fraud on the part of the vendor; 3 B. & P. 162; 30 Me. 266; 2 Johns. Ch. 519; 5 *id.* 79; 9 N. Y. 36; 24 Pa. 142; 3 Md. Ch. Dec. 351; 1 Spenc. 353; 66 N. C. 233; 70 *id.* 713; 4 Ill. 334; 76 *id.* 71; 8 Leigh 658; 7 Gratt. 238; 15 B. Monr. 627; Freem. Ch. 134, 276; 3 Ired. Eq. 408; 3 Humphr. 347; 5 Ia. 293; 39 Tex. 177; and consult Rawle, Cov. for Title, 5th ed. § 319. This doctrine applies to a sale made under a decree foreclosing a mortgage, and the purchaser cannot rely upon statements made by the officer conducting the sales; 35 Neb. 466.

In sales of personal property substantially the same rule applies, and is thus stated in Story, Sales, 3d ed. § 348:—The purchaser buys at his own risk, unless the seller gives an express warranty, or unless the law implies a warranty from the circumstances of the case or the nature of the thing sold, or unless the seller be guilty of fraudulent misrepresentation or concealment in respect to a material inducement to the sale; Benj. Sales, § 611; 10 Wall. 383; 4 Johns. 421; 53 N. Y. 515; 82 Pa. 441; 11 Metc. 559; 33 Ia. 120; 43 Cal. 110; 51 Ala. 410; 75 N. C. 397; 36 Pac. Rep. (Cal.) 1033; Tiffany, Sales 168. It is the settled doctrine of English and American law that the purchaser is required to notice such quali-

ties of the goods purchased as are reasonably supposed to be within the reach of his observation and judgment. Under the civil law there was on a sale for a fair price an implied warranty of title and that the goods sold were sound, but under the common law there is a clear distinction between the responsibility of the seller as to title and as to quality; the former he warranted, the latter, if the purchaser had opportunity to examine, he did not; 2 Kent 478; Pothier, *Cont. de Vente*, No. 184. See MISREPRESENTATION; CONCEALMENT.

This doctrine does not apply in an action for damages for inducing one by false representations to take an assignment of a lease executed by one who had no title to the land; 88 Ga. 629.

Consult Rawle, Covenants for Title; Benjamin, Sales; Story, Sales; 2 Kent 478; Leake, Cont. 198; 1 Story, Equity; Sugden, Vendors & P.

CAVEATOR. One who files a caveat.

CAYAGIUM. A toll or duty paid the king for landing goods at some quay or wharf. The barons of the Cinque Ports were free from this duty. Cowel.

CEAPGILD. Payment of an animal. An ancient species of forfeiture. Cowel; Spelman, Gloss.

CEDE. To assign; to transfer. Applied to the act by which one state or nation transfers territory to another.

CEDENT. An assignor. The assignor of a chose in action. Kames, Eq. 43.

CEDULA. In Spanish Law. A written obligation, under private signature, by which a party acknowledges himself indebted to another in a certain sum, which he promises to pay on demand or on some fixed day.

In order to obtain judgment on such an instrument, it is necessary that the party executing it should acknowledge it in open court, or that it be proved by two witnesses who saw its execution.

The citation affixed to the door of an absconding offender, requiring him to appear before the tribunal where the accusation is pending.

CELEBRATION OF MARRIAGE. The solemn act by which a man and woman take each other for husband and wife, conformably to the rules prescribed by law.

CELIBACY. The state or condition of life of a person not married.

CEMETERY. A place set apart for the burial of the dead. Cemeteries are regulated in England and many of the United States by statute. The fundamental English act is the cemeteries clauses act, 1847, 10 & 11 Vict. c. 65.

After ground has once been devoted to this object it can be applied to secular purposes only with the sanction of the legislature; L. R. 4 Q. B. 407; 100 Mass. 1. A cemetery association holds the fee of lands purchased for the purposes of the association. The persons to whom lots are conveyed for burial purposes take only an easement—the right to use their lots for such purposes; 46 N. Y. 503; 21 Hun 184; Washb. Easem. 604; 109 Mass. 21; 4 Ohio 515; and a statute directing a removal of bodies, without providing compensation to the lot owners, is constitutional; 30 N. Y. Sup. 157; s. c. 80 Hun 266. In the absence of a deed, or certificate equivalent thereto, they are mere licensees; 8 B. & C. 288. Non-residence does not divest an heir at law of an easement in a burial lot while the gravestones of his parents remain; 22 S. W. Rep. (Ky.) 651. Their rights cease when the cemetery is vacated, as such, by authority of law; 39 Md. 631; 88 Pa. 42; and the owner of a lot in which no interments have been made, loses all use of it by the passage of a law making interments therein unlawful; 66 Pa. 411. An act declaring it unlawful to open a public street or alley through a cemetery does not prevent one who has laid out a cemetery from dedicating a strip along the edge of it which he still owns for a public alley, it not having the effect of abridging or interfering with the rights of parties to whom lots had already been sold; 30 Atl. Rep. 840; s. c. 165 Pa. 81.

A cemetery association has the right to limit all interments to the family of the lot owner and their relatives; 44 La. Ann. 28.

The property of cemetery associations is usually exempt from taxation; 118 Mass. 354; 152 *id.* 408; 86 Ill. 336; 129 N. Y. 68; and this exemption has been held to include immunity from claims for municipal improvements, *e. g.*, a sewer passing by the cemetery; 37 Leg. Int. Pa. 264. See 1 Washb. R. P. 9; Washb. Easem. 515; Cooley, Tax. 203; 19 Am. L. Reg. 65; but it seems that it would not be relieved from paying an assessment for street improvements; 46 N. Y. 506; 42 Ohio St. 128; 5 Gill 396; 116 Mass. 181; 24 N. J. L. 385; 86 Ill. 336; 50 Mo. 155.

In New York, monument makers having placed a lien upon a monument and other material furnished for a tomb, under the act giving such a lien, Laws 1888, c. 543, and declared an intention of removing the work and disposing of it under the lien, a perpetual injunction was granted, and the act was held unconstitutional. The right to have a grave preserved from desecration, even if a mere sentiment as was argued, was held to be one that has received the sanction and approval of all ages and will be protected by a court of equity; filing a lien and sale under it is not due process of law, and from such an act equity will protect the property of the living and preserve the repose of the dead; Brooks v. Taynor & Co., unreported. See DEAD BODY.

CENEGILD. In Saxon Law. A pecuniary mulct or fine paid to the relations of a murdered person by the murderer or his relations. Spelman, Gloss.

CENNINGA. A notice given by a buyer to a seller that the things which had

been sold were claimed by another, in order that he might appear and justify the sale. Blount; Whishaw.

The exact significance of this term is somewhat doubtful. It probably denoted notice, as defined above. The finder of stray cattle was not always entitled to it; for Spelman says, "As to strange (or stray) cattle, no one shall have them but with the consent of the hundred of tithingmen; unless he have one of these, we cannot allow him any *cenninga* (I think notice)." Spelman, Gloss.

CENS. In Canadian Law. An annual payment or due reserved to a seignor or lord, and imposed merely in recognition of his superiority. Guyot, Inst. c. 9.

The land or estate so held is called a *censive;* the tenant is a *censitarie.* It was originally a tribute of considerable amount, but became reduced in time to a nominal sum. It is distinct from the rentes. The *cens* varies in amount and in mode of payment. Payment is usually in kind, but may be in silver; 2 Low. C. 40.

CENSARIA. A farm, or house and land, let at a standing rent. Cowel.

CENSO. In Spanish and Mexican Law. An annuity; a ground rent. The right which a person acquires to receive a certain annual pension, in consideration of the delivery to another of a determined sum of money or of an immovable thing. Civil Code Mex. art. 3206; Black, Dict.; 13 Tex. 655.

CENSO RESERVATIO. In Spanish and Mexican Law. The right to receive from another an annual pension by virtue of having transferred land to him by full and perfect title. 13 Tex. 655.

CENSUS (Lat. *censere*, to reckon). An official reckoning or enumeration of the inhabitants and wealth of a country.

The census of the United States is taken every tenth year, in accordance with the provisions of the constitution; and many of the states have made provisions for a similar decennial reckoning at intervening periods. The method of taking the census prior to that of 1890 was prescribed by U. S. Rev. Stat. title xxxi.; but the act of March 1, 1889, U. S. Rev. Stat. 1 Supp. 653, provided for taking the eleventh and subsequent censuses, and for the establishment of a census office in the Department of the Interior. By act of March 3, 1893, this office was abolished, and provision made for completing the unpublished work of the eleventh census in the office of the Secretary of the Interior; U. S. Rev. Stat. 2 Supp. 126.

The courts take judicial notice of the results of a census; 87 Ia. 588; 64 Cal. 87; 149 Pa. 210; 29 N. E. Rep. (Ind.) 157; 78 Pac. Rep. (Cal.) 270; 30 S. W. Rep. (Mo.) 103; 31 *id.* (Mo.) 23; *contra*, 31 N. E. Rep. (N. Y.) 921.

CENSUS REGALIS. The royal property (or revenue).

CENT (Lat. *centum*, one hundred). A coin of the United States, weighing forty-eight grains, and composed of ninety-five per centum of copper and of tin and zinc in such proportions as shall be determined by the Director of the Mint. Act of Feb. 12, 1873, s. 13. See Rev. Stat. § 3515.

Previous to the act of congress just cited, the cent was composed wholly of copper. By the act of April 2, 1792, Stat. at Large, vol. 1, p. 248, the weight of the cent was fixed at eleven pennyweights, or 264 grains; the half cent in proportion. Afterwards, namely, on the 14th of January, 1793, it was reduced to 208 grains; the half-cent in proportion. 1 U. S. Stat. at Large, 299. In 1796 (Jan. 26), by the proclamation of President Washington, who was empowered by law to do so, act of March 3, 1795, sect. 8, 1 U. S. Stat. at Large, 440, the cent was reduced in weight to 168 grains; the half-cent in proportion. It remained at this weight until the passage of the act of Feb. 21, 1857, which provided for a weight of seventy-eight grains and an alloy of eighty-eight per centum of copper and twelve of nickel. The same act directs that the coinage of half-cents should cease. By the coinage act of Feb. 12, 1873, the weight and alloy were fixed as above stated. The first issue of cents from the national mint was in 1793, and has been continued every year since, except 1815. But in 1791 and 1792 some experimental pieces were struck, among which was the so-called Washington cent of those years.

CENTESIMA (Lat. *centum*). **In Roman Law.** The hundredth part.

Usuriæ centesimæ. Twelve *per cent. per annum;* that is, a hundredth part of the principal was due each month,—the month being the unit of time from which the Romans reckoned interest. 2 Bla. Com. 462, n.

CENTRAL CRIMINAL COURT. In English Law. A court which has jurisdiction of all cases of treason, murder, felony, or misdemeanor committed within the city of London and county of Middlesex, and certain parts of the counties of Essex, Kent, and Surrey, and also of all serious offences within the former jurisdiction of the admiralty court.

This court was erected in 1834, and received the jurisdiction of the court of sessions, as far as concerned all the more serious offences, by virtue of the act 4 & 5 Will. IV. c. 36; and by virtue of the same act, and the subsequent acts 7 Will. IV. and 19 & 20 Vict. c. 16, received the entire criminal jurisdiction of the court of admiralty.

The act provided that the court should consist of the lord mayor, the lord chancellor, the judges of the three superior courts at Westminster, the judges in bankruptcy, the judges of the admiralty, the dean of the arches, the aldermen, recorder, and common serjeant of London, the judges of the sheriff's court, persons who have been lord chancellor, or judge in one of the superior courts, and such others as may from time to time be appointed by the crown. Since the judicature acts all the judges of the High Court of Justice have been judges of the court. By act of 44 & 45 Vict. c. 68, the power of making rules and orders, originally given to eight or more of the judges of courts at Westminister, is vested in four or more of the judges of the High Court of Justice.

Twelve sessions at least are held every year, at the Sessions House in the Old Bailey. The important cases are heard in a session of the court presided over by two of the judges of the High Court of Justice. The less important cases are tried by either the recorder or common serjeant, or judge of the city of London court commissioned

for that purpose,—on every occasion the lord mayor or some of the aldermen being also present on the bench. Two sessions of the court adjoin each other and sit simultaneously. See 2 Steph. com. 299; Whart. Lex.

CENTUMVIRI (Lat. one hundred men). The name of a body of Roman judges.

Their exact number was one hundred and five, there being selected three from each of the thirty-five tribes comprising all the citizens of Rome. They constituted, for ordinary purposes, four tribunals; but some cases (called *centumvirales causas*) required the judgment of all the judges. 3 Bla. Com. 515.

CENTURY. One hundred. One hundred years.

The Romans were divided into *centuries*, as the English were formerly divided into hundreds.

CEORL. A tenant at will of free condition, who held land of the thane on condition of paying rent or services.

A freeman of inferior rank occupied in husbandry. Spelman, Gloss.

Those who tilled the outlands paid rent; those who occupied or tilled the inlands, or demesne, rendered services. Under the Norman rule, this term, as did others which denoted workmen, especially those which applied to the conquered race, became a term of reproach, as is indicated by the popular signification of churl. Cowel; Spelman, Gloss. See 1 Poll. & Maitl. 8; 2 *id.* 458.

CEPI (Lat.). I have taken. It was of frequent use in the returns of sheriffs when they were made in Latin; as, for example, *cepi corpus et* B. B. (I have taken the body and discharged him on bail bond); *cepi corpus et est in custodia* (I have taken the body and it is in custody); *cepi corpus et est languidus* (I have taken the body and he is sick).

CEPI CORPUS (Lat. I have taken the body). The return of an officer who has arrested a person upon a capias. 3 Bouvier, Inst. n. 2804.

CEPIT (Lat. *capere*, to take; *cepit*, he took or has taken).

In Civil Practice. A form of replevin which is brought for carrying away goods merely. Wells, Repl. § 53; 3 Hill 282. *Non detinet* is not the proper answer to such a charge; 17 Ark. 85. And see 3 Wis. 399. Success upon a *non cepit* does not entitle the defendant to a return of the property; 5 Wis. 85. A plea of *non cepit* is not inconsistent with a plea showing property in a third person; 8 Gill 133.

In Criminal Practice. Took. A technical word necessary in an indictment for larceny. The charge must be that the defendant took the thing stolen with a felonious design. Bacon, Abr. *Indictment*, G., 1.

CEPIT ET ABDUXIT (Lat.). He took and led away. Applicable in a declaration in trespass or indictment for larceny where the defendant has taken away a living chattel.

CEPIT ET ASPORTAVIT (Lat.). He took and carried away. Applicable in a declaration in trespass or an indictment for larceny where the defendant has carried away goods without right. 4 Bla. Com. 231.

CEPIT IN ALIO LOCO (Lat. he took in another place). **In Pleading.** A plea in replevin, by which the defendant alleges that he took the thing replevied in another place than that mentioned in the declaration; 1 Chit. Pl. 490; 2 *id.* 558; Rast. Entr. 554, 555; Willes 475; Morris, Repl. 141; Wells, Repl. § 707. It is the usual plea where the defendant intends to avow or justify the taking to entitle himself to a return; 4 Bouvier, Inst. n. 3569.

CERT MONEY. The head-money given by the tenants of several manors yearly to the lords, for the purpose of keeping up certain inferior courts. Called in the ancient records *certum letæ* (leet money). Cowel.

CERTAINTY. In Contracts. Distinctness and accuracy of statement.

A thing is certain when its essence, quality, and quantity are described, distinctly set forth, etc. Dig. 12. 1. 6. It is uncertain when the description is not that of an individual object, but designates only the kind. La. Civ. Code, art. 3522, no. 8; 5 Co. 121.

If a contract be so vague in its terms that its meaning cannot be certainly collected, and the statute of frauds preclude the admissibility of parol evidence to clear up the difficulty, 5 B. & C. 583, or parol evidence cannot supply the defect, then neither at law nor in equity can effect be given to it; 1 R. & M. 116. If it is impossible to ascertain any definite meaning, such agreement is necessarily void; [1892] Q. B. 478. As to uncertainty of contract see 93 Mich. 491; 75 Md. 80; 70 Hun 575; 8 Wash. 458.

It is a maxim of law that that is certain which may be made certain: *certum est quod certum reddi potest;* Co. Litt. 43. For example, when a man sells the oil he has in his store at so much a gallon, although there is uncertainty as to the quantity of oil, yet, inasmuch as it can be ascertained, the maxim applies, and the sale is good. See, generally, Story, Eq. § 240; Mitf. Eq. Pl., Jeremy ed. 41; Cooper, Eq. Pl. 5; Wigram, Disc. 77.

In Pleading. Such clearness and distinctness of statement of the facts which constitute the cause of action or ground of defence that they may be understood by the party who is to answer them, by the jury who are to ascertain the truth of the allegations, and by the court who are to give the judgment. 13 East 107; 2 B. & P. 267; Co. Litt. 303; Comyns, Dig. *Pleader*, c. 17. See 21 Or. 435.

Certainty to a common intent is attained by a form of statement in which words are used in their ordinary meaning, though by argument or inference they may be made to bear a different one. See 2 H. Bla. 530; Andr. Steph. Pl. 384.

Certainty to a certain intent in general is attained when the meaning of the statute

may be understood upon a fair and reasonable construction without recurrence to possible facts which do not appear; 1 Wms. Saund. 49; 9 Johns. 317; 5 Conn. 423.

Certainty to a certain intent in particular is attained by that technical accuracy of statement which precludes all argument, inference, and presumption against the party pleading. When this certainty is required, the party must not only state the facts of his case in the most precise way, but add to them such as show that they are not to be controverted, and, as it were, anticipate the case of his adversary; Lawes, Pl. 54.

The last description of certainty is required in estoppels; Co. Litt. 303; 2 H. Bla. 530; Dougl. 159; and in pleas which are not favored in law, as alien enemy; 8 Term 167; 6 Binn. 247. See 10 Johns. 70; 1 Rand. 270. With respect to an indictment, it is laid down that "an indictment ought to be certain to every intent, and without any intendment to the contrary;" Cro. Eliz. 490; and the charge contained in it must be sufficiently explicit to support itself; for no latitude of intention can be allowed to include anything more than is expressed; 2 Burr. 1127; 92 U. S. 542; 96 *id.* 360; 40 Ia. 148; 31 Me. 401; 114 Mass. 263; 71 Mo. 460; 58 N. H. 348; 19 Tex. App. 383.

These definitions, which have been adopted from Lord Coke, have been subjected to severe criticism, but are of some utility in drawing attention to the different degrees of exactness and fulness of statement required in different instances. Less certainty is required where the law presumes that the knowledge of the facts is peculiarly in the opposite party; 8 East 85; 13 *id.* 112; 3 Maule & S. 14; 13 Johns. 437.

Less certainty than would otherwise be requisite is demanded in some cases, to avoid prolixity of statement. 2 Wms. Saund. 117, n. 1. See, generally, 1 Chit. Pl.

CERTIFICANDO DE RECOGNITIONE STAPULÆ. In English Law. A writ commanding the mayor of the staple to certify to the lord chancellor a statute staple taken before him where the party himself detains it, and refuses to bring in the same. There is a like writ to certify a statute merchant and in divers others cases. Reg. Orig. 148; Black, Dict.

CERTIFICATE. In Practice. A writing made in any court, and properly authenticated, to give notice to another court of anything done therein.

A writing by which testimony is given that a fact has or has not taken place.

Certificates are either *required by law*, as an insolvent's certificate of discharge, an alien's certificate of naturalization, which are evidence of the facts therein mentioned; or *voluntary*, which are given of the mere motion of the party giving them, and are in no case evidence. Com. Dig. *Chancery* (T, 5); 1 Greenl. Ev. § 498; 2 Willes 549.

There were anciently various modes of trial commenced by a certificate of various parties, which took the place of a writ in a common-law action. See Com. Dig. *Certificate.*

By statute, the certificates of various officers may be made evidence, in which case the effect cannot be extended by including facts other than those authorized; 1 Maule & S. 599; 3 Pet. 12, 29; 4 How. 522; 13 Pick. 172; 6 S. & R. 324; 3 Murph. 331; Rob. La. 307. An officer who has made a defective certificate of a married woman's acknowledgment cannot correct the defect after the expiration of his term; 91 Ala. 366; nor can he contradict his own certificate by testifying to fraud and coercion on the part of the husband toward the wife; 87 Va. 33. As to the power of an officer to amend his certificate, see 34 Cent. L. J. 26. A certificate of acknowledgment is a judicial act, and in the absence of fraud conclusive of material facts stated in it; 115 Pa. 338; 150 *id.* 514; but only of facts required by statute to be included in it, and therefore not that the wife of the grantor was of full age; 71 Pa. 476; 6 W. N. C. (Pa.) 428. See RETURN; NOTARY; ACKNOWLEDGMENT; STOCK.

CERTIFICATE OF ASSIZE. In Practice. A writ granted for the re-examination or retrial of a matter passed by assize before justices. Fitzh. Nat. Brev. 181. It is now entirely obsolete. 3 Bla. Com. 389. Consult, also, Comyns, Dig. *Assize* (B, 27, 28).

CERTIFICATE OF COSTS. See JUDGE'S CERTIFICATE.

CERTIFICATE OF DEPOSIT. In Banking. A written statement from a bank that the party named therein has deposited the amount of money specified in the certificate, and that the same is held subject to his order in accordance with the terms thereof.

CERTIFICATE OF REGISTRY. A certificate that a ship has been registered as the law requires. 3 Kent 149. Under the United States statutes, "every alteration in the property of a ship must be indorsed on the certificate of registry, and must itself be registered." Unless this is done, the ship or vessel loses its national privileges as an American vessel; 1 Pars. Sh. &. Adm. 50; Desty, Sh. &. Adm. § 8. The English statutes make such a transfer void. Stat. 3 & 4 Will. IV. c. 54; Stat. 17 & 18 Vict. c. 104; Abb. Sh. 13th ed. 925.

The registry is not a document required by the law of nations as expressive of a ship's national character; 4 Taunt. 367; and is at most only *prima facie* evidence of ownership; 2 Hall, Adm. 1; 2 Wall. Jr. 264; Newb. Adm. 176, 312; 23 Pa. 76; 1 Cal. 481; 33 E. L. & Eq. 204; 14 East 226; 16 *id.* 169. The registry acts are to be considered as forms of local or municipal institution for purposes of public policy; 3 Kent 149.

CERTIFICATION. In Scotch Law. A notice to a party in a suit that, if he fail to do something, certain consequences will follow. Paterson, Comp.

CERTIFIED CHECK. A check which has been recognized by the proper officer as a valid appropriation of the amount of money therein specified to the person therein named, and which bears upon itself the evidence of such recognition.

The term as commonly understood implies that the check certified has passed from the custody of the bank and into the hands of some other persons; 155 U. S. 444.

Certification of a check is usually accomplished by writing the name of the officer authorized to bind the bank in that manner or the word "good," across the face of the check; but a parol acceptance of a check by an officer of the bank has been said to be sufficient to operate as a certification; 59 Barb. S. C. 226.

After certification the bank is bound as a direct and original promisor to the payee, and a new contract exists on which the latter has a right of action directly against the bank; Morse, Banks and Banking 414.

The maker of a check is discharged from all liability thereon, after it has been certified at the request of the holder; 52 N. Y. 350; 12 L. R. A. 492; 7 Biss. 193; 94 U. S. 343; 4 N. J. L. J. 34; 4 Barb. 401; 17 Ont. 40; but not if he procures the certification himself before the check is issued; 42 Ill. 238; 12 Colo. 480; 4 N. J. L. J. 34; 4 Ohio C. C. 135; 28 La. Ann. 933; 123 Ind. 78; 9 Heisk. 211; and there are *dicta* to the same effect; 52 N. Y. 350; 94 U. S. 343. But see an elaborate discussion of the subject questioning these decisions and maintaining that there is no difference between the case of certification at the request of the payee or of the drawer; 6 H. L. Rev. 138; and also Morse, Bks. & Bkg. § 415.

CERTIORARI. In Practice. A writ issued by a superior to an inferior court of record, requiring the latter to send in to the former some proceeding therein pending, or the record and proceedings in some cause already terminated in cases where the procedure is not according to the course of the common law. See 112 Mass. 206.

The writ lies in most of the states of the United States to remove from the lower courts proceedings which are created and regulated by statute merely, for the purpose of revision; 13 Pick. 195; 8 Me. 293; 5 S. & R. 174; 2 Dutch. 49; 4 Hayw. 100; 2 Yerg. 173; 1 G. & J. 193; 8 Vt. 271; 1 Ohio 383; 2 Va. Cas. 270; 54 Barb. 589; 1 Ala. 95; 8 Cal. 58; 6 Mich. 137; 110 N. C. 417; 159 Pa. 559; 88 Ill. 27; and to complete the proceedings when the lower court refuses to do so, upon erroneous grounds; 1 Hayw. 302; 2 Ark. 73; and to correct errors in law; 75 Ala. 491; 99 Ill. 171; 49 Mich. 194; 65 Me. 160; 48 N. J. L. 112; 97 Pa. 260; 48 Wis. 407. In England, 13 E. L. & Eq. 129; 9 L. R. Q. B. 350; and in some states of the United States; 3 H. & M'H. 115; Coxe 287; 2 South. 539; 7 Cow. 141; 2 Yerg. 173; 2 Whart. 117; 2 Va. Cas. 268; 2 Murph. 100; 1 Ala. 95; 5 R. I. 385; the writ may also be issued to remove criminal causes to a superior court. Har. Certiorari 8. But see 10 Ohio, 345. It also lies where a probate court proceeds without jurisdiction in admitting a claim against an estate; 30 Ill. App. 121; or where the court has jurisdiction but makes an order exceeding its power; 45 Mo. App. 387. It is also given by statute to review the acts and powers of official boards and officers; 62 Hun 619; 155 Mass. 467; 71 Wis. 502.

It is used also as an auxiliary process to obtain a full return to other process, as when, for example, the record of an inferior court is brought before a superior court by appeal, writ of error, or other lawful mode, and there is a manifest defect or suggestion of diminution, to obtain a perfect transcript and all papers; 7 Cra. 288; 9 Wheat. 526; 2 Cow. 38; 2 South. 270, 551; 7 Halst. 85; 1 Blackf. 32; 3 Ind. 316; 1 Dev. & B. 382; 11 Mass. 414; 2 Munf. 229; 16 B. Monr. 472; 2 Ala. 499; 1 Col. T. 490. It does not issue as a matter of right on mere suggestion of defects in the record, but the application must be supported by evidence; 106 Mo. 111.

The office of the writs of certiorari and mandamus is often much the same. It is the practice of the United States supreme court, upon a suggestion of any defect in the transcript of the record sent up into that court upon a writ of error, to allow a special certiorari, requiring the court below to certify more fully; 3 Dall. 411; 7 Cra. 288; 3 How. 553; 9 Wall. 661. Relief may also be had in the U. S. Circuit Court of Appeals on allegation of diminution in the record sent up from the circuit court, as provided by rule 18; 49 Fed. Rep. 1; 1 C. C. A. 254. The same result might also be effected by a writ of mandamus. The two remedies are, when addressed to an inferior court of record, from a superior court, requiring the return of a record, much the same. But where diminution of the record is suggested in the inferior court, and the purpose is to obtain a more perfect *record*, and not merely a more perfect *copy* or *transcript*, it is believed that the writ of mandamus is the appropriate remedy.

In many of the states, the writ produces the same result in proceedings given by statute, such as the proceedings for obtaining damages under the mill acts, highway acts, pauper laws, etc., as the writ of error does when the proceedings are according to the course of the common law. Where the lower court is to be required to proceed in a cause, a writ of procedendo or mandamus is the proper remedy.

It does not lie to enable the superior court to revise a decision upon matters of fact; 69 N. Y. 408; 34 N. J. L. 343; 112 Mass. 206; 65 Me. 160; 18 Ill. 324; 5 Wis. 191; 46 Cal. 667; 88 Ga. 283; 55 N. J. L. 87; 6 Mackey 586; 41 La. Ann. 179. See 2 Ohio 27; 45 Mo. App. 387; nor matters resting in the discretion of the judge of the inferior court; 9 Metc. 423; 1 Dutch. 173; see 147 Pa. 342; unless by special statute; 6 Wend. 564; 10 Pick. 358; 4 Halst. 209; or where palpable injustice has been done; 1 Miss. 112; 1 Wend. 288; 2 Mass. 173, 489.

It does not lie where the errors are formal merely, and not substantial; 8 Ad. & E. 413; 4 Mass. 567; 6 Miss. 578; 56 Me. 184; 59 Ill. 225; nor where substantial

justice has been done though the proceedings were informal; 24 Me. 9; 13 Tex. 18; 32 Wis. 467; 109 Mass. 270; 99 Ill. 171; 61 Wis. 494; nor where the proceedings are not void on their face and show no arbitrary action on the part of the trial judge; 45 La. Ann. 1295.

Certiorari will not lie as a substitute for an appeal from an interlocutory order of a superior court; 109 N. C. 310; nor to review an appealable order; 74 Cal. 217. The evidence cannot be reviewed upon certiorari; 146 Pa. 546; 151 *id.* 113; nor the rulings on the admission of evidence; 96 Mich. 415.

It is granted or refused in the discretion of the superior court; Har. Certiorari 49; 24 Me. 9; 17 Mass. 352; 2 N. H. 210; 26 Barb. 437; 34 N. J. L. 261; 4 T. B. Mon. 420; 1 Miss. 112; 28 Ark. 87; 16 Vt. 446; 24 Ga. 379; L. R. 5 Q. B. 466; 42 Ill. App. 650; 29 W. Va. 63; 111 U. S. 766; 109 Ill. 142; and the application must disclose a proper case upon its face; 8 Ad. & E. 43; 17 Mass. 351; 2 Hawks 102; 2 Harr. Del. 459; Wright, Ohio 130; 4 Jones, N. C. 309; 18 Ark. 449; 17 Ill. 31; 4 Tex. 1; 2 Swan 176.

The judgment is either that the proceedings below be quashed or that they be affirmed; Har. Certiorari 38, 49; 8 Yerg. 102, 218; 5 Mass. 423; 12 G. & J. 329; 6 Coldw. 362; see 35 N. H. 315; 75 Ala. 491; 113 Ill. 154; 20 Ga. 77; 53 Wis. 57; either wholly or in part; 5 Mass. 420; 4 Ohio 200; 13 Johns. 461. See, also, 1 Overt. 58; 2 Hayw. 38; 4 Ala. 357. The costs are discretionary with the court; 16 Vt. 426; 6 Ind. 367; but at common law neither party recovers costs; 8 Johns. 321; 11 Mass. 465; 3 N. H. 44; 4 Ohio 200; and the matter is regulated by statute in some states; 4 Watts 451; 1 Spenc. 271. See MANDAMUS; PROCEDENDO. Consult 4 Bla. Com. 262, 265.

By the act of congress of March 3, 1891, establishing circuit courts of appeal, § 6, it is provided that in any case in which the decision of that court is final a certiorari may issue from the supreme court to bring up the record to that court for its review and determination. U. S. Rev. St. 1 Supp. 903. See UNITED STATES COURTS.

CERTIORARI FACIAS. Cause to be certified. The command of a writ of certiorari.

CERVISARII (*cervisiæ*, ale). Among the Saxons, tenants who were bound to supply drink for their lord's table. Cowel; Domesday.

CERVISIA. Ale. *Cervisarius.* An alebrewer; an ale-house keeper. Cowel; Blount.

CESIONARIO. In Spanish Law. An assignee. White, New Recop. 304.

CESSAVIT PER BIENNIUM (Lat. he has ceased for two years). **In Practice.** An obsolete writ, which could formerly have been sued out when the defendant had for two years *ceased* or neglected to perform such service or to pay such rent as he was bound to do by his tenure, and had not upon his lands sufficient goods or chattels to be distrained. Fitzh. Nat. Brev. 208. It also lay where a religious house held lands on condition of performing certain spiritual services which it failed to do. 3 Bla. Com. 232.

CESSET EXECUTIO (Lat. let execution stay). **In Practice.** The formal order for a stay of execution, when proceedings in court were conducted in Latin. See EXECUTION.

CESSET PROCESSUS (Lat. let process stay). **In Practice.** The formal order for a stay of process or proceedings, when the proceedings in court were conducted in Latin. See 2 Dougl. 627; 11 Mod. 231.

CESSIO BONORUM (Lat. a transfer of property). **In Civil Law.** An assignment of his property by a debtor for the benefit of his creditors.

Such an assignment discharged the debtor to the extent of the property ceded only, but exempted him from imprisonment. Dig. 2. 4. 25; 48. 19. 1; Nov. 4. 3. And see La. Civ. Code 2166; 2 Mart. La. N. S. 108; 5 *id.* 299; 4 Wheat. 122; 1 Kent 422.

CESSION (Lat. *cessio*, a yielding).

In Civil Law. An assignment. The act by which a party transfers property to another. See CESSIO BONORUM.

In Ecclesiastical Law. A surrender. When an ecclesiastic is created bishop, or when a parson takes another benefice, without dispensation, the first benefice becomes void by a legal cession or surrender. Cowel.

In Government Law. The transfer of land by one government to another.

France ceded Louisiana to the United States, by the treaty of Paris, of April 30, 1803; Spain made a cession of East and West Florida, by the treaty of Feb. 22, 1819. Cessions have been severally made to the general government of a part of their territory by New York, Virginia, Massachusetts, Connecticut, South Carolina, North Carolina, and Georgia. See Gordon, Dig. art. 2236–2250.

It is the usage of civilized nations, when territory is ceded, to stipulate for the property rights of its inhabitants; 159 U. S. 452.

CESSIONARY. In Scotch Law. An assignee. Bell, Dict.

CESTUI QUE TRUST. He for whose benefit another person is seised of lands or tenements or is possessed of personal property.

He who has a right to a beneficial interest in and out of an estate the legal title to which is vested in another. 2 Wash. R. P. *163.

He may be said to be the equitable owner; Will. R. P. 16th ed. 188; 1 Spence, Eq. Jur. 497; 1 Ed. Ch. 223; 2 Pick. 29; is entitled, therefore, to the rents and profits; may transfer his interest, subject to the provisions of the instrument creating the trust;

1 Spence, Eq. Jur. 507; 2 Washb. R. P. 195; and may ordinarily mortgage his interest; 49 N. J. Eq. 57; may defend his title in the name of his trustee; 1 Cruise, Dig. tit. 12, c. 4, § 4; but has no legal title to the estate, as he is merely a tenant at will if he occupies the estate: 2 Ves. Sen. Ch. 472; 16 C. B. 652; 1 Washb. R. P. 88; and may be removed from possession in an action of ejectment by his own trustee; Lew. Trust. 8th ed. *677; Hill, Trust. 274; 3 Dev. 425; 2 Pick. 508; he cannot sue for damages done to trust lands unless the trustee refuses to protect the rights of the beneficiary; 68 Hun 122. Where the trustee neglects to defend the legal title to trust property, the beneficiary may sue to remove a cloud on the title; 54 Fed. Rep. 55. See TRUST.

CESTUI QUE USE. He for whose benefit land is held by another person.

He who has a right to take the profits of lands of which another has the legal title and possession, together with the duty of defending the same and to direct the making estates thereof; Tudor, Lead. Cas. 252; 2 Bla. Com. 330. See 2 Washb. R. P. 95; USE.

CESTUI QUE VIE. He whose life is the measure of the duration of an estate. 1 Washb. R. P. 88.

CHACEA. A station for game, more extended than a park, less so than a forest; the liberty of hunting within such limits. Cowel.

The driving or hunting animals; the way along which animals are driven. Spelman, Gloss.

CHAFEWAX. An officer in chancery who fits the wax for sealing to the writs, commissions, and other instruments there made to be issued out. He is probably so called because he warms (*chaufe*) the wax.

CHAFFERS. Anciently signified wares and merchandise: hence the word *chaffering*, which is yet used for buying and selling, or beating down the price of an article. The word is used in stat. 3 Edw. III. c. 4.

CHALDRON. A measure of capacity, equal to fifty-eight and two-thirds cubic feet, nearly. Cowel.

CHALLENGE. In Criminal Law. A request by one person to another to fight a duel. No particular form of words is necessary to constitute a challenge, and it may be oral or written; 6 Blackf. 20; 12 Ala. 276; 2 Nott. & M. 181; 3 Dana (Ky.) 418. Sending a challenge is a high offence at common law, and indictable as tending to a breach of the peace; Hawk. Pl. Cr. b. 1, c. 3, § 3; 3 East 581; 1 Dana 524; 1 South. 40; 2 M'Cord 334; 1 Const. 107; 1 Hawks 487; 2 Ala. 506; 6 Blackf. 20; 9 Leigh 603; 3 Rog. 133; 3 Wheel. Cr. Cas. 245. He who carries a challenge is also punishable by indictment: Clark, Cr. L. 340; 3 Cra. 178. In most of the states, this barbarous practice is punishable by special laws. 2 Bish. Cr. Law, §§ 312–315. And in a large number of them by their constitutions the giving, accepting, or knowingly carrying a challenge, deprives the party of the right to hold any office of honor or profit in the commonwealth.

In most of the civilized nations, challenging another to fight is a crime, as calculated to destroy the public peace; and those who partake in the offence are generally liable to punishment. In Spain, it is punished by loss of offices, rents, and honors received from the king, and the delinquent is incapable to hold them in future; Aso & M. Inst. b. 2, t. 19, c. 2, § 6. See, generally, Joy, Chall.; 1 Russ. Cr. 275; 2 Bish. Cr. Law, chap. xv.; 6 J. J. Marsh. 120; 1 Const. S. C. 107; 1 Munf. 468.

In Practice. An exception to the jurors who have been arrayed to pass upon a cause on its trial. See 2 Poll. & Maitl. 619, 646.

An exception to those who have been returned as jurors. Co. Litt. 155 *b*.

The most satisfactory derivation of the word is that adopted by Webster and Crabb, from *call*, challenge implying a calling off. The word is also used to denote exceptions taken to a judge's capacity on account of interest; 2 Binn. 454; 4 *id.* 349; and to the sheriff for favor as well as affinity; Co. Litt. 158 *a*; 10 S. & R. 336. The right is not allowed to enable the prisoner to select such jurors as he may wish, but to select just and impartial ones; 97 N. C. 469.

Challenges are of the following classes:—

To the array. Those which apply to all the jurors as arrayed or set in order by the officer upon the panel. Such a challenge is, in general, founded upon some error or manifest partiality committed in obtaining the panel, and which, from its nature, applies to all the jurors so obtained. These are not allowed in the United States generally; Colby, Pr. 235; 2 Blatchf. 435; 6 Miss. 20; the same end being attained by a motion addressed to the court, but are in some states; 41 Tex. 417; 24 Miss. 445; 1 Mann. Mich. 451; 20 Conn. 510; 1 Zabr. 656; 1 Cowen 432; 2 Blackf. 332; 82 Pa. 306. The challenge must be based upon objection to all the jurors composing the panel; 34 Ill. App. 338. Mere irregularity in drawing a jury is not sufficient cause to sustain a challenge to the array; 39 Ill. App. 481; nor is the fact that a challenge to the array has been sustained for bias and prejudice of the officer summoning them and few of the same jurors are on the second venire; 95 Cal. 425; nor is the fact that one of the men named on the special venire is dead and another removed from the county; 113 N. C. 716; 52 N. J. Law 207. It was a good ground of challenge to the array that no persons of African descent were selected as jurors but all such were excluded because of their race and color, on affidavit of the prisoner to that effect, no evidence having been adduced *pro* or *con;* 103 U. S. 370.

For cause. Those for which some reason is assigned.

These may be of various kinds, unlimited in number, may be to the array or to the poll, and depend for their allowance upon

the existence and character of the reason assigned.

To the favor. Those challenges to the poll for cause which are founded upon reasonable grounds to suspect that the juror will act under some undue influence or prejudice, though the cause be not so evident as to authorize a principal challenge; Co. Litt. 147 *a*, 157 *a*; Bacon, Abr. *Juries*, E, 5; 3 Wis. 823. Such challenges are at common law decided by triors, and not by the court. See TRIORS; 16 N. Y. 501; 14 N. J. L. 195. But see 24 Ark. 346; 21 N. Y. 134; 6 Hun 140.

Peremptory. Those made without assigning any reason, and which the court must allow. The number of these in trials for felonies was, at common law, thirty-five; 4 Bla. Com. 354; but, by statute, has been reduced to twenty in most states, and is allowed in criminal cases only when the offence is capital; Thorn. Juries 119; 2 Blatchf. 470; 10 B. Monr. 125; 8 Ohio St. 98; 25 Mo. 167; see 5 Wis. 324; 1 Jones, N. C. 289; 16 Ohio 354; 85 Ala. 339. The prosecuting officer may exercise his right of peremptory challenge of a juror at any time previous to the acceptance of the jury by the defendant; 36 S. C. 504; in civil cases the right is not allowed at all; 9 Exch. 472; 2 F. & F. 137; 2 Blatchf. 470; or, if allowed, only to a very limited extent; 5 Harr. Del. 245; 7 Ohio St. 155; 9 Barb. 161; 20 Conn. 510; 8 Blackf. 507; 3 Iowa 216. Unless given by statute no right exists; 86 Ala. 206. The rule that a juror shall be accepted or challenged and sworn as soon as his examination is completed is not objectionable as embarrassing the exercise of the right of peremptory challenge; 154 U. S. 134. In the United States courts in trials for treason or capital cases, the accused has twenty and the United States five peremptory challenges; U. S. Rev. Stat. § 819. The number of peremptory challenges allowed varies much in the different states. See 12. A. & E. Encyc. 346, 347, n. 3, for state statutes on the subject.

To the poll. Those made separately to each juror to whom they apply. Distinguished from those to the array.

Principal. Those made for a cause which when substantiated is of itself sufficient evidence of bias in favor of or against the party challenging. Co. Litt. 156 *b*. See 3 Bla. Com. 363; 4 *id.* 353. They may be either to the array or to the poll; Co. Litt. 156 *a*, *b*.

The importance of the distinction between principal challenges and those to the favor is found in the case of challenges to the array or of challenges to the poll for favor or partiality. All other challenges to the poll must, it seems, be principal. The distinctions between the various classes of challenges are of little value in modern practice, as the court generally determine the qualifications of a juror upon suggestion of the cause for challenge, and examination of the juror upon oath when necessary. See TRIORS.

The *causes* for challenge are said to be either *propter honoris respectum* (from regard to rank), which do not exist in the United States; *propter defectum* (on account of some defect), from personal objections, as alienage, infancy, lack of statutory requirements; *propter affectum* (on account of partiality), from some bias or partiality either actually shown to exist or presumed from circumstances; *propter delictum* (on account of crime), including cases of legal incompetency on the ground of infamy; Co. Litt. 155 *b et seq.*

These causes include, amongst others, *alienage;* Wall. C. C. 147, but see 2 Cra. 3; *incapacity* resulting from age, lack of statutory qualifications; 10 Gratt. 767; see 43 La. Ann. 365; *partiality* arising from near relationship; 19 N. H. 372; 19 Pa. 95; 10 Gratt. 690; Busb. 330; 32 Me. 310; 20 Conn. 87; 2 Barb. Ch. 331; 3 Ind. 198; 65 Ga. 304; see 74 Mo. 270; 97 Pa. 543; an *interest* in the result of the trial; Thorn. Juries 90, 105; 11 Ind. 234; 8 Cush. 69; 21 N. H. 438; 1 Zabr. 656; 11 Mo. 247; 69 Tex. 650; but it should be a direct pecuniary interest; 15 Neb. 657; 3 Ill. 661; 20 Fla. 980; 29 Ga. 105; *conscientious scruples* as to finding a verdict of conviction in a capital case; 1 Baldw. 78; 16 Tex. 206, 445; 60 Ind. 441; 2 Cal. 257; 3 Ga. 453; 17 Miss. 115; 16 Ohio 364; 13 N. H. 536; 65 Cal. 148; 19 Tex. App. 618; see 13 Ark. 568; 14 Ill. 433; 5 Cush. 295; *membership* of societies, under some circumstances; 13 Q. B. 815; 5 Cal. 347; 4 Gray 18; *citizenship* in a municipality interested in the case; 42 Ia. 315; 51 N. Y. 506; 51 Ind. 119; 61 Mo. 479; 20 Kan. 156; 21 N. E. Rep. (Ind.) 977; but see 73 Ia. 241; acting as an employé of one of the parties; 64 Miss. 738; 18 S. C. 263; 63 Ga. 173; *bias* indicated by *declarations* of wishes or opinions as to the result of the trial; 1 Zabr. 106; 19 Ohio 198; 1 Johns. 316; 60 Ill. 452, 465; 75 Pa. 424; 52 Ind. 68; see 96 U. S. 640; or *opinions* formed or expressed as to the guilt or innocence of one accused of crime; 19 Ark. 156; 30 Miss. 627; 2 Wall. Jr. 333; 10 Humphr. 456; 13 Ill. 685; 2 Greene 404; 19 Ohio 198; 5 Ga. 85, see 1 Dutch. 566; 15 Ga. 498; 18 *id.* 383; 7 Ind. 332; 2 Swan 581; 16 Ill. 364; 1 Cal. 379; 5 Cush. 295; 7 Gratt. 593; 12 Mo. 223; 18 Conn. 166; but if opinion is based on newspaper report or rumor, and the juror says he can give an impartial decision on the evidence, he is competent; 61 Cal. 548; 102 Ind. 502; 105 Ill. 547; 35 La. Ann. 327; 95 N. C. 611; 39 Mich. 245; 111 Pa. 251. A juror may be asked whether his "political affiliations or party predilections tend to bias his judgment either for or against the defendant;" 158 U. S. 408.

Who may challenge. Both parties, in civil as well as in criminal cases, may challenge, for cause; and equal privileges are generally allowed both parties in respect to peremptory challenges; but see 6 B. Monr. 15; 3 Wis. 823; 2 Park. Cr. Cas. N. Y. 586; and after a juror has been challenged by one party and found indifferent, he may yet be challenged by the other; 32 Miss. 389. A juror has no right to challenge himself, and though a good cause of challenge subsists, yet, if neither party will take advantage of it, the court cannot

reject him ; 1 N. J. L. 220 ; but see 43 Miss. 641.

The time to make a challenge is between the appearance and swearing of the jurors ; 8 Gratt. 637 ; 3 Jones N. C. 443 ; 3 Ia. 216 ; 23 Pa. 12 ; 8 Gill 487 ; 8 Blackf. 194 ; 3 Ga. 453 ; 14 La. Ann. 461 ; 4 Nev. 265 ; 22 Mich. 76 ; 113 Mass. 297 ; but see 7 Ala. 189 ; 1 Curt. C. C. 23 ; 80 Ga. 544 ; 78 Mich. 124 ; the fact that a panel has been passed by a party as satisfactory will not prevent him from challenging one of the jurors so passed at any time before he is sworn ; 78 Cal. 118 ; 88 Ala. 220. See 121 Ill. 442 ; 40 Mo. App. 234. It is a general rule at common law that no challenge can be made till the appearance of a full jury ; 4 B. & Ald. 476 ; 45 Cal. 323 ; on which account a party who wishes to challenge the array may pray a *tales* to complete the number, and then make his objection. Challenges to the array, where allowed, must precede those to the poll ; and the right to the former is waived by making the latter ; Co. Litt. 158 *a* ; Bacon, Abr. *Juries*, E, 11 ; 6 Cal. 214 ; 35 Neb. 139 ; but see 13 Wall. 434. In cases where peremptory challenges are allowed, a juror unsuccessfully challenged for cause may subsequently be challenged peremptorily ; 4 Bla. Com. 356 ; 6 Term 531 ; 4 B. & Ald. 476. See 5 Cush. 295.

Manner of making. Challenges to the array must be made in writing ; 1 Mann. Mich. 451 ; 1 Ia. 141 ; but challenges to the poll are made orally and generally by the attorney's or party's saying, "Challenge," or, "I challenge," or, "We challenge ;" 1 Chit. Cr. Law 533–541 ; 4 Hargr. St. Tr. 740 ; Trials per Pais 172 ; Cro. Car. 105. See 43 Me. 11 ; 25 Penn. 134 ; 82 *id.* 306.

The guaranty in the constitution of a trial by jury does not prevent legislation as to the manner of selecting jurors or allowing peremptory challenges to the state ; 61 Vt. 153.

CHAMBER. A room in a house. There may be an estate of freehold in a chamber as distinct and separate from the ownership of the rest of the house ; 1 Term 701 ; Co. Litt. 48 *b* ; 4 Mass. 576 ; 1 Metc. 538 ; 10 Conn. 318 ; and ejectment will lie for a deprivation of possession ; 1 Term 701 ; 9 Pick. 293 ; though the owner thereof does not thereby acquire any interest in the land ; 11 Metc. 448. See Brooke, Abr. *Demand* 20 ; 6 N. H. 555 ; 3 Watts 243 ; 3 Leon. 210.

Consult Washburn ; Preston, Real Property.

CHAMBER OF ACCOUNTS. In French Law. A sovereign court, of great antiquity, in France which took cognizance of and registered the accounts of the king's revenue : nearly the same as the English court of exchequer. Encyc. Brit.

CHAMBER OF COMMERCE. A society of the principal merchants and traders of a city, who meet to promote the general trade and commerce of the place. Some of these are incorporated, as in Philadelphia. Similar societies exist in all the large commercial cities, and are known by various names, as, Board of Trade, etc.

CHAMBERS. In Practice. The private room of the judge. Any hearing before a judge which does not take place during a term of court or while the judge is sitting in court, or an order issued under such circumstances, is said to be *in chambers*. The act may be an official one, and the hearing may be in the court-room; but if the court is not in session, it is still said to be done *in chambers*.

CHAMPART. In French Law. The grant of a piece of land by the owner to another, on condition that the latter would deliver to him a portion of the crops. 18 Toullier, n. 182.

CHAMPERTOR. In Criminal Law. One who makes pleas or suits, or causes them to be moved, either directly or indirectly, and sues them at his proper costs, upon condition of having a part of the gain. Stat. 33 Edw. I. stat. 2.

One who is guilty of champerty.

CHAMPERTY (Lat. *campum partire*, to divide the land). A bargain with a plaintiff or defendant in a suit, for a portion of the land or other matter sued for, in case of a successful termination of the suit which the champertor undertakes to carry on at his own expense. See 19 Alb. L. J. 468 ; 82 Va. 309 ; 7 Bing. 369.

Champerty differs from maintenance chiefly in this, that in champerty the compensation to be given for the service rendered is a part of the matter in suit, or some profit growing out of it ; 4 Bla. Com., Chase's ed. 905, n. 8 ; 16 Ala. 488 ; 24 Ala. N. S. 472 ; 9 Metc. 489 ; 1 Jones, Eq. 100 ; 5 Johns. Ch. 44 ; 4 Litt. 117 ; 57 Ga. 263 ; 10 Heisk. 359 ; 89 Ill. 183 ; while in simple maintenance the question of compensation does not enter into the account ; 2 Bish. Cr. Law § 131 ; 53 Ind. 317.

The offence was indictable at common law ; 4 Bla. Com. 135 ; 1 Pick. 415 ; 5 T. B. Monr. 413 ; 1 Swan 393 ; 8 M. & W. 691 ; see L. R. 8 Q. B. 112 ; 2 App. Cas. 186 ; 4 L. R. Ir. 43 ; 1 Ohio 132 ; 3 Greene 472 ; 18 Ill. 449 ; 28 Vt. 490 ; 6 Tex. 275 ; and is in some of the states of the United States by statute ; 37 Me. 196 ; 14 N. Y. 289 ; 18 Ill. 449 ; 73 *id.* 11 ; 15 B. Monr. 64 ; 14 Conn. 12 ; 40 *id.* 565 ; 38 Tex. 458 ; 2 Mo. App. 1. Champerty avoids contracts into which it enters ; 8 R. I. 389. A common instance of champerty, as defined and understood at common law, is where an attorney agrees with a client to collect by suit at his own expense a particular claim or claims in general, receiving a certain proportion of the money collected ; 9 Ala. N. S. 755 ; 17 *id.* 305 ; 1 Ohio 132 ; 4 Dowl. 304 ; or a percentage thereon ; 17 Ala. N. S. 206 ; 9 Metc. 489 ; 2 Bish. Cr. Law § 132 ; 86 Wis. 170 ; S. C. 56 N. W. Rep. 637 ; and see 3 Pick. 79 ; 4 Duer 275 ; 1 Pat. & H. 48 ; 18 Ill. 449 ; 15 B. Monr. 64 ; 29 Ala. N. S. 676 ; 6 Dana 479 ; 17 Ark. 608 ; 4 Mich. 535 ; 8 R. I. 389 ; 12 *id.* 94 ; 53 Ill. 275 ; 7 Bush 355. The doctrine of champerty does not apply to judicial sales ; 10 Yerg. 460 ; 5 N. Y. 320 ; 17 S. W. Rep. (Ky.) 859. See 85 Me. 172 ; 148 Mass. 18.

The tendency of modern decisions is, while departing from the unnecessary severity of the old law, at the same time to preserve the principle which defeats the mischief to which the old law was directed. It has been the disposition of courts to look not so much to technical distinctions, and by treating statutes on the subject as declaratory of the common law, to deal with the subject with more flexibility, keeping in view the real object of the policy to restrain what was defined by Knight Bruce, L. J., to be "the traffic of merchandizing in quarrels, of huckstering in litigious discord;" 1 D. M. & G. 680, 686. In this spirit, the common-law rule relative to champerty and maintenance is no longer recognized in many states; 65 Hun 619; 82 Va. 309; 21 Or. 260; 55 Fed. Rep. 44; 38 Tex. 58; 45 *id.* 106; but in New York by statute it is unlawful for an attorney to give or promise a consideration for placing in his hands a claim for injuries against a railroad company; Code C. P. 678; 61 Hun 613. Where an attorney agrees to prosecute an action for damages and advance all costs because of the poverty of the plaintiff, taking a contingent fee of a portion of the amount recovered, it is not void for champerty; 37 Ill. App. 180; nor is a contract to pay for services of an attorney contingent entirely upon success; 36 W. Va. 1; 49 Ohio St. 475; 97 Pa. 455; 98 *id.* 196; 127 *id.* 474; 57 N. W. Rep. (Neb.) 767; 37 Ill. App. 180; 14 S. E. Rep. (W. Va.) 444; (and see 30 Ill. App. 62 and 23 N. E. Rep. 400;) 102 N. Y. 395; 71 Ia. 197; 138 Mass. 530; 119 Ill. 626; 40 Kan. 195. But the purchase by attorneys of rights of action, for the purpose of bringing suit thereon, is commonly prohibited in law, on grounds of public policy; Chase's Bla. Com. 905, n. 8; and an agreement that the client shall receive a certain amount out of the sum recovered and that all above that shall belong to the attorney, is champertous; 13 Or. 47; 35 Leg. Int. (Pa.) 152; but such an agreement for collection without suit is not champertous; 24 Atl. Rep. 955; s. c. 84 Me. 578.

In England, in New York, and probably most of the states, the purchase of land, pending a suit concerning it, is champerty; and if made with knowledge of the suit and not pursuant to a previous agreement, it is void; 4 Kent 449; 24 S. W. Rep. (Ky.) 4; 30 *id.* 20; 70 Hun 428; this doctrine, established by the English statutes, Westm. 1, c. 25, Westm. 2, c. 49, and 28 Edw. I. c. 11, became part of the common law, and either as such or by statutory adoption became engrafted upon the law of almost all the states. The principle extends to the purchase of any cause of action, as a patent which has been infringed; 68 Fed. Rep. 627; unpaid promissory notes; 31 Atl. Rep. (Vt.) 315. In Pennsylvania a person may convey an interest in lands held adversely to him; 13 Pa. Co. Ct. 70.

The champerty of the plaintiff is no defence in the action concerning which the contract was made. A railroad company sued for an overcharge cannot defend by showing that the plaintiff made a champertous contract with his attorney to induce the company to accept the overcharge and then sue for the penalty; 60 Ark. 221; nor is such defence good in actions for personal injuries; 57 N. W. Rep. (Neb.) 767; nor can a purchaser of a disputed title defend against a prior unrecorded deed to plaintiff's attorney for one-half of the land, on the ground that the latter was given under a champertous contract; 42 Neb. 701; and generally the objection that a contract is champertous cannot be set up by a stranger to it or in defence of a suit brought under it; 14 So. Rep. (Ala.) 541; 29 N. E. Rep. (Ohio) 573; 11 So. Rep. (La.) 220; 16 S. W. Rep. (Mo.) 854.

An attorney suing as "administrator" to recover for a death by wrongful act may be guilty of a champertous agreement with the beneficiaries, which may be pleaded as a defence to the suit under a statute investing the code with equity powers for the purposing of discovering and preventing the offence; 55 Fed. Rep. 44. For an excellent analysis of the cases and the rules to be derived from them, see Wald's Poll. Cont. 293.

CHAMPION. He who fights for another, or who takes his place in a quarrel. One who fights his own battles. Bracton, l. 4, t. 2, c. 12.

CHANCE. See ACCIDENT.

CHANCE-MEDLEY. In Criminal Law. A sudden affray. This word is sometimes applied to any kind of homicide by misadventure, but in strictness it is applicable to such killing only as happens in defending one's self; 4 Bla. Com. 184.

CHANCELLOR. An officer appointed to preside over a court of chancery, invested with various powers in the several states.

There is a chancellor for the state in Delaware, and also, with vice-chancellors, in New Jersey, and in Alabama, Mississippi, and Tennessee there are district chancellors elected by the people. Under the federal system and in the other states the powers and jurisdiction of courts of equity are exercised and administered by the same judges who hold the common-law courts.

The title is also used in some of the dioceses of the Protestant Episcopal Church in the United States to designate a member of the legal profession who gives advice and counsel to the bishop and other ecclesiastical authorities.

In Scotland, this title is given to the foreman of the jury. Bisph. Eq. 7.

An officer bearing this title is to be found in some countries of Europe, and is generally invested with extensive political authority. It was finally abolished in France in 1848. The title and office of chancellor came to us from England. See 1 Spence, Eq. Jur.; Encyc. Am.; 4 Viner, Abr. 374; Woodd. Lect. 95.

For the history of the office, see CANCELLARIUS.

In England the title is borne by several functionaries, thus :—

The Lord High Chancellor is prolocutor of the house of lords, formerly presided over the court of chancery, and is principal judge of the high court of justice under the judicature act, 1873. He is a privy councillor by virtue of his office, and visitor of all hospitals and colleges of the king's foundation for which no other visitor is appointed. To him belongs the appointment of justices of the peace throughout the kingdom. Cowel; 3 Bla. Com. 38, 47; 2 Steph. Com. 382; 3 *id.* 320.

The Chancellor of the Duchy of Lancaster, who presides over the court of the duchy, to judge and determine controversies relating to lands holden of the king in right of the Duchy of Lancaster. This court has a concurrent jurisdiction with the court of chancery in matters relating to the duchy. Cowel; 3 Bla. Com. 78; 3 Steph. Com., 11th ed. 372, n.

The Chancellor of the Exchequer is an officer who formerly sat in the court of exchequer, and, with the rest of the court, ordered things for the king's benefit. Cowel. This part of his functions is now practically obsolete; and the chancellor of the exchequer is now known as the minister of state who has control over the national revenue and expenditure. 2 Steph. Com., 11th ed. 467.

The Chancellor of a Diocese is the officer appointed to assist a bishop in matters of law, and to hold his consistory courts for him. 1 Bla. Com. 382; 2 Steph. Com., 11th ed. 684.

The Chancellor of a University, who is the principal officer of the university. His office is for the most part honorary.

CHANCELLORS' COURTS IN THE TWO UNIVERSITIES. In English Law. Courts of local jurisdiction in and for the two universities of Oxford and Cambridge in England. 3 Bla. Com. 83. These are courts subsisting under ancient charters granted to these universities and confirmed by act of parliament, and they have an exclusive jurisdiction *inter alia*, in actions in which any member or servant of the university is a party—in any case at least where the cause of action arises within the liberties of the university, and the member, or servant, was resident in the university when it arose and when the action was brought; 4 Inst. 227; Rep. *t.* Hardw. 341; 2 Wils. 406; 12 East 12; 13 *id.* 635; 15 *id.* 634; 10 Q. B. 292; which privilege of exclusive jurisdiction was granted in order that the students might not be distracted from their studies and other scholastic duties by legal process from distant courts. The most ancient charter containing this grant to the University of Oxford was 28 Hen. III. A. D. 1244, and the privileges thereby granted were confirmed and enlarged by every succeeding prince down to Hen. VIII., in the 14th year of whose reign the largest and most extensive charter of all was granted, and this last-mentioned charter is the one now governing the privileges of that university. A charter somewhat similar to that of Oxford was granted to Cambridge in the third year of Queen Elizabeth. And subsequently was passed the statute of 13 Eliz. c. 29, whereby the legislature recognized and confirmed all the charters of the two universities, and those of the 14 Henry VIII. and 3 Eliz. by name (13 Eliz. c. 29); 16 Q. B. D. 761 (Oxford), 12 East 12 (Cambridge), which act established the privileges of these universities without any doubt or opposition.

It is to be observed, however, that the privilege can be claimed only on behalf of members who are defendants, and when an action in the High Court is brought against such member the university enters a *claim of conusance*, that is, claims the cognizance of the matter, whereupon the action is withdrawn from the High Court and transferred to the University Court; 16 Q. B. D. 761. But as regards the University of Cambridge the jurisdiction appears to be no longer exclusive; 19 & 20 Vict. cxvii. § 18; and it attaches only when both parties are scholars or privileged persons and the cause of action arose in Cambridge or its suburbs.

Procedure in these courts was usually regulated according to the laws of the civilians, subject to specific rules made by the vice-chancellor, with the approval of three of her Majesty's judges. See (as to Oxford) 25 & 26 Vict. c 26, § 12. Under the charter of Henry VIII. the chancellor and vice-chancellor and the deputy of such vice-chancellor are justices of the peace for the counties of Oxford and Berks, which jurisdiction has been recently confirmed in them by 49 & 50 Vict. c. 31; 3 Steph. Com. 325.

The courts of the Universities of Oxford and Cambridge have a criminal as well as a civil jurisdiction, and this of an extensive kind. The chancellor's court has authority to determine all offences which are misdemeanors only, when committed by a member of the university. And even treason, felony, and mayhem, if found to have been committed by any member thereof, may be tried in the court of the Lord High Steward of the University. A similar jurisdiction is enjoyed by the University of Cambridge. See Bac. Abr. tit. Universities.

The right was granted under Henry IV., confirmed by 13 Eliz. c. 29, which charter provides, that a scholar or other privileged person be tried before the high steward of the university or his deputy, who is to be nominated by the chancellor of the university for the time being, but such high steward must be approved by the Lord High Chancellor of England; and a special commission is given him under the great seal.

The judge of the chancellor's court at Oxford was a vice-chancellor, with a deputy or assessor. An appeal lay from his sentence to delegates appointed by the congregation, thence to delegates appointed by

the house of convocation, and thence, in case of any disagreement only, to judges delegates appointed by the crown under the great seal in chancery; 3 Steph. Com., 11th ed. 325.

Proceedings in these courts are now governed by the common and statute law of the realm; Stat. 17 & 18 Vict. c. 81, § 45; 18 & 19 Vict. c. 36; 19 & 20 Vict. cc. 31, 95; 20 & 21 Vict. c. 25.

CHANCERY. See COURT OF CHANCERY.

CHANNEL. The bed in which the main stream of a river flows, and not the deep water of the stream, as followed in navigation. 55 Ia. 558. The main channel is that bed of the river over which the principal volume of water flows; 31 Fed. Rep. 757.

By act of congress of Sept. 19, 1890, U. S. Rev. Stat. 1 Supp. 800, any alteration or modification of the channel of any navigable water of the United States, by any construction, excavation, or filling, or in any other manner without the approval of the secretary of war, is prohibited. For the construction of this act, see 54 Fed. Rep. 351.

CHANTRY. A church or chapel endowed with lands for the maintenance of priests to say mass daily for the souls of the donors. *Termes de la Ley;* Cowel.

CHAPELRY. The precinct of a chapel; the same thing for a chapel that a parish is for a church. *Termes de la Ley;* Cowel.

CHAPELS. Places of worship. They may be either *private* chapels, such as are built and maintained by a private person for his own use and at his own expense, or *free* chapels, so called from their freedom or exemption from all ordinary jurisdiction, or chapels *of ease*, which are built by the mother-church for the ease and convenience of its parishioners, and remain under its jurisdiction and control.

CHAPTER. **In Ecclesiastical Law.** A congregation of clergymen.

Such an assembly is termed *capitulum*, which signifies a little head; it being a kind of head, not only to govern the diocese in the vacation of the bishopric, but also for other purposes. Coke, Litt. 103.

CHARACTER. The possession by a person of certain qualities of mind or morals, distinguishing him from others.

In Evidence. The opinion generally entertained of a person derived from the common report of the people who are acquainted with him; his reputation. 3 S. & R. 336; 3 Mass. 192; 3 Esp. 236; Tayl. Ev. 328, 329.

A clear distinction exists between the strict meaning of the words character and reputation. Character is defined to be the assemblage of qualities which distinguish one person from another, while reputation is the opinion of character generally entertained; Worcester, Dict. This distinction, however, is not regarded either in the statutes or in the decisions of the courts; thus, a libel is said to be an injury to character; the character of a witness for veracity is said to be impeached; evidence is offered of a prisoner's good character; Abbott, Law Dict. See 6 Or. 213; 26 Vt. 278. The word character is therefore used in the law, rather to express what is properly signified by reputation.

The moral character and conduct of a person in society may be used in proof before a jury in three classes of cases; *first*, to afford a presumption that a particular person has not been guilty of a criminal act; *second*, to affect the damages in particular cases, where their amount depends on the reputation and conduct of any individual; and, *third*, to impeach or confirm the veracity of a witness.

Where the guilt of an accused person is doubtful, and the character of the supposed agent is involved in the question, a presumption of innocence arises from his former conduct in society, as evidenced by his general reputation; since it is not probable that a person of known probity and humanity would commit a dishonest or outrageous act in the particular instance. But where it is a question of great and atrocious criminality, the commission of the act is so unusual, so out of the ordinary course of things and beyond common experience—it is so manifest that the offence, if perpetrated, must have been influenced by motives not frequently operating upon the human mind—that evidence of reputation and of a man's habitual conduct under common circumstances, must be considered far inferior to what it is in the instance of accusations of a lower grade. Against facts strongly proved, good character cannot avail. It is therefore in smaller offences, in such as relate to the actions of daily and common life, as when one is charged with pilfering and stealing, that evidence of a high character for honesty will satisfy a jury that the accused is not likely to yield to so slight a temptation. In such case, where the evidence is doubtful, proof of character may be given with good effect. But still, even with regard to the higher crimes, evidence of good character, though of less avail, is competent evidence to the jury, and a species of evidence which the accused has a right to offer. But it behooves one charged with an atrocious crime, like murder, to prove a high character, and by strong evidence, to make it counterbalance a strong amount of proof on the part of the prosecution. It is the privilege of the accused to put his character in issue, or not. If he does, and offers evidence of good character, then the prosecution may give evidence to rebut and counteract it. But it is not competent for the prosecution to give in proof the bad character of the defendant, unless he first opens that line of inquiry by evidence of good character; Per Shaw, C. J., 5 Cush. 325. See 5 Esp. 13; 1 Campb. 460; 2 St. Tr. 1038; 1 Coxe 424; 5 S. & R. 352; 2 Bibb 286; 5 Day 260; 7 Conn. 116; 14 Ala. 382; 6 Cowen 673; 3 Hawks 105; 30 Tex. App. 675; 17 R. I. 763; 36 Neb. 481.

On the trial of an indictment for homicide, evidence offered generally to prove

that the deceased was well known, and understood to be a quarrelsome, riotous, and savage man, is inadmissible; 1 Whart. Cr. L. § 641; see 94 Ala. 25; 153 Pa. 451; but for the purpose of showing that the homicide was justifiable on the ground of self-defence, proof of the character of the deceased may be admitted, if it is also shown that the prisoner was influenced by his knowledge thereof in committing the deed; 26 Ohio 162; 28 Fla. 113. The general reputation of the deceased as a violent and dangerous person is presumptive proof of knowledge of decedent's character; 17 S.W. Rep. (Ky.) 186. Unless the character of the deceased is attacked, it is clearly not admissible for the prosecution to prove its peaceableness; 1 Whart. Cr. L. § 641; 114 Ill. 86. Good character will not avail one if the crime has been proven beyond a reasonable doubt; 133 N. Y. 609; 88 Ga. 91; 54 Ind. 400; 59 N. W. Rep. (Mich.) 230. In a criminal case the defendant has the right to prove his reputation for honesty and truth; 30 Tex. App. 614; though he be indicted for murder by poisoning, he can show his reputation for peace and quietude; 132 Ind. 317; 50 Kan. 525.

In some instances, evidence in disparagement of character is admissible, not in order to prove or disprove the commission of a particular fact, but with a view to damages. In actions for criminal conversation with the plaintiff's wife, evidence may be given of the wife's general bad reputation for want of chastity, and even of particular acts of adultery committed by her previous to her intercourse with the defendant; Whart. Ev. 51; Bull. N. P. 27, 296; 12 Mod. 232; 3 Esp. 236. See 5 Munf. 10. As to the statutory use of the word "character," see 8 Barb. 603; 5 Park. Cr. C. 254; 5 Ia. 389, 430; 49 *id.* 531.

In actions for slander or libel, the law is well settled that evidence of the previous general character of the plaintiff, before and at the time of the publication of the slander or libel, is admissible, under the general issue, in mitigation of damages. The ground of admitting such evidence is that a person of disparaged fame is not entitled to the same measure of damages as one whose character is unblemished. And the reasons which authorize the admission of this species of evidence under the general issue alike exist, and require its admission, where a justification has been pleaded but the defendant has failed in sustaining it; Stone *v.* Varney, 7 Metc. 86, where the decisions are collected and reviewed; 4 Denio 509; 20 Vt. 232; 6 Pa. 170; 2 Nott & M'C. 511; Heard, Lib. & Sl. § 299. See 1 Johns. 46; 11 *id.* 38; 93 Mich. 117. When evidence is admitted touching the general reputation of a person, it is manifest that it is to be confined to matters in reference to the nature of the charge against him; 2 Wend. 352. See 93 Cal. 596.

In an action for damages for assault and battery it is error to admit evidence of defendant's good character; 91 Mich. 399; 4 Ind. App. 232.

The party against whom a witness is called may disprove the facts stated by him, or may examine other witnesses as to his general character; but they will not be allowed to speak of particular facts or parts of his conduct; Bull. N. P. 296; 47 Minn. 47. For example, evidence of the general character of a prosecutrix for a rape may be given, as that she was a street-walker; but evidence of specific acts of criminality cannot be admitted; 3 C. & P. 589. And see 17 Conn. 467; 18 Me. 372; 14 Mass. 387; 5 Cox, Cr. Cas. 146. The regular mode is to inquire whether the witness under examination has the means of knowing the former witness's general character, and whether, from such knowledge, he would believe him on his oath; 4 St. Tr. 693; 4 Esp. 102; 17 Wall. 586. In answer to such evidence against character, the other party may cross-examine the witness as to his means of knowledge and the grounds of his opinion, or he may attack such witness's general character, and by fresh evidence support the character of his own; 2 Stark. 151, 241; Stark. Ev. pt. 4, 1753 to 1758; 1 Phill. Ev. 229. A party cannot give evidence to confirm the good character of a witness, unless his general character has been impugned by his antagonist; 9 Watts 124; 71 Mo. 436; 99 Ind. 28; 86 Pa. 74; 1 Allen 483. Consult Wharton; Best; Greenleaf; Phillips; Powell; Rice; Starkie; Taylor, Evidence; Roscoe, Crim. Evidence.

CHARGE. A duty or obligation imposed upon some person. A lien, incumbrance, or claim which is to be satisfied out of the specific thing or proceeds thereof to which it applies.

To impose such an obligation; to create such a claim.

To accuse.

The distinctive significance of the term rests in the idea of obligation directly bearing upon the individual thing or person to be affected, and binding him or it to the discharge of the duty or satisfaction of the claim imposed. Thus, charging an estate with the payment of a debt is appropriating a definite portion to the particular purpose; charging a person with the commission of a crime is pointing out the individual who is bound to answer for the wrong committed; charging a jury is stating the precise principles of law applicable to the case immediately in question. In this view, a charge will, in general terms, denote a responsibility peculiar to the person or thing affected and authoritatively imposed, or the act fixing such responsibility.

In Contracts. An obligation, binding upon him who enters into it, which may be removed or taken away by a discharge. *Termes de la Ley.*

An undertaking to keep the custody of another person's goods.

An obligation entered into by the owner of an estate, which binds the estate for its performance. Comyns, Dig. *Rent*, c. 6; 2 Ball & B 223.

In Devises. A duty imposed upon a devisee, either personally, or with respect to the estate devised. It may be the payment of a legacy or sum of money or an annuity, the care and maintenance of a relative or other person, the discharge of an existing lien upon land devised or the

payment of debts, or, in short, the performance of any duty or obligation which may be lawfully imposed as a condition of the enjoyment of the bounty of a testator. A charge is not an interest in, but a lien upon, lands; 3 Mas. 768; 12 Wheat. 498; 4 Metc. 523; 134 Mass. 62; 95 Pa. 305; 1 Ves. & B. 260; and will not be divested by a sheriff's sale; 162 Pa. 346.

Where a charge is personal, and there are no words of limitation, the devisee will generally take the fee of the estate devised; 4 Kent 540; 2 Bla. Com. 108; 3 Term 356; 6 Johns. 185; 24 Pick. 139; but he will take only a life estate if it be upon the estate generally; 14 Mees. & W. 698; 3 Mas. 209; 10 Wheat. 231; 18 Johns. 35; 15 Me. 436; 8 Harr. & J. 208; 9 Mass. 161; 18 Wend. 200; unless the charge be greater than a life estate will satisfy; 6 Co. 16; 4 Term 93; 1 Barb. 102; 24 Pick. 138; 1 Washb. R. P. 59.

Consult Washburn, Real Property; Kent; Preston, Estates; Roper, Legacies; Williams, Executors; 9 L. R. A. 584, n.; 44 Alb. J. 186. See LEGACY.

In Equity Pleading. An allegation in the bill of matters which disprove or avoid a defence which it is alleged the defendant is supposed to pretend or intend to set up. Story, Eq. Pl. § 31.

It is frequently omitted, and this the more properly, as all matters material to the plaintiff's case should be fully stated in the stating part of the bill; Cooper, Eq. Pl. 11; 1 Dan. Ch. Pr. 372, 1883, n.; Merwin, Eq. § 915; 11 Ves. Ch. 574. See 2 Hare, Ch. 264.

In Practice. The instructions given by the court to the grand jury or inquest of the county, at the commencement of their session, in regard to their duty.

The exposition by the court to a petit jury of those principles of the law which the latter are to apply in order to render such a verdict as will, in the state of facts proved at the trial to exist, establish the legal rights of the parties to the suit.

The essential idea of a charge is that it is authoritative as an exposition of the law, which the jury are bound by their oath and by moral obligations to obey; 10 Metc. 285-287; 13 N. H. 536; 21 Barb. 566; 2 Blackf. 162; 1 Leigh 588; 3 *id.* 731; 3 J. J. Marsh. 150; 21 How. St. Tr. 1039; 69 Pa. 522. See 5 South. L. Rev. 352; 1 Crim. L. Mag. 51; 3 *id.* 484. This is the rule in the federal courts; 156 U. S. 51, 715; Alabama, 12 Ala. 153; 70 *id.* 33; 73 *id.* 498; Arkansas; 13 Ark. 360; 35 *id.* 585; but see 13 Ark. 59; California; 44 Cal. 65; Kentucky; 1 Metc. (Ky.) 1; Maine; 53 Me. 336; Massachusetts; 10 Metc. (Mass.) 286; 5 Gray 185; Michigan; 48 Mich. 37; Mississippi; 61 Miss. 363; Missouri; 7 Mo. 607; Nebraska; 14 Neb. 60; New Hampshire; 13 N. H. 536; New York; 49 N. Y. 141; North Carolina; 1 Jones (N. C. L.) 251; Ohio; 29 Ohio St. 413; Pennsylvania; 143 Pa. 64; Rhode Island; 7 Bost. L. Rep. 347; South Carolina; 14 Rich. (S. C. L.) 87; Texas; 7 Tex. App. 472; and Virginia; 5 Gratt. 664. By statute, in some states, the jury are constituted judges of the law as well as of the facts in criminal cases,—an arrangement which assimilates the duties of a judge to those of the moderator of a town-meeting or of the preceptor of a class of law-students, besides subjecting successive criminals to a code of laws varying as widely as the impulses of successive juries can differ. It is so in Georgia; 48 Ga. 66; Illinois; 42 Ill. 331; Indiana; 104 Ind. 467; Louisiana; 37 La. Ann. 444; Maryland; 49 Md. 531; Tennessee; 2 Swan 237; and Vermont; 23 Vt. 14. Even in these states, however, the courts have tried to escape from this doctrine, and have of late years practically nullified it in many instances. See 56 Ga. 61; 75 *id.* 382; 57 Md. 108; 76 Ill. 211; 90 *id.* 221; 37 La. Ann. 449; 56 Vt. 263. The charge frequently and usually includes a *summing up* of the evidence, given to show the application of the principles involved; and in English practice the term *summing up* is used instead of charge. Though this is customary in many courts, the judge is not bound to sum up the facts; Thomps. Ch. Juries § 79; 3 Hawks, 390. But if he do sum up he must present all the material facts; 6 W. & S. 132; 1 Ga. 428. This is the practice in the courts of the U. S.; 8 Wall. 342.

It should be a clear and explicit statement of the law applicable to the condition of the facts; 4 Hawks 61; 1 A. K. Marsh. 76; 4 Conn. 356; 3 Wend. 75; 10 Metc. 14, 263; 1 Mo. 97; 24 Me. 289; 16 Vt. 679; 3 Green 32; 5 Blackf. 296; 23 Pa. 76; 1 Gill 127; 72 Mich. 10; adding such comments on the evidence as are necessary to explain its application; 8 Me. 42; 1 Const. S.C. 216; 1 W. & S. 68; 22 Ga. 385 (though in some states the court is prohibited by law from charging as to matters of fact, "but may state the testimony and the law;" *e. g.*, California, Tennessee, South Carolina, Georgia, Massachusetts, etc.); and may include an opinion on the weight of evidence; 13 How. 115; 2 M. & G. 721; 34 N. H. 460; 8 Conn. 431; 81 Pa. 139; 5 Cow. 245; 28 Vt. 223; 5 Jones, N. C. 393; though the rule is otherwise in some states; 79 Ill. 441; 53 Ga. 162; 31 Ark. 307; 83 Ala. 40; 16 Or. 15; 75 Mich. 127; but should not undertake to decide the facts; 7 J. J. Marsh. 410; 3 Dana 66; 7 Cow. 29; 10 Ala. N. S. 599; 10 Gill & J. 346; 5 R. I. 295; unless in the entire absence of opposing proof; 5 Gray 440; 7 Wend. 160; 17 Vt. 176; 26 Mo. 523; 1 Pa. 68; 28 Ala. N. S. 775. And see 3 Dana 566. A United States court may express an opinion upon the facts: 128 U. S. 171; 36 Fed. Rep. 166. It is improper to instruct which of two conflicting theories of the evidence the jury shall accept; 94 Ala. 68. The presiding judge may express to the jury his opinion as to the weight of evidence. He is under no obligation to recapitulate all the items of the evidence, nor even all bearing on a single question; 155 U. S. 117.

Failure to give instructions not asked for is not error; 82 Wis. 571; 93 Cal. 518; 53 N. J. Law 601; 87 Ga. 681. A request to charge is properly refused though embodying correct principles, where there is no evidence to support it; 94 Ala. 45; 155 Mass. 298; 84 Me. 84; 3 Wash. St. 241; 109 N. C. 132; 88 Ga. 446; 66 Tex. 221; 150 Pa. 376; 130 U. S. 611; 126 Ill. 408; 25 Tex. App. 358. A request to charge may be disregarded when the court has already fully instructed the jury on the point. The court should refuse to charge upon a purely hypothetical statement of facts calculated to mislead the jury; 159 U. S. 3.

Erroneous instructions in matters of law which might have influenced the jury in forming a verdict are a cause for a new trial; 12 Pick. 177; 9 Conn. 107; 4 Hawks 64; even though on hypothetical questions; 11 Wheat. 59; 14 Tex. 483; 6 Cal. 214; on

which no opinion can be required to be given; 5 Ohio 88; 11 Gill & J. 388; 3 Ired. 470; 5 Jones N. C. 388; 28 Ala. N. S. 100; 3 Humphr. 466; 6 Mo. 6; 20 N. H. 354; 16 Me. 171; 5 Cal. 478; 5 Blackf. 112; 16 Miss. 401; 16 Tex. 229; 3 Ia. 509; 18 Ga. 411; but the rule does not apply where the instructions could not prejudice the cause; 11 Conn. 342; 1 McLean 509; 2 How. 457. See 3 Wyo. 657. Any decision or declaration by the court upon the law of the case, made in the progress of the cause, and by which the jury are influenced and the counsel controlled, is considered within the scope and meaning of the term "instructions;" Hilliard, New Trials 255.

Where on a trial for murder defendant's counsel asks the court to give its charge in writing, and after complying it gives orally other and additional charges, it is cause for new trial; 89 Ga. 188.

When an instruction to the jury embodies several propositions of law, to some of which there are no objections, the party objecting must point out specifically to the trial court the part to which he objects, in order to avail himself of the objection; 157 U. S. 72.

See Thompson, Charging Juries.

CHARGEABLE. This word in its ordinary acceptation. as applicable to the imposition of a duty or burden, signifies capable of being charged, subject, or liable to be charged, or proper to be charged, or legally liable to be charged. 46 Vt. 625.

CHARGE DES AFFAIRES. CHARGE D'AFFAIRES. In International Law. The title of a diplomatic representative or minister of an inferior grade, to whose care are confided the affairs of his nation. The term is usually applied to a secretary of legation or other person in charge of an embassy or legation during a vacancy in the office or temporary absence of the ambassador or minister.

He has not the title of minister, and is generally introduced and admitted through a verbal presentation of the minister at his departure, or through letters of credence addressed to the minister of state of the court to which he is sent. He has the essential rights of a minister; 1 Kent 39, n.; 4 Dall. 321.

CHARGE TO ENTER HEIR. In Scotch Law. A writ commanding a person to enter heir to his predecessor within forty days, otherwise an action to be raised against him as if he had entered.

The heir might appear and renounce the succession, whereupon a degree *cognitionis causa* passed, ascertaining the creditor's debt. If the heir did not appear, he then became personally liable to the creditor. A charge was either general, or special, or general-special. Charges are now abolished, by 10 & 11 Vict. c. 48, § 16, and a summons of constitution against the unentered heir substituted.

CHARGES. The expenses which have been incurred in relation either to a transaction or to a suit. Thus, the *charges* incurred for his benefit must be paid by a hirer; the defendant must pay the *charges* of a suit. In relation to actions, the term includes something more than the costs, technically so called.

CHARITABLE USES, CHARITIES. Gifts to general public uses, which may extend to the rich as well as the poor. Camden, Ld. Ch, in Ambl. 651; adopted by Kent, Ch., 7 Johns. Ch. 294; Lyndhurst, Ld. Ch., in 1 Ph. Ch. 191; and U. S. Supreme Court in 24 How. 506; Bisp. Eq. § 124; 2 Sneed 305.

Gifts to such purposes as are enumerated in the act 43 Eliz. c. 4, or which, by analogy, are deemed within its spirit or intendment. Boyle, Char. 17.

Such a gift was defined by Mr. Binney to be "whatever is given for the love of God or for the love of your neighbor, in the catholic and universal sense—given from these motives, and to these ends—free from the stain or taint of every consideration that is personal, private, or selfish." 2 How. 128; approved by the Supreme Court of Pennsylvania in 28 Pa. 35, and the Supreme Court of the United States in 95 U. S. 311.

Lord MacNaghten said in [1891] A. C. 531:—Charity in its legal sense comprises four principal divisions: trusts for the relief of poverty, trusts for the advancement of education, trusts for the advancement of religion, and trusts for other purposes beneficial to the community not falling under any of the preceding heads.

They had their origin under the Christian dispensation, and were regulated by the Justinian Code. Code Just. i. 3, *De Episc. et Cler.*; Domat, b. 2, t. 2, § 6, 1, b. 4, t. 2, § 6, 2; 1 Eq. Cas. Abr. 96; Mr. Binney's argument on the Girard will, p. 40; Chastel on the Charity of the Primitive Churches, b. 1, c. 2, b. 2, c. 10; *Codex, donationem piarum, passim.* Under that system, donations for pious uses which had not a regular and determined destination were liable to be adjudged invalid, until the edicts of Valentinian III. and Marcian declared that legacies in favor of the poor should be maintained even if legatees were not designated. Justinian completed the work by sweeping all such general gifts into the coffers of the church, to be administered by the bishops. The doctrine of pious uses seems to have passed directly from the civil law into the law of England; 3 Pet. 100, 139; Howe, Studies in the Civil Law 68. It would seem that, by the English rule before the statute, general and indefinite trusts for charity, especially if no trustees were provided, were invalid. If sustainable, it was under the king's prerogative, exercising in that respect a power analogous to that of the ordinary in the disposition of *bona vacantia* prior to the Statute of Distributions; F. Moore 882, 890; Duke, Char. Uses 72, 362; 1 Vern. 224, note; 1 Eq. Cas. Abr. 96, pl. 8; 1 Ves. Sen. 225; Hob. 136; 1 Am. L. Reg. 545. The main purpose of the stat. 43 Eliz. c. 4 was to define the uses which were charitable, as contradistinguished from those which, after the Reformation in England, were deemed superstitious, and to secure their application; Shelf. Mortm. 89, 103. The objects enumerated in the statute were, "Relief of aged, impotent and poor people; maintenance of sick and maimed soldiers and mariners, schools of learning, free schools and scholars in universities; repairs of bridges, ports, havens, causeways, churches, seabanks and highways; education and preferment of orphans, relief, stock or maintenance for houses of correction; marriage of poor maids; supportation, aid and help of young tradesmen, handicraftsmen and persons decayed; relief or redemption of prisoners or captives; aid or ease of any poor inhabitants concerning payments of fifteens, setting out of soldiers, and other taxes."

Subsequently it appears that this statute, as a mode of proceeding, fell into disuse, although under its influence and by its mere operation many

charities were upheld which would otherwise have been void; Sneif. Mortm. 378, 279, and notes; 3 Leigh 470; Nelson, *Lex Test.* 137; Boyle, Char. 18 *et seq.*; 1 Burn, Eccl. Law, 317 *a*. Under this statute, courts of chancery are empowered to appoint commissioners to superintend the application and enforcement of charities; and if, from any cause, the charity cannot be applied precisely as the testator has declared, such courts exercise the power in some cases of appropriating it, according to the principles indicated in the devise, as near as they can to the purpose expressed. And this is called an application *cy pres*; 3 Washb. R. P. 514. See CY PRES.

There is no need of any particular persons or objects being specified; the generality and indefiniteness of the object constituting the charitable character of the donation; Boyle, Char. 23. A charitable use, when neither law nor public policy forbids, may be applied to almost anything that tends to promote the well-doing and well-being of man; Perry, Trusts § 687.

They embrace gifts to the poor of every class, including poor relations, where the intention is manifest; 33 Pa. 9; 2 Sneed 305; 4 Wheat. 518; 1 Sumn. 276; 35 N. H. 445; 7 Ch. D. 714; for the poor of a county, "who by timely assistance may be kept from being carried to the poor house;" 2 Del. Ch. 392; *id.* 421; for every description of college and school, and their instructors and pupils, where nothing contrary to the fundamental doctrine of Christianity is taught; to all institutions for the advancement of the Christian religion; 7 B. Monr. 351, 481; 4 Ired. Eq. 19; 30 Pa. 425; to all churches; 10 Cush. 129; 7 S. & R. 559; 4 Ia. 180; 63 Conn. 377; foreign missions; 86 Ky. 610; for the education of two young men for all coming time for the Christian ministry; 41 Fed. Rep. 371; the advancement of Christianity among the infidels; 1 Ves. Jr. 243; the benefit of ministers of the gospel; 28 N. J. Eq. 570; for distributing Bibles and religious tracts; 3 Cush. 358; 10 Pa. 23; chapels, hospitals, orphan asylums; 33 Pa. 9; 12 La. Ann. 301; 8 Rich. Eq. 190; 125 Mass. 321; even when discrimination is made in favor of members of one religious denomination; 90 Pa. 21; dispensaries; 27 Barb. 260; public libraries; 145 Ill. 625; and the like; 2 Sandf. Ch. 46; 14 Allen 539; 2 Sim. & S. 594; 7 H. L. Cas. 124; friendly societies; 32 Ch. D. 158; the Salvation Army; 34 Ch. D. 528; educational trusts; [1895] 1 Ch. 367; a volunteer corps; [1894] 3 Ch. 265; any religious society; [1893] 2 Ch. 41; (but not a Dominican convent, for the promotion of private prayer by its own members; *id.* 51); a society for the prevention of cruelty to animals (but not for the maintenance of animals); 41 Ch. D. 552; [1895] 2 Ch. 501; to repair a sea dyke; 38 Ch. D. 507; to provide a scholarship [1895] 1 Ch. 480; to repair a churchyard; 33 Ch. D. 187; but not to repair a tomb; L. R. 4 Eq. 521. Sport is not a charity; [1895] 2 Ch. 649; to general public purposes; 30 Pa. 437; as supplying water or light to towns, building roads and bridges, keeping them in repair, etc.; 24 Conn. 350; and to the advancement of religion and other charitable purposes general in their character; 4 R. I. 414; 12 La. Ann. 301; 5 Ohio St. 237; 33 Pa. 415; 81 *id.* 445; 152 *id.* 477; 5 Ind. 465; L. R. 10 Eq. 246; L. R. 1 Eq. 585; L. R. 4 Ch. App. 309; L. R. 20 Eq. 483; 2 Pa. Dist. R. 435; 159 Mass. 226; 51 N. J. Eq. 154; [1893] 2 Ch. 41; 60 Fed. Rep. 335; Tudor, Char. Tr.; or a devise may be made to a municipal corporation for charitable uses; 2 How. 128; 112 Mo. 561; 116 Ind. 139; and a city may refuse to accept such a bequest; 60 Conn. 314. A charitable devise may become void for uncertainty as to the beneficiary; 51 Minn. 277; 37 S. C. 457; 77 Md. 104; 92 Tenn. 559; 8 Misc. Rep. 388. The decision that the appropriation for the World's Columbian Exposition was a charitable use; 56 Fed. Rep. 630; was reversed by the Circuit Court of Appeals, which held that, being made for the benefit of a local corporation, it did not constitute a charitable trust, although aiding a great public enterprise; *id.* 654.

When the purposes of a charity may be best sustained by alienating the specific property bequeathed and investing the proceeds in a different manner, a court of equity has jurisdiction to direct such sale and investment, taking care that no deviation of the gift be permitted; 6 Wall. 169; 44 N. J. Eq. 179; 70 Md. 139.

Charities in England were formerly interpreted, sustained, controlled, and applied by the court of chancery, in virtue of its general jurisdiction in equity, aided by the stat. 43 Eliz. c. 4 and the prerogative of the crown; the latter being exercised by the lord chancellor, as the delegate of the sovereign acting as *parens patriæ;* Spence, Eq. Jur. 439, 441; 12 Mass. 537. The subject has since been regulated by various statutes; the Charitable Trusts Act of 1853, 16 & 17 Vict. c. 137, amended by various subsequent acts down to 1894; Tud. Char. Tr. part iii.; 3d ed. By the Toleration Act, 1 Wm. & M. c. 18, charitable trusts for promoting the religious opinions of Protestant Dissenters have been held valid; 2 Ves. Sen. 273. Roman Catholics share in their benefits; 2 & 3 Will. IV. c. 115; and Jews, by 9 & 10 Vict. c. 59, § 2.

The weight of judicial authority in England was in favor of the doctrine which, as will be seen, prevails in this country, that equity exercised an inherent jurisdiction over charitable uses independently of the statute of Elizabeth;—that the statute did not create, but was in aid of, the jurisdiction. In support of this conclusion are found such judges as Ld. Ch. Northington, in 1 Eden 10; Amb. 351; Sir Jos. Jekyll, in 2 P. Wms. 119; Ld. Ch. Redesdale, in 1 Bligh 347; Ld. Ch. Hardwicke, in 2 Ves. Sr. 327; Ld. Keeper Finch, in 2 Lev. 167; Ld. Ch. Sugden, in 1 Dr. & W. 258; Ld. Ch. Somers, in 2 Vern. 342; Ld. Ch. Eldon, in 1 Bligh 358, and 7 Ves. 36; Wilmot, C. J., in Wilmot's Notes 24; Ld. Ch. Lyndhurst, in Bligh 335; and Sir John Leach, in 1 Myl. & K. 376.

The stat. 43 Eliz. c. 4 has not been reenacted or strictly followed in the United

States. In some of them it has been adopted by usage; but, with several striking exceptions, the decisions of the English Chancery upon trusts for charity have furnished the rule of adjudication in our courts, without particular reference to the fact that the most remarkable of them were only sustainable under the peculiar construction given to certain phrases in the statute; Boyle, Char. 18 *et seq.* The opinion prevailed extensively in this country that the validity of charitable endowments and the jurisdiction of courts of equity in such cases depended upon that statute. In the case of the Baptist Association *v.* Hart's Ex'rs (4 Wheat. 1), the U. S. supreme court adopted that view and accepted the conclusion that there was at common law no jurisdiction of charitable uses exercised in chancery, although in afterwards reviewing that decision an effort was made to distinguish the case by the two features that such cases are not recognized by the law of Virginia, where it arose, and that it was a donation to trustees incapable of taking, with beneficiaries uncertain and indefinite; 2 How. 128. These views were assailed in 1833 by Baldwin, J. (Bright. 346), in 1835, in 7 Vt. 241, and in 1844 by Mr. Binney in the Girard will case in 2 How. 128. In that case there was furnished a memorandum of fifty cases extracted from the then recently published chancery calendars, in which the jurisdiction had been exercised prior to the stat. of 43 Eliz. (2 How. 155, note); and although the accuracy of this list was challenged by Mr. Webster in argument; (*id.* 179 note), the court, per Story, J., accepted it to "establish, in the most satisfactory and conclusive manner," the conclusion stated. Baldwin, J., also enumerated forty-six cases of the enforcement of such trusts independently of the statute; Bright. 346. The doctrine was fully adopted by the U. S. supreme court in the Girard will case, and has been since adhered to; 95 U. S. 304. It is now conceded as settled that courts of equity have an inherent and original jurisdiction over charities, independent of the statute; Perry, Trusts § 694; 45 Me. 122; 28 Ala. 299; 29 Mo. 543; 25 Ind. 246; 27 Tex. 173; 2 Del. Ch. 392; *id.* 421, 463.

In Virginia and New York, that statute, with all its consequences, seems to have been repudiated; 3 Leigh 450; 22 N. Y. 70, & App.; 52 N. Y. 232; 112 *id.* 299. So in North Carolina, Connecticut, Maryland, and the District of Columbia; 1 Dev. Eq. 276; 1 Hawks 96; 4 Ired. Ch. 26; 6 Conn. 293; 22 *id.* 31; 5 Harr. & J. 392; 6 *id.* 1; 8 Md. 551; 75 *id.* 275; 7 Am. Dec. 339; 95 U. S. 304. In Georgia, Illinois, Indiana, Iowa, Kentucky, Massachusetts, Rhode Island, Vermont, and perhaps some other states, the English rule is acted on; 8 Blackf. 15; 18 B. Monr. 635; 4 Ga. 404; 4 Ia. 252; 16 Pick. 107; 4 R. I. 414; 12 La. Ann. 301; 7 Vt. 211, 241; 4 Wheat. 1; 2 How. 127; 17 *id.* 369; 24 *id.* 465; 145 Ill. 625. See 16 Ill. 225; 19 Ala. N. S. 814; 1 Swan 348. While not in force as a statute in Pennsylvania, it is embodied as to its principles in the common law of that state; 120 Pa. 624; 38 Alb. L. J. 431.

It is said that charitable uses are favorites with courts of equity; the construction of all instruments, when they are concerned, is liberal in their behalf; 95 U. S. 313; and even the rule against perpetuities is relaxed for their benefit; *ibid.*; [1891] 3 Ch. 252; 2 Pa. Dist. R. 435; 63 Conn. 125; Bisph. Eq. § 133; 24 How. 495; 63 Pa. 99; 9 R. I. 177; *contra*, 34 N. Y. 584. See also Gray, Perp. §§ 589-602. But if a gift to charity is made to depend on a condition precedent, the event must occur within the rule against perpetuities; [1894] 3 Ch. 265; except where the event is the divesting of another charity; [1891] 3 Ch. 252. A gift may be made to a charity not *in esse* at the time; *ibid.*; Perry, Trusts § 736; 46 Wis. 70. See 126 N. Y. 215; 147 U. S. 557. And a gift for specific charitable purposes will not fail for want of trustees; 158 Mass. 400. See 140 N. Y. 30.

Generally, the rules against accumulations do not apply; Perry, Trusts § 738; 10 Allen 1; 45 Pa. 1. Where there is no trustee appointed or none capable of acting, the trust will be sustained, and a trustee appointed; 3 Hare 191; 3 Pet. 99. In New York a certain designated beneficiary is essential to the creation of a valid trust and the *cy-pres* doctrine is not accepted; see 79 N. Y. 602, said to reach the limit of uncertainty in that state, and 95 *id.* 418, and 108 *id.* 312, commenting on that case and reasserting the general rule in New York as stated; Tilden *v.* Green, 130 N. Y. 29; s. c. 14 L. R. A. 1; a bequest in which the beneficiary is not designated and the selection thereof is delegated to trustees with complete discretionary power is invalid, and the uncertainty as to beneficiaries cannot be cured by anything done by the trustees to execute it; *id.*

A testamentary gift for a charity to an unincorporated association afterwards incorporated is sometimes sustained; as when the devise does not vest until after the incorporation; 57 Hun 161; but otherwise the incapacity to take cannot be cured by subsequent incorporation or amendment; 14 L. R. A. (N. Y.) 410 and note. A devise to a charity, however, is held valid where future incorporation is provided for or contemplated; *id.* Under the civil law, a similar rule seems to have prevailed, and gifts for pious uses might be made to a legal entity to be established by the state after the testator's death; Mackeldy, Civ. Law § 157; 3 Pet. 100; 17 La. 46; Howe, Studies in the Civil Law 68.

Legacies to pious or charitable uses are not, by the law of England, entitled to a preference in distribution; although such was the doctrine of the civil law. Nor are they in the United States, except by special statutes.

See, generally, 3 Washburn, Real Prop. 687, 690; Boyle, Char.; Duke, Char. Uses; 2 Kent 361; 4 *id.* 616; 2 Ves. Ch. 52, 272; 6 *id.* 404; 7 *id.* 86; Ambl. 715; 2 Atk. 88;

24 Pa. 84; 3 Rawle 170; 1 Pa. 49; 17 S. & R. 88; 2 Dana 170; 9 Cow. 437; 9 Wend. 394; 1 Sandf. Ch. 439; 9 Barb. 324; 17 *id.* 104; Brett, Lead. Cas. Mod. Eq.; 9 N. Y. 554; 9 Ohio 203; 5 Ohio St. 237; 24 Conn. 350; 6 Pet. 435; 9 *id.* 566; 9 Cra. 331; 2 How. 127; 20 Miss. 165; 10 Ill. 225; 2 Strobh. Eq. 379. Dwight's argument, Rose will case; Dwight's Charity Cases; a very full article in 1 Am. L. Reg. N. S. 129, 321, 385; 9 Am. Dec. 577. See 31 Am. L. Reg. 123, 235 and 5 Harvard L. Rev. 389 for discussion of the Tilden will case, cited *supra*, and also Potter will case, 1 Del. Ch. 421 (App.), in which the arguments are very fully reported and the authorities collected on both sides of the questions involved in this title.

CHARTA. A charter or deed in writing. Any signal or token by which an estate was held.

CHARTA CHYROGRAPHATA. An indenture. The two parts were written on the same sheet, and the word chyrograph written between them in such a manner as to divide the word in the separation of the two parts of the indenture.

CHARTA COMMUNIS. An indenture.

CHARTA PARTITA. A charter-party.

CHARTA DE UNA PARTE. A deed poll. A deed of one part.

Formerly this phrase was used to distinguish a *deed poll*—which is an agreement made by one party only; that is, only one of the parties does any act which is binding upon him—from a deed *inter partes*. Co. Litt. 229. See DEED POLL.

CHARTA DE FORESTA (also written *Carta de Foresta*). A collection of the laws of the forest, made in the reign of Hen. III., and someitmes said to have been originally a part of Magna Charta.

The *charta de foresta* was called the Great Charter of the woodland population, nobles, barons, freemen, and slaves, loyally granted by Henry III. early in his reign (A. D. 1217). Inderwick, King's Peace 159; Stubb's Charters 847. There is a difference of opinion as to the *original* charter of the forest similar to that which exists respecting the true and original Magna Charta (*q. v.*), and for the same reason, viz.:—that both required repeated confirmation by the kings, despite their supposed inviolability. This justifies the remark of recent historians as to the great charter that "this theoretical sanctity and this practical insecurity are shared with 'the Great Charter of Liberties' by the Charter of the Forest which was issued in 1217." 1 Poll. & Maitl. 158. It is asserted with great positiveness by Inderwick that no forest charter was ever granted by King John, but that Henry III. issued the charter of 1217 (which he puts in the third year of the reign, which, however, only commenced Oct. 28, 1216), in pursuance of the promises of his father; and Lord Coke, referring to it as a charter on which the lives and liberties of the woodland population depended, says that it was confirmed at least thirty times between the death of John and that of Henry V.; 4 Co. Inst. 303.

Webster, under the title Magna Charta, says that the name is applied to the charter granted in the 9th Hen. III. and confirmed by Edw. I. Prof. Maitland, in speaking of Magna Charta, refers to "the sister-charter which defined the forest law" as one of the four documents which, at the death of Henry III., comprised the written law of England. 1 Soc. England 410. Edward I. in 1297 confirmed "the charter made by the common consent of all the realm in the time of Henry III. to be kept in every point without breach." Inderwick, King's Peace 160; Stubb's Charters 486. The Century Dictionary refers to this latter charter of Edw. I. as *the* Charter of the Forest; but it was, as already shown, only a confirmation of it, and a comparison of the authorities leaves little if any doubt that the date was as above stated and the history as here given. Its provisions may be found in Stubb's Charters and they are summarized by Inderwick, in his recent work above cited. See FOREST LAWS.

CHARTEL. A challenge to single combat. Used at the period when trial by single combat existed. Cowel.

CHARTER. A grant made by the sovereign either to the whole people or to a portion of them, securing to them the enjoyment of certain rights. 1 Story, Const. § 161; 1 Bla. Com. 108.

A charter differs from a constitution in this, that the former is granted by the sovereign, while the latter is established by the people themselves: both are the fundamental law of the land.

A deed. The written evidence of things done between man and man. Cowel. Any conveyance of lands. Any sealed instrument. Spelman. See Co. Litt. 6; 1 Co. 1; F. Moore 687.

An act of legislature creating a corporation. Dane. Abr. *Charter*.

The name is ordinarily applied to government grants of powers or privileges of a permanent or continuous nature, such as incorporation, territorial dominion or jurisdiction. Between private persons it is also loosely applied to deeds and instruments under seal for the conveyance of lands. Cent. Dict.

The charter of a corporation is to be strictly construed; 80 Me. 544; 130 U. S. 1; 69 Tex. 306. The reservation by the legislature of power to repeal a charter cannot give authority to take away or destroy property lawfully acquired or created under the charter; 111 N. Y. 1. A charter may be taken under the power of eminent domain; 102 Pa. 123. See CORPORATION.

BLANK CHARTER. A document given to the agents of the crown in the reign of Richard II., with power to fill up as they pleased.

CHARTER OF CONFRMATION. **In Scotch Law.** A document which ratified and confirmed the purchaser's rights, and the sasine following upon it.

OPEN CHARTER. **In Scotch Law.** A charter from the crown or from the subject containing a precept of sasine which has not been executed.

ORIGINAL CHARTER. **In Scotch Law.** A charter by which the first grant of the subject is made to the vassal by the superior. Bell, Dict.

CHARTER OF PARDON. **In English Law.** An instrument under the great seal by which a pardon is granted to a man for felony or other offence. Black, L. Dict.

CHARTER-LAND. **In English Law.** Land formerly held by deed under certain rents and free services. It differed in nothing from free socage land; and it was also called bookland. 2 Bla. Com. 90.

CHARTER-PARTY. A contract of affreightment, by which the owner of a ship or other vessel lets the whole or a part of her to a merchant or other person for the conveyance of goods, on a particular voy-

age, in consideration of the payment of freight.

The term is derived from the fact that the contract which bears this name was formerly written on a card (*charta-partita*), and afterwards the card was cut into two parts from top to bottom and one part was delivered to each of the parties, which was produced when required, and by this means counterfeits were prevented. Abb. Ship. 175; Pothier, *Traité de Charte-partie*, gives this explanation taken from Boerius: "It was formerly usual in England and Aquitaine to reduce contracts into writing on a chart, divided afterwards into two parts from top to bottom, of which each of the contracting parties took one, which they placed together and compared when they had occasion to know the terms of their contract."

It is in writing not generally under seal, in modern usage; 1 Pars. Adm. & Sh. 270; 2 Wash. 145; 4 Rand. 504; but may be by parol; Ben. Adm. 287; 16 Mass. 336; 9 Metc. 233; Ware, Dist. Ct. 263; 3 Sumn. 144. It should contain, *first*, the name and tonnage of the vessel; see 14 Wend. 195; 7 N. Y. 262; *second*, the name of the captain; 2 B. & Ald. 421; *third*, the names of the vessel-owner and the freighter; *fourth*, the place and time agreed upon for the loading and discharge; *fifth*, the price of the freight; 2 Gall. 61; *sixth*, the demurrage or indemnity in case of delay; 9 C. & P. 709; 10 M. & W. 498; 17 Barb. 184; Abb. Adm. 548; 4 Binn. 299; 9 Leigh 532; 5 Cush. 18; *seventh*, such other conditions as the parties may agree upon; 13 East 343; 20 Bost. L. Rep. 669: Bee 124. The owner who signs a charter-party impliedly warrants that the vessel is commanded by competent officers; 67 Hun 392. One of the conditions implied in a charter-party is that the vessel will commence the voyage with reasonable diligence; waiting four months violates the contract; 54 Fed. Rep. 530.

It may either provide that the charterer hires the whole capacity and burden of the vessel,—in which case it is in its nature a contract whereby the owner agrees to carry a cargo which the charterer agrees to provide,—or it may provide for an entire surrender of the vessel to the charterer, who then hires her as one hires a house, and takes possession in such a manner as to have the rights and incur the liabilities which grow out of possession. See 10 Bingh. 345; 8 Ad. & E. 835; 4 Wash. 110; 1 Cra. 214; 8 *id.* 39; 23 Me. 289; 4 Cow. 470; 1 Sumn. 551; 1 Paine 358. If the object sought can be conveniently accomplished without a transfer of the vessel, the courts will not be inclined to consider the contract as a demise of the vessel; 2 Sumn. 583; 3 Cliff. 339; 1 Cra. 214; 11 Wall. 591; 97 U. S. 379.

When a ship is chartered, this instrument serves to authenticate many of the facts on which the proof of her neutrality must rest, and should therefore be always found on board chartered ships; 1 Marsh. Ins. 407.

Unqualified charter-parties are to be construed liberally as mercantile contracts, and one who has thereby charged himself with an obligation must make it good unless prevented by the act of God, the law, or the other party; 50 Fed. Rep. 118, 124. A charter-party controls a bill of lading in case of conflict between them; 35 Fed. Rep. 620. In construing a charter-party, matter expunged from a printed form may be considered in determining the intentions of the parties; 53 Fed. Rep. 828. Quarantine regulations which interfere with the charter engagements of a vessel are fairly within the clause excepting liability for results caused by restraints of successor; 50 Fed. Rep. 835. See Maude & Pollock, Merchant Shipping; Abb. Shipping; Desty, Ship. & Adm.; Leggett, Chart. Part.

CHARTIS REDDENDIS (Lat. for returning charters). A writ which lay against one who had charters of feoffment intrusted to his keeping, which he refused to deliver. Reg. Orig. 159. It is now obsolete.

CHASE. The liberty or franchise of hunting, oneself, and keeping protected against all other persons, beasts of the chase within a specified district, without regard to the ownership of the land. 2 Bla. Com. 414–416.

The district within which such privilege is to be exercised.

A chase is a franchise granted to a subject, and hence is not subject to the *forest* laws; 2 Bla. Com. 38. It differs from a park, because it may be another's ground, and is not enclosed. It is said by some to be smaller than a forest and larger than a park. *Termes de la Ley.* But this seems to be a customary incident, and not an essential quality.

The act of acquiring possession of animals *ferœ naturœ* by force, cunning, or address.

The hunter acquires a right to such animals by occupancy, and they become his property; 4 Toullier, n. 7. No man has a right to enter on the lands of another for the purpose of hunting, without his consent; 14 East 249; Pothier, *Propriété*, pt. 1, c. 2, a. 2.

CHASTE. In the seduction statutes it means actual virtue in conduct and principle. One who falls from virtue and afterwards reforms is chaste within the meaning of the statutes; A. & E. Encyc; 48 Ga. 288; 5 Ia. 389; 8 Barb. 603; 55 N. Y. 644; 73 Ala. 527; 32 Mich. 112.

CHASTITY. That virtue which prevents the unlawful commerce of the sexes.

A woman may defend her chastity by killing her assailant. See SELF-DEFENCE.

Sending a letter to a married woman soliciting her to commit adultery is an indictable offence; 7 Conn. 266. See 14 Pa. 226. In England, and perhaps elsewhere, the mere solicitation of chastity is not indictable; 2 Chit. Pr. 478. Words charging a woman with a violation of chastity are actionable in themselves, because they charge her with a crime punishable by law, and of a character to degrade, disgrace, and exclude her from society; 2 Conn. 707; 5 Gray 2, 5; 2 N. H. 194; Heard, Lib. & Sl. § 36; 5 Johns. 190; 11 Metc. 552; 32 Pa. 275; but not so in the District of Columbia; 91 U. S. 225.

CHATTEL (Norm. Fr. *goods*, of any kind). Every species of property, movable or immovable, which is less than a freehold.

In the *Grand Coustumier* of Normandy it is described as a mere movable, but is set in opposition to a fief or *feud*; so that not only goods, but whatever was not a *feud* or fee, were accounted chattels; and it is in this latter sense that our law adopts it. 2 Bla. Com. 385.

Real chattels are interests which are annexed to or concern real estate: as, a lease for years of land. And the duration of the lease is immaterial, whether it be for one or a thousand years, provided there be a certainty about it and a reversion or remainder in some other person. A lease to continue until a certain sum of money can be raised out of the rents is of the same description; and so in fact will be found to be any other interest in real estate whose duration is limited to a time certain beyond which it cannot subsist, and which is, therefore, something less than a freehold. A lease giving the exclusive privilege for a term of years of boring and digging for oil and other minerals is also a chattel; 120 Pa. 590.

Personal chattels are properly things movable, which may be carried about by the owner; such as animals, household stuff, money, jewels, corn, garments, and everything else that can be put in motion and transferred from one place to another; 2 Kent 340; Co. Litt. 48 *a*; 4 Co. 6; 5 Mass. 419; 1 N. H. 350.

Chattels, whether real or personal, are treated as personal property in every respect, and, in case of the death of the owner, usually belong to the executor or administrator, and not to the heir at law. There are some chattels, however, which, as Chanceller Kent observes, though they be movable, yet are necessarily attached to the freehold: contributing to its value and enjoyment, they go along with it in the same path of descent or alienation. This is the case with deeds, and other papers which constitute the muniments of title to the inheritance; the shelves and family pictures in a house; and the posts and rails of an enclosure. It is also understood that pigeons in a pigeon-house, deer in a park, and fish in an artificial pond go with the inheritance, as heirlooms to the heir at law. But fixtures, or such things of a personal nature as are attached to the realty, whether for a temporary purpose or otherwise, become chattels, or not, according to circumstances; Mitch. R. P. 21. See FIXTURES; 2 Kent 342; Co. Litt. 20 *a*, 118; 12 Price, p. 163; 11 Co. 50 *b*; 1 Chit. Pr. 90; 8 Viner, Abr. 296; 11 *id.* 166; 14 *id.* 109; Bacon, Abr. *Baron*, etc. C, 2; Dane, Abr. Index; Comyns, Dig. *Biens*, A.

CHATTEL INTEREST. An interest in corporeal hereditaments less than a freehold. 2 Kent 342.

There may be a chattel interest in real property, as in case of a lease; Stearns, Real Act. 115. A term for years, no matter of how long duration, is but a chattel interest, unless declared otherwise by statute. See the subject fully treated in 1 Washburn, R. P. 310 *et seq.*

CHATTEL MORTGAGE. A transfer of personal property as security for a debt or obligation in such form that upon failure of the mortgagor to comply with the terms of the contract, the title to the property will be in the mortgagee. Thomas, Mort. 427.

An absolute pledge, to become an absolute interest if not redeemed at a fixed time. 2 Caines, Cas. 200, per Kent, Ch.

Strictly speaking, a conditional sale of a chattel as security for the payment of a debt or the performance of some other obligation. Jones, Chat. Mort. § 1. The condition is that the sale shall be void upon the performance of the condition named. At law, if the condition be not performed, the chattel is irredeemable at law; but it may be otherwise in equity or by statute; *ibid.* The title is fully vested in the mortgagee and can be defeated only by the due performance of the condition; upon a breach, the mortgagee may take possession and treat the chattel as his own; *ibid.*; 34 N. Y. Sup. Ct. 398. See 52 Barb. 367; 12 Wis. 413.

At common law a chattel mortgage may be made without writing; it is valid as between the parties; 4 N. Y. 497; and even as against third parties if accompanied by possession in the mortgagee; 66 Barb. 433; but delivery is not essential in all cases to the validity of a chattel mortgage; 35 Ala. 131; but see 66 Barb. 433. It differs from a *pledge* in that in case of a mortgage the title is vested in the mortgagee, subject to defeasance upon the performance of the condition; while in the case of a pledge, the title remains in the pledgor, and the pledgee holds the possession for the purposes of the bailment; 24 Wend. 116; 28 Vt. 237; 48 Me. 368; 35 Cal. 404; 1 Pet. 449; 1 Pick. 389; 2 Ala. 555. By a mortgage the title is transferred; by a pledge, the possession; Jones, Mort. § 4.

Upon default, in cases of pledge, the pledgor may recover the chattel upon tendering the amount of the debt secured; but in case of a mortgage, upon default the chattel, at law, belongs to the mortgagee; 43 How. Pr. 445. In equity he may be held liable to an account; 38 *id.* 296. Apart from statutes, no special form is required for the creation of a chattel mortgage. A bill of sale absolute in form, with a separate agreement of defeasance, constitute together a mortgage, as between the parties; 97 Mass. 452, 489; 38 Ala. 185; 30 Cal. 685; 85 Tex. 182; 2 Mo. App. 102; or a note with an endorsement on the back that at any time the maker agreed to make a chattel mortgage; 46 Mo. App. 512. And in equity, the defeasance may be subsequently executed; 26 Ala. 312. A parol defeasance is not good in law; 10 Allen 332; 36 Me. 562; 10 Mo. 506; *contra*, 3 Mich. 211; but it is in equity; 72 N. Y. 133; 45 Md. 477; 43 Ga. 262; 83 Ill. 470; 6 Oreg. 321, 362; even as to third parties with notice; 6 N. W. Rep. 367. See 33 Neb. 454. The question whether a bill of sale was intended as a chattel mortgage is for the jury; 51 Mo. App. 534.

In a *conditional sale*, the purchaser has merely a right to purchase, and no debt or

obligation exists on the part of the vendor; this distinguishes such a sale from a mortgage; 40 Miss. 462; 4 Daly 77.

Where there is an absolute sale and a simultaneous agreement of resale, the tendency is to consider the transaction a mortgage; 12 Sm. & M. 306; 11 Tex. 478; 15 Ark. 280; but not when the intention of the parties is clearly otherwise; 6 Gratt. 197; 5 Humph. 575.

It is not necessary that a chattel mortgage should be under seal; 47 Me. 504; 98 Mass. 59; Ping. Chat. Mort. 45; 14 Wall. 244; 5 Mich. 107.

At *common law* a mortgage can be given only of chattels actually in existence, and belonging to the mortgagor actually or potentially; 32 N. H. 484; 2 Mo. App. 322; 6 Bradw. 162; 38 N. J. L. 253; 42 Wis. 583; 11 R. I. 476, 482; 6 Dak. 32; and even though the mortgagor may afterwards acquire title, the mortgage is bad against subsequent purchasers and creditors; but it is otherwise between the parties; 20 Hun 265; claims for money not yet earned may be the subject of a chattel mortgage; 14 L. R. A. (Ia.) 126, and an elaborate note thereto.

In *equity* the rule is different; the mortgage, though not good as a conveyance, is valid as an executory agreement; the mortgagor is considered as a trustee for the mortgagee; 11 R. I. 476; 10 H. L. Cas. 191; 2 Story 630; 94 U. S. 382; 2 Fed. Rep. 747; 1 Woods 214; 111 N. C. 197. See article in 15 Am. L. Rev. 121. But see 13 Metc. 17; 43 Wis. 583. Under this principle all sorts of future interests in chattels may be mortgaged; Jones, Chat. Mort. § 174.

Independently of statutes, a delivery is necessary to the validity of a chattel mortgage, as against creditors. See 42 Ill. App. 370; 97 Ala. 630. The registration statutes simply provide a substitute for change of possession. Between the parties, a change of possession is unnecessary; if there is a change of possession, registration is not required; 30 Wis. 81; 49 N. H. 340; 129 Ind. 7. At common law an unrecorded chattel mortgage is *prima facie* fraudulent and void as to creditors, where there is no change of possession, but such presumption may be rebutted; 51 Fed. Rep. 551; 51 Kan. 404. See 34 N. Y. 253; 20 Ohio St. 110. Statutes regulating chattel mortgages exist in all of the states except Louisiana. In Pennsylvania a statute provides for chattel mortgages on certain kinds of personal property.

No mortgage of a *vessel* is valid against third parties without notice, unless recorded in the office of the collector of customs of the port where the vessel is enrolled; Rev. Stat. § 4192, etc. As between parties and those who have notice, registration is not required; 100 U. S. 145; 61 N. Y. 71; 3 Wood 61; as to Extraterritoriality of Chattel Mortgages, see CONFLICT OF LAWS.

CHAUD-MEDLEY (Fr. *chaud*). The killing of a person in the heat of an affray.

It is distinguished by Blackstone from chance-medley, an accidental homicide. 4 Bla. Com. 184. The distinction is said to be, however, of no great importance. 1 Russ. Cr. 660. Chance-medley is said to be the killing in self-defence, such as happens on a sudden rencounter, as distinguished from an accidental homicide. *Id.*

CHEAT. "Deceitful practices in defrauding or *endeavoring* to defraud another of his known right, by some *wilful device*, contrary to the plain rules of common honesty." Hawk. Pl. Cr. b. 2, c. 23, § 1.

The fraudulent obtaining the property of another by any deceitful and illegal practice or token (short of felony) which affects or may affect the public.

In order to constitute a cheat or indictable fraud, there must be a prejudice received; and such injury must affect the public welfare, or have a tendency so to do; 2 East, Pl. Cr. 817; 1 Deacon, Cr. Law 225.

It seems to be a fair result of the cases, that a cheat, in order to be indictable at common law, must have been public in its nature, by being calculated to defraud numbers, or to deceive or injure the public in general, or by affecting the public trade or revenue, the public health, or being in fraud of public justice, etc. And the other cases to be found in the books, of cheats apparently private which have been yet held to be indictable at common law, will, upon examination, appear to involve considerations of a public nature also, or else to be founded in conspiracy or forgery. Thus, it is not indictable for a man to obtain goods by false verbal representations of his credit in society, and of his ability to pay for them; 6 Mass. 72; or to violate his contract, however fraudulently it be broken; 1 Mass. 137; or fraudulently to deliver a less quantity of amber than was contracted for and represented; 2 Burr. 1125; 1 W. Bla. 273; or to receive good barley to grind, and to return instead a musty mixture of barley and oatmeal; 4 Maule & S. 214. See 2 East, Pl. Cr. 816; 7 Johns. 201; 2 Mass. 138; 1 Me. 387; 1 Yerg. 76; 1 Dall. 47; 1 B. & H. L. Cr. Cas. 1. Refusing to return a promissory note obtained for the purpose of examination is merely a private fraud; 14 Johns. 371.

To cheat a man of his money or goods, by using false weights or false measures, has been indictable at common law from time immemorial; 3 Greenl. Ev. § 86; 6 Mass. 72. See 1 Dall. 47. In addition to this, the statute 33 Hen. VIII. 1, which has been adopted and considered as a part of the common law in some of the United States, and the provisions of which have been either recognized as common law or expressly enacted in nearly all of them, was directed, as appears from its title and preamble, against such persons as received money or goods by means of counterfeit letters or privy tokens in other men's names; 6 Mass. 72; 12 Johns. 292; 3 Greenl. Ev. § 86; 2 Bish. Cr. L. 145. A "privy token," within the meaning of this statute, was held to denote some real visible mark or thing, as a key, a ring, etc., and not a mere affirmation or promise. And though writings, generally speaking, may be considered as tokens, yet to be within this statute they must be such as were made in the names of third persons, whereby some

additional credit and confidence might be gained to the party using them; 2 East, Pl. Cr. 826, 827.

The word "cheat" is not actionable, unless spoken of the plaintiff in relation to his profession or business; Heard, Lib. & Sl. §§ 16, 28, 48; 6 Cush. 185; 2 Chit. Rep. 657; 2 Pa. 187; 20 Up. Can. Q. B. 382; 5 Wend. 263; 3 Hill 139; 2 Mass. 406; 35 Ia. 6. See FALSER PETENCES; TOKEN; ILLITERATE.

CHECK. **Contracts.** A written order or request, addressed to a bank or persons carrying on the business of banking, by a party having money in their hands, desiring them to pay, on presentment, to a person therein named or bearer, or to such person or order, a named sum of money. 2 Dan. Neg. Inst. 528; 28 Gratt. 170; 1 MacArth. 350; 2 Story 502; 23 Minn. 336. See 6 N. Y. 412.

The chief differences between checks and bills of exchange are: *First*, a check is not due until presented, and, consequently, it can be negotiated any time before presentment, and yet not subject the holder to any equities existing between the previous parties; 3 Johns. Cas. 5, 9; 9 B. & C. 388; Chit. Bills, 8th ed. 546. *Secondly*, the drawer of a check is not discharged for want of immediate presentment with due diligence; while the drawer of a bill of exchange is. The drawer of a check is only discharged by such neglect when he sustains actual damage by it, and then only *pro tanto*; 6 Cow. 484; 10 Wend. 306; 2 Hill 425. See 31 Pa. 100. *Thirdly*, the death of the drawer of a check rescinds the authority of the banker to pay it; while the death of the drawer of a bill of exchange does not alter the relations of the parties; 3 M. & G. 571-573. *Fourthly*, checks, unlike bills of exchange, are always payable without grace; 25 Wend. 672; 6 Hill 174. See a discussion of this subject, 4 Kent, Lacey's ed., note on p. 571 of the index, commenting upon opinion of Cowen, J., in 21 Wend. 372.

Checks are in use only between banks and bankers and their customers, and are designed to facilitate banking operations. It is of their very essence to be payable on demand, because the contract between the banker and customer is that the money is payable on demand; 21 Wend. 372; 2 Stor. 502, 512; 10 Wall. 647; 36 Neb. 744.

As between the holder of a check and the indorser it is required that due diligence be used in presenting them, and it should be protested in order to hold the drawer and indorsers; 3 Kent, Lacey's ed. 88; but it is not necessary to use diligence in presenting an ordinary check, in order to charge the drawer, unless he has received damage by the delay; 2 Pet. 586; 2 Hill 425; 1 Ga. 304; 2 M. & R. 401; 3 Scott, N. R. 555; 3 Kent, Lacey's ed. 88; 57 N. Y. 641; 22 Gratt. 743; 1 Vroom 284; Story, Pr. Notes § 492; 17 Ohio St. 82; 30 Mo. 183; 45 Wis. 192; 76 Ill. 303. And see on this point 13 L. R. A. 43; 154 Pa. 396; 44 Wis. 479.

In common with other kinds of negotiable paper, they must contain an order to pay money, and words of negotiability. This enables a *bona fide* holder for value to collect the money without regard to the previous history of the paper; 16 Pet. 1; 20 Johns. 637; 42 Ala. 108.

They must be properly signed by the person or firm keeping the account at the banker's, as it is part of the implied contract of the banker that only checks so signed shall be paid. The words "Agt. Glass Buildings" added to the signature of a check used for paying an individual debt of the agent, are enough to put the person receiving it on inquiry as to his authority to use the fund for such purpose; 14 L. R. A. 234, and note reviewing cases.

Post-dated checks are payable on the day of their date, although negotiated beforehand. See 1 Vroom 284; 10 Wend. 304; 2 Story 502. Where all the parties to a check reside in the same place, the holder has until the day following its date in which to present it; 29 Weekly Notes Cases, Pa. 32.

Checks, being payable on demand, are not to be accepted, but presented at once for payment. There is a practice, however, of marking checks "good," by the banker, which fixes his responsibility to pay that particular check when presented, and amounts, in fact, to an acceptance; 10 Wall. 648. Such a marking is called certifying; and checks so marked are called certified checks. See 25 N. Y. 143; 73 Pa. 483. The bank thereby becomes the principal debtor; 52 N. Y. 350; 10 Wall. 648; to the holder, not the drawer; 39 Pa. 92; and the statute of limitation does not run against the check; 39 Pa. 92; and the certifying after delivery at payee's instance takes the amount thereof out of the hands of the maker, and any loss by the insolvency of the bank falls on the payee; 37 Ill. App. 475; 156 Mass. 458; but where certified to at maker's request he is not discharged from liability; 156 Mass. 458; 160 Mass. 401. The bank cannot refuse to pay because notified not to pay by the drawer; 12 Hun 537; nor generally can it set up that the check was forged, or that the drawer has no funds; Tiedm. Comm. P. 437; 18 Wall. 621. In New York, it is held that certifying a check warrants only the signature, and not the terms of the check; 67 N. Y. 458. See 40 Ill. App. 640; *contra*, 28 La. Ann. 189. The certification is in effect merely an acceptance, and creates no trust in favor of the holder of the check, and gives no lien on any particular portion of the assets of the bank; 77 Hun 159. See CERTIFIED CHECK.

Giving a check is not payment unless the check is paid; 1 Hall 56, 78; L. R. 10 Ex. 153; 99 Mass. 277; 4 Hun 639; 66 Ill. 351; 7 S. & R. 116. But a tender was held good when made by a check contained in a letter, requesting a receipt in return, which the plaintiff sent back, demanding a larger sum, without objecting to the nature of the tender; and receiving a check marked "good" is payment; 2 Dan. Neg. Inst. 559.

A check cannot be the subject of a *donatio mortis causa*, unless it is presented and paid during the life of the donor; because his death revokes the banker's authority to pay; 4 Bro. Ch. 286; 27 La. Ann. 465. But in such a case a check has been considered as of a testamentary character; 3 Curt. Eccl. 650; and see 1 P. Wms. 441.

There is a practice of writing across checks "memorandum," or "mem." They are given thus, not as an ordinary check, but as a memorandum of indebtedness; and between the original parties this seems to be their only effect. In the hands of a third party, for value, they have, however, all the force of checks without such word of restriction; 16 Pick. 535; 11 Paige 612; Story, Pr. Notes § 499. See INDORSEMENT.

CHECK BOOK. A book containing blanks for checks.

These books are so arranged as to leave a margin, called by merchants a *stump*, or *stubb*, when the check is filled out and torn off. Upon these stumps a memorandum is made of the date of the check, the payee, and the amount; and this memorandum, in connection with the evidence of the party under oath, is evidence of the facts there recorded.

CHEMIN (Fr.). The road wherein every man goes; the king's highway. Called in law Latin *via regia*. *Termes de la Ley;* Cowel; Spelman, Gloss.

CHEMIS. In Old Scotch Law. A mansion-house.

CHEROKEE NATION.

The eastern and western tribes of Cherokee Indians united and became one body politic under the title of the Cherokee Nation on July 12, 1838. By treaties with the United States of 1833 and 1866, a portion of the Indian Territory is set apart to them, and over it they have jurisdiction. They have a constitution which was adopted in 1839, and certain amendments were made thereto in 1866. Under authority of the National Council a compilation of the laws of the Cherokee Nation was published in 1881.

The government of the Nation is divided into legislative, executive, and judicial branches.

THE LEGISLATIVE POWER is vested in a Senate and Council which meets annually, the former being composed of two senators from each district, while in the latter the members are apportioned according to the number of voters. The members are chosen by the qualified voters and hold their office for a period of two years. Only male citizens of the Nation who have attained the age of twenty-five years are eligible as members of the National Council. It has power to make all necessary laws and regulations for the good of the Nation, and the two are called the National Council.

THE EXECUTIVE POWER is vested in a principal chief, who is elected by the people for a term of four years. He must be a natural born citizen and have attained the age of thirty-five years. In case of his death, resignation, or removal, the duties devolve upon an assistant principal chief. There is also a council composed of five persons appointed by the National Council for a period of two years, with whom the principal chief may take counsel in directing the affairs of the Nation.

THE JUDICIAL POWER is vested in a supreme court and such inferior courts as may be established. The supreme court holds its sessions annually, and is composed of three judges who are elected by the National Council for a term of four years. It has exclusive jurisdiction of contested election cases, and appellate jurisdiction over all cases taken from the circuit courts. There are three judicial circuits with a circuit and district court in each, the powers of which are regulated by the National Council. It is neither a state nor a territory under the constitution and laws of the United States, but a part of what is called Indian Country; 20 Fed. Rep. 298.

CHEVAGE. A sum of money paid by villeins to their lords in acknowledgment of their villenage.

It was paid to the lord in token of his being chief or head. It was exacted for permission to marry, and also permission to remain without the dominion of the lord. When paid to the king, it was called subjection. *Termes de la Ley;* Co. Litt. 140 *a*; Spelman, Gloss.

CHEVANTIA. A loan, or advance of money on credit.

CHEVISANCE (Fr. agreement). A bargain or contract. An unlawful bargain or contract.

CHICKASAW NATION. Within certain territorial limits established by treaty between the United States, the Choctaw and the Chickasaw Indians, signed at Washington, June 22, 1855, the Chickasaw nation has exclusive control and jurisdiction.

The following treaties have been made, establishing the rights of this nation: Between the United States and the Chickasaws, concluded October 20, 1832, ratified March 1, 1833; one concluded May 24, 1834, ratified July 1, 1834; one between the United States, the Choctaws, and the Chickasaws, concluded January 17, 1837, ratified March 24, 1837; one between the United States and the Chickasaws, concluded June 22, 1852, ratified February 24, 1853; one between the United States, the Choctaws, and the Chickasaws, concluded June 22, 1855, ratified March 4, 1856. This nation has a constitution, prefaced by a declaration of rights.

All free males nineteen years old or more, who are Chickasaws by birth or adoption, may vote.

THE LEGISLATIVE POWER.—*The Senate* is to be composed of not less than one-third nor more than two-thirds the number of representatives, elected by the people for the term of two years. The present number of senators is twelve, elected in each of the four districts of the Nation, each district being also a county. A senator must be thirty years of age at least, must be a Chickasaw by birth or adoption, and must have been a resident of the Nation for one year, and for the last six months a citizen of the county from which he is chosen.

The House of Representatives consists of eighteen members, elected by the people of the counties for one year. A representative must be twenty-one years old, and otherwise possess the same qualifications as a senator. Constitution, art. iv.

THE EXECUTIVE POWER.—*The Governor* is elected for two years by the people of the nation. He must be a Chickasaw by birth or adoption, thirty years of age, and must have resided in the Nation for one year next before his election.

THE JUDICIAL POWER.—*The Supreme Court* is composed of one chief and two assistant justices, elected by the legislature for the term of four years. A judge must be thirty years old. This court has appellate jurisdiction only coextensive with the limits of the Nation. It may issue the writs necessary to enforce its jurisdiction, and compel any judge of the district court to proceed to trial.

The Circuit Court is held in each of the four counties of the Nation. It has original jurisdiction of all criminal cases, and exclusive jurisdiction of all crimes amounting to felony, as well as of all civil cases not cognizable by the county court, and has original jurisdiction of all actions of contract where the amount involved is more than fifty dollars. One circuit judge for the Nation is elected by the legislature. He rides four circuits a year, holding court each time in each of the four counties in the state.

A County Court is held in each county by a single judge, elected by the people of the county for the term of two years. It has a civil jurisdiction in all actions where the amount involved is more than fifty dollars. It has also jurisdiction of the probate of wills, the settlement of estates of decedents, the appointment and control of guardians. A probate term is held each month.

CHIEF. One who is put above the rest. Principal. The best of a number of things.

Declaration in chief is a declaration for the principal cause of action. 1 Tidd, Pr. 419.

Examination in chief is the first examination of a witness by the party who produces him. 1 Greenl. Ev. § 445.

Tenant in chief was one who held directly of the king. 1 Washb. R. P. *19.

CHIEF BARON. The title of the chief justice of the English court of exchequer. 3 Bla. Com. 44.

CHIEF CLERK IN THE DEPARTMENT OF STATE. An officer appointed by the secretary of state, whose duties are to attend to the business of the office under the superintendence of the secretary, and, when the secretary is removed from office by the president, or in any other case of vacancy, during such vacancy to take the charge and custody of all records, books, and papers appertaining to the department. The other executive departments have similar officers.

CHIEF JUSTICE. The presiding or principal judge of a court.

CHIEF JUSTICIAR. Under the early Norman kings, the highest officer in the kingdom next to the king.

He was guardian of the realm in the king's absence. His power was diminished under the reign of successive kings, and, finally, completely distributed amongst various courts in the reign of Edward I. 3 Bla. Com. 38. The same as *Capitalis Justiciarius.*

CHIEF LORD. The immediate lord of the fee. Burton, R. P. 317.

CHIEF PLEDGE. The borsholder, or chief of the borough. Spelman, Gloss.

CHILD. The son or daughter, in relation to the father or mother.

Illegitimate children are bastards. *Legitimate children* are those born in lawful wedlock. *Natural children* are illegitimate children. *Posthumous children* are those born after the death of the father.

Children born in lawful wedlock, or within a competent time afterwards, are presumed to be the issue of the father, and follow his condition; but this presumption may be repelled by the proof of such facts tending to establish non-intercourse as may satisfy a jury to the contrary; Field, Inf. 40; 3 C. & P. 215, 427; 13 Ves. Ch. 58; 3 Paige, Ch. 139; 6 Binn. 286; 3 Dev. 548. See 3 Wall. 175. Those born out of lawful wedlock follow the condition of the mother. The father is bound to maintain his children, and to educate them, and to protect them from injuries; Schoul. Dom. Rel. *315. The stat. 43 Eliz. c. 2, provided that the father and mother, grandfather and grandmother of a poor, impotent, etc., child should support it. The payment was assessed by the justices at the quarter sessions and was enforced by a levy on the goods of the offender, who in default was committed to prison. It is said that this act is in force in the U. S.; Schoul. Dom. Rel. *320. See 66 Pa. 19. But not after majority; 1 Ld. Raym. 699. Children are not liable at common law for the support of infirm and indigent parents; 16 Johns. 281; but generally they are bound by statutory provisions to maintain their parents who are in want, when they have sufficient ability to do so; 2 Kent 208; Pothier, *Du Mariage*, n. 384, 389; 2 Root 168; 5 Cow. 284; 88 Mich. 91. The child may justify an assault in defence of his parent; 3 Bla. Com. 3. The father, in general, is entitled to the custody of minor children; but, under certain circumstances, the mother will be entitled to them when the father and mother have separated; 5 Binn. 520; but see 92 Cal 653. Where they are placed in the care of the husband, the court is not precluded from making an order giving the divorced wife access to them; [1891] Prob. 124. The courts of U. S. will, in their sound discretion, give the custody to the mother, or to a third party. Considerations as to the age and condition of the child weigh with the court. The well-being of the child, rather than the supposed right of either parent, controls the question of custody; 10 Cent. L. J. 389; s. c. 12 R. I. 462; 21 N. J. Eq. 384; 28 S. W. (Ky.) 664; Field, Inf. 60. The mother of an illegitimate child has a right to its custody; 10 Q. B. D. 454. See FATHER; MOTHER. Children are liable to the reasonable physical correction of their parents. See CORRECTION; ASSAULT; BATTERY.

The term children does not, ordinarily and properly speaking, comprehend grandchildren, or issue generally; yet sometimes that meaning is affixed to it in cases of necessity; 6 Co. 16; 14 Ves. 576; 17 How. 417; 36 Ala. 594; 104 Mass. 193. And it has been held to signify the same as issue, in cases where the testator, by using the terms children and issue indiscriminately, showed his intention to use the former term in the sense of issue, so as to entitle grandchildren, etc., to take under it; 1 Ves. Sen. Ch. 196; 3 V. & B. 69; 7 Paige, Ch. 328; 1 Bail. Eq. 7; 4 Watts 82; 3 Greenl. Cruise, Dig. 213. See 25 Ga. 549; 88 Pa. 478. When legally construed, the term children is confined to legitimate children; 7 Ves. Ch. 458; see 23 Hun 260; 14 N. J. Eq. 159; and when the term is used in a will, there must be evidence to be collected from the will itself, or extrinsically, to show affirmatively that the testator intended that his illegitimate children should take, or they will not be included; 1 V. & B. 422; 4 Kent 346, 414, 419; 6 H. L. 265; 84 N. Y. 516. See BASTARD. The civil code of Louisiana, art. 2522, n. 14, enacts that "under the name of children are comprehended not only children of the first degree, but the grandchildren, great-grandchildren, and all other descendants in the direct line."

Posthumous children inherit, in all cases, in like manner as if they had been born in the lifetime of the intestate and had survived him; 2 Greenl. Cruise, Dig. 135; 4 Kent 412. See 2 Washb. R. P. 412, 439, 699.

In Pennsylvania, and in some other states; act of 1836, p. 250; Rhode Island, Rev. Stat. tit. xxiv. c. 154, § 10; 3 Gray 367;

the will of their fathers or mothers in which no provision is made for them is revoked, as far as regards them, by operation of law; 3 Binn. 498; 5 Wash. St. 390. In Iowa a will is revoked by the birth of a child after its execution; 50 Fed. Rep. 310. See, as to the law of Virginia on this subject, 3 Munf. 20. See AGE; IN VENTRE SA MERE. As to their competency as witnesses, see WITNESS.

CHILDWIT (Sax.). A power to take a fine from a bondwoman gotten with child without the lord's consent.

By custom in Essex county, England, every reputed father of a bastard child was obliged to pay a small fine to the lord. This custom is known as childwit. Cowel.

CHILE. A republic of South America, formerly a Spanish dependency.

The executive is a president elected for five years and a council of 11 members. The senate of 32 members is elected by the provinces for six years, and the chamber of deputies of 94 members is elected by the departments for three years. There are courts of first instance in the departmental capitals, and courts of appeals and a high court in the capital. Chile became independent in 1810. The present constitution was adopted in 1833 and amended in 1874 and 1891.

CHILTERN HUNDREDS. A range of hills in England, formerly much infested by robbers.

To exterminate the robbers, a steward of the Chiltern Hundreds was appointed. The office long since became a sinecure, and is now used to enable a member of parliament to resign, which he can do only by the acceptance of some office within the gift of the chancellor. 2 Steph. Com. 408; Whart. Dict.

CHIMIN. See CHEMIN.

CHIMINAGE. A toll for passing on a way through a forest; called in the civil law *pedagium*. Cowel. See Co. Litt. 56 *a*; Spelman, Gloss.; *Termes de la Ley*.

CHIMINUS. The way by which the king and all his subjects and all under his protection have a right to pass, though the property of the soil of each side where the way lieth may belong to a private man. Cowel.

CHINA. An empire. The most important division of the Chinese Empire.

The ruler has power to appoint his successor, who must be of the ruler's family, but of a younger generation. The civil laws are administered by a cabinet of four numbers, under which are "seven boards of government." This constitutes the central autocratic power, subject to the direction of which the viceroy of each province rules. There is also a board of fifty members, independent of the government, who can present petitions, etc., to the sovereign.

CHINESE. Stringent laws for the entire exclusion of Chinese from the United States have been passed in California, Nevada, and Oregon; many of these have been decided to be unconstitutional. An ordinance providing that every male person imprisoned in the county jail should have his hair cut short is unconstitutional, as inflicting cruel and unusual punishment, and as contrary to the XIV. amendment of the U. S. constitution; 5 Sawy. 552. A statute forbidding the employment of Chinamen on public works, etc., is void, as contravening the Burlingame treaty and the XIV. amendment; 5 Sawy. 566; 1 Fed. Rep. 481. So is an act forbidding Chinamen to fish for the purpose of sale; 2 Fed. Rep. 743. But a state law forbidding the exhumation of dead bodies and their removal, without a permit, is not invalid when applied to the removal of bodies of Chinamen who have been buried in California; it is a merely sanitary regulation; 2 Fed. Rep. 624.

Under the XIV. amendment the laws excluding immigrants who are Chinese laborers are inapplicable to a person born in the United States, though his parents were not citizens and could not become such under the naturalization laws; 49 Fed. Rep. 146, 148.

The act of May 5, 1892, requiring the deportation of all Chinese laborers who fail to get a certificate of residence, is in no sense a sentence for crime or a banishment, and the provision of the constitution against cruel and unusual punishment has no application; 149 U. S. 698.

The failure of a Chinese laborer to register, as required by act of Congress, May 5, 1892, is held not to be excused by the fact that after the commencement of the time allowed for registration, but before its expiration, he was convicted and imprisoned for crime; 69 Fed. Rep. 972.

Under the act of May 5, 1892, Chinese persons were prohibited from coming to the United States except under certain conditions, for which see U. S. Rev. Stat. 2 Supp. 13, also full notes on pp. 14 to 19, which contain the various decisions of the federal courts in relation thereto. Act of Nov. 3, 1893 (exclusion act), applies to Chinese persons who, having left the country before its passage, afterwards sought to return; 66 Fed. Rep. 953; 14 C. C. A. 281. A Chinaman, who during half his time is engaged in cutting and sewing garments for sale by a firm of which he is a member, is not a merchant within the exclusion act; 66 Fed. Rep. 955.

CHINESE INTEREST. Interest for money charged in China. In a case where a note was given in China, payable eighteen months after date, without any stipulation respecting interest, the court allowed the Chinese interest of one per cent. per month from the expiration of the eighteen months. 2 W. & S. 227, 264.

CHIPPINGAVEL. A toll for buying and selling. A tax imposed on goods brought for sale. Whishaw; Blount.

CHIRGEMOTE (spelled, also, *Chirchgemote, Circgemote, Kirkmote*; Sax. *circge-*

mote, from *circ*, *ciric*, or *cyric*, a church, and *gemot*, a meeting or assembly).

In Saxon Law. An ecclesiastical court or assembly (*forum ecclesiasticum*); a synod; a meeting in a church or vestry. Blount; Spelman, Gloss.; LL. Hen. I. cc. 4, 8; Co. 4th Inst. 321; Cunningh. Law Dict.

CHIROGRAPH (Lat. *chirographa*). **In Conveyancing.** A deed or public instrument in writing.

Chirographs were anciently attested by the subscription and crosses of witnesses. Afterwards, to prevent frauds and concealments, deeds of mutual covenant were made in a *script* and *rescript*, or in a part and counter-part; and in the middle, between the two copies, they drew the capital letters of the alphabet, and then tallied, or cut asunder in an indented manner, the sheet or skin of parchment, one of which parts being delivered to each of the parties were proved authentic by matching with and answering to one another. Deeds thus made were denominated *syngrapha* by the canonists, because that word, instead of the letters of the alphabet or the word *chirographum*, was used. 2 Bla. Com. 296. This method of preventing counterfeiting, or of detecting counterfeits, is now used, by having some ornament or some word engraved or printed at one end of certificates of stocks, checks, and a variety of other instruments, which are bound up in a book, and, after they are executed, are cut asunder through such ornament or word.

The last part of a fine of land.

It is called, more commonly, the foot of the fine. It is an instrument of writing, beginning with these words: "This is the final agreement," etc. It concludes the whole matter, reciting the parties, day, year, and place, and before whom the fine was acknowledged and levied. Cruise, Dig. t. 35, c. 2, s. 52.

In Civil and Canon Law. An instrument written out and subscribed by the hands of the king or prince. An instrument written out by the parties and signed by them.

The Normans, destroying these *chirographa*, called the instruments substituted in their place *charta* (charters), and declared that these *charta* should be verified by the seal of the signer with the attestation of three or four witnesses. Du Cange; Cowel.

In Scotch Law. A written voucher for a debt. Bell, Dict. The possession of this instrument by the debtor raises a presumption of payment by him. Bell, Dict.; Erskine, Inst. 1. 2, t. 4, § 5.

CHIVALRY, TENURE BY. Tenure by knight-service. Co. Litt.

CHOCTAW NATION. By treaty with the United States, a portion of territory is set apart, over which the Choctaw Indians have exclusive jurisdiction.

They have a constitution, prefaced by a bill of rights.

By the constitution, every free male citizen twenty-one years old, and who has been a citizen of the Nation six months and who has lived in the county one month, is entitled to vote.

THE LEGISLATIVE POWER.—*The Senate* is composed of not less than one-third nor more than one-half the number of representatives, elected by the people for the term of four years. They are so classified that one-half the number go out of office every two years. A senator must be thirty years old, and have been a resident of the district for which he is chosen at least one year and of the nation two years preceding his election.

The House of Representatives is composed of not less than seventeen nor more than thirty-five members, apportioned among the counties, and elected by the people for the term of two years.

THE EXECUTIVE POWER.—*The Governor* is elected by the people for the term of two years. He must be thirty years old, and a free and acknowledged citizen of the Choctaw Nation, and must have lived in the Nation five years. He is eligible for four years only out of any term of six years.

THE JUDICIAL POWER.—*The Supreme Court* consists of three circuit court judges. It holds two sessions each year, at the capital. It sits as a court of errors and appeals only.

The Circuit Court is composed of three judges, elected by the people, one from each of the districts into which the Nation is divided for the purposes of this court. It has original jurisdiction in all criminal cases, and in all civil cases where the amount involved exceeds fifty dollars, except those cases of minor offences where a justice of the peace has exclusive jurisdiction. Two terms a year, at least, must be held in each county.

The Probate Court is held by a judge elected in each county by the people for the term of two years. It has the regulation of the settlement of estates of decedents, the appointment and control of guardians of minors, lunatics, etc., and the probate of wills.

Justices of the Peace are chosen by the electors of each county for the term of two years. They have a civil jurisdiction in all cases where the amount involved is less than fifty dollars. They constitute a board of police for the county, and have charge of the highways, bridges, etc.

CHOPS. The mouth of a harbor. Stats. of Mass. 1882, p. 1288.

CHOSE (Fr. *thing*). Personal property.

Choses in possession. Personal things of which one has possession.

Choses in action. Personal things of which the owner has not the possession, but merely a right of action for their possession. 2 Bla. Com. 389, 397; 1 Chit. Pr. 99.

CHOSE IN ACTION. A right to receive or recover a debt, or money, or damages for breach of contract, or for a tort connected with contract, but which cannot be enforced without action. Comyns, Dig. *Biens*.

It is one of the qualities of a chose in action that at common law it is not assignable; 10 Co. 47, 48; 2 Johns. 1; 20 *id.* 380; 12 Wend. 297; 1 Cra. 367. In Bracton's day it went to the heir, and he, not the executor, sued for the debts due to a dead man. This naturally led to difficulties, and the courts gradually yielded to the pressure of necessity and without a statute, so momentous a change was made as that early in the time of Edward I. the chancery had framed and the king's court had upheld writs of debt for and against executors; 2 Poll. & Maitl. 344. It was Coke's idea that the origin of the rule against assignment of choses in action was the "wisdom and policy of the founders of our law," in discouraging maintenance and litigation, but Pollock thinks that there is no doubt that it was the logical consequence of the primitive view of a contract as creating a strictly personal obligation between creditor and debtor. See Wald, Poll. Torts 207, and a long note G. in App. supporting this view. In equity, from an early period, the courts have viewed the assignment of a chose in action for a valuable consideration as a contract by the assignor to permit the

assignee to use his name for the purpose of recovery, and, consequently, enforce its specific performance, unless contrary to public policy; 1 P. Wms. Ch. 381; 1 Ves. Sen. Ch. 412; 2 Stor. 660; 2 Ired. Eq. 54; 1 Wheat. 236; 15 Mo. 662. And now, at common law, the assignee is entitled to sue and recover in the name of the assignor, and the debtor will not be allowed, by way of defence to such suit, to avail himself of any payment to or release from the assignor, if made or obtained after notice of the assignment; 4 Term 340; 1 Hill 483; 4 Ala. N. S. 184; 14 Conn. 123; 29 Me. 9; 13 N. H. 230; 10 Cush. 93; 20 Vt. 25; 44 Ark. 564. If, after notice of the assignment, the debtor expressly promise the assignee to pay him the debt, the assignee will then, in the United States, be entitled to sue in his own name; 10 Mass. 316; 5 Pet. 597; 2 R. I. 146; 7 H. & J. 213; 2 Barb. 349, 420; 27 N. H. 269; but without such express promise the assignee, except under peculiar circumstances, must proceed, even in equity in the name of the assignor; 2 Barb. Ch. 596; 1 Johns. Ch. 463; 7 G. & J. 114; 2 Wheat. 373; or by agreement he can sue in his own name and pay over the proceeds of the sale to the assignor, in which he becomes a trustee; 44 Mo. App. 338. By statute in England, 36 & 37 Vict. c. 66, s. 25 (6), any absolute assignment by writing under the hand of the assignor of a chose in action, with written notice to the debtor, passes the legal right thereto and all remedies thereon. A partial assignment of choses in action is good in equity, although the legal title remains with the assignor; 69 Tex. 625.

But courts of equity will not, any more than courts of law, give effect to such assignments when they contravene any rule of law or of public policy. Thus, they will not give effect to the assignment of the half pay or full pay of an officer in the army; 2 Anstr. 533; 1 Ball & B. 389; or of a right of entry or action for land held adversely; 2 Ired. Eq. 54; or of a part of a right in controversy, in consideration of money or services to enforce it; 16 Ala. 488; 4 Dana 173; 2 Dev. & B. Eq. 24. Neither do the courts, either of law or of equity, give effect to the assignment of mere personal actions which die with the person; 4 S. & R. 19; 13 N. Y. 322; 6 Cal. 456; 47 Minn. 577; 4 Wash. St. 783; 58 Mass. 403. See 87 Ga. 386. A cause of action for deceit is assignable; 44 Mo. App. 338; but not for slander; 20 S. C. 123. But a claim of damages to property, though arising *ex delicto*, which on the death of the party would survive to his executors or administrators as assets, may be assigned; Bisp. Eq. 166; 3 E. D. Sm. 246; 12 N. Y. 622; 46 Wis. 118. The transfer of a bill of lading will pass the claim for the conversion of the goods represented by it; 44 Mo. App. 498; 81 Ga. 792; See 94 Mich. 381. The right of vendor to bring a second suit in trespass to try title is assignable and passes to the vendee; 1 Tex. Civ. App. 498.

The assignee of a chose in action, unless it be a negotiable promissory note or bill of exchange, without notice, in general takes it subject to all the equities which subsist against the assignor; 1 P. Wms. 496; 4 Price 161; 1 Johns. 522; 7 Pet. 608; 2 Stockt. 146; 10 Conn. 444; 22 N. Y. 535; 68 N. C. 255; 29 Ia. 339; 103 Pa. 415; 63 Ill. 482. But it is not subject to the equities of third persons of which he had no notice; 44 Ill. App. 516. And a payment made by the debtor, even after the assignment of the debt, if before notice thereof, will be effectual; 3 Day 364; 10 Conn. 444; 3 Binn. 394; 4 Metc. 594.

In Pennsylvania by statute a bond is assignable and suit can be brought on it by the assignee if there are two witnesses to the assignment and in Delaware under a similar statute but one witness is now required.

To constitute an assignment, no writing or particular form of words is necessary, if the consideration be proved and the meaning of the parties apparent; 15 Mass. 485; 16 Johns. 51; 13 Sim. Ch. 469; 1 M. & C. 690; 56 Barb. 362; 1 Ves. 331; 37 N. J. Eq. 123; 49 Me. 167; 34 Pa. 299; and therefore the mere delivery of the written evidence of debt; 2 Jones, N. C. 224; 28 Mo. 56; 24 Miss. 260; 13 Mass. 304; 132 Pa. 277; 5 Me. 349; 17 Johns. 284; the delivery being essential to the assignment; 84 Va. 731; 37 N. J. Eq. 123; 33 Vt. 431; or the giving of a power of attorney to collect a debt, may operate as an equitable transfer thereof, if such be the intention of the parties; 7 Ves. Ch. 28; 1 Caines, Cas. 18; 19 Wend. 73. See ASSIGNMENT.

Bills of exchange and promissory notes, in exception to the general rule, are by the law merchant transferable, and the legal as well as equitable right passes to the transferee. See BILL OF EXCHANGE. In some states, by statutory provisions, bonds, mortgages, and other documents may be assigned, and the assignee receives the whole title, both legal and equitable; 2 Bouvier, Inst. 192. In New York, the code enables an assignee to maintain an action in his own name in those cases in which the right was assignable in law or in equity before the code was adopted; 4 Duer 74.

CHRISTIAN. One who believes in or assents to the truth of the doctrines of Christianity, as taught by Jesus Christ in the New Testament. It does not include Mohammedans, Jews, Pagans, or infidels; 53 N. H. 9.

CHRISTIANITY. The religion established by Jesus Christ.

Christianity has been judicially declared to be a part of the common law of Pennsylvania; 11 S. & R. 394; 5 Binn. 555; of New York, 8 Johns. 291; of Connecticut, 2 Swift, System 321; of Delaware, 2 Harr. Del. 553; of Massachusetts, 7 Dane, Abr. c. 219, a. 2, 19. See 20 Pick. 206. To write or speak contemptuously and maliciously against it is an indictable offence; Odg. Lib. & Sl. 450; Cooper, Libel 59, 114. See 5 Jur. 529; 8 Johns. 290; 20 Pick. 206; 2 Lew. 237.

Archbishop Whately, in his preface to the Elements of Rhetoric, says, "It has been declared, by the highest legal authorities, that 'Christianity is part of the law of the land,' and, consequently, any one who impugns it is liable to prosecution. What is the precise meaning of the above legal maxim I do not profess to determine, having never met with any one who could explain it to me; but evidently the mere circumstance that we have religion by law established does not of itself imply the illegality of arguing against that religion." It seems difficult, says an accomplished writer (Townsend, St. Tr. vol. ii. p. 389), to render more intelligible a maxim which has perplexed so learned a critic. Christianity was pronounced to be part of the common law, in contradistinction to the ecclesiastical law, for the purpose of proving that the temporal courts, as well as the courts spiritual, had jurisdiction over offences against it. Blasphemies against God and religion are properly cognizable by the law of the land, as they disturb the foundations on which the peace and good order of society rest, root up the principle of positive laws and penal restraints, and remove the chief sanction for truth, without which no question of property could be decided and no criminal brought to justice. Christianity is part of the common law, as its root and branch, its majesty and pillar—as much a component part of that law as the government and maintenance of social order. The inference of the learned archbishop seems scarcely accurate, that all who impugn this part of the law must be prosecuted. It does not follow, because Christianity is part of the law of England, that every one who impugns it is liable to prosecution. The manner of and motives for the assault are the true tests and criteria. Scoffing, flippant, railing comments, not serious arguments, are considered offences at common law, and justly punished, because they shock the pious no less than deprave the ignorant and young. The meaning of Chief Justice Hale cannot be expressed more plainly than in his own words. An information was exhibited against one Taylor, for uttering blasphemous expressions too horrible to repeat. Hale, C. J., observed that "such kind of wicked, blasphemous words were not only an offence to God and religion, but a crime against the laws, state, and government, and therefore punishable in the court of King's Bench. For, to say religion is a cheat, is to subvert all those obligations whereby civil society is preserved; that Christianity is part of the laws of England, and to *reproach* the Christian religion is to speak in subversion of the law." Ventr. 293. To remove all possibility of further doubt, the English commissioners on criminal law, in their sixth report, p. 83 (1841), have thus clearly explained their sense of the celebrated passage: "The meaning of the expression used by Lord Hale, that 'Christianity was parcel of the laws of England,' though often cited in subsequent cases, has, we think, been much misunderstood. It appears to us that the expression can only mean either that, as a great part of the securities of our legal system consist of judicial and official oaths sworn upon the Gospels, Christianity is closely interwoven with our municipal law, or that the laws of England, like all municipal laws of a Christian country, must, upon principles of general jurisprudence, be subservient to the positive rules of Christianity. In this sense, Christianity may justly be said to be incorporated with the law of England, so as to form parcel of it; and it was probably in this sense that Lord Hale intended the expression should be understood. At all events, in whatever sense the expression is to be understood, it does not appear to us to supply any reason in favor of the rule that arguments may not be used against it; for it is not criminal to speak or write either against the common law of England, generally, or against particular portions of it, provided it be not done in such a manner as to endanger the public peace by exciting forcible resistance; so that the statement that Christianity is parcel of the law of England, which has been so often urged in justification of laws against blasphemy, however true it may be as a general proposition, certainly furnishes no additional argument for the propriety of such laws." If blasphemy mean a railing accusation, then it is, and ought to be, forbidden; Heard, Lib. & Sl. § 328. See 2 How. 127, 197; 11 S. & R. 394; 8 Johns. 290; 10 Ark. 259; 2 Harr. Del. 553, 569; 21 Am. L. Reg. 201, 333, 587; 24 *id.* 217. See Cooley, Const. Lim.

CHRISTIAN NAME. The baptismal name distinct from the surname. It has been said from the bench that a Christian name may consist of a single letter. Wharton. See NAME.

CHURCH. A society of persons who profess the Christian religion. 7 Halst. 206, 214; 10 Pick. 193; 3 Pa. 282; 31 *id.* 9.

The place where such persons regularly assemble for worship. 3 Tex. 288.

The term church includes the chancel, aisles, and body of the church. Hamm. N. P. 204; 3 Tex. 288. By the English law, the terms church or chapel, and church-yard, are expressly recognized as in themselves correct and technical descriptions of the building and place, even in criminal proceedings; 8 B. & C. 25; 1 Salk. 256; 11 Co. 25 *b*; 2 Esp. 5, 28.

Burglary may be committed in a church, at common law; 3 Cox, Cr. Cas. 581. The church of England is not deemed a corporation aggregate; but the church in any particular place is so considered, for the purposes at least of receiving a gift of lands; 9 Cra. 292; 2 Conn. 287; 3 Vt. 400; 2 Rich. Eq. 192. See 9 Mass. 44; 11 Pick. 495; 1 Me. 288; 4 Ia. 252; 3 Tex. 288; 2 Md. Ch. Dec. 143.

As to the right of succession to glebe lands, see 9 Cra. 43, 292; 9 Wheat. 468; or other church property, see 18 N. Y. 395. As to the power of a church to make by-laws, etc., under local statutes, see 5 S. & R. 510; 3 Pa. 282; 4 Des. 578; 30 Vt. 595; 5 Cush. 412. Acquiescence in and use of a constitution for over 50 years makes it valid and binding on the society; 156 Pa. 119; 98 Mich. 279.

Controversies in the civil courts concerning property rights of religious societies are generally to be decided by a reference to one or more of three propositions:—

(1st.) Was the property or fund, which is in question, devoted, by the express terms of the gift, grant, or sale, by which it was acquired, to the support of any specific religious doctrine or belief, or was it acquired for the general use of the society for religious purposes, with no other limitation?

(2d.) Is the society which owned it of strictly congregational or independent form of church government, owing no submission to any organization outside the congregation?

(3d.) Or is it one of a number of such societies, united to form a more general body of churches, with ecclesiastical control in the general association over the members and societies of which it is composed?

In the first class of cases, the court will, when necessary to protect the trust to which the property has been devoted, inquire into the religious faith or practice of the parties claiming its use or control, and will see that it shall not be diverted from that trust.

If the property was acquired in the ordinary way of purchase, or gift, for the use of a religious society, the court will inquire who constitute that society, or its legitimate successors, and award to them the use of the property.

In case of the independent order of the congregation, this is to be determined by the majority of the society, or by such organization of the society as, by its own rules, constitute its government.

In the class of cases in which property has been acquired in the same way by a society which constitutes a subordinate part of a general religious organization with established tribunals for ecclesiastical government, these tribunals must decide all questions of faith, discipline, rule, custom, or ecclesiastical government.

In such cases where the right of property in the civil court is dependent on the question of doctrine, discipline, ecclesiastical law, rule, or custom, or church government, and that has been decided by the highest tribunal within the organization to which it has been carried, the civil court will accept that decision as conclusive, and be governed by it in its application to the case before it; Watson *v.* Jones, 13 Wall. 680; s. c. 11 Am. L. Reg. 430; with a full note by Judge Redfield. See 6 Ohio Cir. Ct. R. 80; 146 Ill. 399.

See a learned and full article on the law of church corporations; 12 Am. L. Reg. N. S. 201, 329, 537. See also 15 *id.* 264; 92 Ill. 463; 88 Pa. 60, 503; 89 *id.* 97; 103 U. S. 330; 81 Wis. 374; 13 Lawy. Rep. Ann. 198; Kynett, Rel. Corp.

Where it is apparent from the charter of a church that it is in full connection with a synodical body, and not independent of it as a congregation, those who secede, whether a majority or not, lose all right and privilege to the corporate property, and those who remain hold them; 10 Paige 627. Where property is devoted under a trust to a particular religious faith or form of church government, those who adhere, however small in numbers, are entitled to its use, as against those who abandon the doctrines of church government; 1 Speer, Eq. 87; 41 Pa. 9; 4 N. J. 653; 1 Kern. 243; 6 Ohio 363; 98 Mass. 65; 7 Paige 281; 3 Meriv. 264; 91 Tenn. 303.

CHURCH RATE. A tribute by which the expenses of the church are to be defrayed. They are to be laid by the parishioners, in England, and may be recovered before two justices, or in the ecclesiastical court. Wharton, Dict.

CHURCH-WARDEN. An officer whose duty it is to take care of or guard the church.

They are taken to be a kind of corporation in favor of the church for some purposes: they may have, in that name, property in goods and chattels, and bring actions for them for the use and benefit of the church, but may not waste the church property, and are liable to be called to account; 3 Steph. Com. 90; 1 Bla. Com. 394; Cowel.

These officers are created in some ecclesiastical corporations by the charter, and their rights and duties are definitely explained. In England, it is said, their principal duties are to take care of the church or building, the utensils and furniture, the church-yard, certain matters of good order concerning the church and church-yard, the endowments of the church; Bacon, Abr. By the common law, the capacity of church-wardens to hold property for the church is limited to personal property; 9 Cra. 43.

CHURL. See CEORL.

CINQUE PORTS. The five ports of England which lie towards France.

These ports, on account of their importance as defences to the kingdom, early had certain privileges granted them, and in recompense were bound to furnish a certain number of ships and men to serve on the king's summons once in each year. "The service that the barons of the Cinque Ports acknowledge to owe; upon the king's summons, if it shall happen, to attend with their ships fifteen days at their own cost and charges, and so long as the king pleases, at his own charge;" Cowel, *Quinque Portus.* The Cinque Ports, under the ordinance of Henry III. in 1229, were Hastings, Dover, Sandwich, Hythe and Romney, and Winchelsea and Rye; 1 Social England 412. The two latter are sometimes reckoned ports of Sandwich; and the other of the Cinque Ports have ports appended to them in like manner. The Cinque Ports had a Lord Warden, who had a peculiar jurisdiction, sending out writs in his own name. This office is still maintained, and in August, 1895, the Marquis of Salisbury, then Prime Minister, was inducted into the office with much ceremony.

The first admiralty jurisdiction in somewhat modern form appears to have been committed to the Lord Warden and Bailiffs of the Cinque Ports. The constitution of these ports into a confederacy for the supply and maintenance of the navy was due to Edward the Confessor. Edward I. confirmed their charter. The last charter was in 1668. Their courts had civil, criminal, equity, and admiralty jurisdiction and were not subject to the courts at Westminster. See the charters in Jeakes' Charters of the Cinque Ports. See Inderwick's The King's Peace.

The jurisdiction was abolished by 18 & 19 Vict. c. 48; 20 & 21 Vict. c. 1. The representatives in parliament and the inhabitants of the Cinque Ports were each termed barons; Brande; Cowel; *Termes de la Ley*

CIPHER. See TELEGRAPH.

CIRCAR. In Hindu Law. Head of affairs; the state or government; a grand division of a province; a headman. A name used by Europeans in Bengal to denote the Hindu writer and accountant employed by themselves or in the public offices. Wharton; Black, L. Dict.

CIRCUIT. A division of the country, appointed for a particular judge to visit for the trial of causes or for the administration of justice. See 3 Bla. Com. 58.

Courts are held in each of these circuits, at stated periods, by judges assigned for that purpose; 3 Steph. Com. 321. The United States are divided into nine circuits; 1 Kent 301.

The term is often applied, perhaps, to the periodical journeys of the judges through their various circuits. The judges, or, in England, commissioners of assize *nisi prius*, are said *to make their circuit*; 3 Bla. Com. 57. The custom is of ancient origin. In A. D. 1170, justices in *eyre* were appointed, with delegated powers from the *aula regis*, being held members of that court, and directed to make the circuit of the kingdom once in seven years. See Inderwick, The King's Peace 60.

The custom is still retained in some of the states, as well as in England, as, for example, in Massachusetts, where the judges sit in succession in the various counties of the state, and the full bench of the supreme court, by the arrangement of law terms, makes a complete circuit of the state once in each year. See, generally, 3 Steph. Com. 221 *et seq.*; 1 Kent 301.

CIRCUIT COURTS. In American Law. Courts whose jurisdiction extends over several counties or districts, and of which terms are held in the various counties or districts to which their jurisdiction extends.

The term is applied distinctively to a class of the

federal courts of the United States, of which terms are held in two or more places successively in the various circuits into which the whole country is divided for this purpose; see 1 Kent 301; COURTS OF THE UNITED STATES; and, in some of the states, to courts of general jurisdiction of which terms are held in the various counties or districts of the state. Such courts sit in some instances as courts of nisi prius, in others, either at nisi prius or in banc. They may have an equity as well as a common-law jurisdiction, and may be both civil and criminal courts. The systems of the various states are widely different in these respects; and reference must be had to the articles on the different states for an explanation of the system adopted in each. The term is unknown in the classification of English courts, and conveys a different idea in the various states in which it is adopted as the designation of a court or class of courts, although the constitution of such courts, in many instances, is quite analogous to that of the English courts of assize and nisi prius.

CIRCUIT COURT OF APPEALS. See COURTS OF THE UNITED STATES.

CIRCUITY OF ACTION. Indirectly obtaining, by means of a subsequent action, a result which may be reached in an action already pending.

This is particularly obnoxious to the law, as tending to multiply suits; 4 Cow. 682.

CIRCUMDUCTION. **In Scotch Law.** A closing of the period for lodging papers, or doing any other act required in a cause. Paterson, Comp.

CIRCUMSTANCES. The particulars which accompany an act. The surroundings at the commission of an act.

The facts proved are either possible or impossible, ordinary and probable or extraordinary and improbable, recent or ancient; they may have happened near us, or afar off; they are public or private, permanent or transitory, clear and simple or complicated; they are always accompanied by circumstances which more or less influence the mind in forming a judgment. And in some instances these circumstances assume the character of irresistible evidence: where, for example, a woman was found dead in a room, with every mark of having met with a violent death, the presence of another person at the scene of action was made manifest by the bloody mark of a *left* hand visible on her *left* arm; 14 How. St. Tr. 1324; Greenl. Ev. 13 *a*. These points ought to be carefully examined, in order to form a correct opinion. The first question ought to be, is the fact possible? If so, are there any circumstances which render it impossible? If the facts are impossible, the witness ought not to be credited. If, for example, a man should swear that he saw the deceased shoot himself with his own pistol, and, upon an examination of the ball which killed him, it should be found too large to enter into the pistol, the witness ought not to be credited; 1 Stark. Ev. 505; or if one should swear that another had been guilty of an impossible crime.

CIRCUMSTANTIAL EVIDENCE. See EVIDENCE.

CIRCUMSTANTIBUS. See TALES.

CIRCUMVENTION. **In Scotch Law.** Any act of fraud whereby a person is reduced to a deed by decreet. Tech. Dict. It has the same sense in the civil law. Dig. 50. 17. 49. 155; *id.* 12. 6. 6. 2; *id.* 41. 2. 34.

CITACION. **In Spanish Law.** The order of a legal tribunal directing an individual against whom a suit has been instituted to appear and defend it within a given time. It is synonymous with the term *emplazamiento* in the old Spanish law, and the *in jus vocatio* of the Roman law.

CITATIO AD REASSUMENDAM CAUSAM. **In Civil Law.** The name of a citation, which issued when a party died pending a suit, against the heir of the defendant, or, when the plaintiff died, for the heir of the plaintiff. Our bill of revivor is probably borrowed from this proceeding.

CITATION (Lat. *citare*, to call, to summon). **In Practice.** A writ issued out of a court of competent jurisdiction, commanding a person therein named to appear on a day named and do something therein mentioned, or show cause why he should not. Proctor, Pract.

The act by which a person is so summoned or cited.

In the ecclesiastical law, the citation is the beginning and foundation of the whole cause, and is said to have six requisites, namely: the insertion of the name of the judge, of the promovert, of the impugnant, of the cause of suit, of the place, and of the time of appearance; to which may be added the affixing the seal of the court, and the name of the register or his deputy. 1 Brown, Civ. Law 453, 454; Ayliffe, Parerg. xliii. 175; Hall, Adm. Pr. 5; Merlin, *Rép.*

The process issued in courts of probate and admiralty courts. It is usually the original process in any proceeding where used, and is in that respect analogous to the writ of capias or summons at law, and the subpœna in chancery.

In Scotch Practice. The calling of a party to an action done by an officer of the court under a proper warrant.

The service of a writ or bill of summons. Paterson, Comp.

CITATION OF AUTHORITIES. The production of or reference to the text of acts of legislatures, treatises, or cases of similar nature decided by the courts, in order to support propositions advanced.

As the knowledge of the law is to a great degree a knowledge of precedents, it follows that there must be necessarily a frequent reference to these preceding decisions to obtain support for propositions advanced as being statements of what the law is. Constant reference to the law as it is enacted is, of course, necessary. References to the works of legal writers are also desirable for elucidation and explanation of doubtful points of law.

In the United States, the laws of the general government are generally cited by their date: as, Act of Sept. 24, 1789, § 35; or, Act of 1819, c. 170; or by reference to the statutes, as 24 Stat. L. 505; or by the section of the Revised Statutes of 1878, or its supplements. The same practice prevails in Pennsylvania, and in most of the other states, when the date of the statute is important. Otherwise, in most of the states, reference is made to the revised code of laws or the official publication of the laws: as, Va. Rev. Code, c. 26; N. Y. Rev. Stat. 8th ed. 400. Books of reports and textbooks are generally cited by the number of the volume and page: as, 2 Washburn, R. P. 350; 4 Pa. 60. Sometimes, however, the paragraphs are numbered, and refer-

ence is made to the paragraphs: as, Story, Bailm. § 494; Gould, Pl. c. 5, § 30.

The civilians on the continent of Europe, in referring to the Institutes, Code, and Pandects or Digest, usually give the number, not of the book, but of the law, and the first word of the title to which it belongs; and, as there are more than a thousand of these, it is no easy task for one not thoroughly acquainted with those collections to find the place to which reference is made. The American writers generally follow the natural mode of reference, by putting down the name of the collection, and then the number of the book, title, law, and section. For example, Inst. 4. 15. 2. signifies Institutes, book 4, title 15, and section 2; Dig. 41. 9. 1. 3. means Digest, book 41, title 9, law 1, section 3; Dig. *pro dote*, or *ff pro dote*, signifies section 3, law 1, of the book and title of the Digest or Pandects entitled *pro dote*. It is proper to remark that Dig. and *ff* are equivalent: the former signifies Digest, and the latter —which is a careless mode of writing the Greek letter π, the first letter of the word πανδεκται—signifies Pandects; and the Digest and Pandects are different names for one and the same thing. The Code is cited in the same way. The Novels are cited by their number, with that of the chapter and paragraph: for example, Nov. 185. 2. 4. for *Novella Justiniani* 185, *capite* 2, *paragrapho* 4. Novels are also quoted by the Collation, the title, chapter, and paragraph, as follows: *In Authentico, Collatione* 1, *titulo* 1, *cap.* 281. The Authentics are quoted by their first words, after which is set down the title of the Code under which they are placed: for example, *Authentica, cum testator. Codice ad legem fascidiam.* See Mackeldey, Civ. Law § 65; Domat, Civ. Law, Cush. ed. Index.

The system of citations in the present and the last editions of this work differs somewhat from that adopted in the earlier editions, in order that such citation might occupy as little space as possible. The briefest possible citation, that will avoid ambiguity, has been adopted in this work; the table of abbreviations (see ABBREVIATIONS) gives the full name of the book or volume of reports referred to.

Statutes of the various states will be cited by giving the number of the volume (where there are more volumes than one), the name of the state (using the common geographical abbreviation), the designation of the code, and the page where the statute or provision in consideration is found: thus, 1 N. Y. Rev. Stat. 4th ed. 63. To this it is desirable to add, when regard for space allows, the chapter and section of the statute referred to. In some cases the system of citing state statutes adopted in Stimson's Am. Stat. Law is resorted to, and the statutes of a state are referred to by the name of the state, the year, the page or chapter and section by number, omitting the letters c., p., and s. or §: thus, R. I. 1893, 65. 12., meaning Rhode Island Laws, 1893, chap. 65, § 12.

United States statutes, and statutes of the states not included in the codified collection of the state, are cited as statutes of the year in which they were enacted, or by the proper section of the Revised Statutes.

English statutes are referred to by indicating the year of the reign in which they were enacted, the chapter and section: thus, 17 & 18 Vict. c. 96, § 2.

Text-books are referred to by giving the number of the volume (where there are more volumes than one), and the name of the author, with an abbreviation of the title of the work sufficiently extended to distinguish it from other works by the same author, and to indicate the class of subjects of which it treats: thus, 2 Story, Const.

Where an edition is referred to which has been prepared by other persons than the authors, or where an edition subsequent to the first is referred to, this fact is sometimes indicated, and the page, section, or paragraph of the edition cited is given: thus, Angell & A. Corp., Lothrop ed. 96; Smith, Lead. Cas., 5th Hare & W. ed. 173. The various editions of Blackstone's Commentaries, however, have the editor's name preceding the title of the book: thus Sharswood, Bla. Com.; Coleridge, Bla. Com.; wherever the reference is to a note by the editor cited; otherwise the reference is merely to Blackstone.

Reports of the Federal courts of the United States, and of the English, Irish, and Scotch courts, are cited by the names of the reporters: thus, 3 Cra. 96; 5 East 241; or, in later reports, the official method of citation is used. In a few instances, common usage has given a distinctive name to a series; and wherever this is the case such name has been adopted; as, Term; C. B.; Exch.

The reports of the state courts are cited by the name of the state, wherever a series of such reports has been recognized as existing: thus, 5 Ill. 63; 21 Pa. 96; and the same rule applies to citations of the reports of provincial courts: thus, 6 Low. C. 167. The later volumes of reports of the supreme court of the United States are cited by their serial number: thus, 161 U. S.

Otherwise, the reporter's name is used; thus, 5 Rawle 23, or an abbreviation of it; as 11 Pick. 23. This rule extends also to the provincial reports; and the principle is applied to the decisions of Scotch and Irish cases, except in later cases, when the official method is adopted.

Where the same reporter reports decisions in courts both of law and equity, an additional abbreviation, usually to equity reports and sometimes to law reports, indicates which series is meant: thus, 3 Ired. Eq. 87; 14 N. J. L. 42.

For a list of abbreviations as used in this book, and as commonly used in legal books, see ABBREVIATIONS.

CITE. To summon; to command the presence of a person; to notify a person of legal proceedings against him and require his appearance thereto. Black, L. Dict.

CITIZEN. **In English Law.** An inhabitant of a city. 1 Rolle, Abr. 138. The representative of a city, in parliament. 1 Bla. Com. 174.

In American Law. One who, under the constitution and laws of the United States, has a right to vote for representatives in congress, and other public officers, and who is qualified to fill offices in the gift of the people.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside; XIV. Amendment, U. S. Const.

One of the sovereign people. A constituent member of the sovereignty, synonymous with the people. 19 How. 404.

A member of the civil state entitled to all its privileges. Cooley, Const. Lim. 77. See 92 U. S. 542; 21 Wall. 162; Web. Cit. 48.

Citizens are either native-born or naturalized. Native citizens may fill any office; naturalized citizens may be elected or appointed to any office under the constitution of the United States, except the offices of president and vice-president.

Neither Chinese nor Japanese can become citizens; 5 Sawy. 155; 21 Fed. Rep. 905; 62 *id.* 126; 71 *id.* 274; U. S. Stat. L. 22; unless born within this country, of resident

parents not engaged in the diplomatic service; 10 Sawy. 353. The constitution of the United States (art. 4, s. 2) provides that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." These are privileges which in their nature are *fundamental;* which belong of right to the citizens of all free states, and which have, at all times, been enjoyed by the citizens of the several states; 4 Wash. C. C. 380. The supreme court will not define these, but will decide each case as it arises; 12 Wall. 418; 94 U. S. 39; 18 How. 591; see 37 N. J. 106; 55 Ill. 185; 16 Wall. 36, 130; 8 *id.* 168; 18 *id.* 129; 92 U. S. 542. The term citizen in the constitution applies only to natural persons; 8 Wall. 168; 1 Wood 85; 48 Ill. 172; 13 Pet. 519.

Where a foreigner takes the oath declaring his intention of becoming a citizen of the United States, his minor sons thereby acquire an inchoate status as citizens, and if they attain majority before their father completes his naturalization, they are capable of becoming citizens by other means than the direct application provided for by the naturalization laws; 143 U. S. 135; but the illegitimate minor children of a naturalized citizen do not become citizens at the time he is naturalized; Lynch, Nat. and Cit. 16.

Free persons of color, born in the United States, were always entitled to be regarded as citizens; 1 Abb. U. S. 28; but see 19 How. 393. Negroes born within the United States are citizens; 2 Bond 389; Chase's Dec. 157 (but not before the 14th Amendment; 19 How. 393; 10 Bush 681); but the child of a member of one of the Indian tribes within the United States is not a citizen, though born in the United States; 2 Sawy. 118; 1 Dill. 444; and although the parents have given up their tribal relations they cannot become citizens until they are first naturalized; 112 U. S. 103. The fact that an unnaturalized person of foreign birth is enabled by a state statute to vote and hold office does not make him a citizen; 4 Dill. 425.

The *age* of the person does not affect his citizenship, though it may his political rights; 1 Abb. L. Dict. 224; nor the *sex; ibid.;* 21 Wall. 162; 92 U. S. 214; 1 McArthur 169; the right to vote and the right to hold office are not necessary constituents of citizenship; 21 Wall. 162; 43 Cal. 43.

All natives are not citizens of the United States: the descendants of the aborigines are not entitled to the rights of citizens; see *supra;* also 112 U. S. 103. Anterior to the adoption of the constitution of the United States, each state had the right to make citizens of such persons as it pleased.

A citizen of the United States residing in any of the states of the Union is a citizen of that state; 6 Pet. 761; Paine 594; 6 Rob. 33; 12 Blatch. 320; 1 Brock. 391; 1 Paige, Ch. 183.

The child of American parents born in a foreign country, on board an American ship of which his father was the captain, is a citizen of the United States; 5 Blatch. 18; and so is a child born abroad whose father was at the time a citizen of the United States residing abroad; 13 Op. Att.-Gen. 91; 45 Ia. 99. See 58 Me. 353; and so if both parents are citizens and reside abroad but have not renounced their citizenship; 50 Fed. Rep. 310.

A person may be a citizen for commercial purposes and not for political purposes; 7 Md. 209.

All persons who deserted the naval or military service of the United States, and did not return there to within sixty days after the issuance of the proclamation of the president, dated March 11, 1865, are deemed to have voluntarily relinquished and forfeited their rights of citizenship, and shall forever be incapable of holding any office of trust or profit under the United States, or of exercising any rights of citizenship thereof; U. S. Rev. Stat. § 1996.

As to citizenship as acquired by naturalization, see ALLEGIANCE; NATURALIZATION; ALIEN.

Citizenship, not residence, confers the right to sue in the Federal courts; 63 Fed. Rep. 873. See Reno. Non-Residents, c. vii. Corporations are citizens of the state by which they are created, irrespective of the citizenship of their members; 8 Wall. 168; 106 U. S. 118. If two corporations created by different states, are consolidated each still retains its own citizenship for purposes of suit; 136 U. S. 356; 66 Fed. Rep. 655. See Reno. Non-Residents, § 104.

There is an indisputable legal presumption that a state corporation, when sued or suing in a circuit court of the United States, is composed of citizens of the state which created it. A railroad company organized under the laws of one state and authorized by its own state, may accept authority from another state to extend its railroad into such state and to control railroads therein. Such corporations may be treated by each of the states as domestic corporations. The presumption that a corporation is composed of citizens of the state which created it accompanies it when it does business in another state, and it may sue or be sued in the Federal courts in such other state as a citizen of the state of its original creation; 161 U. S. 545.

CITY. In England. An incorporated town or borough which is or has been the see of a bishop. Co. Litt. 108; 1 Bla. Com. 114; Cowel.

A large town incorporated with certain privileges. The inhabitants of a city. The citizens. Worcester, Dict.

Although the first definition here given is sanctioned by such high authority, it is questionable if it is essential to its character as a city, even in England, that it has been at any time a see; and it certainly retains its character of a city after it has lost its ecclesiastical character; 1 Steph. Com. 115; 1 Bla. Com. 114; and in the United States it is clearly unnecessary that it should ever have possessed this character. Originally, this word did not signify a town, but a portion of mankind who lived under the same government—what the Romans called *civitas*, and the Greeks πολις; whence the word *politeia civitas seu reipublicæ status et adminis-*

tratio. Toullier, *Dr. Civ.* Fr. l. 1, t. 1, n. 202; Henrion de Pansey, *Pouvoir Municipal*, pp. 36, 37.

CIVIL. In contradistinction to *barbarous* or *savage*, indicates a state of society reduced to order and regular government: thus, we speak of civil life, civil society, civil government, and civil liberty. In contradistinction to *criminal*, to indicate the private rights and remedies of men, as members of the community, in contrast to those which are public and relate to the government: thus, we speak of civil process and criminal process, civil jurisdiction and criminal jurisdiction.

It is also used in contradistinction to *military* or *ecclesiastical*, to *natural* or *foreign*; thus, we speak of a civil station, as opposed to a military or an ecclesiastical station; a civil death, as opposed to a natural death; a civil war, as opposed to a foreign war; Story, Const. § 789; 1 Bla. Com. 6, 125, 251; Montesquieu, Sp. of Laws, b. 1, c. 3; Rutherforth, Inst. b. 2, c. 2; *id.* c. 3; *id.* c. 8. p. 359; Heineccius, Elem. Jurisp. Nat. b. 2, ch. 6.

CIVIL ACTION. In Practice.

In the Civil Law.—A personal action which is instituted to compel payment, or the doing some other thing which is purely civil. Pothier, Introd. *Gen. aux Cont.* 110.

At Common Law.—An action which has for its object the recovery of private or civil rights or compensation for their infraction. See Action.

CIVIL COMMOTION. An insurrection of the people for general purposes, though it may not amount to rebellion where there is an usurped power. 2 Marsh. 793.

In the printed proposals which are considered as making a part of the contract of insurance against fire, it is declared that the insurance company will not make good any loss happening by any civil commotion.

CIVIL DAMAGE ACTS. Acts passed in many of the United States which provide an action for damages against a vender of intoxicating liquors, on behalf of the wife or family of a person who has sustained injuries by reason of his intoxication. Such an act, even if it allows an action against the owner on the property where the liquor was sold, without evidence that he authorized the sale, is constitutional; 74 N. Y. 509. See also 54 N. H. 117; 130 Mass. 158; 33 Wis. 570; 48 Vt. 628. Where the owner of a building had no knowledge as to how his premises were used, he is nevertheless liable where his agent rents it for the sale of intoxicating liquors; 131 N. Y. 536. See 72 Ill. 133. The act in New York creates a new right of action, viz., for injury to the "means of support;" it is not necessary that the injury should be one remediable at common law; 74 N. Y. 526. Injury to means of support is not necessarily deprivation of the bare necessities of life, but any substantial subtraction from the maintenance suitable to the man's business and condition in life; 48 Ill. App. 369. The Indiana act is constitutional, even though the liquor-seller was licensed; 57 Ind. 171. So in 41 Mich. 475. If the death of the husband can be traced to an intervening cause, the liquor-seller is not liable; 84 Ill. 195; s. c. 25 Am. Rep. 446; 54 Ind. 559. Damages for injuries resulting in death cannot be recovered; 35 Ohio St. 859; s. c. 35 Am. Rep. 598, 601; *contra*, 9 Neb. 304; 4 Hun 733; 87 N. Y. 493; 106 Ill. 263; 54 N. H. 117; 46 Ia. 195; but see 5 Hun 530; 8 *id.* 128; 146 Pa. 610. In some states exemplary damages can be recovered; 50 Ia. 34; 67 Me. 517; 33 Ohio St. 444; *contra*, 6 Neb. 304; 48 Ia. 588. The fact that the wife had bought liquor from the defendant under compulsion, or in order to keep her husband at home, does not defeat her right; *ibid.* See, generally, 20 Alb. L. J. 204; 48 Ill. App. 369.

CIVIL DEATH. That change of state of a person which is considered in the law as equivalent to death. See Death.

CIVIL LAW. This term is generally used to designate the Roman jurisprudence, *jus civile Romanorum.*

In its most extensive sense, the term Roman Law comprises all those legal rules and principles which were in force among the Romans, without reference to the time when they were adopted. But in a more restricted sense we understand by it the law compiled under the auspices of the Emperor Justinian, and which are still in force in many of the states of modern Europe, and to which all refer as authority or written reason.

The ancient *leges curiatæ* are said to have been collected in the time of Tarquin, the last of the kings, by a *pontifex maximus* of the name of *Sextus* or *Publius Papinius*. This collection is known under the title of *Jus Civile Papinianum*; its existing fragments are few, and those of an apocryphal character. Mackeldey § 21.

After a fierce and uninterrupted struggle between the patricians and plebeians, the latter extorted from the former the celebrated law of the *Twelve Tables*, in the year 300 of Rome. This law, framed by the decemvirs and adopted in the *comitia centuriata*, acquired great authority, and constituted the foundation of all the public and private laws of the Romans, subsequently, until the time of Justinian. It is called *Lex Decemviralis. Id.* From this period the sources of the *jus scriptum* consisted in the *leges*, the *plebiscita*, the *senatus consulta*, and the constitutions of the emperors, *constitutiones principum*; and the *jus non scriptum* was found partly in the *mores majorum*, the *consuetudo*, and the *res judicata*, or *auctoritas rerum perpetua similiter judicatorum.* The edicts of the magistrates, or *jus honorarium*, also formed a part of the unwritten law; but by far the most prolific source of the *jus non scriptum* consisted in the opinions and writings of the lawyers—*responsa prudentium.*

The few fragments of the twelve tables that have come down to us are stamped with the harsh features of their aristocratic origin. But the *jus honorarium* established by the prætors and other magistrates, as well as that part of the customary law which was built up by the opinions and writings of the *prudentes*, are founded essentially on principles of natural justice.

Many collections of the imperial constitutions had been made before the advent of Justinian to the throne. He was the first after Theodosius who ordered a new compilation to be made. For this purpose he appointed a committee of ten lawyers, with very extensive powers; at their head was the *ex-quæstor sacri palatii*, Johannes, and among them the afterwards well-known Tribonian. His instructions were to select, in the most laconic form, all that was still of value in the existing collections, as well as in the later constitutions; to omit all obsolete matter; to introduce such alterations as were required by the times; and to divide the

whole into appropriate titles. Within fourteen months the committee had finished their labors. Justinian confirmed this new code, which consisted of twelve books, by a special ordinance, and prohibited the use of the older collections of rescripts and edicts. This code of Justinian, which is now called *Codex vetus*, has been entirely lost.

After the completion of this code, Justinian, in 530, ordered Tribonian, who was now invested with the dignity of *quæstor sacri palatii*, and sixteen other jurists, to select all the most valuable passages from the writings of the old jurists which were regarded as authoritative, and to arrange them, according to their subjects, under suitable heads. These commissioners also enjoyed very extensive powers; they had the privilege, at their discretion, to abbreviate, to add, and to make such other alterations as they might consider adapted to the times; and they were especially ordered to remove all the contradictions of the old jurists, to avoid all repetitions, and to omit all that had become entirely obsolete. The natural consequence of this was, that the extracts did not always truly represent the originals, but were often interpolated and amended in conformity with the existing law. Alterations, modifications, and additions of this kind are now usually called *emblemata Triboniani*. This great work is called the Pandects, or Digest, and was completed by the commissioners in three years. Within that short space of time, they had extracted from the writings of no less than thirty-nine jurists all that they considered valuable for the purpose of this compilation. It was divided into fifty books, and was entitled *Digesta sive Pandectæ juris enucleati ex omni vetere jure collecti*. The Pandects were published on the 16th of December, 533, but they did not go into operation until the 30th of that month. In confirming the Pandects, Justinian prohibited further reference to the old jurists; and, in order to prevent legal science from becoming again so diffuse, indefinite, and uncertain as it had previously been, he forbade the writing of commentaries upon the new compilation, and permitted only the making of literal translations into Greek.

In preparing the Pandects, the compilers met very frequently with controversies in the writings of the jurists. Such questions, to the number of thirty-four, had been already determined by Justinian before the commencement of the collection of the Pandects, and before its completion the decisions of this kind were increased to fifty, and were known as the fifty decisions of Justinian. These decisions were at first collected separately, and afterward embodied in the new code.

For the purpose of facilitating the study of the law, Justinian ordered Tribonian, with the assistance of Theophilus and Dorotheus, to prepare a brief system of law under the title of Institutes, which should contain the elements of legal science. This work was founded on, and to a great extent copied from, the commentaries of Gaius, which, after having been lost for many centuries, were discovered by the great historian Niebuhr, in 1816, in a palimpsest, or re-written manuscript, of some of the homilies of St. Jerome, in the Chapter Library of Verona. What had become obsolete in the commentaries was omitted in the Institutes, and references were made to the new constitutions of Justinian so far as they had been issued at the time. Justinian published his Institutes on the 21st November, 533, and they obtained the force of law at the same time with the Pandects, December 30, 533. Theophilus, one of the editors, delivered lectures on the Institutes in the Greek language, and from these lecture originated the valuable commentaries known under the Latin title, *Theophili Antecessoris Paraphrasis Græca Institutionum Cæsarearum*. The Institutes consist of four books, each of which contains several titles.

After the publication of the Pandects and the Institutes, Justinian ordered a revision of the Code, which had been promulgated in the year 529. This became necessary on account of the great number of new constitutions which he had issued, and of the fifty decisions not included in the Old Code, and by which the law had been altered, amended, or modified. He therefore directed Tribonian, with the assistance of Dorotheus, Menna, Constantinus, and Johannes, to revise the Old Code and to incorporate the new constitutions into it. This revision was completed in the same year; and the new edition of the Code, *Codex repetitæ prælectionis*, was confirmed on the 16th November, 534, and the Old Code abolished. The Code contains twelve books subdivided into appropriate titles.

During the interval between the publication of the *Codex repetitæ prælectionis*, in 535, to the end of his reign, in 565, Justinian issued, at different times, a great number of new constitutions, by which the law on many subjects was entirely changed. The greater part of these constitutions were written in Greek, in obscure and pompous language, and published under the name of *Novellæ Constitutiones*, which are known to us as the Novels of Justinian. Soon after his death, a collection of one hundred and sixty-eight Novels was made, one hundred and fifty-four of which had been issued by Justinian, and the others by his successors.

Justinian's collections were, in ancient times, always copied separately, and afterwards they were printed in the same way. When taken together, they were indeed called, at an early period, the *Corpus Juris Civilis*; but this was not introduced as the regular title comprehending the whole body; each volume had its own title until Dionysius Gothofredus gave this general title in the second edition of his glossed *Corpus Juris Civilis*, in 1604. Since that time this title has been used in all the editions of Justinian's collections.

It is generally believed that the laws of Justinian were entirely lost and forgotten in the Western Empire from the middle of the eighth century until the alleged discovery of a copy of the Pandects at the storming and pillage of Amalfi, in 1135. This is one of those popular errors which had been handed down from generation to generation without question or inquiry, but which has now been completely exploded by the learned discussion, supported by conclusive evidence, of Savigny, in his History of the Roman Law during the Middle Ages. Indeed, several years before the sack of Amalfi the celebrated Irnerius delivered lectures on the Pandects in the University of Bologna. The pretended discovery of a copy of the Digest at Amalfi, and its being given by Lothaire II. to his allies the Pisans as a reward for their services, is an absurd fable. No doubt, during the five or six centuries when the human intellect was in a complete state of torpor, the study of the Roman Law, like that of every other branch of knowledge, was neglected; but on the first dawn of the revival of learning the science of Roman jurisprudence was one of the first to attract the attention of mankind; and it was taught with such brilliant success as to immortalize the name of Irnerius, its great professor.

Even at the present time the Roman Law, as a complete system, exercises dominion in every state in Europe except England. The countrymen of Lycurgus and Solon are governed by it, and in the vast empire of Russia it furnishes the rule of civil conduct. In America, it is the foundation of the law of Louisiana, Canada, Mexico, and all the republics of South America. Its influence in the formation of the common law of England cannot be denied by the impartial inquirer. The more thoroughly this subject is investigated, the larger is ascertained to be the indebtedness of the common law to the Roman system. It was publicly taught in England, by Roger Vacarius, as early as 1149; and all admit that the whole equity of jurisprudence prevailing in England and the United States is mainly based on the civil law. Consult Poll. & Maitl.; Social England; Address of Mr. Crackanthorpe, Am. Bar. Ass'n Rept. 1896; 1 Kent 516; Paper of Mr. Howe, Am. Bar Ass'n Rept. 1895. See CODES; DIGESTS; INSTITUTES; NOVELS.

CIVIL LIST. An annual sum granted by the English parliament at the commencement of each reign, for the expenses of the royal household and establishment as distinguished from the general exigencies of the state. It is the provision for the crown made out of the taxes in lieu of its proper patrimony and in consideration of the assignment of that patrimony to the public use. Wharton, Dict.

CIVIL OBLIGATION. One which binds in law, and which may be enforced in a court of justice. Pothier, Obl. 173, 191.

CIVIL OFFICER. Any officer of the United States who holds his appointment under the national government, whether his duties are executive or judicial, in the

highest or the lowest departments of the government, with the exception of officers of the army and navy. Rawle, Const. 213; 1 Story, Const. § 790.

The term occurs in the constitution of the United States, art. 2, sec. 4, which provides that the president, vice-president, and *civil officers* of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors. It has been decided that a senator of the United States is not a civil officer within the meaning of this clause of the constitution. Senate Journals, 10th January, 1799; 4 Tucker, Bla. Com. App. 57, 58; Rawle, Const. 213; Sergeant, Const. Law 376; Story, Const. § 791.

CIVIL REMEDY. **In Practice.** The remedy which the party injured by the commission of a tortious act has by action against the party committing it, as distinguished from the proceeding by indictment, by which the wrong-doer is made to expiate the injury done to society.

In cases of treason, felony, and some other of the graver offences, this private remedy is suspended, on grounds of public policy, until after the prosecution of the wrong-doer for the public wrong; 4 Bla. Com. 363; 12 East 409; 35 Ala. 184; 1 N. H. 239. The law is otherwise in *Massachusetts*, except, perhaps, in case of felonies punishable with death; 15 Mass. 333; *North Carolina*, 1 Tayl. 58; *Ohio*, 4 Ohio 377; *South Carolina*, 3 Brev. 302; *Mississippi*, 30 Miss. 492; *Tennessee*, 6 Humph. 433; *Maine*, 23 Me. 331; and *Virginia*. At common law, in cases of homicide the civil remedy is *merged* in the public punishment; 1 Chit. Pr. 10. See INJURIES; MERGER; Bish. Cr. L. § 267.

CIVIL RIGHTS. A term applied to certain rights secured to citizens of the United States by the 13th and 14th Amendments to the constitution, and by various acts of congress made in pursuance thereof.

The act of April 9, 1866, provided that all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are citizens of the United States; that such citizens of every race and color shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, etc., and to the full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and be subject to like punishment, etc., and none other. This act is constitutional; 1 Abb. U. S. 28; 1 Am. L. T. 7; and must be liberally construed; 1 Abb. U. S. 28.

It is substantially replaced by the 14th Amendment which provides that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or deprive any person of life, liberty, or property, without due process of law; or deny to any person within its jurisdiction the equal protection of the laws.

This provision applies to white as well as colored persons, and is intended to protect them against the action both of their own state and of other states in which they may happen to be. It renders void an act of a state legislature which gives to a few persons the sole right to carry on stock-yards near New Orleans; 16 Wall. 36. A statute of West Virginia provided that juries should be composed of "white male citizens," etc. Held, that the object of this amendment was to prevent any discrimination between whites and blacks, and this statute was therefore invalid; 99 U. S. 303. But where a statute of Virginia did not in terms exclude negroes from juries, but entrusted the selection of jurymen to the county judge, who habitually excluded negroes in his selection, it was held that his conduct was a gross violation of the act of congress of March, 1878, which prohibits such discrimination, but that it was not such a denial of the rights of negroes as is contemplated by the statutes for the removal of such causes to the federal courts; a mixed jury in any particular case is not provided for in the act; but it is the right of every colored man that in the selection of jurymen to pass upon his life, etc., negroes shall not be, *by law*, excluded on account of their race; 100 U. S. 313; 17 Alb. L. J. 111. See 45 La. Ann. 903.

The provision of the act of March 1, 1875, that no person possessing all other qualifications required by law shall be disqualified from jury service in any state on account of race, color, or previous condition of servitude, and imposing a penalty upon any officer who shall not comply with its provisions, is constitutional; 100 U. S. 339.

Where equally good public schools are provided for white and colored children, a provision that the two races shall attend different schools is not contrary to the 14th Amendment; 3 Woods 177; 70 Miss. 477; (but an act establishing a uniform system of common schools for colored children and excluding them from any share in the common school-fund was held to be a violation of the 14th Amendment of the constitution of the United States; 83 Ky. 49.) So of the separation of white and black persons in public conveyances, when appropriate, though distinct, quarters are provided for each; 9 Cent. L. J. 206; 114 Mo. 88; 45 La. Ann. 80; 109 U. S. 3; 62 Fed. Rep. 46; so with the rules of a theatre reserving certain sections for whites, while allowing black persons to occupy others; 111 Mo. 303; but to require colored persons to occupy particular seats in a theatre was held to be a violation of the Act, Ill. June 10, 1885, declaring the right of colored persons to "full and equal enjoyment of the accommodations" of theatres, etc.; 30 Ill. App.; aff. 128 Ill. 287. These amendments were designed to secure rights of a civil and political nature only, but not social or domestic rights; a state law forbidding marriages between whites and blacks does not contravene these provisions; 59 Ala. 57; 3 Woods 367; 3 Hughes 9; 30 Gratt. 808. A state law punishing more severely adultery between a white and a negro is valid; 58 Ala. 190; 106 U. S. 583. So is one de-

claring null and void marriages between whites and negroes: 1 Woods 537. A barber shop cannot discriminate against a colored person and deny him any rights therein to which a white person would be entitled if requiring the services of a barber; 25 Neb. 674.

A state is not prohibited by the 14th Amendment from prescribing the jurisdiction of the several courts, either as to their territorial limits, or the subject matter, amount, or penalties of their respective judgments; 101 U. S. 22.

A law in Maine that no person shall recover damages from any municipality for injuries caused by a defective highway, if he is a resident of a place by the laws of which such actions will not lie, is invalid under the 14th Amendment; 69 Me. 278.

The right to sell liquor is not one of the rights of citizens protected by the 14th Amendment; 18 Wall. 129. The constitutionality of statutes prohibiting the transaction of business or engaging in the ordinary secular avocations on Sunday is unquestioned; 33 Barb. 548; 4 Ired. 400; 40 Ala. 725; 31 La. Ann. 663; 33 Ind. 201.

Negroes born within the United States are entitled to vote under the 14th Amendment, and are protected therein by the act of May 31, 1870; 2 Bond 389.

This amendment does not add to the privileges and immunities of citizens, but only protects those which they already have. It does not entitle women to vote in the various states; 21 Wall. 162; 1 McArth. 169; 11 Blatch. 200. It does not prohibit a state from passing laws to regulate the charges of warehousemen in their business; 94 U. S. 113; nor a state law forbidding the carrying of dangerous weapons; 153 U. S. 535.

See also 17 Wall. 446; U. S. Rev. Stat. §§ 1977, 1978, 1979, 1980; article in 1 So. L. Rev. 192.

CIVILIAN. A doctor, professor, or student of the civil law.

CIVILITER. Civilly: opposed to *criminaliter*, or criminally.

When a person does an unlawful act injurious to another, whether with or without an intention to commit a tort, he is responsible *civiliter*. In order to make him liable *criminaliter*, he must have *intended* to do the wrong; for it is a maxim, *actus non facit reum nisi mens sit rea*. 2 East 104.

CIVILITER MORTUUS. Civilly dead. In a state of civil death.

In New York one sentenced to life imprisonment in the state prison is *civiliter mortuus;* 4 Johns. Ch. 228; 6 *id.* 118.

CLAIM. A challenge of the ownership of a thing which is wrongfully withheld from the possession of the claimant. Plowd. 359. See 1 Dall. 444; 12 S. & R. 179.

The owner of property proceeded against in admiralty by a suit *in rem* must present a *claim* to such property, verified by oath or affirmation, stating that the claimant by whom or on whose behalf the claim is made, and no other person, is the true and *bona fide* owner thereof, as a necessary preliminary to his making defence; 2 Conkl. Adm. 201–210.

A demand entered of record of a mechanic or material man for work done or material furnished in the erection of a building, in Pennsylvania and some other states.

The assertion of a liability to the party making it to do some service or pay a sum of money. See 16 Pet. 539.

The possession of a settler upon the wild lands of the government of the United States; the lands which such a settler holds possession of. The land must be so marked out as to distinguish it from adjacent lands; 10 Ill. 273. Such claims are considered as personalty in the administration of decedents' estates; 8 Ia. 463; are proper subjects of sale and transfer; 1 Morr. 70, 80, 312; 8 Ia. 463; 5 Ill. 531; the possessor being required to deduce a regular title from the first occupant to maintain ejectment; 5 Ill. 531; and a sale furnishing sufficient consideration for a promissory note; 1 Morr. 80, 438; 1 Ia. 23. An express promise to pay for improvements made by "claimants" is good, and the proper amount to be paid may be determined by the jury; 2 Ill. 532.

CLAIM OF CONUSANCE. In Practice. An intervention by a third person demanding jurisdiction of a cause which the plaintiff has commenced out of the claimant's court. Now obsolete. 2 Wils. 409; 3 Bla. Com. 298. See COGNIZANCE.

CLAIMANT. In Admiralty Practice. A person authorized and admitted to defend a libel brought *in rem* against property; thus, for example, Thirty hogsheads of sugar. Bentzon, Claimant *v.* Boyle, 9 Cra. 191.

CLAMOR (Lat.). A suit or demand; a complaint. Du Cange; Spelman, Gloss.

In Civil Law. A claimant. A debt any thing claimed from another. A proclamation; an accusation. Du Cange.

CLARE CONSTAT (Lat. it is clearly evident).

In Scotch Law. A deed given by a mesne lord (subject-superior) for the purpose of completing the title of the vassal's heir to the lands held by the deceased vassal under the grantor. Bell, Dict.

CLAREMETHEN. In Old Scotch Law. The warranty of stolen cattle or goods; the law regulating such warranty. Skene; Black, L. Dict.

CLARENDON, CONSTITUTIONS OF. The constitutions of Clarendon were certain statutes made in the reign of Henry II. of England, at a parliament held at Clarendon (A. D. 1164) by which the king checked the power of the pope and his clergy and greatly narrowed the exemption they claimed from secular jurisdiction.

Previous to this time, there had been an entire separation between the clergy and laity, as members of the same commonwealth. The clergy, having emancipated themselves from the laws as administered by the courts of law, had assumed powers and exemptions quite inconsistent with the good government of the country.

This state of things led to the enactment referred to. By this enactment all controversies arising out of ecclesiastical matters were required to be determined in the civil courts, and all appeals in spiritual causes were to be carried from the bishops to the primate, and from him to the king, but no further without the king's consent. The archbishops and bishops were to be regarded as barons of the realm, possessing the privileges and subject to the burdens belonging to that rank, and bound to attend the king in his councils. The revenues of vacant sees were to belong to the king, and goods forfeited to him by law were no longer to be protected in churches or church-yards. Nor were the clergy to pretend to the right of enforcing the payment of debts in cases where they had been accustomed to do so, but should leave all lawsuits to the determination of the civil courts. The rigid enforcement of these statutes by the king was unhappily stopped, for a season, by the fatal event of his disputes with Archbishop Becket. Fitz Stephen 27; 2 Lingard 59; 1 Hume 382; Wilkins 321; 4 Bla. Com. 422; 1 Poll. & M. 430-440, 461; 2 *id.* 196.

CLASS. A number of persons or things ranked together for some common purpose or as possessing some attribute in common.

The term is used of legatees; 3 M'Cord, Ch. 440; of obligees in a bond; 3 Dev. 284; and of other collections of persons; 17 Wend. 52; 16 Pick. 132; 77 Pa. 338; 1 Ld. Raym. 708.

CLAUSE. A part of a treaty; of a legislative act; of a deed; of a will, or other written instrument. A part of a sentence.

CLAUSUM. In Old English Law. Close. Closed.

A writ was either *clausum* (close) or *apertum* (open). Grants were said to be by *literæ patentæ* (open grant) or *literæ clausæ* (close grant); 2 Bla. Com. 346.

A close. An enclosure.

Occurring in the phrase *quare clausum fregit* (4 Blackf. 181), it denotes in this sense only realty in which the plaintiff has some exclusive interest, whether for a limited or unlimited time or for special or for general purposes; 1 Chit. Pl. 174; 9 Cow. 39; 12 Mass. 127; 6 East 606.

CLAUSUM FREGIT. See QUARE CLAUSUM FREGIT; TRESPASS.

CLEAR. Free from indistinctness or uncertainty; easily understood; perspicuous, plain; free from impediment, embarrassment or accusation. Webster.

For a clear deed, see 3 W. & S. 563; clear title; 105 Mass. 409; clear of expense; 2 Ves. & B. 341; clear of assessments; 4 Yeates 386; clear days; 14 M. & W. 120; 3 B. & Ald. 581.

CLEARANCE. A certificate given by the collector of a port, in which it is stated that the master or commander (naming him) of a ship or vessel named and described, bound for a port named (and having on board goods described, in case the master requires the particulars of his cargo to be stated in such clearance), has entered and cleared his ship or vessel according to law.

This certificate, or clearance, evidences the right of the vessel to depart on her voyage; and clearance has therefore been properly defined as *a permission to sail*. The same term is also used to signify the act of clearing. Worcester, Dict.

The sixteenth section of the act of August 18, 1856 (R. S. § 4207), regulating the diplomatic and consular systems of the United States, makes it the duty of the collector of the customs whenever any clearance is granted to any ship or vessel of the United States, duly registered as such, and bound on any foreign voyage, to annex thereto, in every case, a copy of the rates or tariff of fees which shall be allowed in pursuance of the provisions of that act.

The act of congress of 2d March, 1799, section 93 (R. S. § 4197), directs that the master of any vessel bound to a foreign port or place shall deliver to the collector of the district from which such vessel shall be about to depart a manifest of all the cargo on board, and the value thereof, by him subscribed, and shall swear or affirm to the truth thereof; whereupon the collector shall grant a clearance for such vessel and her cargo, but without specifying the particulars thereof in such clearance, unless required by the master so to do. And if any vessel bound to any foreign place shall depart on her voyage to such foreign place without delivering such a manifest and obtaining a clearance, the master shall forfeit and pay the sum of five hundred dollars for every such offence; provided, that the collectors and other officers of the customs shall pay due regard to the inspection laws of the states in which they respectively act, in such manner that no vessel having on board goods liable to inspection shall be cleared out until the master or other person shall have produced such certificate, that all such goods have been duly inspected, as the laws of the respective states do or may require to be produced to the collector or other officer of the customs; and provided, that receipts for the payment of all legal fees which shall have accrued on any vessel shall, before any clearance is granted, be produced to the collector or other officer aforesaid.

The 11th section of the act of February 10, 1820 (R. S. § 4200) provides that, before a clearance shall be granted for any vessel bound to a foreign place, the owners, shippers, or consignors of the cargo on board of such vessel shall deliver to the collector manifests of the cargo, or the parts thereof shipped by them respectively, and shall verify the same by oath or affirmation; and such manifests shall specify the kinds and quantities of the articles shipped by them respectively, and the value of the total quantity of each kind of articles; and such oath or affirmation shall state that such manifest contains a full, just, and true account of all articles laden on board of such vessel by the owners, shippers, or consignors respectively, and that the values of such articles are truly stated according to their actual cost or the values which they truly bear at the port and time of exportation. And, before a clearance shall be granted for any such vessel, the master of every such vessel, and the owners, shippers, and consignors of the cargo shall state, upon oath or affirmation, to the collector, the foreign place or country in which such cargo is truly intended to be landed; and the said oath or affirmation shall be taken and subscribed in writing.

According to Boulay-Paty, *Dr. Com.* t. 2. p. 19, the clearance is imperatively demanded for the safety of the vessel; for if a vessel should be found without it at sea it may be legally taken and brought into some court for adjudication on a charge of piracy. See SHIP'S PAPERS.

CLEARING-HOUSE. In Commercial Law. An office where bankers settle daily with each other the balance of their accounts.

The origin of the system is said to have been in Edinburgh; at least the bankers of that city so claim; but the earliest record of one (and that is not clear as to date) is that of London, founded in 1775, or possibly earlier. It was started in the alehouse of those times, the general resort of proprietors of new enterprises. The system, however, increased in usefulness so much as to require rooms, which were procured in Lombard Street, and a system was rapidly developed of exchanging checks and other securities to reduce the amount of actual money required for settlements. In this country such associations were established in New York in 1853, Boston in 1856, Philadelphia, Baltimore, and Cleveland in 1858, Worcester in 1861, Chicago in 1865, and since that date the number increased rapidly to thirty-one in 1884 (Bolles, Proct. Bkg.), and the system is now extended to most of the cities in which there are several banks. They also exist in Australia, France, Germany, Switzerland, Italy, and other continental countries of Europe. Most of these associations are unincorporated, but in Minnesota there is an act (Mar. 4, 1893) for their incorporation. The Clearing-house Association of New York consists of all the incorporated banks—private bankers not being admitted, as in London. Two clerks from each bank attend at the clearing-house every morning, where one takes a position inside of a counter at a desk bearing the number of his bank, the other standing outside the counter and holding in his hand parcels containing the checks on each of the other banks received the previous day. At the sound of a bell, the outside men begin to move, and at each desk they deposit the proper parcel, with an account of its contents—until, having walked around, they find themselves at their own desk again. At the end of this process the representative of each bank has handed to the representatives of every other bank the demands against them, and received from each of the other banks their demands on his bank. A comparison of the amounts tells him at once whether he is to pay into or receive from the clearing-house a balance in money. Balances are settled daily. In London the practice of presenting checks at the clearing-house has been held a good presentment to the banker at law. It is not usual to examine the checks until they are taken to the bank, and if any are then found not good they are returned to the bank which presented them, which settles for such returned checks. In this country when a check is returned not good through the clearing-house, it is usually again presented at the bank.

To accomplish this purpose of settling daily balances was the original and still is the principal object of a clearing-house, whatever differences of method or detail may be found in different cities. The mode of proceeding in Philadelphia is described in 32 W. N. C. Pa. 358 and 62 Fed. Rep. 645; and that of London in 5 Mann. & G. 348; s. c. 6 Scott, N. R. 1; s. c. 12 L. J. C. P. 118.

The original purpose of a clearing-house—the exchange of paper payable by the several banks and the settlement of the daily balances between them—has undergone a gradual but very extensive expansion; and their operations have naturally given rise to much litigation, and many of the questions arising are not settled. In the larger cities they have become to some extent financial regulators and the medium through which in times of financial disturbance or stringency there is attained concerted action by the banks of a city. Such was the action of the New York and other clearing-houses in the period of financial distrust in 1893, in issuing to banks requiring them clearing-house certificates, representing the deposit of securities, and as available to the banks for settling clearing-house balances as currency or other money. The result was to make a practical increase in the circulation immediately available, flexible in its operations and readily withdrawn from circulation when no longer required.

Such certificates are held valid, and suit may be brought by the clearing-house committee upon notes included in the collateral deposited by a bank for the purpose of taking out certificates; 32 W. N. C. Pa. 183; 29 *id.* 139, 258. A clearing-house due bill is an ordinary due bill from a bank "to Banks," and usually stipulates that it is good when both signed and countersigned by duly authorized officers, and to be payable only through the clearing-house on the day after its issue. During the financial difficulties above referred to such due bills were used by the banks in payment of checks whenever practicable, being as available as cash for deposit in another bank of the same city. They are held not to be certificates of deposit but negotiable, and requiring indemnity to recover the amount due on them if lost or stolen; 16 Phila. 94.

A clearing-house association is properly sued in the names of the committee who have the entire control of its securities and business funds; 58 Fed. Rep. 746.

The tendency of the decisions upon the rights and liabilities of clearing-houses is to treat them with respect to the customs of the banks as merely instruments of making the exchanges, and not as liable to individual depositors or holders of paper for funds which have passed through the clearing-house in the process of exchange between banks. They are not responsible for anything except the proper distribution of money paid to settle balances, their purpose being to provide a convenient place where checks may be presented and balances adjusted; 118 Pa. 294. When a bank suspended after the morning exchanges but before the payment of the general balance due from it, which was made good by the other banks and applied by the clearing-house to the indebtedness of the suspended bank, it was held that the clearing-house was not liable to the holder of a draft on one of the other banks deposited in the suspended bank, because the draft was never in the hands of the clearing-house for collection, nor did its manager hold the proceeds thereof with knowledge of the plaintiff's rights or of the existence of the draft until demand was made upon it; 32 W. N. C. Pa. 358.

The rules of a clearing-house have the binding effect of law as between the banks; 77 Hun 159; 118 Pa. 294; 31 N. J. L. 563; 35 La. Ann. 251; but do not affect the relations between the payee of a check presented through the clearing-house for

payment, and the bank on which the check is drawn; 77 Hun 159.

The course of business of a clearing-house is based upon the idea that the members are principals (and trusted by each other as such), and not agents of parties not members, and this renders possible the volume of business transacted; 31 N. J. L. 563.

With respect to the effect of presentment at the clearing-house or failure to demand payment there, it has been held that presentation to the banker's clerk at the clearing-house was a presentation at the place of payment designated in a bill of exchange; 2 Campb. 596; that the failure to present a check at the clearing-house in violation of an imperative custom to do so does not discharge the drawer of the check as between the bankers and their customer; 1 Nev. & M. 541; and such failure to present is not material if presented in the ordinary way, even if the check was to have been paid if presented at the clearing-house, the latter being merely a substitute for ordinary presentation, authorized by custom but not required except as a substitute for the regular mode if that is omitted; 5 Mo. App. 444. Sending notes to a bank through the clearing-house is but leaving them there for payment during banking hours and not a demand at the bank for immediate payment; 132 Mass. 147.

The right of return of paper found not good secured by the rules of the clearing-house is a special provision in compensation for payment without inspection, with an opportunity for future inspection and recall of the payment. When the opportunity is had and not availed of, the general principles of law intervene to regulate the rights and liabilities of the paying bank; 106 Mass. 441; s. c. 8 Am. Rep. 349. The return of such paper after its receipt through the clearing-house is not prevented by its having been marked cancelled by mistake; 1 Campb. 426; 5 Mann. & G. 348; nor by putting it on a file and entering it in the journal; 118 Pa. 294; nor by failure to return by the time fixed by rule whether caused by mistake of fact; 129 Mass. 438; 101 *id.* 281; or not; *id.* 287; nor in such case if the bank had through mistake given credit to the depositor; 139 Mass. 513; but a rule of the Chicago clearing-house limiting the time of return was held to constitute a binding contract, and the right to recover back a payment made by mistake and discovered within fifteen minutes was denied and the Massachusetts rule criticised; 23 Fed. Rep. 179.

When there is no rule and no uniform custom, payment at the clearing-house is provisional, to become complete when payment is made in the ordinary course of business, and if not so made to be treated as payment under a mistake of fact, and with the same rights of reclamation as if made without a clearing-house; 132 Mass. 147. The rules may be waived; 7 Lans. 197.

A bank not a member, in sending checks through the clearing-house, is bound by its action under its rules in returning payment made by mistake; *id.*; but a bank not a member is not bound by the clearing-house rules as to the time of returning checks not good, in case of a check sent by it through a bank which was a member; such a case is governed by the ordinary principles applicable to it and not by the clearing-house rules; 31 N. J. L. 563.

When the drawee bank received a forged check through the clearing-house as genuine and failed to return it or to discover the forgery for several days, the bank which took the check and sent it to the clearing-house could not be held liable for negligence in receiving it from a stranger and sending it through the clearing-house without notice; 30 Md. 11; s. c. 96 Am. Dec. 554.

In London there is also a railway clearing-house.

See Sewell; Boone; Paine; Gilbart, Banking; Byles, Bills; Pulling, Laws, etc., of London; Cleveland, Banking Laws of New York; Morse, Banks and Banking; 101 N. Y. 595; 25 L. R. A. 824, note.

CLEMENTINES. In Ecclesiastical Law. The collection of decretals or constitutions of Pope Clement V., which was published, by order of John XXII., his successor, in 1317.

The death of Clement V., which happened in 1314, prevented him from publishing this collection, which is properly a compilation as well of the epistles and constitutions of this pope as of the decrees of the council of Vienna, over which he presided. The Clementines are divided into five books, in which the matter is distributed nearly upon the same plan as the decretals of Gregory IX. See Dupin, *Bibliothèque.*

CLENGE. In Old Scotch Law. To clear or acquit of a criminal charge. Literally to cleanse or clean. Black, L. Dict.

CLERGY. The name applicable to ecclesiastical ministers as a class.

Clergymen were exempted by the emperor Constantine from all civil burdens. Baronius, *ad ann.* 319, § 30. Lord Coke says, 2 Inst. 3, ecclesiastical persons have more and greater liberties than other of the king's subjects, wherein to set down all would take up a whole volume of itself. In the United States the clergy is not established by law.

CLERGYABLE. In English Law. Allowing of, or entitled to, the benefit of clergy (*privilegium clericale*). Used of persons or crimes. 4 Bla. Com. 371. See Benefit of Clergy.

CLERICAL ERROR. An error made by a clerk in transcribing or otherwise. This is always readily corrected by the court.

An error, for example, in the teste of a *fi. fa.*; 4 Yeates 185, 205; or in the teste and return of a *vend. exp.*; or in a certificate of a notary; 13 So. Rep. (Ala.) 947; or where an action is begun by one plaintiff and is afterwards amended by adding additional parties, the entering of judgment in favor of "the plaintiff" instead of "the plaintiffs" is a clerical error and amendable on appeal; 49 Ill. App. 203; 1 Dall. 197; or in writing Dowell for McDowell; 1

S. & R. 120; 9 *id.* 284. See 8 Co. 162 *a*; 56 Fed. Rep. 570; 99 Cal. 621. An error is amendable where there is something to amend by, and this even in a criminal case; 2 Pick. 550; 1 Binn. 367; 12 Ad. & E. 217; for the party ought not to be harmed by the omission of the clerk; 3 Binn. 102; even of his signature, if he affixes the seal; 1 S. & R. 97.

CLERICUS (Lat.). **In Civil Law.** Any one who has taken orders in church, of whatever rank; monks. A general term including bishops, subdeacons, readers, and cantors. Du Cange. Used, also, of those who were given up to the pursuit of letters, and who were learned therein. Also of the amanuenses of the judges or courts of the king. Du Cange.

In English Law. A secular priest, in opposition to a regular one. Kennett, Paroch. Ant. 171. A clergyman or priest; one in orders. *Nullus clericus nisi causidicus* (no clerk but what is a pleader). 1 Bla. Com. 17. A freeman, generally. One who was charged with various duties in the king's household. Du Cange.

CLERICUS MERCATI HOSPITII REGIS. The clerk of the market at the king's gate. An honorable office pertinent to the ancient custom of holding markets in the suburbs of the king's court. In early times he witnessed the parties' verbal contracts. At a later date he adjudicated in its prices of commodities; he inquired as to all weights and measures; he measured land; and had the power to send bakers and others to the pillory. Inderwick, The King's Peace.

CLERK. In Commercial Law. A person in the employ of a merchant, who attends only to a part of his business, while the merchant himself superintends the whole. He differs from a factor in this, that the latter wholly supplies the place of his principal in respect to the property consigned to him. Pardessus, *Droit Comm.* n. 38; 1 Chit. Pr. 80.

In Ecclesiastical Law. Any individual who is attached to the ecclesiastical state and has submitted to the tonsure. One who has been ordained. 1 Bla. Com. 338. A clergyman. 4 Bla. Com. 367.

In Offices. A person employed in an office, public or private, for keeping records or accounts.

His business is to write or register, in proper form, the transactions of the tribunal or body to which he belongs. Some clerks, however, have little or no writing to do in their offices: as the clerk of the market, whose duties are confined chiefly to superintending the markets. This is a common use of the word at the present day, and is also a very ancient signification, being derived, probably, from the office of the *clericus*, who attended, amongst other duties, to the provisioning the king's household. See Du Cange.

CLERKSHIP. The period which must be spent by a law-student in the office of a practising attorney before admission to the bar. 1 Tidd, Pr. 61.

CLIENT. In Practice. One who employs and retains an attorney or counsellor to manage or defend a suit or action to which he is a party, or to advise him about some legal matters. See ATTORNEY-AT-LAW.

CLOSE. An interest in the soil. Doctor & Stud. 30; 6 East 154; 1 Burr. 133; or in trees or growing crops. 4 Mass. 266; 9 Johns. 113.

In every case where one man has a right to exclude another from his land, the law encircles it, if not already inclosed, with an imaginary fence, and entitles him to a compensation in damages for the injury he sustains by the act of another passing through his boundary—denominating the injurious act a breach of the inclosure; Hamm. N. P. 151; Doctor & Stud. dial. 1, c. 8, p. 30; 2 Whart. 430.

In considering the cases in which trespass might be supported for an injury to land, for breaking the close, it is laid down that the term *close*, being technical and signifying the *interest* in the soil, and not merely a close or inclosure in the common acceptance of that term. It lies however temporary the tenant's interest, and though it be merely in the profits of the soil as *vesturæ terræ* or *herbagii pasturæ*; Co. Litt. 4 *b*; 5 East 480; 6 *id.* 606; 5 T. R. 535; *prima tonsura*; 7 East 200; chase for warren, etc.; 2 Salk. 637; if it be in exclusion of others; 2 Bla. Rep. 1150; 8 M. & S. 499. So it lies by one having a right to take off grass; 6 East 602; or after a tenancy expires to emblements; 9 Johns. 108; or one having the right to cut timber trees; 4 Mass. 266.

An ejectment will not lie for a close; 11 Co. 55; Cro. Eliz. 235; Ad. Ej. 24. See CLAUSUM.

CLOSE COPIES. Copies which might be written with any number of words on a sheet. Office copies were to contain only a prescribed number of words on each sheet.

CLOSE HAULED. In Admiralty Law. This is a nautical term and means the arrangement of a vessel's sails when she endeavors to make progress in the nearest direction possible towards that point of the compass from which the wind blows. 6 El. & Bl. 771; Black, L. Dict.

CLOSE ROLLS. Rolls containing the record of the close writs (*literæ clausæ*) and grants of the king, kept with the public records. 2 Bla. Com. 346.

CLOSE WRITS. Writs directed to the sheriff instead of to the lord. 3 Reeve, Hist. Eng. Law 45. Writs containing grants from the crown to particular persons and for particular purposes, which, not being intended for public inspection, are closed up and sealed on the outside, instead of being open and having the seal appended by a strip of parchment. 2 Bla. Com. 346; Sewall, Sher. 372.

CLOTURE. The procedure in deliber-

ative assemblies whereby debate is closed. Introduced in the English parliament in the session of 1882. Wharton. It is generally effected by moving the previous question. See Roberts, Rules of Order §§ 20, 58 *a*. This motion is not recognized in the senate of the United States.

CLOUD ON TITLE. See BILL TO REMOVE CLOUD FROM TITLE.

CLUB. A voluntary unincorporated association of persons for purposes of a social, literary, or political nature or the like. A club is not a partnership; 2 M. & W. 172; Black, L. Dict.

CO-ADMINISTRATOR. One who is administrator with one or more others. See ADMINISTRATOR.

CO-ASSIGNEE. One who is assignee with one or more others. See ASSIGNMENT.

CO-EXECUTOR. One who is executor with one or more others. See EXECUTOR.

COADJUTOR. The assistant of a bishop. An assistant.

COADUNATIO. A conspiracy. 9 Coke, 56.

COAL NOTE. In English Law. A species of promissory note authorized by the stat. 3 Geo. II. c. 26, §§ 7, 8, which, having these words expressed therein, namely, "value received in coals," are to be protected and noted as inland bills of exchange.

COAST. The margin of a country bounded by the sea. This term includes the natural appendages of the territory which rise out of the water, although they are not of sufficient firmness to be inhabited or fortified. Shoals perpetually covered with water are not, however, comprehended under the name of coast. The small islands situate at the mouth of the Mississippi, composed of earth and trees drifted down by the river, which are not of consistency enough to support the purposes of life, and are uninhabited, though resorted to for shooting birds, were held to form a part of the coast.

COCKET. A seal appertaining to the king's custom-house. Reg. Orig. 192. A scroll or parchment sealed and delivered by the officers of the custom-house to merchants as an evidence that their wares are customed. Cowel; Spelman, Gloss. See 7 Low. C. 116. The entry office in the custom-house itself. A kind of bread said by Cowel to be hard-baked; sea-biscuit; a measure.

CODE (Lat. *Codex*, the stock or stem of a tree—originally the board covered with wax, on which the ancients originally wrote). A body of law established by the legislative authority of the state, and designed to regulate completely, so far as a statute may, the subject to which it relates.

From the rude beginning, expressed in the derivation of the word, there developed the somewhat diversified signification which it has acquired in jurisprudence. It has been used to describe a collection of pre-existing laws arranged and classified into a logical system, or one intended to be such, without the interpolation of new matter, and also a declaration of the law composed partly of such materials as might be at hand from all sources,—statutes, adjudications, customs,—supplemented by such amendments, alterations, and additions as seemed to the lawgivers to be required to constitute a complete system and adapt it to the purpose of its adoption, or promulgation.

This mixed character, it may probably be asserted with confidence, is essential to the existence of a code as the term is now understood, and has entered more or less into the composition of every body of laws known as such in history.

The idea of a code involves that of the exercise of the legislative power in its promulgation; but the name has been loosely applied also to private compilations of statutes.

The subject of codes and the kindred topics of legal reform have received great attention from the jurists and statesmen of the present century. Probably no subject in the domain of law has been the occasion of more extended and earnest discussion than the relative merits of the Code system as it is understood by jurists, and that which is considered and treated on both sides of the controversy as its antithesis, a body of law partly written and partly unwritten, finding its beginnings in customs gradually ripening into customary law; seeking later expression in statutes and passing through a period of judicial interpretation and modification by being fitted, as it were, into successive cases, with sufficiently varying facts to produce that flexibility which is needed for final crystallization into a body of rules and principles sufficiently well settled as to have attained the dignity of a well ordered system. Of the one the Roman Law is the illustration unrivalled in history, as is the English Common Law of the other. While, however, these do represent two distinct and well defined systems of the development of law, the thoughtful and impartial reader of what is written by the ardent advocates of each, assuming as many of them do that the adoption of the one is the exclusion of the other, may find himself inclining to the conclusion that in dealing with this as with most juridical questions, an entirely one-sided view will leave much to be desired. It may be permissible to question whether these two systems are essentially distinct and antagonistic types, or different methods employed in and essential to the evolution of municipal law as a whole, and of the science of jurisprudence in its widest sense. It is true that there are recorded in history proposals to form a code of laws *de novo* having relation only to the future and disregarding the past, but this has been properly regarded as the visionary dream of the enthusiast rather than the matured conclusion of a judicious lawgiver. It is hardly to be questioned that no code has ever taken its place as an instrument of legal administration into which there did not enter as a substantial constituent a body of existing common law, and that every body of unwritten law on a given subject is tending towards ultimately finding its expression in what is tantamount to a code, whether called by that name or not. Indeed, if dry technicalities of definition be avoided, it is hardly an exaggeration to say that there are single decisions of English or American judges, such, for example, as Coggs *v.* Bernard, which may not be inaptly termed a code or codification of the law on the subject to which they relate, and which come to be recognized as such with authority which could hardly be increased by legislative affirmation. The difficulty of making a hard and fast line between the two systems is quite well shown by all the attempts to define precisely the

word code. A very judicious writer, after a review of the historical codes, concludes that substantially they are of three kinds; and his classification is not only satisfactory in itself but admirably illustrates what has been said.

"*First.*—The classification of statutes of force systematically arranged, according to subject-matter, without amendment, alteration, or interpolation of new law, the only change being in the correction of errors of expression, repetitions, superfluities, and contradictions, compressed into as small a space as possible, which, when done, will leave the laws in letter and in spirit just as they *were*.

"*Second.*—The same as the first in form, but going further and making such amendments as are deemed necessary to harmonize and perfect the existing system.

"*Third.*—To take a yet greater latitude, and, without changing the existing *system* of laws, to add new laws, and to repeal old laws, both in harmony with it, so that the code will meet *present* exigencies, and so far as possible provide for the future; and this is *real* codification." To these accurate statements the writer adds a fourth, "wholly impracticable and even visionary," which is "to disregard at will *existing* laws, and make a system substantially *new*," such as the author deems best and wisest. Paper of Judge Clark, Rep't Ga. St. Bar Ass'n, 1890.

There is unquestionably a strong tendency towards codification in a general sense, which manifests itself in the tendency to general revisions of federal and state statutes, the adoption of codes of procedure by name in several of them, and in fact though not in name in many others, the codes of India, and not the least in the growing interest in an active discussion of the subject. If this interest leads to action wisely tempered with a due regard for the proper functions of written and unwritten law, and freedom from extreme views and the effort to accomplish the impossible task of reducing all law to the unyielding forms of statutory enactment, it will undoubtedly be fruitful of good results.

When it is considered how rapidly statutes accumulate as time passes, it is obvious that great convenience will be found in having the statute law in a systematic body, arranged according to subject-matter, instead of leaving it unorganized, scattered through the volumes in which it was from year to year promulgated. Revision to this extent is very frequent, and is what is usually accomplished in the Revised Statutes of many states which are inartificially termed codes. Of this general character were the Revised Statutes of the United States; *infra*. When the transposition of the statutes from a chronological to a scientific order is undertaken, more radical changes immediately propose themselves. These are of two classes: *first*, amendments for the purpose of harmonizing the inconsistencies which such an arrangement brings to notice, and supplying defects; *second*, the introduction into the system of all other rules which are recognized as the unwritten or common law of the state. The object of the latter class of changes is to embody in one systematic enactment all that is thenceforth to be regarded as the law of the land. It is this attempt which is usually intended by the distinctive term codification.

The first two of the questions thus indicated may be deemed as settled, by general concurrence, in favor of the expediency of such changes; and the process of the collection of the statute law in one general code, or in a number of partial codes or systematic statutes, accompanied by the amendments which such a revision invites, is a process which for some years has been renovating the laws of England and the United States. Although at the same time something has been done, especially in this country, towards embodying in these statutes principles which before rested in the common or report law, yet the feasibility of doing this completely, or even to any great extent, must be deemed an open question. It has been discussed with great ability by Bentham, Savigny, Thibaut, and others. It is undeniable that, however successfully a code might be supposed to embody all existing and declared law, so as to supersede previous sources, it cannot be expected to provide prospectively for all the innumerable cases which the diversity of affairs rapidly engenders, and there must soon come a time when it must be studied in the light of numerous explanatory decisions.

Real codification involves the most intimate and exhaustive knowledge not only of the statute law to be included, but also of the judicial interpretation and construction of it, and from the moment of the adoption of a code it begins to be the subject of a new series of decisions which are required to interpret, modify, and explain it and adapt it to modern conditions and the facts of cases of new impression, as is and always has been the case with respect to the adaptation of the ancient rules of the common law to modern conditions. In doing this the necessity for and opportunity of judicial legislation are infinite, and with the multiplicity of courts and jurisdictions the difficulties of preserving a system founded on reason are far greater than they were even a very few years ago. And this consideration is strongly urged in favor of the code system. On the other hand, that the law of master and servant, which was founded on such relations as the coachman and the blacksmith's striker, should have been applied with so little friction to the railroad and the factory, is hardly less wonderful than the development of the common carrier of the post road and van to the telephone company, and these rapid transformations may serve as the basis of an argument that no civil code can be framed with sufficient wisdom to provide for the constantly changing conditions of life and business.

In addition to the considerations herein mentioned as bearing upon the subject, the lord chief justice of England, in his address before the American Bar Association (Report 1896), in disapproving of the proposal to codify international law, mentions and illustrates a very fundamental objection to the codification of branches of the law not yet definitely reduced to fixed rules. His observations approach very nearly the suggestion of a striking and effective limitation of the extent to which codification should go beyond the scientific revision of statute law, and in the direction of including law settled by decision and not by statute. Some branches of the law are admirably adapted to complete codification, some others are not yet, and others again by their nature never can or will be.

The discussions on this subject have called attention to a subject formerly little considered, but which is of fundamental importance to the successful preparation of a code—the matter of statutory expression. There is no species of composition which demands more care and precision than that of drafting a statute. The writer needs not only to make his language intelligible, he must make it incapable of misconstruction. When it has passed to a law, it is no longer his intent that is to be considered, but the intent of the words which he has used; and that intent is to be ascertained under the strong pressure of an attempt of the advocate to win whatever possible construction may be most favorable to his cause. The true safeguard is found not in the old method of accumulating synonyms and by an enumeration of particulars, but rather—as is shown by those American codes of which the Revised Statutes of New York and the revision of Massachusetts are admirable specimens—by concise but complete statement of the full principle in the fewest possible words, and the elimination of description and paraphrase by the separate statement of necessary definitions. One of the rules to which the New York revisers generally adhered, and which they found of very great importance, was to confine each section to a single proposition. In this way the intricacy and obscurity of the old statutes were largely avoided. The reader who wishes to pursue this interesting subject will find much that is admirable in Coode's treatise on Legislative Expression (Lond. 1845) (reprinted in Brightly's Purdon's Digest, Penna.). The larger work of Gael (Legal Composition, Lond. 1840) is more especially adapted to the wants of the English profession.

GREAT BRITAIN. There has not been in England any general codification in the modern sense.

There were some early English so-called codes which were of the former character. The first code in England appears to have been about the year 600 by Athelbert, king of the Kentings. His reign overlaps the reign of Justinian. His laws have come down to us only in a copy made after the Norman Conquest. They consist of ninety brief sentences. In the end of the 7th century the west Saxons had written laws,—the

laws of Ine. The next legislator we come down to is Alfred the Great, about two centuries later. Later came the code of Canute. 1 Social England 165.

These are merely of historical interest. But in recent years there has been in England as elsewhere an interest in the subject of the arrangement, classification, and simplification of the law which found expression not only in words but in legislative action. The necessity for some reform, and the conditions which have forced the subject upon the attention of the English Bar and Parliament, are well expressed by Mr. Crackanthorpe in his recent address before the American Bar Association (Report, 1896) :—

"We have in our libraries a number of monographs, dealing with the subheads of Law in the most minute detail—books on Torts and Contracts, on Settlements and Wills, on Purchases and Sales, on Specific Performance, on Negotiable Instruments, and so forth. We have also many valuable compendia, or institutional treatises, dealing with the Law as a whole. Each and all of these, however, bear witness to the disjointed character of our Jurisprudence. The numerous monographs overlap and jostle each other, like so many rudderless boats tossing at random on the surface of a wind-swept lake, while the institutional treatises, in their endeavor to be exhaustive, fail in point of logical arrangement, just as a vessel overladen with a mixed cargo fails to get it properly stowed away in the hold. Some day, perhaps, we shall produce a Corpus Juris which will reduce our legal wilderness to order, and, by grubbing up the decayed trees, enable us to discern the living forest. We have already digested with success portions of our civil law, notably that relating to bills of exchange and a part of that relating to partnership and trusts. These experiments are likely to be renewed from time to time, and I doubt not that ultimately we shall have a civil code as complete as that which has just been promulgated in Germany. At present we have not even a criminal code such as you have in the State of New York and as is to be found in most continental countries, all that has been done in that direction being to pass five consolidating statutes dealing with larceny and a few other common offences."

In addition to those mentioned the partial codes thus far adopted in England include the Bills of Sale Act, the Employers' Liability Act, and others, and the India code is the result of a very successful effort to codify specific titles of the common law, and it is now constantly referred to in common-law jurisdictions as the best considered expression of the rules of the common law on subjects covered by it at the time of its adoption. In addition to the partial or special English codes referred to, the course which the discussion upon codification has taken in that country has led to the systematic collection and revision of statutes upon particular subjects. Under the direction of Lord Cairns, the statutes of England from 1 Henry III. have been systematically revised by a committee, and published as the "Revised Statutes." Eighteen volumes have been published, bringing the work down to 1878.

In other British dependencies there have been movements in the direction of codification more pronounced in some instances than those in England. In Hong Kong and at the Straits Settlements codes of civil procedure were adopted on the lines of the New York code, which was also utilized in the Indian code.

The English Judicature Act of 1873 accomplished many of the reforms in the line of simplification which were aimed at in the New York code and those which followed it in the United States. Among other things, it provided for one civil action to take the place of the different actions of common law and the suits in equity; it provided for bringing actions in the name of the real party in interest and as many of them as had an interest, and against all against whom relief was claimed; for a decision according to the rules of the common law and equity, the latter to prevail when there was a conflict; it specified that the pleadings should be the statement of claim or complaint, the answer or defence, and the reply; that the trial should be by court, or jury, or referee.

This Judicature Act has been adopted by Victoria, Queensland, South Australia, Western Australia, Tasmania, New Zealand, Jamaica, St. Vincent, The Leeward Islands, British Honduras, Gambia, Grenada, Nova Scotia, Newfoundland, Ontario, and British Columbia. 35 Am. L. Reg. & Rev. N. s. 541.

UNITED STATES. In this country the subject has received no less attention and presented obstacles of less magnitude. Codes and revisions have been enacted as follows:

The Revision of Federal Statutes in 1873, which went into effect June 22, 1874, was by act of congress declared to constitute the law of the land; the pre-existing laws were thereby repealed, and ceased to be of effect. By subsequent acts of congress, certain errors in this revision were corrected. A new edition of the Revision of 1873 was authorized by acts of March 2, 1877, and March 9, 1878; this is not a new enactment, but merely a new publication; it contains a copy of the Revision of 1873, with certain specific alterations and amendments made by subsequent enactments of the 43d and 44th congresses, incorporated according to the judgment and discretion of the editor, under the authority of the acts providing for his appointment. These alterations, or amendments, were merely indicated by italics and brackets. The act of March 9, 1878, provides that the edition of 1878 shall be legal evidence of the laws therein contained in all the courts of the United States, and of the several states and territories, "but shall not preclude reference to, nor control, in case of any discrepancy, the effect of any original act as passed by congress since the first day of December, 1873."

The supplement of 1881 is official to a limited extent. The provisions in regard to it are as follows: "The publication herein authorized shall be taken to be *prima facie* evidence of the laws therein contained in all the courts of the United States, and of the several states and territories therein; but shall not preclude reference to, nor control, in case of any discrepancy, the effect of any original act as passed by congress:—*Provided*, that nothing herein contained shall be construed to change or alter any existing law;" 21 Stat. L. 388. See Wright *v.* U. S., 15 Ct. of Cl. 80, where the subject is explained by Richardson, J., one of the compilers. Volume I. Supplement to the Revised Statutes, contains all the permanent general laws enacted from the passage of the Revised Statutes in 1874, to and including the fifty-first congress, which expired in 1891, and supersedes Vol. I., prepared under resolution of June 7, 1880. The publication is *prima facie* evidence of the laws therein contained in all

of the courts of the United States. Vol. II. of the Supplement contains the general laws of the fifty-second and subsequent congresses.

COLONIAL CODES. Of these there were several adopted in the colonies prior to the Revolution.

In 1665 a code prepared by Lord Chancellor Clarendon, called the "Duke's Laws," was promulgated and went into operation at Long Island and West Chester, New York. Afterwards its provisions slowly made their way in New York and the other provinces.

It was an attempt to state the law relating to the rights of persons and property, and of procedure both civil and criminal.

The Massachusetts colony, in March, 1634, appointed a committee to revise the law. Other committees were appointed in 1635 and 1637. Maryland adopted a code in 1639. In Massachusetts in 1641, a code of laws was adopted which was called "The Liberties of the Massachusetts Colony in New England." Connecticut adopted a code in 1650, chiefly copied from the Massachusetts code. Virginia appears to have adopted a body of laws in 1611, and in 1656 their laws were reduced into one volume.

STATE CODES. New York is the pioneer in the work of codification. In that state the first act relating to procedure after the organization of state government was passed March 16, 1778. Various other acts were passed between 1801 and 1813. In 1813 there was a general revision of the law, and the subject of practice of the law. In 1828 the revisers collected into one act the various provisions relating to practice in all the courts which was made a part of the Revised Statutes. It is said that this part of the Revised Statutes constituted the first code of civil procedure in New York. It embraced nearly all the practice in all the courts and has been the basis of subsequent code revision. In 1848 the "Code of Procedure" was adopted. Mr. David Dudley Field, the eminent writer on this subject, had begun his work on law reform in 1839. In 1848 a commission of which he was chairman produced the "Code of Procedure," containing 391 sections, which was adopted in that year. This code was largely amended in 1849, and has received frequent amendments at various times since that year. It is said that there have been 1323 amendments to the Code of Civil Procedure, and that about 2500 statutes and code amendments have been passed, not counting the special acts, since the organization of the state government.

Codes of Civil Procedure. The condition of code practice in the various states may be fairly summarized as follows:—

The following states have a code practice; in some of them it is so designated; in others it is practically a complete scheme of civil procedure in statutory form:—

Alabama, Arkansas, California, Colorado, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Utah, Washington, Wisconsin, Wyoming.

The following have in effect a substantial code:—

Florida, Connecticut, Massachusetts.

The following have in effect a partial code:—

Arizona, Illinois, Maryland, Mississippi, New Mexico, Texas, Vermont.

The following have no code:—

Delaware, Maine, New Hampshire, New Jersey, Pennsylvania, Rhode Island, Virginia, West Virginia, and the District of Columbia.

Code System generally. This has been formally adopted in a few states only, though the statute law of very many states contains what are practically and substantially codes on special subjects of the character of the English partial codes above referred to.

California and Montana have adopted the entire code system, including a civil code, a code of civil procedure, a penal code, a code of criminal procedure, and a political code.

As to the working of the civil code in California after twelve years of experience, Wallace, C. J., of that state, thus expressed himself:—

"I think the civil code the most important and beneficial piece of legislation that has ever been enacted in California. It has effected more for our people than all other legislation taken together since the foundation of the state. I have never seen an unfavorable criticism of it, which was, in my judgment, well founded. I believe that while at first there was some inclination in our profession to hesitate about the propriety of its adoption, our bench and bar are now, with remarkably few exceptions, unanimous in its commendation."

In Louisiana, the civil law prevails and there are complete codes framed thereunder. One feature of the Louisiana code should be carefully noted. It assumes that cases not anticipated *may occur*. Art. 21 declares that "in all civil matters where there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably an appeal is to be made to natural law and reason, or received usages, where positive law is silent." This code was adopted in 1824 and took effect in 1825, the revision of 1870 being the same code, with the slavery provisions omitted, and with such amendments as had previously been made. It is said that the power above quoted has never been exercised except to furnish a remedy or mode of procedure. See LOUISIANA.

North Dakota also has the code system, and in addition to the subjects covered in California has probate and justices' codes.

South Dakota, in addition to its code of practice, has probate and justices' codes.

Mr. Field, in writing on the subject, "Law Reform in the United States and its Influence Abroad," in the American Law Review for August, 1891, after referring to the adoption of the New York Code of Civil Procedure, thus summarizes the action taken in other states up to that time in the same direction:

"Though this revolution in legal procedure encountered the most violent opposition from lawyers in New York, the example was speedily followed by other American states. The beginning was made

by Missouri, led by Mr. Justice Wells, District Judge of the United States for that district. Then came other states and most of the territories, at different times, numbering, I believe, twenty-five already. I am not sure that I can give the order in which they came in, but I think the following is a correct enumeration: California in 1851, Kentucky in 1851, Ohio in 1853, Iowa in 1855, Wisconsin in 1856, Kansas in 1859, Nevada in 1861, Dakota in 1862, Oregon in 1862, Idaho in 1864, Minnesota in 1866, Nebraska in 1866, Arizona in 1866, Arkansas in 1868, North Carolina in 1868, Wyoming in 1869, Washington Territory in 1869, South Carolina in 1870, Utah in 1870, Connecticut in 1879, Indiana in 1881, Colorado in 1887, Georgia later."

He also states that the Code of Criminal Procedure "was enacted by the legislature of New York in 1881. . . Before this time, however, it had been adopted by eighteen of the other American States or Territories, viz.: By California in 1850, by Kentucky in 1854, Iowa in 1858, Kansas in 1859, Nevada in 1861, Dakota in 1863, Oregon in 1864, Idaho in 1864, Montana in 1864, Washington in 1869, Wyoming in 1869, Arkansas in 1874, Utah in 1876, Arizona in 1877, Wisconsin in 1878, Nebraska in 1881, Indiana in 1881, and Minnesota in 1883;" and that before the penal code of New York was enacted in 1882 it had been adopted by California and the territories of Dakota and Idaho since admitted as states, and no inconsiderable portion of it has been adopted in Oregon.

FOREIGN COUNTRIES. On the continent of Europe the systems of law are generally founded upon the civil law, and each country has its own code, which is usually an adaptation in whole or in part of Roman Law. These codes are different in character, falling within sometimes one and sometimes another of the classes above enumerated, as they were intended to be scientific collections and classifications of existing law or to include new legislation.

The modern codes of Europe were preceded by periods of codification, such as that which Maine designates the "era of codes," in which, throughout the world, so far as the sphere of Roman and Hellenic influence extended, there appeared codes of the class of which The Twelve Tables is the conspicuous example; Maine, Anc. L. 2, 13; and the many codes of the Middle Ages based upon Roman law modified by local customs. There were also a great number of codes of maritime law, which in its nature was, and still is, well adapted to this exact form of expression, many of which are collected in the Black Book of the Admiralty (*q. v.*), which has been said to contain all maritime codes known at the time. Below are briefly referred to the best known historic codes, ancient and modern.

AUSTRIAN. *The Civil Code* was promulgated July 7, 1810, under Joseph II. (1786). The first part of it was published and submitted to the Universities and the courts of justice, and some parts having been found wholly unsuited to the purpose, were by his successor abrogated. It is founded in a great degree upon the Prussian. *The Penal Code* (1852) is said to adopt to some extent the characteristics of the French Penal Code.

The civil code originated in an ordinance issued by Maria Theresa in 1753, the avowed objects being to provide for uniformity of the law in the provinces and digest the existing law. The result was unsatisfactory and another commission authorized Counsellor Harten to construct a code, of which the conditions prescribed are quite worthy of repetition. They were:—1. To abstain from doctrinal development. 2. To have in view contestations of the most frequent occurrence. 3. To be clear in expression. 4. To be governed by natural equity rather than the principles of the Roman Law. 5. To simplify the laws and to refrain from too much subtlety in details.

BURGUNDIAN. *Lex Romana*, otherwise known in modern times as the *Papiniani Responsorum*. Promulgated A. D. 517.

It was founded on the Roman law; and its chief interest is the indication which, in common with the other Barbaric codes, it affords of the modifications of jurisprudence under the changes of society amidst which it arose.

CONSOLATO DEL MARE. A code of maritime law of high antiquity and great celebrity.

Its origin is not certainly known. It has been ascribed to the authority of the ancient kings of Arragon; but there is some reason for maintaining the theory that it was gradually collected and handed down as a digest of all the principal rules and usages established among the maritime nations of Europe from the twelfth to the fourteenth century. Since it was first promulgated at Barcelona in the fourteenth century it has been enlarged from time to time by the addition of various commercial regulations. Its doctrines are founded to a large extent on the Greek and Roman law. It seems to have been originally written in the dialect of Catalonia; but it has been translated into every language of Europe, except English. It has had great weight in determining the maritime law of Europe. It comprised the ancient ordinances of the Greek and Roman emperors and of the kings of France and Spain, and the laws of the Mediterranean islands and of Venice and Genoa. It is referred to at the present day as an authority in respect to the ownership of vessels, the rights and obligations thereto, to the rights and responsibilities of master and seamen, to the law of freight, of equipment and supply, of jettison and average, of salvage, of ransom, and of prize. The edition of Pardessus, in his *Collection de Lois Maritimes* (vol. 2), is deemed the best. There is also a French translation by Boucher, Paris, 1808. The original printed edition was published at Barcelona, in 1494. See also, Reddie, Hist. of Mar. Com. 171; Marvin's Leg. Bibl.; J. Duer, Ins.; 7 N. A. Rev. 330.

FRENCH CODES. The chief French codes of the present day are five in number, sometimes known as *Les Cinq Codes*. They were in great part the work of Napoleon, and the first in order bears his name. They are all frequently printed in one duodecimo volume. These codes do not embody the whole French law, but minor codes and a number of scattered statutes must also be resorted to upon special subjects.

Code Civil, or *Code Napoléon*, is composed of thirty-six laws, the first of which was passed in 1803 and the last in 1804, which united them all in one body, under the name of *Code Civil des Français*.

The first steps towards its preparation were taken in 1793, but it was not prepared till some years subsequently, and was finally thoroughly discussed in all its details by the Court of Cassation, of which Napoleon was president and in the discussions of which he took an active part throughout. In 1807 a new edition was promulgated, the title *Code Napoléon* being substituted. In the third edition (1816) the old title was restored; but in 1852 it was again displaced by that of Napoleon.

Under Napoleon's reign it became the law of Holland, of the Confederation of the Rhine, Westphalia, Bavaria, Italy, Naples, Spain, etc. It has undergone great amendment by laws enacted since it was established. It is divided into three books. Book 1, Of Persons and the enjoyment and privation of civil rights. Book 2, Property and its different modifications. Book 3, Different ways of acquiring property. Prefixed to it is a preliminary title, Of the Publication, Effects, and Application of Laws in General.

One of the most perspicuous and able commenta-

tors on this code is Toullier, frequently cited in this work.

Code de Procédure Civil. That part of the code which regulates civil proceedings.

It is divided into two parts. Part First consists of five books: the first of which treats of justices of the peace; the second, of inferior tribunals; the third, of royal (or appellate) courts; the fourth, of extraordinary means of proceeding; the fifth, of the execution of judgments. Part Second is divided into three books, treating of various matters and proceedings special in their nature.

Code de Commerce. The code for the regulation of commerce.

This code was enacted in 1807. Book 1 is entitled, Of Commerce in General. Book 2, Maritime Commerce. The whole law of this subject is not embodied in this book. Book 3, Failures and Bankruptcy. This book was very largely amended by the law of 28th May, 1838. Book 4, Of Commercial Jurisdiction,—the organization, jurisdiction and proceedings of commercial tribunals. This code is, in one sense, a supplement to the *Code Napoléon*, applying the principle of the latter to the various subjects of commercial law. Sundry laws amending it have been enacted since 1807. Pardessus is one of the most able of its expositors. See Goirand, Code of Commerce.

Code d'Instruction Criminelle. The code regulating procedure in criminal cases, taking that phrase in a broad sense.

Book 1 treats of the police; Book 2, of the administration of criminal justice. It was enacted in 1808 to take effect with the Penal Code in 1811.

Code Pénal. The penal or criminal code.

Enacted in 1810. Book 1 treats of penalties in criminal and correctional cases, and their effects; Book 2, of crimes and misdemeanors, and their punishment; Book 3, offences against the police regulations, and their punishment. Important amendments of this code have been made by subsequent legislation.

There is also a *Code Forestier;* and the name code has been inaptly given to some private compilations on other subjects.

GENTOO CODE. A translation of the laws of the Hindus made during the administration of Warren Hastings as Governor-General of India, and prior to the translation of the Institutes of Menu.

The formulation of Hindu law in those institutes (*q. v. supra*) had the same effect in India as had always resulted from the written expression of the law. There was gradually formed a new body of law consisting of decisions and opinions of learned men upon the construction of written law closely resembling the body of law which was engrafted upon the Institutes of Justinian. The translation of those laws in the Gentoo code was followed by a further digest under the authority of the English government, so that a very complete body of Hindu law grew up, which discloses a system of procedure resembling in a marked degree that of the present day, comprising,—a complaint, a summons or citation, an appearance, a hearing of both parties, the presence of attorneys, and a law of evidence and method of examining witnesses.

There seems also to have been in India in very early times a system of natural arbitration by neighbors, probably the earliest effort at an administration of justice and resembling the ancient county court of the Saxons. See Menu, *infra.*

GERMAN CODE. In the current which swept over Europe during the sixteenth century, substituting, as Professor Sohm phrases it, "the revived spirit of antiquity for mediæval conceptions and ideas," Germany participated in the changes which took place in all departments of science. Then the Roman law was "received" in that country, and from that time it has been a controlling factor in the jurisprudence of the countries which form the German Empire. In certain territorial limits over which the Prussian Landrecht (see PRUSSIAN CODE) held sway "the formal validity of the *Corpus Juris Civilis* has been expressly set aside," but even there "the force of Roman principles of law has nevertheless remained substantially unimpaired within large departments of German jurisprudence." Particularly is the science of the Roman private law imbedded in the German jurisprudence, and indeed the existence of law as a science in Germany dates from the introduction of the Roman law. There were no preconceived ideas with which to conflict, and it was accepted by a national intellect unprejudiced by any preconceived ideas. See Prussian Code, *infra.*

The completion of twenty-five years of the life of the Empire has been made the occasion of the construction and promulgation of a new German code which has been in the course of preparation for several years. It is an example for the most part of antecedent laws, though of an arrangement novel in various respects. The civil code, having passed the Reichstag and received the approval of the emperor, was duly promulgated August 19, 1896, to go into effect January 1, 1900, at the same time with other special codes, including those of Civil Procedure, Insolvency, Assignments, Arbitrations, and the like.

GREGORIAN. An unofficial compilation of the rescripts of the Roman emperors. It was made in the fourth century, and is not now extant.

The Theodosian Code, which was promulgated nearly a century afterwards, was a continuation of this and of the collection of Hermogenes. The chief interest of all these collections is in their relation to their great successor the Justinian Code.

HANSE TOWNS, LAWS OF THE. A code of maritime law established by the Hanseatic towns.

It was first published in German, at Lubec, in 1597. In an assembly of deputies from the several towns, held at Lubec, May 23, 1614, it was revised and enlarged. The text, with a Latin translation, was published with a commentary by Kuricke; and a French translation has been given by Cleirac in *Us et Coutumes de la Mer.* It is not unfrequently referred to on subjects of maritime law.

HENRI (*French*). The best-known of several collections of ordinances made during the sixteenth, seventeenth, and eighteenth centuries, the number of which in part both formed the necessity and furnished the material for the *Code Napoléon.*

HENRI (*Haytien*). A very judicious adaptation from the *Code Napoléon* for the Haytiens. It was promulgated in 1812 by Christophe (Henri I.).

HERMOGENIAN. An unofficial compilation made in the fourth century, supplementary to the code of Gregorius. It is not now extant.

JUSTINIAN CODE. A collection of imperial ordinances compiled by order of the emperor Justinian.

All the judicial wisdom of the Roman civilization

which is of importance to the American lawyer is embodied in the compilations to which Justinian gave his name, and from which that name has received its lustre. Of these, first in contemporary importance, if not first in magnitude and present interest, was the Code. In the first year of his reign he commanded Tribonian, a statesman of his court, to revise the imperial ordinances. The first result, now known as the *Codex Vetus*, is not extant. It was superseded a few years after its promulgation by a new and more complete edition. Although it is this alone which is now known as the Code of Justinian, yet the Pandects and the Institutes which followed it are a part of the same system, declared by the same authority; and the three together form one codification of the law of the Empire. The first of these works occupied Tribonian and nine associates fourteen months. It is comprised in twelve divisions or books, and embodies all that was deemed worthy of preservation of the imperial statutes from the time of Hadrian down. The Institutes is an elementary treatise prepared by Tribonian and two associates upon the basis of a similar work by Gaius, a lawyer of the second century.

The Pandects, which were made public about a month after the Institutes, were an abridgment of the treatises and the commentaries of the lawyers. They were presented in fifty books. Tribonian and the sixteen associates who aided him in this part of his labors accomplished this abridgment in three years. It has been thought to bear obvious marks of the haste with which it was compiled; but it is the chief embodiment of the Roman law, though not the most convenient resort for the modern student of that law.

Tribonian found the law, which for fourteen centuries had been accumulating, comprised in two thousand books, or—stated according to the Roman method of computation—in three million sentences. It is probable that this matter, if printed in law volumes such as are now used, would fill from three to five hundred volumes. The comparison, to be more exact, should take into account treatises and digests, which would add to the bulk of the collection more than to the substance of the material. The commissioners were instructed to extract a series of plain and concise laws, in which there should be no two laws contradictory or alike. In revising the imperial ordinances, they were empowered to amend in substance as well as in form.

The codification being completed, the emperor decreed that no resort should be had to the earlier writings, nor any comparison be made with them. Commentators were forbidden to disfigure the new with explanations, and lawyers were forbidden to cite the old. The imperial authority was sufficient to sink into oblivion nearly all the previously existing sources of law; but the new statutes which the emperor himself found it necessary to establish, in order to explain, complete, and amend the law, rapidly accumulated throughout his long reign. These are known as the "Novels." The Code, the Institutes, the Pandects, and the Novels, with some subsequent additions, constitute the *Corpus Juris Civilis*.

Among English translations of the Institutes are that by Cooper (Phila. 1812; N. Y. 1841)—which is regarded as a very good one—and that by Sanders (Lond. 1853), which contains the original text also, and copious references to the Digests and Code. Among the modern French commentators are Ortolan and Pasquiere.

LIVINGSTON'S CODE. Edward Livingston, one of the commissioners who prepared the Louisiana Code, prepared and presented to congress a draft of a penal code for the United States; which, though it was never adopted, is not unfrequently referred to in the books as stating principles of criminal law.

MARINE ORDINANCES OF LOUIS XIV. See ORDONNANCE DE LA MARINE, *infra*.

MENU, INSTITUTES OF. A code of Hindu law, of great antiquity, which still forms the basis of Hindu jurisprudence (Elphinstone's Hist. of India, p. 83), and is said also to be the basis of the laws of the Burmese and of the Laos. Buckle, Hist. of Civilization, vol. 1, p. 54, note 70. "It undoubtedly enshrines many genuine observances of the Hindu race, but the opinion of the best contemporary orientalists is that it does not, as a whole, represent a set of rules ever actually administered in Hindustan." Maine, Anc. Law 16.

This code contains simple rules for regulating the trial of ordinary actions; the number and competency of witnesses and sufficiency of evidence; methods of procedure in court and the judgment and its enforcement. There is no indication of such an office as the attorney, as the judge is required to examine witnesses and parties; there is also a summary of the customary law.

The institutes of Menu are in, point of the relative progress of Hindu jurisprudence, a recent production; Maine, Anc. Law 17; though ascribed to the ninth century B. C. A translation will be found in the third volume of Sir William Jones's Works. See, also, Gentoo Code, *supra*; HINDU LAW.

MOSAIC CODE. The code proclaimed by Moses for the government of the Jews, B. C. 1491.

One of the peculiar characteristics of this code is the fact that, whilst all that has ever been successfully attempted in other cases has been to change details without reversing or ignoring the general principles which form the basis of the previous law, that which was chiefly done here was the assertion of great and fundamental principles in part contrary and in part perhaps entirely new to the customs and usages of the people. These principles, thus divinely revealed and sanctioned, have given the Mosaic Code vast influence in the subsequent legislation of other nations than the Hebrews. The topics on which it is most frequently referred to as an authority in our law are those of marriage and divorce, and questions of affinity and of the punishment of murder and seduction. The commentaries of Michaelis and of Wines are valuable aids to its study.

ORDONNANCE DE LA MARINE. A code of maritime law enacted in the reign of Louis XIV.

It was promulgated in 1681, and with great completeness embodied all existing rules of maritime law, including insurance. Kent pronounces it a monument of the wisdom of the reign of Louis "far more durable and more glorious than all the military trophies won by the valor of his armies." Its compilers are unknown. An English translation is contained in the appendix to Peter's Admiralty Decisions, vol. 2. The ordinance has been at once illustrated and eclipsed by Valin's commentaries upon it.

OLERON, LAWS OF. A code of maritime law which takes its name from the island of Oleron.

Both the French and the English claim the honor of having originated this code,—the former attributing its compilation to the command of Queen Eleanor, Duchess of Guienne, near which province the island of Oleron lies; the latter ascribing its promulgation to her son, Richard I. A recent English writer considers that the greater part of it is probably of older date, and was merely confirmed by Richard; 1 Soc. Eng. 313. The latter monarch, without doubt, caused it to be improved, if he did not originate it, and he introduced it into England. He did at Chinon, in 1190, issue ordinances for the government of the navy which have been fairly described as the basis of our modern articles of war, and what they did for the navy, the code of Oleron, to which they were allied, did for the merchant service. The provisions of both are extremely interesting, and some of the most curious of them may be found in 1 Social England 312. Some additions were made to this Code by King John. It was promulgated anew in the reign of Henry III., and again confirmed in the reign of Edward III. It is most accessible to the American profession in the translation contained in the appendix to the first volume of Peters's Admiralty Decisions. The French version, with Cleirac's commentary, is contained in *Us et Coutumes de la Mer*. The subjects upon

which it is now valuable are much the same as those of the *Consolato del Mare*.

OSTROGOTHIC. The code promulgated by Theodoric, king of the Ostrogoths, at Rome, A. D. 500. It was founded on the Roman law.

PRUSSIAN CODE. *Allgemeines Landrecht.* The former code of 1751 was not successful, and the Grand Chancellor de Cocceji was charged by Frederick II. with the duty of codifying the law of Prussia; he died in 1735, and afterwards the work was arrested by the seven years' war, but was resumed in 1780, under Frederic II., and a project was prepared by Dr. Carmer and Dr. Volmar, which was submitted to the *savans* of Europe and to the royal courts. After long and thorough discussion, the present code was finally promulgated and put in force June 1, 1794, by Frederick William, and then for the first time all Europe was united under one system of law. It is known also as the Code Frederic. See German code, *supra*.

RHODIAN LAWS. A maritime code adopted by the people of Rhodes, and in force among the nations upon the Mediterranean nine or ten centuries before Christ. There is reason to suppose that the collection under this title in Vinnius is spurious, and, if so, the code is not extant. See Marsh. on Ins. b. 1, c. 4, p. 15.

THEODOSIAN. A code compiled by a commission of eight, under the direction of Theodosius the Younger.

It comprises the edicts and rescripts of sixteen emperors, embracing a period of one hundred and twenty-six years. It was promulgated in the Eastern Empire in 438, and quickly adopted, also, in the Western Empire. The great modern expounder of this code is Gothofredus (Godefroi). The results of modern researches regarding this code are well stated in the Foreign Quar. Rev. vol. 9, 374.

TWELVE TABLES. Laws of ancient Rome, compiled on the basis of those of Solon and other Greek legislators.

They first appeared in the year of Rome 303, inscribed on ten plates of brass. In the following year two more were added; and the entire code bore the name of the Laws of the Twelve Tables. The principles they contained were the germ of the body of the Roman law, and enter largely into the modern jurisprudence of Europe. See fragment of the law of the Twelve Tables, in Cooper's Justinian 656; Gibbon's Rome c. 44; Maine, Anc. Law 2.

VISIGOTHIC. The *Lex Romani;* now known as *Breviarum Alaricianum.* Ordained by Alaric II. for his Roman subjects, A. D. 506.

WISBUY, LAWS OF. A concise but comprehensive code of maritime law, established by the "merchants and masters of the magnificent city of Wisbuy."

The port of Wisbuy, now in ruins, was situated on the northwestern coast of Gottland, in the Baltic sea. It was the capital of the island, and the seat of an extensive commerce, of which the chief relic and the most significant record is this code. It is a mooted point whether this code was derived from the Laws of Oleron, or that from this; but the similarity of the two leaves no doubt that one was the offspring of the other. It was of great authority in the northern parts of Europe. "*Lex Rhodia navalis,*" says Grotius, "*pro jure gentium in illo mare Mediterraneo vigebat; sicut apud Gallium leges Oleronis, et apud omnes transrhenanos, legis Wisbuenses. De Jure B.* lib. 2, c. 3. It is still referred to on subjects of maritime law. An English translation will be found in the appendix to the first volume of Peter's Admiralty Decisions.

In a learned address before the American Bar Association (Annual Report, 1886), upon "Codification, the Natural Result of the Evolution of the Law," Mr. Semmes, one of the most earnest advocates of the merits of the civil law and the code system, sketches the history of the codes of Europe and the relation of the civil to the common law. From this paper many of the historical facts connected with the European codes are obtained, and to it are referred those who wish to pursue the study of the subject for an admirable guide to the learning of the civilians and a judicious argument in favor of the system. Mr. Semmes in his conclusion says:—

"The history of codification teaches that the task of preparing a code of laws is difficult, that its proper execution is a work of years, to be entrusted, not to a deciduous committee of fugitive legislators, but to a permanent commission of the most enlightened and cultivated jurists, whose project, prior to adoption, should be subjected to rigid and universal criticism."

See as to codification, Matthews, Codification (pamphlet); 14 Am. L. Rev. 662; 5 *id.* 1; 1 So. L. Rev. N. S. 192; 6 *id.* 1; Outlines of an International Code, by David Dudley Field; 27 Law Mag. (Engl.) 3d ser. 312; Law Mag. & Rev. (1872) 963; *id.* (1873) 420; 3 *id.* (4th ser. 1877–8) 259; 5 *id.* 59; see 4 *id.* 31; Mr. James C. Carter's pamphlet (N. Y., 1884); Rept. Am. Bar Assn. 1889.

CODEX (Lat.). A volume or roll. The code of Justinian.

CODICIL. Some addition to, or qualification of, a last will and testament.

This term is derived from the Latin *codicillus*, which is a diminutive of *codex*, and in strictness imports a little code or writing,—a little will. In the Roman Civil Law, codicil was defined as an act which contains dispositions of property in prospect of death, without the institution of an heir or executor. Domat, Civil Law, p. ii. b. iv. tit. i. s. 1; Just. *De Codic.* art. i. s. 2. So, also, the early English writers upon wills define a codicil in much the same way. "A codicil is a just sentence of our will touching that which any would have done after their death, without the appointing of an executor." Swinb. Wills, pt. i. s. 5, pl. 2. But the present definition of the term is that first given. 1 Wills, Exrs. 8; Swinb. Wills, pt. i. s. v. pl. 5.

Under the Roman Civil Law, and also by the early English law, as well as the canon law, all of which very nearly coincided in regard to this subject, it was considered that no one could make a valid will or testament unless he did name an executor, as that was of the essence of the act. This was attended with great formality and solemnity, in the presence of seven Roman citizens as witnesses, *omni exceptione majores.* Hence a codicil is there termed an unofficious, or unsolemn, testament. Swinb. Wills, pt. i. s. v. pl. 4; Godolph, pt. i. c. 1, s. 2; *id.* pt. i. c. 6, s. 2; Plowd. 185; where it is said by the judges, that "without an executor a will is null and void," which has not been regarded as law, in England, for the last two hundred years, probably.

The office of a codicil under the civil law seems to have been to enable the party to dispose of his property, in the near prospect of death, without the requisite formalities of executing a will (or testament, as it was then called). Codicils were strictly confined to the disposition of property; whereas a testament had reference to the institution of an heir or executor, and contained trusts and confidences to be carried into effect after the decease of the testator. Domat, b. iv. tit. i.

In the Roman Civil Law there were two kinds of codicils: the one, where no testament existed, and which was designed to supply its place as to the disposition of property, and which more nearly resembled our *donatio causa mortis* than anything else now in use; the other, where a testament did exist, had relation to the testament, and formed a part of it and was to be construed in connection with it. Domat, p. ii. b. iv. tit. i. s. i. art. v. It is in this last sense that the term is now universally

used in the English law, and in the American states where the common law prevails.

Codicils owe their origin to the following circumstance. Lucius Lentulus, dying in Africa, left codicils, confirmed by anticipation in a will of former date, and in those codicils requested the Emperor Augustus, by way of *fidei commissum*, or trust, to do something therein expressed. The emperor carried this will into effect, and the daughter of Lentulus paid legacies which she would not otherwise have been legally bound to pay. Other persons made similar *fidei commissa*, and then the emperor, by the advice of learned men whom he consulted, sanctioned the making of codicils, and thus they became clothed with legal authority. Inst. 2. 25; Bowy. Com. 155.

All codicils are part of the will, and are to be so construed; 4 Bro. Ch. 55; 17 Sim. 108; 16 Beav. 510; 2 Ves. Sen. Ch. 242, by Lord Hardwicke; 4 Y. & C. Ch. 160; 2 Russ. & M. 117; 3 Sandf. Ch. 11; 4 Kent 531. See 88 Ala. 427; 43 Barb. 424; and executed with the same formalities; Shoul. Wills 359; 4 Kent 531; 13 Gray 103.

A codicil properly executed to pass real and personal estate, and in conformity with the statute of frauds, and upon the same piece of paper with the will, operates as a republication of the will, so as to have it speak from that date; 4 Pa. 376; 4 Dane Abr. c. 127, a. 1, § 11, p. 550; 14 B. Monr. 333; 1 Cush. 118; 3 M. & C. 359. So also it has been held that it is not requisite that the codicil should be on the same piece of paper in order that it should operate as a republication of the will; 1 Hill 590; 7 *id.* 346; 3 Zabr. 447; 1 Ves. Sen. 442; 14 Mo. 587; but where it is on the same piece of paper, not signed, only the will proper which was signed should be admitted to probate; 9 Pa. Co. Ct. R. 333; but see 5 Har. & J. 371.

A codicil duly executed, and attached or referring to a paper defectively executed as a will, has the effect to give operation to the whole, as one instrument; Shoul. Wills 448; 3 B. Monr. 390; 6 Johns. Ch. 374, 375; 14 Pick. 543; 16 Ves. Ch. 167; 7 *id.* 98; 1 Ad. & E. 423; 85 Hun 580. See numerous cases cited by Mr. Perkins, Piggott *v.* Walker, 7 Ves. Ch., Sumner ed. 98; 1 Cr. & M. 42.

There may be numerous codicils to the same will. In such cases, the later ones operate to revive and republish the earlier ones; 3 Bingh. 614; 12 J. B. Moore 2. See 55 Md. 365.

But in order to set up an informally executed paper by means of one subsequently executed in due form, referring to such informal paper, the reference must be such as clearly to identify the paper; 4 N. Y. 140.

A codicil which depends on the will for interpretation or execution falls, if the will be revoked; 1 Tucker 436; 5 Bush 337.

It is not competent to provide by will for the disposition of property to such persons as shall be named in a subsequent codicil, not executed according to the prescribed formalities in regard to wills; since all papers of that character, in whatever form, if intended to operate only in the disposition of one's property after death, are of a testamentary character, and must be so treated; 2 Ves. Ch. 204; 2 M. & K. 765; 1 V. & B. 422, 445.

So much of the will as is inconsistent with the codicil is revoked; 14 How. 390; 28 Vt. 374.

A codicil whose only provision is the appointment of an executor who died, cannot be admitted to probate apart from the will; 148 Pa. 5. A testator executed a codicil which was described as "a codicil to my will executed some years ago." After his death the will could not be found, but probate of the codicil was granted; [1892] Prob. 254. See WILLS.

COEMPTIO (Lat.). **In Civil Law.** The ceremony of celebrating marriage by solemnities.

The parties met and gave each other a small sum of money. They then questioned each other in turn. The man asked the woman if she wished to be his *mater-familias*. She replied that she so wished. The woman then asked the man if he wished to be her *pater-familias*. He replied that he so wished. They then joined hands; and these were called nuptials by *coemptio*. Boethius, *Coemptio*; Calvinus, Lex.; Taylor, Law Gloss.

COERCION. Constraint; compulsion; force.

Direct or positive coercion takes place when a man is by physical force compelled to do an act contrary to his will: for example, when a man falls into the hands of the enemies of his country, and they compel him, by a just fear of death, to fight against it. See 4 Ct. Cls. 1; *id.* 288, 317.

Implied coercion exists where a person is legally under subjection to another, and is induced, in consequence of such subjection, to do an act contrary to his will.

As will is necessary to the commission of a crime or the making of a contract, a person actually coerced into either has no will on the subject, and is not responsible; 1 East, Pl. Cr. 225; 5 Q. B. 279; 45 Mich. 2; 90 Pa. 161. The command of a superior to an inferior; 3 Wash. C. C. 209, 220; 12 Metc. 56; 1 Blatchf. 549; 13 How. 115; of a parent to a child; Broom, Max. 11; of a master to his servant, or a principal to his agent; 13 Mo. 246; 3 Cush. 279; 5 Miss. 304; 14 Ala. 365; 22 Vt. 32; 14 Johns. 119; do not amount to coercion.

As to persons acting under the constraint of superior power, and, therefore, not criminally amenable, the principal case is that of married women, with respect to whom the law recognizes certain presumptions. Thus, if a wife commits a felony, other than treason or homicide, or, perhaps, highway robbery, in company with her husband, the law presumes that she acted under his coercion, and, consequently, without any guilty intent, unless the fact of non-coercion is distinctly proved; Clarke, Cr. L. 77. See 2 C. & K. 887, 903; 103 Mass. 71; 65 N. C. 398. This presumption appears on some occasions to have been considered conclusive, and is still practically regarded in no very different light, especially when the crime is of a flagrant character; but the better opinion seems to be that in every case the presumption may now be rebutted by positive proof that the woman acted as

a free agent; and in one case that was much discussed, the Irish judges appear to have considered that such positive proof was not required, but that the question was always one to be determined by the jury on the evidence submitted to them; Jebb 93; 1 Mood. 143. It seems that a married woman cannot be convicted under any circumstances as a receiver of stolen goods, when the property has been taken by her husband and given to her by him; 1 Dearsl. 184.

Husband and wife were jointly charged with felonious wounding with intent to disfigure and to do grievous bodily harm. The jury found that the wife acted under the coercion of the husband, and that she did not personally inflict any violence on the prosecutor. On this finding, the wife was held entitled to an acquittal; 1 Dearsl. & B. 553.

Whether the doctrine of coercion extends to any misdemeanor may admit of some doubt; but the better opinion seems to be that, provided the misdemeanor is of a serious nature, as, for instance, the uttering of base coin, the wife will be protected in like manner as in cases of felony; although it has been distinctly held that the protection does not extend to assaults and batteries or the offence of keeping a brothel; Russ. Cr. 38; 2 Lew. 229; 8 C. & P. 19, 541; 1 Metc. 151; 10 Mass. 152. Indeed, it is probable that in all inferior misdemeanors this presumption, if admitted at all, would be held liable to be defeated by far less stringent evidence of the wife's active co-operation than would suffice in cases of felony; 8 C. & P. 541; 2 Mood. 53; 1 Tayl, Ev. 152. The law upon responsibility of married women for crime is fully stated in 1 B. & H. Lead. Cr. Cas. 76–87.

CO-EXECUTOR. One who is a joint executor with one or more others.

COFRADIA. The congregation or brotherhood entered into by several persons for the purpose of performing pious works. No society of this kind can be lawfully formed without license from the king and the bishop of the diocese.

COGNATES. In Civil and Scotch Law. Relations through females. 1 Mackeldey, Civ. Law 137; Bell, Dict.

COGNATI. In Civil Law. Collateral heirs through females. Relations in the line of the mother. 2 Bla. Com. 235.

The term is not used in the civil law as it now prevails in France. In the common law it has no technical sense; but as a word of discourse in English it signifies, generally, allied by blood, related in origin, of the same family.

Originally, the maternal relationship had no influence in the formation of the Roman family, nor in the right of inheritance. But the edict of the prætor established what was called the Prætorian succession, or the *bonorum possessio*, in favor of cognates in certain cases. Dig. 38. 8. See PATERFAMILIAS; AGNATI.

COGNATION. In Civil Law. Signifies generally the kindred which exists between two persons who are united by ties of blood or family, or both.

Civil cognation is that which proceeds alone from the ties of families, as the kindred between the adopted father and the adopted child.

Mixed cognation is that which unites at the same time the ties of blood and family, as that which exists between brothers the issue of the same lawful marriage. Inst. 3. 6; Dig. 38. 10.

Natural cognation is that which is alone formed by ties of blood; such is the kindred of those who owe their origin to an illicit connection, either in relation to their ascendants or collaterals.

COGNISANCE. See COGNIZANCE.

COGNITIONIBUS ADMITTENDIS. A writ requiring a justice or other qualified person, who has taken a fine and neglects to certify it in the court of common pleas, to do so.

COGNIZANCE (Lat. *cognitio*, recognition, knowledge; spelled, also, *Conusance* and *Cognisance*). Acknowledgment; recognition; jurisdiction; judicial power; hearing a matter judicially. See 12 Ad. & El. 259.

Of Pleas. Jurisdiction of causes. A privilege granted by the king to a city or town to hold pleas within the same. *Termes de la Ley.* It is in frequent use among the older writers on English law in this latter sense, but is seldom used, if at all, in America, except in its more general meaning. The universities of Cambridge and Oxford possess this franchise: 11 East, 543; 1 W Bla. 454; 10 Mod. 126; 3 Bla. Com. 298.

Claim of Cognizance (or of Conusance). An intervention by a third person, demanding judicature in the cause against the plaintiff, who has chosen to commence his action out of claimant's court. 2 Wils. 409; 2 Bla. Com. 350, n.

It is a question of jurisdiction between the two courts, Fortesc. 157; 5 Viner, Abr. 588, and not between the plaintiff and defendant, as in the case of plea to the jurisdiction, and must be demanded by the party entitled to conusance, or his representative, and not by the defendant or his attorney. 1 Chit. Pl. 403.

There are three sorts of conusance. *Tenere placita*, which does not oust another court of its jurisdiction, but only creates a concurrent one. *Cognitio placitorum*, when the plea is commenced in one court, of which conusance belongs to another. A conusance of exclusive jurisdiction: as, that no other court shall hold plea, etc. Hardr. 509; Bac. Abr. *Courts*, D.

In Pleading. The answer of the defendant in an action of replevin who is not entitled to the distress or goods which are the subject of the action—acknowledging the taking, and justifying it as having been done by the command of one who is so entitled. Lawes, Pl. 35, 36. An acknowledgment made by the deforciant, in levying a fine, that the lands in question are the right of

the complainant. 2 Bla. Com. 350. See 21 Pick. 87; 5 Hill 194.

COGNOMEN (Lat.). A family name.

The *prænomen* among the Romans distinguished the person, the *nomen* the gens, or all the kindred descended from a remote common stock through males, while the *cognomen* denoted the particular family. The *agnomen* was added on account of some particular event, as a further distinction. Thus, in the designation Publius Cornelius Scipio Africanus, Publius is the *prænomen*, Cornelius is the *nomen*, Scipio the *cognomen*, and Africanus the *agnomen*. Vicat. These several terms occur frequently in the Roman laws. See Cas. *temp.* Hardw. 286; 6 Co. 65; 1 Tayl. 148.

COGNOVIT ACTIONEM (Lat. he has confessed the action. *Cognovit* alone is in common use with the same significance).

In Pleading. A written confession of an action by a defendant, subscribed, but not sealed, and authorizing the plaintiff to sign judgment and issue execution, usually for a sum named.

It is given after the action is brought to save expense, and differs from a warrant of attorney, which is given before the commencement of any action and is under seal. 3 Bouvier, Inst. 3229.

COHABIT (Lat. *con* and *habere*). To live together in the same house, claiming to be married.

The word does not include in its signification, necessarily, the occupying the same bed; 1 Hagg. Cons. 144; 4 Paige, Ch. 425; though the word is popularly, and sometimes in statutes, used in this latter sense; 20 Mo. 210; Bish. Marr. & Div. § 506, n.; 116 Ind. 464; 82 Va. 115; 159 Mass. 61; 116 U. S. 55.

To live together in the same house.

Used without reference to the relation of the parties to each other as husband and wife, or otherwise. Used of sisters or other members of the same family, or of persons not members of the same family, occupying the same house; 2 Vern. 323; Bish. Marr. & Div. & Sep. 506, n. See 75 Pa. 207; 32 Ark. 187; 54 Me. 565.

COIF. A head-dress.

In England there are certain serjeants at law who are called serjeants of the coif, from the lawn coif they wear on their heads under their thin caps when they are admitted to that order. It was anciently worn as a distinguishing badge. Spelman, Gloss.

COIN. A piece of metal stamped with certain marks and made current at a certain value. Strictly speaking, coin differs from money as the species differs from the genus. Money is any matter, whether metal, paper, beads, or shells, which has currency as a medium in commerce. Coin is a particular species, always made of metal, and struck according to a certain process called coining. Wharton. To fashion pieces of metal into a prescribed shape, weight, and fineness, and stamp them with prescribed devices, by authority of government, that they may circulate as money. 22 Ind. 306; 2 Duvall 29. Congress alone has the power to coin money; Const. U. S. Art. 1, § 7; but the states may pass laws to punish the circulation of false coin; 5 How. 410.

So long as a genuine silver coin is worn only by natural abrasion, is not appreciably diminished in weight, and retains the appearance of a coin duly issued from the mint, it is a legal tender for its original value; 12 Fed. Rep. 840. See 160 U. S. 288.

COLIBERTUS. One who, holding in free socage, was obliged to do certain services for the lord. A middle class of tenants between servile and free, who held their freedom of tenure on condition of performing certain services. Said to be the same as the *conditionales*. Cowel.

COLLATERAL (Lat. *con*, with, *latus*, the side). That which is by the side, and not the direct line. That which is additional to or beyond a thing.

COLLATERAL ANCESTORS. Sometimes used to designate uncles and aunts and other collateral ancestors of the person spoken of, who are in fact not his ancestors. 3 Barb. Ch. 446.

COLLATERAL ASSURANCE. That which is made over and above the deed itself.

COLLATERAL CONSANGUINITY. That relationship which subsists between persons who have the same ancestors but not the same descendants,—who do not descend one from the other. 2 Bla. Com. 203.

The essential fact of consanguinity (common ancestral blood) is the same in lineal and collateral consanguinity; but the relationship is aside from the direct line. Thus, father, son, and grandson are lineally related; uncle and nephew, collaterally.

COLLATERAL ESTOPPEL. The collateral determination of a question by a court having general jurisdiction of the subject. See 26 Vt. 209.

COLLATERAL FACTS. Facts not directly connected with the issue or matter in dispute.

Such facts are inadmissible in evidence; but, as it is frequently difficult to ascertain *a priori* whether a particular fact offered in evidence will or will not clearly appear to be material in the progress of the cause, in such cases it is usual in practice for the court to give credit to the assertion of the counsel who tenders such evidence, that the facts will turn out to be material. But this is always within the sound discretion of the court. It is the duty of the counsel, however, to offer evidence, if possible, in such order that each part of it will appear to be pertinent and proper at the time it is offered; and it is expedient to do so, as this method tends to the success of a good cause.

When a witness is cross-examined as to collateral facts, the party cross-examining will be bound by the answer; and he cannot, in general, contradict him by another witness; Rosc. Cr. Ev. 139.

COLLATERAL INHERITANCE TAX. A tax levied upon the collateral devolution of property by will or under the intestate law. See TAX.

COLLATERAL ISSUE. An issue taken upon some matter aside from the general issue in the case.

Thus, for example, a plea by the criminal that he is not the person attainted when an interval exists between attainder and execution, a plea in abatement, and other such pleas, each raises a collateral issue. 4 Bla. Com. 338, 396.

COLLATERAL KINSMEN. Those who descend from one and the same common ancestor, but not from one another.

Thus brothers and sisters are collateral to each other; the uncle and the nephew are collateral kinsmen, and cousins are the same. All kinsmen are either *lineal* or *collateral*.

COLLATERAL LIMITATION. A limitation in the conveyance of an estate, giving an interest for a specified period, but making the right of enjoyment depend upon some *collateral* event; as an estate to A till B shall go to Rome. Park, Dow. 163; 4 Kent 128; 1 Washb. R. P. 215.

COLLATERAL SECURITY. A separate obligation attached to another contract to guaranty its performance. The transfer of property or of other contracts to insure the performance of a principal engagement. See 38 Ga. 292; 9 Ia. 331.

The property or securities thus conveyed are also called collateral securities; 1 Pow. Mortg. 393; 2 *id.* 666, n. 871; 3 *id.* 944, 1001; 10 Watts 270. See PLEDGE; CHATTEL MORTGAGE.

COLLATERAL UNDERTAKING. A contract based upon a pre-existing debt, or other liability, and including a promise to pay, made by a third person, having immediate respect to and founded upon such debt or liability, without any new consideration moving to him. 7 Har. & J. 391.

COLLATERAL WARRANTY. Warranty as to an estate made by one who was ancestor to the heir thereof, either actually or by implication of law, in respect to other property, but who could not have been so in respect to the estate in question.

Warranty made where the heir's title to the land neither was nor could have been derived from the warranting ancestor. *Termes de la Ley.*

Collateral warranty is spoken of as "a mode of common assurance." The statute of Gloucester being silent as to a collateral warranty, a warranty of a collateral ancestor, whose heir the issue in tail might be descending upon the latter, would bind him without assets by force of the common law. Therefore, by getting a collateral relation, whose heir the issue in tail was to be, to concur in the alienation and bind himself and his heirs to warranty, the statute *De Donis* was successfully evaded.

Thus, if a tenant in tail should discontinue the tail, have issue and die, and the uncle of the issue should release to the discontinuee and die without issue, this is a collateral warranty to the issue in tail. Littleton § 709. The tenant in tail having discontinued as to his issue before his birth, the heir in tail was driven to his action to regain possession upon the death of his ancestor tenant in tail; and in this action the collateral warranty came in as an estoppel. 2 Washb. R. P. 670.

The heir was barred from ever claiming the land, and, in case he had assets from the warranting ancestor, was obliged to give the warrantee other lands in case of an eviction. 4 Cruise, Dig. 436.

By the statute of Gloucester, 6 Edw. I. c. 3, tenant by the curtesy was restrained from making such warranty as should bind the heir. By a favorable construction of the statute *De Donis*, and by the statute 3 & 4 Will. IV. c. 74, tenants in tail were deprived of the power of making collateral warranty. By statute 11 Hen. VII. c. 20, warranty by a tenant in dower, with or without the assent of her subsequent husband, was prevented; and finally the statute 4 & 5 Anne, c. 16, declares all warranties by a tenant for life void against the heir, unless such ancestor has an estate of inheritance in possession. See Co. Litt. 373, Butler's note [328]; Stearns, R. Act. 135, 372.

It is doubtful if the doctrine has ever prevailed to a great extent in the United States, and the statute of Anne has not been generally adopted in the American statute law, although re-enacted in New York; 4 Kent *469; and in New Jersey; 3 Halst. 106. It has been adopted and is in force in Rhode Island; 1 Sumn. 235; and in Delaware; 1 Harr. 50. In Kentucky and Virginia, it seems that collateral warranty binds the heir to the extent of assets descended; 1 Dana 59. In Pennsylvania, the statute of Gloucester is in force, but the statute of Anne is not, and a collateral warranty of the ancestor, with sufficient real assets descending to the heirs, bars them from recovering the lands warranted; 104 Pa. 575. See 2 Bla. Com. 301; 2 Washb. R. P. 668. If the learning of collateral warranty has been called difficult, it is simply because the law of warranty came to be turned from the purpose of its introduction,—that of protection and defence,—and fashioned into a remedy to meet an entirely different purpose. Later, collateral warranty ceased to be used for the purpose of barring estates tail, and its use could never have been universal. Rawle, Cov. for Title, secs. 8, 9. See Litt. § 709; 12 Mod. 513; Year Book 12; Edw. IV. 19; Tudor, Lead. Cas. R. P. 695; Pig. Recov. 9.

COLLATERALES ET SOCII. The former title of masters in chancery.

COLLATIO BONORUM. A collation of goods.

COLLATION. **In Civil Law.** The supposed or real return to the mass of the succession, which an heir makes of the property he received in advance of his share or otherwise, in order that such property may be divided together with the other effects of the succession. See 9 La. Ann. 96; 4 Mart. U. S. 557.

As the object of collation is to equalize the heirs, it follows that those things are excluded from collation which the heir acquired by an onerous title from the ancestor; that is, where he gave a valuable consideration for them. And, upon the same principle, if a co-heir claims no share of the estate, he is not bound to collate. *Qui non vult hereditatem non cogitur ad collationem.* It corresponds to the common law hotchpot; 1 Sumn. 421; 2 Bla. Com. 517.

In Ecclesiastical Law. The act by which the bishop who has the bestowing of a benefice gives it to an incumbent.

Where the ordinary and patron were the same person, presentation and institution to a benefice became one and the same act; and this was called collation. Collation rendered the living full except as against the king; 1 Bla. Com. 391. An advowson under such circumstances is termed collative; 2 Bla. Com. 22.

In Practice. The comparison of a copy

with its original, in order to ascertain its correctness and conformity. The report of the officer who made the comparison is also called a collation.

COLLECTOR. One appointed to receive taxes or other impositions: as, collector of taxes, collector of militia fines, etc. A person appointed by a private person to collect the credits due him.

COLLECTOR OF THE CUSTOMS. An officer of the United States, appointed for the term of four years. Rev. Stat. U. S. § 2613. His general duties are defined in § 2621.

COLLEGA. In Civil Law. One invested with joint authority. A colleague; an associate. Black, L. Dict.

COLLEGE. An organized collection or assemblage of persons. A civil corporation, society, or company, having, in general, some literary object.

The assemblage of the cardinals at Rome is called a college. The body of presidental electors is called the electoral college, although the whole body never come together.

COLLEGIUM (Lat. *colligere*, to collect). **In Civil Law.** A society or assemblage of those of the same rank or honor. An army. A company, in popular phrase. The whole order of bishops. Du Cange.

Collegium illicitum. One which abused its right, or assembled for any other purpose than that expressed in its charter.

Collegium licitum. An assemblage or society of men united for some useful purpose or business, with power to act like a single individual.

All *collegia* were *illicita* which were not ordained by a decree of the senate or of the emperor; 2 Kent 269.

COLLIERY or COALERY. A coal mine, coal pit, or place where coals are dug, with the engines and machinery used in discharging the water and raising the coal. Webster.

Colliery is a collective compound including many things, and is not limited to the lease and fixtures of a tunnel, drift, shaft, slope, or vein from which the coal is mined; 58 Pa. 85.

COLLISION. In Maritime Law. The act of ships or vessels striking together, or of one vessel running against or foul of another.

It may happen *without fault*, no blame being imputable to those in charge of either vessel. In such case, in the English, American, and French courts, each party must bear his own loss; Pardessus, *Droit Comm.* p. 4, t. 2, c. 2, § 4; 14 How. 352; 1 Pars. Sh. & Adm. 525.

A collision by *inevitable accident* is when a collision is caused exclusively by natural causes, without any fault on the part of the owners or those in charge; 23 Wall. 169; 3 Cliff. 456; 12 Ct. Cl. 480. It must appear that neither vessel was in fault; 3 Cliff. 636. Where the captain and crew, except the second mate, were taken sick, and a collision occurred, through the absence of a lookout, it was held to be inevitable accident; 8 Reporter 389. See also 7 Biss. 249.

It may happen by *mutual fault*, that is, by the misconduct, fault, or negligence of those in charge of both vessels; 49 Fed. Rep. 475; 50 *id.* 581, 590; 53 *id.* 286; 9 C. C. A. 73. In such case, neither party has relief at common law; 3 Kent 231; 3 C. & P. 528; 21 Wend. 188, 615; 6 Hill 592; 12 Metc. 415; 26 Me. 39; (though now otherwise in England by the Judicature Act 1873;) but the maritime courts aggregate the damages to both vessels and their cargoes, and then divide the same equally between the two vessels; 3 Kent 232; 1 Conkl. Adm. 374–376; 17 How. 170; 23 Wall. 84; 3 Ben. 371; 49 Fed. Rep. 765; 1 C. C. A. 224; 49 Fed. Rep. 169; 51 *id.* 766; 56 *id.* 271; 122 U. S. 97. See 1 Swab. 60–101. But where the collision is by intentional wrong of both parties, the libel will be dismissed; 4 Blatch. 124.

It may happen by *inscrutable fault*, that is, by the fault of those in charge of one or both vessels and yet under such circumstances that it is impossible to determine who is in fault. In such case the American courts of admiralty and the European maritime courts adopt the rule of an equal division of the aggregate damage; 1 Abb. N. S. 451; Daveis 365; Flanders, Mar. Law, 296. But the English courts have refused a remedy in admiralty; 2 Hagg. Adm. 145; 6 Thornt. 240; and see 2 Hugh. 128.

It may happen *by the fault* of those belonging to one of the colliding vessels, without any fault being imputable to the other vessel. In such case the owners of the vessel in fault must bear the damage which their own vessel has sustained, and are liable as well as their master to a claim for compensation from the owners of the other vessel for the damage done to her; 1 Swab. 23, 173, 200, 211; 3 W. Rob. 283; 1 Blatchf. 211; 2 Wall. Jr. 52; 1 How. 28; 13 *id.* 101. See 48 Fed. Rep. 334; although wilfully committed by the master; Crabbe 22; 1 Wash. C. C. 13; 3 *id.* 262. But see 1 W. Rob. 399; 2 *id.* 502; 1 Hill 343; 19 Wend. 343; 1 East 106; 6 Jur. 443.

Where one vessel, clearly shown to be guilty of a fault adequate in itself to have caused a collision, seeks to impugn the other vessel, there is a presumption in favor of the latter, which can only be rebutted by clear proof of a contributing fault, and this principle is peculiarly applicable to a vessel at anchor, complying with regulations concerning lights and receiving injuries, through the fault of a steamer in motion; 158 U. S. 186. If a cargo be damaged by collision between two vessels, the owner may pursue both vessels or either, or the owners or both, or either; and in case he proceeds against one only, and both are held in fault, he may recover his entire damages of the one sued; 153 U. S. 303.

These four classes of cases are noted in 2 Dods. 85, by Lord Stowell.

Full compensation is, in general, to be

made in such cases for the loss and damage which the prosecuting party has sustained by the fault of the party proceeded against; 2 W. Rob. 279; including all damages which are fairly attributable exclusively to the act of the original wrong-doer, or which may be said to be the direct consequence of his wrongful act; 3 W. Rob. 7, 282; 11 M. & W. 228; 1 Swab. 200; 1 Blatchf. 211; 2 Wall. Jr. 52; 1 How. 28; 13 *id.* 113; 17 *id.* 170.

The personal liability of the owners is, however, limited in some cases to the value of the vessel and freight (but not by common law, or the earlier civil law, or the earlier general maritime law); *Code de Comm.* art. 216; Stat. 17 & 18 Vict. c. 104 (Merchants' Shipping Act), pt. 9. § 503; 9 U. S. Stat. L. 635; 10 *id.* 68, 72, 73; 3 W. Rob. 16, 41, 101; 1 E. L. & Eq. 637; 3 Hagg. Adm. 431; 15 M. & W. 391; 3 Stor. 465; Daveis 172; 2 Am. L. Reg. 157; 13 Wall. 104. See 5 Mich. 368; 53 Fed. Rep. 952. The owner is not liable in respect of the insurance moneys; 8 Ben. 312; 9 Cent. L. J. 285; nor for loss of bounty the vessel might have earned; 3 C. C. A. 534. In maritime law the vessel itself is hypothecated as security for the injury done in such cases; 1 Swab. 1, 3; 22 E. L. & Eq. 62, 72; 14 How. 351; 16 *id.* 469. In England, the owner's liability is the value of the offending ship in her undamaged state; by the American and continental rule, it is the value of the ship immediately after the collision; 9 Cent. L. J. 285. When an owner has neglected to surrender any part of his vessel, he cannot avail himself of this limited liability; 24 Int. Rev. Rec. 198; nor can he where he has parted with his interest in, or title to, the ship before offering to surrender her; *id.* 123.

For the prevention of collisions, certain rules have been adopted (see NAVIGATION RULES) which are binding upon vessels approaching each other from the time the necessity for precaution begins, and continue to be applicable, as the vessels advance, so long as the means and opportunity to avoid the danger remain; 21 How. 372. But, whatever may be the rules of navigation in force at the place of collision, it is apparent that they must sometimes yield to extraordinary circumstances, and cannot be regarded as binding in all cases. Thus, if a vessel necessarily goes so near a rock, or the land, that by following the ordinary rules she would inevitably go upon the rock, or get on shore or aground, no rule should prevail over the preservation of property and life; 1 W. Rob. 478, 485; 4 J. B. Moore 314; 123 U. S. 349; 150 *id.* 674; but obedience to the rules is not a fault, even if a different course would have prevented a collision, and the necessity must be clear and the emergency sudden and alarming before an act of disobedience can be excused; 150 U. S. 674. No vessel should unnecessarily incur the probability of a collision by a pertinacious adherence to the rule of navigation; 1 W. Rob. 471, 478; 2 Wend. 452; and if it was clearly in the power of one of the vessels which came into collision to have avoided all danger by giving way, she will be held bound to do so, notwithstanding the rule of navigation; 6 Thornt. Adm. 600, 607; 3 Cliff. 117. But a vessel is not required to depart from the rule when she cannot do so without danger; 2 Curt. C. C. 363; 18 How. 581.

There must be a lookout properly *stationed and kept;* and under circumstances of special danger, two; 158 U. S. 186; and the absence of such a lookout is *prima facie* evidence of negligence; 10 How. 557; 23 *id.* 448; Daveis 359; 1 C. C. A. 219; 50 Fed. Rep. 585. The rule requiring a lookout admits of no exception on account of size in favor of any craft capable of committing injury; 56 Fed. Rep. 271. The absence of a lookout is not material where the presence of one would not have availed to prevent a collision; 144 U. S. 371. A sailing vessel is entitled to assume that a steam vessel approaching her is being navigated with a proper lookout; 1 C. C. A. 219. By the International Code, rule 8, lights also must be kept; the rule was formerly otherwise in regard to vessels on the high seas; 1 Pars. Sh. & Adm. 549; 2 W. Rob. 4; 2 Wall. Jr. 268. See NAVIGATION RULES; 12 How. 443; 23 *id.* 287; 1 Blatchf. 236, 370; Stu. Adm. Low. C. 222, 242; 21 Pick. 254; 6 Whart. 324; 1 Thornt. Adm. 592; 2 *id.* 101; 4 *id.* 97, 161; 6 *id.* 176; 7 *id.* 507; 2 W. Rob. 377; 3 *id.* 7, 49, 190; 1 Swab. 20, 233; 1 C. C. A. 519; 158 U. S. 186.

The injury to an insured vessel occasioned by a collision is a loss within the ordinary policy of insurance; 4 Ad. & E. 420; 6 N. & M. 713; 14 Pet. 99; 14 How. 352; 8 Cush. 477; but when the collision is occasioned by the fault of the insured vessel, or the fault of both vessels, the insurer is not ordinarily liable for the amount of the injury done to the other vessel which may be decreed against the vessel insured; 4 Ad. & E. 420; 7 E. & B. 172; 40 E. L. & Eq. 54; 11 N. Y. 9; 14 How. 352, and cases cited; but some policies now provide that the insurer shall be liable for such a loss; 40 E. L. & Eq. 54; 7 E. & B. 172.

When the collision was without fault on either side, and occurred in a foreign country, where, in accordance with the local law, the damages were equally divided between the colliding vessels, the amount of the decree against the insured vessel for its share of the damages suffered by the other vessel was held recoverable under the ordinary policy; 14 Pet. 99.

The fact that the libellants in a collision case had received satisfaction from the insurers for the vessel destroyed, furnishes no ground of defence for the respondent; 17 How. 152.

Improper speed on the part of a steamer in a dark night, during thick weather, or in the crowded thoroughfares of commerce, will render such vessel liable for the damages occasioned by a collision; and it is no excuse for such dangerous speed that the

steamer carries the mail and is under contract to convey it at a greater average speed than that complained of; 3 Hagg. Adm. 414; 2 W. Rob. 2, 205; 18 How. 89, 223; 21 *id.* 1; 12 Ct. Cls. 480; 7 Biss. 35; 1 C. C. A. 78; 3 *id.* 534; 49 Fed. Rep. 169; 54 *id.* 542; 52 *id.* 400; 55 *id.* 117; 153 U. S. 130; 137 *id.* 330.

As between a steamer and a sailing vessel, the former must keep out of the way of the latter; 14 Blatch. 524; 91 U. S. 200; 144 *id.* 371; 137 *id.* 330; 54 Fed. Rep. 411; 59 *id.* 200; as between a vessel in motion and one at anchor, with proper lights, the former is ordinarily liable for a collision; 3 Cliff. 636; 2 Low. 220; 4 L. & Eq. Rep. 676; 2 Hugh. 17; 18 Alb. L. J. 151. Where a vessel is moored for the night according to custom along a well-known dock and not projecting beyond the wharf, if run into by a steamer in the fog, she is not at fault because she had no lights set and sounded no gongs; 48 Fed. Rep. 323.

A sailing vessel beating in the vicinity of a steam vessel is not obliged to run out her tack, provided her going about is not calculated to mislead or embarrass the steam vessel; 1 C. C. A. 219.

Instances of negligence are to be found in 95 U. S. 600; 98 *id.* 440; 3 Cliff. 456, 636; 14 Blatchf. 37, 254, 480, 524, 531, 545. An inexperienced oarsman is guilty of negligence in attempting to cross the path of a steamboat but a short distance in front of it; 153 Pa. 117.

When a collision is occasioned solely by the error or unskilfulness of a pilot in charge of a vessel under the provisions of a law compelling the master to take such pilot and commit to him the management of his vessel, the pilot is solely responsible for the damage, and neither the master, his vessel, nor her owner is responsible. But the burden of proof is on the vessel to show that the collision is wholly attributable to the fault of the pilot; L. R. 2 Ad. & Ecc. 3; [1892] Prob. 419. The rule in the United States is otherwise; 7 Wall. 53; but in this case the pilotage law was not absolutely compulsory. See PILOTAGE.

A cause of collision, or *collision and damage*, as it is technically called, is a suit *in rem* in the admiralty.

In the United States courts it is commenced by the filing of a libel and the arrest of the vessel to the mismanagement or fault of which the injury is imputed. In the English admiralty the suit is commenced by the arrest of the vessel and the filing of a petition. In England, the judge is usually assisted at the hearing of the cause by two of the Masters or Elder Brethren of Trinity House, or other experienced shipmasters, whose opinions upon all questions of professional skill involved in the issue are usually adopted by the court; 1 W. Rob. 471; 2 *id.* 225; 2 Chit. Genl. Pr. 514.

In the American courts of admiralty, the judge usually decides without the aid or advice of experienced shipmasters acting as assessors or advisers of the court; but the evidence of such shipmasters, *as experts*, is sometimes received in reference to questions of professional skill or nautical usage. Such evidence is not, however, admissible to establish a usage in direct violation of those general rules of navigation which have been sanctioned and established by repeated decisions; 2 Curt. C. C. 141, 863.

When a party sets up circumstances as the basis of exceptions to the general rules of navigation, he is held to strict proof; 1 W. Rob. 157, 182, 478; 6 Thornt. 607; 5 *id.* 170; 3 Hagg. Adm. 321; and courts of admiralty lean against such exceptions; 11 N. Y. Leg. Obs. 353, 355. The admissions of a master of one of the colliding vessels subsequently to the collision are admissible in evidence; 5 E. L. & Eq. 556; and the masters and crew are admissible as witnesses; 2 Dods. 83; 2 Hagg. Adm. 145; 3 *id.* 321, 325; 1 Conkl. 384.

As to the burden of proof in collision cases, see 9 Jur. 282, 670; 2 W. Rob. 30, 244, 504; 12 *id.* 131, 371; 2 Hagg. Adm. 356; 4 Thornt. Adm. 161, 356; 1 Conkl. 382; 1 How. 28; 18 *id.* 570; Olc. 132; 55 Fed. Rep. 338; [1892] Prob. 419.

The general rules in regard to costs in collision cases, in the admiralty courts, are that if only one party is to blame, he pays the costs of both; if neither is to blame, and the party prosecuting had apparent cause for proceeding, each party pays his own costs, but in the absence of apparent or probable cause the libel will be dismissed with costs; if both parties are to blame, the costs of both are equally divided, or, more generally, each party is left to pay his own costs. But costs in admiralty are always in the discretion of the court, and will be given or withheld in particular cases without regard to these general rules, if the equity of the case requires a departure from them; 2 W. Rob. 213, 244; 5 Jur. 1067; 2 Conkl. 438.

Consult 2 Pars. Mar. Law, 187; Conkl. Adm. 370–426; Fland. Mar. Law, c. 9; Abb. Shipp. Story & Perkins's notes; Marsden; Preble; Spence, Collisions. See LIEN; NAVIGATION RULES.

COLLISTRIGIUM. The pillory.

COLLOCATION. In French Law. The act by which the creditors of an estate are arranged in the order in which they are to be paid according to law.

The order in which the creditors are placed is also called collocation. 2 Low. C. 9, 139.

COLLOQUIUM. In Pleading. A general averment in an action for slander connecting the whole publication with the previous statement. 1 Stark. Sl. 431; Heard, Lib. & Sl. 228; or stating that the whole publication applies to the plaintiff, and to the extrinsic matters alleged in his declaration. 1 Greenl. Ev. § 417.

An averment that the words were spoken "of or concerning" the plaintiff, where the words are actionable in themselves. 6 Term 162; 16 Pick. 132; Cro. Jac. 674; Heard, Lib. & Sl. § 212; 1 Greenl. Ev. § 417; or where the injurious meaning which the plaintiff assigns to the words results from some extrinsic matter, or of and concerning, or with reference to, such matter. 2 Pick. 328; 16 *id.* 1; Heard, Lib. & Sl. §§ 212, 217; 11 M. & W. 287.

An averment that the words in question are spoken of or concerning some usage, report, or fact which gives to words otherwise indifferent the peculiar defamatory

meaning assigned to them. Shaw, C. J., 16 Pick. 6.

Whenever words have the slanderous meaning alleged, not by their own intrinsic force, but by reason of the existence of some extraneous fact, this fact must be averred in a traversable form, which averment is called the *inducement*. There must then be a *colloquium* averring that the slanderous words were spoken of or concerning this fact. Then the word "meaning," or *innuendo*, is used to connect the matters thus introduced by averments and *colloquia* with the particular words laid, showing their identity and drawing what is then the legal inference from the whole declaration, that such was, under the circumstances thus set out, the meaning of the words used. Per Shaw, C. J.; 16 Pick. 6. By the Com. L. Proc. Act (1852) in England the colloquium has been rendered unnecessary. See INNUENDO; Odger, Lib. & Sl.

COLLUSION. An agreement between two or more persons to defraud a person of his rights by the forms of law, or to obtain an object forbidden by law.

Collusion and fraud of every kind vitiate all acts which are infected with them, and render them void. See Shelf. Marr. & Div. 415, 450; 3 Hagg. Eccl. 130, 133; 67 Mich. 547; 87 *id.* 324; 2 Greenl. Ev. § 51; Bousquet, Dict. *Abordage.*

In Divorce Law. An agreement between a husband and wife that one of them will commit or appear to commit a breach of matrimonial duties in order that the other may obtain a remedy at law as for a real injury. 2 Wait, Act. & Def. 591; 2 Lev. & Tr. 302; L. R. 1 P. & M. 121. See 86 Mich. 600; 33 Ill. App. 105. Such an agreement is a fraud upon the court where the remedy is sought; 39 Wis. 167; and will bar a divorce; L. R. 1 P. & M. 121; 2 Bish. Mar. Div. & Sep. 251–266.

COLOMBIA. A republic of South America. It has a president elected for six years and a responsible ministry, a senate of 27 members representing the departments, and a house of representatives of 66 members elected by the people. There is a supreme court composed of seven magistrates appointed for life by the executive with the approval of the national council. The republic is divided into nine departments, each with its own judiciary. Colombia, which was formerly subject to Spain, became independent in 1819, and was divided in 1832 into the three republics of Ecuador, Granada, and Venezuela. In 1858 it became a confederation of eight states, which three years later were increased to nine. Subsequently, in 1883, a new constitution was formed and amended in 1886, when the nine states became mere departments, and their presidents were reduced to governors.

COLONIAL LAWS. The laws of a colony.

In the United States the term is used to designate the body of law in force in the colonies of America at the time of the commencement of our independence, which was, in general, the common law of England, with such modifications as the colonial experience had introduced. The colonial law is thus a transition state through which our present law is derived from the English common law.

In England the term colonial law is used with reference to the present colonies of that realm.

COLORADO. One of the United States of America, being the twenty-fifth state admitted into the Union.

The territory of which it is composed was ceded by the treaties with France in 1803, and Mexico in 1848. The enabling act was approved March 3, 1875, and the state was finally admitted August 1, 1876. The Constitution was adopted in Convention March 14, 1876, and ratified July 1, 1876. See CALIFORNIA; LOUISIANA.

THE EXECUTIVE DEPARTMENT consists of a governor, lieutenant-governor, secretary of state, auditor of state, state treasurer, attorney-general, and superintendent of public instructions, each of whom is elected by the qualified electors of the state for a term of two years. The supreme executive power is vested in the governor, who is charged with the duty of seeing that the laws are faithfully executed.

THE LEGISLATIVE DEPARTMENT is vested in a general assembly which is composed of a senate and house of representatives, the members of which are elected by the people, the former for a term of four years, and the latter for two years. The aggregate number of senators and representatives can at no time exceed one hundred. No act of the general assembly can take effect until ninety days after its passage, except in certain emergencies and under certain conditions.

THE JUDICIAL POWER is vested in a supreme court, district courts, county courts and justices of the peace, and such other courts as may be created. The supreme court is composed of three judges, who are elected by the electors of the state for a term of nine years; it has appellate jurisdiction only and general superintending control over all inferior courts. District courts have original jurisdiction of all causes at law and equity, and such appellate jurisdiction as may be conferred by law; the judges of these courts are elected for a term of six years. The county courts, criminal courts and justices of the peace have certain limited jurisdiction.

COLONUS (Lat.). **In Civil Law.** A freeman of inferior rank, corresponding with the Saxon ceorl and the German rural slaves.

It is thought by Spence not improbable that many of the *ceorls* were descended from the *coloni* brought over by the Romans. The names of the *coloni* and their families were all recorded in the archives of the colony or district. Hence they were called *adscriptitii.* 1 Spence, Eq. Jur. 51.

COLONY. A union of citizens or subjects who have left their country to people another, and remain subject to the mother-country. 3 Wash. C. C. 287.

The country occupied by the colonists.

A colony differs from a possession or a dependency. See DEPENDENCY.

COLOR. In Pleading. An apparent but legally insufficient ground of action admitted to subsist in the opposite party by the pleading of one of the parties to an action. 3 Bla. Com. 309; 4 B. & C. 547; 1 M. & P. 307. To give color is to give the plaintiff credit for having an apparent or *prima facie* right of action, independent of the matter introduced to destroy it, in order to introduce new matter in avoidance of the declaration. It was necessary that all pleadings in confession and avoidance should give color. See 3 Bla. Com. 309, n.; 1 Chit. Pl. 531.

Express color is a feigned matter pleaded by the defendant, from which the plaintiff seems to have a good cause, whereas he has

in truth only an appearance or color of cause. Bacon, Abr. *Trespass*, I, 4; 1 Chit. Pl. 530. It was not allowed in the plaintiff to traverse the colorable right thus given; and it thus became necessary to answer the plea on which the defendant intended to rely.

Implied color is that which arises from the nature of the defence; as where the defence consists of matter of law, the facts being admitted but their legal sufficiency denied by matters alleged in the plea. 1 Chit. Pl. 528; Steph. Pl. 206.

By giving color the defendant could remove the decision of the case from before a jury and introduce matter in a special plea, which would otherwise oblige him to plead the general issue; 3 Bla. Com. 309.

The colorable right must be plausible or afford a supposititious right such as might induce an unlearned person to imagine it sufficient, and yet it must be in legal strictness inadequate to defeat the defendant's title as shown in the plea; Comyns, Dig. *Pleading;* Keilw. 1036; 1 Chit. Pl. 531; 4 Dane, Abr. 552; Archb. Pl. 211.

COLOR OF OFFICE. A pretence of official right to do an act made by one who has no such right. 9 East 364. Such person must be at least a *de facto* officer; 23 Wend. 606.

An act wrongfully done by an officer, under the pretended authority of his office, and grounded upon corruption, to which the office is a mere shadow of color. 41 N. Y. 464.

COLOR OF TITLE. In Ejectment. An apparent title founded upon a written instrument, such as a deed, levy of execution, decree of court, or the like; 3 Wait, Act. & Def. 17; 35 Ill. 394; 94 Ala. 135. A tax deed, though void for failure to comply with the statutes, affords color of title; 37 Neb. 353; 143 Ill. 265; 3 C. C. A. 294. To give color, the conveyance, etc., must be good in form, and profess to convey the title and be duly executed; 8 Cow. 589; 4 Mart. (N. S.) 224; 47 Fed. Rep. 614; 132 Ind. 546; but a deed to a tenant in possession from one who has no title to the land is insufficient as a basis for adverse possession; 132 N. Y. 73. A conveyance void on its face is not sufficient; 11 How. 424; 21 Tex. 97. An entry is by color of title when it is made under a *bonâ fide* and not pretended claim of title existing in another; 3 Watts 72. A quit-claim deed is sufficient color of title to support a plea of title by limitation; 83 Tex. 428. The deed, or color of title, under which a person takes possession of land, serves to define specifically the boundaries of his claims; 10 Pet. 412. When a disseisor enters upon and cultivates part of a tract, he does not thereby hold possession of the whole tract constructively, unless this entry was by color of title by specific boundaries to the whole tract; color of title, is valuable only so far as it indicates the extent of the disseisor's claim; 82 Pa. 99. See 108 Mo. 343; 139 Ill. 21. A person taking lands under a judicial sale, though void, has color of title; 134 Ind. 238; 37 W. Va. 215. See LIMITATIONS.

COLORE OFFICII. By color of office.

COLORED MAN. This term generally refers to one of the negro race.

There is no legal technical signification to this phrase which the courts are bound judicially to know; 31 Tex. 74.

COLT. An animal of the horse species, whether male or female, not more than four years old. Russ. & R. 416.

COMBAT. The form of a forcible encounter between two or more persons or bodies of men; an engagement or battle. A duel.

COMBINATION. A union of men for the purpose of violating the law.

This term has become prominent of late in reference to labor troubles. A strike is defined as "a combination among laborers (those employed by others), to compel an increase of wages, a change in the hours of labor, some change in the mode and manner of conducting the business of the principal, or to enforce some particular policy in the character or number of the men employed, or the like." 58 N. Y. 582. Such combinations are illegal at common law; 8 Mod. 10; 10 Cox, C. C. 593; 1 M. & Rob. 179; C. & M. 663; 12 Cox, C. C. 316; Bright. (Pa.) 36; but are not so in the United States, unless the objects of the combination are sought to be effected by unlawful means; 23 Fed. Rep. 554; 24 *id.* 217; 27 *id.* 443; 62 *id.* 803; 63 *id.* 310; 106 Mass. 1; 57 Vt. 273; 84 Va. 927. See STRIKE; BOYCOTT.

A union of different elements. A patent may be taken out for a new combination of existing machines; 2 Mas. 112.

COMBUSTIO DOMORUM. Arson. 4 Bla. Com. 272.

COMBUSTIO PECUNIÆ. Burning of money; the ancient method of testing mixed and corrupt money paid into the exchequer, by melting it down. Black, L. Dict.

COMES. In Pleading. A word used in a plea or answer which indicates the presence in court of the defendant.

In a plea, the defendant says, "And the said C D, by E F, his attorney, *comes*, and defends," etc. The word comes, *venit*, expresses the appearance of the defendant in court. It is taken from the style of the entry of the proceedings on the record, and formed no part of the *viva voce* pleading. It is, accordingly, not considered as, in strictness, constituting a part of the plea; 1 Chit. Pl. 411; Steph. Pl. 432.

COMES (Lat. *comes*, a companion). An earl. A companion, attendant, or follower.

By Spelman the word is said to have been first used to denote the companions or attendants of the Roman proconsuls when they went to their provinces. It came to have a very extended application, denoting a title of honor generally, always preserving this generic signification of companion of, or attendant on, one of superior rank.

Among the Germans the comites accompanied the kings on their journeys made for the purpose of hearing complaints and giving decisions. They acted in the character of assistant judges. Tac, *de*

Mor. Germ. cap. 11, 12; 1 Spence, Eq. Jur. 66; Spelman, Gloss. Among the Anglo-Saxons, the *comites* were the great vassals of the king, who attended, as well as those of inferior degree, at the great councils or courts of their kings. The term included also the vassals of those chiefs, 1 Spence, Eq. Jur. 42. *Comitatus*, county, is derived from *comes*, the earl or earlderman to whom the government of the district was intrusted. This authority he usually exercised through the *vice-comes*, or *shire reeve* (whence our *sheriff*). The *comites* of Chester, Durham, and Lancaster maintained an almost royal state and authority; and these counties have obtained the title of palatine; 1 Bla. Com. 116; COUNTY PALATINE. The title of earl or comes has now become a mere shadow, as all the authority is exercised by the sheriff (*vice-comes*); 1 Bla. Com. 398.

COMITAS (Lat.). Courtesy; comity. An indulgence or favor granted another nation, as a mere matter of indulgence, without any claim of right made.

COMITATUS (Lat. from *comes*). A county. A shire. The portion of the country under the government of a *comes* or count. 1 Bla. Com. 116.

An earldom. Earls and counts were originally the same as the *comitates*. 1 Ld. Raym. 13.

The county court, of great dignity among the Saxons. 1 Spence, Eq. Jur. 42, 66.

The retinue which accompanied a Roman proconsul to his province. Du Cange. A body of followers; a prince's retinue. Spelman, Gloss.

COMITES. Persons who are attached to a public minister. As to their privileges, see 1 Dall. 117; Baldw. 240; AMBASSADOR.

COMITIA (Lat.). The public assemblies of the Roman people at which all the most important business of the state was transacted, including in some cases even the trial of persons charged with the commission of crime. Anthon, Rom. Antiq. 51. The votes of all citizens were equal in the *comitiæ*. 1 Kent 518.

COMITIA CALATA. A session of the *comitia curiata* for the purpose of *adrogation*, the confirmation of wills, and the adoption by an heir of the sacred rites which followed the inheritance.

COMITIA CENTURIATA (called, also, *comitia majora*). An assemblage of the people voting by centuries. The people acting in this form elected their own officers, and exercised an extensive jurisdiction for the trial of crimes. Anthon, Rom. Antiq. 52.

COMITIA CURIATA. An assemblage of the *populus* (the original burgesses) by tribes. In these assemblies no one of the *plebs* could vote. They were held for the purpose of confirming matters acted on by the senate, for electing certain high officers, and for carrying out certain religious observances.

COMITIA TRIBUTA. Assemblies to create certain inferior magistrates, elect priests, make laws, and hold trials. Their power was increased very materially subsequently to their first creation, and the range of subjects acted on became much more extensive than at first. Anthon, Rom. Antiq. 62; 1 Kent 518.

COMITY. Courtesy; a disposition to accommodate.

Courts of justice in one state will, out of comity, enforce the laws of another state, when by such enforcement they will not violate their own laws or inflict an injury on some one of their own citizens: as, for example, the discharge of a debtor under the insolvent laws of one state will be respected in another state, where there is a reciprocity in this respect.

A circuit court should follow the decisions of another circuit court, upholding a patent, except where new evidence of invalidity is introduced and then the investigation should be confined to that; 3 C. C. A. 672; but see 54 Fed. Rep. 169.

COMITY OF NATIONS. The most appropriate phrase to express the true foundation and extent of the obligation of the laws of one nation within the territories of another. It is derived altogether from the voluntary consent of the latter, and it is inadmissible when it is contrary to its known policy, or prejudicial to its interests. In the silence of any positive rule affirming or denying or restraining the operation of foreign laws, courts of justice presume the tacit adoption of them by their own government, unless repugnant to its policy, or prejudicial to its interests. It is not the comity of the courts, but the comity of the nation which is administered and ascertained in the same way and guided by the same reasoning by which all other principles of the municipal law are ascertained and guided. Story, Confl. L. § 38.

COMMANDER-IN-CHIEF. The president is made commander-in-chief of the army and navy of the United States and of the militia when in actual service, by art. ii. § 2 of the constitution. The term implies supreme authority over the army and navy.

COMMANDITE. In French Law. A partnership in which some furnish money, and others furnish their skill and labor in place of capital. A special or limited partnership.

Those who embark capital in such a partnership are bound only to the extent of the capital so invested; Guyot, *Rép. Univ.*

The business being carried on in the name of some of the partners only, it is said to be just that those who are unknown should lose only the capital which they have invested, from which alone they can receive an advantage. Under the name of limited partnerships, such arrangements are now allowed by many of the states; although no such partnerships are recognized at common law. Troubat, Lim. Partn. cc. 3, 4.

The term includes a partnership containing *dormant* rather than *special* partners. Story, Partn. § 109.

COMMENCEMENT OF A DECLARATION. That part of the declaration which follows the venue and precedes the circumstantial statement of the cause of action. It formerly contained a statement of the names of the parties, and the character in which they sue or are sued, if any other than their natural capacity; of

the mode in which the defendant had been brought into court, and a brief statement of the form of action. In modern practice, however, in most cases, little else than the names and character of the parties is contained in the commencement.

COMMENDA. In French Law. The delivery of a benefice to one who cannot hold the legal title, to keep and manage it for a time limited and render an account of the proceeds. Guyot, *Rép. Univ.*

In Mercantile Law. An association in which the management of the property was intrusted to individuals. Troubat, Lim. Partn. c. 3, § 27.

COMMENDAM. In Ecclesiastical Law. The appointment of a suitable clerk to hold a void or vacant benefice or church living until a regular pastor be appointed. Hob. 144; Latch 236.

In Louisiana. A species of limited partnership.

It is formed by a contract, by which one person or partnership agrees to furnish another person or partnership a certain amount, either in property or money, to be employed by the person or partnership to whom it is furnished, in his or their own name or firm, on condition of receiving a share in the profits in the proportion determined by the contract, and of being liable to losses and expenses to the amount furnished, and no more. A similar partnership exists in France. *Code de Comm.* 26, 33; Sirey, 12, pt. 2, p. 25. He who makes this contract is called, in respect to those to whom he makes the advance of capital, a partner *in commendam*. La. Civ. Code, art. 2811.

COMMENDATORS. In Ecclesiastical Law. Secular persons upon whom ecclesiastical benefices are bestowed. So called because they are commended and intrusted to their oversight. They are merely trustees.

COMMENDATORY LETTERS. In Ecclesiastical Law. Such as are written by one bishop to another on behalf of any of the clergy or others of his diocese travelling thither, that they may be received among the faithful; or that the clerk may be promoted; or necessaries adminstered to others. Wharton.

COMMENDATUS. In Feudal Law. One who by voluntary homage puts himself under the protection of a superior lord. Cowel; Spelman, Gloss.

COMMERCE. The various agreements which have for their object facilitating the exchange of the products of the earth or the industry of man, with an intent to realize a profit. Pardessus, *Dr. Com.* n. 1. Any reciprocal agreements between two persons, by which one delivers to the other a thing, which the latter accepts, and for which he pays a consideration: if the consideration be money, it is called a sale; if any other thing than money, it is called exchange or barter. Domat, *Dr. Pub.* liv. 1, tit. 7, s. 1, n. 2.

Congress has power by the constitution to regulate commerce with foreign nations and among the several states, and with the Indian tribes; 1 Kent 431; Story, Const. § 1052; and such power is not restricted by state authority; 125 U. S. 181; but a state statute, which conflicts with the actual exercise of the powers of congress, must give way to the supremacy of the national authority; 124 U. S. 465.

Commerce with foreign countries and among the states, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation of persons and property, as well as the purchase, sale, and exchange of commodities; the power conferred upon congress by the above clause is exclusive, so far as it relates to matters within its purview which are national in their character, and admit of a requisite uniformity of regulation affecting all the states. That clause was adopted in order to secure such uniformity against discriminating state legislation.

State legislation is not forbidden in matters either local in their operation, or intended to be mere aids to commerce, for which special regulations can more effectually provide, such as harbors, pilotage, beacons, buoys, and other improvements of harbors, bays, and rivers within a state, if their free navigation be not thereby impaired; congress by its inaction in such matters virtually declares that till it deems best to act they may be controlled by the states; 102 U. S. 691, per Field, J. See also 3 Cliff. 339, for a definition of commerce; Cooley, Const. L. 67.

The powers conferred upon congress to regulate commerce among the several states, are not confined to the instrumentalities of commerce known or in use when the constitution was adopted, but keep pace with the progress of the country, and adapt themselves to new developments of time and circumstances so as to include, for example, telegraph lines; 96 U. S. 1. Congress may, in the exercise of its power, construct or authorize individuals or corporations to construct railroads across the states and territories of the United States; 127 U. S. 1.

The fact that congress has not legislated in regard to such commerce does not make it lawful for the states to do so. Such inaction shows only that no restrictions are to be put upon commerce in that direction. The right to legislate is exclusively vested in congress; 92 U. S. 259; 91 *id.* 275; 135 *id.* 100; 122 *id.* 326; 120 *id.* 489. But in another case it was held, that, while action by congress prescribing regulations is exclusive of state authority, yet, until action taken by congress, a state may legislate touching the rights, duties, and liabilities of citizens (if not directed against commerce or any of its regulations), notwithstanding such legislation may indirectly and remotely affect foreign or interstate commerce, for instance, to give a right of action against the owners of a vessel engaged in interstate traffic for the death of a passenger caused by the negligence of those in charge of the vessel; 93 U. S. 99; 121 *id.* 444.

"The line of distinction between that which constitutes an interference with com-

merce, and that which is a mere police regulation, is sometimes exceedingly dim and shadowy, and it is not to be wondered at that learned jurists differ when endeavoring to classify the cases which arise. It is not doubted that congress has the power to go beyond the general regulations of commerce which it is accustomed to establish, and to descend to the most minute directions, if it shall be deemed advisable; and that, to whatever extent ground shall be covered by those directions, the exercise of state power is excluded. Congress may establish police regulations, as well as the states; confining their operations to the subjects over which it is given control by the constitution. But as the general police power can better be exercised under the supervision of the local authorities, and mischiefs are not likely to spring therefrom so long as the power to arrest collision resides in the national courts, the regulations which are made by congress do not often exclude the establishment of others by the state covering very many particulars. Moreover, the regulations of commerce are usually, and in some cases must be, general and uniform for the whole country; while in some localities, state and local policy will demand peculiar regulations with reference to special and peculiar circumstances." Cooley Const. Lim. 731. See 120 U. S. 489; 122 *id.* 326.

The commercial clause of the constitution includes authority to regulate navigation in aid of commerce and to make improvements in navigable waters, such as building a lighthouse in the bed of a stream or requiring navigators of a stream to follow a prescribed course, or directing the water of a navigable stream from one channel to another; 93 U. S. 4. See also 1 Dill. 469. It renders invalid a state statute regulating the arrival of passengers from a foreign port with a view practically to exclude Chinese emigration to the United States, and not merely to exclude pauper or convict emigrants from the state; 92 U. S. 275. See also 3 Sawy. 144. But it does not where the detention is for the purpose of disinfection by order of a state Board of Health; 12 Wheat. 419; 57 Fed. Rep. 276. It invalidates a state statute which requires the payment of a license tax by commercial travellers selling goods manufactured in other states, but not by those selling goods manufactured in the state itself; 153 U. S. 289; 103 *id.* 344; 91 *id.* 275; 128 *id.* 129; 120 *id.* 489; 136 *id.* 104; 44 La. Ann. 356; 70 Miss. 558; 91 Tenn. 669, (but not when the same tax is levied upon peddlers selling goods made in or out of the state; 100 U. S. 676; 156 *id.* 296; and see 102 *id.* 123). So of an act requiring importers of foreign goods to take out a license, in the exercise of a power of taxation; 12 Wheat. 419; 136 U. S. 114; and a state law which requires a party to take out a license for carrying on interstate commerce is unconstitutional and void; 141 U. S. 47. Also a city ordinance of Baltimore laying wharf fees upon vessels laden with the products of other states, which are not exacted from vessels laden with Maryland products; 100 U. S. 434. Also a state statute imposing a burdensome condition upon a shipmaster as a prerequisite for landing his passengers, with the alternative of the payment of a small sum for each of them; 92 U. S. 259. Also a state tonnage tax on foreign vessels, 20 Wall. 577, levied to defray quarantine expenses; 19 Wall. 581; but this does not extend to a tax for city purposes levied upon a vessel owned by a resident of the city, which is not imposed for the privilege of trading; 6 Biss. 505; 99 U. S. 273. It invalidates a state law granting a telegraph company exclusive right to maintain telegraph lines in such state, as contrary to the act of July 24, 1866, which practically forbids a state to exclude from its borders a telegraph company building its lines in pursuance of this act of congress; 96 U. S. 1; also an attempt to regulate transmission of telegraphic messages unto other states and their delivery; 122 U. S. 347; as telegraphic communications carried on between different states are interstate commerce; 127 U. S. 640; also one providing for inspection of sea-going vessels arriving at a port, and of damaged goods found thereon, by a state officer, with a view to furnishing official evidence to the parties immediately concerned, and when goods are damaged, to provide for their sale; 94 U. S. 246; also a state law which requires those engaged in the transportation of passengers among the states upon vessels within the state to give all persons travelling among the states equal rights and privileges in all parts of the vessels without distinction on account of race or color; 95 U. S. 485; (but not one which only applies to passengers carried within the state; 133 U. S. 587; also a state law laying a tax on foreign corporations engaged in carrying passengers or merchandise upon their gross receipts outside of the state; 15 Wall. 284; 7 Biss. 227; also a law of Missouri prohibiting the driving of cattle from Texas and other states into Missouri, during certain months; 95 U. S. 465.

A state law, requiring the master of every vessel in the foreign trade to pay a certain sum to a state officer for every passenger brought from a foreign country into the state, is void as infringing this provision of the constitution; 7 How. 283. No state can grant an exclusive monopoly for the navigation of any portion of the waters within its limits upon which commerce is carried on under coasting licenses granted under the authority of congress; Gibbons *v.* Ogden, 9 Wheat. 1; the rights here in controversy were the exclusive right to navigate the Hudson river with steam vessels. See also, on this point, 3 Wall. 713; 10 *id.* 657; 65 Pa. 399; s. c. 3 Am. Rep. 636. But a state law granting to an individual an exclusive right to navigate the upper waters of a stream which is wholly within the limits of a state, separated from tide waters by falls impassable for purposes of navigation, and not forming a part of a

continuous track of navigation between two or more states, or with a foreign country, is not invalid; 14 How. 568; and see 8 Bush 447. Interstate commerce by sea is of a national character and within the exclusive power of congress; 122 U. S. 326; and is commerce among the states even as to that part of the voyage within the state; 118 U. S. 557.

The state may authorize the building of bridges over navigable waters, notwithstanding the fact that they may, to some extent, interfere with the navigation of the stream. If the stream is one over which the regulation of congress extends, the question arises whether the bridge will interfere with navigation or not; it is not necessarily unlawful if properly built, and if the general traffic of the country will be benefited rather than injured by its construction. There are many cases in which a bridge may be vastly more important than the navigation of the stream which it crosses. It may be said that a state may authorize such constructions, provided they do not constitute a material obstruction to navigation; and each case depends upon its own particular facts. The decision of the state legislature is not conclusive; the final decision rests with the federal courts, who may cause the structure to be abated if it be found to obstruct unnecessarily the traffic on the stream. Those who build the bridge must show the state authority that the construction of the bridge is proper, and that it benefits more than it impedes the general commerce; Cooley, Const. Lim. 738, 739, 740; the Wheeling Bridge Case, 13 How. 518; see also 6 McLean 72, 209, 237; 5 Ind. 13; 50 Fed. Rep. 16; 83 Me. 419; 153 U. S. 525; 154 *id.* 204. See BRIDGE.

The states may establish ferries; 1 Black 603; 41 Miss. 27; 11 Mich. 43; and dams; 2 Pet. 245; 42 Pa. 219; 28 Ind. 257; 1 Biss. 546; 108 Mo. 550.

The state has also the power to regulate the speed and general conduct of vessels navigating its waters, provided such regulations do not conflict with regulations prescribed by congress for foreign commerce, or commerce among the states; Cooley, Const. Lim. 740; 1 Hill 467, 470. It may also provide that a railroad is liable for damage from fire; 38 S. C. 103.

Thus the commercial power of congress is exclusive of state authority only where the subjects upon which it is exerted are national in their character and admit and require uniformity of regulations affecting alike all the states, and when the subjects within that power are local in their nature or operation, or constitute mere aids to commerce, the states may provide for their regulation until congress intervenes; 50 Fed. Rep. 16; 113 U. S. 205.

The constitutional provision does not apply to regulations as to life-preservers, boiler inspections, etc., on steamboats which confine their business to ports wholly within a state; 6 Ben. 42; nor to any commerce entirely within a state; 10 Wall. 557; 145 U. S. 192; 133 *id.* 587; nor to a condition in a railroad charter granted by a state that the company shall pay a part of its earnings to the state, from time to time, as a bonus; 21 Wall. 456; nor to a state law prescribing regulations for warehouses, carrying on business within the state exclusively, notwithstanding they are used as instruments of interstate traffic; 94 U. S. 113; nor to a law of Virginia by which only such persons as are not citizens of that state are prohibited from planting oysters in a soil covered by her tide-waters. Subject to the paramount right of navigation, each state owns the beds of all tide-waters within its jurisdiction, and may appropriate them to be used by its own citizens; 94 U. S. 291. It does not forbid a state from enacting, as a police regulation, a law prohibiting the manufacture and sale of intoxicating liquors; 97 U. S. 25; nor the sale of oleomargarine brought from another state; 148 Pa. 559; 156 *id.* 201; 156 Mass. 236; but the right of importation of intoxicating liquors from one state to another includes the right of sale in the original packages at the place where the importation terminates; 135 U. S. 100; 135 *id.* 161; nor a state act prescribing maximum rates of transportation within the state; 94 U. S. 155; and see *id.* 164; Cooley, Const. L. 75. Nor is a city ordinance, exacting a license fee, for the maintenance of its office in the city, from an express company doing business beyond the limits of a state, invalid; 16 Wall. 479; nor does it apply to a tax on telegraph poles erected with a city; 148 U. S. 92; 67 Hun 21; nor to a statute requiring locomotive engineers to be licensed after examination, it being a valid exercise of the police power; 124 U. S. 465; see 128 *id.* 96. See INTERSTATE COMMERCE COMMISSION.

COMMERCIA BELLI. Compacts entered into by belligerent nations to secure a temporary and limited peace. 1 Kent 159.

Contracts made between citizens of hostile nations in time of war. 1 Kent 104.

COMMERCIAL AGENCY. A person, firm, or corporation engaged in the business of collecting information as to the financial standing, ability, and credit of persons engaged in business and reporting the same to subscribers or to customers applying and paying therefor. "They have become vast and extensive factors in modern commercial transactions for furnishing information to retail jobbers as well as to wholesale merchants. The courts are bound to know judicially that no vendor of goods at wholesale can be regarded as a prudent business man if he sells to a retail dealer, upon a credit, without first informing himself through these mediums of information of the financial standing of the customer, and the credit to which he is fairly entitled;" 1 Ind. App. 573; s. c. 28 N. E. Rep. 103. See also 83 N. Y. 31; 20 Mo. App. 661.

How far the agency may contract against

its own negligence. An exception is made to some extent in favor of such agencies to the rule against stipulations by a person against liability for his own negligence. The agency usually contracts that their agents shall be considered as the agents of their patrons, and that they shall not be liable for the negligence of their agents. Where in an action upon such a contract the plaintiff contended that under it the agency was protected only against gross and not against ordinary negligence, the court thought otherwise, and on motion to take off a non-suit said :—

"By the contract the plaintiffs expressly agreed to take such loss upon themselves. The authorities to which we have been referred have, in our judgment, no application to the case. Common carriers, innkeepers, and others, engaged in the exercise of a public calling, cannot thus protect themselves against the consequences of gross negligence in the agents whom they employ. This limitation of the right to contract, as parties may choose, is an exception from the general rule and confined to the class of cases named, when the public interests are supposed to demand its application. It has no place here. The contract which these parties entered into must be enforced as they made it. It may have been unwise, but with that we have nothing to do. One or the other must bear the risk involved in depending upon agents scattered over the country, of whom neither could know much. The plaintiffs agreed to bear it and they must take the consequence;" 7 W. N. C. Pa. 246.

Under a contract that the actual verity or correctness of the information was in no manner guaranteed, the agency was not liable for loss occasioned to a subscriber by the wilful and fraudulent act of a subagent in furnishing false information; 58 Fed. Rep. 174, reversing 51 *id.* 160. Where the inquiry was made concerning a grocer and the agency reported concerning the wrong person, who had the same name and was a grocer and saloon keeper, the plaintiff could not recover from the agency the value of goods sold on the strength of the report, the evidence being held to show that there was not such gross negligence as would render the agency liable; 70 Hun 334; but such a contract does not protect the agency from an error made in the publication of its books of reference giving the financial responsibility of merchants and others, and upon which a subscriber of the agency relied in selling goods and suffered a loss, and in such case it is unnecessary to thus establish the insolvency of the purchaser by suit before suing the agency; 134 Pa. 161.

When reports are privileged and when libellous. Such an agency is a lawful business and beneficial when lawfully conducted, but not exempt from liability for false and defamatory publications when other citizens would not be exempt. Its communications to a person interested in the information are privileged even if false, if made in good faith and without malice, but if communicated to its subscribers generally they are not privileged; 72 Tex. 15; 116 N. Y. 211; *id.* 217; 81 Mich. 280; 116 Mo. 226; 48 Wis. 348; 18 Fed. Rep. 214; 4 McCrary 160; 77 Ga. 172; 8 Phila. 617. See also 3 Montreal, Q. B. 83; 5 *id.* 42; 18 Can. S. C. 222. The contract of the agency to furnish information to all its subscribers, including those who have no special interest in it, is no defence to an action for libel; 49 N. Y. 417; nor was the fact that the information was given by printed signs of which each subscriber had the key; 46 N. Y. 188; the matter is privileged if communicated to the proper person by a clerk or agent as well as by the proprietor of the agency; 49 N. Y. 417; 12 Fed. Rep. 526; (but see 5 Blatchf. 497 and s. c. 10 Wall. 427, criticised in the two cases just cited;) or if specially reported upon proper occasion to subscribers having special interest in them, though not applied for by such subscribers; 22 Fed. Rep. 771; but if a subscriber apply for special information from the agency, a false denunciation of the person inquired about, coupled with the report, is actionable; 22 S. W. Rep. (Tex.) 868. So also are statements at first privileged but repeated and persisted in when known to be false, or, if otherwise privileged, made maliciously; 12 Fed. Rep. 526; or if made recklessly and without due care and caution in making inquiry; 22 Fed. Rep. 771; 72 Tex. 115; 40 Minn. 475.

The publication and circulation to subscribers in daily reports of the execution of a chattel mortgage was not libellous; 57 Md. 38; *contra*, 49 N. Y. 417; nor was the mere publication of a notice of foreclosure sale under a mortgage; 1 Mo. App. 4; nor of a copy of a judgment, with a note that the judgment was paid the same day; 8 Ir. Rep. 349; but in a similar case when the judgment was so paid, but it was not so stated, the publication was held libellous; 16 Ir. Rep. C. L. 298; and so also is a false publication of a trader that a judgment had been rendered; 22 Q. B. 134. And where the action was for publishing that a judgment had been rendered when only a verdict had been returned, it was held proper to ask a witness to the effect of such statement, whether if he had known the actual fact his conduct would have been the same; 141 Pa. 501.

The burden of proof is upon the agency to show privilege *prima facie*, and after its character is established the burden is on the plaintiff to show malice; 12 Fed. Rep. 526; 37 N. Y. 477; and it is matter of law for the court to determine whether the matter published is libellous *per se;* 35 Hun 16.

Blacklisting. An action for libel may be brought by a person whose name is published in a book containing a list of delinquent debtors, printed and distributed to subscribers, manifestly for coercing the payment of claims, who is denied credit because of such publication, or by one to whom a letter is sent in an envelope on which is printed the name of an association and a statement that it is an organization for the purpose of collecting bad debts; 77 Wis. 236; but the publication and circulation by a corporation among its officers and employés, of a list of discharged employés, who are considered incompetent or untrustworthy, is not libellous, and a person whose name is on the list has no action unless he

can show that the publication was malicious or known to be false; 73 Tex. 568.

Effect of fraudulent representations by vendee to agency upon vendor who relies upon them. An action for deceit will lie against persons or corporations making false representations of pecuniary responsibility to an agency in order to obtain credit and defraud those who may rely upon the reports; 50 Mo. App. 94; 83 N. Y. 31; 18 Hun 44; in such action the statements falsely made to the agency are admissible, *if relied on* by the vendee; 1 Ind. App. 573; or if approved by him after being written out by the agency, but not if not known to the vendor until after the sale; 81 Ala. 134; 75 Mich. 188. A contract for the sale of goods to the person making such representations, who proves to be insolvent at the time of making them and of the sale, may be rescinded and possession of the goods recovered; 58 Hun 610; 42 N. Y. 802; 31 Mo. App. 199; 85 Mich. 535; 61 Ia. 667; 77 Tex. 48; but where there were no representations other than those obtained by the agency from the seller, a fraudulent intent on the part of the vendee to use the agency as an instrument of fraud must be clearly shown; 33 Hun 549; 2 Cent. Rep. (Md.) 620; 99 N. Y. Rep. 9; s c. 2 N. E. Rep. 19; 2 N. E. Rep. (N. Y.) 19. The vendor may show that he refused to make the sale until he received the report of the agency, and the agent may show his business methods; 85 Mich. 535. The right to rescind the sale is not affected by a refusal of the vendee to give further statements of his condition, as the original one is presumed to continue if not recalled by the agency; 36 N. Y. St. Rep. 728; but if the vendee has made subsequent reports showing an impaired responsibility, the vendor must take all the reports into consideration, and not only on the original one; but the vendee is not required to make subsequent reports unless he actually becomes insolvent or knows that he will soon be; 83 Mich. 419; 75 *id.* 188. Reports made six weeks before the sale may be relied on; 20 Mo. App. 173; but not those made from five to seven months before; 88 Mich. 413; 85 *id.* 535; 58 Hun 606; 99 N. Y. 353; 49 *id.* 417.

How affected by the statute of frauds. With respect to the liability of the agency for representations not made in writing when the liability was contested, on the ground that the contract was within the statute of frauds, there is not a satisfactory result to be found in decisions; but it has been held that the action was upon the original contract with the customer, which was by no statute required to be written; U. C. 39 Q. B. 551; (reversed on other points and doubted on this; 1 Ont. App. 153;) and also that the action was sustainable on the original contract to furnish accurate statements, in response to inquiry respecting any persons; 12 Phila. 310.

No remedy in equity against publication. An injunction will not be granted to restrain the agency from the publication of matter injurious to the standing of the plaintiff, there being no jurisdiction in equity unless there is a breach of trust or contract involved; 143 Mass. 295; 9 N. Y. 544.

COMMERCIAL LAW. A phrase employed to denote those branches of the law which relate to the rights of property and relations of persons engaged in commerce.

This term denotes more than the phrase "maritime law," which is sometimes used as synonymous, but which more strictly relates to shipping and its incidents.

As the subjects with which commercial law, even as administered in any one country, has to deal are dispersed throughout the globe, it results that commercial law is less local and more cosmopolitan in its character than any other great branch of municipal law; and the peculiar genius of the common law, in adapting recognized principles of right to new and ever-varying combinations of facts, has here found a field where its excellence has been most clearly shown. The various systems of commercial law have been well contrasted by Leone Levi in his collection entitled "Commercial Law, its Principles and Administration, or the Mercantile Law of Great Britain compared with the Codes and Laws of Commerce of all the Important Mercantile Countries of the Modern World, and with the Institutes of Justinian;" London, 1850-52; a work of great interest both as a contribution to the project of a mercantile code and as a manual of present use.

As to the rule in the Federal Courts, see 16 Pet. 1; *id.* 511; 107 U. S. 33, where Bradley, J., says, "Where the law has not been settled, it is the right and duty of the Federal Courts to exercise their own judgment, as they also always do in reference to the doctrines of commercial law." See 12 Am. L. Reg. (N. S.) 473; UNITED STATES COURTS.

COMMERCIAL PAPER. Negotiable paper given in due course of business, whether the element of negotiability be given it by the law merchant or by statute. 5 Biss. 113.

COMMERCIAL TRAVELLER. A travelling salesman who simply exhibits samples of goods kept for sale by his principal, and takes orders from purchasers for such goods, which goods are afterwards to be delivered by the principal to the purchasers, and payment for the goods is to be made by the purchaser to the principal on such delivery. 34 Kans. 436; 93 N. C. 511. An order solicited by and given to such salesman does not constitute a sale, either absolute or conditional, of the goods ordered, but is a mere proposal, to be accepted or not, as the principal may see fit; 55 Wis. 515; 88 Ill. 298.

An agent who sells by sample and on credit, and is not intrusted with the possession of the goods to be sold, has no implied authority to receive payment, and payment to him will not discharge the purchaser; 68 Mo. 302; 32 N. J. Law 250; 30 Pa. 513; 24 Mich. 36. See 78 Me. 160; 119 Mass. 140.

COMMISSARIA LEX. A principle of the Roman law relative to the forfeiture of contracts. It is not unusual to restrict a sale upon credit, by a clause in the agreement that if the buyer should fail to make due payment the seller might rescind the sale. In the meantime, however, the property was the buyer's and at his risk. A

debtor and his pledgee might also agree that if the debtor did not pay at the day fixed, the pledge should become the absolute property of the creditor. 2 Kent 583. This was abolished by a law of Constantine, Cod. 8. 35. 3.

COMMISSARY. An officer whose principal duties are to supply an army, or some portion thereof, with provisions.

The subsistence department of the army shall consist of one commissary-general of subsistence, with the rank of brigadier-general; two assistant commissaries-general of subsistence, with the rank of lieutenant-colonel of cavalry; eight commissaries of subsistence, with the rank of major of cavalry; and sixteen commissaries of subsistence, with the rank of captain of cavalry. U. S. Rev. Stat. § 1140. Their duties are defined in the following sections.

COMMISSARY COURT. In Scotch Law. A court of general ecclesiastical jurisdiction. It was held before four commissioners, appointed by the crown from among the faculty of advocates.

It had a double jurisdiction: *first*, that exercised within a certain district; *second*, another, universal, by which it reviewed the sentences of inferior commissioners, and confirmed the testaments of those dying abroad or dying in the country without having an established domicil. Bell, Dict.

It has been abrogated, its jurisdiction in matters of confirmation being given to the sheriff, and the jurisdiction as to marriage and divorce to the court of session. Paterson, Comp. See 4 Geo. IV. c. 47; 1 Will. IV. c. 69; 6 & 7 Will. IV. c. 41; 13 & 14 Vict. c. 36.

COMMISSION (Lat. *commissio;* from *committere*, to intrust to).

An undertaking without reward to do something for another, with respect to a thing bailed. Rutherforth, Inst. 105.

A body of persons authorized to act in a certain matter. 5 B. & C. 850.

The act of perpetrating an offence.

An instrument issued by a court of justice, or other competent tribunal, to authorize a person to take depositions, or do any other act by authority of such court or tribunal, is called a commission.

Letters-patent granted by the government, under the public seal, to a person appointed to an office, giving him authority to perform the duties of his office. The commission is not the appointment, but only evidence of it, and, as soon as it is signed and sealed, vests the office in the appointee. 1 Cra. 137; 2 N. & M'C. 357. See 1 Pet. C. C. 194; 2 Sumn. 299; 8 Conn. 109; 1 Pa. 297.

In Common Law. A sum allowed, usually a certain per cent. upon the value of the property involved, as compensation to a servant or agent for services performed. See COMMISSIONS.

COMMISSION MERCHANT. As this term is used, it is synonymous with the legal term "factor," and means one who receives goods, chattels, or merchandise, for sale, exchange, or other disposition, and who is to receive a compensation for his services, to be paid by the owner or derived from the sale of the goods. 50 Ala. 154. See AGENCY; FACTORS.

COMMISSION OF ASSIZE. In English Practice. A commission which formerly issued from the king, appointing certain persons as commissioners or judges of assize to hold the assizes in association with discreet knights during those years in which the justices in eyre did not come.

Other commissions were added to this, which has finally fallen into complete disuse. See COURTS OF ASSIZE AND NISI PRIUS.

COMMISSION OF LUNACY. A writ issued out of chancery, or such court as may have jurisdiction of the case, directed to a proper officer, to inquire whether a person named therein is a lunatic or not. 1 Bouvier, Inst. n. 382.

COMMISSION OF REBELLION. In English Law. A writ formerly issued out of chancery to compel an attendance. It was abolished by the order of August 8, 1841.

COMMISSIONER OF PATENTS. The title given by law to the head of the patent office. Prior to 1836 the business of that office was under the immediate charge of a clerk in the state department, who was generally known as the superintendent of the patent office. He performed substantially the same duties which afterwards devolved upon the commissioner, except that he was not required to decide upon the patentability of any contrivance for which a patent was sought, inasmuch as the system of examinations had not then been introduced and the applicant was permitted to take out his patent at his own risk. See PATENTS; PATENT OFFICE, EXAMINERS IN.

COMMISSIONERS OF BAIL. Officers appointed by some courts to take recognizances of bail in civil cases.

COMMISSIONERS OF DEEDS. Officers appointed by the governors of many of the states, resident in another state or territory, empowered to take acknowledgments, administer oaths, etc., to be used in the state from which they derive their appointment. They have, for the most part, all the powers of a notary public, except that of protesting negotiable paper. Rap. & Lawr. Law Dict.

COMMISSIONERS OF HIGHWAYS. Officers having certain powers and duties concerning the highway, within the limits of their jurisdiction. They are usually three in number. In some of the states they are county officers, and their jurisdiction is coextensive with the county. In others, as in New York, Michigan, Illinois, and Wisconsin, they are town or township officers. They have power to establish, alter, and vacate highways; and it is their duty to cause them to be kept in repair.

COMMISSIONERS OF SEWERS. **In English Law.** A court of record of special jurisdiction in England.

It is a temporary tribunal, erected by virtue of a commission under the great seal, which formerly was granted *pro re natâ* at the pleasure of the crown, but now at the discretion and nomination of the lord chancellor, lord treasurer, and chief justices, pursuant to the statute of sewers. 23 Hen. VIII. c. 5.

Its jurisdiction is to overlook the repairs of the banks and walls of the sea-coast and navigable rivers and the streams communicating therewith, and is confined to such county or particular district as the commission shall expressly name. The commissioners may take order for the removal of any annoyances or the safeguard and conservation of the sewers within their commission, either according to the laws and customs of Romney Marsh, or otherwise, at their own discretion. They are also to assess and collect taxes for such repairs and for the expenses of the commission. They may proceed with the aid of a jury or upon their own view; 3 Bla. Com. 73, 74; Crabb, Hist. Eng. Law 469.

In American Law. Commissioners have been appointed for the purpose of regulating the flow of water in streams. Their duties are discharged in the different states by county courts, county commissioners, etc.

Municipal officers in many cities having jurisdiction of the construction, maintenance, and regulation of sewers.

COMMISSIONER OF WOODS AND FORESTS. An officer created by act of parliament of 1817, to whom was transferred the jurisdiction of the chief justices of the forest. Inderwick, The King's Peace.

COMMISSIONS. **In Practice.** Compensation allowed to agents, factors, executors, trustees, receivers, and other persons who manage the affairs of others, in recompense for their services.

The *right* to such allowance may either be the subject of a special contract, may rest upon an implied contract to pay *quantum meruit*, or may depend upon statutory provisions; 7 C. & P. 584; 9 *id.* 559.

The right does not generally accrue till the completion of the services; 4 C. & P. 289; 7 Bingh. 99; and see 10 B. & C. 438; and does not then exist unless proper care, skill, and perfect fidelity have been employed; 3 Campb. 451; 9 Bingh. 287; 12 Pick. 328; 94 Mich. 172; 2 Tex. Civ. App. 267; and the services must not have been illegal nor against public policy; 4 Esp. 179; 3 B. & C. 639; 11 Wheat. 258. See 10 Lawy. Rep. Ann. 103.

A real estate broker solicited the privilege of offering an oil property for sale at a price which was fixed and afterwards reduced, upon express condition that the property if not sold on a given day should be taken off the market, which, as the broker failed to make the sale, was done. Eleven days afterward the owner sold the property to a person with whom the broker had opened negotiations, and it was held that time was of the essence of the contract and that the broker was not entitled to a commission; 172 Pa. 396.

The *amount* of such commissions is generally a percentage on the sums paid out or received. When there is a usage of trade at the particular place or in the particular business in which the agent is engaged, the amount of commissions allowed to auctioneers, brokers, and factors is regulated by such usage, in the absence of special agreement; 10 B. & C. 438; 1 Pars. Contr. 84, 85; Story, Ag. § 326; where there is no agreement and no custom, the jury may fix the commission as a *quantum meruit*; 9 C. & P. 620; 43 Miss. 288.

The amount which executors, etc., are to receive is frequently fixed by statute, subject to modification in special cases by the proper tribunal; 12 Barb. 671; Edw. Receiv. 176, 302, 643. In the absence of statutory provision, commissions cannot be allowed to executors for services in partitioning real estate, and allotting and transferring the same; 62 Hun 416. Where the executor has failed to keep accounts and to make investments according to the directions in the will, and by his negligence has involved the estate in litigation, he will not be allowed commissions; 48 N. J. Eq. 559. The entire commissions are not properly exigible before the administration is terminated; 40 La. Ann. 484; 44 *id.* 871. An executor is not entitled to commissions on his own indebtedness to the estate; 156 Pa. 473. In England, no commissions are allowed to executors or trustees; 1 Vern. Ch. 316; 4 Ves. Ch. 72, n.; 9 Cl. & F. 111; even where he carries on the testator's business by his direction; 6 Beav. 371. See the cases in all the states in 2 Perry, Trusts § 918, note.

In case the factor guaranties the payment of the debt, he is entitled to a larger compensation (called a *del credere* commission) than is ordinarily given for the transaction of similar business where no such guaranty is made; Paley, Ag. 88.

See AGENCY; AGENTS; EXECUTORS; ADMINISTRATION.

COMMITMENT. **In Practice.** The warrant or order by which a court or magistrate directs a ministerial officer to take a person to prison.

The act of sending a person to prison by means of such a warrant or order. 9 N. H. 204.

A commitment should be in writing under the hand and seal of the magistrate, and should show his authority and the time and place of making it; 2 R. I. 436; 3 Harr. & M'H. 113; T. U. P. Charlt. 280; 3 Cra. 448. It must be made in the name of the United States or of the commonwealth or people, as required by the constitution of the United States or of the several states.

It should be directed to the keeper of the prison, and not generally to carry the party to prison; 2 Stra. 934; 1 Ld. Raym. 424.

It should describe the prisoner by his name and surname, or the name he gives as his.

It ought to state that the party has been charged on oath; 14 Johns. 371; 3 Cra. 448; but see 2 Va. Cas. 504; 2 Bail. 290; and should mention with convenient certainty the particular crime charged against the prisoner; 3 Cra. 448; 11 St. Tr. 304, 318; Hawk. Pl. Cr. b. 2, c. 16, s. 16; 4 Md. 262; 1 Rob. 744; 5 Ark. 104; 26 Vt. 205. See 17 Wend. 181; 23 *id.* 638; but a defect in describing the offence is immaterial if it is sufficiently described in the order endorsed on the deposition; 88 Cal. 316. It should point out the place of imprisonment, and not merely direct that the party be taken to prison; 2 Stra. 934; 1 Ld. Raym. 424.

It may be for further examination, or final. If final, the command to the keeper of the prison should be to keep the prisoner "until he shall be discharged by due course of law," when the offence is not bailable; see 3 Conn. 502; 29 E. L. & E. 134; when it is bailable, the gaoler should be directed to keep the prisoner in his "said custody for want of sureties, or until he shall be discharged by due course of law." When the commitment is not final, it is usual to commit the prisoner "for further hearing."

The word commit in a statute has a technical meaning, and a warrant which does not direct an officer to commit a party to prison but only to receive him into custody and safely keep him for further examination, is not a commitment; 23 Ct. Cls. 218.

See, generally, 4 Cra. 129; 2 Yerg. 53; 6 Humphr. 391; 9 N. H. 185; 5 Rich. So. C. 255; 85 Ga. 171.

COMMITTEE. In Legislation. One or more members of a legislative body, to whom is specially referred some matter before that body, in order that they may investigate and examine into it and report to those who delegated this authority to them.

The minority of a committee to which a corporate power has been delegated, cannot bind the majority, or do any valid act, in the absence of any special provision otherwise; 127 U. S. 579.

In Practice. A guardian appointed to take charge of the person or estate of one who has been found to be *non compos mentis*.

For committee of the person, the next of kin is usually selected; and, in case of the lunacy of a husband or wife, the one who is of sound mind is entitled, unless under very special circumstances, to be the committee of the other; Shelf. Lun. 137, 140. It is the duty of such a person to take care of the lunatic.

For committee of the estate, the heir at law is favored. Relations are preferred to strangers; but the latter may be appointed; Shelf. Lun. 144. It is the duty of such committee to administer the estate faithfully and to account for his administration. He cannot, in general, make contracts in relation to the estate of the lunatic, or bind it, without a special order of the court or authority that appointed him.

COMMITTITUR PIECE. In English Law. An instrument in writing, on paper or parchment, which charges a person already in prison, in execution at the suit of the person who arrested him.

COMMIXTION. In Civil Law. A term used to signify the act by which goods are mixed together.

The matters which are mixed are dry or liquid. In the commixtion of the former, the matter retains its substance and individuality; in the latter, the substance no longer remains distinct. The commixtion of liquid is called *confusion* (q. v.), and that of solids a mixture. *Lec. Elém. du Dr. Rom.* §§ 370, 371; Story, Bailm. § 40; 1 Bouvier, Inst. n. 506.

COMMODATE. In Scotch Law. A gratuitous loan for use. Erskine, Inst. b. 3, t. 1, § 20; 1 Bell, Com. 225. The implied contract of the borrower is to return the thing borrowed in the same condition as received.

Judge Story regrets that this term has not been adopted and naturalized, as mandate has been from *mandatum*. Story, Bailm. § 221. Ayliffe, in his Pandects, has gone further and terms the bailor the *commodant*, and the bailee the *commodatory*, thus avoiding those circumlocutions which, in the common phraseology of our law, have become almost indispensable. Ayliffe, *Pand.* b. 4, t. 16, p. 517. Brown, in his Civil Law, vol. 1, 352, calls the property loaned "*commodated* property."

COMMODATO. In Spanish Law. A contract by which one person lends gratuitously to another some object not consumable, to be restored to him in kind at a given period.

COMMODATUM. A contract by which one of the parties binds himself to return to the other certain personal chattels which the latter delivers to him to be used by him without reward; loan for use.

COMMON. An incorporeal hereditament, which consists in a profit which one man has in connection with one or more others in the land of another. 12 S. & R. 32; 10 Wend. 647; 16 Johns. 14, 30; 10 Pick. 364; 3 Kent 403.

Common of digging, or common in the soil, is the right to take for one's own use part of the soil or minerals in another's lands; the most usual subjects of the right are sand, gravel, stones and clay. It is of a very similar nature to common of estovers and of turbary. Elton, Com. 109; Black, L. Dict.

Common of estovers is the liberty of taking necessary wood, for the use of furniture of a house or farm, from another man's estate. This right is inseparably attached to the house or farm, and is not apportionable. If, therefore, a farm entitled to estovers be divided by the *act of the party* among several tenants, neither of them can take estovers, and the right is extinguished; 2 Bla. Com. 34; Plowd. 381; 10 Wend. 639. It is to be distinguished from the right to estovers which a tenant for life has in the estate which he occupies. See ESTOVERS.

Common of pasture is the right of feeding one's beast on another's land. It is either

appendant, appurtenant, because of vicinage, or in gross.

Common of piscary is the liberty of fishing in another man's water. 2 Bla. Com. 34. See FISHERY.

Common of shack. The right of persons occupying lands, lying together in the same common field, to turn out their cattle after harvest to feed promiscuously in that field. Whart. Dict.; Steph. Com., 11th ed. 623; 1 B. & Ald. 710.

Common of turbary is the liberty of digging turf in another man's ground. Common of turbary can only be appendant or appurtenant to a house, not to lands, because turves are to be spent in the house; 4 Co. 37; 3 Atk. 189; Noy. 145; 7 East 127.

The taking seaweed from a beach is a commonable right in Rhode Island; 2 Curt. C. C. 571; 1 R. I. 106; 2 *id.* 218. In Virginia there are statutory provisions concerning the use of all unappropriated lands on the Chesapeake Bay, on the shore of the sea, or of any river or creek, and the bed of any river or creek in the eastern part of the commonwealth, ungranted and *used as common;* Va. Code, c. 62, § 1.

In most of the cities and towns in the United States, there are considerable tracts of land appropriated to public use. These commons were generally laid out with the cities or towns where they are found, either by the original proprietors or by the early inhabitants.

Where land thus appropriated has been accepted by the public, or where individuals have purchased lots adjoining land so appropriated, under the expectation excited by its proprietors that it should so remain, the proprietors cannot resume their exclusive ownership; 3 Vt. 521; 10 Pick. 310; 4 Day 328; 1 Ired. 144; 7 Watts 394. And see 14 Mass. 440; 2 *id.* 475; 37 Mich. 291; 2 Pick. 475; 12 S. & R. 32; 6 Vt. 355.

COMMON APPENDANT. Common of pasture appendant is a right annexed to the possession of land, by which the owner thereof is entitled to feed his beasts on the wastes of the manor. It can only be claimed by prescription: so that it cannot be pleaded by way of custom; 1 Rolle, Abr, 396; 6 Coke 59. It is regularly annexed to arable land only, and can only be claimed for such cattle as are necessary to tillage, as horses and oxen to plough the land, and cows and sheep to manure it; 2 Greenl. Cruise, Dig. 4. 5; 10 Wend. 647. Common appendant may by usage be limited to any certain number of cattle; but where there is no such usage, it is restrained to cattle *levant* and *couchant* upon the land to which it is appendant; Digb. R. P. 156; 8 Term 396; 2 M. & R. 205; 2 Dane, Abr. 611, § 12. It may be assigned; and by assigning the land to which it is appended, the right passes as a necessary incident to it. It may be apportioned by granting over a parcel of the land to another, either for the whole or a part of the owner's estate; Willes 227; 4 Co. 36; 8 *id.* 78. It may be extinguished by a release of it to the owner of the land, by a severance of the right of common, by unity of possession of the land, or by the owner of the land, to which the right of common is annexed, becoming the owner of any part of the land subject to the right; 25 Pa. 161; 16 Johns. 14; Cro. Eliz. 592.

Common of estovers or of piscary, which may also be appendant, cannot be apportioned; 8 Co. 78. But see 2 R. I. 218.

COMMON APPURTENANT. Common appurtenant differs from common appendant in the following particulars, viz.: it may be claimed by grant or prescription, whereas common appendant can only arise from prescription; it does not arise from any connection of tenure, nor is it confined to arable land, but may be claimed as annexed to any kind of land; it may be not only for beasts usually commonable, such as horses, oxen, and sheep, but likewise for goats, swine, etc.; it may be severed from the land to which it is appurtenant, it may be commenced by grant; and an uninterrupted usage for twenty years is evidence of a grant. In most other respects commons appendant and appurtenant agree; 2 Greenl. Cruise, Dig. 5; 30 E. L. & Eq. 176; 15 East 108.

COMMON BECAUSE OF VICINAGE. The right which the inhabitants of two or more contiguous townships or vills have of intercommoning with each other. It ought to be claimed by prescription, and can only be used by cattle *levant* and *couchant* upon the lands to which the right is annexed; and cannot exist except between *adjoining* townships, where there is no intermediate land; Co. Litt. 122 *a*; 4 Co. 38 *a*; 7 *id.* 5; 10 Q. B. 581, 589, 604; 19 *id.* 620; 18 Barb. 523.

COMMON IN GROSS. A right of common which must be claimed by deed or prescription. It has no relation to land, but is annexed to a man's person, and may be for a certain or indefinite number of cattle. It cannot be aliened so as to give the entire right to several persons to be enjoyed by each in severalty. And where it comes to several persons by operation of law, as by descent, it is incapable of division among them, and must be enjoyed jointly. Common appurtenant for a limited number of cattle may be granted over, and by such grant becomes common in gross; Co. Litt. 122 *a*, 164 *a*; 5 Taunt. 244; 16 Johns. 30; 2 Bla. Com. 34.

See, generally, Viner, Abr. *Common;* Bacon, Abr. *Common;* Comyns, Dig. *Common;* 2 Bla. Com. 34; 2 Washb. R. P.; Williams, Rights of Common (1880); 61 Mo. 210; 97 Ill. 498; 4 How. 421.

COMMON ASSURANCES. Deeds which make safe or assure to a man the title to his estate, whether they are deeds of conveyance or to charge or discharge.

COMMON BAIL. Fictitious sureties entered in the proper office of the court. See BAIL; ARREST.

COMMON BAR. In Pleading. A plea to compel the plaintiff to assign the particular place where the trespass has been

committed. Steph. Pl., And. ed. 351. It is sometimes called a blank bar.

COMMON BARRATRY. See BARRATRY.

COMMON BENCH. The ancient name for the court of common pleas. See BENCH; BANCUS COMMUNIS.

COMMON CARRIERS. A common carrier is one whose business, occupation, or regular calling it is to carry chattels for all persons who may choose to employ and remunerate him. 1 Pick. 50; 2 Kelly 353; Schouler, Bailm., 2d ed. § 345; Edw. Bailm. 495; 24 Conn. 479.

The definition includes carriers by land and water. They are, on the one hand, stagecoach and omnibus proprietors, railroad and street railway companies; 36 Neb. 890; truckmen, wagoners, and teamsters, carmen and porters; and express companies, whether such persons undertake to carry goods from one portion of the same town to another, or through the whole extent of the country, or even from one state or kingdom to another. And, on the other hand, this term includes the owners and masters of every kind of vessel or water-craft who set themselves before the public as the carriers of freight of any kind for all who choose to employ them, whether the extent of their navigation be from one continent to another or only in the coasting trade or in river or lake transportation, or whether employed in lading or unlading goods or in ferrying, with whatever mode of motive power they may adopt; Story, Bailm. §§ 494–496; 2 Kent 598, 599; Redf. Railw. § 124; 1 Salk. 249; 2 Ga. 348; 14 Ala. N. S. 261; 129 U. S. 397; 2 Dana 431; 12 Ga. 217; 26 Wend. 153. A pipe line company is a common carrier bound to receive and transport, for all persons alike, all oil intrusted to its care, and is not in any sense an agent for the person who employs it to transfer oil; 172 Pa. 580.

It has been doubted whether carmen; 8 C. & P. 207; and coasters; 6 Cow. 266; were common carriers; but these cases stand alone, and are contradicted by many authorities; 19 Barb. 577; 24 *id.* 533; 9 Rich. 193. Telegraph or telephone companies are not carriers; 60 Ill. 421; 41 N. Y. 544; 78 Pa. 238; 45 Barb. 274; 58 Ga. 433; 49 Conn. 352; but they are subject to the rules governing common carriers and others engaged in like public employment; 50 Fed. Rep. 677; 154 U. S. 1. See TELEGRAPH COMPANIES; TELEPHONE COMPANIES.

The liability of the owner of a tug-boat to his tow is not that of a common carrier; 77 Pa. 238; 13 Wend. 387; 24 La. Ann. 165; 1 Black 62; 6 Cal. 462.

And although the carrier receives the goods as a forwarder only, yet if his contract is to transport and to deliver them at a specified address, he is liable as a common carrier; 5 Am. Law Reg. N. S. 16; 48 N. H. 339.

Common carriers are responsible for all loss or damage during transportation, from whatever cause, except the act of God or the public enemy; Ang. Carr. 70, § 67; 1 Term 27; 2 Ld. Raym. 909, 918; 1 Salk. 18 and cases cited; 25 E. L. & Eq. 595; 2 Kent 597, 598; 7 Yerg. 340; 3 Munf. 239; 21 Wend. 190; 5 Strobh. 119; Rice 108; 4 Zabr. 697; 12 Conn. 410; 4 N. H. 259; 11 Ill. 579; 129 U. S. 397; 15 Minn. 279; 66 Ala. 167; 55 Tex. 323. The act of God is held to extend only to such inevitable accidents as occur without the intervention of man's agency; Wood, Ry. L. 1877; 21 Wend. 192; 4 Dougl. 287; which could not be avoided by the exercise of due skill and care; 2 Watts 114; 10 Wall. 176; but where freight cars are stopped by a flood and the contents stolen, the loss is not due to inevitable accident, act of God, or insurrection; 154 Pa. 342. See ACT OF GOD.

The carrier is not responsible for losses occurring from natural causes, such as frost, fermentation, evaporation, or natural decay of perishable articles, or the natural and necessary wear in the course of transportation, or the shipper's carelessness, provided the carrier exercises all reasonable care to have the loss or deterioration as little as practicable; Bull. N. P. 69; 2 Kent 299, 300; Story, Bailm. § 492 *a*; 6 Watts 424; Redf. Railw. § 141; 86 Me. 225; 53 Fed. Rep. 936; 21 S. W. Rep. (Tex.) 622; 28 Pac. Rep. (Or.) 894. See 115 Ill. 407; 1 L. R. A. 702.

In every contract for the carriage of goods by sea, unless otherwise expressly stipulated, there is a warranty on the part of the shipowner that the ship is seaworthy when she begins her voyage, and his undertaking is not discharged because the want of fitness is the result of latent defects; 157 U. S. 124.

Carriers, both by land and water, when they undertake the general business of carrying every kind of goods, are bound to carry for all who offer; and if they refuse, without just excuse, they are liable to an action; 4 B. & Ald. 32; 8 M. & W. 372; 1 Pick. 50; 5 Mo. 36; 15 Conn. 539; 2 Sumn. 221; 6 Railw. Cas. 61; 6 Wend. 335; 19 *id.* 261; 2 Story 16; 12 Mod. 484; 4 C. B. 555; L. R. 1 C. P. 423; 19 S. C. 353; 6 How. 344; 30 L. J. Q. B. 273. But the business of a common carrier may be restricted within such limits as he may deem expedient, if an individual, or which may be prescribed in its grant of powers, if a corporation, and he is not bound to accept goods out of the line of his usual business. But should the carrier accept goods not within the line of his business, he assumes the liability of a common carrier as to the specific goods accepted; 23 Vt. 186; 14 Pa. 48; 10 N. H. 481; 30 Miss. 231; 4 Exch. 369; 17 Wall. 357; 6 Wend. 335; 26 Vt. 248; Schouler, Bailm., 2d ed. § 372; Redf. Railw. Ca. 116. The carrier may require freight to be paid in advance; but in an action for not carrying, it is only necessary to allege a readiness to pay freight; 8 M. & W. 372; 18 Ill. 488; 14 Ala. N. S. 249. It is not required to prove or allege a tender, if the carrier refuse to accept the goods for transportation. The carrier is entitled to a lien upon the goods for freight; 2 Ld. Raym. 752; and for ad-

vances made to other carriers ; 6 Humphr. 70 ; 16 Ill. 408 ; 16 Johns. 356 ; 13 B. Monr. 243. The consignor is *prima facie* liable for freight ; but the consignee may be liable when the consignor is his agent, or when the title is in him and he accepts the goods ; 3 Bingh. 383 ; 4 Den. 110 ; 3 E. D. Sm. 187 ; Schouler, Bailm., 2d ed. § 535.

Common carriers may qualify their common-law responsibility by special contract ; 4 Coke 83 ; Ang. Carr. § 220 ; 1 Ventr. 238 ; Story, Bailm. § 549, and note 5 ; 17 Wall. 357 ; 16 Wall. 318 ; 63 Pa. 14 ; 4 Ind. App. 326. A carrier cannot exact as a condition precedent that a shipper must sign a contract in writing limiting the common law liability ; 48 Kan. 210 ; 29 S. W. Rep. (Tex.) 565. A contract to qualify the common-law liability may be shown by proving a notice, brought home to and assented to by the owner of the goods or his authorized agent, wherein the carrier stipulates for a qualified liability ; 8 M. & W. 243 ; 6 How. 344 ; 3 Me. 228 ; 11 N. Y. 491 ; 9 Watts 87 ; 8 Pa. 479 ; 31 *id.* 209 ; 2 Rich. 286 ; 12 B. Monr. 63 ; 23 Vt. 186 ; 4 Har. & J. 317. Or it may be reduced to writing, in the form of a bill of lading. See BILL OF LADING. A contract by carrier limiting his liability for negligence is governed by the *lex loci contractus ;* 148 Pa. 527.

But the carrier cannot contract against his own negligence or the negligence of his employés and agents ; 15 Am. Law Reg. N. S. 140 ; 50 Pa. 313 ; 1 Fed. Rep. 382 ; 41 Conn. 333 ; 17 Wall. 357 ; 54 Pa. 53 ; 77 *id.* 516 ; 129 U. S. 128, 397 ; 153 *id.* 199 ; L. R. 2 App. Cas. 792 ; 93 U. S. 174 ; 95 *id.* 655 ; 17 Blatchf. 412 ; 56 Ala. 338 ; 86 Ill. 71 ; 6 Ind. 416 ; 47 *id.* 471 ; 97 Mass. 124 ; 115 *id.* 304 ; 42 Mo. 88.

Railroad companies, steamboats, and all other carriers who allow express companies to carry parcels and packages on their cars, or boats, or other vehicles, are liable as common carriers to the owners of goods for all loss or damage which occurs, without regard to the contract between them and such express carriers ; 6 How. 344 ; 23 Vt. 186. See Wheeler, Carriers 89.

Railways, steamboats, packets, and other common carriers of passengers, although not liable for injuries to their passengers without their fault, are nevertheless responsible for the baggage of such passengers intrusted to their care as common carriers of goods ; and such responsibility continues for a reasonable time after the goods have been placed in the warehouse or depot of the carrier, at the place of destination, for delivery to the passenger or his order ; 1 C. B. 839 ; 2 B. & P. 416 ; 6 Hill 586 ; 26 Wend. 591 ; 10 N. H. 481 ; 7 Rich. 158. See 81 Tex. 479. Where one company checks baggage through a succession of lines owned by different companies, each company becomes responsible for the whole route ; 8 N. Y. 37 ; 2 E. D. Sm. 184. The baggage-check given at the time of receiving such baggage is regarded as *prima facie* evidence of the liability of the company. It stands in the place of a bill of lading ; 7 Rich. 158 ; Redf. Railw. § 128. Baggage will not include merchandise ; 9 Eng. L. & Eq. 477 ; 25 Wend. N. Y. 459 ; 6 Hill, N. Y. 586 ; 12 Ga. 217 ; 10 Cush. 506. Jewelry and a watch in a trunk, being female attire, are regarded as proper baggage ; 4 Bingh. 218 ; 3 Pa. 451. See 131 U. S. 440 ; 148 U. S. 627. But money, except a reasonable amount for expenses, is not properly baggage ; 9 Wend. 85 ; 5 Cush. 69 ; 9 Humphr. 621 ; 20 Mo. 513 ; 15 Ala. 242. See BAGGAGE.

The responsibility of common carriers begins upon the delivery of the goods for immediate transportation. A delivery at the usual place of receiving freight, or to the employés of the company in the usual course of business, is sufficient ; 20 Conn. 534 ; 2 C. & K. 680 ; 2 M. & S. 172 ; 16 Barb. 383 ; Ang. Carr. §§ 129–147 ; 46 Mo. App. 574 ; 56 Ark. 279 ; 52 N. Y. 262 ; 38 Ill. 354 ; Edw. Bailm. 528 ; but where carriers have a warehouse at which they receive goods for transportation, and goods are delivered there not to be forwarded until some event occur, the carriers are, in the mean time, only responsible as depositaries ; 24 N. H. 71 ; and where goods are received as wharfingers, or warehousers, or forwarders, and not as carriers, liability will be incurred only for ordinary negligence ; 7 Cow. 497. Where goods are injured because of insecure packing or boxing, the carrier is not liable ; 22 Or. 14 ; but where it does not appear that they were received as in bad order, or that they were so in fact, the presumption is that they were in good order ; 89 Ga. 815. Where there was less than a carload of goods, and there was no agreement on the part of the carrier to transport them in a ventilated car, although it was requested by the carrier that they should be so shipped, it was held that the carrier was not liable for the loss of perishable goods ; 173 Pa. 398.

The responsibility of the carrier terminates after the arrival of the goods at their destination and a reasonable time has elapsed for the owner to receive them in business hours. After that, the carrier may put them in a warehouse, and is only responsible for ordinary care ; Wood, Ry. L. 1906 ; 10 Metc. 472 ; 27 N. H. 86 ; 2 M. & S. 172 ; Story, Bailm. § 444. Where goods are delivered to the consignee in violation of instructions not to deliver without a bill of lading, the company is liable to the shipper for loss thereby sustained ; 61 Hun 623. In carriage by water, the carrier is, as a general rule, bound to give notice to the consignee of the arrival of the goods ; Redf. Railw. § 130 ; and the delivery of goods from a ship must be according to the custom and usages of the port, and such delivery will discharge the carrier of his responsibility ; 154 U. S. 51.

Where goods are so marked as to pass over successive lines of railways, or other transportation having no partnership connection in the business of carrying, the successive carriers are only liable for damage or loss occurring during the time the goods are in their possession for transportation ; 48 N. H. 339 ; 22 Wall. 129 ; 52 Vt. 335 ; 23 *id.* 186 ;

6 Hill 158; 22 Conn. 502; 1 Gray 502; 4 Am. Law Reg. 234; 36 S. C. 110; 1 Okla. 44. A carrier may stipulate that it shall be released from liability after goods have left its road; 78 Tex. 372; 84 Tex. 352; 41 Ill. App. 607; 5 Tex. Civ. App. 547. The English courts hold the first carrier, who accepts goods marked for a place beyond his route, responsible for the entire route, unless he stipulates expressly for the extent of his own route only; 8 M. & W. 421; 3 E. L. & Eq. 497; 18 *id.* 553, 557.

Where one of the carriers has contracted clearly and unequivocally to deliver goods at their destination, *i. e.*, to carry them over the whole route, his liability will continue until final delivery; 33 Conn. 178; 63 Pa. 272; 3 Fed. Rep. 768; 51 N. H. 9; 48 *id.* 339; 96 U. S. 258; 84 Ill. 239. See 9 L. R. A. 833, note; 49 Vt. 255; 127 N. Y. 438; but the carrier upon whose line the damage or loss has occurred will also be liable; 1 Am. Law Reg. o. s. 119; 28 Wis. 209; 32 Vt. 665. Where the connecting carrier refuses or unreasonably delays to accept goods, the original carrier while so holding them is a carrier, and the liability as such continues until they are warehoused; 46 Mo. App. 656.

A contract to transport goods from or to points not on the carrying line, and without the state by which it is incorporated, is held to be good; 2 Am. Law Reg. N. S. 184; 47 Me. 573; 27 Vt. 110; 19 Wend. 534; Redf. Railw. Cases 110; 48 N. H. 339; *contra*, 24 Conn. 468.

The agents of corporations who are common carriers, such as railway and steamboat companies, will bind their principals to the full extent of the business intrusted to their control, whether they follow their instructions or not; 14 How. 468, 483. See 127 N. Y. 438. Nor will it excuse the company because the servant or agent acted wilfully in disregard of his instructions; 5 Duer, N. Y. 193; Redf. Railw. § 137, and cases cited in notes.

The contracts of common carriers, like all other contracts, are liable to be controlled and qualified by the known usages and customs and course of the business in which they are engaged; and all who do business with them are bound to take notice of such usages and customs as are uniform, of long standing, and generally known and understood by those familiar with such transactions; 25 Wend. 660; 6 Hill 157; 23 Vt. 186, 211, 212; 21 Ga. 526.

The liability of a common carrier may, at common law, be limited by the character of, or defects in, the subject-matter of the contract. The limitation was formerly applied to contracts for the carriage of slaves, and it was held in such cases that a carrier was not an insurer, and was only liable for the want of skill and care; 2 Pet. 150; 4 McCord 223; 4 Port. 234. The carrier of animals is not answerable for the damages caused by the conduct or propensities of the animals themselves; 9 Barb. 145; S. C. 13 Am. L. Reg. N. S. 145 (with note by Mr. Hunter). See 21 Mich. 165; 9 Bush 645; 111 Mass. 142; 8 Ill. App. 160; 75 Ala. 596; 44 Ia. 424; 27 S. W. Rep. (Tex.) 887; 29 *id.* (Tex.) 1110; but in other respects the liability for injury to live stock is as great as it would be under a contract for the carriage of inanimate objects; 4 Ohio St. 722; 9 Kan. 235; 26 Vt. 248; 52 N. H. 355; 5 Neb. 117; 72 Ill. 504; 4 M. & W. 749; 1 H. & H. 489.

In Michigan, Kentucky, and Tennessee, a railroad company is not at common law a carrier of live stock and may refuse to receive it for transportation; and only becomes liable as a common carrier by assuming to carry it as such; 21 Mich. 165; 25 *id.* 329; 10 Lea, Tenn. 304; 9 Bush, Ky. 645. Where a mandamus was asked to compel a common carrier to receive live stock for transportation under common-law liability, it was refused by the supreme court of New York; 16 Hun 313. If the carrier accept live stock for transportation, he is bound to exercise at least ordinary care; 38 Ia. 127; 70 Tex. 491; 29 S. W. Rep. (Tex.) 695; 57 Mo. App. 550; 22 S. E. Rep. (Va.) 490; 168 Pa. 209; 28 S. W. Rep. (Tex.) 925; 57 Mo. App. 135. The burden of proof is on carrier to show that loss or injury to live stock resulted from an excepted cause, when shipped under special contract, containing exemptions from liability; 69 Miss. 191.

There has been much legislation on the subject of special contracts for the transportation of live stock, and the courts have construed them with reference to their subject-matter and intrinsic qualities. In most of the states it seems to be settled that a carrier of live stock is liable for all accidents to them except those which arise from the act of God, the public enemy, or the inherent propensities of the animals themselves. See Wheel. Com. Car.

The carrier has an insurable interest in the goods, both in regard to fire and marine disasters, measured by the extent of his liability for loss or damage; 12 Barb. 595.

The carrier is not bound, unless he so stipulate, to deliver goods by a particular time, or to do more than to deliver in a reasonable time under all the circumstances attending the transportation; Story, Bailm. § 545 *a*; 5 M. & G. 551; 6 McLean 296; 19 Barb. 36; 12 N. Y. 245. See 15 W. R. 792; L. R. 9 C. P. 325; 23 Wis. 138; 41 Ill. 73; 79 Mo. 296. What is a reasonable time is to be decided by the jury, from a consideration of all the circumstances; 7 Rich. 190, 409; 32 L. J. Q. B. 292; 4 B. & S. 66.

But if the carrier contract specially to deliver in a prescribed time, he must perform his contract, or suffer the damages sustained by his failure; 1 Duer, N. Y. 209; 12 N. Y. 99; 2 B. & P. 416; 21 L. J. Q. B. 178; 105 Mass. 437; 83 Mo. 574.

He is liable, upon general principles, where the goods are not delivered through his default, to the extent of their market value at the place of their destination; Ang. Carr. 488, 489; 4 Whart. 204; 11 La. Ann. 324; Sedg. Dam. 356; 2 B. & Ad. 932; 49 Vt. 255; 27 Ill. 148; 55 Mo. 167; 43 Mich. 209. See, also, 12 S. & R. 183; 1 Cal. 108.

If the goods are only damaged, or not delivered in time, the owner is bound to receive them. He will be entitled to damages, but cannot repudiate the goods and recover from the carrier as for a total loss; 5 Rich. 462; 12 N. Y. 509; 35 N. H. 390; 60 N. Y. Super. Ct. 132.

For the authorities in the civil law on the subject of common carriers, the reader is referred to Dig. 4. 9. 1 to 7; Pothier, *Pand.* lib. 4, t. 9; Domat, liv. 1, t. 16, ss. 1 and 2; Pardessus, art. 537 to 555; *Code Civil*, art. 1782, 1786, 1952; Moreau & Carlton, *Las Partidas*, c. 5, t. 8, l. 26; Erskine, Inst. b. 2, t. 1, § 28; 1 Bell, Comm. 465; Abbott, Shipp. part 3, c. 3, § 3, note (1); 1 Voet, *Ad Pand.* lib. 4, t. 9; Merlin, Rép. *Voiture, Voiturier;* Goirand, Code of Commerce (1880) 163.

Consult Angell on Carriers; Chitty & Temple; Lawson; Ray; Thompson; Browne; Wheeler, Carriers; Story; Schouler, Bailments; Darlington; Parsons; Redfield; Wood, Railways; 13 Lawy. Rep. Ann. 33; COMMON CARRIERS OF PASSENGERS; BAGGAGE; BAILMENTS; LIEN; EXPRESS COMPANIES.

COMMON CARRIERS OF PASSENGERS. Common carriers of passengers are such as undertake for hire to carry all persons indifferently who may apply for passage, so long as there is room, and there is no legal excuse for refusing. Thomps. Carriers of Passengers 26, n. § 1; 11 Allen 304; 19 Wend. 239; 10 N. H. 486; 15 Ill. 472; 2 Sumn. 221; 3 B. & B. 54; 9 Price 408.

A company owning parlor and sleeping cars, who enter into no contract of carriage with the passenger, but only give him superior accommodations during the journey, is not a common carrier; 73 Ill. 360; 62 Fed. Rep. 265. See PARLOR CARS; SLEEPING CARS. A street railway company is a common carrier of passengers and liable as such on common-law principles; 36 Neb. 890. See STREET RAILWAYS.

Common carriers may excuse themselves when there is an unexpected press of travel and all their means are exhausted. But see Redfield, Railw. 344. § 155, and notes, and cases cited; Story, Bailm. § 591; 10 N. H. 486; and they may for good cause exclude a passenger: thus, they are not required to carry drunken and disorderly people, or one affected with a contagious disease, or those who come on board to assault passengers, commit a crime, flee from justice, gamble, or interfere with the proper regulations of the carrier, and disturb the comfort of the passengers; Wood, Ry. L. 1200; 4 Dill. 321; 4 Wall. 605; 15 Gray 20; 11 Allen 304; 57 Ind. 576; 68 *id.* 316; 76 Pa. 510; 32 Ohio St. 345; or one whose purpose is to injure the carrier's business; 2 Sumn. 221; 11 Blatchf. 233; but if a carrier receives a passenger, knowing that a good cause exists for his exclusion, he cannot afterwards eject him for such cause; 4 Wall. 605; 34 Cal. 616. Where one rightfully on a train as a passenger is put off, it is of itself a good cause of action against the company irrespective of any physical injury that may have resulted; 143 U. S. 60. It is not liable for injuries resulting from one trying to steal a ride on a freight train; 157 Mass. 377.

Passenger-carriers are not held responsible as insurers of the safety of their passengers, as common carriers of goods are. But they are bound to the very highest degree of care and watchfulness in regard to all their appliances for the conduct of their business; so that, as far as human foresight can secure the safety of passengers, there is an unquestionable right to demand it of all who enter upon the business of passenger-carriers; 2 Esp. 533; 17 Ill. 496; 36 Neb. 890; 1 Tex. Civ. App. 642; 145 Ill. 67; L. R. 9 Q. B. 122; 2 Q. B. D. 377; 136 Mass. 321; 102 U. S. 451; 94 Pa. 351.

The carrier is not excused because the passenger does not pay fare; 14 How. 483; or because he is an express messenger and is injured while engaged in his duties as such; 56 Ark. 594; 96 Pa. 256; common carriers must exercise the same degree of care in carrying passengers free, on pass or otherwise, as in carrying them for hire, and cannot in such case exempt themselves from liability for negligence; Ray. Neg. Imp. Dut. 5; 37 Mich. 111; 1 Cal. 348; 40 Barb. 546; 21 Ind. 48; 30 Allen 9; 30 Ill. 9; 24 N. Y. 196; 57 Pa. 335; 39 Ia. 246; 68 Mo. 340; 63 Md. 433; 71 Ind. 271; 22 L. R. A. 794. *Aliter* in England as to negligence; 13 Ir. L. T. 100; 9 Ir. L. T. 69; L. R. 10 Q. B. 437; 5 Wash. St. 46. When live stock is shipped upon a railroad it is customary to issue to the persons in charge "drover's" passes, which entitle the holder to accompany the stock and return. By the terms of such a pass the carrier may restrict his liability for injury done to the holder, but cannot, by any limitation therein contained, relieve himself from accountability for injury caused by his own or his servants' negligence; 17 Wall. 357; 19 Ohio 1, 221, 260; 51 Pa. 315; 47 Ind. 471; 41 Ala. 486; 39 Ia. 246; 20 Minn. 125; 93 U. S. 291; 26 Gratt. 328; 71 Ind. 271. But *contra* in case of negligence, in England; L. R. 8 Q. B. 57; 10 *id.* 212; and in New York; 24 N. Y. 181, 196; 25 *id.* 442; 32 *id.* 333; 49 *id.* 263; 61 Hun 623. Where a train is signalled at a section house, which is not a regular stopping-place, and a person boards it without any one's knowledge, and in doing so is injured, the road is not liable; 68 Miss. 643. The passenger must be ready and willing to pay such fare as is required by the established regulations of the carriers in conformity with law. But an actual tender of fare or passage-money does not seem requisite in order to maintain an action for an absolute refusal to carry, and much less is it necessary in an action for any injury sustained; 6 C. B. 775; Story, Bailm. § 591; 1 East 203; 2 Kent 598, 599, and note. The rule of law is the same in regard to paying fare in advance that it is as to freight, except that, the usage in the former case being to take pay in advance, a passenger is expected to have procured

his ticket before he had taken passage; and the law will presume payment according to such usages; 3 Pa. 451. One ceases to be a passenger of a street car the moment he leaves it; 156 Mass. 320.

Passenger-carriers are responsible as common carriers for the baggage or their passengers; 13 Wend. 626; but may limit their common-law liability by express contract, and by specific and reasonable regulations made known to the public, but they cannot relieve themselves from liability from loss occasioned by their own or their servants' negligence; 19 Wend. 234, 251; 2 Ohio 132; 8 Pa. 479; 47 Ind. 471; 41 Ala. 488. See L. R. 10 Q. B. 437. The term baggage includes such articles as the traveller's comfort, convenience, and amusement require. See BAGGAGE. The carrier may make such reasonable regulations as seem to him proper for the checking, custody, and carriage of baggage; 7 Allen 329. And is liable as a carrier until the passenger has had a reasonable time to remove it after its arrival at his destination; 69 Hun 479. But a steamship company is not responsible as a carrier for the baggage retained by a passenger; 2 N. Y. 355; 7 Cush. 155; 32 Wis. 85; 3 H. & C. 137; L. R. 6 C. P. 44; 83 Pa. 446.

Where the servants of common carriers of passengers—as the drivers of stage-coaches, etc., the captains of steamboats, and the conductors of railway trains—are allowed to carry parcels, the carriers are responsible for their safe delivery, although such servants are not required to account for what they receive by way of compensation; 6 Wend. 351; 23 Vt. 186, 203; 2 Story. 16; 2 Kent 609.

In regard to the particulars of the duty of carriers of passengers as to their entire equipment both of machinery and servants, the decisions are very numerous; but they all concur in the result that if there were anything more which could have been done by the carrier to insure the safety of his passengers, and injury occurs in consequence of the omission, he is liable. The consequence of such a rule naturally is, that, after any injury occurs, it is more commonly discovered that it was in some degree owing to some possible omission or neglect on the part of the carrier or his servants, and that he is, therefore, held responsible for the damage sustained; but where the defect was one which no degree of watchfulness in the carrier will enable him to discover, he is clearly not liable; Redf. Railw. § 149, notes; Ang. Carr. § 534; Story, Bailm. §§ 592–596; 2 B. & Ad. 160; 11 Gratt. 697; 1 McLean 540; 13 N. Y. 9; 16 How. 469; 97 Mass. 361; 71 Mo. 113; 102 Pa. 115; 105 *id.* 460; 11 C. B. N. S. 588. They must also furnish safe and convenient stations and approaches; 26 Ia. 124; 29 Ohio St. 374. And they must absolutely protect passengers against the misconduct of their own servants engaged in executing the contract; 121 U. S. 637; and if an employé is free from liability for injury done a passenger, the carrier is also; 142 U. S. 18. Where one enters a ticket-office to buy a ticket he is entitled to the protection of a passenger, although the agent refuse to sell him a ticket; 89 Va. 639.

The degree of speed allowable upon a railway depends upon the condition of the road; 5 Q. B. 747.

Passenger-carriers are not responsible where the injury resulted directly from the negligence of the passenger; Wood, Railw. L. 1272; 22 Vt. 213; 95 U. S. 439; 23 Pa. 147; Ang. Carr. 556; Redf. Railw. 330, § 150, and cases cited in notes; 3 B. & Ald. 304; 86 Pa. 303; 36 Wis. 92.

It is the duty of a street railway company to stop when a passenger is about to alight and not to start again until he has done so; 147 U. S. 571; but the act of alighting from a moving car is not negligence *per se*, regardless of attending circumstances; 48 Mo. App. 659; 49 *id.* 104; 93 Mich. 553; 44 La. Ann. 1059; 44 Ill. App. 56; but see 151 Pa. 562.

Where there is intentional wrong on the part of the defendant, the plaintiff may recover, notwithstanding negligence on his part; 5 Hill 282. So, also, where the plaintiff's negligence contributed but remotely to the injury, and the defendant's culpable want of care was its immediate cause, a recovery may still be had; 43 Mo. 480; 10 M. & W. 564; 5 C. & P. 190; 9 Ex. 91; 51 Ill. 333; 56 Cal. 513; 61 Md. 54. So, also, if the defendant is guilty of such a degree of negligence that the plaintiff could not have escaped its consequences, he may recover, notwithstanding there was want of prudence on his part; 3 M. & W. 244; 18 Ga. 679, 686; 1 Dutch. 556; Redf. Railw. § 150, and cases cited in notes. Passengers leaping from cars or other vehicles, either by land or water, from any just sense of peril, may still recover; 9 La. Ann. 441; 15 Ill. 468; 17 *id.* 406; 23 Pa. 147, 150; 13 Pet. 181; Redf. Railw. § 151.

Carriers of passengers are bound to carry for the whole route for which they stipulate, and according to their public advertisements and the general usage and custom of their business; Story, Bailm. § 600; 19 Wend. 534; 8 E. L. & Eq. 362. The carrier's liability extends over the entire route for which he has contracted to carry, though the destination is reached over connecting lines; 29 N. H. 49; 4 Cush. 400; 11 Minn. 277; 21 Wis. 582. But the carrier is also liable on whose line the loss or injury is suffered; 22 Conn. 502; 29 Vt. 421; 19 Barb. 222.

Where a passenger is carried some distance beyond his destination, and ejected against his protest, being compelled to walk back to the station, the company is liable for breach of contract; 6 Ind. App. 52. See TICKET.

Passenger-carriers are liable for reasonable damages for a failure to deliver passengers in reasonable time, according to their public announcements; 8 E. L. & Eq. 362; 34 *id.* 154; 1 Cal. 353; 18 N. Y. 534; 63 Barb. 260; 1 Hurl. & N. 408; L. R. 1 C. P. D. 286.

Passenger-carriers may establish reasonable regulations in regard to the conduct of passengers, and discriminate between those who conform to their rules in regard to obtaining tickets, and those who do not, —requiring more fare of the latter; 18 Ill. 460; 34 N. H. 230; 29 Vt. 160; 7 Metc. 596; 12 *id.* 482; 4 Zabr. 435; 29 E. L. & Eq. 143; Redf. Railw. § 28, and notes; 24 Conn. 249; 4 Ind. App. 413; 134 Ind. 100; but a passenger is not bound to comply with the rules of a company unless they are reasonable; 90 Ga. 562. Passengers may be required to go through in the same train or forfeit the remainder of their tickets; Ray, Neg. Imp. Dut. 522; 11 Metc. 121; 1 Am. Railw. Cas. 601; 72 Pa. 231; 46 N. H. 213; 4 Zabr. 438; 11 Ohio St. 462; 84 Tex. 678. The words "good this trip only" upon a ticket will not limit the undertaking of the company to any particular day or any specific train,—they relate to a journey and not to a time; and the ticket is good if used at any time within six years from its date; 24 Barb. 514; 51 Cal. 425. See article in 5 So. L. Rev. N. S. 765; 66 Cal. 191; 89 N. Y. 281; 85 Tex. 158; but a ticket "good for this day only," or for "only two days after date," is of no validity after that date though not used; 1 Allen 267; 7 Hun 670. Where a passenger buys a ticket which is silent as to stop-over privileges, he may rely on the statements of the ticket agent on that subject; 143 U. S. 60.

Railway passengers, when required by the regulations of the company to surrender their tickets in exchange for the conductor's checks, are liable to be expelled from the cars for a refusal to comply with such regulation, or to pay fare again; 22 Barb. 130; or for refusal to exhibit his ticket at the request of the conductor in compliance with the standing regulations of the company; 15 N. Y. 455. See TICKETS.

Railway companies may exclude merchandise from their passenger trains. The company is not bound to carry a passenger daily whose trunk or trunks contain merchandise, money, or other things known as "express matter;" 5 Am. Law Reg. 364. See, also, upon the subject of by-laws as to passengers on railways, Redf. Railw. § 28, and notes.

Where a stage-coach is overturned when laden with passengers, it is regarded as *prima facie* evidence of negligence in the proprietor or his servants; Ray, Neg. Imp. Dut. 25; 13 Pet. 181. Where the driver leaves his horses in the road unfastened, and a passenger is injured by their running away, he is entitled to recover; 66 Tex. 265. And where any injury occurs to a passenger upon a railway, it has been considered *prima facie* evidence of negligence on the part of the company; 5 Q. B. 747; 8 Pa. 483; 15 Ill. 471; 16 Barb. 113, 356; 20 *id.* 282.

The general rules above laid down, so far as they are applicable, *mutatis mutandis*, control the rights and duties of passenger-carriers both by land and water. There are many special regulations, both in regard to the conduct of sailing and steam vessels, which it is the duty of masters to observe in order to secure the safety of passengers, and which it will be culpable negligence to disregard; but they are too minute to be here enumerated. See Ang. Carr. § 633. And a pilot being on board and having the entire control of the vessel will not exonerate the owner from responsibility any more than if the master had charge of the vessel,—the pilot being considered the agent of the owner; 8 Pick. 22; 5 B. & P. 182. But in 1 How. 28 it was considered that the owner is not responsible, while a pilot licensed under the acts of parliament is directing the movements of his ship in the harbor of Liverpool, for an injury to another ship by collision, such being the English law and the collision occurring in British waters; but it was held that the vessel was liable for the negligence of a pilot which it was obliged to take under a state law, or pay full pilotage; 7 Wall. 53. It is otherwise, if the employment of a pilot is compulsory under a law providing that neglect to do so shall be a misdemeanor; 63 Fed. Rep. 845.

COMMON COUNCIL. See COUNCIL.

COMMON COUNTS. Certain general counts, not founded on any special contract, which are introduced in a declaration, for the purpose of preventing a defeat of a just right by an accidental variance in the evidence.

These are, in an action of assumpsit, counts founded on implied promises to pay money in consideration of a precedent debt, and have been variously classified. Those usually comprehended under the term are:—

1. *Indebitatus assumpsit*, which alleges a debt founded upon one of the several causes of action from which the law implies a promise to pay, and this is made the consideration for the promise to pay a sum of money equivalent to such indebtedness. This covers two distinct classes:—

a. Those termed money counts, because they related exclusively to money transactions as the basis of the debt alleged:

(1) Money paid for defendant's use.
(2) Money had and received by defendant for the plaintiff's use.
(3) Money lent and advanced to defendant.
(4) Interest.
(5) Account stated.

b. Any of the usual states of fact upon which the debt may be founded, the most common being:

(1) Use and occupation.
(2) Board and lodging.
(3) Goods sold and delivered.
(4) Goods bargained and sold.
(5) Work, labor, and services.
(6) Work, labor, and materials.

2. *Quantum meruit.*
3. *Quantum valebant.*

See ASSUMPSIT.

COMMON FINE. A small sum of money paid to the lords by the residents in certain leets. Fleta; Wharton.

COMMON FISHERY. A fishery to which all persons have a right. A common fishery is different from a *common of fishery*, which is the right to fish in another's pond, pool, or river. See FISHERY.

COMMON HIGHWAY. By this term is meant a road to be used by the community at large for any purpose of transit or traffic. Hammond, N. P. 239. See HIGHWAY.

COMMON INFORMER. One who, without being specially required by law or by virtue of his office, gives information of crimes, offences, or misdemeanors which have been committed, in order to prosecute the offender; a prosecutor.

COMMON INTENT. The natural sense given to words.

It is the rule that when words are used which will bear a natural sense and an artificial one, or one to be made out by argument and inference, the natural sense shall prevail. It is simply a rule of construction, and not of addition. Common intent cannot add to a sentence words which have been omitted; 2 H. Blackst. 530. In pleading, certainty is required; but certainty to a common intent is sufficient—that is, what upon a reasonable construction may be called certain, without recurring to *possible* facts; Co. Litt. 203 *a*; Dougl. 163. See CERTAINTY.

COMMON LAW. That system of law or form of the science of jurisprudence which has prevailed in England and in the United States of America, in contradistinction to other great systems, such as the Roman or civil law.

Those principles, usages, and rules of action applicable to the government and security of persons and of property, which do not rest for their authority upon any express and positive declaration of the will of the legislature. 1 Kent 492.

The body of rules and remedies administered by courts of law, technically so called, in contradistinction to those of equity and to the canon law.

The law of any country, to denote that which is common to the whole country, in contradistinction to laws and customs of local application.

The most prominent characteristic which marks this contrast, and perhaps the source of the distinction, lies in the fact that under the common law neither the stiff rule of a long antiquity, on the one hand, nor, on the other, the sudden changes of a present arbitrary power, are allowed ascendency, but, under the sanction of a constitutional government, each of these is set off against the other; so that the will of the people, as it is gathered both from long established custom and from the expression of the legislative power, gradually forms a system—just, because it is the deliberate will of a free people—stable, because it is the growth of centuries—progressive, because it is amenable to the constant revision of the people. A full idea of the genius of the common law cannot be gathered without a survey of the philosophy of English and American history. Some of the elements will, however, appear in considering the various narrower senses in which the phrase "common law" is used.

Perhaps the most important of these narrower senses is that which it has when used in contradistinction to statute law, to designate unwritten as distinguished from written law. It is that law which derives its force and authority from the universal consent and immemorial practice of the people. It has never received the sanction of the legislature by an express act, which is the criterion by which it is distinguished from the statute law. When it is spoken of as the *lex non scripta*, it is meant that it is law not written by authority of law. The statutes are the expression of law in a written form, which form is essential to the statute. The decision of a court which establishes or declares a rule of law may be reduced to writing and published in the reports; but this report is not the law; it is but evidence of the law; it is but a written account of one application of a legal principle, which principle, in the theory of the common law, is still unwritten. However artificial this distinction may appear, it is nevertheless of the utmost importance, and bears continually the most wholesome results. It is only by the legislative power that law can be bound by phraseology and by forms of expression. The common law eludes such bondage; its principles are not limited nor hampered by the mere forms in which they may have been expressed, and the reported adjudications declaring such principles are but the instances in which they have been applied. The principles themselves are still unwritten, and ready, with all the adaptability of truth, to meet every new and unexpected case. Hence it is said that the rules of the common law are flexible; 1 Gray 263; 1 Swan 42; 5 Cow. 587, 628, 632.

It naturally results from the inflexible form of the statute or written law, which has no self-contained power of adaptation to cases not foreseen by legislators, that every statute of importance becomes, in course of time, supplemented, explained, enlarged, or limited by a series of adjudications upon it, so that at last it may appear to be merely the foundation of a larger superstructure of unwritten law. It naturally follows, too, from the less definite and precise forms in which the doctrine of the unwritten law stands, and from the proper hesitation of courts to modify recognized doctrines in new exigencies, that the legislative power frequently intervenes to declare, to qualify, or to abrogate the doctrines of the common law. Thus, the written and the unwritten law, the statutes of the present and the traditions of the past, interlace and react upon each other. Historical evidence supports the view which these facts suggest, that many of the doctrines of the common law are but the common-law form of antique statutes, long since overgrown and imbedded in judicial decisions. While this process is doubtless continually going on in some degree, the contrary process is also continually going on; and to a very considerable extent, particularly in the United States, the doctrines of the common law are being reduced to the statutory form, with such modifications, of course, as the legislature will choose to make. This subject is more fully considered under the title Code, which see.

In a still narrower sense, the expression "common law" is used to distinguish the body of rules and of remedies administered by courts of law technically so called in contradistinction to those of equity administered by courts of chancery, and to the canon law, administered by the ecclesiastical courts.

In England the phrase is more commonly used at the present day in the second of the three senses above mentioned.

In this country the common law of England has been adopted as the basis of our jurisprudence in all the states except Louisiana. Many of the most valued principles of the common law have been embodied in the constitution of the United States and the constitutions of the several states; and in many of the states the common law and the statutes of England in force in the colony at the time of our independence are by the state constitution declared to be the law of the state until repealed. There is an express constitutional adoption of it in Delaware, New York, Michigan, Wisconsin, and West Virginia, and an implied adoption of it in the constitutions of Kentucky and West Virginia. It has been adopted by statute in Arizona, Arkansas, California, Colorado, Florida, Idaho, Illinois, Indiana, Kansas, Missouri, Montana, Nebraska, Nevada, New Mexico, North Carolina, Pennsylvania,

South Carolina, Texas, Vermont, Virginia, Washington and Wyoming. It was extended to Alabama by the ordinance of 1787 and the recognition of the latter in the state constitution; 3 How. 212; 28 Ala. 707. It is recognized by judicial decision without any statute in Iowa; 7 Ia. 252; Mississippi; 42 Miss. 1. See 1 Bish. Crim. Law § 15, note 4, § 45, where the rules adopted by the several states in this respect are stated. Hence, where a question in the courts of one state turns upon the laws of a sister state, if no proof of such laws is offered, it is, in general, presumed that the common law as it existed at the time of the separation of this country from England prevails in such state; 4 Denio 305; 29 Ind. 458; 11 Mich. 181; 47 Minn. 228; *contra*, in Pennsylvania, in cases where that state has changed from the common law; the presumption being that the law of the sister state has made the same change, if there is no proof to the contrary. The term common law as thus used may be deemed to include the doctrine of equity; 8 N. Y. 535; but the term is also used in the amendments to the constitution of the United States (art. 7) in contradistinction to equity, in the provision that "In suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." The "common law" here mentioned is the common law of England, and not of any particular state; 1 Gall. 20; 1 Baldw. 554, 558; 3 Wheat. 223; 3 Pet. 446. See 5 *id.* 241; 1 Mass. 61; 18 Wis. 147. The term is used in contradistinction to equity, admiralty, and maritime law; 3 Pet. 446; 1 Baldw. 554.

The common law of England is not in all respects to be taken as that of the United States or of the several states: its general principles are adopted only so far as they are applicable to our situation, and the principles upon which courts discriminate between what is to be taken and what is to be left have been much the same whether the common law was adopted by constitution, statute, or decision. While no hard and fast rule can be laid down which will at once differentiate every case, a very discriminating effort was made by Chancellor Bates, in Clawson *v.* Primrose, 4 Del. Ch. 643, to formulate the result of the decisions and ascertain the criterion which they had in most instances applied to the subject. In this discussion, which was characterized by Professor Washburn as the best he had ever read, the conclusion reached is thus stated:

"It cannot be overlooked that, notwithstanding the broad language of the constitution ('the common law of England as well as so much of the statute law as has been heretofore adopted in practice, . . . such parts only excepted as are repugnant to the rights and privileges contained in this constitution and the declaration of rights') there were many parts of the common law of England, as it stood prior to 1776, which never have in fact been regarded by our courts as in force in this country; yet it is to be observed that the courts have not herein acted arbitrarily in adopting some parts of the common law and rejecting other parts, according to their views of the policy of particular rules or doctrine. On the contrary, those parts of the common law of England which have not been here practically administered by the courts will be found on examination to reduce themselves to two classes, resting upon grounds which render them proper to be treated as *implied* exceptions to the constitutional provision in addition to the *expressed* exception of such parts of the common law as were repugnant to the rights and privileges contained in the constitution. One of these classes of exceptions may be briefly disposed of. It embraces those parts of the rules and practice of the common law which had become superseded by long settled usages of trade, or business, or habits of dealing among our people, such as could not be unsettled or disturbed without serious inconvenience or injury. In such cases, upon the necessary maxim that *communis error facit jus*, the courts accepted these departures as practical modifications of the common law.

"The other class of rules which, though parts of the common law of England, have never been administered by the courts under the constitution of 1776, embraces those parts of the common law which in the terms usually employed were, at the period of our independence, inapplicable to the existing circumstances and institutions of our people.

"There is less difficulty in applying the limitation practically than in attempting to define it. I understand it as excluding those parts of the common law of England which were applicable to subjects connected with political institutions and usages peculiar to the mother country, and having no existence in the colonies, such for example as offices, dignities, advowsons, titles, etc.,; also, as excluding some of the more artificial rules of the common law, springing out of the complicated system of police, revenue, and trade, among a great commercial people and not therefore applicable to the more simple transactions of the colonies or of the states in their early history; also it may be understood as excluding or modifying many rules of what is known as the common law of practice, and possibly of evidence, which the greater simplicity in our system for the administration of justice, would render unnecessary or inconvenient.

"But, on the other hand, our legislative and judicial history shows conclusively that what may be termed the common law of property was received as an entire system, subject to alterations by the legislature only. Rights of property and of person are fundamental rights necessary to be defined and protected in every civil society. The common law, as a system framed to this very end, could not be deemed inapplicable in the colonies for want of a subject matter, or as being needless or superfluous, or unacceptable, which is the true sense of the limitation in question. Certain it is, as a matter of history, that our ancestors did not so treat it."

Among the other cases in which the subject is treated are 2 Pet. 144; 9 Cra. 333; 9 S. & R. 330; 5 Cow. 628; 5 Pet. 241; 8 *id.* 658; 7 Cra. 32; 1 Wheat. 415; 3 *id.* 223; 2 Dall. 297, 384; 1 Mass. 61; 9 Pick. 532; 3 Me. 162; 6 *id.* 55; 3 G. & J. 62; 1 Gall. 489; 3 Conn. 114; 34 *id.* 260; 28 Ind. 220; 5 W. Va. 1; 37 Barb. 16; 28 Ala. 704. See Sampson's Discourse before the N. Y. Hist. Soc.

The adoption of the common law has been held to include the construction of common-law terms; 4 How. Miss. 163; 5 Ark. 536; statutes; 2 Metc. 118; and constitutional provisions; 9 Humph. 43; curtesy; 3 Humph. 267; dower; 4 Ia. 381; husband and wife; 15 Cal. 308; champerty; 1 Ohio 132; real property, title, estates, and tenures; 42 Miss. 1; 26 Ala. 493; 24 Miss. 343; sureties; 2 How. 127; charitable uses; 7 Vt. 241; 8 N. Y. 541; 17 S. & R. 88; decedent's estates; 86 N. Y. 529; remedies and practice; T. U. P. Charlt. 172; 1 Gall. 20; 42 Ala. 597; 1 Hemp. 105; 5 Pet. 253; 47 Ala. 424; 24 Ohio L. J. 435.

In actions in the federal courts in a territory, the common law is the rule of decision, in the absence of statutes or proof of

laws or customs prevailing in the territory; 2 C. C. A. 367; 10 U. S. App. 200; 51 Fed. Rep. 551. The common-law rule of decision in a federal court is that of the state in which it is sitting; 2 McLean 568.

Illustrations of what it has been held not to include are the rule respecting conveyance by parol; 1 Ohio 245; but see 89 Ill. 370; shifting inheritances; 13 Ohio St. 21; 17 Ind. 367; 5 Wall. 710; mere possession of land as against miners; 5 Cal. 100; newspaper communications respecting a judge considered as a contempt in England; 4 Ill. 404; cutting timber; 28 Ind. 220; easement by use in party-wall; 10 Ohio St. 523; estates in joint tenancy; 2 Ohio 305; rule as to partial reversal of a judgment against an infant and another; Kirby 117; *cy prés* doctrine; 35 Ind. 198; riparian rights to soil under water; 20 Nev. 269; overruling 7 *id.* 249; to running water; 2 Aik. Vt. 187; the definition of a navigable river; 122 Pa. 191; the law of waters as applied to large lakes, or to a river which is a national boundary; 19 Barb. 484.

In criminal law the common law is generally in force in the United States to some extent, and while it is in some states held that no crime is punishable unless made such by statute, there are in many states general statutes resorting to the common law for all crimes not otherwise enumerated, and for criminal matters generally. When there is no statutory definition of a crime named, the common-law definition is generally resorted to; 5 Cush. 295; as also are its rules of evidence in criminal cases, and of practice as well as principle in the absence of statutes to the contrary; 16 Tex. 445; and in Louisiana, although not recognized in civil matters, the common law in criminal cases is expressly adopted; 8 Rob. La. 545. It has been held to prevail in the District of Columbia as to theft; 33 Conn. 260; as to conspiracy in Maryland; 5 Harr. & J. 358; kidnapping in New Hampshire; 8 N. H. 550; homicide without intent to kill in Maine; 32 Me. 369; and in Tennessee; 3 Humph. 493; capacity to commit rape in New York; 2 Park. Cr. Rep. 174; but not in Ohio; 14 Ohio 222.

There is no common law of the United States, as a distinct sovereignty; 64 Fed. Rep. 59; 63 N. W. Rep. (Ia.) 589; 8 Pet. 658; 5 Cal. 374; 128 Pa. 217; and therefore there are no common-law offences against the United States; 7 Cra. 32; 52 Fed. Rep. 104; 36 *id.* 449; 108 U. S. 199; 144 *id.* 677. There is a rare and valuable pamphlet on this subject, by St. George Tucker Campbell, which contains a full discussion of this question. For earlier cases before the question was fully settled, see 2 Dall. 384; 1 Gall. 488; 1 Wheat. 415. But the common law is resorted to by federal courts for definition of common-law crimes not defined by statute; 2 Curt. C. C. 446; 4 Fed. Rep. 198. See COMMERCIAL LAW.

The admiralty law is distinct from the common-law and the line of demarcation is to be sought in the English decisions before the Revolution and those of the state courts prior to the constitution. See 5 Wheat. 391; Baldw. 558; 46 Me. 400. And as to the adoption of the English ecclesiastical law, see 35 Vt. 365; 38 N. C. 91; 2 Paige 501; 50 N. Y. 557.

In general, too, the statutes of England are not understood to be included, except so far as they have been recognized by colonial legislation, but the course pursued has been rather to re-enact such English statutes as were deemed applicable to our case. Those passed since the settlement of the particular colony are not in force, unless specially accepted by it, or expressly made to apply to it; if these were suitable to the condition of the colony they were usually accepted; Quincy 72; 5 Pet. 280; 2 Gratt. 579; 1 Dall. 64.

There cannot be said to be a settled rule as to what date is to be fixed as determining what British statutes were received as part of the common law. Many states fix July 4, 1776. This is provided by constitution in Florida, Maryland and Rhode Island, and by statute in Kentucky; in other states 4th Jac. I. is the period named after which English statutes are not included, as Arkansas, Colorado, Illinois, Indiana, Missouri, Virginia, Wyoming, (but the last four except stats. 43 Eliz. c. 6, § 2; 13 Eliz. c. 8 and 37 Hen. VIII. c. 9.;) 1 Black 459; 28 Ind. 220; 7 Pet. 596; 78 Mo. 587; 11 Colo. 393. As to English statutes in force in Pennsylvania, see Report of the Judges in 3 Binn. 595; Roberts, Eng. Stat.; 1 Dall. 15; *id.* 19; *id.* 73; 3 Yeates 17; 4 *id.* 47; 2 Watts 294; 8 *id.* 388; 134 Pa. 315. Generally, it may be stated that the statutes adopted prior to the Revolution, and held applicable under rules stated, are accepted as part of the common law; 1 Nev. 40; 8 Pick. 309; Mart. & Y. Tenn. 226; 18 Wis. 148. But see 31 Ala. 20; 4 Paige 178; 17 Ohio 452; 61 Mich. 105. Upon the subject of English statutes as part of the common law see an able note on the whole subject of this title in 22 L. R. A. 501. By reason of the modifications arising out of our different condition, and those established by American statutes and by the course of American adjudication, the common law of America differs widely in many details from the common law of England; but the fact that this difference has not been introduced by violent changes, but has grown up from the native vigor of the system, identifies the whole as one jurisprudence.

See works of Franklin, by Sparks, vol. 4, p. 271, as to the adoption of the common law in America; see also Cooley, Const. Lim., 2d ed. 34, n. 35; 10 R. I. 227; 2 Wait, Actions and Defences 276.

COMMON LAW PROCEDURE ACTS. See PROCEDURE ACTS.

COMMON NUISANCE. One which affects the public in general, and not merely some particular person. 1 Hawkins, Pl. Cr. 197. See NUISANCE.

COMMON PLEAS. The name of a court having jurisdiction generally of civil actions.

Such pleas or actions are brought by private persons against private persons, or by the government, when the cause of action is of a civil nature. In England, whence we derived this phrase, common pleas are so called to distinguish them from *pleas of the crown.*

The Court of Common Pleas in England consisted of one chief and four puisné (associate) justices. It is thought by some to have been established by king John for the purpose of diminishing the power of the *aula regis*, but is referred by some writers to a much earlier period. 8 Coke 289; 1 Poll. & Maitl. 177; *Termes de la Ley*; 3 Blackstone, Comm. 39. It exercised an exclusive original jurisdiction in many classes of civil cases. See 3 Sharsw. Bla. Comm. 38, n. The right of practising in this court was for a long time confined to two classes of practitioners, limited in number, but is now thrown open to the bar generally. See 3 C. B. 537.

Courts of the same name exist in many states of the United States.

COMMON RECOVERY. A judgment recovered in a fictitious suit, brought against the tenant of the freehold, in consequence of a default made by the person who is last vouched to warranty in the suit, which recovery, being a supposed adjudication of the right, binds all persons, and vests a free and absolute fee-simple in the recoverer.

A common recovery is a kind of conveyance, and is resorted to when the object is to create an absolute bar of estates tail, and of the remainders and reversions expectant on the determination of such estates. 2 Bla. Com. 357. Though it has been used in some of the states, this form of conveyance is nearly obsolete, easier and less expensive modes of making conveyances, which have the same effect, having been substituted; 2 Bouvier, Inst. nn. 2092, 2096; 7 N. H. 9; 9 S. & R. 390; 2 Rawle 168; 1 Whart. 151; 6 Mass. 328.

COMMON SCHOOLS. Schools for general elementary instruction, free to all the public. 2 Kent 195–202.

COMMON SCOLD. One who, by the practice of frequent scolding, disturbs the neighborhood. Bish. Crim. Law § 147.

The offence of being a common scold is cognizable at common law. It is a particular form of nuisance, and was punishable by the ducking-stool at common law, in place of which punishment fine and imprisonment are substituted in the United States; Whart. Cr. L. 1442; 12 S. & R. 220; 3 Cra. 620. See 1 Term 748; 6 Mod. 11; 4 Rog. 90; 1 Russ. Cr. 302; Roscoe, Cr. Ev., 8th ed. 824; 53 N. J. L. 45.

COMMON SEAL. The seal of a corporation. See SEAL.

COMMON SERJEANT. A judicial officer of the city of London, who aids the recorder in disposing of the criminal business of the Old Bailey Sessions. Holthouse.

COMMON TRAVERSE. See TRAVERSE.

COMMON VOUCHEE. In common recoveries, the person who is vouched to warranty. In this fictitious proceeding the crier of the court usually performs the office of a common vouchee. 2 Bla. Com. 358.

COMMONALTY. The common people of England, as distinguished from the king and nobles.

The body of a society or corporation, as distinguished from the officers. 1 Perr. & D. 243. Charters of incorporation of the various tradesmen's societies, etc., in England are usually granted to the master, wardens, and commonalty of such corporation.

COMMONER. One possessing a right of common.

COMMONS. Those subjects of the English nation who are not noblemen. They are represented in parliament by the house of commons.

COMMONWEALTH. A word which properly signifies the common weal or public policy; sometimes it is used to designate a republican form of government.

The English nation during the time of Cromwell was called The Commonwealth. It is the legal title of the states of Kentucky, Massachusetts, Pennsylvania, and Virginia.

COMMORANT. One residing in a particular town, city, or district. Barnes 162.

COMMORIENTES. Those who perish at the same time in consequence of the same calamity. See SURVIVOR; DEATH.

COMMUNI DIVIDUNDO. In Civil Law. An action which lies for those who have property in common, to procure a division. It lies where parties hold land in common but not in partnership. Calvinus, Lex.

COMMUNINGS. In Scotch Law. The negotiations preliminary to a contract.

COMMUNIO BONORUM (Lat.). In Civil Law. A community of goods.

When a person has the management of common property, owned by himself and others, not as partners, he is bound to account for the profits, and is entitled to be reimbursed for the expenses which he has sustained by virtue of the quasi-contract which is created by his act, called *communio bonorum*. Vicat; 1 Bouvier, Inst. n. 907, note.

COMMUNITY (Lat. *communis*, common).

In Civil Law. A corporation or body politic. Dig. 3. 4.

In French Law. A species of partnership which a man and woman contract when they are lawfully married to each other.

Conventional community is that which is formed by express agreement in the contract of marriage.

By this contract the legal community which would otherwise subsist may be modified as to the proportions which each shall take, and as to the things which shall compose it.

Legal community is that which takes place by virtue of the contract of marriage itself.

The French system of community property was known as the dotal system, *q. v.* The Spanish system was the Ganancial System, *q. v.* The conquest of Mexico by the Spaniards and their acquisition of the Florida territory resulted in the introduction on American soil of the Spanish system.

Louisiana, originally a French colony, was afterwards ceded to Spain when the Spanish law was introduced. It again reverted to the French and from them was acquired by the United States. The Louisiana Code has, with slight modifications, adopted the dotal system of the *Code Napoléon* as regards the separate rights of husband and wife, but as to their common property it retained the essential features of the Spanish ganancial system. Texas and California have adopted the community system of Spain and Mexico or modified it by their constitutions. New Mexico appears to have followed the Spanish law of property rights of married persons in its entirety. The community system as adopted in older community states has been adopted by Nevada, Washington, and Idaho, with certain modifications. Hence it may be said that the American community system prevails at this day in Louisiana, Texas, California, Nevada, Arizona, Washington, Idaho, Montana, and New Mexico, and is indebted to Spain for its origin. See Ballinger, Community Property, sec. 6; 1 New Mexico 147.

The community embraces the profits of all the effects of which the husband has the administration and enjoyment, either of right or in fact; and of the estates which they may acquire during the marriage, either by donations made jointly to them, or through their outlay or industry as well as the fruits of the *bienos proprios* which each one brought to the matrimony, and of all that which this acquisition produced by whatever title acquired; Ballinger, Community Prop. § 5, or by purchase, or in any other similar way, even although the purchase be made in the name of one of the two, and not of both; because in that case the period of time when the purchase is made is alone attended to, and not the person who made the purchase; 10 La. 146, 172; 1 Mart. La. N. S. 325; 4 *id.* 212; 12 La. Ann. 598. The debts contracted during the marriage enter into the community, and must be acquitted out of the common fund; but not the debts contracted before the marriage.

The effects which compose the community of gains are divided into two equal portions between the heirs at the dissolution of the marriage; La. Civ. Code 2375. See Pothier, Contr.; Toullier. But the wife's interest in the community property is residuary and she is not the owner of any specific property before the debts are paid, whether to third persons or to the succession of her husband; 45 La. Ann. 389.

A chose in action to recover damages for personal injuries, if acquired during marriage, is considered community property; 94 Cal. 425.

COMMUTATION. The change of a punishment to which a person has been condemned into a less severe one. This can be granted only by the authority in which the pardoning power resides. See 1 Nev. 321; 31 Ohio 206; 22 Gratt. 789.

COMMUTATIVE CONTRACT. In Civil Law. One in which each of the contracting parties gives and receives an equivalent.

The contract of sale is of this kind. The seller gives the thing sold, and receives the price, which is the equivalent. The buyer gives the price, and receives the thing sold, which is the equivalent. Such contracts are usually distributed into four classes, namely: *Do ut des* (I give that you may give); *Facio ut facias* (I do that you may do); *Facio ut des* (I do that you may give); *Do ut facias* (I give that you may do). Pothier, Obl. n. 13. See La. Civ. Code, art. 1761.

COMPACT. An agreement. A contract between parties, which creates obligations and rights capable of being enforced, and contemplated as such between the parties, in their distinct and independent characters. Story, Const. b. 3, c. 3; Rutherf. Inst. b. 2, c. 6, § 1.

The parties may be nations, states, or individuals; but the constitution of the United States declares that "no state shall, without the consent of congress, enter into agreement or compact with another state, or with a foreign power." See 11 Pet. 1, 185; 8 Wheat. 1; Baldw. 60.

COMPANIONS. In French Law. A general term, comprehending all persons who compose the crew of a ship or vessel. Pothier, Mar. Contr. n. 163.

COMPANY. An association of a number of individuals for the purpose of carrying on some legitimate business.

This term is not synonymous with partnership, though every such unincorporated company is a partnership. Usage has reserved the term to associations whose members are in greater number, their capital more considerable, and their enterprises greater, either on account of their risk or importance.

When these companies are authorized by the government, they are known by the name of corporations.

The proper signification of the word "company" when applied to a person engaged in trade, denotes those united for the same purpose or in a joint concern. It is commonly used in this sense or as indicating a partnership. 33 Me. 52.

Sometimes the word is used to represent those members of a partnership whose names do not appear in the name of the firm. See 12 Toullier 97.

COMPARATIVE NEGLIGENCE. That doctrine in the law of negligence by which the negligence of the parties is compared in the degree of "slight," "ordinary," and "gross" negligence, and a recovery permitted notwithstanding the contributory negligence of the plaintiff, when the negligence of the plaintiff is slight and the negligence of the defendant gross, but refused when the plaintiff has been guilty of a want of ordinary care contributing to his injury; or when the negligence of the defendant is not gross, but only ordinary or slight when compared under the circum-

stances of the case with the contributory negligence of the plaintiff. A. & E. Encyc.; 103 Ill. 512; 115 *id.* 358; 82 *id.* 198; Whart. Neg. § 334. See NEGLIGENCE.

COMPARISON OF HANDWRITING. See HANDWRITING.

COMPATIBILITY. Such harmony between the duties of two offices that they may be discharged by one person.

COMPEARANCE. In Scotch Practice. Appearance; an appearance made for a defendant; an appearance by counsel. Bell; Black.

COMPENSACION. In Spanish Law. The extinction of a debt by another debt of equal dignity between persons who have mutual claims on each other.

COMPENSATIO CRIMINIS. The compensation or set-off of one crime against another: for example, in questions of divorce, where one party claims the divorce on the ground of adultery of his or her companion, the latter may show that the complainant has been guilty of the same offence, and, having himself violated the contract, cannot complain of its violation on the other side. This principle is incorporated in the codes of most civilized nations. See 1 Hagg. Cons. 144; 1 Hagg. Eccl. 714; 2 Paige, Ch. 108; 2 D. & B. 64; Bishop, Marr. & D. §§ 393, 394.

COMPENSATION (Lat. *compendere*, to balance). **In Chancery Practice.** Something to be done for or paid to a person of equal value with something of which he has been deprived by the acts or negligence of the party so doing or paying.

When a simple mistake, not a fraud, effects a contract, but does not change its essence, a court of equity will enforce it, upon making compensation for the error. "The principle upon which courts of equity act," says Lord Chancellor Eldon, "is by all the authorities brought to the true standard, that though the party had not a title at law, because he had not strictly complied with the terms so as to entitle him to an action (as to time, for instance), yet if the time, though introduced (as some time must be fixed, where something is to be done on one side, as a consideration for something to be done on the other), is not the essence of the contract, a material object, to which they looked in the first conception of it, even though the lapse of time has not arisen from accident, a court of equity will compel the execution of the contract upon this ground, that one party is ready to perform, and that the other may have a performance in substance if he will permit it;" 13 Ves. Ch. 287. See 10 *id.* 505; 13 *id.* 73, 81, 426; 6 *id.* 575; 1 Cox, Ch. 59.

In Civil Law. A reciprocal liberation between two persons who are both creditors and debtors of each other. *Est debiti et crediti inter se contributio.* Dig. 16. 2. 1.

It resembles in many respects the common-law set-off. The principal difference is that a set-off must be pleaded to be effectual; whereas compensation is effectual without any such plea. See 2 Bouvier, Inst. n. 1407.

It may be *legal*, by *way of exception*, or by *reconvention;* 8 La. 158; Dig. 16. 2; Code, 4. 31; Inst. 4. 6. 30; Burge, Suret. b. 2, c. 6, p. 181.

It takes place by mere operation of law, and extinguishes reciprocally the two debts as soon as they exist simultaneously, to the amount of their respective sums. It takes place only between two debts having equally for their object a sum of money, or a certain quantity of consumable things of one and the same kind, and which are equally liquidated and demandable. It takes place whatever be the *cause* of the debts, except in case, *first*, of a demand of restitution of a thing of which the owner has been unjustly deprived; *second*, of a demand of restitution of a deposit and a loan for use; *third*, of a debt which has for its cause aliments declared not liable to seizure. La. Civ. Code 2203–2208. See 11 La. Ann. 520; 16 *id.* 181.

As to taking property, see EMINENT DOMAIN.

In Criminal Law. Recrimination, which see.

COMPERTORIUM. In the Civil Law. A judicial inquest by delegates or commissioners to find out and relate the truth of a cause. Wharton.

COMPERUIT AD DIEM (Lat. he appeared at the day).

In Pleading. A plea in bar to an action of debt on a bail bond. The usual replication of this plea is, *nul tiel record:* that there is not any such record of appearance of the said ——. For forms of this plea, see 5 Wentworth 470; Lilly, Entr. 114; 2 Chit. Pl. 527.

When the issue is joined on this plea, the trial is by the record. See 1 Taunt. 23; Tidd, Pr. 239. And see, generally, Comyns, Dig. *Pleader* (2 W. 31); 7 B. & C. 478.

COMPETENCY. The legal fitness or ability of a witness to be heard on the trial of a cause. That quality of written or other evidence which renders it proper to be given on the trial of a cause.

There is a difference between competency and credibility. A witness may be competent, and, on examination, his story may be so contradictory and improbable that he may not be believed; on the contrary, he may be incompetent, and yet be perfectly credible if he were examined.

The court are the sole judges of the competency of a witness, and may, for the purpose of deciding whether the witness is or is not competent, ascertain all the facts necessary to form a judgment; 1 Greenl. Ev. § 426.

Prima facie every person offered is a competent witness, and must be received, unless his incompetency appears; 9 State Tr. 652.

In French Law. The right in a court to exercise jurisdiction in a particular case: as, where the law gives jurisdiction to the court when a thousand francs shall be in

dispute, the court is competent if the sum demanded is a thousand francs or upwards, although the plaintiff may ultimately recover less.

COMPETENT. Able, fit, qualified; authorized or capable to act. Abb. L. Dict.; as *competent court;* 1 C. P. D. 176; *competent evidence;* 1 Lea 504; *competent persons*, 5 Ad. & El. 75; *competent clerk*, 27 Mis. 393.

COMPETENT EVIDENCE. That which the very nature of the thing to be proven requires, as the production of a writing where its contents are the subject of inquiry. 1 Lea 504; 1 Greenl. Ev. § 2. See EVIDENCE.

COMPETENT WITNESS. One who is legally qualified to be heard to testify in a cause. In Kentucky, Michigan, and Missouri, a will must be attested, for the purpose of passing lands, by competent witnesses; but, in Kentucky, if wholly written by the testator, it need not be so attested. See WITNESS.

COMPILATION. A literary production composed of the works of others and arranged in a methodical manner.

A compilation requiring, in its execution, taste, learning, discrimination, and intellectual labor, is an object of copyright (*q. v.*); as, for example, Bacon's Abridgment. Curtis, Copyr. 186. A compilation consists of selected extracts from different authors; an abridgment is a condensation of the views of an author; 4 McLean 314.

COMPLAINANT. One who makes a complaint. A plaintiff in a suit in chancery is so called.

COMPLAINT. In Criminal Law. The allegation made to a proper officer that some person, whether known or unknown, has been guilty of a designated offence, with an offer to prove the fact, and a request that the offender may be punished. It is a technical term, descriptive of proceedings before a magistrate. 11 Pick. 436. See 16 Me. 117.

To have a legal effect, the complaint must be supported by such evidence as shows that an offence has been committed and renders it certain or probable that it was committed by the person named or described in the complaint.

The fact that a complaint is drawn in flagrant disregard of the rules of pleading is not sufficient to support a demurrer thereto, if the allegations are susceptible of a construction that will support the action; 18 N. Y. S. 758.

In Practice. The name given in New York and other states to the statement of the plaintiff's case which takes the place of the declaration in common-law pleading.

COMPOS MENTIS. See NON COMPOS MENTIS.

COMPOSITION. An agreement, made upon a sufficient consideration, between a debtor and creditor, by which the creditor accepts part of the debt due to him in satisfaction of the whole. See COMPOUNDING A FELONY.

A composition deed executed by a debtor and his creditors in due form, operates as a settlement of the original claims of such creditors and supersedes the cause of action thereon, the rights and remedies of the parties being determined thereafter by the new agreement; 48 Minn. 317. An oral agreement between several creditors and their debtor to compound and discharge their claims is valid; 73 Hun 56; 85 N. Y. 189. In an action upon a composition agreement, any creditor being a party thereto may bring a several action for damages for breach thereof; 56 N. W. Rep. (Minn.) 352.

COMPOSITION OF MATTER. A mixture or chemical combination of materials. The term is used in the act of congress, July 4, 1836, § 6, in describing the subjects of patents. It may include both the substance and the process, when the compound is new.

COMPOUND INTEREST. Interest upon interest; for example, when a sum of money due for interest is added to the principal, and then bears interest. This is not, in general, allowed. See INTEREST.

COMPOUNDER. In Louisiana. He who makes a composition.

An amicable compounder is one who has undertaken by the agreement of the parties to compound or settle differences between them. La. Code of Pract. art. 444.

COMPOUNDING A FELONY. The act of a party immediately aggrieved, who agrees with a thief or other felon that he will not prosecute him, on condition that he return to him the goods stolen, or who takes a reward not to prosecute. See 2 Harr. 532; 51 Ill. 234; 39 Ga. 85.

This is an offence punishable by fine and imprisonment, and at common law rendered the person committing it an accessary; Hawk. Pl. Cr. 125. And a conviction may be had though the person guilty of the original offence has not been tried; 97 Ala. 72. A failure to prosecute for an assault with an intent to kill is not compounding a felony; 29 Ala. N. S. 628. The accepting of a promissory note signed by a party guilty of larceny, as a consideration for not prosecuting, is sufficient to constitute the offence; 16 Mass. 91; and the offence is committed although the consideration is for another than the one making the agreement; 58 Ia. 121. The mere retaking by the owner of stolen goods is no offence, unless the offender is not to be prosecuted; Hale, Pl. Cr. 546; 1 Chit. Cr. Law 4; Clarke, Cr. L. 329; 16 Ill. 93; 51 *id.* 234.

The compounding of *misdemeanors*, as it is also a perversion or defeating of public justice, is in like manner an indictable offence at common law; 18 Pick. 440; 5 East 301; 111 Pa. 14; 47 Conn. 221. But the law will permit a compromise of any

offence, though made the subject of a criminal prosecution, for which the injured party might recover damages in an action. But, if the offence is of a public nature, no agreement can be valid that is founded on the consideration of stifling a prosecution for it; 6 Q. B. 308; 9 *id.* 371; 2 Benn. & H. Lead. Cr. Cas. 258, 262; 6 Wis. 42; 27 Mich. 293; 42 Ia. 649; 30 Me. 105; 18 Pick. 440.

In the United States, compounding a felony is an indictable offence, and no action can be supported on any contract of which such offence is the consideration in whole or in part; 16 Mass. 91; 18 Pick. 440; 5 Vt. 42; 9 *id.* 23; 5 N. H. 553; 2 South. N. J. 578; 13 Wend. N. Y. 592; 6 Dana 338. A receipt in full of all demands given in consideration of stifling a criminal prosecution is void; 11 Vt. 252.

COMPRA Y VENTA (Span.). Buying and selling. The laws of contracts arising from purchase and sale are given very fully in *Las Partidas*, part 3, tit. xviii. ll. 56.

COMPRINT. The surreptitious printing of the copy of another to the intent to make a gain thereby. Strictly, it signifies to print together. There are several statutes in prevention of this act. Jacob; Cowel.

COMPRIVIGNI (Lat.). Step-brothers or step-sisters. Children who have one parent, and only one, in common. Calvinus, Lex.

COMPROMISARIUS. In Civil Law. An arbitrator.

COMPROMISE. An agreement made between two or more parties as a settlement of matters in dispute.

Such settlements are sustained at law; Poll. Contr. 180; 2 Strobh. Eq. 258; 2 Mich. 145; 1 Watts 216; 2 Pa. 531; and are highly favored; 6 Munf. 406; 1 Bibb 168; 2 *id.* 448; 4 Hawks 178; 6 Watts 321; 14 Conn. 12; 4 Metc. Mass. 270; 62 Mich. 262. See, also, 21 E. L. & Eq. 199; 6 T. B. Monr. 91; 2 Rand. Va. 442; 5 Watts 259; 143 Pa. 374. The amount in question must, it seems, be uncertain; 2 B. & Ad. 889; 1 Ad. & E. 106. And see 5 Pet. 114; 21 Pa. 237; 20 Mo. 102; 13 Pick. 284; 6 Bingh. N. C. 62; 3 M. & W. 648; 1 Bouvier, Inst. 798. The compromise of a doubtful or disputed claim is a sufficient consideration to uphold an *assumpsit;* 18 N. Y. Supp. 858. See 49 Fed. Rep. 715.

Where a debtor tenders part of a disputed claim to the creditor in full satisfaction, if the latter accepts the tender, he is bound by the terms thereof; 46 Mo. App. 624. An offer of settlement by plaintiff, but not accepted by defendant, does not bind either party; 29 Fla. 238. There can be no compromise of a criminal charge; 1 Chit. Pr. 17.

An offer to pay money by way of compromise is not evidence of debt, since, as was said by Lord Mansfield, "it must be permitted to men 'to buy their peace' without prejudice to them, if the offer did not succeed; and such offers are made to stop litigation without regard to the question whether anything, or what, is due."

If the terms "buy their peace" are attended to, they will resolve all doubts on this head of evidence; Bull. N. P., 7th ed. (1817) 236; and the author adds an example:—If A sue B for one hundred pounds, and B offer to pay him twenty pounds, it shall not be received in evidence, for this neither admits nor ascertains any debt, and is no more than saying he would give twenty pounds to get rid of the action. But if an account consist of ten articles, and B admits that a particular one is due, it is good evidence for so much.

In one of the oldest cases on the subject, Lord Kenyon declared at *nisi prius*:—"Evidence of concessions made for the purpose of settling matters in dispute I shall never admit;" 3 Esp. 113; but evidence was admitted that after the action was brought the defendant called upon the plaintiff and said he was sorry that the thing had happened, and offered two hundred pounds in settlement, which was not accepted; 3 Stark. N. P. 128; and in other cases evidence of offers of compromise made, but not expressed to be without prejudice, were held to be admissible; 1 M. & W. 446; *id.* 447, n.; apparently in opposition to the rule laid down by Lord Mansfield and Lord Kenyon above referred to.

It may, however, be considered settled that letters or admissions containing the expression in substance that they are to be without prejudice will not be admitted in evidence; 4 C. & P. 462; L. R. 6 Ch. 827; 3 Sc. N. R. 741.

In the last case the rule is put definitely on the ground of public policy by Tindal, C. J., who said:—"It is of great consequence that parties should be unfettered by correspondence entered into upon the express understanding that it is to be without prejudice," and he also declared "that where used in the letter containing the offer, the words 'without prejudice' must cover the whole correspondence," and this rule has been followed and it was held that not only the letter bearing the words "without prejudice," but also the answer thereto, which was not so guarded, was inadmissible in evidence; and to the same effect is L. R. 10 Ch. 264. It is the recognized rule in the United States that admissions made in treating for an adjustment cannot be given in evidence; 33 Mo. 323; 117 Mass. 55; 13 Ga. 406; 40 N. Y. Sup. Ct. 8; and in Canada; 3 Ont. 584; 11 *id.* 442.

Verbal offers of compromise of a claim made by a defendant's solicitor are also protected and cannot be given in evidence against his client; 2 C. & K. 24; 6 C. P. 437.

An account rendered by the defendant to the plaintiff, showing a balance in the plaintiff's favor, accompanied by a letter proposing an arrangement and stating that the letter and account were without prejudice was held to be inadmissible as evidence; 6 C. P. 437. The principle of the exclusion of such admissions, whether verbal or documentary, therefore, seems to rest on the fact that there is some matter in controversy or some claim by one person against the other for the settlement or adjustment of which the communication is made, and that in furtherance of the maxim, "*Interest reipublicæ ut sit finis litium*," it is for the public good that communications having that end in view should not be allowed to prejudice either party in the event of their proving abortive. It is not necessary that such communications should be expressly guarded if they manifestly appear to have been made by way of compromise; 2 C. & K. 24; such admissions or negotiations are inadmissible whether made "without prejudice" or not; 15 Md. 510; 15 S. E. Rep. (S. C.) 331; 14 S. E. Rep. (Ga.) 556; s. c. 88 Ga. 321; 130 N. Y. 677; 2 Whart. Ev. § 1090; but see 10 So. Rep. (La.) 369; s. c. 43 La. Ann. 1062; 28 N. E. Rep. (Ind.) 1033; 51 Ill. App. 274. Where a letter opening negotiations for a compromise, but not stated to be without prejudice, was followed a day or two afterwards by another guarding against prejudice, it was held

that the whole correspondence was thereby protected; 26 W. R. 109, and Gurney, B., refused to receive in evidence a letter written "without prejudice," even in favor of the party who had written it, saying, "If you write without prejudice so as not to bind yourself, you cannot use the letter against the other party; 8 C. & P. 388.

And evidence of plaintiff that offers of compromise were made by him is inadmissible; 20 N. Y. Supp. 961; 66 Hun 316. And negotiations between parties for the purpose of clearing title to land and compromising differences will not prejudice the rights of either party; 21 S. W. Rep. (Tex.) 282.

Correspondence of this kind is not only inadmissible as evidence at the trial of the action, but it has also been held to be privileged from production for the purpose of discovery; 11 Beav. 111; 15 *id.* 321; *id.* 388.

Romilly, M. R., in the last of these cases, stated the rule very much in the same way as did Tindal, C. J., *supra*; he said: "Such communications made with a view of an amicable arrangement ought to be held very sacred, for if parties were to be afterwards prejudiced by their efforts to compromise, it would be impossible to attempt an amicable arrangement of differences."

When a correspondence for a settlement had commenced "without prejudice" but those words were afterwards dropped, it was immaterial; 6 Ont. 719.

The same principle is applied where the cause of action is other than a debt, as in a bastardy proceeding, where offers of compromise were held not admissible against the defendant as admissions of his guilt; 50 N. W. Rep. (Neb.) 155; 30 *id.* 638; 91 Ala. 615; 108 N. C. 267; nor does the payment of a certain sum on a claim for a much larger sum constitute a recognition of a legal liability to make further payments on such claim; 113 U. S. 648; but where offers of compromise are made to a third person, who has no authority to settle the claim, and there is no intimation that they were made "without prejudice" or in confidence, they are admissible in evidence; 20 S. W. Rep. (Mo.) 975; a statement made by one of several defendants to his co-defendants, advocating the settlement of plaintiff's claims is not within the rule excluding offers made for the purpose of compromise, but is competent as an admission of liability; 30 Pac. Rep. (Cal.) 529; and evidence of the admission of an independent fact, although made during a negotiation tending towards a compromise, is admissible; 32 N. Y. Supp. 156; 11 Misc. Rep. 422; 117 Mass. 55; 44 N. H. 22.

The extent of the protection which may be invoked by the use of the word "without prejudice" is limited to the purposes contemplated by the rule as stated and will not be extended to exclude evidence of communications, which from their character may prejudice the person to whom it is addressed if he should reject the offer; 62 L. J. Rep. Q. B. 511; nor a letter which is intended to be used by the party writing it; the words protect both parties from its use, but if the writer declare that he will use it, from that moment it loses its privileged character; 29 U. C. Q. B. 136. Such communications, when the negotiation is successful and a compromise is agreed to, are admissible both for the purpose of showing the terms of the compromise and enforcing it; 6 Ont. 719; and also in order to account for lapse of time; 15 Beav. 388, per Romilly, M. R.; L. R. 23 Q. B. Div. 88. But whether verbal or written, such communications cannot be regarded for the purpose of determining the question of costs; 58 L. J. Rep. Q. B. 501. In this well considered case, the English court of appeal established the rule contrary to what had been in some previous cases thought proper. See 2 Dr. & Sm. 29; 1 Jur. N. S. 899.

In Civil Law. An agreement between two or more persons, who, wishing to settle their disputes, refer the matter in controversy to arbitrators, who are so called because those who choose them give them full powers to arbitrate and decide what shall appear just and reasonable, to put an end to the differences of which they are made the judges. 1 Domat, *Lois, Civ.* liv. 1, t. 14.

COMPTE ARRETE. (Fr.). An account stated in writing and acknowledged to be correct on its face by the party against whom it is stated. 9 La. Ann. 485.

COMPTROLLER. An officer of a state, or of the United States, who has certain duties to perform in the regulation and management of the fiscal matters of the government under which he holds office.

In the treasury department of the United States there is an officer known as the comptroller of the treasury. The act of July 31, 1894, reorganizing the accounting offices of the government, abolished the offices of second comptroller of the treasury and the commissioner of customs, and provided that hereafter the fiirst comptroller shall be known as the comptroller of the treasury. The Comptroller is charged with the duty of revising accounts, upon appeal from the settlements made by the auditors, such appeal to be taken within one year by either the claimant, the head of the department interested, or by the comptroller himself. Upon the request of a disbursing officer, or the head of a department, the comptroller is required to give his decision upon the validity of a payment to be made, which decision, when rendered, shall govern the auditors and the comptroller in the settlement of the account involving the payment; to approve, disapprove, or modify all decisions made by the auditors making an original construction, or modifying an existing construction of statutes, and to certify his action to the auditor. He shall transmit all decisions made by him forthwith to the auditor or auditors whose duties are affected thereby. By the regulations of the department the comptroller passes upon the sufficiency of authorities to indorse drafts and receive and receipt for money from the government, upon the evidence presented in applications for duplicates or lost or destroyed United States bonds, drafts, checks, etc. The forms of keeping and rendering all public accounts (except those relating to the postal service), the recovery of debts certified by the auditors to be due to the United States, and the preservation, with their vouchers and certificates, of accounts finally adjusted, are under the direction of the comptroller. Upon revision of accounts, appealed from the several auditors to the comptroller, his decision upon such revision is final and conclusive upon the executive branch of the government.

COMPULSION. Forcible inducement to the commission of an act.

Acts done under compulsion are not, in general, binding upon a party; but when a man is compelled by lawful authority to do that which he ought to do, that compulsion does not affect the validity of the act; as, for example, when a court of competent jurisdiction compels a party to execute a deed, under the pain of attachment for contempt, the grantor cannot object to it on the ground of compulsion. But if the court compelled a party to do an act forbidden by law, or had not jurisdiction

over the parties or the subject-matter, the act done by such compulsion would be void. See COERCION; DURESS.

COMPULSORY PILOTAGE. See PILOTAGE.

COMPURGATOR. One of several neighbors of a person accused of a crime or charged as a defendant in a civil action, who appeared and swore that they believed him on his oath. 3 Bla. Com. 341.

Formerly, when a person was accused of a crime, or sued in some kinds of civil actions, he might purge himself upon oath of the accusation made against him, whenever the proof was not the most clear and positive; and if upon his oath he declared himself innocent, he was absolved.

This usage, so eminently calculated to encourage perjury by impunity, was soon found to be dangerous to the public safety. To remove this evil, the laws were changed, by requiring that the oath should be administered with the greatest solemnity; but the form was soon disregarded, for the mind became easily familiarized to those ceremonies which at first imposed on the imagination, and those who cared not to violate the truth did not hesitate to treat the form with contempt. In order to give a greater weight to the oath of the accused, the law was again altered so as to require that the accused should appear before the judge with a certain number of his neighbors, who were freeholders of the hundred, who should swear that they believed the accused had sworn truly. This new species of witnesses were called compurgators. If it was not his first offence or if his compurgators did not agree to make the oath, he was put to the ordeal (*q. v.*). The origin of the system lies back in the history of the Teuton race. It is said still to survive in the practice of the criminal courts by which an accused person is allowed to call witnesses as to his character, as a defence, while the prosecution is not allowed to traverse their testimony. Inderwick, The King's Peace.

The number of compurgators varied according to the nature of the charge and other circumstances. See Du Cange, *Juramentum;* Spelman, Gloss. *Assarth; Termes de la Ley;* 3 Bla. Com. 341-348.

COMPUTUS (Lat. *computare*, to account). A writ to compel a guardian, bailiff, receiver, or accountant, to yield up his accounts. It is founded on the stat. Westm. 2, cap. 12; Reg. Orig. 135.

CONCEAL. To withhold or keep secret mental facts from another's knowledge, as well as to hide or secrete physical objects from sight or observation. 57 Me. 339.

CONCEALED WEAPONS. As to validity of statutes against carrying concealed deadly weapons, see 8 Am. Rep. 22; 14 *id.* 330; ARMS.

CONCEALERS. Such as find out concealed lands: that is, lands privily kept from the king by common persons having nothing to show for them. They are called "*a troublesome, disturbant sort of men; turbulent persons.*" Cowel.

CONCEALMENT. The improper suppression of any fact or circumstance by one of the parties to a contract from the other, which in justice ought to be known.

The omission by an applicant for insurance preliminarily to state facts known to him, or which he is bound to know, material to the risk proposed to be insured against, or omission to state truly the facts expressly inquired about by the underwriters to whom application for insurance is made, whether the same are or are not material to the risk.

Concealment, when fraudulent, avoids a contract, or renders the party using it liable for the damage arising in consequence thereof; 7 Metc. 252; 16 Me. 30; 2 Ill. 344; 3 B. & C. 605; 10 Cl. & F. 934; 12 Cush. 416. But it must have been of such facts as the party is bound to communicate; Webb, Poll. Torts 368; 3 E. L. & Eq. 17; 3 Conn. 413; 5 Ala. N. S. 596; 5 Pa. 467; 8 N. H. 463; 1 Dev. 351; 18 Johns. 403; 6 Humphr. 36. A concealment of extrinsic facts is not, in general, fraudulent, although peculiarly within the knowledge of the party possessing them; 2 Wheat. 195; 1 Baldw. 331; 14 Barb. 72; 2 Ala. N. S. 181. But see 1 Miss. 72; 1 Swan 54; 4 M'Cord 169. And the rule against the concealment of latent defects is stricter in the case of personal than of real property; 6 Woodb. & M. 358; 3 Campb. 508; 3 Term 759.

A failure to state facts known to an insurer, or his agent, or which he ought to know, since these he will be presumed to know, or which lessen the risk, for that only is material which tends to increase the risk, in the absence of express stipulation, and where no inquiry is made, is no concealment; May, Ins. § 207; 16 Ohio 334.

Where there is confidence reposed, concealment becomes more fraudulent; 9 B. & C. 577; 4 Metc. 381.

See, generally, 2 Kent 482; DECEIT; MISREPRESENTATION; REPRESENTATION.

CONCESSI (Lat. I have granted). A term formerly used in deeds.

It is a word of general extent, and is said to amount to a grant, feoffment, lease, release, and the like; 2 Saund. 96; Co. Litt. 301, 302; Dane, Abr. Index; 5 Whart. 278.

It has been held in a feoffment or fine to imply no warranty; Co. Litt. 384; 4 Co. 80; Vaughan's Argument in Hayes *v.* Bickersteth, Vaughan 126; Butler's note, Co. Litt. 384. But see 1 Freem. 339, 414.

CONCESSIMUS (Lat. we have granted). A term used in conveyances. It created a joint covenant on the part of the grantors. 5 Co. 16; 3 Kebl. 617; Bacon, Abr. *Covenant.*

CONCESSION. A grant. The word is frequently used in this sense when applied to grants made by the French and Spanish governments in Louisiana.

CONCESSOR. A grantor.

CONCILIUM. A council.

CONCILIUM REGIS. A tribunal which existed in England during the times of Edward I. and Edward II., composed of the judges and sages of the law. To them were referred cases of great difficulty. Co. Litt. 304.

CONCLUSION (Lat. *con claudere*, to shut together). The close; the end.

In Pleading. In Declarations. That part which follows the statement of the cause of action. In personal or mixed actions, where the object is to recover damages, the conclusion is, properly, *to the damage* of the plaintiff, etc. Comyns, Dig. *Pleader*, c. 84; 10 Co. 1156. And see 1 M. & S. 236; Damages.

The form was anciently, in the King's Bench, "To the damage of the said A B, and thereupon he brings suit;" in the Exchequer, "To the damage," etc., "whereby he is the less able to satisfy our said lord the king the debts which he owes his said majesty at his exchequer, and therefore he brings his suit;" 1 Chit. Pl. 356–358. It is said to be mere matter of form, and not demurrable; 7 Ark. 282.

In Pleas. The conclusion is either *to the country*—which must be the case when an issue is tendered, that is, whenever the plaintiff's material statements are contradicted—or by verification, which must be the case when new matter is introduced. See Verification. Every plea in bar, it is said, must have its proper conclusion. All the formal parts of pleadings have been much modified by statute in the various states and in England.

In Practice. Making the last argument or address to the court or jury. The party on whom the *onus probandi* is cast, in general, has the conclusion.

In Remedies. An estoppel; a bar; the act of a man by which he has confessed a matter or thing which he can no longer deny.

For example, the sheriff is concluded by his return to a writ; and, therefore, if upon a capias he return *cepi corpus*, he cannot afterwards show that he did not arrest the defendant, but is concluded by his return. See Plowd. 276 *b*; 3 Thomas, Co. Litt. 600.

CONCLUSION TO THE COUNTRY. In Pleading. The tender of an issue for trial by a jury.

When an issue is tendered by the defendant, it is as follows: "And of this the said C D puts himself upon the country." When tendered by the plaintiff, the formula is, "And this the said A B prays may be inquired of by the country." It is held, however, that there is no material difference between these two modes of expression, and that if the one be substituted for the other the mistake is unimportant; 10 Mod. 166.

When there is an affirmative on one side and a negative on the other, or *vice versa*, the conclusion should be to the country; 2 Saund. 189; 2 Burr. 1022; 16 Johns. 267. So it is though the affirmative and negative be not in express words, but only tantamount thereto; Co. Litt. 126 *a*; 1 Saund. 103; 1 Chit. Pl. 592; Com. Dig. *Pleader*, E, 32.

CONCLUSIVE EVIDENCE. That which cannot be controlled or contradicted by any other evidence.

Evidence which of itself, whether contradicted or uncontradicted, explained or unexplained, is sufficient to determine the matter at issue. 6 Lond. L. Mag. 373.

CONCLUSIVE PRESUMPTION. A rule of law determining the quantity of evidence requisite for the support of a particular averment which is not permitted to be overcome by any proof that the fact is otherwise. 1 Greenl. Ev. § 15. Thus, for example, the possession of land under claim of title for a certain period of time raises a conclusive presumption of a grant. See Presumption.

In the civil law, such presumptions are said to be *juris et de jure*.

CONCORD. An agreement or supposed agreement between the parties in levying a fine of lands in which the deforciant (or he who keeps the other out of possession) acknowledges that the lands in question are the right of complainant; and from the acknowledgment or admission of right thus made, the party who levies the fine is called the cognizor, and the person to whom it is levied, the cognizee. 2 Bla. Com. 350; Cruise, Dig. tit. 35, c. 2, § 33; Comyns, Dig. *Fine* (E, 9).

CONCORDAT. A convention; a pact; an agreement. The term is generally confined to the agreements made between independent governments, and most usually applied to those between the pope and some prince.

CONCUBARIA. A fold, pen or place where cattle lie. Cowel; Wharton.

CONCUBEANT. Lying together. Wharton.

CONCUBINAGE. A species of marriage which took place among the ancients, and which is yet in use in some countries. See Concubinatus.

The act or practice of cohabiting, in sexual commerce, without the authority of law or a legal marriage. See 1 Brown, Civ. Law 80; Merlin, *Rép.*; Dig. 32. 49. 4; 7. 1. 1; Code, 5. 27. 12.

CONCUBINATUS. A natural marriage, as contradistinguished from the *justæ nuptiæ*, or *justum matrimonium*, the civil marriage.

The *concubinatus* was the only marriage which those who did not enjoy the *jus connubii* could contract. Although this natural, marriage was authorized and regulated by law, yet it produced none of those important rights which flowed from the civil marriage—such as the paternal power, etc.; nor was the wife entitled to the honorable appellation of *mater-familias*, but was designated by the name of *concubina*. After the exclusive and aristocratic rules relative to the *connubium* had been relaxed, the *concubinatus* fell into disrepute; and the law permitting it was repealed by a constitution of the Emperor Leo the Philosopher, in the year 886 of the Christian era. See Pater-familias.

CONCUBINE. A woman who cohabits with a man as his wife, without being married.

CONCUR. In Louisiana. To claim a part of the estate of an insolvent along with other claimants. 6 Mart. La. N. S. 460; as, "the wife concurs with her husband's creditors, and claims a privilege over them."

CONCURRENCE. In French Law. The equality of rights or privileges which

several persons have over the same thing: as, for example, the right which two judgment-creditors, whose judgments were rendered at the same time, have to be paid out of the proceeds of real estate bound by them. *Dict. de Jur.*

CONCURRENT. Running together; having the same authority; thus, we say, a concurrent consideration occurs in the case of mutual promises; such and such courts have concurrent jurisdiction,—that is, each has the same jurisdiction.

Concurrent writs. Duplicate originals, or several writs running at the same time for the same purpose, for service on or arrest of a person, when it is not known where he is to be found; or for service on several persons, as when there are several defendants to an action. Mozley & W. Dict.

CONCUSSION. **In Civil Law.** The unlawful forcing of another by threats of violence to give something of value. It differs from robbery in this, that in robbery the thing is taken by force, while in concussion it is obtained by threatened violence. Heineccius, *Lec. El.* § 1071.

CONDEMN. To sentence; to adjudge. 3 Bla. Com. 291.

To declare a vessel a prize. To declare a vessel unfit for service. 1 Kent 102; 5 Esp. 65.

CONDEMNATION. The sentence of a competent tribunal which declares a ship unfit for service. This sentence may be re-examined and litigated by the parties interested in disputing it; 5 Esp. 65; Abb. Sh. 15; 30 L. J. Ad. 145.

The judgment, sentence, or decree by which property seized and subject to forfeiture for an infraction of revenue, navigation, or other laws is condemned or forfeited to the government. See CAPTOR.

The sentence or judgment of a court of competent jurisdiction that a ship or vessel taken as a prize on the high seas was liable to capture, and was properly and legally captured and held as prize.

Some of the grounds of capture and condemnation are: *violation of neutrality* in time of war; 2 Gall. 261; *carrying contraband goods;* 5 Wall. 1, 28; 3 *id.* 514; *breach of blockade; id.* 28, 170; *id.* 603.

By the general practice of the law of nations, a sentence of condemnation is at present generally deemed necessary in order to divest the title of a vessel taken as a prize. Until this has been done, the original owner may regain his property, although the ship may have been in possession of the enemy twenty-four hours, or carried *infra præsidia;* Hall, Int. L. 417; 1 Rob. 139; 3 *id.* 97, n.; Carth. 423; 1 Kent 101–104; 10 Mod. 79; 4 Wheat. 298; Vattel, b. 3, ch. 14, § 216; 2 Dall. 1, 2, 4; 8 Cra. 226; Marsh. Ins. 402. A sentence of condemnation is generally binding everywhere; Marsh. Ins. 402; 3 Kent 103; 3 Wheat. 246; 4 Cra. 434. But see 1 Binn. 299, n.; 7 Bingh. 495. Title vests completely in the captors, and relates back to the time of capture; 2 Russ. & M. 35; 15 Ves. 139.

Confiscation is the act of the sovereign against a rebellious subject; condemnation as prize is the act of a belligerent against another belligerent. The former may be effected by such means as the sovereign through legal channels may please to adopt; the latter can be made only in accordance with principles recognized in the common jurisprudence of the world. Both are *in rem;* but confiscation recognizes the title of the original owner, while in prize the tenure of the property is qualified, provisional and destitute of absolute ownership; 14 Ct. Cls. 14.

The condemnation of prize property while lying in a neutral port or the port of an ally is valid; 13 How. 498. *Contra,* in England; 5 Rob. 285.

See BLOCKADE.

The word is in general use in connection with the taking of land under the right of eminent domain, *q. v.* The condemnation of lands is but a purchase of them *in invitum,* and the title acquired is but a quit claim; 31 Cal. 215.

In Civil Law. A sentence or judgment which condemns some one to do, to give, or to pay something, or which declares that his claim or pretensions are unfounded.

The word is used in this sense by common-law lawyers also; though it is more usual to say conviction, both in civil and criminal cases; 3 Bla. Com. 291. It is a maxim that no man ought to be condemned unheard and without the opportunity of being heard.

CONDICTIO (Lat. from *condicere*).

In Civil Law. A summons.

A personal action. An action arising from an obligation to do or give some certain, precise, and defined thing. Inst. 3. 15. pr.

Condictio is a general name given to personal actions, or actions arising from obligations, and is distinguished from *vindicatio* (real action), an action to regain possession of a thing belonging to the *actor,* and from *actiones mixtæ* (mixed actions). *Condictio* is also distinguished from an action *ex stipulatu,* which is a personal action which lies where the thing to be done or given is uncertain in amount or identity. See Calvinus, Lex.; Halifax, Anal. 117.

CONDICTIO EX LEGE. An action arising where the law gave a remedy but provided no appropriate form of action. Calvinus, Lex.

CONDICTIO INDEBITI. An action which lies to recover that which the plaintiff has paid to the defendant, by mistake, and which he was not bound to pay, either in fact or in law.

This action does not lie if the money was due *ex æquitate,* or by a natural obligation, or if he who made the payment knew that nothing was due; for *qui consulto dat quod non debeat præsumitur donare;* Bell. Dict.; Calvinus, Lex.; 1 Kames, Eq. 307.

CONDICTIO REI FURTIVÆ. An action against the thief or his heir to recover the thing stolen.

CONDICTIO SINE CAUSA. An

action by which anything which has been parted with without consideration may be recovered. It also lay in case of failure of consideration, under certain circumstances. Calvinus, Lex.

CONDIDIT. In Ecclesiastical Law. The name of a plea entered by a party to a libel filed in the ecclesiastical court, in which it is pleaded that the deceased made the will which is the subject of the suit, and that he was of sound mind. 2 Eccl. 438; 6 *id.* 431.

CONDITION. In Civil Law. The situation of every person in some one of the different orders of persons which compose the general order of society and allot to each person therein a distinct, separate rank. Domat, tom. ii. l. 1, tit. 9, sec. i. art. viii.

A paction or agreement which regulates that which the contractors have a mind should be done if a case which they foresee should come to pass. Domat, tom. i. l. 1, tit. 1, sec. 4.

Casual conditions are such as depend upon accident, and are in no wise in the power of the person in whose favor the obligation is entered into.

Mixed conditions are such as depend upon the joint wills of the person in whose favor the obligation is contracted and of a third person: as "If you marry my cousin, I will give," etc. Pothier.

Potestative conditions are those which are in the power of the person in whose favor the obligation was contracted: as, if I contract to give my neighbor a sum of money in case he cuts down a tree.

Resolutory conditions are those which are added not to suspend the obligation till their accomplishment, but to make it cease when they are accomplished.

Suspensive obligations are those which suspend the obligation until the performance of the condition. They are casual, mixed, or potestative.

Domat says conditions are of three sorts. The *first* tend to accomplish the covenants to which they are annexed. The *second* dissolve covenants. The *third* neither accomplish nor avoid, but create some change. When a condition of the first sort comes to pass, the covenant is thereby made effectual. In case of conditions of the second sort, all things remain in the condition they were in by the covenant, and the effect of the *condition* is in suspense until the condition comes to pass and the covenant is void. Domat, lib. i. tit. 1, § 4, art. 6. See Pothier, Obl. pt. i. c. 2, art. 1, § 1; pt. ii. c. 3, art. 2.

In Common Law. The status or relative situation of a person in the state arising from the regulations of society. Thus, a person under twenty-one is an infant, with certain privileges and disabilities. Every person is bound to know the condition of the person with whom he deals.

A qualification, restriction, or limitation modifying or destroying the original act with which it is connected.

A clause in a contract or agreement which has for its object to suspend, rescind, or modify the principal obligation, or, in a case of a will, to suspend, revoke, or modify the devise or bequest.

A modus or quality annexed by him that hath an estate, or interest or right to the same, whereby an estate, etc., may either be defeated, enlarged, or created upon an uncertain event. Co. Litt. 201 *a*.

A qualification or restriction annexed to a conveyance of lands, whereby it is provided that in case a particular event does or does not happen, or in case the grantor or grantee does or omits to do a particular act, an estate shall commence, be enlarged, or be defeated. Greenl. Cruise, Dig. tit. xiii. c. i. § 1.

A future uncertain event on the happening or the non-happening of which the accomplishment, modification, or rescission of a testamentary disposition is made to depend.

A condition annexed to a bond is usually termed a defeasance, which see. A condition defeating a conveyance of land in a certain event is generally a mortgage. See MORTGAGE. Conditions annexed to the realty are to be distinguished from *limitations;* a stranger may take advantage of a *limitation*, but only the grantor or his heirs of a condition; 2 Dutch. 1; 3 *id.* 376; 2 Paine 545; a limitation always determines an estate without entry or claim, and so doth not a condition; Sheppard, Touchst. 121; 2 Bla. Com. 155; 4 Kent 122, 127; 3 Gray 142; 19 N. Y. 100: from *conditional limitations;* in case of a condition, the entire interest in the estate does not pass from the grantor, but a possibliity of reverter remains to him and to his heirs and devisees; in case of a conditional limitation, the possibility of reverter is given over to a third person; Chal. R. P. 233; 3 Gray 142; from *remainders;* a condition operates to defeat an estate before its natural termination, a remainder takes effect on the completion of a preceding estate; Co. Litt. Butler's note 94; from *covenants;* a covenant may be said to be a contract, a condition, something affixed *nomine pœnæ* for the non-fulfilment of a contract; the question often depends upon the apparent intention of the parties, rather than upon fixed rules of construction; if the clause in question goes to the whole of the consideration, it is rather to be held a condition; 2 Parsons Contr. 31; Platt, Cov. 71; 10 East 295; see 2 Stockt. 489; 6 Barb. 386; 4 Harr. Del. 117; a covenant may be made by a grantee, a condition by the grantor only; 2 Co. 70; from *charges;* if a testator create a charge upon the devisee personally in respect of the estate devised, the devisee takes the estate on condition, but where a devise is made of an estate and also a bequest of so much to another person, payable "thereout" or "therefrom" or "from the estate," it is rather to be held a charge; 4 Kent 604; 12 Wheat. 498; 4 Metc. 523; 1 N. Y. 488; 14 M. & W. 698. Where a forfeiture is not distinctly expressed or implied, it is held a charge; 10 Gill & J. 480; 10 Leigh 172. See, also, 38 Me. 18; 1 Pow. Dev. 664; CHARGE; LEGACY.

Affirmative conditions are positive conditions.

Affirmative conditions implying a negative are spoken of by the older writers: but no such class is now recognized. Shep. Touchst. 117.

Collateral conditions are those which require the doing of a collateral act. Shep. Touchst. 117.

Compulsory conditions are such as expressly require a thing to be done.

Consistent conditions are those which agree with the other parts of the transaction.

Copulative conditions are those which are composed of distinct parts or separate

conditions, all of which must be performed. They are generally conditions precedent, but may be subsequent. Pow. Dev. c. 15.

Covert conditions are implied conditions.

Conditions in deed are express conditions.

Disjunctive conditions are those which require the doing of one of several things. If a condition become impossible in the copulative, it may be taken in the disjunctive. Viner, Abr. *Condition* (S b) (Y b 2).

Express conditions are those which are created by express words. Co. Litt. 328.

Implied conditions are those which the law supposes the parties to have had in mind at the time the transaction was entered into, though no condition was expressed. Shep. Touchst. 117.

Impossible conditions are those which cannot be performed in the course of nature.

Inherent conditions are such as are annexed to the rent reserved out of the land whereof the estate is made. Shep. Touchst. 118.

Insensible conditions are repugnant conditions.

Conditions in law are implied conditions. The term is also used by the old writers without careful discrimination to denote limitations, and is little used by modern writers. Littleton § 380; 2 Bla. Com. 155.

Lawful conditions are those which the law allows to be made.

Positive conditions are those which require that the event contemplated should happen.

Possible conditions are those which may be performed.

Precedent conditions are those which are to be performed before the estate or the obligation commences, or the bequest takes effect. Powell, Dev. c. 15. A bond to convey land on the payment of the purchase-money furnishes a common example of a condition precedent. 9 Cush. 95. They are distinguished from conditions subsequent.

Repugnant conditions are those which are inconsistent with, and contrary to, the original act.

Restrictive conditions are such as contain a restraint: as, that a lessee shall not alien. Shep. Touchst. 118.

Single conditions are those which require the doing of a single thing only.

Subsequent conditions are those whose effect is not produced until after the vesting of the estate or bequest or the commencement of the obligation.

A mortgage with a condition defeating the conveyance in a certain event is a common example of a condition subsequent. All conditions must be either precedent or subsequent. The character of a condition in this respect does not depend upon the precise form of words used; 7 Gill & J. 227, 240; 2 Dall. 317; 20 Barb. 425; 6 Me. 106; 1 Va. Cas. 138; 4 Rand. 352; 6 J. J. Marsh. 161; 6 Litt. 151; 1 Spenc. 435; 1 La. Ann. 424; 1 Wis. 527; nor upon the position of the words in the instrument; 1 Term 645; Cas. *temp.* Talb. 166; the question is whether the conditional event is to happen before or after the principal; 4 Rand. 358. The word "if" implies a condition precedent, however, unless controlled by other words; Crabb, R. P. § 2152.

Unlawful conditions are those which are forbidden by law.

They are those which, *first*, require the performance of some act which is forbidden by law, or which is *malum in se*; or, *second*, require the omission of some act commanded by law; or, *third*, those which encourage such acts or omissions. 1 P. Wms. 189.

Void conditions are those which are of no validity or effect.

Creation of. Conditions must be made at the same time as the original conveyance or contract, but may be by a separate instrument, which is then considered as constituting one transaction with the original; 5 S. & R. 375; 7 W. & S. 335; 3 Hill 95; 3 Wend. 208; 10 Ohio 433; 10 N. H. 64; 2 Me. 132; 7 Pick. 157; 6 Blackf. 113. Conditions are sometimes annexed to and depending upon estates, and sometimes annexed to and depending upon recognizances, statutes, obligations, and other things, and are also sometimes contained in acts of parliament and records; Shep. Touchst. 117.

Unlawful conditions are void. Conditions in restraint of marriage *generally* are held void; Poll. Contr. 334; 13 Mo. 211; see 10 Pa. 350; 156 Mass. 265; 152 *id.* 523; 84 Me. 400; otherwise of conditions restraining from marriage to a particular person, or restraining a widow from a second marriage; 10 E. L. & Eq. 139; 2 Sim. 255; 6 Watts 213. A condition in general restraint of alienation is void; 1 Den. 449; 14 Miss. 730; 24 *id.* 203; 6 East 173; 141 U. S. 296; and see 21 Pick. 42; but a condition restraining alienation for a limited time may be good; Co. Litt. 223; 2 S. & R. 573. An unreasonable condition is also void; 62 Hun 612; as is a condition repugnant to the grant; 111 N. C. 519.

Where land is devised, there need be no limitation over to make the condition good; 1 Mod. 300; 1 Atk. 361. See 109 N. C. 461; but where the subject of the devise is personalty without a limitation over, the condition, if subsequent, is held to be *in terrorem* merely, and void; 1 Jarm. Wills 887; 3 Whart. 575. See 62 Hun 612. But if there be a limitation over, a non-compliance with the condition divests the bequest; 1 Eq. Cas. Abr. 112. A limitation over must be to persons who could not take advantage of a breach; 1 Wend. 388; 2 Conn. 196. A gift of personalty may not be on condition subsequent at common law, except as here stated; 1 Rolle, Abr. 412. See 21 Mo. 277.

Any words suitable to indicate the intention of the parties may be used in the creation of a condition; "On condition" is a common form of commencement.

Formerly, much importance was attached to the use of particular and formal words in the creation of a condition. Three phrases are given by the old writers by the use of which a condition was created without words giving a right of re-entry. These were *Sub conditione* (On condition), *Provisa ita quod* (Provided always), *Ita quod* (So that). Littleton 331; Shep. Touchst. 125.

Amongst the words used to create a condition where a clause of re-entry was added were, *Quod si contingat* (If it shall happen), *Pro* (For), *Si* (If), *Causa* (On account of); sometimes, and in case of the king's grants, but not of any other person, *ad faciendum* or *faciendo*, *ea intentione*, *ad effectum*

or *ad propositum*. For avoiding a lease for years, such precise words of condition are not required; Co. Litt. 204 *b*. In a gift, it is said, may be present a modus, a condition and a consideration: the words of creation are *ut* for the modus, *si* for the condition, and *quid* for the consideration.

Technical words in a will will not create a condition where it is unreasonable to suppose that the testator intended to create a technical condition: 7 N. H. 142. The words of condition need be in no particular place in the instrument; 1 Term 645; 6 *id.* 668.

Construction of. Conditions which go to defeat an estate or destroy an act are strictly construed; while those which go to vest an estate are liberally construed; Crabb, R. P. § 2130; 17 N. Y. 34; 4 Gray 140; 35 N. H. 445; 18 Ill. 431; 15 How. 323. The condition of an obligation is said to be the language of the obligee, and for that reason to be construed liberally in favor of the obligor; Co. Litt. 42 *a*, 183 *a*; 2 Pars. Contr. 22; Shep. Touchst. 375; Dy. 14 *b*, 17 *a*; 1 Johns. 267. But wherever an obligation is imposed by a condition, the construction is to be favorable to the obligee; 2 Jarm. Wills 526; 1 Sumn. 440. Conditions subsequent are not favored in law but are always strictly construed because they tend to destroy estates; 73 Ia. 328; and where it is doubtful whether a clause in a deed be a covenant or a condition, the courts will incline against the latter construction; 44 N. J. Eq. 349.

Performance should be complete and effectual; 1 Rolle, Abr. 425. An inconsiderable casual failure to perform is not non-performance; 6 Dana 44; 17 N. Y. 34. Any one who has an interest in the estate may perform the condition; but a stranger gets no benefit from performing it; 10 S. & R. 186. Conditions precedent, if annexed to land, are to be strictly performed, even when affecting marriage; 1 Mod. 300; 1 Atk. 361. Conditions precedent can generally be exactly performed; and, at any rate, equity will not generally interfere to avoid the consequences of non-performance; 3 Ves. Ch. 89; 1 Atk. 361; 3 *id.* 330; West 350; 2 Brown, Ch. 431. But in cases of conditions subsequent, equity will interfere where there was even a partial performance, or where there is only a delay of performance; Crabb, R. P. § 2160; 4 Ind. 628; 26 Me. 525. This is the ground of equitable jurisdiction over mortgages.

Generally, where there is a gift over in case of non-performance, the parties will be held more strictly to a performance than where the estate or gift is to revert to the grantor or his heirs.

Where conditions are liberally construed, a strict performance is also required; and it may be said, in the same way, that a non-exact performance is allowed where there is a strict construction of the condition.

Generally, where no time of performance is limited, he who has the benefit of the contract may perform the condition when he pleases, at any time during his life; Beach, Wills 412; Plowd. 16; Co. Litt. 208*b*; and need not do it when requested; Co. Litt. 209 *a*. A condition precedent must be performed within a reasonable time, when no time is fixed for the performance thereof; 17 Nev. 409. But if a prompt performance be necessary to carry out the will of a testator, the beneficiary shall not have a lifetime in which to perform the condition: 5 S. & R. 384. In this case, no previous demand is necessary; 5 S. & R. 385; nor is it when the continuance of an estate depends upon an act to be done at a fixed time; 116 Ind. 424. But even then a reasonable time is allowed; 1 Rolle, Abr. 449.

If the place be agreed upon, neither party alone can change it, but either may with consent of the other; 1 Rolle 444; 11 Vt. 612; 3 Leon. 260. See CONTRACT; PERFORMANCE.

Non-performance of a condition which was possible at the time of its making, but which has since become impossible, is excused if the impossibility is caused by act of God; Poll. Contr. 387; 10 Pick. 507; or by act of law, if it was lawful at its creation; 16 Wall. 366; 1 Pa. 495; or by the act of the party; as, when the one imposing the obligation accepts another thing in satisfaction or renders the performance impossible by his own default; 21 Pick. 389; 1 Paine 652; 6 Pet. 745; 1 Cow. 339. If performance of one part becomes impossible by act of God, the whole will, in general, be excused; 1 B. & P. 242; Cro. Eliz. 280; 5 Co. 21; 1 Ld. Raym. 279.

The effect of conditions may be to *suspend* the obligation; as, if I bind myself to convey an estate to you on condition that you first pay one thousand dollars, in which case no obligation exists until the condition is performed: or may be to *rescind* the obligation; as, if you agree to buy my house on condition that it is standing unimpaired on the tenth of May, or I convey to you my farm on condition that the conveyance shall be void if I pay you one thousand dollars, in such cases the obligation is rescinded by the non-performance of the condition: or it may *modify* the previous obligation; as if I bind myself to convey my farm to you on the payment of four thousand dollars if you pay in bank stock, or of five thousand if you pay in money: or, in case of gift or bequest, may qualify the gift or bequest as to amount or persons.

The effect of a condition precedent is, when performed, to vest an estate, give rise to an obligation, or enlarge an estate already vested; 12 Barb. 440. Unless a condition precedent be performed, no estate will vest; and this even where the performance is prevented by the act of God or of the law; Co. Litt. 42; 2 Bla. Com. 157; 4 Kent 125; 4 Jones, N. C. 249; 109 N. C. 461. Not so if prevented by the party imposing it; 13 B. Monr. 163; 2 Vt. 469.

If a condition subsequent was void at its creation, or becomes impossible, unlawful, or in any way void, the estate or obligation remains intact and absolute; 2 Bla. Com.

157 ; 15 Ga. 103. Where the condition upon which an estate is to be divested and go to a third party is founded on a contingency that can never happen, the grantee will take a fee simple ; 97 N. C. 206.

In case of a condition broken, if the grantor is in possession, the estate revests at once ; 5 Mass. 321 ; 5 S. & R. 375 ; 32 Me. 394 ; 63 Vt. 266 ; 129 Ind. 244 ; 1 Tex. Civ. App. 245. But see 2 N. H. 120. But if the grantor is out of possession, he must enter ; 8 Blackf. 138 ; 12 Ired. 194 ; 18 Conn. 535 ; 8 N. H. 477 ; 34 Me. 322 ; 8 Exch. 67 ; and is then in, as of his previous estate ; Co. Litt. Butler's note, 94. Only the grantor, his heirs or devisees, can take advantage of the failure to perform a condition subsequent, contained in a deed ; 129 Ill. 436 ; 50 Ark. 141.

It is usually said in the older books that a condition is not assignable, and that no one but the grantor and his heirs can take advantage of a breach ; Gilbert, Ten. 26. Statutory have equal rights in this respect with common-law heirs ; 18 Conn. 635 ; 25 Me. 625 ; and in some of the United States the common-law rule has been broken in upon, and the devisee may enter ; 16 Pa. 150 ; 5 Pick. 528 ; *contra*, 20 Barb. 455 ; while in others even an assignment of the grantor's interest is held valid, if made after breach ; 4 Harr. Del. 140 ; and of a particular estate ; 19 N. Y. 100. In *equity*, a condition with a limitation over to a third person will be regarded as a trust, and, though the legal rights of the grantor and his heirs may not be destroyed, equity will follow him and compel a performance of the trust ; Co. Litt. 236 *a* ; 6 Pick. 306 ; 9 Watts 60 ; 2 Conn. 201.

Consult Blackstone ; Kent, Commentaries ; Crabb ; Washburn ; Real Prop. ; Leake, Pollock, Contracts. As to effect of conditions in deeds, see 9 Lawy. Rep. Ann. 165.

CONDITIONAL FEE. A fee which, at the common law, was restrained to some particular heirs, exclusive of others.

It was called a conditional fee by reason of the condition, expressed or implied in the donation of it, that if the donee died without such particular heirs, the land should revert to the donor. For this was a condition annexed by law to all grants whatsoever, that, on failure of the heirs specified in the grant, the grant should be at an end and the land return to its ancient proprietor.

Such a gift, then, was held to be a gift upon condition that it should revert to the donor if the donee had no heirs of his body, but, if he had, it should then remain to the donee. It was, therefore, called a fee simple, on condition that the donee had issue. As soon as the donee had issue born, his estate was supposed to become absolute, by the performance of the condition,—at least so far absolute as to enable him to charge or to alienate the land, or to forfeit it for treason. But on the passing of the statute of Westminster II., commonly called the statute *De Donis Conditionalibus*, the judges determined that the donee had no longer a conditional fee simple which became absolute and at his own disposal as soon as any issue was born ; but they divided the estate into two parts, leaving the donee a new kind of particular estate, which they denominated a *fee tail ;* and vesting in the donor the ultimate fee simple of the land, expectant on the failure of issue, which expectant estate was called a reversion. And hence it is said that tenant in fee tail is by virtue of the statute *De Donis*. 2 Bla. Com. 112.

A conditional fee may be granted by will as well as by deed ; 37 N. E. Rep. (Ind.) 322.

CONDITIONAL LIMITATION. A condition followed by a limitation over to a third person in case the condition be not fulfilled or there be a breach of it.

A condition determines an estate after breach upon entry or claim by the proper person : a limitation marks the period which determines an estate without any act on the part of him who has the next expectant interest. A conditional limitation is, therefore, of a mixed nature, partaking of that of a condition and a limitation. 3 Gray 143. The limitation over need not be to a stranger ; 2 Bla. Com. 155 ; 11 Metc. 102 ; Watk. Conv. 204.

Consult CONDITION ; LIMITATION ; 1 Washburn, Real Prop. 459 ; 4 Kent 122, 127 ; 1 Preston, Est. §§ 40, 41, 93.

CONDITIONAL SALE. A sale in which the transfer of title is made to depend upon the performance of a condition. Black, L. Dict. See SALE ; ROLLING STOCK.

CONDITIONAL STIPULATION. In Civil Law. A stipulation on condition. Inst. 3, 16, 4.

CONDITIONS OF SALE. The terms upon which the vendor of property by auction proposes to sell it.

The instrument containing these terms, when reduced to writing or printing.

It is always prudent and advisable that the conditions of sale should be printed and exposed in the auction-room : when so done, they are binding on both parties, and nothing that is *said* at the time of sale, to add to or vary such printed conditions, will be of any avail ; 12 East 6 ; 6 Ves. Ch. 330 ; 15 *id.* 521 ; 2 Munf. 119 ; 1 Des. Ch. 573 ; 11 Johns. 555. See forms of conditions of sale in Babington Auct. 233–243 ; Sugden, Vend. App. no. 4.

CONDONACION. In Spanish Law. The remission of a debt, either expressly or tacitly. 14 Am. L. Reg. 641.

CONDONATION. The conditional forgiveness or remission, by a husband or wife, of a matrimonial offence which the other has committed.

"A blotting out of an imputed offence against the marital relation so as to restore the offending party to the same position he or she occupied before the offence was committed." 1 Sw. & Tr. 334. See, as to this definition, 2 Bish. Mar. & Div. § 35 ; 36 Ga. 286.

While the condition remains unbroken, condonation, on whatever motive it proceeded, is an absolute bar to the remedy for the particular injury condoned ; Bish. Mar. & Div. § 354.

The doctrine of condonation is chiefly, though not exclusively, applicable to the offence of adultery. It may be either express, *i. e.* signified by words or writing, or implied from the conduct of the parties. The latter, however, is much the more common ; and it is in regard to that that the chief legal difficulty has arisen. The only general rule is, that any cohabitation

with the guilty party, after the commission of the offence, and with the knowledge or belief on the part of the injured party of its commission, will amount to conclusive evidence of condonation; but this presumption may be rebutted by evidence; 60 Law J. Prob. 73. See 33 Cent. L. J. 93. The construction, however, is more strict when the wife than when the husband is the delinquent party; Bish. Mar. & Div. § 355. But a mere promise to condone is not in itself a condonation; 1 Sw. & Tr. 183; 19 Ala. 363; but see, *contra*, 3 Blackf. 202, where there was only an unaccepted inducement held out to the wife to return. Knowledge of the offence is essential; 60 Ind. 259; 1 Bradw. 245; 23 Ark. 615. A divorce will not be granted for adultery where the parties continue to live together after it was known; 15 So. Rep. (La.) 657.

Every implied condonation is upon the implied condition that the party forgiven will abstain from the commission of the like offence thereafter; and also treat the forgiving party, in all respects, with conjugal kindness. Such, at least, is the better opinion; though the latter branch of the proposition has given rise to much discussion. It is not necessary, therefore, that the subsequent injury be of the same kind, or proved with the same clearness, or sufficient of itself, when proved, to warrant a divorce or separation. Accordingly, it seems that a course of unkind and cruel treatment will revive condoned adultery, though the latter be a ground of divorce *a vinculo matrimonii*, while the former will, at most, only authorize a separation from bed and board; Geary, Mar. & F. R. 281; 1 Edw. Ch. 439; 4 Paige, Ch. 460; 14 Wend. 637; 31 N. J. Eq. 225; 6 Mo. App. 572; 8 Oreg. 224. Acts of cruelty against a wife revive acts of cruelty which have been condoned; 67 Hun 491; 4 Wash. St. 705.

Condonation is not so strict a bar against the wife as the husband; 3 Md. Ch. 21; 32 Miss. 279; 1 Bradw. 245; 1 Hag. Ec. 773.

The presumption of condonation from co-habitation in cases of cruelty is not so strong as in cases of adultery; 2 Bish. Mar. & Div. § 50 *et seq.* See 5 Am. L. Reg. N. S. 641. A divorce on the ground of cruelty will not be granted where the parties lived together a long time after the alleged cruelty and before the action was brought, as the offence will be presumed to have been condoned; 109 N. C. 139; 140 Ill. 326; 49 Ill. App. 573.

CONDUCT MONEY. Money paid to a witness for his travelling expenses. Wharton.

CONDUCTIO (Lat.). A hiring; a bailment for hire.

It is the correlative of *locatio*, a letting for hire. *Conducti actio*, in the civil law, is an action which the hirer of a thing or his heir had against the latter or his heir to be allowed to use the thing hired. *Conducere*, to hire a thing. *Conductor*, a hirer, a carrier; one who undertakes to perform labor on another's property for a specified sum. *Conductus*, the thing hired. Calvinus, Lex.; Du Cange; 2 Kent 586.

CONE AND KEY. A woman at fourteen or fifteen years of age may take charge of her house and receive *cone* and *key* (that is, keep the accounts and keys). Cowel. Said by Lord Coke to be *cover* and *keye*, meaning that at that age a woman knew what in her house should be kept under lock and key. Co. 2d Inst. 203.

CONFECTIO (Lat. from *conficere*). The making and completion of a written instrument. 5 Co. 1.

CONFEDERACY. In Criminal Law. An agreement between two or more persons to do an unlawful act or an act which, though not unlawful in itself, becomes so by the confederacy. The technical term usually employed to signify this offence is *conspiracy*. See 41 Wis. 284; 52 How. Pr. 353.

In Equity Pleading. An improper combination alleged to have been entered into between the defendants to a bill in equity.

A general charge of confederacy is made a part of a bill in chancery, and is the fourth part, in order, of the bill; but it has become merely formal, except in cases where the complainant intends to show that such a combination actually exists or existed, in which case a special charge of such confederacy must be made. Story, Eq. Pl. § 29; Mitf. Eq. Pl. 41; Cooper, Eq. Pl. 9.

In International Law. An agreement between two or more states or nations, by which they unite for their mutual protection and good. This term is applied to such an agreement made between two independent nations; but it is also used to signify the union of different states of the same nation: as, the confederacy of the states.

The original thirteen states, in 1781, adopted for their federal government the "Articles of confederation and perpetual union between the states." These were completed on the 15th of November, 1777, and, with the exception of Maryland, which afterwards also agreed to them, were adopted by the several states, which were thereby formed into a federal government, going into effect on the first day of March, 1781, 1 Story, Const. § 225, and so remained until the adoption of the present constitution, which acquired the force of the supreme law of the land on the first Wednesday of March, 1789. 5 Wheat. 420. See ARTICLES OF CONFEDERATION.

CONFEDERATE BONDS. As the bonds of the Confederate States have been declared illegal by the Fourteenth Amendment, a contract entered into since the war for the sale and delivery of such bonds is void, and no action will lie for a breach of the contract; 16 Fed. Rep. 53.

CONFEDERATE MONEY. Contracts made during the rebellion in Confederate money may be enforced in the United States courts, and parties compelled to pay in lawful money of the United States the actual value of the notes at the time and place of contract; 115 U. S. 556; and when payment was accepted and receipted for by the creditor, it was held to be a valid payment; 117 U. S. 327. These notes were currency imposed upon the community by

irresistible force, and it must be considered in the courts of law the same as if it had been issued by a foreign government temporarily occupying a part of the territory of the United States ; 8 Wall. 1 ; and a contract payable in such notes was not invalid ; 15 Wall. 448 ; 19 *id.* 556 ; 111 U. S. 50 ; 103 *id.* 792 ; 94 *id.* 434 ; 105 *id.* 132 ; but where a contract was entered into before the war, and the deferred payments came due and were discharged with depreciated currency, it was held, as against the non-ratification of the payment, to be void ; 32 Fed. Rep. 511. *Contra*, 4 S. W. Rep. (Tex.) 309.

After one has accepted payment in Confederate money and acquiesces in the transaction for fifteen years, he is concluded by laches from disputing its validity ; 145 U. S. 214. Where payment was made in 1864 in such money it was sufficient consideration though it afterwards became worthless ; 1 Tex. Civ. App. 354. The act of a fiduciary in accepting Confederate money in payment of debts due the estate and investing the proceeds in bonds of the Confederate States issued for the avowed purpose of waging war against the United States is wholly illegal and void ; 32 Fed. Rep. 511.

CONFEDERATE STATES. The Confederate States were a *de facto* government in the sense that its citizens were bound to render the government obedience in civil matters, and did not become responsible, as wrong-doers, for such acts of obedience ; 8 Wall. 9 ; but it was not strictly a *de facto* government ; *ibid.* ; see 96 U. S. 176. During the war, the inhabitants of the Confederate States were treated as belligerents ; 8 Wall. 10 ; 2 *id.* 404. Land sold to the Confederate government, and captured by the Federal government, became the property of the United States ; 16 Wall. 414.

The Confederate States was an illegal organization, within the provision of the constitution of the United States prohibiting any treaty, alliance, or confederation of one state with another ; whatever efficacy, therefore, its enactments possessed in any state entering into that organization, must be attributed to the sanction given to them by that state ; 96 U. S. 176. The laws of the *several states* were valid except so far as they tended to impair the national authority or the rights of citizens under the constitution ; *ibid.*

Unless suspended or superseded by the commanders of the United States forces which occupied the insurrectionary states, the laws of those states, so far as they affected the inhabitants, remained in force during the war, and over them their tribunals continued to exercise their ordinary jurisdiction ; 97 U. S. 509. See articles in 2 So. L. Rev. 313 ; 3 *id.* 47.

CONFEDERATION. The name given to the form of government which the American colonies during the revolution devised for their mutual safety and government.

CONFERENCE. In French Law. A similarity between two laws or two systems of laws.

In International Law. Verbal explanations between the representatives of at least two nations, for the purpose of accelerating matters by avoiding the delays and difficulties of written communications.

A meeting of plenipotentiaries of different nations to adjust differences or formulate a plan of joint action ; as, the conference at Berlin of representatives of the United States, Great Britain, and Germany respecting the affairs of Samoa, in 1889, and the monetary conference at Brussels of representatives of the United States and several European powers in 1894. See CONGRESS.

In Legislation. Mutual consultations by two committees appointed, one by each house of a legislature, in cases where the houses cannot agree in their action.

CONFESSION. In Criminal Law. The voluntary declaration made by a person who has committed a crime or misdemeanor, to another, of the agency or participation which he had in the same.

An admission or acknowledgment by a prisoner, when arraigned for an offence, that he committed the crime with which he is charged.

Judicial confessions are those made before a magistrate or in court in the due course of legal proceedings.

Extra-judicial confessions are those made by the party elsewhere than before a magistrate or in open court.

Voluntary confessions are admissible in evidence ; 20 Ga. 60 ; 12 La. Ann. 805 ; 3 Ind. 552 ; 30 Miss. 593 ; 30 Tex. App. 619 ; 94 Ala. 50 ; 3 Wash. St. 99 ; 92 Ky. 282 ; 93 Mich. 638 ; 76 Cal. 328 ; 25 Neb. 55 ; 41 La. Ann. 617 ; but a confession is not admissible in evidence where it is obtained by temporal inducement, by threats, promise or hope of favor held out to the party in respect of his escape from the charge against him, by a person in authority ; 4 C. & P. 570 ; 4 Harr. Del. 503 ; 37 N. H. 175 ; 5 Fla. 285 ; 10 Ind. 106 ; 10 Gratt. 734 ; 40 Mich. 706 ; 38 Ala. 422 ; 55 Ga. 136 ; 63 *id.* 600 ; 50 Miss. 147 ; 1 Mont. 394 ; 2 Col. 186 ; 31 Tex. Cr. App. 489 ; 37 Vt. 191 ; 84 Pa. 200 ; 91 N. C. 581 ; see 18 N. Y. 9 ; 108 Mass. 285 ; 135 *id.* 269 ; 119 *id.* 305 ; 55 Vt. 510 ; 126 Mass. 464 ; 66 N. C. 639 ; 51 Ill. 236 ; 44 L. T. Rep. N. S. 687 ; 29 Pa. 429 ; 113 N. C. 688 ; or where there is reason to presume that such person appeared to the party to sanction such threat or inducement ; 5 C. & P. 539 ; 2 Crawf. & D. 347 ; 1 Dev. 259 ; but the inducement must be held out by a person in authority ; 12 E. L. & Eq. 591 ; 10 Gray 173 ; 3 Heisk. 232 ; but see 4 C. & P. 570 ; otherwise the confession is admissible ; 1 C. & P. 97, 129 ; Russ. & R. 153 ; 1 Leach 291 ; 1 Gray 461 ; 1 Strobh. 155 ; 9 Rich. 428 ; 14 Gratt. 652 ; 19 Vt. 116 ; 125 Mass. 210 ; 44 Miss. 332 ; 15 La. Ann. 145 ; 39 Mich. 245 ; but see 5 Jones, N. C. 432 ; 32 Miss. 382 ; 2 Ohio St. 583 ; or if the induce-

ment be spiritual merely; 1 Mood. 197; Jebb, Ir. 15; 15 Mass. 161; 8 Ohio St. 98; or an appeal to the party to speak the truth; L. R. 1 C. C. C. 362; 44 Miss. 333; 125 Mass. 210; even if the appeal comes from an officer of the law; 15 Ir. L. R. N. S. 60; 54 Ind. 359; 44 Ia. 82; 2 Tex. Ap. 588; 94 Ala. 55; 160 Mass. 530; but see 2 Crawf. & D. 152; Tayl. Ev. § 804. Mere advice to confess and tell the truth does not exclude; 75 N. C. 356; 54 Mo. 192; 55 Ga. 592; but see 36 S. C. 524; and the temporal inducement must have been held out by the person to whom the confession was made; Phill. Ev. 430; 4 C. & P. 223; Jebb 15; unless collusion be suspected; 4 C. & P. 550. The fact that defendant was intoxicated when he made his confession, though tending to affect its weight, is not ground for its exclusion; 32 Tex. Cr. App. 625.

A confession is admissible though elicited by questions put to a prisoner by a constable, magistrate, or other person; 5 C. & P. 312; 8 *id.* 179, 621; 14 Ark. 556; 119 Mass. 305; 63 N. Y. 590; 57 Mo. 102; 16 Kans. 14; 94 Ala. 50; 31 Tex. Crim. R. 276; 44 Ia. 82; even though the question assumes the prisoner's guilt or the confession is obtained by trick or artifice; 1 Mood. 28; Phill. Ev. 427; 33 Miss. 347; 85 Mo. 145; 14 Minn. 165; 80 N. Y. 484; 40 Ala. 314; see 8 C. & P. 622; 91 Ga. 277; and although it appears that the prisoner was not warned that what he said would be used against him; 8 Mod. 89; 9 C. & P. 124. Statements made to a trial judge freely and voluntarily are admissible in evidence; 45 La. Ann. 36.

A statement not compulsory, made by a party not at the time a prisoner under a criminal charge, is admissible in evidence against him, although it is made upon oath; 5 C. & P. 530; 7 Ired. 96; 5 Rich. 391; 122 Mass. 454; 71 N. Y. 602; 41 Tex. 39; 59 Ind. 105; 31 Tex. Cr. App. 485; *contra*, 39 Miss. 615; see 8 C. & P. 250; otherwise, if the answers are compulsory; 1 Den. Cr. Cas. 236; 6 C. & P. 161, 177; 15 N. Y. 384; 3 Wis. 823; 2 Park. Cr. Cas. 663; 2 Dill. 405; 49 Cal. 69. A confession may be inferred from the conduct and demeanor of a prisoner when a statement is made in his presence affecting himself; 5 C. & P. 332; 21 Pick. 515; 98 N. C. 595; 76 Ill. 217; 36 Ohio St. 628; 47 Ind. 251; 121 Mass. 69; see 26 Mich. 1; 32 Ala. N. S. 560; 126 Mass. 374; 63 N. Y. 522; 14 Tex. App. 474; unless such statement is made in the deposition of a witness or examination of another prisoner before a magistrate; 1 Mood. 347; 6 C. & P. 164.

Where a confession has been obtained, or an inducement held out, under circumstances which would render a confession inadmissible, a confession subsequently made is not admissible in evidence; unless from the length of time intervening, from proper warning of the consequences, or from other circumstances, there is reason to presume that the hope or fear which influenced the first confession is dispelled; 1 Greenl. Ev. 231; 4 C. & P. 225; 1 Wheel. Cr. Cas. 67; 5 Halst. 163; 3 Jones, N. C. 443; 5 Rich. 391; 24 Miss. 512; 33 Neb. 663; 113 N. C. 624; 10 N. J. L. 163; 37 Vt. 191; 2 Cra. C. C. 76; and the motives proved to have been offered will be presumed to continue, and to have produced the confession, unless the contrary is shown by clear evidence, and the confession will be rejected; 1 Dev. 259; 12 Miss. 31; 5 Cush. 605; 18 Conn. 166; 2 Leigh 701; 32 Ala. N. S. 560; 1 Sneed 75. And see 6 C. & P. 404; 5 Jones, N. C. 315; 12 La. Ann. 895.

Under such circumstances, contemporaneous declarations of the party are receivable in evidence, or not, according to the attending circumstances; but any act of the party, though done in consequence of such confession, is admissible if it appears from a fact thereby discovered that so much of the confession as immediately relates to it is true; 1 Leach 263, 386; Russ. & R. 151; 9 Pick. 496; 32 Miss. 382; 7 Rich. 327.

A confession made before a magistrate is admissible though made before the evidence of the witnesses against the party was concluded; 4 C. & P. 567. See 45 La. Ann. 36.

Parol evidence, precise and distinct, of a statement made by a prisoner before a magistrate during his examination, is admissible though such statement neither appears in the written examination nor is vouched for by the magistrate; 61 Me. 171; 2 Russ. Cr. 876; 7 C. & P. 188; but not if it is of a character which it was the duty of the magistrate to have noted; 1 Greenl. Ev. § 227, n. Parol evidence of a confession before a magistrate may be given where the written examination is inadmissible through informality; 1 Lew. 46; 4 C. & P. 550, n.; 1 M. & M. 403; Busb. 239.

The whole of what the prisoner said must be taken together; 1 Greenl. Ev. 218; 2 C. & K. 221; 9 Leigh 633; 2 Dall. 86; 5 Miss. 364. See 3 Park. Cr. Cas. 256; 26 Ala. N. S. 107; 11 Colo. 637; 61 Mo. 302; 24 Wis. 144; 39 Cal. 52; 11 Gray 323. Where a prisoner signs the confession which is written by another for him, he waives any objection to it as evidence; 157 Mass. 200.

All confessions are *prima facie* involuntary and therefore inadmissible, and they can be rendered admissible only by showing that they are voluntary and not constrained; 83 Ala. 1, 76; 84 *id.* 430; 50 Ark. 305; but a confession is not rendered inadmissible by the fact that the party is in custody, provided it is not extorted by inducements or threats; 160 U. S. 355.

The prisoner's confession, when the *corpus delicti* is not otherwise proved, is insufficient to warrant his conviction; 1 Hayw. 455; 5 Halst. 163, 185; 18 Miss. 229; 17 Ill. 426; 2 Tex. 79. See, *contra*, Russ. & R. 481, 509; 1 Leach 311; 3 Park. Cr. Cas. 401; 11 Ga. 225. Consult Greenleaf; Phillipps, Evidence; Wharton, Criminal Evidence; Roscoe, Crim. Ev; Joy, Confessions; 1 Bennett & H. Lead. Cr. Cas. 112; ADMISSIONS.

CONFESSION AND AVOIDANCE. **In Pleading.** The admission in a pleading of the truth of the facts as stated in the pleading to which it is an answer, and

the allegation of new and related matter of fact which destroys the legal effect of the facts so admitted. The plea and any of the subsequent pleadings may be by way of confession and avoidance, or, which is the same thing, *in* confession and avoidance. Pleadings in confession and avoidance must give color. See COLOR; 1 East 212. They must admit the material facts of the opponent's pleading, either expressly in terms; Dy. 171 *b*; or in effect. They must conclude with a verification; 1 Saund. 103, n. For the form of statement, see Steph. Pl. 72, 79.

Pleas in confession and avoidance are either in justification and excuse, which go to show that the plaintiff never had any right of action, as, for example, son assault demesne, or in discharge, which go to show that his right has been released by some matter subsequent.

See, generally, 1 Chit. Pl. 540; 2 *id.* 644; Co. Litt. 282 *b*; Archb. Civ. Pl. 215; Dane, Abr. Index.

CONFESSOR. A priest of some Christian sect, who receives an account of the sins of his people, and undertakes to give them absolution of their sins. The common law does not recognize any such relation, at least so as to exempt or prevent the confessor from disclosing such communications as are made to him in this capacity, when he is called upon as a witness. See CONFIDENTIAL COMMUNICATIONS.

CONFIDENCE. This word is considered peculiarly appropriate to create a trust. It is, when applied to the subject of a trust, as nearly a synonym as the English language is capable of. Trust is a confidence which one man reposes in another, and confidence is a trust. 2 Pa. 133.

CONFIDENTIAL COMMUNICATIONS. Those statements with regard to any transaction made by one person to another during the continuance of some relation between them which calls for or warrants such communications.

At law, certain classes of such communications are held not to be proper subjects of inquiry in courts of justice, and the persons receiving them are excluded from disclosing them when called upon as witnesses, upon grounds of public policy.

Secrets of state and communications between the government and its officers are usually privileged; 2 S. & R. 23; 6 Watts 164; 22 N. J. Eq. 111; 1 F. & F. 425; 5 H. & N. 538; 92 U. S. 107. So also the consultations of the judges, the testimony of arbitrators in certain cases, and the sources of information in criminal prosecutions. 1 Wharton, Ev. sec. 600; 11 Am. Rep. 349; 11 Barb. (N. Y.) 510; 10 Ohio 112; 23 Me. 85; 4 C. & P. 327; 78 Mo. 115; 14 Am. Dec. 214; 12 Am. Rep. 736; Steven's Dig. Ev. art. 113.

Of this character are all communications made between a husband and his lawful wife in all cases in which the interests of the other party are involved; Tayl. Ev. 781; 13 Pet. 223; 117 Mass. 90; 41 Ga. 613; 21 La. Ann. 343; 15 Me. 104; 2 Leigh 142; 6 Binn. 488; 6 H. & J. 153; 4 Term 678; 5 Esp. 107; 132 N. Y. 181; 35 Kan. 391; 22 Ill. 661; 101 Ind. 160. See 10 Metc. 287; 3 Day 37; 4 Vt. 116; 1 Dougl. 48; 3 Harring. 88; 8 C. & P. 284. Nor does it make any difference which party is called upon as a witness; Ry. & M. 352; or when the relation commenced; 3 C. & P. 558; or whether it has terminated; 13 Pet. 209; 3 Dev. & B. 110; 1 Barb. 392; 6 East 192; 1 C. & P. 364; 98 Pa. 501; 45 Ind. 366; 102 *id.* 102; 81 Ill. 266; 29 Ga. 470; 31 Ark. 604. And see 13 Pick. 445; 7 Vt. 506; 5 Ala. N. S. 224; 1 B. Monr. 224. A third party who overheard such a conversation may testify as to it; 110 Mass. 181; 127 Ill. 518. The wife may be examined as to a conversation with her husband in the presence of a third party; 35 Vt. 379; 46 Barb. 158; 62 Hun 622; 154 Mass. 488; 131 *id.* 31; 61 Ind. 224; 25 Ohio St. 500; but not if the third person failed to hear or paid no attention to the conversation; 113 Mass. 160.

The confidential counsellor, solicitor, or attorney of any party cannot be compelled to disclose papers delivered or communications made to him, or letters or entries made by him, in that capacity; 4 B. & Ad. 876; 45 N. Y. 57; 80 *id.* 394; 33 Wis. 205; 12 Pick. 89; 23 Mo. 474; 11 Wheat. 295; 109 Mo. 1; 42 Ill. App. 370; 33 Ark. 771; 119 Ill. 543; 103 Mass. 523; 110 U. S. 311; 74 Me. 540; 9 Exch. 298; 7 Q. B. 767; nor will he be permitted to make such communications against the will of his client; 4 Term 756, 759; 12 J. B. Moo. 520; 3 Barb. Ch. 528; 8 Mass. 370; nor even if the communication is made in the presence of a third person; 155 Mass. 378. nor will the client be compelled to disclose such communications; 43 Ind. 112; 34 Ohio St. 91; 28 Vt. 701; not even when the client takes the witness stand in his own behalf; 43 Ind. 112; 38 Ia. 395; 34 Ohio St. 91; *contra*, 101 Mass. 193. The privilege extends to all matters made the subject of professional intercourse, without regard to the pendency of legal proceedings; 5 C. & P. 592; 6 Madd. 47; 22 Pa. 89; 12 Pick. 89; 38 Me. 581; 25 Vt. 47; 24 Miss. 134; 80 N. Y. 394; 65 Miss. 179; 65 Ga. 525; but see 28 Vt. 701, 750; and to matters discovered by the counsellor, etc., in consequence of this relation; 5 Esp. 52. See 1 M. & K. 102; 3 M. & C. 515; Story, Eq. Pl. § 601; 13 Ga. 260. See 29 Ala. N. S. 254; 21 Ga. 301.

Interpreters; 4 Term 756; 3 Wend. 337; 4 Munf. 273; 7 Ind. 202; 1 Pet. C. C. 356; and agents to collect evidence; 2 Beav. 173; 1 Phill. Ch. 471, 687; are considered as standing in the same relation as the attorney; so, also, is a barrister's clerk; 2 C. & P. 195; 1 *id.* 545; 5 *id.* 177; 5 M. & G. 271; 8 D. & R. 726; 12 Pick. 93; 3 Wend. 337; 16 N. Y. 180; 5 Cal. 450; but not a student at law in an attorney's office; 7 Cush. 576.

The cases in which communications to

counsel have been holden not to be privileged may be classed under the following heads: When the communication was made before the attorney was employed as such; 1 Ventr. 197; see 38 Me. 581; 79 Cal. 636; 40 Hun 333; 34 Mo. 337; after the attorney's employment has ceased; 4 Term 431; 12 La. Ann. 91; 6 Hun 602; when the attorney was consulted because he was an attorney, yet was not acting as such; 4 Term 753; 4 Mich. 414; 14 Ill. 89; 7 Rich. 459; where his character of attorney was the cause of his being present at the taking place of a fact, but there was nothing in the circumstances to make it amount to a communication; 2 Ves. Ch. 189; 2 Curt. Eccl. 866; 29 N. H. 163; see 46 Ia. 88; when the matter communicated was not in its nature private, and could in no sense be termed the subject of a confidential, communication; 7 East 357; 2 Brod. & B. 176; 3 Johns. Cas. 198; 2 Ind. App. 170; when it was intended that the communications should be imparted by him to others; 91 Cal. 63; when the things disclosed had no reference to professional employment, though disclosed while the relation of attorney and client subsisted; Peake 77; when the attorney made himself a subscribing witness; 10 Mod. 40; 2 Curt. Eccl. 866; 3 Burr. 1687; when he is a party to the transaction; 3 Wis. 274; Story, Eq. Pl. § 601; when he was directed to plead the facts to which he is called to testify; 7 Mart. La. N. S. 179; where an attorney is employed only to draw up a deed and bill of sale to be executed by another to such person, he may testify as to what passed between them and himself; 6 Dak. 107. The attorney may be called upon to prove his client's handwriting; 120 Mass. 215; L. R. 8 Eq. 575; L. R. 5 Ch. Ap. 703; 47 Fed. Rep. 472; to identify his client; 2 D. & R. 347; 2 Cowp. 846; though not to disclose his client's address; L. R. 15 Eq. 257; unless the client be a ward of court; L. R. 8 Eq. 575; or a bankrupt; L. R. 5 Ch. 703. He may be required to testify as to whether he was retained by his client, and in what capacity; Whart. Ev. 589; 12 Pa. 304; but see 11 Wheat. 280.

After testator's death on the question whether an instrument present for probate was his will, the attorney may testify as to directions given him in its preparation by testator; 157 Mass. 90; see 111 N. Y. 239. He may testify as to what was said in their presence by a third person brought by his client; 106 Mo. 313.

The doctrine of privileged communications does not apply to testimony of a solicitor of patents, who is not an attorney-at-law; 49 Fed. Rep. 124.

Communications between a party or his legal adviser and witnesses are privileged; L. R. 8 Eq. 522; 16 *id.* 112; but see 63 Hun 632; so are communications between parties to a cause touching the preparation of evidence; Hare, Discov. 152; 43 L. J. C. P. 206; but see 6 B. & S. 888; 3 H. & N. 871. Communications between an attorney and client are not privileged where the latter disclaims the existence of such relations; 63 Hun 632.

The rule of privilege does not extend to confessions made to *clergymen;* 1 Greenl. Ev. 247; 4 Term 753; 2 Skimm. 404; 15 Mass. 161; 1 McNally 253; 4 Harr. 563; though judges have been unwilling to enforce a disclosure; 3 C. & P. 519; 6 Cox, C. C. 219; and see 92 U. S. 105; 62 Ill. 209; 21 Pick. 515; and the rule is otherwise by statute in some states; Iowa Code, 1851, art. 23, 93; Michigan Rev. Stat. 1846, c. 102, § 85; Missouri Rev. Stat. 1845, c. 186, § 19; 2 New York Rev. Stat. 406, § 72; 13 Wend. 311; Wisconsin Rev. Stat. 1849, c. 98, § 75; nor to *physicians;* 11 Hargr. St. Tr. 243; 20 How. St. Tr. 643; 1 C. & P. 97; 3 *id.* 518; L. R. 6 C. P. 252; 39 Mich. 606; L. R. 9 Ex. 398; but in some states this has been changed by statute; Whart. Ev. § 606; 5 Hun 1; 61 *id.* 627; 77 Ind. 203; 112 U. S. 250; 26 Mo. App. 621; 40 Pac. Rep. (Kan.) 646; 100 Cal. 391; see 14 Wend. 637; but he may testify from knowledge and information acquired while not treating a patient professionally; 129 N. Y. 654; nor to *confidential friends;* 4 Term 758; 1 Caines 157; 3 Wis. 456; 14 Ill. 89; L. R. 18 Eq. 649; *clerks;* 3 Campb. 337; 1 C. & P. 337; *bankers;* 2 C. & P. 325; *stewards;* 2 Atk. 524; 11 Price 455; nor *servants;* 6 How. Miss. 35. Consult Wharton; Starkie; Greenleaf; Evidence; 17 Am. Jur. 304.

CONFIRMATIO (Lat. *confirmare*). The conveyance of an estate, or the communication of a right that one hath in or unto lands or tenements, to another that hath the possession thereof, or some other estate therein, whereby a voidable estate is made sure and unavoidable, or whereby a particular estate is increased or enlarged. Shep. Touchst. 311; 2 Bla. Com. 325.

Confirmatio crescens tends and serves to increase or enlarge a rightful estate, and so to pass an interest.

Confirmatio diminuens tends or serves to diminish and abridge the services whereby the tenant holds.

Confirmatio perficiens tends and serves to confirm and make good a wrongful and defeasible estate, by adding the right to the possession or defeasible seisin, or to make a conditional estate absolute, by discharging the condition.

CONFIRMATIO CHARTARUM (Lat. confirmation of the charters). A statute passed in the 25 Edw. I., whereby the Great Charter is declared to be allowed as the common law; all judgments contrary to it are declared void; copies of it are ordered to be sent to all cathedral-churches and read twice a year to the people; and sentence of excommunication is directed to be as constantly denounced against all those that, by word or deed or counsel, act contrary thereto or in any degree infringe it. 1 Bla. Com. 128.

CONFIRMATIO PERFICIENS. A confirmation which makes valid a wrongful and defeasible title, or makes a con-

ditional estate, absolute. Shep. Touchst. 311; Black.

CONFIRMATION. A contract by which that which was voidable is made firm and unavoidable.

A species of conveyance.

Where a party, acting for himself or by a previously authorized agent, has attempted to enter into a contract, but has done so in an informal or invalid manner, he confirms the act and thus renders it valid, in which case it will take effect as between the parties from the original making. See 2 Bouvier, Inst. nn. 2067–2069.

To make a valid confirmation, the party must be apprized of his rights; and where there has been a fraud in the transaction he must be aware of it and intend to confirm his contract. See 1 Ball & B. 353; 2 Sch. & L. 486; 12 Ves. Ch. 373; 1 *id.* 215; 1 Atk. 301; 8 Watts 280.

A confirmation does not strengthen a void estate. For confirmation may make a voidable or defeasible estate good, but cannot operate on an estate void in law; Co. Litt. 295. The canon law agrees with this rule; and hence the maxim, *qui confirmat nihil dat.* Toullier, Dr. Civ. Fr. l. 3, t. 3, c. 6, n. 476. See Viner, Abr.; Comyns, Dig.; Ayliffe, Pand.*386; 1 Chit. Pr. 315; 3 Gill & J. 290; 3 Yerg. 405; 1 Ill. 236; 9 Co. 142 *a*; RATIFICATION.

CONFIRMEE. He to whom a confirmation is made.

CONFIRMOR. He who makes a confirmation to another.

CONFISCARE. To confiscate.

CONFISCATE. To appropriate to the use of the state.

Especially used of the goods and property of alien enemies found in a state in time of war. 1 Kent 52 *et seq.* *Bona confiscata* and *forisfacta* are said to be the same (1 Bla. Com. 299), and the result to the individual is the same whether the property be forfeited or confiscated; but, as distinguished, an individual forfeits, a state confiscates, goods or other property. Used also as an adjective—forfeited. 1 Bla. Com. 299.

It is a general rule that the property of the subjects of an enemy found in the country may be appropriated by the government without notice, unless there be a treaty to the contrary; Hall, Int. L. 397; 1 Gall. 563; 3 Dall. 199. It has been frequently provided by treaty that foreign subjects should be permitted to remain and continue their business, notwithstanding a rupture between the governments, so long as they conducted themselves innocently; and when there was no such treaty, such a liberal permission has been announced in the very declaration of war. Vattel, l. 3, c. 4, § 63. Sir Michael Foster (Discourses on High Treason, pp. 185–6) mentions several instances of such declarations by the king of Great Britain; and he says that alien enemies were thereby enabled to acquire personal chattels and to maintain actions for the recovery of their personal rights in as full a manner as alien friends; 1 Kent 57.

In the United States, the broad principle has been assumed "that war gives to the sovereign full right to take the persons and confiscate the property of the enemy, wherever found. The mitigations of this rigid rule which the policy of modern times has introduced into practice will more or less affect the exercise of this right, but cannot impair the right itself;" 8 Cra. 122. Commercial nations have always considerable property in the possession of their neighbors; and when war breaks out, the question what shall be done with enemies' property found in the country is one rather of policy than of law, and is properly addressed to the consideration of the legislature, and not to courts of law. The strict right of confiscation exists in congress; and without a legislative act authorizing the confiscation of enemies' property, it cannot be condemned; 8 Cra. 128.

The right of confiscation exists as fully in case of a civil war as it does when the war is foreign, and rebels in arms against the lawful government, or persons inhabiting the territory exclusively within the control of the rebel belligerents, may be treated as public enemies. So may adherents, or aiders and abettors of such a belligerent, though not resident in such enemy's territory; 11 Wall. 269. Proceedings under the Confiscation Act of July 17, 1862, were justified as an exercise of belligerent rights against a public enemy, but were not, in their nature, a punishment for treason. Therefore, confiscation being a proceeding distinct from, and independent of, the treasonable guilt of the owner of the property confiscated, pardon for treason will not restore rights to property previously condemned and sold in the exercise of belligerent rights as against a purchaser in good faith and for value; 91 U. S. 21.

The claim of a right to confiscate debts contracted by individuals in time of peace, and which remain due to subjects of the enemy in time of war, rests very much upon the same principles as that concerning the enemy's tangible property found in the country at the commencement of the war. But it is the universal practice to forbear to seize and confiscate debts and credits; 1 Kent 64. See 4 Cra. 415; T. U. P. Charlt. 140; 2 H. & J. 101, 112, 286, 471; 7 Conn. 428; 1 Day 4; Kirb. 228, 291; 2 Tayl. 115; Cam. & N. 77, 492; 2 Dill. 555; 15 Wall. 591; Chase, Dec. 259.

A suit in confiscation is an action of entirely different nature from a proceeding in prize. Confiscation is the act of the sovereign against a rebellious subject. Condemnation as prize is the act of a belligerent against another belligerent. Confiscation may be effected by such means, either summary or arbitrary, as the sovereign expressing its will through lawful channels, may please to adopt. Condemnation as prize can only be made in accordance with principles of law recognized in the common jurisprudence of the world. Both are proceedings *in rem*, but confiscation recognizes the title of the original owner to the property which is to be forfeited, while in

prize the tenure of the property seized is qualified, provisional and destitute of absolute ownership; Blatchf. Pr. Cas. 620. To confiscate property seized upon land, resort must be had to the common-law side of the court; 20 Wall. 110; prize proceedings are always in admiralty; 14 Ct. Cls. 48.

See, generally, Chitty, Law of Nations, c. 3; Marten, Law of Nat. lib. 8, c. 3, s. 9; Burlamaqui, Pol. Law, part 4, c. 7; Vattel, liv. 3, c. 4, § 63; Twiss, Law of Nations; Wheaton; Hall, International Law.

CONFITENS REUS. An accused person who admits his guilt. Wharton.

CONFLICT OF LAWS. A contrariety or opposition in the laws of states or countries in those cases where, from their relations to each other or to the subject-matter in dispute, the rights of the parties are liable to be affected by the laws of both jurisdictions.

As a term of art, it also includes the deciding which law is in such cases to have superiority. It also includes many cases where there is no opposition between two systems of law, but where the question is how much force may be allowed to a foreign law with reference to which an act has been done, either directly or by legal implication, in the absence of any domestic law exclusively applicable to the case.

An opposition or inconsistency of domestic laws upon the same subject.

Among the leading canons on the subject are these: the laws of every state affect and bind directly all property, real or personal, situated within its territory, all contracts made and acts done and all persons resident within its jurisdiction, and are supreme within its own limits by virtue of its sovereignty; 6 Binn. 361; 7 Wall. 151; 37 Mo. 354; Cowp. 208; 4 T. R. 192. Ambassadors and other public ministers while in the state to which they are sent, and members of an army marching through or stationed in a friendly state, are not subject to this rule; 4 Barb. 522; 4 Cra. 173.

Possessing exclusive authority, with the above qualification, a state may regulate the manner and circumstances under which property, whether real or personal, in possession or in action, within it, shall be held, transmitted, or transferred, by sale, barter, or bequest, or recovered or enforced; the condition, capacity, and state of all persons within it; the validity of contracts and other acts done there; the resulting rights and duties growing out of these contracts and acts; and the remedies and modes of administering justice in all cases; Story, Confl. Laws § 18; Vattel, b. 2, c. 7, §§ 84, 85.

Whatever force and obligation the laws of one country have in another depends upon the laws and municipal regulations of the latter; that is to say, upon its own proper jurisprudence and polity, and upon its own express or tacit consent; Huberus, lib. 1, t. 3, § 2. When a statute or the unwritten or common law of the country forbids the recognition of the foreign law, the latter is of no force whatever. When both are silent, then the question arises, which of the conflicting laws is to have effect.

Generally, force and effect will be given by any state to foreign laws in cases where from the transactions of the parties they are applicable, unless they affect injuriously her own citizens, violate her express enactments, or are *contra bonos mores*.

The broad rule as to contracts is thus stated by Mr. Wharton (Confl. Laws § 401): "Obligations, in respect to the mode of their solemnization, are subject to the rule *locus regit actum;* in respect to their interpretation, to the *lex loci contractus;* in respect to the mode of their performance, to the law of the place of their performance. But the *lex fori* determines when and how such laws, when foreign, are to be adopted, and in all cases not specified above, supplies the applicatory law." This rule is quoted by Hunt, J., in 91 U. S. 411. In a later part of his opinion, in the same case, he says: "Matters bearing upon the execution, the interpretation, and the validity of a contract are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy, such as the bringing of suits, admissibility of evidence, statutes of limitations, depend upon the law of the place where the suit is brought. A careful consideration of the decisions of this country and of England will sustain these positions;" cited in 125 Mass. 374, which is in turn cited in 106 U. S. 124, where, in a suit on a bond executed in New York to indemnify the plaintiff's intestate as surety in an appeal bond in a suit in Louisiana, the court defined the "*seat of the obligation*" and held the law applicable to be the *lex loci solutionis* which was the law of Louisiana; the *lex loci contractus* was said to be a confusing phrase, because it is in reality the law not of the place of execution but of the seat of the obligation, and that might be either the place of execution or the place of performance.

Mr. Wharton has since expressed the rule in the following terms, in the second edition (1881) of his Confl. Laws § 401: "A contract, so far as concerns its formal making, is to be determined by the place where it is solemnized, unless the *lex situs* of property disposed of otherwise requires; so far as concerns its interpretation, by the law of the place where its terms are settled, unless the parties had the usages of another place in view; so far as concerns the remedy, by the law of the place of suit; and so far as concerns its performance, by the law of the place of performance." See 62 Ga. 241; 62 Ala. 518; 48 N. H. 176; 74 Ill. 197; 150 Pa. 466; 11 Cal. 118; as to *lex solutionis;* 22 Kan. 89; 4 McLean 440; 76 Ark. 356; 44 La. Ann. 511; 14 Johns. 338; 3 Mas. 91; as to *lex fori;* 80 N. C. 294; 26 Ark. 356; 11 La. 465; 1 Pet. 312; 4 McLean 540; 56 Ark. 187; 5 How. 83; as to *lex loci;* where a contract is a fraud on the laws of the *lex fori*, it will not be enforced; 47 Me. 120; See 49 Minn. 356; nor will it be enforced if contrary to public policy; Poll. Contr. 371; Whart. Confl. Laws § 490.

REAL ESTATE. In general, the mode of conveying, incumbering, transmitting, devising, and controlling real estate is governed by the law of the place of situation of the property; 44 Minn. 348; 126 Ind. 58; 7 Cr. 115; 11 How. 33; 3 La. Ann. 418; 14 Ves. 541; 4 T. R. 182. See LEX REI SITÆ.

Perhaps an exception may exist in the case of mortgages; 23 Miss. 175; 3 McLean 397. But the point cannot be considered as settled; 1 Washb. R. P. 524; Story, Confl. Laws § 363; Westl. Priv. Int. Law 75. It is said by Wharton (Confl. Laws § 368) that the law governing the mortgage, as such, is the law of *situs* of the land which the mortgage covers; but the *debt* is governed by the law of the domicil of the party to whom it is due, no matter where the property be situated; see 46 N. H. 300; 5 Sawy. 32; 41 N. Y. 313; 21 Wis. 340; 138 Ill. 559; 1 N. D. 216; and that when the money is invested on the land for which the mortgage is given, the *lex sitæ* prevails. For the purposes of taxation a *debt* has its *situs* at the domicil of the creditor; 100 U. S. 490.

PERSONAL PROPERTY. For the general rules as to the disposition of personal property, see DOMICIL. *Bills of exchange and promissory notes* are to be governed, as to validity and interpretation, by the law of the place of making, as are other contracts. The residence of the drawee of a bill of exchange, and the place of making a promissory note where no other place of payment is specified, is the *locus contractus;* 10 B. & C. 21; 1 Woodb. & M. 381; 4 C. & P. 35; 4 Mich. 450; 6 McLean 622; 35 N. J. L. 285; 9 Cush. 46; 26 Vt. 698; 11 Gratt. 477; 3 Gill 430; 18 Conn. 138; 6 Ind. 107; 65 N. H. 39; 89 Ky. 461; see 11 Tex. 54; 17 Miss. 220, where the place of address is said to be the place of making. As between the drawee and drawer and other parties (but not as between an indorser and indorsee, 19 N. Y. 436; but see 14 Vt. 33), each indorsement is considered a new contract; 14 B. Monr. 556; 5 Sandf. 330; 2 Ga. 158; 3 McLean 397. On a bill of exchange drawn in one state and payable in another, the time within which notice of protest must be mailed is determined by the law of a latter state; 125 Ind. 375. See LEX LOCI. A statute of limitations of a foreign state providing that an action on a note shall be brought within a certain time after the cause of action accrues bars the debt itself if not brought within the time limited, and may be pleaded in bar of an action brought on the note in another state; 6 Dak. 91. See 83 Me. 87.

The place of payment is, however, to be considered as the place of making; 30 Miss. 59; 7 Ohio St. 134; 4 Mich. 450; 5 McLean 448; 3 Gill 430; 8 B. Monr. 306; 14 Ark. 189; 17 Miss. 220; 13 Gray 597. But see 4 N. J. 319.

The better rule as to the rate of interest to be allowed on bills of exchange and promissory notes, where no place of payment is specified and no rate of interest mentioned seems to be the interest of the *lex loci;* 6 Johns. 183; 5 C. & F. 1, 12; 6 Cra. 221; 3 Wheat. 101; 1 Dall. 191; 12 La. Ann. 815; 58 Hun 606. And see 9 Gratt. 31; 24 Miss. 463; 24 Mo. 65; 1 Pars. Contr. 238; 53 Barb. 350; 33 N. J. L. 81; 3 Wheat. 101. The damages recoverable on a bill of exchange not paid are those of the place where the plaintiff is entitled to reimbursement. In the United States, these are generally fixed by statute; 4 Johns. 119; 6 Mass. 157; 2 Wash. C. C. 167; 3 Sumn. 523.

Where a place of payment is specified, the interest of that place must be allowed; 126 Mass. 360; 14 Vt. 33; 22 Barb. 118; 77 N. Y. 573. See 17 Johns. 511; except that when a contract is made in one state, to be performed in another, parties may contract for the legal rate of interest allowable in either state, provided such contract is entered into in good faith, and not merely to avoid the usury laws; 20 Mart. La. 1; 46 N. H. 300; 1 Wall. 310; 26 Barb. 213; 25 Ohio St. 413; 22 Ia. 194; 35 N. J. L. 285. See 91 Ga. 505; *contra*, Story, Confl. Laws § 298. A note made in one state and payable in another, is not subject to the usury laws of the latter state, if it is valid in that respect in the state where it was made; 47 Ark. 54; 2 Miles Pa. 185.

Chattel mortgages valid and duly registered under the laws of the state in which the property is situated at the time of the mortgage, will be held valid in another state to which the property is removed, although the regulations there are different; 13 Pet. 107; 62 Mo. 524; 25 Miss. 471; 53 N. H. 562; 7 Ohio St. 134; 12 Barb. 631; but see 48 Kan. 606; 40 Ill. App. 234; 7 Wall. 140; 35 N. Y. 657; and it will be enforced in the state to which the property has been removed, although it would have been invalid if made in that state; 30 Mo. 383; but it is said by Wharton (Confl. Laws § 317), that the law in regard to chattel mortgages is governed by the *lex rei sitæ;* that a lien is extinguished when goods are taken from the place where the lien was created to a place where such a lien is not recognized; Whart. Confl. Laws § 318; 9 Phila. 615 (where a chattel mortgage made in Maryland was held invalid in Pennsylvania as against a *bona fide* purchaser without notice); and a Louisiana court refused to enforce a chattel mortgage made in another state, such mortgages being unknown in Louisiana; 26 La. Ann. 185. See 37 Pa. 508, where it was held that a trust of personalty valid in the domicil would be protected if the parties removed to another state. See also 4 Dist. Rep. Pa. 270; 15 Pa. Co. Ct. 471.

The law of the *situs* governs a mortgage of chattels in one state, executed in another; Rorer, Int. St. L. 96; Jones, Chat. Mortg. § 305; 58 N. H. 88; 7 Wall. 139; 22 Kan. 89; 38 Ala. 67. See 76 Ind. 512; 21 Barb. 198; *contra*, 12 N. J. Eq. 86; 10 Ind. 28. The *lex fori* determines the remedies on the mortgage; 37 N. H. 86; *contra*, Story, Confl. Laws § 402; 50 Ill. 370 (where there appears to have been notice). See 38 N. Y. 153, where a mortgage on a ship,

made and shown to be invalid in Pennsylvania, was held invalid in New York; 8 Humphr. 542.

The registration of chattel mortgages and transfer of government and local stocks are frequently made subjects of positive law, which then suspends the law of the domicil.

Where the mortgagor of chattels removes with them to another state, the mortgagee, to preserve his rights, need not again record the mortgage in such other state; 32 Minn. 377; 37 N. H. 87; 62 Mo. 524; 37 N. J. L. 201. But in Alabama it must be recorded to preserve its validity; 14 Ala. 55; 89 Ala. 588.

As to whether such mortgages will be respected in preference to claims of citizens of the state into which the property is removed, it is held that they will; 30 Vt. 42, overruling 23 Vt. 279; 7 Ohio St. 134; 12 Barb. 631; 8 Humphr. 542. A chattel mortgage valid in the state where executed without change of possession protects the property mortgaged against an attachment in Vermont, though in the possession of the mortgagor; 25 Vt. 581; 57 *id.* 360.

Questions of priority of liens and other claims are, in general, to be determined by the *lex rei sitæ* even in regard to personal property; 5 Cra. 289; 4 Binn. 353; 14 Mart. La. 93; 2 H. & J. 193, 224; 3 Pick. 128; 3 Rawle 312; 13 Pet. 312; 17 Ga. 491; 4 Rich. 561; 13 Ark. 543; 3 Barb. 89; see 33 Ala. 536. A chattel mortgage made in Canada, with possession delivered to the mortgagee, was held entitled to priority in Michigan, whither the property was taken without consent of the mortgagee, over a prior chattel mortgage in Michigan executed before the property was taken to Canada and recorded after its return; Vining *v.* Millar, 32 L. R. A. (Mich.) 442.

The existence of the lien will generally depend on the *lex loci;* Story, Confl. Laws §§ 322 *b*, 402; 5 Cra. 289. See note on extra-territoriality of chattel mortgages, 17 L. R. A. 127.

Marriage comes under the general rule in regard to contracts, with some exceptions. See Lex Loci. 25 Amer. Law Rev. 82.

The scope of a marriage settlement made abroad is to be determined by the *lex loci contractus;* 1 Bro. P. C. 129; 2 M. & K. 513; where not repugnant to the *lex rei sitæ;* 31 E. L. & Eq. 443; 4 Bosw. 266.

When the contract for marriage is to be executed elsewhere, the place of execution becomes the *locus contractus;* 23 E. L. & Eq. 288.

Torts. In an action brought in one state for injuries done in another, the statutes and decisions of the courts of the latter state must fix the liability; 47 Minn. 92; 48 Ohio St. 623; 88 Va. 971; 89 Tenn. 235. See 145 U. S. 193.

Movables in general. Personal property follows the owner; and hence its disposition and transfer must be determined by the law of his domicil; 2 Kent 428. See Domicil.

Special Personal Relations. *Executors* and *administrators*, in the absence of a specific statute authorizing it, have no power to sue or be sued by virtue of a foreign appointment as such; Westl. Priv. Int. Law 279; 2 Jones, Eq. 276; 10 Rich. 393; L. R. 5 Ch. App. 315; 1 Woolw. 383; 110 Mass. 369; 61 Pa. 478; 3 W. Va. 154; 55 Ga. 253; 54 Mo. 408; 38 Ala. 678; 54 Me. 453; 12 Wheat. 169; 3 Q. B. 498; 2 Ves. 35. It seems to be otherwise where a foreign executor has brought assets into the state; 18 B. Monr. 582; 1 Bradf. Surr. 241; and see 16 Ark. 28; 15 La. Ann. 243; and is otherwise by statute in Ohio; 5 McLean 4.

In the United States, however, payment to such executor will be a discharge, it seems; 7 Johns. Ch. 49; 18 How. 104; *contra*, 3 Sneed 55; otherwise in England; Dy. 305; 3 Kebl. 163; 1 M. & G. 159; 3 Q. B. 493. But see Westl. Priv. Int. Law 272.

And an executor who has so changed his situation towards the action as to render it his own may sue in a foreign court; Westl. Priv. Int. Law 286; 1 Hare 84; 4 Beav. 506.

Administration must be taken out in the *situs* (place of situation) of the property; 12 Wheat. 109; 20 Johns. 229; 1 Mas. 381; 1 Bradf. Surr. 69.

But, in general, administration is granted as of course to the executor or administrator entitled under the *lex domicilii* (but not, it seems, to a minor; 1 Sw. & T. 253; or a creditor; Ambl. 416). In such cases the probate granted in the place of domicil is the principal, that in the *situs* is ancillary; 3 Bradf. Surr. 233; L. R. 2 P. & M. 89; 1 Woolw. 383; 10 Gray 162; 10 H. L. Cas. 1; 3 Rawle 312; 61 Pa. 478; 21 Conn. 577. There is no legal privity between them; 35 N. H. 484.

All property of the decedent which is in the jurisdiction of the court granting principal or ancillary administration, or which comes into it if not already taken possession of under a grant of administration, comes under its operation; 3 Paige, Ch. 459.

Whether or not a legacy bears interest, depends on the laws of the state of the domicil; 152 Mass. 74.

Ships and cargoes and the proceeds thereof, on the death of the owner, complete their voyages and return to the home port to be administered; Story, Confl. Laws § 520; 45 Ill. 382; 1 Strobh. 25; 3 Paige, Ch. 459; 1 Strobh. L. 25.

The property in each jurisdiction is held liable for debts due in that jurisdiction, and the surplus is to be remitted to the principal administrator for distribution under the *lex domicilii;* 8 Cl. & F. 1; L. R. 4 Ch. App. 735; but whether the court of the ancillary jurisdiction will decree a distribution or remit the property to the domiciliary jurisdiction, has been held to be a matter of judicial discretion; 53 N. Y. 192; 52 Ala. 124. See 57 Miss. 566; 24 Beav. 100; 3 Pick. 145; 3 Bradf. Surr. 233; 21 Conn. 577. See Domicil.

In case of insolvency, it is said the assets would be retained for an equitable distribution among the creditors of an amount proportioned to the whole amount of assets

and claims; 3 Pick. 147; but this rule has been doubted; Whart. Confl. Laws § 623.

Each administrator must give priority to claims according to the law of his jurisdiction; Story, Confl. Laws § 524; 5 Pet. 518; 20 Johns. 265.

Guardians have no power over the property, whether real or personal, of their wards, by virtue of a foreign appointment; 4 Cow. 52; 1 Johns. Ch. 153; 4 Gill & J. 332; 4 T. R. 185; they must have the sanction of the appropriate local tribunal; Rorer, Int. St. L. 356; 6 Blatch. 537; 9 Wall. 394; 4 Allen 321; Whart. Confl. Laws § 260; L. R. 2 Eq. 74. As to the relations of foreign and domestic guardians, see 14 B. Monr. 544.

As to the power of a guardian over the domicil of his ward, see DOMICIL.

Receivers in equity have no extra-territorial powers by virtue of their appointment; 17 How. 322; 52 Mo. 17; 25 N. Y. 577; but see 3 Biss. 513. A receiver appointed for an insolvent corporation in one state has no title to its property in another state; 52 Tex. 396; 28 Conn. 274; 57 Fed. Rep. 534. See RECEIVERS.

Sureties come under the general rules, and their contracts are governed by the *lex loci;* but in the case of a bond with sureties, given to the government by a navy agent for the faithful performance of his duties, the liability of the sureties is governed by the common law, as the accountability of the principal was at Washington, the seat of government; 6 Pet. 172 (the case coming up from Louisiana). See 7 Pet. 435. See SURETYSHIP.

JUDGMENTS AND DECREES OF FOREIGN COURTS relating to immovable property within their jurisdiction are held binding everywhere. And the rule is the same with regard to movables actually within their jurisdiction; Story, Confl. Laws § 592; 79 Pa. 354; 23 Wall. 458; 2 C. & P. 155. See 95 U. S. 714; L. R. 4 H. L. 414; 23 Pick. 270; 4 Cra. 434.

Thus *admiralty* proceedings *in rem* are held conclusive everywhere if the court had a rightful jurisdiction founded on actual possession of the subject-matter; 4 Cra. 241, 293, 433; 7 *id.* 423; 9 *id.* 126; 4 Johns. 34; 3 Sumn. 600; 1 Stor. 157; 1 H. & J. 142; 1 Binn. 299; 6 Mass. 277; L. R. 5 Q. B. 599; 1 Low. 253; 10 Nev. 47.

But such decree may be avoided for matter apparently erroneous on the face of the record; 7 Term 523; 1 Cai. Cas. 21; or if there be an ambiguity as to grounds of condemnation; 7 Bingh. 495; 1 Greenl. Ev. § 541, n.; 14 Cow. 520, n. 3; 2 Kent 120.

Proceedings under the garnishee process are held proceedings *in rem;* and a decree may be pleaded in bar of an action against the trustee or garnishee; 1 Greenl. Ev. § 542; 4 Cow. 520, n. But the court must have rightful jurisdiction over the *res* to make the judgment binding; and then it will be effectual only as to the *res*, unless the court had actual jurisdiction over the person also; 31 Me. 314; 7 B. Monr. 376; 9 Mass. 498; Story, Confl. Laws § 592; Greenl. Ev. § 542; 10 Nev. 47; 95 U. S. 714.

ASSIGNMENTS AND TRANSFERS. Voluntary assignments of personal property, valid where made, will transfer property everywhere; 15 N. Y. 320; 4 N. J. 162, 270; 17 Pa. 91; 58 Fed. Rep. 672; 43 *id.* 716; 1 La. Ann. 430; 2 *id.* 659; 52 Conn. 330; 137 Mass. 366; not as against citizens of the state of the *situs* attaching prior to the assignees' obtaining possession; 13 Mass. 146; 5 Harring. 31. Otherwise 12 Md. 54; 4 N. J. 162.

An involuntary assignment by operation of law as under bankrupt or insolvent laws will not avail as against attaching creditors in the place of situation of the property; 5 N. Y. 320; 4 Zabr. 162, 270; 6 Pick. 286, 302; 2 Hayw. 24; 4 M'Cord 519; 5 N. H. 213; 14 Mart. La. 93; 6 Binn. 353; 5 Cra. 289; 29 Me. 208; 1 Harr. & McH. 236; 19 N. Y. 207; 32 Miss. 246; 28 Conn. 274; 23 Ark. 526; 18 Pick. 247; 37 La. Ann. 522. See 61 Conn. 154; 49 N. J. Eq. 48.

It may be a question whether the same rule would hold if the assignees had obtained possession; Dougl. 161; 81 Wis. 291. An assignment by operation of law is good so as to vest property in the assignees by comity of nations; 6 M. & S. 126; 20 Johns. 262; 6 Binn. 363; 3 Mass. 517.

In England it is firmly settled that an assignment under the bankrupt law of a foreign country passes all the personal property of the bankrupt locally situate, and debts owing in England, and that an attachment of such property by an English creditor, after such bankruptcy, with or without notice to him, is invalid to overreach the assignment; but this rule does not prevail in the United States, either as regards a foreign assignee or an assignee under the laws of another state in the Union; Story, Confl. Laws § 409; 17 How. 322. See 25 Q. B. Div. 399.

The assignment by marriage is held valid; Story, Confl. Laws § 423. See DOMICIL.

Discharges by the *lex loci contractus* are valid everywhere; 4 Bosw. 459; 7 Cush. 15; 40 Me. 204; 26 Vt. 703; 13 Mass. 1; 12 Wheat. 370; 5 East 124. This rule is restricted in the United States by the clause in the constitution forbidding the passage of any law impairing the obligation of contracts. Under this provision, it is held that a state insolvent or bankrupt law may not have any extra-territorial effect to discharge the debtor; 5 How. 307; 7 N. Y. 500; Story, Const. § 1115. See LEX FORI. It may, however, take away the remedy for non-performance of the contract in the *locus contractus*, on contracts made subsequently.

As to FOREIGN JUDGMENTS and FOREIGN LAWS, see those titles.

CONFRONTATION. In Practice. The act by which a witness is brought into the presence of the accused, so that the latter may object to him, if he can, and the former may know and identify the accused and maintain the truth in his pres-

ence. In criminal cases no man can be a witness unless confronted with the accused, except by consent.

CONFUSIO (Lat. *confundere*). A pouring together of liquids; a blending of an inseparable compound.

In *commixtion* a separation can be made; in *confusio* it cannot; 2 Bla. Com. 405.

The merger of the qualities of debtor and creditor in the same person. Sohm, 347.

CONFUSION OF DEBTS. The concurrence of two adverse rights to the same thing in one and the same person. 11 Humph. 198.

CONFUSION OF GOODS. Such a mixture of the goods of two or more persons that they cannot be distinguished.

When this takes place by the mutual consent of the owners, they have an interest in the mixture in proportion to their respective shares; 6 Hill 425, but see 112 N. C. 283. Where it is caused by the wilful act of one party without the other's consent, the one causing the mixture must separate them at his own peril; Bisp. Eq. § 86; 30 Me. 237, 295; 19 Ohio 337; 9 Barb. 630; 3 Kent 365; and must bear the whole loss; 2 Blackf. 377; 3 Ind. 306; 2 Johns. Ch. 62; 11 Metc. 493; 30 Me. 237; 11 Colo. 223; otherwise, it is said, if the confusion is the result of negligence merely, or accident; 20 Vt. 333. The rule extends no further than necessity requires; 2 Campb. 575; 1 Vt. 286; 24 Pa. 246; 97 N. C. 383; for if the goods can be distinguished, it will not justify one in taking another's goods upon the ground that they have been intermingled; 55 Fed. Rep. 576.

See 35 Cent. Law J. 405; 49 N. J. Eq. 573; 36 Neb. 607.

CONFUSION OF RIGHTS. A union of the qualities of debtor and creditor in the same person, The effect of such a union is, generally, to extinguish the debt; 1 Salk. 306; Cro. Car. 551; 1 Ld. Raym. 515. See 5 Term 381; Comyns, Dig. *Baron et Feme* (D).

CONGE. In French Law. A clearance. A species of passport or permission to navigate.

CONGE D'ACCORDER (Fr. leave to accord). A phrase used in the process of levying a fine. Upon the delivery of the original writ, one of the parties immediately asked for a *congé d'accorder*, or leave to agree with the plaintiff. *Termes de la Ley*; Cowel. See LICENTIA CONCORDANDI; 2 Bla. Com. 350.

CONGE D'EMPARLER (Fr. leave to imparl). The privilege of an imparlance (*licentia loquendi*). 3 Bla. Com. 299.

CONGE D'ELIRE (Fr.). The king's permission royal to a dean and chapter in time of vacation to choose a bishop, or to an abbey or priory of his own foundation to choose the abbot or prior.

Originally, the king had free appointment of all ecclesiastical dignities whensoever they chanced to be void. Afterwards he made the election over to others, under certain forms and conditions: as, that at every vacation they should ask of the king *congé d'elire;* Cowel; *Termes de la Ley;* 1 Bla. Com. 379, 382. The permission to elect is a mere form; the choice is practically made by the crown.

CONGEABLE (Fr. *congé*, permission, leave). Lawful, or lawfully done, or done with permission; as, entry congeable, and the like. Littleton § 279.

CONGO. A free state in Africa. There is a Supreme Council of State under the nominal presidency of Leopold II., King of the Belgians, who has offered, after the lapse of ten years from 1890, to hand over the state to Belgium. It has a Civil Code compiled in 1890.

CONGREGATION. A society of a number of persons who compose an ecclesiastical body.

In the ecclesiastical law, this term is used to designate certain bureaus at Rome, where ecclesiastical matters are attended to.

In the United States, by congregation is meant the members of a particular church who meet in one place to worship. See 2 Russ. 120; 9 Barb. 64.

CONGRESS. An assembly of deputies convened from different governments to treat of peace or of other international affairs; as the Congress of Berlin to settle the terms of peace between Russia and Turkey in 1878, composed of representations of the great Powers of Europe

In theory a congress may conclude a treaty, while a conference is for consultation, and its result, ordinarily a protocol, prepares the way for a treaty. See Cent. Dict.; Encyc. Dict. But this is not always true, as the Berlin conference of 1889 was composed of plenipotentiaries and its deliberations resulted in a treaty.

The legislative body of the United States, composed of the senate and house of representatives (*q. v.*). U. S. Const. art. 1, § 1.

Each house is the judge of the election and qualifications of its members. A majority of each house is a quorum; but a smaller number may adjourn from day to day, and compel the attendance of absent members. Each house may make rules, punish its members, and by a two-thirds vote expel a member. Each house must keep a journal and publish the same, excepting such parts as may, in their judgment, require secrecy, and record the yeas and nays at the desire of one-fifth of the members present. Art. 1, s. 5. A court is bound to assume that the journal speaks the truth and cannot receive oral testimony to impeach its correctness; 144 U. S. 1.

The members of both houses are in all cases, except treason, felony, and breach of the peace, privileged from arrest while attending to and returning from the session of their respective houses; and no member can be questioned in any other place for any speech or debate in either house. U. S. Const. art. 1, s. 6.

Each house of congress has claimed and exercised the power to punish contempts and breaches of its privileges, on the ground that all public functionaries are essentially invested with the powers of self-preservation, and that whenever authorities are given, the means of carrying them into execution are given by necessary implication. Jefferson, Manual, § 3, art. *Privilege;* Duane's Case, Senate Proceedings, Gales and Seaton's Annals of Cong., 6th Congress, pp. 122–124, 184, and Index; Wolcott's Case, Journal Hou. Reps. 1st. Sess. 35th Congress, pp. 371–374, 386–389, 535–539; Irwin's Case, 2d Sess.

43d Congress, Index. In Kilbourn's Case, 103 U. S. 138, it was held that although the house can punish its own members for disorderly conduct or for failure to attend its sessions, and can decide cases of contested elections and determine the qualifications of its members, and exercise the sole power of impeachment of officers of the government, and may, when the examination of witnesses is necessary to the performance of these duties, fine or imprison a contumacious witness,—there is not found in the constitution any general power vested in either house to punish for contempt. The order of the house ordering the imprisonment of a witness for refusing to answer certain questions put to him by the house, concerning the business of a real estate partnership of which he was a member, and to produce certain books in relation thereto, was held void and no defence on the part of the sergeant-at-arms in an action by the witness for false imprisonment. The members of the committee, who took no actual part in the imprisonment, were held not liable to such action. The cases in which the power had been exercised are numerous. See Barclay, Dig. Rules of Hou. Reps. U. S. tit. *Privilege*. This power, however, extends no further than imprisonment; and that will continue no further than the duration of the power that imprisons. The imprisonment will therefore terminate with the adjournment or dissolution of congress.

The rules of proceeding in each house are substantially the same: the house of representatives choose their own speaker; the vice-president of the United States is, *ex officio*, president of the senate. For rules of proceeding and forms observed in passing laws, see Barclay's Dig.

When a bill is engrossed, and has received the sanction of both houses, it is sent to the president for his approbation. If he approves of the bill, he signs it. If he does not, it is returned, with his objections, to the house in which it originated, and that house enters the objections at large on its journal and proceeds to reconsider it. If, after such reconsideration, two-thirds of the house agree to pass the bill, it is sent, together with the objections, to the other house, by which it is likewise reconsidered, and, if approved by two-thirds of that house, it becomes a law. But in all such cases the votes of both houses are determined by yeas and nays, and the names of the persons voting for and against the bill are to be entered on the journal of each house respectively.

If any bill shall not be returned by the president within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the congress by their adjournment prevent its return; in which case it shall not be a law. See Kent, Lect. XI.

The right of the president to sign a bill after an adjournment of congress although within ten days of its passage, has been inferentially approved by the supreme court on four different occasions, in connection with the captured and abandoned property act, which was signed by the president on March 12, 1863, and after the adjournment of congress; 2 Wall. 423; 2 *id.* 561; 9 *id.* 56; 13 *id.* 128. Upon this point the court of claims held, in a remarkably thorough and convincing opinion delivered by Mr. Justice Nott, that a bill signed by the president after the usual adjournment of congress for the winter holidays, but within ten days from the time when it was presented to him, was duly approved within the intent and meaning of the constitution, and must be recognized and administered as a law of the United States; 29 Ct. Cls. 523.

The house of representatives has the exclusive right of originating bills for raising revenue; and this is the only privilege that house enjoys in its legislative character which is not shared equally with the other; and even those bills are amendable by the senate in its discretion; Art. 1, s. 7.

One of the houses cannot adjourn, during the session of congress, for more than three days without the consent of the other; nor to any other place than that in which the two houses shall be sitting; Art. 1, s. 5.

All the legislative powers granted by the constitution of the United States or necessarily implied from those granted, are vested in the congress.

CONJECTIO CAUSÆ. In Civil Law. A statement of the case. A brief synopsis of the case given by the advocate to the judge in opening the trial. Calvinus, Lex.

CONJECTURE. A slight degree of credence, arising from evidence too weak or too remote to cause belief. 1 Mascardus, *De Prob.* quæst. 14, n. 14.

An idea or notion founded on a probability without any demonstration of its truth.

CONJOINTS. Persons married to each other. Story, Confl. Laws § 71; Wolffius, *Droit de la Nat.* § 858.

CONJUGAL RIGHTS. A class of personal rights arising from the relation of husband and wife.

In England, a writ lies for the restitution of conjugal rights in case of intentional desertion, including, perhaps, a refusal to consummate marriage, under some circumstances; but this remedy has never been adopted in the United States; Bish. Mar. & Div. § 503 *et seq.*; 3 Bla. Com. 94; Geary, Mar. & Fam. R. 371 *et seq.*

CONJUNCTIVE. Connecting in a manner denoting union.

There are many cases in law where the conjunctive *and* is used for the disjunctive *or*, and *vice versa*.

An obligation is conjunctive when it contains several things united by a conjunction to indicate that they are all equally the object of the matter or contract.

CONJUNCTIVE OBLIGATION. One in which the several objects in it are connected by a copulative, or in any other manner which shows that all of them are severally comprised in the contract. This contract creates as many different obligations as there are different objects; and the debtor, when he wishes to discharge himself, may force the creditor to receive them separately. Civil Code, La. § 2063.

CONJURATION (Lat. a swearing together).

A plot, bargain, or compact, made by a number of persons under oath, to do some public harm.

Personal conference with the devil or some evil spirit, to know any secret or effect any purpose. The laws against conjuration and witchcraft were repealed in 1736, by stat. 9 Geo. II. c. 5; Mozley & W. Law Dict.

CONNECTICUT. The name of one of the original states of the United States of America.

It was not until the year 1665 that the whole territory now known as the state of Connecticut was under one colonial government. The charter was granted by Charles II. in April, 1662. Previous to that time there had been two colonies, with separate governments.

As this charter to the colony of Connecticut embraced the colony of New Haven, the latter resisted it until about January, 1665, when the two colonies, by mutual agreement, became indissolubly united. In 1687, Sir Edward Andros attempted to seize and take away the charter; but it was secreted and preserved in the famous Charter Oak at Hartford, and is now kept in the office of the secretary of state. 1 Hollister, Hist. Conn. 315. It remained in force, with a temporary suspension, as a fundamental law of the state, until the present constitution was adopted. Story, Const. 386; Comp. Stat. Conn. Rev. of 1875, iii. xlv.

The present constitution was adopted on the 15th

of September, 1818. Seventeen amendments have been adopted, 1823–1875.

THE LEGISLATIVE POWER.—This is vested in two distinct houses or branches, the one styled the senate, the other the house of representatives, and both together, the General Assembly.

The Senate consists of twenty-four members, one elected biennially from each of the twenty-four senatorial districts into which the state is divided.

The House of Representatives consists of two members from each town which was in existence when the constitution was adopted, unless the right to one of them has been voluntarily relinquished, and from every other town having five thousand inhabitants, and of one member from each of the towns which have been organized since the adoption of the constitution. The representatives are elected annually, on the Tuesday after the first Monday in November.

THE EXECUTIVE POWER.—This is vested in a governor and lieutenant-governor.

The Governor is chosen biennially on the Tuesday after the first Monday in November by the electors of the state. He is to hold his office for two years from the Wednesday after the first Monday of January succeeding his election, and until his successor is duly qualified.

THE JUDICIAL POWER.—This is vested in a supreme court of errors, a superior court, and such inferior courts as the general assembly may from time to time establish.

The courts of general jurisdiction are the supreme court of errors, superior court, court of common pleas, and district courts. No person can hold a judicial office after the age of seventy.

The Supreme Court of Errors is held by five judges. The judges hold office for eight years. They are elected by the general assembly on nomination by the governor. This court has final and conclusive jurisdiction of all proceedings in error, from judgments of inferior courts, and may carry into complete execution all judgments and decrees.

The Superior Court is composed of these judges and eight others, elected in the same way and for the same term. It is the principal *nisi prius* court, and has also jurisdiction of petitions for change of name.

The Court of Common Pleas exists only in New Haven, Hartford, Fairfield, Litchfield, and New London counties. These courts are *nisi prius* courts with a limited jurisdiction, regulated mainly by the value of the amount in controversy, which can in no case exceed $1000. Legal and equitable remedies are granted in all these courts in the same proceeding, there being a code of civil practice, partly resembling that of New York. Criminal Courts of Common Pleas are established for New London and Fairfield counties, respectively; they have appellate jurisdiction in all criminal cases; acts 1889, pp. 63, 113. In the counties of Windham, Tolland, and Middlesex, where there are no courts of common pleas, the superior courts exercise criminal jurisdiction in cases not cognizable by a justice of the peace. In the principal cities there are *city courts* having a limited civil and, in some cases, criminal jurisdiction.

Probate Courts are held, in the districts into which the state is divided for this purpose, by judges elected biennially by the people of the district.

Justices of the Peace are elected biennially in November, by the electors of the several towns.

County Commissioners, three in number in each county, are appointed annually by the general assembly. They have power to remove deputy sheriffs, enter upon county lands, levy county taxes, take care of the highways, administer the poor debtor's oath, and appoint county treasurers.

CONNECTING LINES. See COMMON CARRIERS.

CONNIVANCE. An agreement or consent, indirectly given, that something unlawful shall be done by another.

Connivance differs from condonation, though the same legal consequences may attend it. Connivance necessarily involves criminality on the part of the individual who connives; condonation may take place without imputing the slightest blame to the party who forgives the injury. Connivance must be the act of the mind before the offence has been committed; condonation is the result of a determination to forgive an injury which was not known until after it was inflicted. 3 Hagg. Eccl. 350.

Connivance differs, also, from collusion: the former is generally collusion for a particular purpose, while the latter may exist without connivance. 3 Hagg. Eccl. 130.

The connivance of the husband to his wife's prostitution deprives him of the right of obtaining a divorce, or of recovering damages from the seducer; Geary, Mar. & Fam. R. 268; 4 Term 657. The husband may actively connive at the adultery; 41 Barb. 114; 21 N. J. Eq. 61; or he may passively; 5 Eng. Ecc. 27; 3 Hagg. Eccl. 87. It may be satisfactorily proved by implication. See Shelf. Mar. & Div. 449; 2 Bish. Mar. & Div. § 6; 2 Hagg. Eccl. 278, 376; 3 *id.* 58, 82, 107, 119, 312; 3 Pick. 299; 2 Cai. 219; 15 N. H. 161; 31 Mich. 300; 109 Mass. 407; 35 Iowa 477.

CONNOISSEMENT. In French Law. An instrument, signed by the master of a ship or his agent, containing a description of the goods loaded on a ship, the persons who have sent them, the persons to whom they were sent, and the undertaking to transport them. A bill of lading. Guyot, *Répert. Univ.; Ord. de la Marine*, l. 3, t. 3, art. 1.

CONNUBIUM (Lat.). A lawful marriage.

CONOCIMIENTO. In Spanish Law. A bill of lading. In the Mediterranean ports it is called *poliza de cargamiento*. For the requisites of this instrument, see the Code of Commerce of Spain, arts. 799–811.

CONQUEST (Lat. *conquiro*, to seek for).

In Feudal Law. Purchase; any means of obtaining an estate out of the usual course of inheritance.

The estate itself so acquired.

According to Blackstone and Sir Henry Spelman, the word in its original meaning was entirely dissociated from any connection with the modern idea of military subjugation, but was used solely in the sense of purchase. It is difficult and quite profitless to attempt a decision of the question which has arisen, whether it was applied to William's acquisition of England in its original or its popular meaning. It must be allowed to offer a very reasonable explanation of the derivation of the modern signification of the word, that it was still used at that time to denote a technical *purchase*—the prevalent method of *purchase* then, and for quite a long period subsequently, being by driving off the occupant by superior strength. The operation of making a *conquest*, as illustrated by William the Conqueror, was no doubt often afterwards repeated by his followers on a smaller scale; and thus the modern signification became established. On the other hand, it would be much more difficult to derive a general signification of *purchase* from the limited modern one of military subjugation. But the whole matter must remain mainly conjectural; and it is undoubtedly going to far too say, with Burrill, that the meaning assigned by Blackstone is "demonstrated," or, with Wharton, that the same meaning is a "mere idle ingenuity." Fortunately, the question is not of the slightest importance in any respect.

In International Law. The acquisition of the sovereignty of a country by force of arms, exercised by an independent power

which reduces the vanquished to the submission of its empire.

It is a general rule that, where conquered countries have laws of their own, those laws remain in force after the conquest until they are abrogated, unless contrary to religion or *mala in se*. In this case, the laws of the conqueror prevail; 1 Story, Const. § 150.

The conquest and occupation of a part of the territory of the United States by a public enemy renders such conquered territory during such occupation a foreign country with respect to the revenue laws of the United States; 4 Wheat. 246; 2 Gall. 486. The people of a conquered territory change their allegiance, but not their relations to each other; 7 Pet. 86. Conquest does not *per se* give the conqueror *plenum dominum et utile*, but a temporary right of possession and government; 2 Gall. 486; 3 Wash. C. C. 101; 8 Wheat. 591; 2 Bay 229; 2 Dall. 1; 12 Pet. 410.

The right which the English government claimed over the territory now composing the United States was not founded on conquest, but discovery. Story, Const. § 152.

In Scotch Law. Purchase. Bell, Dict.; 1 Kames 210.

CONQUETS. In French Law. The name given to every acquisition which the husband and wife, jointly or severally, make during the conjugal community. Thus, whatever is acquired by the husband and wife, either by his or her industry or good fortune, enures to the extent of one half for the benefit of the other. Merlin, *Rép. Conquêt;* Merlin, *Quest., Conquêt.* In Louisiana, these gains are called *aquets.* La. Civ. Code, art. 2369. The *conquêts* by a former marriage may not be settled on a second wife to prejudice the heirs; 2 Low. C. 175.

CONSANGUINEOUS FRATER. A brother who has the same father. 2 Bla. Com. 231.

CONSANGUINITY (Lat. *consanguis*, blood together).

The relation subsisting among all the different persons descending from the same stock or common ancestor. See 1 Brad. Surr. R. 495.

Having the blood of some common ancestor. 9 Vt. 30.

Collateral consanguinity is the relation subsisting among persons who descend from the same common ancestor, but not from each other. It is essential, to constitute this relation, that they spring from the same common root or stock, but in different branches.

Lineal consanguinity is that relation which exists among persons where one is descended from the other, as between the son and the father, or the grandfather, and so upward in a direct ascending line; and between the father and the son, or the grandson, and so downwards in a direct descending line.

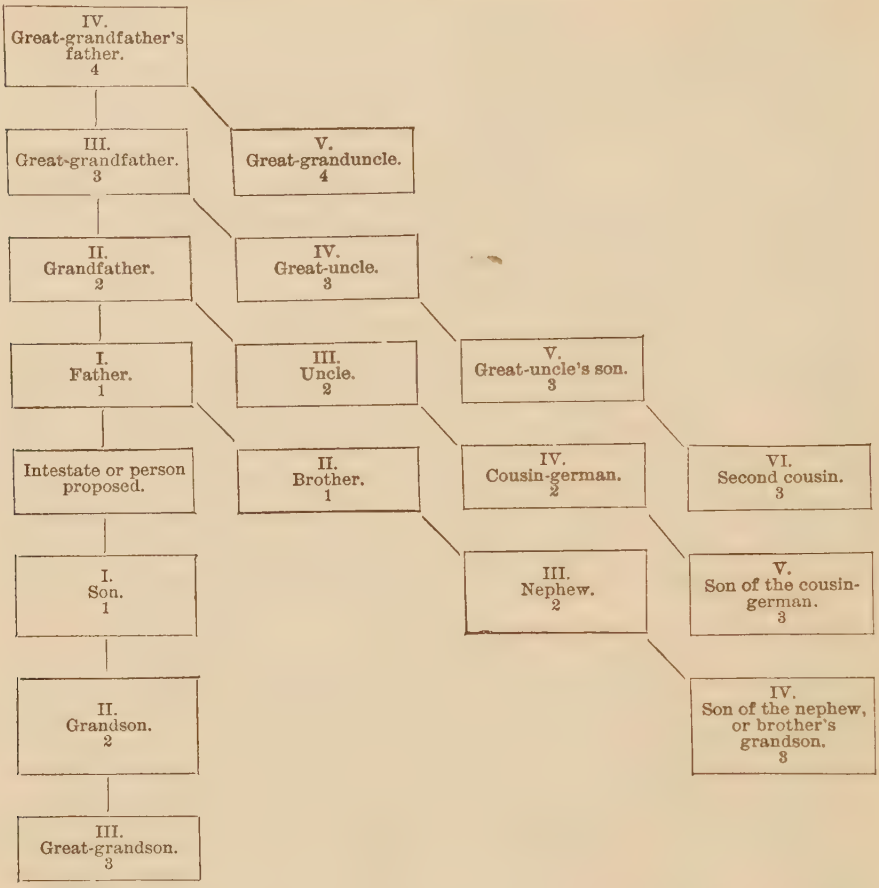
In computing the degree of lineal consanguinity existing between two persons, every generation in the direct course of relationship between the two parties makes a degree; and the rule is the same by the canon, civil, and common law.

The mode of computing degrees of collateral consanguinity at the common and by the canon law is to discover the common ancestor, to begin with him to reckon downwards, and the degree the two persons, or the more remote of them, is distant from the ancestor, is the degree of kindred subsisting between them. For instance, two brothers are related to each other in the first degree, because from the father to each of them is one degree. An uncle and a nephew are related to each other in the second degree, because the nephew is two degrees distant from the common ancestor; and the rule of computation is extended to the remotest degrees of collateral relationship.

The method of computing by the civil law is to begin at either of the persons in question, and count up to the common ancestor, and then downwards to the other person, calling it a degree for each person, both ascending and descending, and the degrees they stand from each other is the degree in which they stand related. Thus, from a nephew to his father is one degree; to the grandfather, two degrees; and then to the uncle three; which points out the relationship.

The following table, in which the Roman numeral letters express the degrees by the civil law, and those in Arabic figures those by the common law, will fully illustrate the subject.

The mode of the civil law is preferable, for it points out the actual degree of kindred in all cases; by the mode adopted by the common law, different relations may stand in the same degree. The uncle and nephew stand related in the second degree by the common law, and so are two first cousins, or two sons of two brothers; but by the civil law the uncle and nephew are in the third degree, and the cousins are in the fourth. The mode of computation, however, is immaterial; for both will establish the same person to be the heir; 2 Bla. Com. 202.



CONSCRIPTION. A compulsory enrolment of men for military service; draft. The body of conscripts. Stand. Dict.

CONSENSUAL CONTRACT. In Civil Law. A contract completed by the consent of the parties merely, without any further act.

The contract of sale, among the civilians, is an example of a consensual contract, because the moment there is an agreement between the seller and the buyer as to the thing and the price, the vendor and the purchaser have reciprocal actions. On the contrary, on a loan, there is no action by the lender or borrower, although there may have been consent, until the thing is delivered or the money counted; Pothier, Obl. pt. 1, c. 1, s. 1, art. 2; 1 Bell, Comm. 435.

CONSENT (Lat. *con*, with, together, *sentire*, to feel). A concurrence of wills.

Express consent is that directly given, either *viva voce* or in writing.

Implied consent is that manifested by signs, actions, or facts, or by inaction or silence, which raises a presumption that the consent has been given.

Consent supposes a physical power to act, a moral power of acting, and a serious, determined, and free use of these powers. Fonblanque, Eq. b. 1, c. 2, s. 1. Consent is implied in every agreement. See AGREEMENT; CONTRACT.

Where a power of sale requires that the sale should be with the consent of certain specified individuals, the fact of such consent having been given ought to be evinced in the manner pointed out by the creator of the power, or such power will not be considered as properly executed; 10 Ves. Ch. 308, 378. See further, as to the matter of consent in vesting or divesting legacies; 2 V. & B. 234; 3 Ves. Ch. 239; 12 *id.* 19; 3 Bro. Ch. 145; 1 Sim. & S. 172. As to implied consent arising from acts, see ESTOPPEL IN PAIS.

In Criminal Law. No act shall be deemed a crime if done with the consent of the party injured, unless it be committed in public, and is likely to provoke a breach of the peace, or tends to the injury of a third party; provided no consent can be given which will deprive the consenter of any inalienable right; A. & E. Encyc; Desty, Cr. L. § 33. The one who gives consent must be capable of doing so; 1 Whar. Cr. L. § 146; 25 N. Y. 373. As to age of consent, see RAPE.

CONSENT RULE. An entry of record by the defendant, confessing the lease, entry, and ouster by the plaintiff, in an action of ejectment. This was, until recently, used in England, and still is in those of the United States in which the action of ejectment is still retained as a means of acquiring possession of land.

The consent rule contains the following particulars, viz. : *first*, the person appearing consents to be made defendant instead of the casual ejector; *second*, he agrees to appear at the suit of the plaintiff, and, if the proceedings are by bill, to file common bail; *third*, to receive a declaration in ejectment, and to plead not guilty; *fourth*, at the trial of the case, to confess lease, entry, and ouster, and to insist upon his title only; *fifth*, that if, at the trial, the party appearing shall not confess lease, entry, and ouster, whereby the plaintiff shall not be able to prosecute his suit, such party shall pay to the plaintiff the cost of the *non pros.*, and suffer judgment to be entered against the casual ejector; *sixth*, that if a verdict shall be given for the defendant, or the plaintiff shall not prosecute his suit for any other cause than the non-confession of lease, entry, and ouster, the lessor of the plaintiff shall pay costs to the defendant; *seventh*, that, when the landlord appears alone, the plaintiff shall be at liberty to sign judgment immediately against the casual ejector, but that execution shall be stayed until the court shall further order; Ad. Eject. 233. See, also, 2 Cow. 442; 4 Johns. 311; 1 Cai. Cas. 102.

CONSEQUENTIAL DAMAGES. Those damages which arise not from the immediate act of the party, but as an incidental consequence of such act. See DAMAGES.

CONSEQUENTS. In Scotch Law. Implied powers or authorities. Things which follow, usually by implication of law. A commission being given to execute any work, every power necessary to carry it on is implied; 1 Kames, Eq. 241; Black, L. Dict.

CONSERVATOR (Lat. *conservare*, to preserve). A preserver; one whose business it is to attend to the enforcement of certain statutes.

A delegated umpire or standing arbitrator, chosen to compose and adjust difficulties arising between two parties. Cowel.

A guardian. So used in Connecticut. 3 Day 472; 5 Conn. 280; 12 *id.* 376.

CONSERVATOR OF THE PEACE. He who hath an especial charge, by virtue of his office, to see that the king's peace be kept.

Before the reign of Edward III., who created justices of the peace, there were sundry persons interested to keep the peace, of whom there were two classes: one of which had the power annexed to the office which they hold; the other had it merely by itself, and were hence called wardens or conservators of the peace. Lambard, *Eirenarchia*, l. 1, c. 3. This latter sort are superseded by the modern justices of the peace; 1 Bla. Com. 349.

The king's majesty was the principal conservator of the peace within all his dominions. The lord chancellor or keeper, the lord treasurer, the lord high steward of England, and the lord mareschal and lord high constable of England, all the justices of the court of king's bench (by virtue of their offices), and the master of the rolls (by prescription) were general conservators of the peace throughout the whole kingdom, and might commit all breakers of it, or bind them in recognizances to keep it: the other judges were only so in their own courts. The coroner was also a conservator of the peace within his own county, as also the sheriff, and both of them might take recognizances or security for the peace. Constables, tythingmen, and the like were also conservators of the peace within their own jurisdiction; and might apprehend all breakers of the peace, and commit them until they found sureties for their keeping it.

The judges and other similar officers of the various states, and also of the United States, are conservators of the public peace, being entitled "to hold to the security of the peace and during good behavior."

The Constitution of Delaware (1831) provides that:—

"The members of the senate and house of representatives, the chancellor, the judges, and the attorney-general shall, by virtue of their offices, be conservators of the peace throughout the state; and the treasurer, secretary, and prothonotaries, registers, recorders, sheriffs, and coroners, shall, by virtue of their offices, be conservators thereof within the counties respectively in which they reside."

CONSERVATOR TRUCIS (Lat.). An officer whose duty it was to inquire into all offences against the king's truces and safe conducts upon the main seas out of the liberties of the Cinque Ports.

Under stat. 2 Hen. V. stat. 1, c. 6, such offences are declared to be treason, and such officers are appointed in every port, to hear and determine such cases, "according to the ancient maritime law then practised in the admiral's court as may arise upon the high seas, and with two associates to determine those arising upon land." 4 Bla. Com. 69, 70.

CONSIDERATIO. See CONSIDERATUM EST PER CURIAM.

CONSIDERATION (L. Latin, *consideratio*). An act or forbearance, or the promise thereof, which is offered by one party to an agreement, and accepted by the other as an inducement to that other's act or promise. Poll. Contr. 91.

Blackstone defines it to be the reason which moves a contracting party to enter into a contract (2 Com. 443); but this definition is manifestly defective because it is within the distinction so well taken by Patteson, J., who says:—"It is not to be confounded with motive, which is not the same thing as consideration. The latter means something which is of value in the eye of the law, moving from the plaintiff, either of benefit to the plaintiff or of detriment to the defendant;" Langd. Sel. Cas. Cont. 168; s. c. 2 Q. B. 851. In distinguishing between consideration and motive a helpful criterion is to be found in the expression

"nothing is consideration that is not regarded as such by both parties;" 14 Wall. 570, 577; 110 Mass. 389; 79 Ind. 549, 551.

The price, motive, or matter of inducement to a contract,—whether it be the compensation which is paid, or the inconvenience which is suffered by the party from whom it proceeds. A compensation or equivalent. A cause or occasion meritorious, requiring mutual recompense in deed or in law. Viner, Abr. *Consideration* (A).

It is also defined as "any act of the plaintiff from which the defendant or a stranger derives a benefit or advantage, or any labor, detriment, or inconvenience sustained by the plaintiff, however small, if such act is performed or inconvenience suffered by the plaintiff by the consent, express or implied, of the defendant." Tindal, C. J., in 3 Scott 250. According to Kent it must be:—given in *exchange*, *mutual*, an *inducement* to the contract, *lawful*, and of sufficient *value*, with respect to the assumption. 2 Com. 464.

Concurrent considerations are those which arise at the same time or where the promises are simultaneous and reciprocal.

Continuing considerations are those which consist of acts which must necessarily continue over a considerable period of time.

Executed considerations are acts done or values given at the time of making the contract. Leake, Contr. 18, 612.

Executory considerations are promises to do or give something at a future day. *Ibid.*

Good considerations are those of blood, natural love or affection, and the like.

Motives of natural duty, generosity, and prudence come under this class; 2 Bla. Com. 297; 2 Johns. 52; 10 *id.* 293; 2 Bail. 588; 1 M'Cord 504; 2 Leigh 337; 20 Vt. 595; 1 C. & P. 401; 48 Ohio St. 562; 150 Pa. 98; 61 Conn. 50. The only purpose for which a *good* consideration may be effectual is to support a covenant to stand seized to uses; Shep. Touchst. 512. The term is sometimes used in the sense of a consideration valid in point of law; and it then includes a valuable as well as a meritorious consideration; 3 Cra. 140; 2 Aik. 601; 24 N. H. 302; 2 Madd. 430; 3 Co. 81; Ambl. 598; 1 Ed. Ch. 167. Generally, however, *good* is used in antithesis to *valuable*.

Illegal considerations are acts, which if done or promises which if enforced, would be prejudicial to the public interest. Harriman, Cont. 101.

Impossible considerations are those which cannot be performed.

Moral considerations are such as are based upon a moral duty.

Past consideration is an act done before the contract is made, and is ordinarily by itself no consideration for a promise; Anson, Contr. 82. Pollock considers that whether a past benefit is, in any case, a good consideration is a question not free from uncertainty. On principle it should not be. Possible exceptions might be services rendered on request, without definite promise of reward (see Hob. 105) and voluntarily doing something which one was legally bound to do. Also a promise to pay a debt barred by the statute of limitations; but he considers that none of these exceptions are logical. See Poll. Cont. 170.

Valuable considerations are either some benefit conferred upon the party by whom the promise is made, or upon a third party at his instance or request; or some detriment sustained, at the instance of the party promising, by the party in whose favor the promise is made. Chit. Contr. 7; Doct. & Stud. 179; 2 Pet. 182; 5 Cra. 142, 150; 1 Litt. 183; 3 Johns. 100; 8 N. Y. 207; 6 Mass. 58; 2 Bibb 30; 2 J. J. Marsh. 222; 2 N. H. 97; Wright, Ohio 660; 13 S. & R. 29; 12 Ga. 52; 24 Miss. 9; 4 Ill. 33; 5 Humphr. 19; 4 Blackf. 388; 3 C. B. 321; 4 East 55; 96 N. C. 67. The detriment to the promisee must be a detriment on entering into the contract and not from the breach of it; 2 Misc. Rep. 293.

"A valuable consideration may consist either in some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other." L. R. 10 Ex. 162. See 5 Pick. 380.

A valuable consideration is usually in some way pecuniary, or convertible into money; and a very slight consideration, provided it be valuable and free from fraud, will support a contract; 2 How. 426; 12 Mass. 365; 12 Vt. 259; 29 Ala. N. S. 188; 20 Pa. 303; 22 N. H. 246; 11 Ad. & E. 983; 16 East 372; 9 Ves. Ch. 246; 2 Cr. & M. 623; 2 Sch. & L. 395, n. *a*; 52 Mich. 83; 23 Ohio St. 292. Valuable considerations are divided by the civilians into four classes, which are given, with literal translations: *Do ut des* (I give that you may give), *Facio ut facias* (I do that you may do), *Facio ut des* (I do that you may give), *Do ut facias* (I give that you may do).

Consideration has been treated as the very life and essence of a contract; and a parol contract or promise for which there was no consideration could not be enforced at law; 7 W. & S. 317; Plowd. 308; Smith, Lead. Cas. 456; Doc. & Stud. 2, c. 24; 3 Call 439; 7 Conn. 57; 1 Stew. 51; 5 Mass. 301; 4 Johns. 235; 6 Yerg. 418; Cooke 467; 6 Halst. 174; 4 Munf. 95; 11 Md. 281; 25 Miss. 66; 80 Me. 412; 140 Ill. 269; 153 Pa. 281; 89 Ga. 117; 114 Mo. 203; Brooke, Abr. *Action sur le Case*, 40; such a promise was often termed a *nudum pactum* (*ex nudo pacto non oritur actio*), or *nude pact*.

This phrase was undoubtedly borrowed from the Roman law, but its use in English law had no relation whatever to its meaning in the Roman; nor is the word *pact* of the latter in any sense related to the common-law *contract*. The *nudum pactum*, as appears by the note cited *infra* from Pollock, had not anciently in England its modern signification of an agreement without consideration in the sense of the maxim quoted. In an elaborate note to Pollock on Contracts 673, Note F., the learned author calls attention to a difference between consideration in the English law and its nearest continental analogies, which difference, he says, has not always been realized. The actual history of the English doctrine is obscure. The most we can affirm is that the general idea was formed somewhere in the latter part of the fifteenth century. At the same time or a little later, *nudum pactum* lost its ancient meaning (viz.: an agreement not made by specialty so as to support an action of covenant or falling within one of certain classes so as to support an action

of debt), and came to mean what it does now. The word consideration in the sense now before us came into use, at least as a settled term of art, still later. In the early writers, *consideration* always means the judgment of a court. . . .

The early cases of actions of assumpsit show by negative evidence which is almost conclusive that in the first half of the 15th century, the doctrine of consideration was quite unformed, though the phrase *quid pro quo* is earlier. But in 1459 there was a case which showed that an action of debt would then lie on any consideration executed. In the Doctor and Student (A. D. 1530) we find substantially the modern doctrine. So far as the writer of that work knows, he finds the first full discussion of consideration by that name in Plowden's report of Sharington *v.* Stratton; Plowd. 298.

The question of consideration was of importance in the learning of Uses before the statute, and the reflection is obvious that both the general conception and the name of Consideration have had their origin in the court of chancery in the law of uses and have been thence imported into the law of contracts rather than developed by the common-law courts. On this hypothesis, a connection with the Roman *causa* may be suggested with some plausibility.

The same writer proceeds to say that in the process thus sketched out some steps are conjectural, and considers that the materials are not ripe for a positive conclusion and will not be until the unpublished records of mediæval English law shall be competently edited. See Holmes, The Common Law 253, where a different theory of the origin of consideration is given as being a generalization from the technical requirements of the action of debt in its earlier form.

The theory on which the phrase *nudum pactum* was wrongly applied was that the maxim signified that a *gratuitous promise* to do or pay anything on the one side, without any compensation on the other, could only be enforced, in the Roman law, when made (or clothed) with proper words or formalities—*pactum verbis prescriptis vestitum;* Vinnius, *Com. de. Inst.* lib. 3, *de verborum obligationibus*, tit. 16, p. 677; Cod. lib. 7, tit. 52. This solemnity it was argued had much the force of our seal, which imported consideration, as it was said, meaning that the formality implied *consideration* in its ordinary sense *i.e.*, deliberation, caution, and fulness of assent; Hare, Contr. 146; 3 Bingh. 111; 3 Burr. 1639; 4 Md. Ch. Dec. 176; 35 Me. 260, 491; 25 Miss. 86; 53 Minn. 10; but see 2 Colo. App. 259. There was, however, the distinction often lost sight of but which ought to be made that even on the theory that the vitality of a seal was solely as a token of the existence of a consideration, under the common law it was not the fact that the instrument was under seal which gave it vitality, but the consideration whose existence is implied therefrom, while, under the civil law, the subject of consideration bore no such relation to the contract as it does under the English law even accepting the theory of Stephen and other writers stated under title CONTRACT, *q. v.*, that the consideration is not an essential element of a contract,—necessary to its existence. Under the civil law it was of the essence of certain contracts that they should be gratuitous, and those based upon a consideration constituted only a single division called commutative contracts, which again was subdivided into the four classes represented by the formula quoted, *supra*, *do et des*, etc.

While, therefore, the Roman law doubtless exercised a large influence upon the English law of contracts, the subject of consideration particularly has been overlaid with erroneous theories, and the ascertainment of its true bearing long postponed, by the pursuit of false analogies, due probably to the early adoption of such phrases as the above and their incorporation into the common law, to express superficial impressions created by them rather than the meaning attributed to them by the Roman jurists.

These analogies have, however, been in recent years the subject of more careful investigation, and the study of the early English authorities and a greatly increased interest in, and knowledge of, the Roman law, have resulted in disturbing many of the theories of consideration in its true relation to the contract and the true meaning of the seal as making a contract actionable which would not be so if by parol.

The consideration is generally conclusively presumed from the nature of the contract, when sealed; 11 S. & R. 107; 66 Hun 635; but in some of the states by law, and in others by statute, the want or failure of a consideration may be a good defence against an action on a sealed instrument or contract; 1 Bay 275; 5 Binn. 232; 11 Wend. 106; 1 Blackf. 173; 3 J. J. Marsh. 473; 1 Bibb 500; 13 Ired. 235; 8 Rich. 437.

Negotiable instruments also, as bills of exchange and promissory notes, by statute 3 & 4 Anne (adopted as common law or by re-enactment in the United States), carry with them *prima facie* evidence of consideration; 4 Bla. Com. 445. See BILLS OF EXCHANGE, etc.

The consideration, if not expressed (when it is *prima facie* evidence of consideration), in all parol contracts (oral or written), must be proved; this may be done by evidence *aliunde;* 2 Ala. 51; 3 N. Y. 335; 7 Conn. 57, 291; 16 Me. 394, 458; 4 Munf. 95; 4 Pick. 71; 26 Me. 397; 1 La. Ann. 192; 21 Vt. 292; 4 Mo. 33.

A contract upon a *good* consideration is considered merely *voluntary*, but is good both in law and equity as against the grantor himself when it has once been executed; Chit. Contr. 28; but void against creditors and subsequent *bona fide* purchasers for value; Stat. 27 Eliz. c. 4; Cowp. 705; 10 B. & C. 606; 69 Ia. 755.

Moral or equitable considerations are not sufficient to support an express or implied promise. They are only sufficient as between the parties in conveyances by deed, and in transfers, not by deed, accompanied by possession; 9 Yerg. 418; 3 B. & P. 249. See 11 A. & E. 438; 3 Pick. 207. These purely moral obligations are left by the law to the conscience and good faith of the individual. Mr. Baron Parke says, "A mere moral consideration is *nothing*;" 9 M. & W. 501; 8 Mo. 698. See 78 Hun 121. It was at one time held in England that an express promise made in consequence of a previously existing moral obligation created a valid contract; per Mansfield, C. J., Cowp. 290; 5 Taunt. 36. This doctrine was at one time received in the United States, but appears now to be repudiated there; Poll. Contr. 168; except in Pennsylvania; 4 Pa. 364; 24 *id.* 370.

It is often said that a moral obligation is sufficient consideration; but it is a rule, that such moral obligation must be one which has once been valuable and enforceable at law, but has ceased to be so by the operation of the statute of limitations, or by the intervention of bankruptcy for instance. The obligation, in such case, remains equally strong on the conscience of the debtor. The rule amounts only to a permission to waive certain positive rules of law as to *remedy;* Poll. Contr. 623; 2 Bla. Com. 445; Cowp. 290; 3 B. & P. 249, n.; 2 East 506; 2 Ex. 90; 8 Q. B. 487; 6 Cush. 238; 20 Ohio 332; 24 Wend. 97; 24 Me. 561; 38 Pa. 306; 13 Johns. 259; 7 Conn. 57; 1 Vt. 420; 3 Pa. 172; 12 S. & R. 177; 17 *id.* 126; 14 Ark. 267; 1 Wis. 131; 21 N. H. 129; 4 Md. 476. See 51 Mo. App. 637; 78 Hun 121; 125 Pa. 394. But now, by statute, in England a promise to pay a debt barred by bankruptcy or one contracted during infancy is void; Leake, Contr. 318. If the *moral duty* were once a *legal* one which could have been made available in defence, it is equally within the rule; 5 Barb. 556; 2 Sandf. 311; 25 Wend. 389; 10 B. Monr. 382; 8 Tex. 397. See as to moral obligation as a consideration, 32 Cent. L. J. 53.

An express promise to perform a previous legal obligation, without any new consideration, does not create a new obligation; 7 Dowl. 781; 25 Ind. 328; 15 C. B. 295; 16 Q. B. 689; 91 N. Y. 401; 40 Ohio St. 400; 34 N. J. L. 54; 40 Vt. 28; 54 Ill. 303; 121 Mass. 106.

A valuable consideration alone is good as against subsequent purchasers and attaching creditors; and one which is rendered at the request, express or implied, of the promisor; Dy. 172, n.; 1 Rolle, Abr. 11, pl. 2, 3; 1 Ld. Raym. 312; 1 Wms. Saund. 264, n. (1); 3 Bingh. N. C. 710; 6 Ad. & E. 718; 3 C. & P. 36; 6 M. & W. 485; 2 Stark. 201; 2 Stra. 933; 3 Q. B. 234; Cro. Eliz. 442; F. Moore 643; 1 M'Cord 22.

Among valuable considerations may be mentioned these:—

In general, the waiver of any legal or equitable right at the request of another is sufficient consideration for a promise; 3 Pick. 452; 2 N. H. 97; Wright, Ohio 660; 20 Wend. 184; 4 Ired. Eq. 207; 4 Harr. 311; 4 B. & C. 8; 5 Pet. 114; 2 Nev. & P. 114; 4 Ad. & E. 108; 47 Minn. 320; 62 Mich. 570; 23 Mo. App. 427.

Forbearance for a certain or reasonable time to institute a suit upon a valid or doubtful claim, but not upon one utterly unfounded. This is a benefit to one party, the promisor, and an injury to the other, the promisee; 1 Rolle, Abr. 24, pl. 33; Com. Dig. *Action on the Case upon Assumpsit* (B, 1); L. R. 7 Ex. 235; L. R. 10 Q. B. 92; L. R. 2 C. P. 196; 8 Md. 55; 4 Me. 387; 4 Johns. 237; 1 Cush. 168; 9 Pa. 147; 13 Ill. 140; 5 Humphr. 19; 6 Leigh 85; 1 Dougl. 188; 20 Ala. N. S. 309; 6 Ind. 528; 4 Dev. & B. 209; 21 E. L. & Eq. 199; 6 T. B. Monr. 91; 2 Rand. 442; 15 Ga. 321; 5 Gray 553; 3 Md. 346; 25 Barb. 175; 9 Yerg. 436; 15 Me. 138; 6 Munf. 406; 11 Vt. 483; 4 Hawks 178; 6 Conn. 81; 1 Bulstr. 41; 2 Binn. 506; 4 Wash. C. C. 148; 5 Rawle 69; 23 Vt. 235; 44 Ill. App. 582; 18 C. B. 273; 27 Fed. Rep. 175; 36 Mich. 320; 77 Ind. 1; 34 N. J. L. 346; 133 Mass. 284; 105 Ill. 43; 57 Wis. 258. An agreement to forbear suit, though for an indefinite period, is sufficient consideration; 130 N. Y. 415; 34 Neb. 592; 42 Mo. App. 503.

An invalid or not enforceable agreement to forbear is not a good consideration; for suit may be brought immediately after the promise is made. The forbearance must be an enforceable agreement for a reasonable time; Hardr. 5; 4 East 455; 4 M. & W. 795; 4 Me. 387; 3 Pa. 282; 9 Vt. 233; L. R. 8 Eq. 36; 43 Ia. 80; 25 Ala. 320; 45 N. H. 530; 74 Ill. 58; 78 Ky. 550. But if a meritorious claim is made in good faith, a forbearance to prosecute it may be a good consideration for a promise, although on the facts or on the law the suit would have failed of success; 11 Ill. 140; 60 Ill. 185; L. R. 5 Q. B. 449; 43 N. J. Eq. 377; 25 L. T. R. 504; 32 Ch. Div. 269; 63 Wis. 387; 5 Gray 45; 10 Harv. L. Rev. 113.

The prevention of litigation is a valid and sufficient consideration; for the law favors the settlement of disputes. Thus, a compromise or mutual submission of demands to arbitration is a highly favored consideration at law; 1 Ch. Rep. 158; 4 Pick. 507; 2 Strobh. Eq. 258; 2 Mich. 145; 2 Pa. 531; 6 Munf. 406; 1 Bibb 168; 4 Hawks 178; 14 Conn. 12; 4 Metc. 270; 35 N. H. 556; 11 Vt. 483; 28 Miss. 56; 4 Jones, N. C. 359; 27 Me. 262; 21 Ala. N. S. 424; 14 Conn. 12; 2 M'Mull. 356; 4 Ill. 378; 5 Dana 45; 21 E. L. & Eq. 199; 2 Rand. 442; 5 B. & Ald. 117; 49 Fed. Rep. 715; 43 *id.* 364; 73 N. Y. 514; 66 Hun 170; 9 Colo. 358; 122 Ind. 211; 32 Ch. D. 266.

The giving up a suit instituted to try a question respecting which the law is doubtful, or is supposed by the parties to be doubtful, is a good consideration for a promise; Poll. Contr. 180; Leake, Contr. 626; L. R. 5 Q. B. 241; 82 Tex. 677; 2 Binn. 509; 2 C. B. 548; 4 East 455; 78 N. Y. 334; 102 Ill. 272; 5 Pet. 98; 112

Mass. 438; 49 N. J. Law 508; 78 N. Y. 334; 154 Mass. 453 and cases cited.

Incurring a legal liability to a third party is a valid consideration for a promise by the party at whose request the liability was incurred; L. R. 8 Eq. 134.

Refraining from the use of liquor and tobacco for a certain time at the request of another, is a sufficient consideration for a promise by the latter to pay a sum of money; 124 N. Y. 538.

The assignment of a debt or chose in action (unless void by reason of maintenance) with the consent of the debtor, is a good consideration for the debtor's promise to pay the assignee. It is merely a promise to pay a debt due, and the consideration is the discharge of the debtor's liability to the assignor; 4 B. & C. 525; 13 Q. B. 548; 23 Vt. 532; 7 Tex. 47; 22 N. H. 185; 10 J. B. Moo. 34; 2 Bingh. 437; 1 Cr. M. & R. 430; 22 Me. 484; 7 N. H. 549. See 63 Hun 572. Work and service are perhaps the most common considerations.

In the case of deposit or mandate it was once held that there was no consideration; Yelv. 4, 128; Cro. Eliz. 883; the reverse is now usually maintained; 10 J. B. Moo. 192; 2 M. & W. 143; M'Cl. & Y. 205; 13 Ired. 39; 24 Conn. 484; 1 Perr. & D. 3; 1 Sm. Lead. Cas. 96.

In these cases there does not appear to be any benefit arising from the bailment to the promisor. The definitions of mandate and deposit exclude this. Nor does any injury at the time accrue to the promisee; the bailment is for his benefit entirely.

Trust and confidence in another are said to be the considerations which support this contract. But we think parting with the possession of a thing may be considered an injury to the promisee, for which the prospect of return was the consideration held out by the promisor.

Mutual promises made at the same time are concurrent considerations, and will support each other if both be legal and binding; Cro. Eliz. 543; 6 B. & C. 255; 3 B. & Ad. 703; 3 E. L. & Eq. 420; 12 How. 126; 8 Miss. 508; 17 Me. 372; 4 Ind. 257; 4 Jones, N. C. 527; 7 Ohio St. 270; 3 Humphr. 19; 1 Caines 45; 1 Murph. 287; 13 Ill. 140; 8 Mo. 574; 83 Tex. 277; 157 Mass. 294; 75 Hun 140. Yet the promise of an infant is a consideration for the promise of an adult. The infant may avoid his contract, but the adult cannot; 9 Metc. 519; 7 Watts 412; 5 Cow. 475; 1 D. Chipm. 252; 1 A. K. Marsh. 76; 2 Bail. 497; 3 Maule & S. 205.

Marriage is now settled to be a *valuable* consideration, though it is not convertible into money or pecuniarily valuable; 3 Cow. 537; 11 Leigh 136; 7 Pet. 348; 6 Dana 89; 22 Me. 374; 2 D. F. & J. 566; 39 Ill. App. 145; 4 Wash. St. 199; 2 Yeates 109; 74 Ga. 669.

Subscriptions to take shares in a chartered company are said to rest upon sufficient consideration; for the company is obliged to give the subscriber his shares, and he must pay for them; Pars. Contr. 377; 16 Mass. 94; 8 *id.* 138; 21 N. H. 247; 34 Me. 360; 15 Barb. 249; 5 Ala. N. S. 787; 22 Me. 84; 9 Vt. 289.

On the subject of voluntary subscriptions for charitable purposes there is much confusion among the authorities; 6 Metc. 310. See SUBSCRIPTION.

Illegal considerations can be no foundation for a contract. Violations of morality, decency, and policy are in contravention of common law: as, contracts to commit, conceal, or compound a crime. So, a contract for *future* illicit intercourse, or in fraud of a third party, will not be enforced. *Ex turpi contractu non oritur actio.* But the act in question is not always a criterion; e. g. as to immoral considerations that which the law considers is whether the promise has a tendency to produce immoral results; hence while a promise of future illicit cohabitation is an illegal consideration; L. R. 16 Eq. 275; 54 Cal. 146; 11 Pa. 316; Harriman, Cont. 114; but a promise founded upon past illicit cohabitation is not illegal; 1 Johns. Ch. 329; but simply voluntary and governed by the same rules as other past executed considerations; Poll. Cont. 262. The illegality created by statute exists when the statute either expressly prohibits a particular thing, or affixes a penalty which implies prohibition, or implies such prohibition from its object and nature; 1 Ball & B. 360; 10 Ad. & E. 815; 2 E. L. & Eq. 113; 2 M. & G. 167; 6 Dana 91; 3 Bibb 500; 9 Vt. 23; 21 *id.* 184; 11 Wheat. 258; 22 Me. 488; 2 Miss. 18; 2 Ind. 392; 14 Mass. 322; 4 S. & R. 159; 15 Pa. 452; 4 Halst. 352; 2 Sandf. 186; 4 Humphr. 199; 3 McLean 214; 14 N. H. 294, 435; 5 Rich. 47; 3 Brev. 54; 145 U. S. 421. If any part of the consideration is void as against the law, it is void *in toto;* 11 Vt. 592; 84 Ga. 606; see 15 R. I. 261; 26 Vt. 184; 20 Ohio St. 431, but *contra*, if the promise be divisible and apportionable to any part of the consideration, the promise so far as not attributable to the illegal consideration might be valid; Leake, Contr. 631; 2 M. & G. 167.

A contract founded upon an impossible consideration is void. *Lex neminem cogit ad vana aut impossibilia;* 5 Viner, Abr. 110, 111, *Condition* (C) *a*, (D) *a*; 1 Rolle, Abr. 419; Co. Litt. 206 *a*; 2 B. & C. 474; Leake, Contr. 719. But this impossibility must be a natural or physical impossibility; 3 B. & P. 296, n.; 7 Ad. & E. 798; 1 Pet. C. C. 91, 221; 5 Taunt. 249; 2 Moore & S. 89; 9 Bingh. 68; but it may be otherwise when the consideration is valid at the time the contract was formed, but afterwards became impossible; Leake, Contr. 719.

An executory consideration which has totally failed will not support a contract when the performance of the consideration forms a condition precedent to the performance of the promise; Add. Contr. 126; 7 C. & P. 108; 2 C. B. 548; 3 Johns. 458; 7 N. Y. 369; 1 Vt. 166; 7 Mass. 14; 13 *id.* 216; 23 Ala. N. S. 320; 1 Const. S. C. 467; 2 Day 437; 2 Root 258; 4 Conn. 428; 1 N. &

M'C. 210; 1 Ov. 438; 3 Call 373; 26 Me. 217; 5 Humphr. 337, 496; 3 Pick. 83; 6 Cra. 53; 4 Dev. & B. 212; 15 N. H. 114; 3 Ind. 289; Dudl. 161.

Sometimes when the consideration partially fails, the appropriate part of the agreement may be apportioned to what remains, if the contract is capable of being severed; 4 Ad. & E. 605; 1 M. & R. 218; 8 M. & W. 870; 2 Cro. & M. 48, 214; 14 Pick. 198; 28 N. H. 290; 2 W. & S. 235; L. R. 10 Q. B. 491; 1 Q. B. Div. 679; 26 Minn. 288; 26 Me. 217.

A past consideration will not generally be sufficient to support a contract. It is something done before the obligor makes his promise, and, therefore, cannot be a foundation for that promise, unless it has been executed at the request (express or implied) of the promisor. Such a request plainly implies a promise of fair and reasonable compensation; 6 M. & G. 153; L. R. 8 Ch. 888; *id.* 5 C. P. 65; 2 Ill. 113; 14 Johns. 378; 22 Pick. 393; 9 N. H. 195; 7 Me. 76, 118; 27 *id.* 106; 7 Johns. 87; 2 Conn. 404; 1 Sm. Lead. Cas., note to Lampleigh *v.* Braithwaite. But a pre-existing obligation will support a promise to perform that obligation which the law, in the case of a debt, will imply; Harriman, Contr. 83; 5 M. & W. 541; but a past consideration which did not raise an obligation at the time it was furnished, will support no promise whatever; 3 Q. B. 234; Harriman, Contr. 83; where there has been a request for services, a subsequent promise to pay a definite sum for them is evidence of the actual value of the services; *id.*

As to time, considerations may be of the past, present, or future. Those which are present or future will support a contract not void for other reasons; Story, Contr. 71. When the consideration is to do a thing hereafter, and the promise has been accepted, and a promise in return founded upon it, the latter promise rests upon sufficient foundation, and is obligatory; 3 Md. 67; 17 Me. 303; 24 Wend. 285; 17 Pick. 407; 1 Spear 368.

The adequacy of the consideration is generally immaterial; Add. Contr. 11; L. R. 5 Q. B. 87; s. c. 43 L. J. Q. B. 35; 8 A. & E. 745; 6 *id.* 438; 11 *id.* 983; L. R. 7 Ex. 235; 5 C. B. N. S. 265; 24 L. J. C. P. 271; 16 East 372; 5 W. & S. 476; 5 Rawle 69; excepting formerly in England before 31 & 32 Vict. c. 4, in the case of the sale of a reversionary interest or where the inadequacy of the consideration is so gross as of itself to prove fraud or imposition; 48 Ohio St. 562. There is no case where mere inadequacy of price, independent of other circumstances has been held sufficient to set aside a contract between parties standing on equal ground and dealing with each other without imposition or oppression; 2 Watts 104; 75 Mo. 681; 68 Ind. 405; 85 *id.* 294; 57 Vt. 227; 42 N. Y. 369. The adequacy of the consideration does not affect the contract; 2 How. 426; but the consideration must be real and not merely colorable; one cent has been held not to be a sufficient consideration for a promise to pay $700; 17 Ind. 29; and $1 has been held insufficient to support a promise to pay $1000; 7 R. I. 470; a dollar would be a sufficient consideration for any promise except one to pay a larger sum of money absolutely; 2 How. 426.

See note to Chesterfield *v.* Jannsen in 1 W. & T. Lead. Cas.; CONTRACT.

CONSIDERATUM EST PER CURIAM (Lat. it is considered by the court). A formula used in giving judgments.

A judgment is the decision or sentence of the law, given by a court of justice, as the result of proceedings instituted therein for the redress of an injury. The language of the judgment is not, therefore, that "it is decreed," or "resolved," by the court, but that "it is considered by the court," *consideratum est per curiam*, that the plaintiff recover his debt, etc.

In the early writers, *considerare*, *consideratio* always means the judgment of a court. This usage was preserved down to our time in the judgment of the common-law courts in the form "It is considered," which, as Sir Frederick Pollock says, has been "wantonly" altered to "It is adjudged," under the Judicature Acts. Poll. Cont. 675, Note F.

CONSIGN. To send goods to a factor or agent. See 4 Daly 320.

In Civil Law. To deposit in the custody of a third person a thing belonging to the debtor, for the benefit of the creditor, under the authority of a court of justice. Pothier, Obl. pt. 3, c. 1, art. 8.

The term to consign, or consignation, is derived from the Latin *consignare*, which signifies to seal; for it was formerly the practice to seal up the money thus received in a bag or box. Aso & M. Inst. b. 2, t. 11, c. 1, § 5.

Generally, the consignation is made with a public officer: it is very similar to our practice of paying money into court. See Burge, Suret.

CONSIGNATIO. See CONSIGN.

CONSIGNEE. One to whom a consignment is made.

When the goods consigned to him are his own, and they have been ordered to be sent, they are at his risk the moment the consignment is made according to his direction; and the persons employed in the transmission of the goods are his agents; 1 Liverm. Ag. 9. When the goods are not his own, if he accept the consignment, he is bound to pursue the instructions of the consignor: as, if the goods be consigned upon condition that the consignee will accept the consignor's bills, he is bound to accept them; *id.* 139; or if he is directed to insure, he must do so; *id.* 325.

It is usual in bills of lading to state that the goods are to be delivered to the consignee or his assigns, he or they paying freight: in such case the consignee or his assigns, by accepting the goods, by implication become bound to pay the freight; 29 N. Y. 436; 47 N. Y. 619; 3 Bingh. 383; 2 Pars. Contr. 640.

CONSIGNMENT. The goods or prop-

erty sent by means of a common carrier by one or more persons, called the consignors, in one place, to one or more persons, called the consignees, who are in another. The goods sent by one person to another, to be sold or disposed of by the latter for and on account of the former. The transmission of the goods.

CONSIGNOR. One who makes a consignment.

CONSILIARIUS (Lat. *consiliare*, to advise). **In Civil Law.** A counsellor, as distinguished from a pleader or advocate. An assistant judge. One who participates in the decisions. Du Cange.

CONSILIUM (called, also, *Dies Consilii*). A day appointed to hear the counsel of both parties. A case set down for argument.

It is commonly used for the day appointed for the argument of a demurrer, or errors assigned ; 1 Tidd, Pr. 438 ; 2 *id.* 684, 1122 ; 1 Sell. Pr. 336 ; 2 *id.* 385 ; 1 Archb. Pr. 191, 246.

CONSIMILI CASU (Lat. in like case). **In Practice.** A writ of entry, framed under the provisions of the statute Westminster 2d (13 Edw. I.), c. 24, which lay for the benefit of the reversioner, where a tenant by the curtesy aliened in fee or for life ; 3 Bla. Com., 4th Dublin ed. 183 n. ; Bac. Abr. Court of Chancery (A).

Many other new writs were framed under the provisions of this statute ; but this particular writ was known emphatically by the title here defined. The writ is now practically obsolete. See 3 Bla. Com. 51 ; CASE ; ASSUMPSIT.

CONSISTORY. In Ecclesiastical Law. An assembly of cardinals convoked by the pope.

The consistory is either public or secret. It is *public* when the pope receives princes or gives audience to ambassadors ; *secret* when he fills vacant sees, proceeds to the canonization of saints, or judges and settles certain contestations submitted to him.

CONSISTORY COURT. In English Law. The courts of diocesan bishops held in their several cathedrals (before the bishop's chancellor, or commissary, who is the judge) for the trial of all ecclesiastical causes arising within their respective dioceses, and also for granting probates and administrations. From the sentence of these courts an appeal lies to the archbishop of each province respectively. 2 Steph. Com. 230, 237 ; 3 *id.* 430, 431 ; 3 Bla. Com. 64 ; 1 Woodd. Lect. 145 ; Halifax, An. b. 3, c. 10, n. 12.

CONSOLATO DEL MARE. See CODE.

CONSOLIDATE. To unite into one, distinct things or parts of a thing. In a general sense, to unite into one mass or body, as to consolidate the forces of an army or various funds. In parliamentary usage, to consolidate two bills is to unite them into one. In law, to consolidate benefices, actions, or corporations is to combine them into one. See 45 Ia. 56.

CONSOLIDATED FUND. In England. (Usually abbreviated to *Consols.*) A fund for the payment of the public debt.

Formerly, when a loan was made, authorized by government, a particular part of the revenue was appropriated for the payment of the interest and of the principal. This was called the fund ; and every loan had its fund. In this manner the Aggregate fund originated in 1715 ; the South-Sea fund in 1717 ; the General fund in 1717 ; and the Sinking fund, into which the surplus of these flowed, which, although intended for the diminution of the debt, was applied to the necessities of the government. These four funds were consolidated into one in the year 1787 ; and this fund is the Consolidated fund.

It is wholly appropriated to the payment of certain specific charges and the interest on the sums originally lent the government by individuals, which yield an annual interest of three per cent. to the holders. The principal of the debt is to be returned only at the option of the government.

CONSOLIDATION. In Civil Law. The union of the usufruct with the estate out of which it issues, in the same person ; which happens when the usufructuary acquires the estate, or *vice versa*. In either case the usufruct is extinct. Lec. Elm. Dr. Rom. 424.

It may take place in two ways : first, by the usufructuary surrendering his right to the proprietor, which in the common law is called a surrender ; secondly, by the release of the proprietor of his rights to the usufructuary, which in our law is called a release.

In Ecclesiastical Law. The union of two or more benefices in one. Cowel.

In Practice. The union of two or more actions in the same declaration.

CONSOLIDATION OF CORPORATIONS. See MERGER.

CONSOLIDATION OF RAILROADS. See MERGER ; RAILROAD.

CONSOLIDATION RULE. In Practice. An order of the court requiring the plaintiff to join in one suit several causes of action against the same defendant which may be so joined consistently with the rules of pleading, but upon which he has brought distinct suits. 1 Dall. 147 ; 3 S. & R. 264 ; 2 Archb. Pr. 180. The matter is regulated by statute in many of the states.

An order of court, issued in some cases, restraining the plaintiff from proceeding to trial in more than one of several actions brought against different defendants but involving the same rights, and requiring the defendants also, in such actions, to abide the event of the suit which is tried. It is in reality in this latter case a mere stay of proceedings in all the cases but one.

It is often issued where separate suits are brought against several defendants founded upon a policy of insurance ; 2 Marsh. Ins. 701 ; see 4 Cow. 78, 85 ; 1 Johns. 29 ; or against several obligors in a bond ; 3 Chit. Pr. 645 ; 3 C. & P. 58. See 1 N. & M'C. 417, n. ; 1 Ala. 77 ; 5 Yerg. 297 ; 7 Mo. 477 ; 2 Tayl. 200 ; 4 Halst. 335 ; 3 S. & R. 262 ; 19 Wend. 63.

Where two actions arose upon the same transaction, one for trespass against defendant's property, another against his person, and might have been joined, the court

ordered them tried at the same time; 1 Dill. 351.

When two actions are consolidated, the original actions are discontinued and only the consolidated action remains; 30 Abb. N. C. 131; 3 Misc. Rep. 110.

The Federal courts are authorized to consolidate actions of a like nature, or relative to the same question, as they may deem reasonable; Rev. Stat. § 921.

CONSORTIUM (Lat. a union of lots or chances). A lawful marriage. Union of parties in an action.

Company; companionship.

It occurs in this last sense in the phrase *per quod consortium amisit* (by which he has lost the companionship), used when the plaintiff declares for any bodily injury done to his wife by a third person. 3 Bla. Com. 140.

CONSPIRACY (Lat. *con*, together, *spiro*, to breathe). **In Criminal Law.** A combination of two or more persons by some concerted action to accomplish some criminal or unlawful purpose, or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means. 4 Metc. 111; 4 Wend. 229; 15 N. H. 396; 5 H. & J. 317; 3 S. & R. 220; 12 Conn. 101; 11 Cl. & F. 155; 4 Mich. 414; 38 Ill. App. 168; 148 U. S. 197; Stimson, Lab. Law 195.

Lord Denman defined conspiracy as a combination for accomplishing an unlawful end, or a lawful end by unlawful means. 4 B. & Ad. 345.

The terms criminal or unlawful are used, because it is manifest that many acts are unlawful which are not punishable by indictment or other public prosecution, and yet there is no doubt that a combination by numbers to do them is an unlawful conspiracy and punishable by indictment; 12 Conn. 101; 15 N. H. 396; 1 Mich. 216; Dearsl. 337; 11 Q. B. 245; 9 Pa. 24; 8 Rich. 72; 1 Dev. 357.

Of this character was a conspiracy to cheat by false pretences without false tokens, when a cheat by false pretences only by a single person was not a punishable offence; 11 Q. B. 245. So a combination to destroy the reputation of an individual by verbal calumny of itself is not indictable; per Shaw, C. J., 4 Metc. 123. So a conspiracy to induce and persuade a young woman, by false representations, to leave the protection of her parent's house, with a view to facilitate her prostitution; 5 W. & S. 461; 2 Den. C. Cas. 79; and to procure an unmarried girl of seventeen to become a common prostitute; 4 F. & F. 160; to procure a woman to be married by a mock ceremony, whereby she was seduced; 48 Ia. 562. And see 5 Rand. 627; 6 Ala. N. S. 765. So a conspiracy, by false and fraudulent representations that a horse bought by one of the defendants from the prosecutor was unsound, to induce him to accept a less sum for the horse than the agreed price; 1 Dearsl. 337. A conspiracy by traders to dispose of their goods in contemplation of bankruptcy, with intent to defraud their creditors; 1 F. & F. 33.

The obtaining of goods on credit by an insolvent person without disclosing his insolvency, and without having any reasonable expectation of being able to pay for such goods in and by means of the fair and ordinary course of his business, is not of itself such an unlawful act as may be the subject of an action for conspiracy; though it would be otherwise, it seems, in the case of a purchase made without any expectation of payment; 1 Cush. 189. But the obtaining possession of goods under the pretence of paying cash for them on delivery, the buyer knowing that he has no funds to pay with, and appropriating the goods to his own use in fraud of the seller, is such a fraud or cheat as may be the subject of a charge of conspiracy; 1 Cush. 189.

A combination to go to a theatre to hiss an actor; 2 Campb. 369; 6 Term 628; to indict for the purpose of extorting money; 4 B. & C. 329; to charge a person with being the father of a bastard child; 1 Salk. 174; to coerce journeymen to demand a higher rate of wages; 6 Term 619; 14 Wend. 9; to charge a person with poisoning another; F. Moore 816; to affect the price of public stocks by false rumors; 3 M. & S. 67; to prevent competition at an auction; 6 C. & P. 239; to cheat by a fraudulent prospectus of a projected company and by false accounts; 11 Cox, Cr. Ca. 414; by false accounts between partners; L. R. 1 C. C. 274; by a mock auction; 11 Cox, Cr. Ca. 404; have each been held indictable.

Where the retail dealers of coal in a city form an association the main purpose of which is to fix prices below which it should not be retailed, whereby they prevent a dealer, not a member of the association, from obtaining coal from the wholesale dealers, they are guilty of conspiracy; 66 Hun 590; 139 N. Y. 251.

Strikes of laborers to raise wages or lockouts by employers are lawful; 10 Cox, Cr. Ca. 592; if without intimidation; 11 Cox, Cr. Ca. 325. The system of sending a committee to the neighborhood of each factory where the strike is on, for the purpose of reporting the number of workmen engaged in such factories and their addresses, is not necessarily unlawful; 28 Wkly. Law Bul. Ohio 32; workmen may peaceably persuade their fellow-workmen to leave their employer's service in order to compel an advance in wages; 17 N. Y. Supp. 264; and where they enter into a lawful combination to control by artificial means the supply of labor preparatory to a demand for advance in wages, a combination of the employers to resist such is lawful; 159 Pa. 420. See Stimson, Lab. L.; Cogley, Strikes; Carson's Wright, Crim. Conspiracies. See also COMBINATION, LABOR UNIONS. This subject is mostly regulated by statute in England. An *action* will lie for damages for conspiracy where journeymen tailors by concerted action return all their garments unfinished to their employer; 9 Neb. 390; and for the fraudulent use of legal proceedings to injure another; 76 N. Y. 247. A combination by two or more persons to induce others not to deal with or enter into con-

tracts with a particular individual, is actionable, if injury results and it is done for that purpose; [1893] 1 Q. B. 715; 52 N. J. L. 284. A combination to boycott is illegal and will be enjoined; 45 Fed. Rep. 135.

In order to render the offence complete, it is not necessary that any act should be done in pursuance of the unlawful agreement entered into between the parties, or that any one should have been defrauded or injured by it. The conspiracy is the gist of the crime; 9 Co. 55; 28 L. T. N. S. 75; 2 Mass. 337, 538; 3 S. & R. 220; 23 Pa. 555; 4 Wend. 259; 3 Zabr. 33; 3 Ala. 360; 5 Harr. & J. 317; 107 N. C. 822; 44 Fed. Rep. 896. But see 10 Vt. 353. Where persons enter on an unlawful purpose, with the intent to aid or encourage each other in carrying out their design, they are each criminally responsible for everything resulting from such purpose whether specifically contemplated or not; 97 Ala. 57; 142 U. S. 450.

By the laws of the United States (R. S. § 5334), a wilful and corrupt conspiracy to cast away, burn, or otherwise destroy any ship or vessel, with intent to injure any underwriter thereon, or the goods on board thereof, or any lender of money on such vessel on bottomry or respondentia, is made felony, and the offender punishable by fine not exceeding ten thousand dollars, and by imprisonment and confinement at hard labor not exceeding ten years.

Conspiracies to prevent witnesses from testifying, to impede the course of justice, to hinder citizens from voting, to prevent persons from holding office, to defraud the United States by obtaining approval of false claims, to levy war against the United States, to impede the enforcement of the laws, etc., etc., are made punishable by act of congress; U. S. R. S. Index, *Conspiracy*.

In the absence of damage, the simple act of conspiracy does not furnish ground for a civil action; 76 Md. 118.

After a conspiracy has come to an end, the admissions of one conspirator by way of narrative of past facts are not admissible in evidence against the others; 150 U. S. 93; 144 *id.* 263.

In a prosecution under U. S. R. S. § 5480, as amended, for a conspiracy to defraud by means of the postoffice, three matters of fact must be charged in the indictment and established by the evidence: 1. That the persons charged devised a scheme to defraud; 2. that they intended to effect this scheme by opening or intending to open correspondence with some other person through the postoffice establishment or by inciting such other person to open communication with them; 3. and that in carrying out such scheme such person must have either deposited a letter or packet in the postoffice, or taken or received one therefrom; 157 U. S. 187.

Where parties are on trial for conspiracy to stop the mails, contemporary telegrams from different parts of the country, announcing the stoppage of mail trains, are admissible in evidence against the defendants if brought home to them, and so, too, are acts and declarations of persons not parties to the record if it appears that they were made in carrying the conspiracy into effect; 159 U. S. 590.

A combination of persons not themselves employés, to procure the latter to strike to the injury of the employer's business, is held to be a criminal conspiracy giving also the right to an injunction and damages; 148 U. S. 197 (but see a criticism of this case, Stimson, Lab. Law 269); 106 Mass. 1; 107 *id.* 555; 147 *id.* 212; 62 Fed. Rep. 803; but the tendency in the American courts is not to treat such combinations as unlawful conspiracies; 63 Fed. Rep. 310; 38 Leg. Int. Pa. 412; 60 How. Pr. 168; but, where the evidence included facts showing intimidation, it is a criminal conspiracy; 34 Pitts. L. J. Pa. 313; and an injunction will be granted; 30 Atl. Rep. 261; S. C. 164 Pa. 449. In England the subject is regulated by statute providing that no agreement or combination of two or more to do, or procure to be done, any act in contemplation or furtherance of a trade dispute between employer and workmen shall be indictable as a conspiracy, if such act would not be criminal if committed by one; 38 & 39 Vict. c. 86. In the United States, the Maryland statute contains an exact copy of the English; in Montana, Minnesota and Oklahoma, the common law of conspiracy seems to be repealed, and in New York it is modified. For legislation on the subject and the course of decisions concerning it see Stimson, Lab. Law § 55.

Consult Russell, Crimes, Greaves ed.; Gabbett, Crim. Law; Bish. Crim. Law; Wright, Crim. Consp. See WRIT OF CONSPIRACY.

CONSPIRATORS. Persons guilty of a conspiracy.

CONSTABLE. An officer whose duty it is to keep the peace in the district which is assigned to him.

The most satisfactory derivation of the term and history of the origin of this office is that which deduces it from the French *comestable* (Lat. *comes stabuli*), who was an officer second only to the king. He might take charge of the army, wherever it was, if the king were not present, and had the general control of everything relating to military matters, as the marching troops, their encampment, provisioning, etc. Guyot, *Rép. Univ.*

The same extensive duties pertained to the constable of Scotland. Bell, Dict.

The duties of this officer in England seem to have been first fully defined by the stat. Westm. (13 Edw. I.); and question has been frequently made whether the office existed in England before that time. 1 Bla. Com. 356. It seems, however, to be pretty certain that the office in England is of Norman origin, being introduced by William, and that subsequently the duties of the Saxon tithing-men, borsholders, etc., were added to its other functions. See Cowel; Willc. Const.; 1 Bla. Com. 356; 1 Poll. & M. 542.

High constables were first ordained, according to Blackstone, by the statute of Westminster, though they were known as efficient public officers long before that time. 1 Sharsw. Bla. Com. 356. They are to be appointed for each franchise or hundred by the leet, or, in default of such

appointment, by the justices at quarter-sessions. Their first duty is that of keeping the king's peace. In addition, they are to serve warrants, return lists of jurors, and perform various other services enumerated in Coke, 4th Inst. 267; 3 Steph. Com. 47; Jacob, Law Dict. In some cities and towns in the United States there are officers called high constables, who are the principal police officers in their jurisdiction.

Petty constables are inferior officers in every town or parish, subordinate to the high constable. They perform the duties of headborough, tithing-man, or borsholder, and, in addition, their more modern duties appertaining to the keeping the peace within their town, village, or tithing.

In England, however, their duties have been much restricted by the act 5 & 6 Vict. c. 109, which deprives them of their power as conservators of the peace. 3 Steph. Com. 47.

In the United States, generally, petty constables only are retained, their duties being generally the same as those of constables in England prior to the 5 & 6 Vict. c. 109, including a limited judicial power as conservators of the peace, a ministerial power for the service of writs, etc., and some other duties not strictly referable to either of these heads. Their immunities and indemnities are proportioned to their powers, and are quite extensive. See 1 Sharsw. Bla. Com. 356, n. They are authorized to arrest without warrant on a reasonable suspicion of felony, for offences against the peace committed in their presence, and in various other cases: 1 Russ. Cr. 800; 1 Chit. Cr. Law 20; 4 Sharsw. Bla. Com. 292. See ARREST.

CONSTABLE OF A CASTLE. The warden or keeper of a castle; the castellain. Stat. Westm. 1, c. 7 (3 Edw. I.); Spelman, Gloss.

The constable of Dover Castle was also warden of the Cinque Ports. There was besides a constable of the Tower, as well as other constables of castles of less note. Cowel; Lambard, Const.

CONSTABLE OF ENGLAND (called, also, *Marshal*). His office consisted in the care of the common peace of the realm in deeds of arms and matters of war. Lambard, Const. 4.

He was to regulate all matters of chivalry, tournaments and feats of arms which were performed on horseback. 3 Steph. Com. 47. He held the court of chivalry, besides sitting in the *aula regis*. 4 Bla. Com. 92.

The office is disused in England, except on coronation-days and other such occasions of state, and was last held by Stafford, Duke of Buckingham, under Henry VIII. His title is Lord High Constable of England. 3 Steph. Com. 47; 1 Bla. Com. 355.

CONSTABLE OF SCOTLAND. An officer who was formerly entitled to command all the king's armies in the absence of the king, and to take cognizance of all crimes committed within four miles of the king's person or of parliament, the privy council, or any general convention of the estates of the kingdom. The office was hereditary in the family of Errol, and was abolished by the 20 Geo. III. c. 43. Bell, Dict.; Erskine, Inst. 1. 3. 37.

CONSTABLE OF THE EXCHEQUER. An officer spoken of in the 51 Hen. III. stat. 5, cited by Cowel.

CONSTABLEWICK. The territorial jurisdiction of a constable. 5 Nev. & M. 261.

CONSTABULARIUS (Lat.). An officer of horse; an officer having charge of foot or horse; a naval commander; an officer having charge of military affairs generally. Spelman, Gloss.

The titles were very numerous, all derived, however, from *comes-stabuli*, and the duties were quite similar in all the countries where the civil law prevailed. His powers were second only to those of the king in all matters relating to the armies of the kingdom.

In England his power was early diminished and restricted to those duties which related to the preservation of the king's peace. The office is now abolished in England, except as a matter of ceremony, and in France. Guyot, *Rép. Univ.*; Cowel.

CONSTAT (Lat. it appears). A certificate by an officer that certain matters therein stated appear of record. See 1 Hayw. 410.

An exemplification under the great seal of the enrolment of letters patent. Co. Litt. 225.

A certificate which the clerk of the pipe and auditors of the exchequer make at the request of any person who intends to plead or move in the court for the discharge of anything; and the effect of it is, the certifying what *constat* (appears) upon record touching the matter in question.

CONSTAT D'HUISSIER. In French Law. An affidavit made by a *huissier* setting forth the appearance, form, quality, color, etc., of any article upon which a suit depends. Arg. Fr. Merc. L. 554; Black, L. Dict.

CONSTATING INSTRUMENTS. The term is used to signify the documents or collection of documents which fix the constitution or charter of a corporation. Brice, *Ultra Vires* 34; 37 N. J. Eq. 363.

CONSTITUENT (Lat. *constituo*, to appoint). He who gives authority to another to act for him. The constituent is bound by the acts of his attorney, and the attorney is responsible to his constituent.

CONSTITUERE. In Old English Law. To establish; to appoint; to ordain. Used in letters of attorney, and translated by constitute. Applied generally, also, to denote appointment. Reg. Orig. 172; Du Cange.

CONSTITUTED AUTHORITIES. The officers properly appointed under the constitution for the government of the people. Those powers which the constitution of each people has established to govern them, to cause their rights to be respected, and to maintain those of each of its members.

They are called *constituted*, to distinguish them from the *constituting* authority which has created or organized them, or has delegated to an authority, which it has itself created, the right of establishing or regulating their movements.

CONSTITUTIO. In Civil Law. An establishment or settlement. Used of controversies settled by the parties without a trial. Calvinus, Lex.

A sum paid according to agreement. Du Cange.

An ordinance or decree having its force from the will of the emperor. Dig. 1. 4. 1, Cooper's notes.

In Old English Law. An ordinance or statute. A provision of a statute.

CONSTITUTION. The fundamental law of a state, directing the principles upon which the government is founded, and regulating the exercise of the sovereign powers, directing to what bodies or persons those powers shall be confided and the manner of their exercise.

An established form of government; a system of laws and customs.

Constitution, in the former law of the European continent, signified as much as decree,—a decree of importance, especially ecclesiastical decrees. The decrees of the Roman emperors referring to the *jus circa sacra*, contained in the code of Justinian, have been repeatedly collected and called the Constitutions. The famous bull *Unigenitus* was usually called in France the Constitution. Comprehensive laws or decrees have been called constitutions; thus, the *Constitutio Criminalis Carolina*, which is the penal code decreed by Charles V. for Germany, the Constitutions of Clarendon (*q. v.*). In political law the word constitution came to be used more and more for the fundamentals of a government,—the laws and usages which give it its characteristic feature. We find, thus, former English writers speak of the constitution of the Turkish empire. These fundamental laws and customs appeared to our race especially important where they limited the power and action of the different branches of government; and it came thus to pass that by constitution was meant especially the fundamental law of a state in which the citizen enjoys a high degree of civil liberty; and, as it is equally necessary to guard against the power of the executive in monarchies, a period arrived—namely, the first half of the present century—when in Europe, and especially on the continent, the term constitutional government came to be used in contradistinction to absolutism.

We now mean by the term constitution, in common parlance, the fundamental law of a free country, which characterizes the organism of the country and secures the rights of the citizen and determines his main duties as a freeman. Sometimes, indeed, the word constitution has been used in recent times for what otherwise is generally called an organic law. Napoleon I. styled himself Emperor of the French by the Grace of God and the Constitutions of the Empire.

Constitutions were generally divided into written and non-written constitutions, analogous to *leges scriptæ* and *non scriptæ*. These terms do not indicate the distinguishing principle; Lieber, therefore, divides political constitutions into accumulated or cumulative constitutions and enacted constitutions. The constitution of ancient Rome and that of England belong to the first class. The latter consists of the customs, statutes, common laws, and decisions of fundamental importance. The Reform act is considered by the English a portion of the constitution as much as the trial by jury or the representative system, which have never been enacted, but correspond to what Cicero calls *leges natæ*. Our constitutions are enacted; that is to say, they were, on a certain day and by a certain authority, enacted as a fundamental law of the body politic. In many cases enacted constitutions cannot be dispensed with, and they have certain advantages which cumulative constitutions must forego; while the latter have some advantages which the former cannot obtain. It has been thought, in many periods, by modern nations, that enacted constitutions and statutory law alone are firm guarantees of rights and liberties. This error has been exposed in Lieber's Civil Liberty. Nor can enacted constitutions dispense with the "grown law" (*lex nata*). For the meaning of much that an enacted constitution establishes can only be found by the grown law on which it is founded, just as the British Bill of Rights (an enacted portion of the English constitution) rests on the common law.

Enacted constitutions may be either *octroyed*, that is, granted by the presumed full authority of the grantor, the monarch; or they may be enacted by a sovereign people prescribing high rules of action and fundamental laws for its political society, such as ours is; or they may rest on contracts between contracting parties,—for instance, between the people and a dynasty, or between several states. We cannot enter here into the interesting inquiry concerning the points on which all modern constitutions agree, and regarding which they differ,—one of the most instructive inquiries for the publicist and jurist. See Hallam's Constitutional History of England; Hare; Miller; Rawle; Story on the Constitution; Sheppard's Constitutional Text-Book; Elliot's Debates on the Constitution, etc.; Lieber's article (Constitution), in the Encyclopædia Americana; Cooley, Const. Lim.; Bryce, Am. Com.; Von Holst, Hist. U. S.

For the constitutions of the several states, including those in force and the previous ones, see Charters and Constitutions, published under authority of Congress in 1878.

Constitution, Self-Executing Provisions. A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced, and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law. Cooley, Const. Lim. 99.

"The question in every case is whether the language of a constitutional provision is addressed to the courts or the legislature. . . . If the nature and extent of the right conferred and of the liability imposed is fixed by the provision itself, so that they can be determined by the examination and construction of its own terms, and there is no language used indicating that the subject is referred to the legislature for action, then the provision should be construed as self-executing, and its language as addressed to the courts." 48 Minn. 150.

"But it must remain entirely clear that where a state constitution declares in clear language that the members of corporations shall be individually liable for their debts to a defined extent, it cannot be held that supplementary legislation is required to execute this provision, and hence that the legislature may leave it forever dormant and inoperative merely because the framers of the constitution did not go on and prescribe the remedy which should be pursued for enforcing it." Thomp. Corp. § 3004.

See 3 Fed. Rep. 739; 80 Hun 14; 77 Wis. 104; 15 Pet. 449; 104 Pa. 150; 148 *id.* 317.

But it has been held that a constitutional provision that "dues from corporations shall be secured by individual liability of the stockholders to an additional amount

equal to the stock owned by such stockholder, and such other means as shall be provided by law," is not self-executing and is inoperative until supplemented by statute; 42 N. E. Rep. (N. Y.) 419.

CONSTITUTION OF THE UNITED STATES OF AMERICA. The supreme law of the United States.

It was framed by a convention of delegates from all of the original thirteen states (except Rhode Island), which assembled at Philadelphia on the 14th of May, 1787. On September 17, 1787, by the unanimous consent of the states present, a form of constitution was agreed upon, and on September 28th was submitted to the congress of the confederation, with recommendations as to the method of its adoption by the states. In accordance with these recommendations, it was transmitted by the congress to the several state legislatures, in order to be submitted to conventions of delegates chosen in each state by the people thereof. The several states accordingly called conventions, which ratified the constitution upon the following dates: Delaware, December 7, 1787; Pennsylvania, December 12, 1787; New Jersey, December 18, 1787; Georgia, January 2, 1788; Connecticut, January 9, 1788; Massachusetts, February 6, 1788; Maryland, April 28, 1788; South Carolina, May 23, 1788; New Hampshire, June 21, 1788; Virginia, June 26, 1788; New York, July 26, 1788; North Carolina, November 21, 1789; Rhode Island, May 29, 1790.

Under the terms of the constitution (art. vii.), its ratification by nine states was sufficient to establish it between the states so ratifying it. Accordingly, when, on July 2, 1788, the ratification by the ninth state was read to congress, a committee was appointed to prepare an act for putting the constitution into effect; and on September 13, 1788—in accordance with the recommendations made by the convention in reporting the constitution—congress appointed days for choosing electors, etc., and resolved that the first Wednesday in March then next (March 4, 1789) should be the time, and the then seat of congress (New York) the place, for commencing government under the new constitution. Proceedings were had in accordance with these directions, and on March 4, 1789, congress met, but, owing to the want of a quorum, the house did not organize until April 1st, nor the senate until April 6th. Washington took the oath of office on April 30th. The constitution became the law of the land on March 4, 1789. 5 Wheat. 420.

The preamble of the constitution declares that the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to themselves and their posterity, do ordain and establish this constitution for the United States of America.

The first article is divided into ten sections. By the *first* the legislative power is vested in congress. The *second* regulates the formation of the house of representatives, and declares who shall be electors. The *third* provides for the organization of the senate, and bestows on it the power to try impeachments. The *fourth* directs the time of meeting of congress, and who may regulate the times, places, and manner of holding elections for senators and representatives. The *fifth* determines the power of the respective houses. The *sixth* provides for a compensation to members of congress, and for their safety from arrests, and disqualifies them from holding certain offices. The *seventh* directs the manner of passing bills. The *eighth* defines the powers vested in congress. The *ninth* contains the following provisions: 1st. That the migration or importation of certain classes of persons shall not be prohibited prior to the year 1808. 2d. That the writ of *habeas corpus* shall not be suspended, except in particular cases. 3d. That no bill of attainder or *ex post facto* law shall be passed. 4th. The manner of levying taxes. 5th. The manner of drawing money out of the treasury. 6th. That no title of nobility shall be granted. 7th. That no officer shall receive a present from a foreign government. The *tenth* forbids the respective states to exercise certain powers there enumerated.

The second article is divided into four sections. The *first* vests the executive power in the president of the United States, and (as amended) provides for his election and that of the vice-president. The *second* section confers various powers on the president. The *third* defines his duties. The *fourth* provides for the impeachment of the president, vice-president, and all civil officers of the United States.

The third article contains three sections. The *first* vests the judicial power in sundry courts, provides for the tenure of office by the judges, and for their compensation. The *second* provides for the extent of the judicial power, vests in the supreme court original jurisdiction in certain cases, and directs the manner of trying crimes. The *third* defines treason, and vests in congress the power to declare its punishment.

The fourth article is composed of four sections. The *first* provides that state records, etc., shall have full faith and credit in other states. The *second* secures to citizens of each state all privileges and immunities of citizens in the several states, and the delivery of fugitives from justice or from labor. The *third* provides for the admission of new states, and the government of the territories. The *fourth* guarantees to every state in the Union a republican form of government, and protection from invasion or domestic violence.

The fifth article provides for amendments to the constitution.

The *sixth article* declares that the debts due under the confederation shall be valid against the United States; that the constitution and treaties made under its powers shall be the supreme law of the land; that public officers shall be required by oath or affirmation to support the constitution of the United States; and that no religious test shall be required as a qualification for office.

The *seventh article* directs what shall be a sufficient ratification of this constitution by the states.

In pursuance of the fifth article of the constitution, articles in addition to, and amendments of, the constitution, were proposed by congress, and ratified by the legislatures of the several states. These additional articles are to the following import (the first ten were proposed at the first session of the first congress, in accordance with the recommendations of various states in ratifying the constitution, and were adopted in 1791. The dates of the adoption of the subsequent amendments are given below):—

The *first* relates to religious freedom; the liberty of speech and of the press; and the right of the people to assemble and to petition for redress of grievances.

The *second* secures to the people the right to bear arms.

The *third* prohibits the quartering of soldiers except in the manner therein specified.

The *fourth* regulates the right of search, and the manner of arrest on criminal charges.

The *fifth* directs the manner of being held to answer for crimes, and provides for the security of the life, liberty, and property of the citizens.

The *sixth* secures to the accused the right to a fair trial by jury.

The *seventh* provides for a trial by jury in civil cases.

The *eighth* directs that excessive bail shall not be required nor excessive fines imposed; nor cruel and unusual punishments inflicted.

The *ninth* secures to the people the rights retained by them.

The *tenth* secures to the states respectively, or to the people, the rights they have not granted.

The *eleventh* (1798) limits the powers of the federal courts as to suits against one of the United States.

The *twelfth* (1804) provides for the mode of electing president and vice-president.

The *thirteenth* (1865) abolishes slavery and involuntary servitude, except as a punishment for crimes.

The *fourteenth* (1868) is composed of five sections. The first defines citizenship and limits the power of the states over citizens of the United States. The second regulates representation; the third disqualification for holding office. The fourth provides for the validity of the public debt, and prohibits the United States or any state from assuming certain debts. The fifth gives congress power to enforce the article.

The *fifteenth* (1870) prohibits the denial or abridgment of the elective franchise, on account of race, color, or previous condition of servitude, and gives congress power to enforce the article.

CONSTITUTIONAL. That which is

consonant to, and agrees with, the constitution.

Laws made in violation of the constitution are null and void, and it is now well established that it is the function of the courts so to declare them in any case coming before the court, which involves the question of their constitutionality. The presumption is always in favor of the constitutionality of a law, and the party alleging the opposite must clearly establish it. A part of a law may be unconstitutional, while there is no such objection to the remaining parts, and in this case all of the law stands, except that part which is unconstitutional. This power of the courts to declare a law unconstitutional can only exist where there is a written constitution. No such power is possessed by the English courts, and an act of parliament is absolutely conclusive and binds everybody when once its meaning is ascertained. But, where a written constitution exists, it is the expression of the will of the sovereign power, and no body which owes its existence to that constitution (as does the legislature) can violate this fundamental expression of the will of the people. It was originally doubted whether the courts possessed this power, even where a written constitution exists, but it is now established beyond doubt. The question may arise with regard to both state and United States laws considered with reference to the United States constitution, and with regard to state laws also as considered in reference to the state. No important question of law has ever been approached with more caution, examined and discussed with more deliberation and finally determined more conclusively, than that of the existence of this judicial power. It arose as early as 1792, on an act conferring powers upon the judges which were alleged to be not judicial, but a decision was avoided by repeal of the statute; see 2 Dall. 409; but the question arising in another case, the act was declared unconstitutional; see 13 How. 40, 52, n.; the question was again raised in 1798 and not decided: 3 Dall. 386; and later it was stated from the bench as the general sentiment of the bench and bar that the power existed; 4 Dall. 194. But in 1803 the question was directly raised in a famous case recently much discussed in legal periodical literature, and the power and duty of the court to declare an act unconstitutional were declared in an opinion by Marshall, C. J., in what Kent terms "an argument approaching to the precision and certainty of a mathematical demonstration;" 1 Kent 453; in that case the actual decision was against the jurisdiction, and therefore no law was declared unconstitutional, but the reasoning of the opinion is the basis of the rule afterwards applied and firmly settled; the question was next seriously raised and finally settled by the reasoning of Marshall, C. J., in 6 Wheat. 264; Marbury *v.* Madison, 1 Cra. 137; prior to this decision the question had been raised and decided in favor of the power of the courts in New Jersey, 4 Halst. 427, 440, 444; Virginia, 4 Call 1, 135; 2 Va. Cas. 20; Wythe 211; in South Carolina, 1 Bay 252; 1 Martin, N. C. 42; in Rhode Island, Pamph. J. B. Varnum, Providence, 1787; and it was raised in New York in a case argued by Hamilton; Hamilton's Works, vol. 5, 115; vol. 7, 197.

In 12 S. & R., Gibson, C. J., in a dissenting opinion, was of opinion that the right of the judiciary to declare a legislative act unconstitutional does not exist, unless expressly stated; but that it is expressly given by the clause in the federal constitution which provides that the constitution shall be the supreme law of the land, etc. The same judge in 2 Pa. 281 said to counsel that he had changed his opinion for two reasons: —the late convention of Pennsylvania by their silence sanctioned the pretensions of the court to deal freely with the acts of the legislature; and he was satisfied from experience of the necessity of the case.

The power has been exercised by the supreme court of the United States in the following cases:—2 Dall. 409; 13 How. 40, 52; 1 Cra. 137; 2 Wall. 561; 4 *id.* 333; 8 *id.* 603; 9 *id.* 41, 274; 11 *id.* 113; 13 *id.* 128; 17 *id.* 322; 92 U. S. 214; 95 *id.* 670; 100 *id.* 82; 103 *id.* 168; 106 *id.* 629; 109 *id.* 3; 116 *id.* 616; 27 *id.* 540; 158 *id.* 601, the last being the Income Tax cases in 1895. During the same period the power was exercised by that court with respect to state or territorial statutes in one hundred and eighty-two cases.

The discussion of the subject has been recently revived by an article on the Income Tax cases in the Am. L. Rev. for July—August, 1895, characterizing the exercise of the power in question as "without constitutional warrant" and "based only on the plausible sophistries of John Marshall, and another by the same writer on the case of Marbury *v.* Madison, characterizing the doctrine as an "unconstitutional usurpation of the lawmaking power by the federal courts;" 30 Am. L. Rev. 188. The first of these was followed by an article in the same periodical taking issue with it; *id.* 55; and one in 34 Am. L. Reg. & Rev. 796. In the last the subject is thoroughly reviewed from the earliest cases down to the Income Tax cases, and it contains much historical matter bearing upon the question not before collected. See also 7 How. L. Rev. 129; Am. L. Rev., March and April, 1885, 177; Coxe on Judicial Power and Unconstitutional Legislation.

In judging what a constitution means, it must be interpreted in the light and by the assistance of the common law; 117 Ind. 477.

Certain fundamental principles govern the courts in passing upon the validity of legislative acts under the constitution; among them are the following:—

It is not usual as a *matter of practice* for courts to pass upon constitutional questions excepting before a full bench; 8 Pet. 118.

It has been said that inferior courts will not pass upon these questions; 4 Mich. 291; but see, *contra*, Cooley, Const. Lim.

198, n.; 1 Kan. 116. The contrary rule would seem now to be well settled.

Courts will not draw into consideration constitutional questions collaterally, or unless the consideration is necessary to the determination of the very point in controversy; 9 Ind. 287; 50 Ala. 277; 24 Barb. 446; 5 Tex. App. 579; 20 Mo. 393; 19 Ohio St. 373. If a statute is valid on its face, the court will not look into evidence *aliunde* to determine whether it violates the constitution; 92 Cal. 605; but where it is plainly invalid for other reasons, courts will not pass on its constitutionality; 8 Ohio Cir. Ct. R. 25; 50 Ala. 276; 30 Mich. 201; 4 Barb. 56.

To justify a court in declaring an act unconstitutional, the case must be so clear that no reasonable doubt can be said to exist; 41 Mo. 63; 17 Abb. Pr. 45; 33 Ark. 17; 16 Pick. 95; 57 N. Y. 473; 68 *id.* 381; 52 Pa. 477; 44 Ga. 76; 48 Mo. 468; see 130 U. S. 632; 39 N. H. 304; 62 Ill. 268; and every intendment will be made in favor of the constitutionality of the law; 5 Colo. 455.

The courts cannot pronounce void an act within the general scope of legislative powers, merely because contrary to natural justice; 2 Rawle 74; 73 Pa. 370; 4 Nev. 178; 60 Ill. 86; 94 U. S. 113; 52 Miss. 53; 119 Ind. 23; nor because it violates fundamental principles of republican government, unless these principles are protected by the constitution; 5 Wall. 469; 56 N. H. 514; nor because it is supposed to conflict with the *spirit* of the constitution; 24 Wend. 220; 21 Ohio St. 14; Cooley, Const. Lim., 6th ed. 204. Any legislative act which does not encroach upon the powers vested in the other departments of the government must be enforced by the courts; 62 Ill. 260; 5 W. Va. 22; 6 Cra. 128.

In the discussion of this subject expressions have been used from time to time by courts and legal authors which tend to leave in the mind of the reader an impression that legislative acts have been set aside upon some other or higher ground than that of unconstitutionality. These expressions will be found on examination either to consist of *dicta* not only entirely *obiter*, but usually not justified even as *dicta* by the facts of the cases in which they occur, or to be qualified by a context usually omitted in citing them. A few of them will suffice as examples. Judge Cooley, in the preface to the second edition of his very learned and valuable work on constitutional limitations, says: "There are on all sides definite limitations which circumscribe the legislative authority, independent of the specific restraints which the people impose by their state constitutions." Again, in the work itself it is said that it is not necessary that the courts, before they can set aside a law as invalid must be able to find some *specific* inhibition which has been disregarded, or some *specific* command which has been disobeyed; Cooley, Const. Lim. 206. This language has been quoted and interpreted to sustain the idea sometimes hinted at rather than seriously and argumentatively advanced, that there is some vague sense of justice and right—some higher law, it might be termed—which may justify a court in holding that a legislative act is invalid, in the absence of an express or implied constitutional objection. And it has been considered that the same view is maintained by Judge Redfield in an article in 10 Am. L. Reg. N. S. 161. So in an early case it has been said that statutes against plain and obvious principles of common right and common reason are void; 1 Bay 98. So also Judge Story made some forcible observations respecting "fundamental maxims of free government," to disregard which no power "lurked under any general grant of legislative authority," 2 Pet. 627, 657, which have been referred to as supporting the view under consideration. Of the like character were the assertions of Hosmer, C. J., that he could not agree "with those judges who assert the omnipotence of the legislature in all cases when the constition has not interposed an explicit restraint;" 4 Conn. 209, 225; and the language of a New York court which declared that the vested *rights* of the inhabitants of the city of New York in certain public property rested "not merely upon the constitution, but upon the great principles of eternal justice which lie at the foundation of all free government;" 10 Barb. 223, 244. Commenting on these and similar statements, Mr. C. A. Kent, in an article in 11 Am. L. Reg. N. S. 734, says on this subject: "The judiciary of a state cannot declare a legislative act unconstitutional, unless it conflict, expressly or by implication, with some provision of the state or of the federal constitution." See 118 Ind. 426.

This is a concise and accurate statement of the law of the subject. A careful examination of these and other authorities relied upon for the purpose stated will make it apparent that there is no substantial basis for a doctrine which will permit a court to apply to a legislative act any test of validity other than that of its constitutionality. When there is doubt as to the construction of a law, courts may give to it one consonant with rather than opposed to principles of right and justice, and this was precisely the scope of the South Carolina case. In the New York case the great fundamental principles need not have been referred to by the court, for the reason that they were all protected by the constitution, and in the Connecticut case not only was no law held invalid, but the sole question decided was that an act declaring valid all marriages previously celebrated by a clergyman of any religious denomination according to its forms was constitutional. The note by Judge Redfield, referred to, is directed only to show that there are limitations to the legislative power, and that it does not embrace "judicial decrees or despotic orders or assessments such as a military conqueror might make," under the guise of taxation. But it will be found that the cases put by him, as well as those used by Judge Cooley, to illustrate the expression quoted from his work,

and indeed all of those which have given rise to the theory under consideration, are provided for in the American constitutions either by express prohibitions and declarations of rights, or by the distribution of the powers of government and the right of the judicial branch to determine finally whether a given act is an exercise of *legislative power*. The whole subject is thoroughly discussed by Judge Cooley in his Constitutional Limitations, 6th ed., and upon full consideration of the authorities he concludes that a court cannot "declare a statute unconstitutional and void, solely on the ground of unjust and oppressive provisions, or because is is supposed to violate the natural, social, or political rights of the citizen, unless it be shown that such injustice is prohibited or such rights guaranteed or protected by the constitution (p. 197); . . . that except when the constitution has imposed limits upon the legislative power, it must be considered as practically absolute, whether it operate according to natural justice or not in any particular case" (p. 201), nor because of "apparent injustice or impolicy," or because "they appear to the minds of the judges to violate fundamental principles of republican government, unless it shall be found that those principles are placed beyond legislative encroachment by the constitution" (p. 202). See also Potter, Dwar. Stats. 62.

In the consideration of these questions, the distinction between the federal and state constitutions must be borne in mind: "Congress can pass no laws but such as the constitution authorizes expressly or by clear implication; while the state legislature has jurisdiction of all subjects on which its legislation is not prohibited." Cooley, Const. Lim. 210; see 24 N. Y. 427; 52 Pa. 477; 148 U. S. 657. But it has been held that the decision of congress that certain claims upon the public treasury are founded upon moral and honorable obligations and upon principles of right and justice, and that public money be appropriated in payment of such claims is constitutional, and can rarely, if ever, be the subject of review by the judicial branch of the government; 163 U. S. 427.

No one can attack as unconstitutional an independent provision of a law, who has no interest in and is not affected by such provision; 51 N. W. Rep. (S. D.)1018; 35 N. E. Rep. (Ind.) 271; 86 Ky. 423; 48 Ala. 540; 51 Me. 449; 32 La. Ann. 726; 89 N. Y. 75.

The judiciary of the United States should not strike down a legislative enactment of a state, especially if it has direct connection with the social order, health and morals of its people, unless such legislation plainly and palpably violates some right granted or secured by the national constitution, or encroaches upon the authority delegated to the United States for the attainment of objects of national concern; 155 U. S. 461.

An act may be declared partly valid and partly void as unconstitutional; 24 Pick. 361; 2 Pet. 526; 41 Md. 446; 92 Mich. 377; 45 Fed. Rep. 175; 143 U. S. 649; 95 *id.* 80; 103 *id.* 459; 116 *id.* 252; 129 N. Y. 643; 83 Pa. 273; 75 N. C. 509.

An act adjudged to be unconstitutional is as if it had never been enacted; 5 Ind. 348; 50 *id.* 341; 34 Mich. 170; 6 McLean 142; 54 N. Y. 528; 118 U. S. 425; 114 *id.* 270; though it was held in 56 Pa. 436, that an officer acting under an unconstitutional law was a *de facto* officer. An unconstitutional law must be deemed to have the force of law so far as to protect an officer acting under it, until it is declared void; 34 Tex. 335, but see 3 McLean 107; 114 U. S. 288. If a decision adjudging a statute unconstitutional is afterwards overruled, the statute is considered to have been in force during the whole period since its enactment; 46 Ind. 86; but see 33 Pa. 495; 5 Phila. 180; 9 Am. L. Rev. 402. An unconstitutional act can under no circumstances be validated by the legislature; 30 S. C. 579.

See 11 Am. L. Reg. N. S. 730; 9 *id.* 585.

As to the constitutionality of various classes of statutes, see the several titles of constitutional law, including:—Arms; Bonds; Bridges; Civil Rights; Commerce; Due Process of Law; Eminent Domain; Ex Post Facto Laws; Executive Power; Extradition; Federal Question; Foreign Judgments; Full Faith and Credit; Habeas Corpus; Impairing Obligation of Contracts; Interstate Commerce; Judicial Power; Judiciary; Liquor Laws; Original Packages; Personal Liberty; Police Power; Privileges and Immunities; Retroactive Laws; Special Legislation; Statutes; Taxation; Title; U. S. Courts.

CONSTITUTIONAL CONVENTION. A convention summoned by the legislature to draw up a new, or amend an old constitution. It is ancillary and subservient to the fundamental law, not hostile and paramount thereto. Jameson, Const. Conv. § 11. It is bound by the act creating it; 75 Pa. 59. See Jameson, Const. Conv. §§ 376–418. The result of its labors, when adopted, must be submitted to a vote of the people, before it can become effective; Jameson, § 479 *et seq.* *Contra*, if the legislature does not so provide in the act calling the convention; 42 Mo. 119; 69 Miss. 898; in such case it need not be submitted to vote; 11 So. Rep. (Miss.) 472.

For a complete list of Constitutional conventions held in the United States, to 1876, see Jameson, Const. Conv. Appendix B, and see the work generally for a full discussion of the interesting questions which have arisen respecting the powers and duties of such bodies. See State.

CONSTITUTIONS OF CLARENDON. See Clarendon.

CONSTITUTIONS OF THE FOREST. See Forest Laws; Charta de Foresta.

CONSTITUTOR. In Civil Law.

He who promised by a simple pact to pay the debt of another; and this is always a principal obligation. Inst. 4. 6. 9.

CONSTITUTUM (Lat.). An agreement to pay a subsisting debt which exists without any stipulation, whether of the promisor or another party. It differs from a stipulation in that it must be for an existing debt. Du Cange.

A day appointed for any purpose. A form of appeal. Calvinus, Lex.

CONSTRAINT. In Scotch Law. Duress.

It is a general rule, that when one is compelled into a contract there is no effectual consent, though, ostensibly, there is the form of it. In such case the contract will be declared void. The constraint requisite thus to annul a contract must be a *vis aut metus qui cadet in constantem virum* (such as would shake a man of firmness and resolution); Erskine, Inst. 3. 1. 16; 4. 1. 26; 1 Bell, Com. b. 3, pt. 1, c. 1, s. 1, art. 1, page 295.

CONSTRAINT. The word constraint is equivalent to the word restraint. 2 Tenn. Ch. 433.

CONSTRUCTION (Lat. *construere*, to put together).

In Practice. Determining the meaning and application as to the case in question of the provisions of a constitution, statute, will, or other instrument, or of an oral agreement.

Drawing conclusions respecting subjects that lie beyond the direct expression of the term. Lieber, Leg. & Pol. Herm. 20.

Construction and interpretation are generally used by writers on legal subjects, and by the courts, as synonymous, sometimes one term being employed and sometimes the other. Lieber, in his Legal and Political Hermeneutics, distinguishes between the two, considering the province of interpretation as limited to the written text, while construction goes beyond, and includes cases where texts interpreted and to be construed are to be reconciled with rules of law or with compacts or constitutions of superior authority, or where we reason from the aim or object of an instrument or determine its application to cases unprovided for; C. 1, § 8; c. 3, § 2; c. 4 c. 5. This distinction needs no higher authority for its accuracy; but it is convenient to adopt the common usage, and consider some common rules and examples on these subjects, without attempting to distinguish exactly cases of construction from those of interpretation.

Legal rules of construction so called, suggest natural methods of finding and weighing evidence and ascertaining the fact of intention, but do not determine the weight which the evidence has in mind, and do not establish a conclusion at variance with that reached by a due consideration of all the competent proof; 58 N. H. 530, 592.

A *strict* construction is one which limits the application of the provisions of the instrument or agreement to cases clearly described by the words used. It is called, also, literal.

A *liberal* construction is one by which the letter is enlarged or restrained so as more effectually to accomplish the end in view. It is called, also, equitable.

The terms *strict* and *liberal* are applied mainly in the construction of statutes; and the question of strictness or liberality is considered always with reference to the statute itself, according to whether its application is confined to those cases clearly within the legitimate import of the words used, or is extended beyond though not in violation of (*ultra sed non contra*) the strict letter. In contracts, a strict construction as to one party would be liberal as to the other.

One leading principle of construction is to carry out the intention of the authors of or parties to the instrument or agreement, so far as it can be done without infringing upon any law of superior binding force.

In regard to cases where this intention is clearly expressed, there is little room for variety of construction; and it is mainly in cases where the intention is indistinctly disclosed, though fairly presumed to exist in the minds of the parties, that any liberty of construction exists.

Words, if of common use, are to be taken in their natural, plain, obvious, and ordinary significations; but if technical words are used, they are to be taken in a technical sense, unless a contrary intention clearly appear in either case, from the context; 9 Wheat. 188; 32 Miss. 678; 49 N. Y. 281; 54 Cal. 111.

All instruments and agreements are to be so construed as to give effect to the whole or as large a portion as possible of the instrument or agreement; and when a court of law is construing an instrument, whether a public law or a private contract, it is legitimate if two constructions are fairly possible to adopt that one which equity would favor; 160 U. S. 77.

Statutes, if penal, are to be strictly, and if remedial, liberally construed; Bish. Writ. L. 193; Dwarris, Stat. 246; but the rule that penal statutes are to be strictly construed is not violated by allowing their words to have full meaning, or even the more extended of two meanings, where such construction best harmonizes with the context, and most fully promotes the policy and objects of the legislature; 6 Wall. 386. The apparent object of the legislature is to be sought for as disclosed by the act itself, the preamble in some cases, similar statutes relating to the same subject, the consideration of the mischiefs of the old law, and perhaps some other circumstances; Wilberforce, Stat. Law 99.

If the words of a constitutional provision convey a definite meaning which involves no absurdity and no contradiction of other parts of the instrument, then that meaning apparent on the face of the instrument must be accepted; 130 U. S. 662.

All statutes are to be construed with reference to the provisions of the common law, and provisions in derogation of the common law are held strictly; 2 Black 358; 117 Ind. 477; 4 Mich. 322; 5 W. Va. 1.

In the construction of a statute a relative word or clause has reference to its first antecedent only, unless so to restrict its application will manifestly do violence to the plain intent of the language; 17 Co. Ct. Pa. 11.

In construing statutes of the various states or of foreign countries, the supreme court of the United States adopts the con-

struction put upon them by the courts of the state or country by whose legislature the statute was enacted; 92 U. S. 289. See 151 U. S. 556; 98 *id.* 359; 24 Fed. Rep. 197; but this does not necessarily include subsequent variations of construction by such courts; 5 Pet. 280. If different interpretations are given in different states to a similar law, that law, in effect, becomes by the interpretations, so far as it is a rule for action by this court, a different law in one state from what it is in the other; 4 Wall. 196. So also in state courts the decisions of the tribunals of other states interpreting legislative enactments are considered as if incorporated therein; 44 N. Y. Sup. Ct. 260. See UNITED STATES COURTS.

In construing a statute, if it be of doubtful import, the courts will adopt a long continued construction put upon it by the executive officers charged with its execution; 12 Wheat. 206; 120 U. S. 169; 127 U. S. 607; 41 Ga. 157; 24 Ill. 27; 16 Ohio 599; 33 Wis. 663; 65 Wis. 341; but such construction in order to be binding on the courts must be long-continued and unbroken; 137 U. S. 562. So, the journals of the legislature may be referred to if the meaning of a statute is doubtful or badly expressed; 23 Wall. 307; 70 Ind. 331; but not the statements of individual members; 3 Q. B. D. 707; 2 H. & C. 521; 108 U. S. 243; 20 Cal. 387; 10 Minn. 107; 18 N. J. Eq. 13; 113 Pa. 52.

In construing a tariff act, when it is claimed that the commercial use of a word differs from its ordinary significance, in order that the former may prevail over the latter it must appear that the commercial designation is the result of established usage which was definite, uniform, and general at the time of the passage of the act; 159 U. S. 418.

In contracts, words may be understood in a technical or peculiar sense when such meaning has been stamped upon them by the usage of the trade or place in which the contract occurs. When words are manifestly inconsistent with the declared purpose and object of the contract, they may be rejected; 2 Atk. 32. When words are omitted so as to defeat the effect of the contract, they will be supplied by the obvious sense and inference from the context. When words admit of two senses, that which gives effect to the design of the parties is preferred to that which destroys it; Add. Contr. 45; Cowp. 714.

If a contract when made was valid by the laws of the state, as then expounded by all departments of its government and administered in its courts of justice, its validity and obligation cannot be impaired (in the federal courts) by any subsequent act of the legislature of the state, or decision of its courts altering the construction of the law; 16 How. 432; 1 Wall. 175; 9 Am. L. Rev. 381.

Usages of the trade or place of making the contract are presumed to be incorporated, unless a contrary stipulation occurs. See LEX LOCI.

Numerous other rules for construction exist, for which reference may be had to the following authorities:—

As to the construction of statutes; 1 Kent 460; Bacon, Abr. *Statutes*, J; Dwarris, Statutes; Sedgwick, Stat. and Const. Law; Sutherland, Statutory Construction; Endlich, Interpretation of Statutes; Lieber, Legal and Polit. Hermeneutics; Cooley, Const. Lim.; Wilberforce, Stat. Law; Black, Interpretatior of Laws; Bishop, Written Law; STATUTE; INTERPRETATION.

As to the construction of contracts; Anson; Addison; Pollock; Leake; Hare; Comyns; Chitty; Parsons; Powell; Story; Harriman, Contracts; Keener, Quasi-contract; 2 Blackstone, Comm. 379; 1 Bell, Comm., 5th ed. 431; 4 Kent, Comm. 419; Vattel, b. 2, c. 17; Story, Const. §§ 593–456; Pothier, Obligations; Long, Story on Sales; CONTRACT. As to deeds, see that title.

As to the construction of wills; Jarman, Redfield, Schouler, Hawkins, Cassoday, Chaplin, Wigram, on Wills; 6 Cruise, Dig. 171; 2 Fonblanque, Eq. 309; Roper, Legacies; Washburn, Real Property; WILLS; DEVISE; LEGACY.

As to the construction of insurance policies, see Beach; Biddle; Bunyon; Cooke; May; Richards; Ostrander, Insurance; and title INSURANCE.

CONSTRUCTIVE. That which amounts in the view of the law to an act, although the act itself is not necessarily really performed. For words under this head, such as constructive fraud, etc., see the various titles FRAUD; NOTICE; TRUST; etc.

CONSUETUDINARIUS (Lat.). **In Old English Law.** A ritual or book containing the rites and forms of divine offices or the customs of abbeys and monasteries.

A record of the *consuetudines* (customs). Blount; Whishaw.

CONSUETUDINARY LAW. Customary or traditional law.

CONSUETUDINES FEUDORUM (Lat. feudal customs). A compilation of the law of feuds or fiefs in Lombardy, made A.D. 1170.

It is called, also, the Book of Fiefs, and is of great and generally received authority. The compilation is said to have been ordered by Frederic Barbarossa, Erskine, Inst. 2. 3. 5, and to have been made by two Milanese lawyers, Spelman, Gloss., but this is uncertain. It is commonly annexed to the *Corpus Juris Civilis*, and is easily accessible. See 3 Kent, Comm., 10th ed. 665, n.; Spelman, Gloss.

CONSUETUDO (Lat.). A custom; an established usage or practice. Co. Litt. 58. Tolls; duties; taxes. Co. Litt. 58 *b*.

This use of *consuetudo* is not correct: *custuma* is the proper word to denote duties, etc. 1 Shars. Bla. Com. 318, n. An action formerly lay for the recovery of customs due, which was commenced by a writ *de consuetudinibus et servitiis* (of customs and services). This is said by Blount to be "a writ of right close which lies against the tenant that deforceth the lord of the rent and services due him." Blount; Old Nat. Brev. 77; Fitzh. Nat. Brev. 151.

There were various customs: as, *consuetudo Anglicana* (custom of England), *consuetudo curiæ* (practice of a court), *consuetudo mercatorum* (custom of merchants). See CUSTOM.

CONSUL. A commercial agent appointed by a government to reside in a seaport or other town of a foreign country, and commissioned to watch over the commercial rights and privileges of the nation deputing him. The term includes consuls-general and vice-consuls. Rev. Stat. § 4130.

A vice-consul is one acting in the place of a consul.

Among the Romans, consuls were chief magistrates who were annually elected by the people, and were invested with powers and functions similar to those of kings. During the middle ages the term consul was sometimes applied to ordinary judges; and, in the Levant, maritime judges are yet called *consuls*. 1 Boulay Paty, Dr. Mar. tit. *Prél.* s. 2, p. 57. Officers with powers and duties corresponding to those of modern consuls were employed by the ancient Athenians, who had them stationed in commercial ports with which they traded. 3 St. John, Mann. and Cus. of Anc. Greece 283. They were appointed about the middle of the twelfth century by the maritime states of the Mediterranean; and their numbers have increased greatly with the extension of modern commerce.

As a general rule, consuls represent the subjects or citizens of their own nation not otherwise represented; Bee 209; 1 Mas. 14; 3 Wheat. 435; 6 *id.* 152; 10 *id.* 66. Their duties and privileges are now generally limited, defined, and secured by commercial treaties, or by the laws of the countries they represent. They are not strictly judicial officers; 3 Taunt. 102; and have no judicial powers except those which may be conferred by treaty and statutes. See 10 Stat. L. 909; 11 *id.* 723; Ware 337; 91 U. S. 13.

American consuls are nominated by the president to the senate, and by the senate confirmed or rejected. U. S. Const. art. 2, sec. 2. Upon the exercise of this power of appointment by the president, congress can place no limitation; 23 Ct. Cls. 443.

They have the power and are required to perform many duties in relation to the commerce of the United States and towards masters of ships, mariners, and other citizens of the United States. Among these are the authority to receive protests or declarations which captains, masters, crews, passengers, merchants, and others make relating to American commerce; they are required to administer on the estates of American citizens dying within their consular jurisdiction and leaving no legal representatives, when the laws of the country permit it; see 2 Curt. Eccl. 241; to take charge of and secure the effects of stranded American vessels in the absence of the master, owner, or consignee; to settle disputes between masters of vessels and the mariners; to provide for destitute seamen within their consulate, and send them to the United States at the public expense. See Rev. Stat. § 1674 *et seq.* Also to hear complaints of ill-treatment of seamen; 55 Fed. Rep. 80. The consuls are also authorized to make certificates of certain facts in certain cases, which receive faith and credit in the courts of the United States; 3 Sumn. 27. But these consular certificates are not to be received in evidence, unless they are given in the performance of a consular function; 2 Cra. 187; Paine 594; 2 Wash. C. C. 478; 1 Litt. 71; nor are they evidence, between persons not parties or privies to the transaction, of any fact, unless, either expressly or impliedly, made so by statute; 2 Sumn. 355; 1 Paine 594; 2 Crabbe 54.

Their rights are to be protected agreeably to the laws of nations, and of the treaties made between the United States and the nation to which they are sent. The act of 18th August, 1856, gives the president power to prescribe and alter from time to time their fees. But by acts passed at various times nearly all consuls now receive an annual salary, and only those not salaried are allowed to take fees for compensation; Rev. Stat. §§ 1690, 1730, 1745. The power to provide for compensation of diplomatic officers is vested in the legislative branch alone, and it may fix or limit the amount; 22 Ct. Cls. 59.

A consul is liable for negligence or omission to perform seasonably the duties imposed upon him, or for any malversation or abuse of power, to any injured person, for all damages occasioned thereby; and for all malversation and corrupt conduct in office a consul is liable to indictment.

Of foreign consuls. Before a consul can perform any duties in the United States, he must be recognized by the president of the United States, and have received his *exequatur*.

A consul is clothed only with authority for commercial purposes; and he has a right to interpose claims for the restitution of property belonging to the citizens or subjects of the country he represents; 1 Curt. 87; 1 Mas. 14; Bee 209; 6 Wheat. 152; 10 *id.* 66; see 2 Wall. Jr. 59; but he is not to be considered as a minister or diplomatic agent, intrusted by virtue of his office to represent his sovereign in negotiations with foreign states; 3 Wheat. 435.

Consuls are generally invested with special privileges by local laws and usages, or by international compacts; but by the laws of nations they are not entitled to the peculiar immunities of ambassadors. In civil and criminal cases they are subject to the local laws, in the same manner with other foreign residents owing a temporary allegiance to the state; 1 Op. Atty. Gen. 45, 302; 5 S. & R. 546; 3 M. & S. 284; 2 Dall. 297; Hall, Int. L. 289; Wicquefort, *De l'Ambassadeur*, liv. 1, § 5; Bynkershoek, cap. 10; Marten, *Droit des Gens*, liv. 4, c. 3, § 148. See 24 Q. B. Div. 368. In the United States, the act of September 24, 1789, s. 13 (R. S. § 687), gives to the supreme court original but not exclusive jurisdiction of all suits in which a consul or vice-consul shall be a party. See 1 Binn. 143; 2 Dall. 299; 2 N. & M'C. 217; 3 Pick. 80; 1 Green 107; 17 Johns. 10; 7 N. Y. 576.

His functions may be suspended at any time by the government to which he is sent, and his *exequatur* revoked. In general, a consul is not liable personally on a contract made in his official capacity on account of his government; 3 Dall. 384. A vice-con-

sul of a foreign nation who possesses an unrevoked *exequatur* issued by the President of the United States, must still be recognized by the courts as the accredited representative of his country and entitled to all its privileges, although the government which sent him has been overthrown and a revolutionary government established in its place; 48 Fed. Rep. 94.

See, generally, Kent; Abb. Shipp.; Pars. Marit. Law; Marten, on Consuls; Worden, on Consuls; Tuson, on Consuls; Azuni, Mar. Law, pt. 1, c. 4, art. 8, § 7; Story, Const. § 1654; Sergeant, Const. Law 225; 7 Opinions of Atty. Gen.

CONSULAR COURTS. Courts held by the consuls of one country within the territory of another, under treaty authority, for the settlement of civil cases between citizens of the country which they represent. They sometimes have also a criminal jurisdiction, subject in the case of certain countries to review by the home courts; U. S. Rev. Stat. § 4095. See Piggott, Extraterritoriality. The United States has such courts in China, Japan, Siam, Madagascar, Persia, Tripoli, Tunis, Morocco, and Muscat; see U. S. Rev. Stat. §§ 4083, 4125, 4126, 4127; and similar jurisdiction is provided for by law in any country of like character with which treaty relations may thereafter be established; *id.* § 4129. Such courts did exist in Egypt and Turkey, but were suspended pursuant to act of March 23, 1874, U. S. Rev. Stat. 1 Supp. 6, by proclamation of the President, March 27, 1876, accepting the jurisdiction of the tribunals established by those countries; 19 Stat. L. 652. The jurisdiction of the home courts over offences on the high seas is not exclusive of the jurisdiction of the consular court, if the offender is not taken to the United States; *In re* Ross, 140 U. S. 453. When a treaty gives to the consular courts exclusive jurisdiction of suits against subjects of its own country, and to the territorial courts similar jurisdiction over its countrymen, the consular court cannot entertain a cross suit, or set-off, as against a subject of that country, in a suit properly brought against a citizen of the nation which it represents; [1895] A. C. 646.

CONSULAR OFFICER. This term includes consuls-general, consuls, commercial agents, deputy-consuls, vice-consuls, vice-commercial agents, and consular agents. R. S. § 1674.

CONSULTATION. The name of a writ whereby a cause, being formerly removed by prohibition out of an inferior court into some of the king's courts in Westminster, is returned thither again; for, if the judges of the superior court, comparing the proceedings with the suggestion of the party, find the suggestion false or not proved, and that, therefore, the cause was wrongfully called from the inferior court, then, upon consultation and deliberation, they decree it to be returned, whereupon this writ issues. *Termes de la Ley;* 3 Bla. Com. 114.

In French Law. The opinion of counsel upon a point of law submitted to them.

CONSUMMATE. Complete; finished; entire.

A marriage is said to be consummate. A right of dower is *inchoate* when coverture and seisin concur, *consummate* upon the husband's death. 1 Washb. R. P. 250, 251. A tenancy by the curtesy is *initiate* upon the birth of issue, and consummate upon the death of the wife. 1 Washb. R. P. 140; 13 Conn. 83; 2 Me. 400; 2 Bla. Com. 128.

A contract is said to be consummated when everything to be done in relation to making it has been accomplished. It is frequently of great importance to know when a contract has been consummated, in order to ascertain the rights of the parties, particularly in the contract of sale. See DELIVERY, where the subject is more fully examined. It is also sometimes of consequence to ascertain where the consummation of the contract took place, in order to decide by what law it is to be governed. See CONFLICT OF LAWS; CONTRACT; LEX LOCI.

CONTAGIOUS DISORDERS. Diseases which are capable of being transmitted by mediate or immediate contact.

Persons sick of such disorders may remain in their own houses; 2 Barb. 104; but are indictable for exposing themselves in a public place endangering the public. See 4 M. & S. 73, 272. Nuisances which produce such diseases may be abated; 15 Wend. 397. See 4 M'Cord 472; 3 Hill, N.Y. 479; 25 Pa. 503; 48 Iowa 15; and a right of action may also be had for injury done to health; 26 Mo. App. 253; 108 Pa. 489. A system of quarantine laws established by a state is a rightful exercise of the police power for the protection of health, which is not forbidden by the constitution; 118 U. S. 455.

CONTANGO. In English Law. The commission received for carrying over or putting off the time of execution of a contract to deliver stocks or pay for them at a certain time. Wharton, Dict.; see Lewis, Stock Exchange.

CONTEK (L. Fr.). A contest, dispute, disturbance, opposition. Britt. c. 42.

CONTEMPLATION OF BANKRUPTCY. An intention or expectation of breaking up business or applying to be decreed a bankrupt. Crabbe 529; 5 B. & Ad. 289; 4 Bing. 20; 9 *id.* 349; 3 McLean 587.

Contemplation of a *state* of bankruptcy or a known insolvency and inability to carry on business, and a stoppage of business. Story, J., 5 Bost. L. Rep. 295, 299. See 3 Story 446.

Something more is meant by the phrase than the expectation of insolvency; it includes the making provision against the results of it; 13 How. 150; 8 Bosw. 194. See 1 Dill. 186; *id.* 203.

A conveyance or sale of property made in contemplation of bankruptcy is fraudulent and void; 2 Bla. Com. 285.

CONTEMPLATION OF INSOLVENCY. This term means something more than expectation of its occurrence; it must include provision against its results so far as the transferee is concerned, and that can only be where he is already a creditor and the object is to take his debt

out of the equal ratable distribution of the assets of the company when insolvent. 21 How. Pr. Rep. 409.

CONTEMPT. A wilful disregard or disobedience of a public authority.

By the constitution of the United States, each house of congress may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member. The same provision is substantially contained in the constitutions of the several states.

The power to make rules carries that of enforcing them, and to attach persons who violate them, and punish them for contempts; 1 Kent 236; 37 N. H. 450; 3 Wils. 188; 14 East 1. But see 4 Moore, P. C. 63; 11 *id.* 347. This power of punishing for contempts is confined to punishment during the session of the legislature, and cannot extend beyond it; 6 Wheat. 204, 230, 231; Rap. Contempt 2; and it seems this power cannot be exerted beyond imprisonment. And it is often regulated by statute; U. S. Rev. St. §§ 101–103. The arrest of the offending party is made by the sergeant-at-arms, acting by virtue of the speaker's warrant, both in England and the United States; 6 Wheat. 204; 10 Q. B. 359. The power of congress to punish for contempt must be found in some express grant in the constitution or be found necessary to carry into effect such powers as are there granted; 103 U. S. 169; 106 *id.* 220. See CONGRESS.

Courts of justice have an inherent power to punish all persons for contempt of their rules and orders, for disobedience of their process, and for disturbing them in their proceedings; Bac. Abr. *Courts* (E); Rolle, Abr. 219; 8 Co. 38 *b*; 11 *id.* 43 *b*; 22 Me. 550; 21 *id.* 550; 5 Ired. 199; 37 N. H. 450; 16 Ark. 384; 25 Ala. N. S. 81; 25 Miss. 883; 1 Woodb. & M. 401; 12 Am. Dec. 178; 29 Ohio 330; 128 U. S. 289; 23 Neb. 848; 7 Cra. 32; 63 N. C. 397; 64 Ill. 195; 65 Ind. 508. See 131 U. S. 267. A court may commit for a period reaching beyond the term at which the contempt is committed; 13 Md. 642. The punishment should not be by piecemeal, but must be entire and final; 49 N. J. Eq. 577.

Contempts of court are of two kinds: such as are committed in the presence of the court, and which interrupt its proceedings, which may be summarily punished by order of the presiding judge; and constructive contempts, arising from a refusal to comply with an order of court; 49 Me. 392. In the court of chancery the failure or refusal to perform an order or decree is a contempt, and the enforcement of such orders and decrees is by attachment. For an exhaustive discussion of the practice in such cases, see note to State *v.* Livingston, 4 Del. Ch. 265.

A prosecution for contempt of court in order to compel obedience to an order made in a chancery proceeding is a civil action; 140 Ill. 552.

As to proceedings to compel payment of alimony, see note, 24 L. R. A. 433.

The punishment is summary and generally immediate in contempts committed *in facie curiæ*, and no process or evidence is necessary; 47 Kan. 771; 2 L. R. H. L. 361; 43 Conn. 257; and a party in contempt cannot be heard except to purge himself; 87 N. Y. 262.

In some states, as in Pennsylvania, the power to punish for contempts is restricted to offences committed by the officers of the court, or in its presence, or in disobedience of its mandates, orders, or rules; but no one is guilty of a contempt for any publication made or act done out of court which is not in violation of such lawful rules or orders or in disobedience of its process. Similar provisions, limiting the power of the courts of the United States to punish for contempts, are incorporated in the act of March 2, 1831; Rev. St. § 725; 4 Sharsw. Cont. of Stor. U. S. Laws 2256. See Oswald's Case, 4 Lloyd's Debates 141 *et seq.* If a newspaper article is *per se* libellous, making a direct charge against court or jury, or admitting of but one reasonable construction and requiring no innuendo to apply its meaning to the court, then the publisher cannot escape by denying under oath that he intended the plain meaning which the language used conveys; 131 Ind. 599. The question of contempt depends upon the act and not the intention of the party; 22 W. R. 398; Taney 362; 3 Burr. 1329; 3 C. B. 745. A publication in a newspaper, read by the jurors and attendants of the court, which has a tendency to interfere with the unbiased administration of the laws in pending cases, may be adjudged a contempt; 45 La. Ann. 1250.

The power of inferior courts to punish for contempt is usually restricted to contempts committed in the presence of the court; 3 Steph. Com. 342, n. 9; L. R. 8 Q. B. 134. A justice of the peace cannot punish contempts, even committed before him, by summary proceedings; 26 Pa. 99.

It is said that it belongs exclusively to the court offended to judge of contempts and what amounts to them; 37 N. H. 450; 8 Oreg. 487; 26 Am. Rep. 752; 26 Pa. 9; 40 Ia. 207; and no other court or judge can or ought to undertake, in a collateral way, to question or review an adjudication of a contempt made by another competent jurisdiction; 14 East 1; 2 Bay 182; 1 Ill. 266; 1 J. J. Marsh. 575; 1 Blackf. 166; T. U. P. Charlt. 136; 14 Ark. 538, 544; 1 Ind. 161; 6 Johns. 337; 6 Wheat. 204; 8 Utah 20; 93 Cal. 139. But it has been repeatedly held that a court of superior jurisdiction may review the decision of one of inferior jurisdiction on a matter of contempt; 1 Grant, Cas. 453; 7 Cal. 181; 13 Gratt. 40; 15 B. Mon. 607; though not on *habeas corpus;* 14 Tex. 436; see 53 Cal. 204; 51 Miss. 50; 24 Am. Rep. 624; see 114 Ill. 147. It should be by direct order of the court; 5 Wis. 227. A proceeding for contempt is regarded as a distinct and independent suit; 22 E. L. & Eq. 150; 25 Vt. 680; 21 Conn. 185. See, generally, 1 Abb. Adm. 508; 5 Duer 629; 1 Dutch. 209; 16 Ill. 534; 1 Ind.

96; 8 Blackf. 574; 3 Tex. 360; 1 Greene 394; 18 Miss. 103; and irregularities in the proceedings are immaterial where the result is a sufficient purging of the contempt and a consequent discharge of the rule; 88 Ga. 78.

Though the same act constitute both a contempt and a crime, the contempt may be tried and punished by the court; U. S. *v.* Debs, 64 Fed. Rep. 724; affirmed by the supreme court, which held that while it was competent for the executive branch of the government to remove forcibly obstructions to the passage of interstate commerce or the carrying of the mails, it is equally competent to invoke the jurisdiction of the courts to remove or restrain them. Such jurisdiction being recognized from ancient times and indubitable authority, is not ousted by the fact that the obstructions are accompanied by or consist of acts in themselves violations of the criminal law, or by the fact that the injunction may be enforced by proceedings in contempt; as the penalty for violation of such an injuction is no substitute for criminal prosecution. The injunction having been served, the circuit court has authority to inquire whether its orders had been disobeyed, and finding that they had been, to enter the order of punishment, and its findings as to the act of disobedience are not open to review on *habeas corpus* in the supreme court or any other; 158 U. S. 564.

See 20 Am. Law Reg. N. S. 81 *et seq.*, where the whole subject is treated at great length. See Rapalje, Contempt; CONGRESS.

CONTEMPTIBILITER (L. Lat. contemptuously; Lat. *contemptus*).

In Old English Law. Contempt, contempts. Fleta, lib. 2, c. 60, § 35.

CONTENTIOUS JURISDICTION. In Ecclesiastical Law. That which exists in cases where there is an action or judicial process and matter in dispute is to be heard and determined between party and party. It is to be distinguished from *voluntary* jurisdiction, which exists in cases of taking probate of wills, granting letters of administration, and the like. 3 Bla. Com. 66.

CONTENTMENT (or, more properly, *contenement;* L. Lat. *contenementum*). A man's countenance or credit, which he has together with, and by reason of, his freehold; or that which is necessary for the support and maintenance of men, agreeably to their several qualities or states of life. Whart. Lex.; Cowel; 4 Bla. Com. 379.

CONTENTS AND NOT-CONTENTS. The "contents" are those who, in the house of lords, express assent to a bill; the "not-" or non-contents," dissent. May, P. L. c. 12, 357.

CONTENTS UNKNOWN. A phrase contained in bills of lading. Used with "in good order" it refers only to external condition. 12 How. 273.

CONTESTATIO LITIS. In Civil Law. The statement and answer of the plaintiff and defendant, thus bringing the case before the judge, conducted usually in the presence of witnesses. Calvinus, Lex.

This sense is retained in the canon law. 1 Kaufm. Mackeldey, C. L. 205. A cause is said to be *contesta* when the judge begins to hear the cause after an account of the claims, given not through pleadings, but by statement of the plaintiff and answer of the defendant. Calvinus, Lex.

In Old English Law. Coming to an issue; the issue so produced. Steph. Pl. App. n. 39; Crabb, Hist. 216.

CONTESTED ELECTION. This phrase has no technical or legally defined meaning. An election may be said to be contested whenever an objection is formally urged against it, which, if found to be true in fact, would invalidate it. This must be true both as to objection founded upon some constitutional provision, as well as upon any mere statutory enactment; 109 Ind. 116.

CONTEXT (Lat. *contextum,—con,* with *texere,* to weave,—that which is interwoven). Those parts of a writing which precede and follow a phrase or passage in question; the connection.

It is a general principle of legal interpretation that a passage or phrase is not to be understood absolutely as if it stood by itself, but is to be read in the light of the context, *i. e.* in its connection with the general composition of the instrument. The rule is frequently stated to be that where there is any *obscurity* in a passage the context is to be considered; but the true rule is much broader. It is always proper to look at the context in the application of the most ambiguous expression. Thus, if on a sale of goods the vendor should give a written receipt acknowledging payment of the price, and containing, also, a promise *not* to deliver the goods, the word "not" would be rejected by the court, because it is repugnant to the context. It not unfrequently happens that two provisions of an instrument are conflicting: each is then the context of the other, and they are to be taken together and so understood as to harmonize with each other so far as may be, and to carry out the general intent of the instrument. In the context of a will, that which follows controls that which precedes; and the same rule has been asserted with reference to statutes. Consult, also, CONSTRUCTION; INTERPRETATION; STATUTES.

CONTIGUOUS. In close proximity, in actual close contact. 69 N. Y. 191; as, contiguous proprietors are those whose lands actually touch. Vicinal are not necessarily contiguous proprietors; 32 La. Ann. 435.

CONTINGENCY. The quality of being contingent or casual; the possibility of coming to pass; an event which may occur. Webster.

It is a fortuitous event which comes without design, foresight, or expectation. 39 Barb. 272.

CONTINGENCY WITH DOUBLE ASPECT. If there are remainders so limited that the second is a substitute for the first in case it should fail, and not in derogation of it, the remainder is said to be in a contingency with double aspect. Fearne, Rem. 373; 1 Steph. Com. 328.

CONTINGENT. When applied to a

use, remainder, devise, bequest, or other legal right or interest, it means that no present interest exists, and that whether such interest or right ever will exist, depends upon a future uncertain event. The legal definition of the word concurs with its ordinary acceptation in showing that the term contingent implies a possibility; 5 Barb. 692.

CONTINGENT DAMAGES. Those given where the issues upon counts to which no demurrer has been filed are tried, before demurrer to one or more counts in the same declaration has been decided. 1 Stra. 431.

Inaccurately used to describe consequential damages, *q. v.*

CONTINGENT ESTATE. A contingent estate depends for its effect upon an event which may or may not happen: as, an estate limited to a person not *in esse*, or not yet born. Crabb, R. P. § 946.

CONTINGENT FEES. See CHAMPERTY.

CONTINGENT INTEREST IN PERSONAL PROPERTY. It may be defined as a future interest not transmissible to the representatives of the party entitled thereto, in case he dies before it vests in possession. Thus, if a testator leaves the income of a fund to his wife for life, and the capital of the fund to be distributed among such of his children as shall be living at her death, the interest of each child during the widow's lifetime is *contingent*, and in case of his death is not transmissible to his representatives. Moz. & W. Law Dict.

CONTINGENT LEGACY. A legacy made dependent upon some uncertain event. 1 Rop. Leg. 506. Beach, Wills 406.

A legacy which has not vested. Wms. Ex. 1229.

CONTINGENT REMAINDER. An estate in remainder which is limited to take effect either to a dubious and uncertain person, or upon a dubious and uncertain event, by which no present or particular interest passes to the remainderman, so that the particular estate may chance to be determined and the remainder never take effect. 2 Bla. Com. 169.

A remainder limited so as to depend upon an event or condition which may never happen or be performed, or which may not happen or be performed till after the determination of the preceding estate. Fearne, Cont. Rem. 3; 2 Washb. R. P. 224. See 89 Mich. 428; 108 Mo. 267; 152 Pa. 18; [1892] 1 Q. B. 184; REMAINDER.

CONTINGENT USE. A use limited in a deed or conveyance of land which may or may not happen to vest, according to the contingency expressed in the limitation of such use.

Such a use as by possibility may happen in possession, reversion, or remainder. 1 Co. 121; Com. Dig. *Uses* (K, 6). A use limited to take effect upon the happening of some future contingent event; as, where lands are conveyed to the use of A and B after a marriage had between them. 2 Bla. Com. 334.

A contingent remainder limited by way of uses. Sugd. Uses 175. See, also, 4 Kent 237.

CONTINUAL CLAIM. A formal claim made once a year to lands or tenements of which we cannot, without danger, attempt to take possession. It had the same effect as a legal entry, and thus saved the right of entry to the heir. Cowel; 2 Bla. Com. 316; 3 *id.* 175. This effect of a continual claim is abolished by stat. 3 & 4 Will. IV. c. 27, § 11. 1 Steph. Com. 509.

CONTINUANCE (Lat. *continuere*, to continue).

In Practice. The adjournment of a cause from one day to another of the same or a subsequent term.

The postponement of the trial of a cause.

The action of a trial court on an application for continuance is purely a matter of discretion and will not be reviewed unless that discretion has been abused; 159 U. S. 487.

In the ancient practice, continuances were entered upon the record, and a variety of forms adapted to the different stages of the suit were in use. See 1 Chit. Pl. 455; 3 Bla. Com. 316. The object of the continuance was to secure the further attendance of the defendant, who having once attended could not be required to attend again, unless a day was fixed. The entry of continuance became at the time mere matter of form, and is now discontinued in England and most of the states of the United States.

Before the declaration, continuance is by *dies datus prece partium*; after the declaration, and before issue joined, by *imparlance*; after issue joined, and before verdict, by *vice-comes non misit breve*; and after verdict or demurrer, by *curia advisare vult*. 1 Chit. Pl. 455, 749; Bac. Abr. *Pleas* (P), *Trial* (H); Com. Dig. *Pleader* (V); Steph. Pl. 64. In its modern use the word has the second of the two meanings given above.

Among the causes for granting a continuance are *absence of a material witness*; 1 Dall. 270; 4 Munf. 547; 10 Leigh 687; 3 Harr. N. J. 495; 2 Wash. C. C. 159; 40 La. Ann. 745; 26 Tex. App. 69; 82 Va. 264; but he must have been subpœnaed; 1 Const. S. C. 198; 10 Tex. 116; 18 Ga. 383; see 2 Dall. 183; 3 Ill. 454; 158 Mass. 381; in many states the opposite party may oppose and prevent it by admitting that certain facts would be proved by such witness; Harp. Eq. 83; 7 Cow. 369; 5 Dana 298; 2 Ill. 399; 15 Miss. 475; 33 *id.* 47; 9 Ind. 563; 43 Ill. App. 161; 72 Mo. 518; 59 Cal. 345; and the party asking delay is usually required to make affidavit as to the facts on which he grounds his request; 10 Yerg. 258; 2 Ill. 307; 7 Ark. 256; 1 Cal. 403; 8 Rich. Eq. 295; 3 Day 280; 18 Ind. 303; and, in some states, as to what he expects to prove by the absent witness; 5 Gratt. 332; 12 Ill. 459; 10 Tex. 525; 4 McLean 538; 3 Tex. Civ. App. 367; in others, an examination is made by the court; 2 Leigh 584; 7 Cow. 386; 4 E. D. Sm. 68; and what dili-

gence was used to procure his presence; 40 Ill. App. 82; 31 Miss. 490; 12 Gratt. 364; and it is error to grant a continuance on oral statement of counsel; 92 Cal. 431; the court is not bound to grant it where it is altogether conjectural whether the witnesses are alive, and if so where they reside or if their evidence can be procured; 50 Minn. 333; or to examine a witness not summoned; 158 Mass. 381; *inability to obtain the evidence* of a witness out of the state in season for trial, in some cases; 1 Wall. C. C. 5; 3 Wash. C. C. 8; 4 McLean 364; 3 Ill. 629; and see 2 Call 415; 2 Cai. 384; 23 Ga. 613; 68 *id.* 833; 12 La. Ann. 3; 1 Pet. C. C. 217; *filing amendments* to the pleadings which introduce new matter of substance; 1 Ill. 43; 4 Mass. 506; 4 Mo. 279; 4 Blackf. 387; 1 Hempst. 17; *filing a bill of discovery* in chancery, in some cases; 3 Har. & J. 452; 3 Dall. 512; see 8 Miss. 458; *detention of a party* in the public service; 2 Dall. 108; see 1 Wall. Jr. 189; *illness of counsel*, sometimes; 1 McLean 334; 11 Pet. 226; 5 Harring. 107; 4 Cal. 188; 41 *id.* 626; 4 Ia. 146; 19 Ga. 586; *or surprise* from unexpected testimony; 55 Ga. 21; 10 Tex. App. 183. But it is not sufficient where it is not shown that the client's case is prejudiced thereby; 4 Ind. App. 288.

The request must be made in due season; 4 Cra. 237; 5 Halst. 245; 2 Root 25, 45; 5 B. Monr. 314. It is addressed to the discretion of the court; 12 Gratt. 564; 3 Mo. 123; Harp. 85, 112; 2 Bailey 576; 1 Ill. 12; 145 U. S. 376; 94 Ala. 394; 93 *id.* 514; 96 Cal. 261; 37 Ga. 678; without appeal; 2 Ala. 320; 2 Miss. 100; 6 Ired. 98; 9 Ark. 108; 16 Pa. 412; 6 How. 1; and is not reviewable on error; 145 U. S. 376; 4 Cra. 237; 10 N. J. L. 235; but an improper and unjust abuse of such discretion may be remedied by superior courts, in various ways. See 1 Blackf. 50, 64; 4 Hen. & M. 157, 180; 4 Pick. 302; 1 Ga. 213; 16 Miss. 401; 9 Mo. 19; 3 Tex. 18; 18 Ill. 439; 7 Cow. 369; 84 Wis. 262. Reference must be made to the statutes and rules of the courts of the various states for special provisions.

CONTINUANDO (Lat. *continuare*, to continue, *continuando*, continuing).

In Pleading. An averment that a trespass has been continued during a number of days. 3 Bla. Com. 212. It was allowed to prevent a multiplicity of actions; 2 Rolle, Abr. 545; only where the injury was such as could, from its nature, be continued; 1 Wms. Saund. 24, n. 1.

The form is now disused, and the same end secured by alleging divers trespasses to have been committed between certain days. 1 Saund. 24, n. 1. See, generally, Gould, Pl. c. 3, § 86; Hamm. N. P. 90, 91; Bac. Abr. *Trespass*, I, 2, n. 2.

CONTINUING CONSIDERATION. See CONSIDERATION.

CONTINUING DAMAGES. See MEASURE OF DAMAGES.

CONTINUOUS EASEMENTS. Easements of which the enjoyment is or may be continual, without the necessity of any actual interference by man, as a waterspout or a right of light or air. Washb. Easem. 21. See EASEMENTS.

CONTRA (Lat.). Over; against; opposite. *Per contra.* In opposition.

CONTRA BONOS MORES. Against sound morals.

Contracts which are incentive to crime, or of which the consideration is an obligation or engagement improperly prejudicial to the feelings of a third party, offensive to decency or morality, or which has a tendency to mischievous or pernicious consequences, are void, as being *contra bonos mores;* 2 Wils. 447; Cowp. 729; 4 Campb. 152; 1 B. & Ald. 683; 16 East 150.

CONTRA FORMAM STATUTI (against the form of the statute).

In Pleading. The formal manner of alleging that the offence described in an indictment is one forbidden by statute.

When one statute prohibits a thing and another gives the penalty, in an action for the penalty the declaration should conclude *contra formam statutorum;* Plowd. 206; 2 East 333; Esp. Pen. Act. 111; 1 Gal. 268. The same rule applies to informations and indictments; 2 Hale, Pl. Cr. 172. But where a statute refers to a former one, and adopts and continues the provisions of it, the declaration or indictment should conclude *contra formam statuti;* Hale, Pl. Cr. 172. Where a thing is prohibited by several statutes, if one only gives the action and the others are explanatory and restrictive, the conclusion should be *contra formam statuti;* And. 115; 2 Saund. 377.

When the act prohibited was not an offence or ground of action at common law, it is necessary both in criminal and civil cases to conclude against the form of the statute or statutes; 1 Saund. 135 *c*; 2 East 333; 1 Chit. Pl. 556; 11 Mass. 280; 1 Gall. 30.

But if the act prohibited by the statute is an offence or ground of action at common law, the indictment or action may be in the common-law form, and the statute need not be noticed even though it prescribe a form of prosecution or of action,—the statute remedy being merely cumulative; Co. 2d Inst. 200; 2 Burr. 803; 3 *id.* 1418; 4 *id.* 2351; 2 Wils. 146; 3 Mass. 515.

When a statute only inflicts a punishment on that which was an offence at common law, the punishment prescribed may be inflicted though the statute is not noticed in the indictment; 2 Binn. 332.

If an indictment for an offence at common law only conclude "against the form of the statute in such case made and provided;" or "the form of the statute" generally, the conclusion will be rejected as surplusage, and the indictment maintained as at common law; 1 Saund. 135 n. 3; 16 Mass. 385; 4 Cush. 143. But it will be otherwise if it conclude against the form of "the statute aforesaid," when a statute

has been previously recited; 1 Chit. Cr. L. 289. See, further, Com. Dig. *Pleader* (C,) 76; 5 Viner, Abr. 552, 556; 1 Gall. 26, 257; 5 Pick. 128; 9 *id.* 1; 1 Hawks 192; 3 Conn. 1; 11 Mass. 280; 5 Me. 79.

CONTRA PACEM (Lat. against the peace).

In Pleading. An allegation in an action of trespass or ejectment that the actions therein complained of were against the peace of the king. Such an allegation was formerly necessary, but has become a mere matter of form and not traversable. See 4 Term 503; 1 Chit. Pl. 163, 402; Arch. Civ. Pl. 155; TRESPASS.

CONTRABAND OF WAR. In International Law. Goods which neutrals may not carry in time of war to either of the belligerent nations without subjecting themselves to the loss of the goods, and formerly the owners, also, to the loss of the ship and other cargo, if intercepted. 1 Kent 138, 143. See 4 Heisk. 345.

Provisions may be contraband of war, and generally all articles calculated to be of direct use in aiding the belligerent powers to carry on the war; and if the use is doubtful, the mere fact of a hostile destination renders the goods contraband; 1 Kent 140; Hall, Int. L. 618.

The classification of goods best supported by authority, English and American, divides all merchandise into three classes: (1) Articles manufactured and primarily or ordinarily used for military purposes in time of war; (2) articles which may be and are used for war or peace according to circumstances; (3) articles exclusively used for peaceful purposes. Articles of the first class destined to a belligerent country are always contraband; articles of the second class are so only when actually destined to the military or naval use of the belligerent; articles of the third class are not contraband, though liable to seizure for violation of blockade or siege. Contraband articles contaminate non-contraband, if belonging to the same owner; in ordinary cases the conveyance of contraband articles attaches only to the freight; it does not subject the vessel to forfeiture; per Chase, C. J., in The Peterhoff, 5 Wall. 28.

The meaning of the term is generally defined by treaty provisions enumerating the things which shall be deemed contraband.

See 2 Wild. Int. L. 210 *et seq.*; Wheat. Int. L. 509; 6 Mass. 102; 2 Johns. Cas. 77, 120; 1 Wheat. 382; 8 Pet. 495; 92 U. S. 520; 1 Bond 446; and also the very important declaration respecting maritime law signed by the plenipotentiaries of Great Britain, France, Austria, Russia, Prussia, Sardinia, and Turkey, at Paris, April 16, 1856, Appendix to 3 Phill. Int. L. 359; also title Contraband and Free Ships in the index to same vol., and part 9, chap. 10, and part 11, chap. 1, of the same.

CONTRACAUSATOR. A criminal; one prosecuted for a crime. Wharton.

CONTRACT (Lat. *contractus*, from *con*, with, and *traho*, to draw. *Contractus ultro utroque obligatio est quam Græci συναλλαγμα vocant.* Fr. *contrat*).

An agreement between two or more parties to do or not to do a particular thing. Taney, C. J., 11 Pet. 420, 572. An agreement in which a party undertakes to do or not to do a particular thing. Marshall, C. J., 4 Wheat. 197. An agreement between two or more parties for the doing or not doing of some specified thing. 1 Pars. Com. 5.

It has been also defined as follows: A compact between two or more parties. 6 Cra. 87, 136. An agreement or covenant between two or more persons, in which each party binds himself to do or forbear some act, and each acquires a right to what the other promises. Encyc. Amer.; Webster. A contract or agreement is where a promise is made on one side and assented to on the other; or where two or more persons enter into an engagement with each other by a promise on either side. 2 Steph. Com. 108, 109.

An agreement upon sufficient consideration to do or not to do a particular thing. 2 Bla. Com. 446; 2 Kent 449.

A covenant or agreement between two parties with a lawful consideration or cause. West, Symbol. lib. 1, § 10; Cowel; Blount.

A deliberate engagement between competent parties upon a legal consideration to do or to abstain from doing some act. Story, Contr. § 1.

An agreement by which two parties reciprocally promise and engage, or one of them singly promises and engages to the other, to give some particular thing or to do or abstain from doing some particular act. Pothier, Conts. Pt. I, c. 1, § 1; 36 Ch. D. 695.

A mutual promise upon lawful consideration or cause which binds the parties to a performance. The writing which contains the agreement of parties with the terms and conditions, and which serves as a proof of the obligation. The last is a distinct signification. 2 Hill, N. Y. 551.

A voluntary and lawful agreement by competent parties, for a good consideration, to do or not to do a specified thing. 9 Cal. 88.

An agreement enforceable at law, made between two or more persons, by which rights are acquired by one or both to acts or forbearances on the part of the other. Anson, Contr. 9.

A learned writer has said, in discussing the proper definition of contract, that "if we seek to build up a definition of the term 'contract' which shall include all things that have been called contracts and shall exclude all things that have been held not to be contracts, the task is evidently impossible. . . . Any definition of contract therefore must be either arbitrary or inexact." Harriman, Contr. 4.

The consideration is not properly included in the definition of contract, because it does not seem to be essential to a contract, although it may be necessary to its enforcement. See CONSIDERATION. 1 Pars. Contr. 7.

Mr. Stephen, whose definition of contract is given above, thus criticizes the definition of Blackstone, which has been adopted by Chancellor Kent and other high authorities. *First*, that the word *agreement* itself requires definition as much as contract. *Second*, that the existence of a consideration, though essential to the validity of a parol contract, forms properly no part of the idea. *Third*, that the definition takes no sufficient notice of the mutuality which properly distinguishes a contract from a promise. 2 Steph. Com. 109.

The use of the word *agreement* (*aggregatio mentium*) seems to have the authority of the best writers in ancient and modern times (see above) as a part of the definition of contract. It is probably a translation of the civil-law *conventio* (*con* and *venio*), a coming together, to which (being derived from *ad* and *grex*) it seems nearly equivalent. We do not think the objection that it is a synonym (or nearly so) a valid one. Some word of the kind is necessary as a basis of the definition. No two synonyms convey precisely the same idea. "Most of them have minute distinctions," says Reid. If two are entirely equivalent, it will soon be determined by accident which shall remain in use and

which become obsolete. To one who has no knowledge of a language, it is impossible to define any abstract idea. But to one who understands a language, an abstraction is defined by a synonym properly qualified. By pointing out distinctions and the mutual relations between synonyms, the object of definition is answered. Hence we do not think Blackstone's definition open to the first objection.

As to the idea of consideration, Mr. Stephen seems correct and to have the authority of some of the first legal minds of modern times. Consideration, however, may be necessary to enforce a contract, though not essential to the idea. Even in that class of contracts (by specialty) in which no consideration is in fact required, one is said to be always presumed in law,—the form of the instrument being held to import a consideration. 2 Kent, 450, n. But see CONSIDERATION, where the subject is more fully treated.

The third objection of Mr. Stephen to the definition of Blackstone does not seem one to which it is fairly open. There is an idea of mutuality in *con* and *traho*, to draw together, and it would seem that mutuality is implied in agreement as well. An *aggregatio mentium* seems impossible without mutuality. Blackstone in his analysis appears to have regarded agreement as implying mutuality; for he defines it (2 Bla. Com. 442) "a mutual bargain or convention." In the above definition, however, all ambiguity is avoided by the use of the words "between two or more parties" following agreement.

In its widest sense, "contract" includes records and specialties (but see *infra*); but this use as a general term for all sorts of obligations, though of too great authority to be now doubted, seems to be an undue extension of the proper meaning of the term, which is much more nearly equivalent to "agreement" which is never applied to specialties. Mutuality is of the very essence of both,—not only mutuality of assent, but of act. As expressed by Lord Coke, *Actus contra actum*; 2 Co. 15; 7 M. & G. 998, argument and note.

This is illustrated in contracts of sale, bailment, hire, as well as partnership and marriage; and no other engagements but those with this kind of mutuality would seem properly to come under the head of contracts. In a bond there is none of this mutuality,—no act to be done by the obligee to make the instrument binding. In a judgment there is no mutuality either of act or of assent. It is *judicium redditum in invitum*. It may properly be denied to be a contract, though Blackstone insists that one is implied. Per Mansfield, 3 Burr. 1545; 1 Cow. 316; per Story, J., 1 Mas. 288. Chitty uses "obligation" as an alternative word of description when speaking of bonds and judgments. Chit. Con. 2, 4. An act of legislature may be a contract; so may a legislative grant with exemption from taxes; 5 Ohio St. 361. So a charter is a contract between a state and a corporation within the meaning of the constitution of the United States, art. 1, § 10, clause 1; 4 Wheat. 518.

At common law, contracts have been divided ordinarily into contracts of record, contracts by specialty, and simple or parol contracts. The latter may be either written (not sealed) or verbal; and they may also be express or implied. Implied contracts may be either implied in law or implied in fact. "The only difference between an express contract and one implied in fact is in the mode of substantiating it. An express agreement is proved by express words, written or spoken . . .; an implied agreement is proved by circumstantial evidence showing that the parties intended to contract;" Leake, Contr. 11; 1 B. & Ad. 415; 1 Aust. Jur. 356, 377.

Accessory contracts are those made for assuring the performance of a prior contract, either by the same parties or by others, such as suretyship, mortgage, and pledges. Louisiana Code, art. 1764; Poth. Obl. pt. 1, c. 1, s. 1, art. 2, n. 14.

Bilateral contracts are those in which a promise is given in consideration of a promise. Parsons, Contr. 464.

Contracts of beneficence are those by which only one of the contracting parties is benefited: as, loans, deposit, and mandate. Louisiana Code, art. 1767.

Certain contracts are those in which the thing to be done is supposed to depend on the will of the party, or when, in the usual course of events, it must happen in the manner stipulated.

Commutative contracts are those in which what is done, given, or promised by one party is considered as an equivalent to or in consideration of what is done, given, or promised by the other. Louisiana Code, art. 1761.

Consensual contracts were contracts of agency, partnership, sale, and hiring in the Roman law, in which a contract arose from the mere consensus of the parties without other formalities. Maine, Anc. Law 243.

Entire contracts are those the consideration of which is entire on both sides.

Executed contracts are those in which nothing remains to be done by either party, and where the transaction has been completed, or was completed at the time the contract or agreement was made: as, where an article is sold and delivered and payment therefor is made on the spot.

Executory contracts are those in which some act remains to be done: as, when an agreement is made to build a house in six months; to do an act before some future day; to lend money upon a certain interest payable at a future time. 6 Cra. 87, 136.

A contract *executed* (which differs in nothing from a grant) conveys a chose in possession; a contract *executory* conveys a chose in action. 2 Bla. Com. 443. As to the importance of grants considered as contracts, see IMPAIRING THE OBLIGATION OF CONTRACTS.

Express contracts are those in which the terms of the contract or agreement are openly and fully uttered and avowed at the time of making: as, to pay a stated price for certain specified goods; to deliver an ox, etc. 2 Bla. Com. 443.

Gratuitous contracts are those of which the object is the benefit of the person with whom it is made, without any profit or advantage received or promised as a consideration for it. It is not, however, the less gratuitous if it proceed either from gratitude for a benefit before received or from the hope of receiving one hereafter, although such benefit be of a pecuniary nature. Louisiana Code, art. 1766. Gratuitous promises are not binding at common law unless executed with certain formalities, viz., by execution under seal.

Illegal contracts are agreements to do acts prohibited by law, as to commit a crime; to injure another, as to publish a libel; H. & N. 73.

Hazardous contracts are those in which the performance of that which is one of its objects depends on an uncertain event. Louisiana Code, art. 1769.

Implied contracts may be either implied *in law* or *in fact*. A contract implied *in law* arises where some pecuniary inequality

exists in one party relatively to the other which justice requires should be compensated, and upon which the law operates by creating a debt to the amount of the required compensation; Leake, Contr. 38. See 2 Burr. 1005; 11 L. J. C. P. 99; 8 C. B. 541. The case of the defendant obtaining the plaintiff's money or goods by fraud, or duress, shows an implied contract to pay the money or the value of the goods.

A contract implied in fact arises where there was not an express contract, but there is circumstantial evidence showing that the parties did intend to make a contract; for instance, if one orders goods of a tradesman or employs a man to work for him, without stipulating the price or wages, the law raises an implied contract (*in fact*) to pay the value of the goods or services. In the former class, the implied contract is a pure fiction, having no real existence; in the latter, it is inferred as an actual fact. See Leake, Contr. 12.

Independent contracts are those in which the mutual acts or promises have no relation to each other either as equivalents or as considerations. Louisiana Code, art. 1762.

Mixed contracts are those by which one of the parties confers a benefit on the other, receiving something of inferior value in return, such as a donation subject to a charge.

Contracts of mutual interest are such as are entered into for the reciprocal interest and utility of each of the parties: as sales, exchange, partnership, and the like.

Onerous contracts are those in which something is given or promised as a consideration for the engagement or gift, or some service, interest, or condition is imposed on what is given or promised, although unequal to it in value.

Oral contracts are simple contracts.

Principal contracts are those entered into by both parties on their own accounts, or in the several qualities or characters they assume.

Real contracts are those in which it is necessary that there should be something more than mere consent, such as a loan of money, deposit, or pledge, which, from their nature, require a delivery of the thing (*res*).

Reciprocal contracts are those by which the parties expressly enter into mutual engagements, such as sale, hire, and the like.

Contracts of record are those which are evidenced by matter of record, such as judgments, recognizances, and statutes staple.

These have been said to be the highest class of contracts. Statutes, merchant and staple, and other securities of the like nature, are confined to England. They are contracts entered into by the intervention of some public authority, and are witnessed by the highest kind of evidence, viz., matter of record; Poll. Contr. 141; 4 Bla. Com. 465.

Severable (or *separable*) *contracts* are those the considerations of which are by their terms susceptible of apportionment or division on either side, so as to correspond to the several parts or portions of the consideration on the other side.

A contract to pay a person the worth of his services as long as he will do certain work, or so much per week as long as he shall work, or to give a certain price per bushel for every bushel of so much corn as corresponds to a sample, would be a severable contract. If the part to be performed by one party consists of several distinct and separate items, and the price to be paid by the other is apportioned to each item to be performed, or is left to be implied by law, such a contract will generally be held to be severable. So when the price to be paid is clearly and distinctly apportioned to different parts of what is to be performed, although the latter is in its nature single and entire. But the mere fact of sale by weight or measure—*i. e.* so much per pound or bushel—does not make a contract severable.

Simple contracts are those not of specialty or record.

They are the lowest class of express contracts, and answer most nearly to our general definition of contract.

To constitute a sufficient parol agreement to be binding in law, there must be that reciprocal and mutual assent which is necessary to all contracts. They are by parol (which includes both oral and written). The only distinction between oral and written contracts is in their mode of proof. And it is inaccurate to distinguish *verbal* from *written*; for contracts are equally *verbal* whether the words are *written* or spoken,—the meaning of verbal being *—expressed in words.* See 3 Burr. 1670; 7 Term 350, note; 11 Mass. 27, 30; 7 Conn. 57; 1 Caines 385.

Specialties are those which are under seal; as, deeds and bonds.

Specialties are sometimes said to include also contracts of record; 1 Pars. Contr. 7; in which case there would be but two classes at common law, viz., specialties and simple contracts. The term specialty is always used substantively.

They are the second kind of express contracts under the ordinary common-law division. They are not merely written, but *signed*, *sealed*, and *delivered* by the party bound. The solemnities connected with these acts, and the formalities of witnessing, gave in early times an importance and character to this class of contracts which implied so much caution and deliberation (consideration) that it was unnecessary to prove the consideration even in a court of equity; Plowd. 305; 7 Term 477; 4 B. & Ad. 652; 3 Bingh. 111; 1 Fonb. Eq. 342, note. Though little of the real solemnity now remains, and a scroll is substituted in most of the states for the seal, the distinction with regard to specialties has still been preserved intact except when abolished by statute. In 13 Cal. 33, it is said that the distinction is now unmeaning and not sustained by reason. See CONSIDERATION; SEAL.

When a contract by specialty is changed by a parol agreement, the whole contract becomes parol; 2 Watts 451; 9 Pick. 298; 13 Wend. 71.

Unilateral contracts are those in which the party to whom the engagement is made makes no express agreement on his part.

They are so called even in cases where the law attaches certain obligations to his acceptance. Louisiana Code, art. 1758. A loan for use and a loan of money are of this kind. Poth. Obl. pt. 1, c. 1, s. 1, art. 2.

Verbal contracts are simple contracts.

Written contracts are those evidenced by writing.

Pothier's treatise on Obligations, taken in connection with the Civil Code of Louisiana, gives an idea of the divisions of the civil law. Poth. Obl. pt. 1, c. 1, s. 1, art. 2, makes the five following classes: *reciprocal* and *unilateral*; *consensual* and *real*; *those of mutual interest*, *of beneficence* and *mixed*; *principal* and *accessory*; *those which* are subjected by the civil law to certain rules and forms, and *those which* are regulated by mere natural justice.

It is true that almost all the rights of personal property do in great measure depend upon contracts of one kind or other, or at least might be reduced under some of them; which is the method taken by the civil law; it has referred the greatest part of

the duties and rights of which it treats to the head of obligations *ex contractu* or *quasi ex contractu*. Inst. 3. 14. 2; 2 Bla. Com. 443.

Quasi-contracts. The usual classification of contracts is objected to by Prof. Keener in his law of Quasi-Contracts. A true contract exists, he says, because the contracting party has *willed*, in circumstances to which the law attaches the sanction of an obligation, that he shall be bound. His contract may be implied in fact, or express. Which of the two it is, is purely a question of the kind of evidence used to establish the contract. In either case the source of the obligation is the intention of the party. "Contract implied in law" is, however, a term used to cover a class of obligations, where the law, though the defendant did not intend to assume an obligation, imposes an obligation upon him, notwithstanding the absence of intention on his part, and, in many cases, in spite of his actual dissent. Such contracts, according to the work cited, may be termed quasi-contracts, and are not true contracts. They are founded generally:—

1. Upon a record.

2. Upon statutory, official, or customary duties.

3. Upon the doctrine that no one shall be allowed to enrich himself unjustly at the expense of another. The latter is the most important and most numerous class. See also Ans. Contr., 6th ed. 7; 2 Harv. L. Rev. 64; 109 U. S. 285.

A claim for half-pilotage fees under a statute allowing such fees, where a pilot's services are offered and declined, is an instance of a quasi-contract of the second class; 2 Wall. 450. See also 144 Mass. 64. Prof. Keener, in his work above cited, considers the duty of a carrier to receive and carry safely as being of a quasi-contractual nature. Among the third class are also cases of the liability of a husband to pay for necessaries furnished to his wife; of a father for those furnished to his child. Also cases of actions to recover money paid under a mistake; actions in assumpsit against a tort-feasor, where the tort is waived; actions to recover compensation for benefits received under a contract which the plaintiff cannot enforce because he has failed to comply with the conditions thereof; actions for benefits conferred by the plaintiff under a contract which the defendant, by reason of the statute of frauds, illegality, impossibility, etc., is not bound to perform; actions for benefits conferred on the defendant at his request, but in the absence of a contract; actions for benefits intentionally conferred, but without the defendant's request; actions for money paid to the use of the defendant; and actions for money paid under compulsion of law and money paid to the defendant under duress, legal or equitable. These are the general classes given in Keener, Quasi-Contracts, to which reference is made, *passim*. The question to be determined is not the defendant's intention, but what in equity and good conscience the defendant ought to do. The action of *indebitatus assumpsit* was extended to most cases of quasi-contracts; Harriman, Contr. 24; 2 Harv. L. Rev. 63. The settled tendency of English and American law is toward a new classification of contracts and the treatment of implied contracts upon the lines here indicated. They are lines clearly defined in the Roman law as shown by Maine (Anc. Law, 3d. Am. ed. 332), who is extensively quoted by Keener. See CONTRACTUAL OBLIGATION.

Negotiations preceding a contract. Where there is an agreement between parties to enter into a contract in the future, and any essential part of the contract is left open, the agreement does not constitute a contract in itself; 156 Mass. 273. Such is the case also if the agreement itself shows that it was not intended to bind the parties, but that a formal contract was to be executed; 42 Mo. 113; 70 L. T. 781. But a mere reference to a contract to be drawn up in the future is not conclusive that the parties are not bound by their original agreement, though it tends to show that such is the case; 102 Mo. 309; L. R. 18 Eq. 180. The question is one of intention to be gathered from the original agreement, in view of all the circumstances; 144 N. Y. 209; Harriman, Cont. 52.

Where negotiations are made "subject to the preparation and approval" or "completion of a formal contract," they do not constitute a binding contract, whether the condition is expressed in the offer; [1895] 2 Ch. 1844; or in the acceptance; 7 Ch. D. 29; but "the mere reference to a future contract is not enough to negative the existence of a present one;" 8 Ch. D. 70. Where a baker sold, and a company bought a shop, and the contract seemed complete in two letters, but afterward the company wrote a third letter introducing a new and vital term, viz., a restriction upon the baker's trading in the district, it was held that the three letters read together negatived the idea that the two letters constituted the contract; 42 Ch. D. 616. Where the acceptance was "subject to the title being approved by our solicitor" it was held, that this meant no more than the liberty which every purchaser impliedly reserves to himself of breaking off the contract if the vendor breaks it, by not making a good title. The Court of Appeals construed these words as a condition, but Lord Cairns, L. C., pointed out that they would, if so construed, imply that the vendor was free, but the purchaser bound; 4 App. Cas. 311. In 3 App. Cases 1124, in the House of Lords, it was said, in holding that a correspondence between parties constituted a complete contract, "If you can find the true and important ingredients of an agreement in that which has taken place between two parties in the course of a correspondence, then, although the correspondence may not set forth, in a form which a solicitor would adopt if he were instructed to draw an agreement in writing, that which is the agreement between

the parties, yet, if the parties to the agreement, the thing to be sold, the price to be paid, and all those matters, be clearly and distinctly stated, although only by letter, an acceptance clearly by letter will not the less constitute an agreement in the full sense between the parties, merely because that letter may say, 'We will have this agreement put in due form by a solicitor.'" In the same case Lord Blackburn said that there must be a complete agreement, "if not there is no contract so long as the parties are only in negotiation. But the mere fact that the parties have expressly stipulated that there shall afterwards be a formal agreement prepared embodying the terms which shall be signed by the parties, does not by itself show that they continue merely in negotiation. It is a matter to be taken into account in construing the evidence and determining whether the parties have really come to a final agreement or not."

Since the judicature acts in England, a tenant holding under an agreement for a lease of which specific performance would be decreed, stands in precisely the same position as if the lease had been executed; 21 Ch. D. 9.

Qualities of contracts. Every agreement should be so complete as to give either party his action upon it; both parties must assent to all its terms; 3 Term 653; 1 B. & Ald. 681; 1 Pick. 278. To the rule that the contract must be obligatory on both parties there are some exceptions: as the case of an infant, who may sue, though he cannot be sued, on his contract; Add. Contr. 380; Stra. 937. See other instances, 6 East 307; 3 Taunt. 169; 5 *id.* 788; 3 B. & C. 232. There must be a good and valid consideration (*q. v.*), which must be proved though the contract be in writing; 7 Term 350, note (*a*); 2 Bla. Com. 444; Fonb. Eq. 335, n. (*a*). There is an exception to this rule in the case of bills and notes, which are of themselves *prima facie* evidence of consideration. And in other contracts (written), when consideration is acknowledged, it is *prima facie* evidence thereof, but open to contradiction by parol testimony. There must be a thing to be done which is not forbidden by law, or one to be admitted which is not enjoined by law. Fraudulent, immoral, or forbidden contracts are void. A contract is also void if against public policy or the statutes, even though the statute be not prohibitory but merely affixes a penalty; Poll. Contr. 259 *et seq.*; Chitty, Com. L. 215, 217, 222, 228, 250; 1 Binn. 110, 118; 4 Dall. 269, 298; 4 Yeates 24, 84; 28 Ala. 514; 7 Ind. 132; 4 Minn. 278; 30 N. H. 540; 2 Sandf. 146. But see 5 Ala. 250. As to contracts which cannot be enforced from non-compliance with the statute of frauds, see FRAUDS, STATUTE OF.

It was for a long time not fully settled whether a contract between A and B that one of them should do something for the benefit of C did or did not give C a right of action on the contract. See 1 B. & P. 98; 3 *id.* 149; but it is now distinctly established in England that C cannot sue; 1 B. & S. 393; Poll. Contr. 200; in America the authorities are somewhat conflicting, and it is necessary to examine the authorities critically to deduce the rule governing particular cases.

On specialties most courts do not permit a suit in a third person's name, yet some do; Poll. Contr. 204, citing 3 Gray 484. In his instructive and valuable work on Contracts just published, Professor Harriman, after citing the authorities for the common-law rule that the one not a party to it can enforce a contract, enumerates and discusses the exceptions. The only exception recognized in Massachusetts (the right to recover money in the hands of the defendant which is of right the property of the plaintiff), is considered no real exception, as the liability is not contractual; the right of a son to sue on a promise made to a father is not now recognized in England or in Massachusetts as it formerly was, and it has no foundation in principle. The broad exception existing in most of the states permitting a person for whose benefit a promise is made to sue upon it, he considers not founded on any principle, but a clear case of judicial legislation which, like most arbitrary rules, has led to confusion. He reaches the conclusion that the right of a stranger to sue in certain cases is recognized in New York, Missouri, Indiana, Illinois, Nebraska, New Hampshire, Maine, and Rhode Island, and that in Massachusetts and Michigan, as in England, the common law prevails. In the federal courts he considers the rule not clearly settled, but that the general rules laid down by the supreme court coincide with the common-law rule; Harr. Cont. ch. vii. In 93 U. S. 143, the court (Davis, J.) said that "the right of a party to maintain assumpsit on a promise not under seal made to another for his benefit, although much controverted, is now the prevailing rule in this country." In 98 U. S. 123, it was held that while the common-law rule is that a stranger cannot sue upon it, "there are confessedly many exceptions to it." In Pennsylvania the general rule is recognized; but it is held that where money or property is placed by one in the possession of another, to be paid or delivered to a third person, the latter has a right of action, being regarded as a party to the consideration on which the undertaking rests; 119 Pa. 76; so, also, 6 Watts 182. And a promise to one to pay a debt due by him to another is valid; 2 Watts 104. In some jurisdictions, even including courts adhering to the general common-law rule, a third person has a right to enforce a trust created for his benefit by another person; 95 U. S. 576; 16 Ill. 125; 112 *id.* 91; 130 Mass. 128; 91 Ind. 595. But see 154 Ill. 627, where it was held that when a contract of sale of land from A to B recited that part of the purchase money was "going to C," the latter could not sue B.

See for a general discussion of the subject, 29 Am. L. Reg. o. s. 596; 4 N. J. L. J. 197, 229; 8 Harv. L. Rev. 93; Harriman, Cont.

Construction and interpretation in reference to contracts. The intention of the parties is the pole-star of construction; but their intention must be found expressed in the contract and be consistent with rules of law. The court will not make a new contract for the parties, nor will words be forced from their real signification.

The subject-matter of the contract and the situation of the parties are to be fully considered with regard to the sense in which language is used.

The legality of the contract is presumed and is favored by construction.

Words are to be taken, if possible, in their ordinary and common sense.

The whole contract is to be considered with relation to the meaning of any of its parts.

The contract will be supported rather than defeated: *ut res magis valeat quam pereat.*

All parts will be construed, if possible, so as to have effect.

Construction is generally against the grantor—*contra proferentem*—except in the case of the sovereign. This rule of construction is not of great importance, except in the analogous case of penal statutes; for the law favors and supposes innocence.

Construction is against claims or contracts which are in themselves against common right or common law.

Neither bad English nor bad Latin invalidates a contract ("which perhaps a classical critic may think no unnecessary caution"); 2 Bla. Com. 379; 6 Co. 59. See CONSTRUCTION.

Parties. There is no contract unless the *parties* assent thereto; and where such assent is impossible from the want, immaturity, or incapacity of mind of one of the parties, there can be no perfect contract. See PARTIES.

Remedy. The foundation of the common law of contracts may be said to be the giving of damages for the breach of contracts. When the thing to be done is the payment of money, damages paid in money are entirely adequate. When, however, the contract is for anything else than the payment of money, the common law knows no other than a money remedy: it has no power to enforce a specific performance of the contract.

The injustice of measuring all rights and wrongs by a money standard, which as a remedy is often inadequate, led to the establishment of the equity power of decreeing specific performance when the remedy has failed at law. For example: contracts for the sale of real estate will be specifically enforced in equity; performance will be decreed, and conveyances compelled.

Where a contract is for the benefit of the contracting party, no action can be maintained by a third person who is a stranger to the contract and the consideration; 173 Pa. 274.

See, generally, as to contracts, Parsons; Chitty; Comyns; Leake; Anson; Story; Pollock, Contracts; Keener, Quasi-Contracts; Com. Dig.; Bac. Abr.; Vin. Abr.; Arch. Civ. Pl. 22; Poth. Obl.; Maine Anc. Law; Austin, Jurisp.; Sugd. Ven. & P.; Long, Sales (Rand. ed.) and Benj. Sales; Jones; Story; Edwards; and Lawson, on Bailment; Toull. *Dr. Civ.* rom. 6, 7; Hamm. Part. c. 1; Calv. Par.

For the several subjects embraced in the law of contracts, see the separate titles, also CONSIDERATION.

CONTRACTION (Lat. *con*, together, *traho*, to draw). A form of a word abbreviated by the omission of one or more letters. This was formerly much practised, but in modern times has fallen into general disuse. Much information in regard to the rules for contraction is to be found in the Instructor Clericalis.

CONTRACTOR. One who enters into a contract. Generally used of those who undertake to do public work or the work for a company or corporation on a large scale, or to furnish goods to another at a fixed or ascertained price. 2 Pard. n. 300. See 5 Whart. 366; 14 Ct. Cl. 59, 280, 289; 13 *id.* 136, 392. As to liability of a party for the negligence of a contractor employed by him, see INDEPENDENT CONTRACTOR.

CONTRACTUAL. Of the nature of or pertaining to a contract, as, contractual liability or contractual obligation, which see. A term used by writers on the Roman law to designate the class of obligations described in the classification of the civilians as *ex contractu*, and recently much used in English and American law in connection with the more modern method of classifying contracts referred to in connection with Quasi-Contract. See CONTRACT.

CONTRACTUAL OBLIGATION. The obligation which arises from a contract or agreement.

In the Roman law the expression was a familiar one, and, taking the result of the discussions of the subject by writers on the civil law, and keeping in view both the etymology and the use of the word obligation, we may define it, as there used, to be a tie binding one to the performance of a duty arising from the agreement of parties.

The term is resorted to as a relief from what he considers the misuse of the word contract and the difficulty of defining it, by Prof. E. A. Harriman, who uses it in this sense: "Nevertheless in the case of many 'contracts,' using the word in its broadest sense, we find existing an obligation with certain definite characteristics which can easily be recognized. This obligation we shall venture to call contractual." He divides "the endless variety of obligations which the courts enforce" into irrecusable and recusable obligations. The former are those which are imposed upon the person without his consent and without regard to any act of his own; the latter are the result of a voluntary act on the part of the person on whom they are imposed. These terms are adopted by him from an article by Professor John H. Wig-

more in 8 Harv. L. Rev. 200, and he again divides recusable obligations into definite and indefinite, meaning thereby to express whether the extent of the undertaking is determined by the act of the party upon whom the obligation rests or not; and to differentiate still further the precise character of definite recusable obligations, which he terms contractual obligations, Professor Harriman originates the terms unifactoral and bifactoral, as the obligation is created by the act of the party bound, or requires two acts, one by the party bound and the other by the party to be benefited. The term contractual was of constant use by writers on the civil law, and Maine, in his Early Law and Custom, refers to the German Salic law as elaborately discussing contractual obligation. Professor Harriman's definition of this term is "that obligation which is imposed by the law in consequence of a voluntary act, and which is determined as to its nature and extent by that act." Harr. Cont. 27. The idea of contractual obligation he thinks was unknown to our Anglo-Saxon ancestors; *id.* 15. It is undoubtedly true, as Professor Harriman asserts, that the best considered theory of contract at the present time has been a slow and tedious development; but it is equally true that among the writers who have given most attention to the study of the historical development of the law there remain wide differences of opinion as to the time and mannerof its development. It is likewise to be observed that the theories of Professor Harriman and those who have preceded him, in the views which he has so logically and comprehensively treated, do in fact include much that is familiar to the student of the Roman law, while there is exhibited a reluctance to give to that system due credit for the principles which were fully developed in it. In his preface the author here cited quotes with approval the remark of Sir Frederick Pollock, that English speaking lawyers "must seek a genuine philosophy of the common law, and not be put off with a surface dressing of Romanized generalities." It may be suggested that when, after centuries of an unscientific development of the English law of contract (due to causes which Professor Harriman well sketches in Part II. of his introduction), what seems to be not only a better, but the true theory has come to be recognized and developed; the coincidence of that theory with the root idea of the subject, as expressed in so scientific a system as the Roman law, should be acknowledged and utilized, rather than ignored, or characterized as "recasting English ideas and institutions in a Roman mould." It may be safely asserted that neither contract nor contractual obligation is an English idea or institution, but an idea of human civilization. Sir Henry Maine says we have no society disclosed to us destitute of the conception; Anc. Law 303. It is equally creditable to us to have discovered and developed the correct idea of it after it has been overlaid with the misconceptions of the common law, as to its true nature, as it was to the Civilians to have formulated it correctly as part of their scientifically constructed system. That a concurrence is reached by these distinct processes is strong confirmation of the accuracy of the result. The limits of this work forbid the elaboration of this subject to which it is entitled, and the reader is referred to Harriman, Contracts; Keener, Quasi-Contracts; Maine, Ancient Law, ch. ix.; Holmes, Common Law; Sandars, Inst. of Justinian; Howe, Studies in the Civil Law, which latter work contains an admirable statement of the subject of obligations in the Roman law.

CONTRADICT. In Practice. To prove a fact contrary to what has been asserted by a witness.

A party cannot *impeach* the character of his witness, but may contradict him as to any particular fact; 1 Greenl. Ev. § 443; Bull. N. P. 297; 3 B. & C. 746; 4 *id.* 25; 5 Wend. 305; 12 *id.* 105; 21 *id.* 190; 7 Watts 39; 4 Pick. 179, 194; 17 Me. 19.

CONTRAESCRITURA. In Spanish Law. Counter-letter. An instrument, usually executed in secret, for the purpose of showing that an act of sale, or some other public instrument, has a different purpose from that imported on its face. Acts of this kind, though binding on the parties, have no effect as to third persons.

CONTRAFACTIO (Lat.). Counterfeiting: as, *contrafactio sigilli regis* (counterfeiting the king's seal). Cowel; Reg. Orig. 42. See COUNTERFEIT.

CONTRAROTULATOR (Fr. *contrerouleur*). A controller. One whose business it was to observe the money which the collectors had gathered for the use of the king or the people. Cowel.

CONTRAROTULATOR PIPÆ. An officer of the exchequer that writeth out summons twice every year to the sheriffs to levy the farms (rents) and debts of the pipe. Blount.

CONTRAVENTION. In French Law. An act which violates the law, a treaty, or an agreement which the party has made. That infraction of the law punished by a fine which does not exceed fifteen francs and by an imprisonment not exceeding three days.

CONTRE-MAITRE. In French Law. The second officer in command of a ship. The officer next in command to the master and under him.

CONTRECTATIO. In Civil Law. The removal of a thing from its place amounting to a theft. The offence is purged by a restoration of the thing taken. Bowy. Com. 268.

CONTREFACON. In French Law. The offence of those who print or cause to be printed, without lawful authority, a book of which the author or his assigns have a copyright. Merlin, *Répert.*

CONTRIBUTION. Payment by one or more persons who are liable, in company with others, of a proportionate part of the whole liability or loss, to one or more of the parties so liable upon whom the whole loss has fallen or who has been compelled to discharge the whole liability. 1 Bibb 562; 4 Johns. Ch. 545; Pars. Part. 198.

"The principle is that parties having a common interest in a subject-matter shall bear equally any burden affecting it. *Qui sentit commodum sentire debit et onus.* Equality is equity. One shall not bear a common burden in ease of the rest. Hence, if, (as often may be done), a lien, charge, or burden of any kind, affecting several, is enforced at law against one only, he should receive from the rest what he has paid or discharged on their behalf. This is the doctrine of equitable contribution, resting on as simple a principle of natural justice as can be put." Per Bates, Ch., in 3 Del. Ch. 260. 3 Co. 11 *b*; 1 Cox, C. C. 318; 1 B. & P. 270; 4 Johns. Ch. 388; 1 Sto. Eq. 477; 1 Wh. & Tud. L. Cas. in Eq. 66. Though its most common application is to sureties and owners of several parcels of land subject to a lien, the application of the principal is said to be universal by Ld. Redesdale in 3 Bligh 59; and it applies equally to dower as to other incumbrances; 3 Del. Ch. 260; Wright, Ohio 285.

A right to contribution exists in the case of debtors who owe a debt jointly which has been collected from one of them; 4 Jones, N. C. 71; 4 Ga. 545; 19 Vt. 59; 3 Denio 130; 7 Humph. 385. See 1 Ohio St. 327. It also exists where land charged with a legacy, or the portion of a posthumous child, descends or is devised to several persons, when the share of each is held liable for a proportionate part; 3 Munf. 29; 1 Johns. Ch. 425; 1 Cush. 107; 8 B. Monr. 419. As to contribution under the maritime law, see GENERAL AVERAGE. See, generally, 4 Gray 75; 34 Me. 205; 11 Pa. 325; 8 B. Monr. 137; 51 Vt. 253; 77 N. Y. 280; 82 N. C. 334; 61 Ala. 440; 53 Cal. 686; 52 Iowa 597; 127 Mass. 396; 16 Blatchf. 122.

Originally this right was not enforced at law, but courts of common law in modern times have assumed a jurisdiction to compel contribution among sureties in the absence of any positive contract, on the ground of an implied assumpsit, and each of the sureties may be sued for his respective quota or proportion; Wh. & Tud. Lead. Cas. 66; 7 Gill 34, 85; 17 Mo. 150. The remedy in equity is, however, much more effective; 12 Ala. N. S. 225; 2 Rich. Eq. 15; Bisp. Eq. § 329. For example, a surety who pays an entire debt can, in equity, compel the solvent sureties to contribute towards the payment of the entire debt; 1 Ch. Cas. 346; Finch 15, 203; while at law he can recover no more than an aliquot part of the whole, regard being had to the number of co-sureties; 2 B. & P. 268; 6 B. & C. 697; 32 Me. 381. See SUBROGATION. See, generally, as to co-sureties, 1 Lead. Cas. Eq. 100; 13 Am. L. Reg. N. S. 529.

There is no contribution, as a general rule, between joint tort-feasors; 8 T. R. 186; 82 Ind. 488; 32 Md. 245; 8 Ohio 81; 11 Paige 18; 10 Cush. 287; 2 Ohio St. 203; 18 Ohio 1; but this rule does not apply when the person seeking redress did not in fact know that the act was unlawful, and is not chargeable with knowledge of that fact; 4 Bing. 72; 26 Ala. 633; 28 Conn. 455; 92 N. C. 148; 66 Pa. 218. See 28 Alb. L. J. 148; 4 A. & E. Encyc. 12, 13.

The rule stated also fails when the injury grows out of a duty resting primarily upon one of the parties, and but for his negligence there would have been no cause of action against the other. A servant is consequently liable to his master for the damages recovered against the latter in consequence of the negligence of the servant; 2 Sm. Lead. Cas. 483. Where a recovery is had against a municipal corporation for an injury resulting from an obstruction to the highway, or other nuisance, occasioned by the act or default of its servant, or even of a citizen, the municipality has a right of action against the wrongdoer for indemnity; 2 Black 418.

In Civil Law. A partition by which the creditors of an insolvent debtor divide among themselves the proceeds of his property proportionably to the amount of their respective credits. *La Code*, art. 2522, n. 10. It is a division *pro rata*. Merlin, *Répert.*

CONTRIBUTORY. A person liable to contribute to the assets of a company which is being wound up, as being a member or (in some cases) a past-member thereof. 3 Steph. Com. 24; Moz. & W. Law Dict.

CONTRIBUTORY NEGLIGENCE. See NEGLIGENCE.

CONTROLLER. A comptroller, which see.

CONTROVER. One who invents false news. Co. 2d Inst. 227.

CONTROVERSY. A dispute arising between two or more persons.

It differs from case, which includes all suits, criminal as well as civil; whereas controversy is a civil and not a criminal proceeding; 2 Dall. 419, 431, 432; 1 Tuck. Bla. Com. App. 420, 421.

By the constitution of the United States, the judicial power extends to controversies to which the United States shall be a party. Art. III. sec. 2. The meaning to be attached to the word controversy in the constitution is that above given.

CONTUBERNIUM. In Civil Law. A marriage between persons of whom one or both were slaves. Poth. *Contr. du Mar.* pt. 1, c. 2, § 4.

CONTUMACY (Lat. *contumacia*, disobedience). The refusal or neglect of a party accused to appear or answer to a charge preferred against him in a court of justice.

Actual contumacy is the refusal of a party actually before the court to obey some order of the court.

Presumed contumacy is the act of refusing or declining to appear upon being cited. 3 Curt. Ecc. 1.

CONTUMAX. One accused of a crime who refuses to appear and answer to the charge. An outlaw.

CONTUSION. In Medical Jurisprudence. An injury or lesion, arising from the shock of a body with a large surface, which presents no loss of substance and no apparent wound. If the skin be divided, the injury takes the name of a contused wound. See 4 C. & P. 381, 558, 565; 6 *id.* 684; Thomas, Med. Dict. *sub v.*; 2 Beck, Med. Jur. 18, 23.

CONUSANCE, CLAIM OF. See COGNIZANCE.

CONUSANT. One who knows; as, if a party knowing of an agreement in which he has an interest makes no objection to it, he is said to be conusant. Co. Litt. 157.

CONUSOR. A cognizor.

CONVENE. In Civil Law. To bring an action.

CONVENTICLE. A private assembly of a few folks under pretence of exercise of religion. The name was first given to the meetings of Wickliffe, but afterwards applied to the meetings of the non-conformists. Cowel.

The meetings were made illegal by 16 Car. II. c. 4, and the term in its later signification came to denote an unlawful religious assembly.

CONVENTIO (Lat. a coming together). **In Canon Law.** The act of summoning or calling together the parties by summoning the defendant.

When the defendant was brought to answer, he was said to be convened,—which the canonists called *conventio*, because the plaintiff and defendant met to contest. Story, Eq. Pl. 402; 4 Bouv. Inst. no. 4121.

In Contracts. An agreement; a covenant. Cowel.

Often used in the maxim *conventio vincit legem* (the express agreement of the parties supersedes the law). Story, Ag. § 368. But this maxim does not apply, it is said, to prevent the application of the general rule of law. Broom, Max. 690. See MAXIMS.

CONVENTION. In Civil Law. A general term which comprehends all kinds of contracts, treaties, pacts, or agreements. The consent of two or more persons to form with each other an engagement, or to dissolve or change one which they had previously formed. Domat, l. 1, t. 1, s. 1; Dig. lib. 2, t. 14, l. 1; lib. 1, t. 1, l. 1, 4 and 5; 1 Bouvier, Inst. no. 100.

In Legislation. This term is applied to a meeting of the delegates elected by the people for other purposes than usual legislation. It is used to denote an assembly to make or amend the constitution of a state; also an assembly of the delegates of the people to nominate candidates to be supported at an election. As to the former use, see Jameson, Constit. Conv.; Cooley, Const. Lim.; CONSTITUTIONAL CONVENTION.

CONVENTIONAL. Arising from, and dependent upon, the act of the parties, as distinguished from *legal*, which is something arising from act of law. 2 Bla. Com. 120.

CONVENTAS (Lat. *convenire*). As assembly. *Conventus magnatum vel procerum.* An assemblage of the chief men or nobility; a name of the English parliament. 1 Bla. Com. 248.

In Civil Law. A contract made between two or more parties,

A multitude of men, of all classes, gathered together.

A standing in a place to attract a crowd.

A collection of the people by the magistrate to give judgment. Calvinus, Lex.

CONVENTUS JURIDICUS. A Roman provincial court for the determination of civil causes.

CONVERSANT. One who is in the habit of being in a particular place is said to be conversant there. Barnes 162.

Acquainted; familiar.

CONVERSION (Lat. *con*, with, together, *vertere*, to turn; *conversio*, a turning to, with, together).

In Equity. The exchange of property from real to personal or from personal to real, which takes place under some circumstances in the consideration of the law, such as, to give effect to directions in a will or settlement, or to stipulations in a contract, although no such change has actually taken place. 1 Bro. C. C. 497; 1 Lead. Cas. Eq. 619; *id.* 872; 3 Redf. 235; 46 Wis. 70; 32 N. J. Eq. 181.

A *qualified* conversion is one directed for some particular purpose; 4 Del. Ch. 72. Where the purpose of conversion totally fails no conversion takes place, but the property remains in its original state, but where there is a partial failure of the purpose of conversion of land the surplus results to the heir; 1 Bro. C. C. 503; as money and not as land, and therefore if he be dead it will pass to his personal representatives even if the land were sold in his lifetime; 4 Madd. 492. The English authorities strongly favor the heir, and the authorities are collected by Bispham (Pr. of Eq. pt. ii. ch. v.) and by Bates, Ch. (4 Del. Ch. 72), who held that where there was a qualified conversion by will, if one of the legacies fail, whether it be void *ab origine* or lapse, that portion of the fund which fails of its object will result to the party who would have been entitled to the real estate unsold. Bispham considers the American authorities less favorable to the heir than the English, citing 3 Wheat. 563, where it was held that if the intent of the testator appears to have been to stamp upon the proceeds of the land described to be sold the character of personalty, to all intents and purposes the claim of the heir is defeated and the estate is considered personal (see also 2 Rawle 185). But in the Delaware case cited it was considered that the English doctrine of quali-

fied conversion was fully sustained by the American cases at large as collected in the American note to Ackroyd *v.* Smithson, 1 Wh. & Tud. L. Cas. in Eq. 590; and the case cited by Bispham from 4 Wheat., as appears from the forgoing statement of it, does not conflict with the English doctrine, as it is expressly limited to cases in which the intention is clear that the heir shall not take.

Land is held to be converted into money, in equity, when the owner has contracted to sell; and if he die before making a conveyance, his executors will be entitled to the money, and not his heirs; 1 W. Bla. 129; 62 Ala. 145.

When land is ordered by a will to be sold, it is regarded as converted into personalty; 3 D. R. Pa. 187; but a mere power of sale will not have that effect until it is exercised; 16 Pa. 65. Lands taken under the right of eminent domain are converted; 29 Atl. Rep. (N. J.) 592.

Money may be held to be converted into land under various circumstances: as where, for example, a man dies before a conveyance is made to him of land which he has bought. 1 P. Wms. 176; 10 Pet. 563; Bouvier, Inst. Index. See 58 How. Pr. 175; 49 Md. 72.

Courts of equity have power to order the conversion of property held in a trust from real estate into personal estate, or *vice versa*, when such conversion is not in conflict with the will of the testator, expressly or by implication, and is for the interest of the *cestui que trust;* 4 Del. Ch. 615; 1 Hill, S. C. 112. The English court of chancery largely exercised this jurisdiction; 2 Sto. Eq. Jur. § 1357; 6 Ves. Jr. 6; 6 Madd. 100.

At Law. An unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of the owner's rights. 44 Me. 197; 36 N. H. 311; 45 Wis. 262.

A constructive conversion takes place when a person does such acts in reference to the goods or personal chattels of another as amount, in view of the law, to appropriation of the property to himself.

A direct conversion takes place when a person actually appropriates the property of another to his own beneficial use and enjoyment, or to that of a third person, or destroys it, or alters its nature.

Every such unauthorized taking of personal property; Poll. Torts 435; 2 J. J. Mar. 84; 1 Bailey 546; 10 Johns. 172; 92 Ill. 218; and all intermeddling with it beyond the extent of authority conferred, in case a limited authority over it has been given; 1 Metc. Mass. 555; 14 Vt. 367; 72 N. Y. 188; 46 Conn. 109; 75 N. Y. 547; 1 Ga. 381; with intent so to apply or dispose of it as to alter its condition or interfere with the owner's dominion; 18 Pick. 227; 8 M. & W. 540; constitutes a conversion, including a *taking* by those claiming without right to be assignees in bankruptcy; 3 Brod. & B. 2; *using* a thing without license of the owner; 8 Vt. 281; 6 Hill 425; 5 Ill. 495; 44 Me. 497; 11 Rich. Eq. 267; 5 Sneed 261; 24 Mo. 86; or in excess of the license; 16 Vt. 138; 5 Mass. 104; 4 E. D. Sm. 397; 5 Duer 40; 5 Jones, N. C. 122; *misuse* or *detention* by a finder or other bailee; 2 Pa. 416; 5 Mass. 104; 3 Pick. 492; 2 B. Monr. 339; 10 N. H. 199; 18 Me. 382; 8 Leigh 565; 3 Ark. 127; 1 Humph. 199; 4 E. D. Sm. 397; 31 Ala. N. S. 26; see 12 Gratt. 153; *delivery* by a bailee in violation of orders; 16 Ala. 466; *non-delivery* by a wharfinger, carrier, or other bailee; 4 Ala. 46; 2 Johns. Cas. 411; 1 Rice 204; 17 Pick. 1; see 28 Barb. N. Y. 515; *a wrongful sale* by a bailee, under some circumstances; 4 Taunt. 799; 8 *id.* 237; 10 M. & W. 576; 11 *id.* 363; 6 Wend. 603; 16 Johns. 74; 1 Dev. L. 306; 92 Ill. 218; 39 Mich. 413; *a failure to sell* when ordered; 1 Har. & J. 579; 13 Ala. N. S. 460; *improper* or *informal* seizure of goods by an officer; 2 Vt. 383; 18 *id.* 590; 5 Cow. 323; 3 Mo. 207; 5 Yerg. 313; 1 Ired. 453; 17 Conn. 154; 2 Blatchf. 552; 37 N. H. 86; *informal sale* by such officer; 2 Ala. 576; 14 Pick. 356; 3 B. Monr. 457; or *appropriation* to himself; 2 Pa. 416; 3 N. H. 144; as against such officer in the last three cases; the *adulteration* of liquors as to the whole quantity affected; 3 A. & E. 306; 8 Pick. 551; an *excessive levy* on a defendant's goods, followed by a sale; 6 Q. B. 381; but *not including* a *mere trespass* with no further intent; 8 M. & W. 540; 18 Pick. 227; nor an *accidental loss* by mere omission of a carrier; 2 Greenl. Ev. § 643; 5 Burr. 2825; 1 Pick. 50; 6 Hill 586; see 17 Pick. 1; nor mere *non-feasance;* 2 B. & P. 438; 12 Johns. 300; 19 Vt. 436. A manual taking is not necessary.

The intention required is simply an intent to use or dispose of the goods, and the knowledge or ignorance of the defendant as to their ownership has no influence in deciding the question of conversion; 3 Ired. 29; 4 Denio 180; 30 Vt. 307; 11 Cush. 11; 17 Ill. 413; 33 N. H. 151.

A license may be presumed where the taking was under a necessity, in some cases; 6 Esp. 81; or, it is said, to do a work of charity; 2 Greenl. Ev. § 643; or a *kindness* to the owner; 4 Esp. 195; 11 Mo. 219; 8 Metc. 578; without intent, in the last two cases, to injure or convert it; 8 Metc. 578. As to what constitutes a conversion as between joint owners, see 2 Dev. & B. Eq. 252; 1 Hayw. 255; 21 Wend. 72; 2 Murph. 65; 16 Vt. 382; 1 Dutch. 173; and as to a joint conversion by two or more, see 2 N. H. 546; 15 Conn. 384; 2 Rich. 507; 3 E. D. Sm. 555; 40 Me. 574. A tenant in common can maintain trover for the sale or attempted sale of the common chattel; 6 Cal. 559; 38 Ala. 559; 42 N. Y. 549; *contra*, 27 Vt. 93; 9 Ex. 145; some cases hold that nothing short of the destruction of the plaintiff's property is a conversion, because a sale passes only the vendor's title and the co-tenant continues a co-tenant with the purchaser; Big. Torts 204. It is held also that trover lies, between co-tenants, for a mere withholding of the chattel, or the misuse of it, or for a refusal to terminate the common interest; 17 Pa. 373; 12 Mich. 328.

An original unlawful taking is in general conclusive evidence of a conversion; 1 M'Cord 213; 15 Johns. 431; 13 N. H. 494; 17 Conn. 154; 29 Pa. 154; 126 Mass. 132; as is the existence of a state of things which constitutes an actual conversion; 6 Wend. 603; 7 Halst. 244; 1 Leigh 86; 12 Me. 243; 3 Mo. 382; 14 Vt. 367; without showing a demand and refusal; but where the original taking was lawful and the detention only is illegal, a demand and refusal to deliver must be shown; 47 Miss. 570; 5 B. & C. 146; 2 J. J. Marsh. 84; 16 Conn. 71; 19 Mo. 467; 2 Cal. 571; but this evidence is open to explanation and rebuttal; Cooley, Torts 532; 2 Wms. Saund. 47 *e*; 5 B. & Ald. 847; 16 Conn. 71; 6 S. & R. 300; 1 Cow. 322; 28 Barb. 75; 8 Md. 148; even though absolute; 2 C., M. & R. 495. Demands and unlawful refusal constitute a conversion; Big. Torts 200; mere refusal is only evidence of conversion; *id.* 202.

The refusal, to constitute such evidence, must be unconditional, and not a reasonable excuse; 7 C. & P. 285; 3 Ad. & E. 106; 5 N. H. 225; 8 Vt. 433; 9 Ala. 383; 16 Conn. 76; 1 Rich. 65; 24 Barb. 528; or accompanied by a condition which the party has no right to impose; 6 Q. B. 443; 2 Dev. L. 130; if made by an agent, it must be within the scope of his authority, to bind the principal; 6 Jur. 507; 5 Hill, N. Y. 455; 1 E. D. Sm. 522; but is not evidence of conversion where accompanied by a condition which the party has a right to impose; 6 Q. B. 443; 5 B. & Ald. 247; 7 Johns. 302; 2 Dev. L. 130; 2 Mas. 77. It may be made at any time prior to bringing suit; 2 Greenl. Ev. § 644; 11 M. & W. 366; 6 Johns. 44; if before he has parted with his possession; 11 Vt. 351. It may be inferred from non-compliance with a proper demand; 7 C. & P. 339; 2 Johns. Cas. 411. The demand must be a proper one; 2 N. H. 546; 1 Johns. Cas. 406; 2 Const. S. C. 239; 9 Ala. 744; made by the proper person; see 2 Brod. & B. 447; 2 Mas. 77; 12 Me. 328; and of the proper person or persons; 3 Q. B. 699; 2 N. H. 546; 1 E. D. Sm. 522. The plaintiff must have at least the right to immediate possession; 127 Mass. 64.

CONVEYANCE. The transfer of the title of land from one person or class of persons to another. 21 Barb. 551; 29 Conn. 356.

The instrument for effecting such transfer. It includes leases; 47 Cal. 242; and mortgages; 46 Cal. 603.

When there is no express agreement to the contrary, the expense of the conveyance falls upon the purchaser; 2 Ves. 155, note; who must prepare and tender the conveyance. But see, *contra*, 2 Rand. 20; Warvelle, Vend. 347. The expense of the execution of the conveyance is, on the contrary, usually borne by the vendor; Sugd. Vend. & P. 296; *contra*, 2 Rand. 20; 2 McLean 495. See 3 Mass. 487; 5 *id.* 472; Eunom. 2, § 12.

The forms of conveyance have varied widely from each other at different periods in the history of the law, and in the various states of the United States. The mode at present prevailing in this country is by bargain and sale. For a fuller account of this subject, see Sugden, Vendors; Geldart; Preston; Thorn. Conv.; Tiedeman; Washb. R. P.; Dembitz, Land Titles; Bouvier, Institutes, Index.

CONVEYANCE OF VESSELS. The transfer of the title to vessels.

The act of congress approved the 29th July, 1850, Rev. Stat. § 4192, entitled An act to provide for recording the conveyances of vessels, and for other purposes, enacts that no bill of sale, mortgage, hypothecation, or conveyance of any vessel, or part of any vessel, of the United States, shall be valid against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof, unless such bill of sale, mortgage, hypothecation, or conveyance be recorded in the office of the collector of the customs where such vessel is registered or enrolled. Provided, that the lien by bottomry on any vessel created, during her voyage, by a loan of money or materials necessary to repair or enable such vessel to prosecute a voyage, shall not lose its priority or be in any way affected by the provisions of the act.

The *second* section enacts that the collectors of the customs shall record all such bills of sale, mortgages, hypothecations, or conveyances, and also all certificates for discharging and cancelling any such conveyances, in a book or books to be kept for that purpose, in the order of their reception,—noting in said book or books, and also on the bill of sale, mortgage, hypothecation, or conveyance, the time when the same was received; and shall certify on the bill of sale, mortgage, hypothecation, or conveyance, or certificate of discharge or cancellation, the number of the book and page where recorded; and shall receive, for so recording such instrument of conveyance or certificate of discharge, fifty cents.

The *third* section enacts that the collectors of the customs shall keep an index of such records, inserting alphabetically the names of the vendor or mortgagor, and of the vendee or mortgagee; and shall permit said index and books of records to be inspected during office-hours, under such reasonable regulations as they may establish; and shall, when required, furnish to any person a certificate setting forth the names of the owners of any vessel registered or enrolled, the parts or proportions owned by each, if inserted in the register or enrollment, and also the material facts of any existing bill of sale, mortgage, hypothecation, or other incumbrance upon such vessel recorded since the issuing of the last register or enrollment,—viz., the date, amount of such incumbrance, and from and to whom or in whose favor made. The collector shall receive for each such certificate one dollar.

The *fourth* section provides that the collectors of the customs shall furnish certified copies of such records, on the receipt of fifty cents for each bill of sale, mortgage, or other conveyance.

The *fifth* section provides that the owner or agent of the owner of any vessel of the United States, applying to a collector of the customs for a register or enrollment of a vessel, shall, in addition to the oath now prescribed by law, set forth, in the oath of ownership, the part or proportion of such vessel belonging to each owner, and the same shall be inserted in the register of enrollment; and that all bills of sale of vessels registered or enrolled shall set forth the part of the vessel owned by each person selling, and the part conveyed to each person purchasing.

CONVEYANCER. One who makes it his business to draw deeds of conveyance of lands for others and to investigate titles of real property. They frequently act as brokers for the sale of real estate and obtaining loans on mortgage, and transact a general real estate business.

CONVEYANCING. A term including both the science and art of transferring titles to real estate from one man to another.

It includes the examination of the title of the alienor, and also the preparation of the instruments of transfer. It is, in England and Scotland, and, to a less extent, in the United States, a highly artificial system of law, with a distinct class of practitioners. A profound and elaborate treatise on the English law of conveyancing is Mr. Preston's. Geldart and Thornton's works are also important; and an interesting and useful summary of the American law is given in Washburn on Real Property. See Clerke; Martindale; Morris; Yeakle, Conveyancing.

CONVEYANCING COUNSEL TO THE COURT OF CHANCERY. Certain counsel, not less than six in number, appointed by the Lord Chancellor, for the purpose of assisting the court of chancery, or any judge thereof, with their opinion in matters of title and conveyancing. Stat. 15 & 16 Vict. c. 80, ss. 40, 41; Moz. & W. Law Dict.

CONVICIUM. In Civil Law. The name of a species of slander or injury uttered in public, and which charged some one with some act *contra bonos mores.* Vicat; Bac. Abr. *Slander*, 29.

CONVICT. One who has been condemned by a competent court. One who has been convicted of a crime or misdemeanor.

To condemn. To find guilty of a crime or misdemeanor. 4 Bla. Com. 362.

CONVICTION (Lat. *convictio;* from *con*, with, *vincire*, to bind). **In Practice.** That legal proceeding of record which ascertains the guilt of the party and upon which the sentence or judgment is founded. 48 Me. 123; 109 Mass. 323; 99 *id.* 420.

Finding a person guilty by verdict of a jury. 1 Bish. Cr. L. § 223; see 45 Alb. L. J. 1.

A record of the summary proceedings upon any penal statute before one or more justices of the peace or other persons duly authorized, in a case where the offender has been *convicted* and sentenced. Holthouse, Dict.

The first of the definitions here given undoubtedly represents the accurate meaning of the term, and includes an ascertainment of the guilt of the party by an authorized magistrate in a summary way, or by confession of the party himself, as well as by verdict of a jury. The word is also used in each of the other senses given. It is said to be sometimes used to denote final judgment. Dwar. 2d ed. 683.

Summary conviction is one which takes place before an authorized magistrate without the intervention of a jury.

Conviction must precede judgment or sentence; 1 Cai. 72; 34 Me. 594; see 51 Ill. 311; but it is not necessarily or always followed by it; 1 Den. C. C. 568; 14 Pick. 88; 8 Wend. 204; 3 Park. C. Cas. 567; 4 Ill. 76; 24 How. Pr. 38. Generally, when several are charged in the same indictment, a part may be convicted and the others acquitted; 2 Den. C. C. 86; 4 Hawks 356; 8 Blackf. 205; but not where a joint offence is charged; 14 Ohio 386; 6 Ired. 340. A person cannot be convicted of part of an offence charged in an indictment, except by statute; 7 Mass. 250; 7 Mo. 177; 1 Murph. 134; 13 Ark. 712. A conviction prevents a second prosecution for the same offence; Whart. Cr. Pl. § 456; 1 McLean 429; 7 Conn. 414; 14 Ohio 295; 2 Yerg. 24; 28 Pa. 13. But the recovery in a civil suit, of a fine, part of a penalty under a statute, does not prevent the prosecution of the defendant for the purpose of enforcing the full penalty by imprisonment; 16 Blackf. 9. And see 70 Me. 452; 8 Tex. App. 447; 66 Ind. 223. A conviction of a less offence may be had where the indictment charges a greater offence, which necessarily includes the less; 82 N. C. 621; 8 Tex. App. 71; 8 Baxt. 401; 23 Kan. 244; 52 Ia. 608. As to the rule where the indictment under which the conviction is procured is defective and liable to be set aside, see 1 Bish. Cr. L. §§ 663, 664; 4 Co. 44 *a*.

At common law conviction of certain crimes when accompanied by judgment disqualifies the person convicted as a witness; 18 Miss. 192. And see 11 Metc. 302. But where a statute making *defendants* witnesses is without exception, a conviction rendering such defendant infamous will not disqualify him; 5 Lans. 332; 63 Barb. 630. See 107 Mass. 403.

Summary convictions, being obtained by proceedings in derogation of the common law, must be obtained strictly in pursuance of the provisions of the statute; 1 Burr. 613; and the record must show fully that all proper steps have been taken; R. M. Charlt. 235; 1 Coxe 392; 2 Bay 105; 19 Johns. 39, 41; 14 Mass. 224; 3 Me. 51; 4 Zabr. 142; and especially that the court had jurisdiction; 2 Tyler 167; 4 Johns. 292; 3 Yeates 475.

As to payment of costs upon conviction, see 1 Bish. Cr. Pr. § 1317, n.

Consult Arnold; Paley, Convictions; Russell; Bishop; Wharton; Clarke, Criminal Law; Greenleaf; Phillips, Evidence.

CONVIVIUM. A tenure by which a tenant was bound to provide meat and drink for his lord at least once in the year. Cowel.

CONVOCATION (Lat. *con*, together, *voco*, to call).

In Ecclesiastical Law. The general assembly of the clergy to consult upon ecclesiastical matters. See COURT OF CONVOCATION.

CONVOY. A naval force, under the command of an officer appointed by government, for the protection of merchant-ships and others, during the whole voyage, or such part of it as is known to require such protection. Marsh. Ins. b. 1, c. 9, s. 5; Park. Ins. 388:

Warranties are sometimes inserted in policies of insurance that the ship shall sail with convoy. To comply with this warranty, five things are essential: first, the ship must sail with the regular convoy appointed by the government; secondly, she must sail from the place of rendezvous appointed by the government; thirdly, the convoy must be for the voyage; fourthly, the ship insured must have sailing instructions; fifthly, she must depart and continue with the convoy till the end of the voyage, unless separated from it by necessity. Marsh. Ins. b. 1, c. 9, s. 5.

CO-OBLIGOR. **Contracts.** One who is bound together with one or more others to fulfil an obligation. As to suing co-obligors, see PARTIES; JOINDER.

COOL BLOOD. Tranquillity, or calmness. The condition of one who has the calm and undisturbed use of his reason. In cases of homicide, it frequently becomes necessary to ascertain whether the act of the person killing was done in cool blood or not, in order to ascertain the degree of his guilt. Bacon, Abr. *Murder* (B); Kel. 56; Sid. 177; Lev. 180.

COOLING-TIME. **In Criminal Law.** Time for passion to subside and reason to interpose. Cooling-time destroys the effect of provocation, leaving homicide murder the same as if no provocation had been given; 1 Russ. Cr. 667; Whart. Hom. 448; Kerr, Hom. 68; 3 Gratt. 594. See 29 Cent. L. J. 186; HOMICIDE.

COPARCENARY, ESTATES IN. Estates of which two or more persons form one heir. 1 Washb. R. P. 414.

The title to such an estate is always by descent. The shares of the tenants need not be equal. The estate is rare in America, but sometimes exists; 3 Ind. 360; 4 Gratt. 16; 17 Mo. 13; 3 Md. 190. See Watk. Conv. 145.

COPARCENERS. Persons to whom an estate of inheritance descends jointly, and by whom it is held as an entire estate. 2 Bla. Com. 187.

In the old English and the American sense the term includes males as well as females, but in the modern English use is limited to females; 4 Kent 366. But the husband of a deceased coparcener, if entitled as tenant by the curtesy, holds as a coparcener with the surviving sisters of his wife, as does also the heir-at-law of his deceased wife upon his own death; Brown, Dict.

COPARTNER. One who is a partner with one or more other persons; a member of a partnership.

COPARTNERSHIP. A partnership.

COPARTNERY. **In Scotch Law.** The contract of copartnership. Bell, Dict.

COPE. A duty charged on lead from certain mines in England. Blount.

COPIA LIBELLI DELIBERANDA. A writ to enable a man accused to get a copy of the libel from the judge ecclesiastical. Cowel.

COPULATIVE TERM. One which is placed between two or more others to join them together.

COPY. A true transcript of an original writing.

Exemplifications are copies verified by the great seal or by the seal of a court. 1 Gilb. Ev. 19.

Examined copies are those which have been compared with the original or with an official record thereof.

Office copies are those made by officers intrusted with the originals and authorized for that purpose.

The papers need not be exchanged and read alternately; 2 Taunt. 470; 1 Stark. 183; 4 Campb. 372; 1 C. & P. 578. An examined copy of the books of an unincorporated bank is not evidence *per se;* 12 S. & R. 256; 2 N. & M'C. 299; 1 Greenl. Ev. § 508.

Copies cannot be given in evidence, unless proof is made that the originals from which they are taken are lost or in the power of the opposite party, and, in the latter case, that notice has been given him to produce the original; 1 Greenl. Ev. § 508; Tayl. Ev. 396.

A translation of a book is not a copy; 2 Wall. Jr. 547; 2 Am. L. Reg. 229; and a copy of a book means a transcript of the entire work; 12 Mo. Law Rep. N. S. 339.

COPYHOLD. A tenure by copy of court-roll. Any species of holding by particular custom of the manor. The estate so held.

A copyhold estate was originally an estate at the will of the lord, agreeably to certain customs evidenced by entries on the roll of the courts baron. Co. Litt. 58 *a*; 2 Bla. Com. 95; 1 Poll. & M. 351, 357. It is a villenage tenure deprived of its servile incidents. The doctrine of copyhold is of no application in the United States. Wms. R. P. 257, 258, Rawle's note; 1 Washb. R. P. 26.

COPYHOLDER. A tenant by copyhold tenure (by copy of court-roll). 2 Bla. Com. 95.

COPYRIGHT. The exclusive privilege, secured according to certain legal forms, of printing, or otherwise multiplying, publishing, and vending copies of certain literary or artistic productions.

The intellectual productions to which the law extends protection are of three classes. *First*, writings or drawings capable of being multiplied by the arts of printing or engraving. *Second*, designs of form or configuration capable of being reproduced upon the surface or in the shape of bodies. *Third*, inventions in what are called the useful arts. To the first class belong books, maps, charts, music, prints, and engravings; to the second class belong statuary, bas-reliefs, designs for ornamenting any surface, and configurations of bodies; the third class comprehends machinery, tools, manufactures, compositions of matter, and processes or methods in the arts. According to the practice of legislation in England and America, the term *copyright* is confined to the exclusive right secured to the author or proprietor of a writing or drawing, which may be multiplied by the arts of printing in any of its branches. Property in the other classes of intellectual objects is usually secured by letters-patent, and the interest is called a *patent-right*. But the distinction is arbitrary and conventional.

The foundation of all rights of this description is the natural dominion which every one has over his own ideas, the enjoyment of which, although they are embodied in visible forms or characters, he may, if he chooses, confine to himself or impart to others. But, as it would be impracticable in civil society to prevent others from copying such characters or forms without the intervention of positive law, and as such intervention is highly expedient, because it tends to the increase of human culture, knowledge, and convenience, it has been the practice of civilized nations in modern times to secure and regulate the otherwise insecure and imperfect right which, according to the principles of natural justice, belongs to the author of new ideas.

This has been done by securing an exclusive right of multiplying copies for a limited period, as far as the municipal law of the particular country extends. But, inasmuch as the original right, founded in the principles of natural justice, is of an imperfect character, and requires, in order to be valuable, the intervention of municipal law, the law of nations has not taken notice of it as it has of some other

rights of property; and therefore all copyright is the result of some municipal regulation, and exists only in the limits of the country by whose legislation it is established. The international copyright which is established in consequence of a convention between any two countries is not an exception to this principle: because the municipal authority of each nation making such convention either speaks directly to its own subjects through the treaty itself, or is exerted in its own limits by some enactment made in pursuance of the international engagement.

It was formerly doubtful in England whether copyright, as applied to books, existed at common law, and whether the first statute (8 Anne, c. 19) which undertook to regulate this species of incorporeal property had taken away the unlimited duration which must have existed at common law if that law recognized any right whatever.

The better opinion seems to be that the common law of England, before the statute of Anne, was supposed to admit the exclusive right of an author to multiply copies of his work by printing, and also his capacity to assign that right; for injunctions were granted in equity to protect it. See, on this subject, 4 Burr. 2303, 2408; 2 Bro. P. C. 145; 1 W. Bla. 301; 3 Swans. 673; 2 Ed. Ch. 327; 4 H. L. C. 815; 4 Exch. 145. But it has long been settled that, whatever the common-law right may have been before the statute, it was taken away by the statute, and that copyright exists only by force of some statutory provision; 8 Pet. 591; 17 How. 454; Drone, Copyr. 1; 128 U. S. 244.

In America, before the establishment of the constitution of the United States, it is doubtful whether there was any copyright at common law in any of the states; 8 Pet. 591. But some of the states had passed laws to secure the rights of authors, and the power to do so was one of their original branches of sovereignty, afterwards ceded to congress. By art. 1, sect. 8, of the federal constitution, power was given to congress "to promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." Under this authority, an act of May 31, 1790, secured a copyright in maps, charts, and books; and an act of April 29, 1802, gave a similar protection to engravings.

The persons entitled to secure a copyright, and what may be protected. The author, inventor, designer, or proprietor of any book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph or negative thereof, or of a painting, drawing, chromo, statue, statuary, and of models or designs intended to be perfected as works of the fine arts, and the executors, administrators, or assigns of any such person, may secure the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the same; and authors or their assigns may reserve the exclusive right of dramatizing the same; and, in the case of a dramatic composition, of publicly performing or representing it, etc., or causing it to be performed or represented by others; R. S. § 4952, as amended March 3, 1891, 1 Supp. 951.

What may be copyrighted. Private letters may be copyrighted by their author; 2 Story 100; and so may abstracts of title; 3 Minn. 94.

The compilations of existing material selected from common sources arranged and combined in original and useful form are the subject of a copyright, whether it consists wholly of selected matter or partly of original composition; Drone, Copyr. 152; Thus: (*ibid.*) dictionaries; 2 Sim. & Stu. 1; gazetteers; 5 Beav. 6; road and guide books; 1 Drew. 353; directories; L. R. 1 Eq. 697; calendars; 12 Ves. 270; catalogues; L. R. 18 Eq. 444; mathematical tables; 1 Russ. & Myl. 73; a list of hounds; L. R. 9 Eq. 324; a collection of statistics; L. R. 3 Eq. 718.

An abridgment, one not a mere transcript of the part of an original, may be copyrighted; Drone, Copyr. 158; 1 Story 11; so may a digest; Drone, Copyr. 158. One who prepares reports of decided cases may obtain a valid copyright for the parts of which he is the author or compiler; 8 Pet. 591; 2 Blatchf. 165; 13 Wall. 608; but the reporter is not entitled to a copyright in the opinion of the court, even though he took it down from the lips of the judge, nor in the head notes when prepared by the judge; 6 U. S. Pat. Off. Gaz. 932.

The translation of a foreign work may be copyrighted, but this will not prevent the publishing of an independent translation of the same work; 6 Biss. 477.

The collection and arrangement of advertisements in a trade directory are the subject of copyright, though each single advertisement is not; [1893] 1 Ch. 218. A compilation made from voluminous public documents may be copyrighted; 32 Fed. Rep. 202. A compilation of prices and quotations on the stock exchange, printed on sheets and issued daily as a newspaper; 73 Law J. 120.

A photographer, who makes no charge for photographing an actress in her public character, has the right to secure a copyright for his own exclusive benefit; 59 Fed. Rep. 324; and where he produces by an arrangement of lights and shadows, an original effect representing his conception of her in a certain character, he is entitled to the protection of the copyright laws; 57 Fed. Rep. 32. So of an artistic photograph of a woman and child; 111 U. S. 53; 48 Fed. Rep. 678;

A "book" may be printed on one sheet; 2 Paine 383; 1 Bond 540.

A diagram with directions for cutting ladies' garments printed on a single sheet of paper is a "book" within the copyright acts; 1 Bond 540; and so is a cut in an illustrated newspaper; 26 Fed. Rep. 519; information in a time-table may be copyrighted; 1 Eq. 697.

A scene in a play representing a series of dramatic incidents, but with very little dialogue, may be copyrighted; 56 Fed. Rep. 483; s. c. 4 C. C. A. 110; so of the introduction, chorus, and skeleton of a "topical song"; 60 Fed. Rep. 758. See 6 Blatchf. 256.

When a new edition differs substantially from the former one, a new copyright may be acquired, provided the alteration shall materially affect the work; 1 Story 11; 13 Blatchf. 163. New editions of a copyright work are protected by the original copyright, but not new matter; 4 Cliff. 1; 1 Flipp. 228.

What may not be copyrighted. No copyright can be obtained on racing tips published in a copyrighted newspaper; [1895] 2 Ch. 29; nor on a daily price current; 2 Paine 382; nor on a blank; 101 U. S. 99;

nor cuts contained in a trade catalogue; 72 Fed. Rep. 168.

Where the judge of a supreme court of a state prepares the opinion or decision of the court, the statement of the case, and the syllabus, and the reporter of the court takes out a copyright in his own name for the state, the copyright is invalid; 128 U. S. 244. Where a reporter is employed on a condition that his reports shall belong to the state, he is not entitled to a copyright; 2 Blatchf. 165; 27 Fed. Rep. 50.

Publications of an improper kind will not be protected by the courts; 1 Deady 223.

An author cannot acquire any right to the protection of his literary products by using an assumed name or pseudonym. Without the protection of a copyright, his work is dedicated to a public when published; 14 Fed. Rep. 728. Where an advertisement solicitor entered into a contract to furnish 60,000 letters in possession of a company, which letters had been received in response to advertisements, it was *held*, in an action upon the contract for unpaid purchase money, that the writers of the letters retained such a proprietary interest in them that they could not be made the subject of sale without their consent, and the contract was therefore void; 32 Fed. Rep. 437.

The compilation of the statutes of a state may be so original as to entitle the author to a copyright, but he cannot obtain one for the laws alone, and the legislature of the state cannot confer any such exclusive privilege upon him; 27 Fed. Rep. 61. Such a compilation of statutes may be copyrighted as to the manner in which the work was done, but not as to the laws alone; *id.*

A stage dance illustrating the poetry of motion of a series of graceful movements, etc., is not a dramatic composition within the act; 50 Fed. Rep. 926. The copyright of a book describing a new system of stenography does not protect the system apart from the language by which it is explained; 49 Fed. Rep. 15.

An opinion is not the subject-matter of copyright; nor is a printed expression of it, unless it amount to a literary composition; [1895] 2 Ch. 29; s. c. 12 Reports 381.

The term for which a copyright may be obtained is the period of twenty-eight years from the time of recording the title; and at the expiration of that period the author, inventor, or designer, if living, or his widow and children, if he be dead, may re-enter for an additional or renewed term of fourteen years; upon recording title of the work, or description of the article so secured, a second time, and complying with all other regulations in regard to original copyrights within six months before the expiration of the first term, and, within two months from the date of said renewal, causing a copy of the record thereof to be published in one or more newspapers of the United States for two or more weeks; U. S. Rev. Stat. 1 Supp. 951.

The formalities requisite to the securing of the original term are: 1. The deposit on or before the day of publication in this or any foreign country, in the office of the librarian of congress or in the mail in the United States, addressed to the librarian of congress at Washington, of a printed copy of the title of the book, map, chart, etc., or a description of the painting, etc., and not later than the day of publication thereof, in this or any foreign country, delivering at the said office or so depositing in the mail, two copies of such book, etc., or in case of a painting, etc., a photograph of the same; and the proprietor of every such copyright book or other article must deliver at the said office or so deposit in the mail a copy of every subsequent edition wherein any substantial changes are made; which copies shall be printed from type set, or plate, negative, or drawing on stone, made in the United States, or from transfers made therefrom; U. S. Rev. Stat. § 4956, as amended by act of March 3, 1891, § 3. 2. The printing of a notice that a copyright has been secured on the title-page of every copy, or the page immediately following, if it be a book, or on the face, or front, if it be a map, chart, musical composition, print, cut, engraving, photograph, painting, drawing, chromo, statue, statuary, or model or design intended to be completed as a work of the fine arts, or on the title or frontispiece, if it be a volume of maps, charts, music, or engravings, in the following words:—

"Entered according to Act of Congress, in the year , by A B, in the office of the Librarian of Congress, at Washington," or at his option, the word "copyright," together with the year the copyright was entered, and the name of the party by whom it was taken out; Thus:—"Copyright, 18—, by A B."

In order to maintain an action for infringement on a copyright of a painting, a notice of copyright must have been inscribed on some visible portion thereof, when it was published; 72 Fed. Rep. 54. In the notice of copyright of a photograph the abbreviation "'94," representing the year, is a substantial compliance with the act; 65 Fed. Rep. 94. The following notice on a map:—"Copyright entered according to Act of Congress, 1889, by T. C. Hefel, Civil Engineer," is sufficient, since it differs from the prescribed formula only by including words which are surplusage; 54 Fed. Rep. 179. The words "1889. Copyrighted by B. J. Falk, New York," are sufficient; 48 Fed. Rep. 222, 224. The words "Copyrighted 1891. All rights reserved," are not a sufficient notice of copyright; 69 Fed. Rep. 291.

It is sufficient, in the case of a separate article of an American author published in a foreign encyclopædia, to deposit the sheets or pages containing the article taken out of the bound volume; 56 Fed. Rep. 764.

Each volume of a book in two or more volumes, when such volumes are published separately, and each number of a periodical shall be considered as an independent publication; Act of March 3, 1891, sec. 11. The initial of the Christian name is suffi-

cient if the full surname be given; 111 U. S. 53. Where the printed title was deposited by E. B. Meyers & Chandler and the printed notice of the entry of the copyright showed that the copyright was entered by E. B. Meyers alone, it was held immaterial; 128 U. S. 657.

A change of title and the filing of such alteration, before the publication of a book and after the filing of the original title, will not affect the validity of the copyright; 56 Fed. Rep. 764.

A copyright may be taken in the name of a trustee for the benefit of some third party who is the author or proprietor; 32 Fed. Rep. 202; 42 *id.* 618; 56 *id.* 764.

One who does business under a fictitious partnership name may receive a copyright under that name; 49 Fed. Rep. 854. An author of an article intended for a foreign encyclopædia obtained a copyright therefor under an agreement with the publisher. It was held that the agreement was a license only to use the article, and that the copyright was properly in the author's name; 56 Fed. Rep. 764.

Prior to the act of congress "providing for keeping and distributing all public documents," approved February 5, 1859, the law provided that one copy of each book or other production should be sent to the librarian of the Smithsonian Institution, and one to the librarian of the Congressional Library. This provision is now repealed; and while in existence it was questionable whether a compliance with its conditions was essential to a valid copyright; 1 Blatchf. 618.

As to what will constitute a sufficient publication to deprive an author of his copyright: The public performance of a play is not such publication; 2 Biss. 34; 13 Blatchf. 47; the private circulation of even printed copies of a book is not; 5 McLean 32; 9 Am. L. Reg. 33; 1 Macn. & G. 25; the deposit of a chart with the secretary of the navy with an express agreement that it was not to be published, is not; 2 Paine 393; see, generally, 7 Am. Rep. 488. Publication of a manuscript constitutes a dedication to the public; 25 Fed. Rep. 183; 133 Mass. 32; the sale of a picture unconditionally carries with it the right of making copies of it and the publication thereof; 3 Cliff. 537. A picture which is publicly exhibited without having inscribed upon some visible portion of it, or upon the substance on which it was mounted, the notice required by the statute, is published; 72 Fed. Rep. 54. In this case the artist publicly exhibited his picture in Germany, without any notice of a reservation of his rights. A copyright subsequently taken out by his assignee was held invalid, as against one who made and sold photographs of it in the United States. See also 4 H. L. Cas. 815; 10 Ir. Ch. 121, 510; 8 Pet. 591; 9 Am. L. Reg. 33.

The remedy for an infringement of copyright is threefold. By an action of debt for certain penalties and forfeitures given by the statute. By an action on the case at common law for damages, founded on the legal right and the injury caused by the infringement. The action must be case, and not trespass; 2 Blatchf. 39. By a bill in equity for an injunction to restrain the further infringement, as an incident to which an account of the profits made by the infringer may be ordered by the court; 2 Morg. Lit. 706; 6 Ves. 705; 8 *id.* 323; 9 *id.* 341; 1 Russ. & M. 73, 159; 1 Y. & C. 197; 2 Hare 560; though it cannot embrace penalties; 2 Curt. C. C. 200; 2 Blatchf. 39.

The complainant in a bill in equity must make out a *prima facie* case of a valid copyright. It is sufficient if there be clear color of title founded on long possession; 6 Ves. 689; 8 *id.* 215; 17 *id.* 422; Jac. 314, 471; 2 Russ. 385; 2 Phil. 154. As to the objections that may be taken by general demurrer, see 2 Blatchf. 39. The injunction may go against an entire work or a part; 2 Russ. 393; 3 Stor. 768; 17 Ves. 422; 3 M. & C. 737; 11 Sim. 31; 2 Beav. 6; 2 Brown, Ch. 80; though the court will not interfere where the extracts are trifling; 2 Swanst. 428; 1 Russ. & M. 73; 2 *id.* 247.

An injunction to restrain the infringement of one directory by another will be limited to the extent to which the two books are identical; 30 Fed. Rep. 772.

Where the extracts of a copyrighted work are scattered through the defendant's book in such manner that the two cannot be distinguished and separated, the court may enjoin the defendant's book as a whole, but if the matters can be separated the injunction should extend only to the copyrighted matter; 33 Fed. Rep. 494.

Where the author's pirated paragraphs of a digest can be separated from paragraphs not subject to criticism, the injunction should be restricted to the infringing paragraphs, even though it might consume a decade to examine the paragraphs of the digest and compare them. This will not relieve the complainant from the burden of proving his case; 64 Fed. Rep. 360.

Although the court is not convinced that a compilation which wrongfully appropriates extracts from the plaintiff's copyrighted work will injure its sale, yet an injunction in a proper case may be granted. Actual pecuniary damage is not the sole right to enjoining violation of copyright; 33 Fed. Rep. 494.

The practice of one newspaper copying literary matter from another is no defence to an action for the infringement of a copyright; [1892] 3 Ch. 489, where the cases are collected.

Original jurisdiction in respect to all these remedies is vested in circuit courts of the United States; Rev. Stat. § 629, cl. 9. Rev. Stat. § 4968 limits the action for the penalties and forfeitures to the period of two years after the cause of action arose. The remedy for an unauthorized printing or publishing of any manuscript is by a special action on the case, or by a bill in equity for an injunction. Original jurisdiction in these cases is likewise vested in the circuit courts.

Infringement. The statute provides that

any person who shall print, publish, dramatize, translate or import, any *copy* of a book which is under the protection of a copyright, without the consent of the proprietor of the copyright first obtained in writing, signed in the presence of two or more witnesses, or who shall, knowing the same to be so printed, sell, or expose to sale, any *copy* of such book, shall forfeit every copy of such book to the proprietor, and shall also forfeit and pay such damages as may be recovered in a civil action brought by the proprietor, etc.; R. S. § 4964, as amended March 3, 1891.

Sec. 4965 provides that any person who, after the recording of the title of any map, chart, dramatic or musical composition, print, cut, engraving or photograph or chromo, etc., shall, without the consent of the proprietor of the copyright first obtained in writing, signed in the presence of two or more witnesses, engrave, etc., either in whole or in part, or knowing the same to be so printed, etc., sell or expose to sale any copy of such map or other article, he shall forfeit to the proprietor all the plates on which the same shall be copied and every sheet thereof either copied or printed, and shall further forfeit one dollar for each sheet of the same found in his possession, etc., and in case of a painting, statue or statuary, ten dollars for every copy of the same in his possession. Provided that in case of a photograph from any object in a work of fine arts, the sum to be recovered shall not be less than one hundred dollars or more than five thousand dollars, and that in case of such infringement of a copyright of a painting, etc., or model, or design of photograph or of a work of the fine arts, the recovery shall be not less than two hundred and fifty dollars and not more than ten thousand dollars. In each case half of the penalty to go to the proprietor of the copyright, and the other half to the use of the United States; § 4965, as amended March 3, 1891. The act is confined to the sheets in the possession of the party who prints or exposes them to sale; 7 How. 798. It has been held to be necessary to the recovery of these statutory penalties and forfeitures that the whole of the book should be reprinted; 23 Bost. Law Rep. 397.

But in order to sustain an action at common law for damages or a bill in equity for an infringement of copyright, an exact reprint is not necessary.

There may be a piracy. 1st. By *reprinting* the whole or part of a book *verbatim*. The mere quantity of matter taken from a book is not of itself a test of piracy; 3 M. & C. 737; the court will look at the value or quality more than the quantity taken; 1 Story 11. Extracts and quotations fairly made, and not furnishing a substitute for the book itself, or operating to the injury of the author, are allowable; 17 Ves. 422; 17 Law Jour. 142; 1 Campb. 94; Ambl. 694; 2 Swanst. 428; 2 Stor. 100; 2 Russ. 383; 1 Am. Jur. 212; 2 Beav. 6; 11 Sim. 31. A "fair use" of a book, by way of quotation or otherwise, is allowable; 4 Cliff. 1; L. R. 8 Ex. 1; 31 L. T. N. S. 775; L. R. 18 Eq. 444; L. R. 5 Ch. 251; it may be for purposes of criticism, but so as not to supersede the work itself; 4 Cliff. 1; L. R. 8 Ex. 1; 26 Fed. Rep. 519; or in a later work to the extent of fair quotation; 11 Sim. 31; 31 L. T. N. S. 775; 2 Stor. 100; in compiling a directory, but not so as to save the compiler all independent labor; 30 Fed. Rep. 772; L. R. 1 Eq. 697; 7 *id.* 34; *id.* 5 Ch. 279; a descriptive catalogue of fruit, etc.; L. R. 18 Eq. 444; a book on ethnology; L. R. 5 Ch. 251; a dictionary, provided the new book may fairly be considered a new work; 31 L. T. R. 16. See 25 L. R. A. 441 for a full discussion; PIRACY.

2d. By *imitating* or copying, with colorable alterations and disguises, assuming the appearance of a new work. Where the resemblance does not amount to identity of parallel passages, the criterion is whether there is such similitude and conformity between the two books that the person who wrote the one must have used the other as a model, and must have copied or imitated it; see 5 Ves. 24; 8 *id.* 215; 12 *id.* 270; 16 *id.* 269, 422; 5 Swanst. 672; 2 Brown, Ch. 80; 2 Russ. 385; 2 S. & S. 6; 3 V. & B. 77; 1 Campb. 94; 1 East 361; 4 Esp. 169; 1 Stor. 11; 3 *id.* 768; 2 W. & M. 497; 2 Paine 393, which was the case of a chart. A fair and *bona fide* abridgment has in some cases been held to be no infringement of the copyright; 1 Morg. Lit. 319, 343; 2 Atk. 141; Amb. 403; Lofft 775; 1 Brown, Ch. 451; 5 Ves. 709; 2 Am. Jur. 491; 3 *id.* 215; 4 *id.* 456, 479; 4 Clifford 1; 1 Y. & C. 298; 4 McLean 306; 2 Stor. 105; 2 Kent 382; see 3 Am. L. Reg. 129. But Drone, Copyright 440, maintains the contrary doctrine.

A later writer on any science or art, such as physiognomy, though consulting and using the works of an earlier writer on the subject, will be held not to have pirated, but to have made a fair use of them, it not appearing that they have been drawn from to a substantial degree, notwithstanding there are some errors common to both, and that they have a similar division of systems as a basis, such division being only a somewhat altered form of a division in a work of a previous writer, from which they both had a right to draw material; 75 Fed. Rep. 6.

"The true test of piracy, then, is not whether a composition is copied in the same language or the exact words of the original, but whether in substance it is reproduced; not whether the whole or whether a material part is taken. In this view of the subject it is no defence of piracy that the work entitled to protection has not been copied literally; that it has been translated into another language; that it has been dramatized; that the whole has not been taken; that it has been abridged; that it is reproduced in a new and more useful form. The controlling question always is whether the substance of the work is taken without authority;" Drone, Copyr. 385.

An author may resort with full liberty to the common sources of information and make use of the common materials open to

all, but his work must be the result of his own independent labor; 75 Fed. Rep. 6.

A subsequent compiler of a directory is only required to do for himself that which the first compiler has done. He may not use a previous compilation to save himself trouble, though he do so but to a very limited extent, but he may use the former work to verify the spelling of names or the correctness of the addresses; 30 F. R. 772.

The compiler of a digest may compare notes, abstracts, and paragraphs from opinions of the courts and from syllabi prepared by the courts, and may digest such opinions and syllabi from printed copies and published in a copyrighted system of rights, but he may not copy the original work of the reporter, or use his work in any way in order to lighten his labors, though he may use it to verify his own accuracy, to detect errors, etc.; 64 Fed. Rep. 360.

A translation has been held not to be a violation of the copyright of the original; 2 Wall. Jr. 547; s. c. 2 Am. L. Reg. 231. The correctness of this decision is questioned in Drone, Copyr. 455.

When the infringement of a copyright is established the question of intent is immaterial; 53 Fed. Rep. 499.

A copyrighted compilation, comprising lists of trotting and pacing horses with their speed, is infringed by one who uses the table to make up records of horses of 2.30 or better, notwithstanding the fact that the latter compilation might have been made by the defendant from other publications valuable to him; 70 Fed. Rep. 237.

Damages. Where the infringing material is so intermingled with the rest of the contents as to be almost incapable of separation, the infringer is liable for the entire profit realized from the book; 128 U. S. 617; 148 U. S. 488. Where the infringing publication uses only a part of the original matter and is issued in a cheaper form, the measure of damages is the profit realized by the infringer, and not what the copyright owner would have realized by a sale of an equal number of the original copyright work; 50 Fed. Rep. 473.

The title to a copyright is made assignable by that provision of the statute which authorizes it be taken out by the "legal assigns" of the author. An assignment may therefore be made before the entry for copyright; but, as the statute makes a written instrument, signed by the author, etc., and attested by two credible witnesses, necessary to a lawful authority in another to print, publish, and sell, a valid assignment or license, whether before or after the copyright is obtained by entry, must be so made. Whether a general assignment of the first term by the author will carry the interest in the additional or renewed term, see 2 Brown, Ch. 80; Jac. 315. Where A employed B to complete a school book for $500, and took an assignment of the copyright, and A published the book calling B the author, it was held that only the original term of the copyright passed to A; 2 W and M. 23.

The sole right of publicly performing or representing dramatic compositions, which have been entered for copyright under the act of 1831, by a supplemental act, passed March 3, 1891, is now added to the sole right of printing and publishing, and is vested in the author or proprietor, his heirs or assigns, during the whole period of the copyright; and authors may reserve the right to dramatize or translate their own works. These new rights, being made incident to the copyright, follow the latter whenever the formalities for obtaining it have been complied with. For an unlawful representation, the statute gives an action of damages, to be assessed at a sum not less than one hundred dollars for the first and at fifty dollars for every subsequent performance, as to the court shall seem just. The author's remedy in equity is also saved. The statute does not apply to cases where the right of representation has been acquired before the composition has been made the subject of copyright.

The provision of act of March 3, 1891, giving authors the exclusive rights to dramatize and translate their copyrighted works does not prevent the title of a copyrighted work ("Trilby") from being used in connection with a dramatic composition, under that name, which presents no scene, incident, or dialogue from that work; 67 Fed. Rep. 904.

For a discussion of these acts, and of the nature and incidents of dramatic literary property, see 9 Am. Law Reg. 33, and 23 Bost. Law Rep. 397. See also 1 Am. L. Reg. 45; 2 *id.* 129; 14 *id.* 213; 2 Biss. 208.

The owner of a copyright who wishes to sell the published work directly and only to individual subscribers, through canvassers employed by him, will be protected from interference by other dealers who have surreptitiously obtained copies without his consent and offered them for sale; 27 Fed. Rep. 914. But it has been held that the owner of a copyright transferring the title of copyrighted books under an agreement restricting their use, cannot, under the copyright statutes, restrain sales of books in violation of the agreement; 61 Fed. Rep. 689; the remedy is confined to the breach of the contract; *id.*

The words "Webster's Dictionary" are public property by reason of the expiration of the copyright in the dictionary; 47 Fed. Rep. 411.

One who buys copies of a publication which violates copyright and sells them again is liable for the profit on his sales; 24 Fed. Rep. 636.

International Copyright. Prior to the act of March 3, 1891, the benefits of the copyright law were confined to citizens of the United States, but that act provides for an international copyright which gives to a citizen or subject of a foreign state or nation the benefit of copyright on substantially the same basis as its own citizens, provided such foreign state or nation permits the same right to citizens of the United States, or when such foreign state or nation is a party to an international agree-

ment which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States may, at its pleasure, become a party to such agreement. The existence of either of the conditions aforesaid shall be determined by the president of the United States, by proclamation made from time to time as the purposes of this act may require. International copyright now extends to the citizens or subjects of Belgium, France, Great Britain, Switzerland, Germany, Italy, Denmark, Spain, Portugal, Mexico, and Chili.

The act of March 3, 1891, § 3, requiring that copies of a book or lithograph deposited with the Librarian of Congress shall be manufactured in this country, does not apply to mere musical compositions, though published in book form, or made by lithographic processes; 67 Fed. Rep. 905.

A copyright, or an undivided part thereof may be assigned to a non-resident foreigner; 56 Fed. Rep. 764; 42 *id.* 618.

CORAAGIUM or CORAAGE. Measures of corn. An unusual and extraordinary tribute, arising only on special occasions. They are thus distinguished from services. Mentioned in connection with *hidage* and *carvage*. Cowel.

CORAM IPSO REGE (Lat.). Before the king himself. Proceedings in the court of king's bench are said to be *coram rege ipso*. 3 Bla. Com. 41.

CORAM NOBIS. A writ of error on a judgment in the king's bench is called a *coram nobis* (before us). 1 Archb. Pr. 234. See CORAM VOBIS.

CORAM NON JUDICE. Acts done by court which has no jurisdiction either over the person, the cause, or the process, are said to be *coram non judice*. 1 Conn. 40. Such acts have no validity. If an act is required to be done before a particular person, it would not be considered as done before him if he were asleep or *non compos mentis;* 5 H. & J. 42; 8 Cra. 9; Paine 55; 1 Prest. Conv. 266.

CORAM PARIBUS. In the presence of the peers or freeholders. 2 Bla. Com. 307.

CORAM VOBIS. A writ of error directed to the same court which tried the cause, to correct an error in fact. 3 Md. 325; 3 Steph. Com. 642.

If a judgment in the King's Bench be erroneous in matter of fact only, and not in point of law, it may be reversed in the same court by writ of error *coram nobis* (before us), or *quæ coram nobis residant;* so called from its being founded on the record and process, which are stated in the writ to remain in the court of the king before the king himself. But if the error be in the *judgment* itself, and not in the process, a writ of error does not lie in the same court upon such judgment. 1 Rolle, Abr. 746. In the Common Pleas, the record and proceedings being stated to remain before the king's justices, the writ is called a writ of error *coram vobis* (before you) or *quæ coram vobis residant*. 3 Chit. Bla. Com. 406, n.

CORD. A measure of wood, containing 128 cubic feet. See 67 Barb. 169.

COREA. A nation of Asia. Its government is an absolute monarchy. The country was subject to the suzerainty of China, but by treaty concluded with Japan in 1895, the claims of China were renounced. The government is under the immediate control of the king, assisted by a cabinet of ministers.

CO-RESPONDENT. Any person called upon to answer a petition or other proceeding, but now chiefly applied to a person charged with adultery with the husband or wife, in a suit for divorce, and made jointly a respondent to the suit. See DIVORCE.

CORN. In its most comprehensive sense, this term signifies every sort of grain, as well as peas and beans; this is its meaning in the memorandum usually contained in policies of insurance. But it does not include rice; Park, Ins. 112; 1 Marsh. Ins. 223, n.; Wesk. Ins. 145. See Com. Dig. *Biens* (G, 1). In the United States it usually means maize, or Indian corn; 53 Ala. 474.

CORN RENTS. Rents reserved in wheat or malt in certain college leases in England. Stat. 18 Eliz. c. 6; 2 Bla. Com. 322.

CORN-LAWS. Laws regulating the trade in bread-stuffs.

The object of corn laws is to secure a regular and steady supply of the great staples of food; and for this object the means adopted in different countries and at different times widely vary, sometimes involving restriction or prohibition upon the export, and sometimes, in order to stimulate production, offering a bounty upon the export. Of the former character was the famous system of corn laws of England, initiated in 1773 by Burke, and repealed in 1846 under Sir Robert Peel. See Cobden's Life.

CORNAGE. A species of tenure in England, by which the tenant was bound to blow a horn for the sake of alarming the country on the approach of an enemy. Bac. Abr. *Tenure* (N).

CORNET. A commissioned officer in a regiment of cavalry, abolished in England in 1871, and not existing in the United States army.

CORODY. An allowance of meat, drink, money, clothing, lodging, and such like necessaries for sustenance. 1 Bla. Com. 283; 1 Chit. Pr. 225. An allowance from an abbey or house of religion, to one of the king's servants who dwells therein, of meat and other sustenance. Fitzh. N. B. 230.

An assize lay for a corody; Cowel. Corodies are now obsolete; Co. 2d Inst. 630; 2 Bla. Com. 40.

CORONATION OATH. The oath administered to a sovereign in England before coronation. Whart. Law Dic.

CORONATOR (Lat.). A coroner. Spel.

CORONATORE EXONERANDO. A writ for the removal of a coroner, for a cause therein assigned.

CORONER. An officer whose principal duty it is to hold an inquisition, with the assistance of a jury, over the body of any person who may have come to a violent death, or who has died in prison.

It is his duty also, in case of the death of the sheriff or his incapacity, or when a vacancy occurs in that office, to serve all the writs and processes which the sheriff is usually bound to serve; 20 Ga. 336; 10 Humph. 346; 73 N. Y. 45; 1 Bla. Com. 349. See SHERIFF.

The chief justice of the King's Bench was the sovereign or chief coroner of all England; though it is not to be understood that he performed the active duties of that office in any one county; 4 Co. 57 *b*; Bac. Abr. *Coroner;* 3 Com. Dig. 242; 5 *id.* 212.

It was also the coroner's duty to inquire concerning shipwreck, and to find who had possession of the goods; concerning treasure-trove, who were the finders, and where the property was; 1 Bla. Com. 349.

The office has lost much of the honor which formerly appertained to it; but the duties are of great consequence to society, both for bringing murderers to punishment and protecting innocent persons from accusation. It may often happen that the imperfections of the early examination enable one who is undoubtedly a criminal to escape. It is proper in most cases of homicide to procure the examination to be made by a physician, and in many cases it is a coroner's duty so to do; 4 C. & P. 571. See 64 Ind. 524; 49 Ia. 148; 8 Oreg. 170.

Coroners were abolished in Massachusetts by act 1877, c. 200, and the governor given the power to appoint, in their place, medical examiners, "men learned in the science of medicine," whose duties were to make examinations of dead bodies, to hold autopsies upon the same, and in case of death from violence to notify the district attorney and a justice of the district of the fact.

See Lee, Coroners; Crock. Sher. & Cor.; 6 Am. L. Reg. 385.

CORPORAL (Lat. *corpus*, body). Bodily; relating to the body: as, corporal punishment.

A non-commissioned officer of the lowest grade in an infantry, cavalry, or artillery company.

CORPORAL OATH. An oath which the party takes laying his hand on the gospels. Cowel. It is now held to mean solemn oath. 1 Ind. 184.

CORPORAL TOUCH. Actual, bodily contact with the hand.

It was once held that before a seller of personal property could be said to have stopped it *in transitu*, so as to regain the possession of it, it was necessary that it should come to his corporal touch; but the contrary is now settled. These words were used merely as a figurative expression. 3 Term 464; 5 East 184.

CORPORATION (Lat. *corpus*, a body). A body, consisting of one or more natural persons, established by law, usually for some specific purpose, and continued by a succession of members.

"An artificial being created by law and composed of individuals who subsist as a body politic under a special denomination with the capacity of perpetual succession and of acting within the scope of its charter as a natural person." 122 Ill. 293.

A corporation aggregate is a collection of individuals united in one body by such a grant of privileges as secures succession of members without changing the identity of the body and constitutes the members for the time being one artificial person or legal being capable of transacting the corporate business like a natural person. Bronson, J., 1 Hill, N. Y. 620.

It is this last characteristic of a corporation, sometimes called its immortality, prolonging its existence beyond the term of natural life, and thereby enabling a long-continued effort and concentration of means to the end which it was designed to answer, that constitutes its principal utility. A corporation is modelled upon a state or nation, and is to this day called a body *politic* as well as corporate,—thereby indicating its origin and derivation. Its earliest form was, probably, the municipality or city, which necessity exacted for the control or local police of the marts and crowded places of the state or empire. The combination of the commonalty in this form for local government became the earliest bulwark against despotic power: and a philosophical historian traces to the remains and remembrance of the Roman *municipia* the formation of those elective governments of towns and cities in modern Europe, which, after the fall of the Roman empire, contributed so largely to the preservation of order and to the protection of the rights of life and property as to become the foundation of modern liberty. McIntosh, Hist. of Eng. p. 31.

Aggregate corporations are those which are composed of two or more members at the same time.

Civil corporations are those which are created to facilitate the transaction of business.

Ecclesiastical corporations are those which are created to secure the public worship of God.

Eleemosynary corporations are those which are created for the purposes of charities, such as schools, hospitals, and the like.

Lay corporations are those which exist for secular purposes.

Municipal corporations are those created for the purpose of administering some portion of the government in a political subdivision of the state, as a city, county, etc.

Private corporations are those which are created wholly or in part, for purposes of private emolument. 4 Wheat. 668; 9 *id.* 907.

Public corporations are those which are exclusively instruments of the public interest.

Sole corporations are those which by law consist of but one member at any one time, as a bishop in England.

In the Dartmouth College Case, 4 Wheat. 666, Mr. Justice Story defined the various kinds of corporations as follows:—

"An aggregate corporation at common law is a collection of individuals united into one collective body, under a special name, and possessing certain immunities, privileges, and capacities in its collective

character, which do not belong to the natural persons composing it. . . . A great variety of these corporations exist in every country governed by the common law; . . . some of these corporations are, from the particular purposes to which they are devoted, denominated *spiritual*, and some *lay;* and the latter are again divided into *civil* and *eleemosynary* corporations. Eleemosynary corporations are such as are constituted for the perpetual distribution of the free alms and bounty of the founder. . . . In this class are ranked hospitals, and colleges, etc. Another division of corporations is into *public* and *private*. Public corporations are generally esteemed such as exist for public and political purposes only, such as towns, cities, etc. Strictly speaking, public corporations are such only as are founded by the government for public purposes, where the whole interests belong also to the government. If, therefore, the foundation be private, though under the charter of the Government, the corporation is private. . . . For instance, a bank created by the Government for its own uses, whose stock is exclusively owned by the government, is, in the strictest sense, a public corporation. So a hospital created and endowed by the government for general charity. But a bank, whose stock is owned by private persons, is a private corporation. . . . The same doctrine may be affirmed of insurance, canal, bridge, and turnpike companies. In all these cases, the uses may, in a certain sense, be called public, but the corporations are private. . . . This reasoning applies in its full force to eleemosynary corporations. . . . This is the unequivocal doctrine of the authorities; and cannot be shaken but by undermining the most solid foundations of the common law."

Kent divides corporations into ecclesiastical and lay, and lay corporations into eleemosynary and civil; 2 Kent 274.

It has been held that a public corporation is one that cannot carry out the purposes of its organization without certain rights under its charter from the commonwealth, and that mere private corporations are those that need no franchise from the state to carry out such purposes; 123 Pa. 164. But Judge Thompson, in his learned work, doubts as to whether these divisions promote clear conceptions of the law; 1 Thomp. Corp. § 22; he considers that a more practical conception would divide them into three classes: public-municipal corporations, to promote the public interest; corporations technically private but of *quasi* public character, such as railroads etc.; and corporations strictly private; *id.* § 37.

The essence of a corporation consists "in a capacity (1) to have perpetual succession in a special and in an artificial form; (2) to take and grant property, contract obligations, sue and be sued by its corporate name as an individual; (3) to receive and enjoy in common grants of privileges and annuities;" 22 Wend. 71.

By both the civil and the common law, the *sovereign* authority only can create a corporation,—a corporation by prescription, or so old that the license or charter which created it is lost, being presumed, from the long-continued exercise of corporate powers, to have been entitled to them by sovereign grant. In England, corporations are created by royal charter or parliamentary act; in the United States, by legislative act of any state, or of the congress of the United States,—congress having power to create a corporation, as, for instance, a national bank when such a body is an appropriate instrument for the exercise of its constitutional powers; 4 Wheat. 424. As to corporations created by congress see 21 Cent. L. J. 421. In many or most of the states general acts have been passed for the creation of certain classes of some corporations. And some state constitutions have taken from the legislature the power to create them by special act.

All corporations, of whatever kind, are moulded and controlled, both as to what they may do and the manner in which they may do it, by their charters or acts of incorporation, which to them are the laws of their being, which they can neither dispense with nor alter. Subject, however, to such limitations as these, or such as general statute or constitutional law, may impose, every corporation aggregate has, by virtue of incorporation and as incidental thereto, *first*, the power of perpetual succession, including the admission, and, except in the case of mere stock corporations, the removal for cause, of members; *second*, the power to sue and be sued, to grant and to receive grants, and to do all acts which it may do at all, in its corporate name; *third*, to purchase, receive, and to hold lands and other property, and to transmit them in succession; *fourth*, to have a common seal, and to break, alter, and renew it at pleasure; and, *fifth*, to make by-laws for its government, so that they be consistent with its charter and with law. Indeed, at this day, it may be laid down as a general rule that a corporation may, within the limits of its charter or act of incorporation express or implied, lawfully do all acts and enter into all contracts that a natural person may do or enter into, so that the same be appropriate as means to the end for which the corporation was created.

A corporation may be dissolved, if of limited duration, by the expiration of the term of its existence, fixed by charter or general law; by the loss of all its members, or of an integral part of the corporation, by death or otherwise, if the charter or act of incorporation provide no mode by which such loss may be supplied; by the surrender of its corporate franchise to, and the acceptance of the surrender by, the sovereign authority; and, lastly, by the forfeiture of its charter by the neglect of the duties imposed or abuse of the privileges conferred by it; the forfeiture being enforced by proper legal process.

In England, a private as well as a public

corporation may be dissolved by act of parliament; but in the United states, although the charter of a municipal corporation may be altered or repealed at pleasure, the charter of a *quasi* public or a private corporation, whether granted by the king of Great Britain previous to the revolution, or by the legislature of any of the states since, is, unless in the latter case express power be for that purpose reserved, within the protection of that clause of the constitution of the United States which, among other things, forbids a state from passing any "law impairing the obligation of contracts." Const. U. S. art. 1, sect. 10; 4 Wheat. 518. Under this clause of the constitution it has been settled that the charter of a *quasi* public or a private corporation, whether civil or eleemosynary, is an executed contract between the government and the corporation, and that the legislature cannot repeal, impair, or alter it against the consent or without the default of the corporation, judicially ascertained and declared; *id.* On the other hand, the doctrine is firmly established that only that which is granted in clear and explicit terms passes by a grant of property, franchise, or privileges in which the government or the public has an interest. . . . Statutory grants of that character to be construed strictly in favor of the public, what is not unequivocally granted is withheld, nothing passes by mere implication. See QUASI CORPORATIONS.

A corporate franchise, however—as, to build and maintain a toll-bridge—may, by virtue of the power of eminent domain, be condemned by a state to public uses, upon just compensation, like any other private property; 6 How. 507.

For the history of corporations before 1800, see 2 Harv. L. Rev. 149.

CORPORATOR. A member of a corporation.

The corporators are not the corporation, for either may sue the other; 4 McLean 547; 19 Vt. 187; 3 Metc. Mass. 44; 97 U. S. 13.

CORPOREAL HEREDITAMENTS. Substantial permanent objects which may be inherited. The term land will include all such. 2 Bla. Com. 17.

CORPOREAL PROPERTY. In Civil Law. That which consists of such subjects as are palpable.

In the common law, the term to signify the same thing is *property in possession*. It differs from *incorporeal property*, which consists of choses in action and easements, as a right of way, and the like.

CORPSE. The dead body of a human being. 1 Russ. & R. 366, n.; 2 Term 733; 1 Leach 497; 8 Pick. 370; Dig. 47. 12. 3. 7; 11. 7. 38; Code, 3. 44. 1. Stealing a corpse is an indictable offence, but not larceny at common law; Co. 3d. Inst. 203; 1 Russ. Cr. 629; 28 Alb L. J. 106. See DEAD BODY.

CORPUS (Lat.). A body. The substance. Used of a human body, a corporation, a collection of laws, etc. The capital of a fund or estate as distinguished from the income.

CORPUS COMITATUS. The body of the county; the inhabitants or citizens of a whole county, as distinguished from a part of the county or a part of its citizens. 5 Mas. 290.

CORPUS CUM CAUSA. See HABEAS CORPUS CUM CAUSA.

CORPUS DELICTI. The body of the offence; the essence of the crime.

It is a general rule not to convict unless the *corpus delicti* can be established, that is, until the fact that the crime has been actually perpetrated has been first proved. Hence, on a charge of homicide, the accused should not be convicted unless the death be first distinctly proved, either by direct evidence of the fact or by inspection of the body; Best, Pres. § 201; 1 Stark. Ev. 575. See 6 C. & P. 176; 2 Hale, P. C. 290; Whart. Cr. Ev. § 324. Instances have occurred of a person being convicted of having killed another, who, after the supposed criminal has been put to death for the supposed offence, has made his appearance alive. The wisdom of the rule is apparent; but it has been questioned whether, in extreme cases, it may not be competent to prove the basis of the *corpus delicti* by presumptive evidence; 3 Benth. Jud. Ev. 234; Wills, Cir. Ev. 105; Best, Pres. § 204; 3 Greenl. Ev. 30. In cases of felonious homicide, the *corpus delicti* consists of two fundamental and necessary facts: first, the death; and secondly, the existence of criminal agency as its cause; 43 Miss. 472. A like analysis would apply in the case of any other crime. When the body of a murdered man was burned and mutilated beyond recognition, testimony that a piece of charred cloth found among the ashes with the deceased were like the trousers that the murdered man wore, and that a slate pencil found there was identical with one he carried about him, was competent evidence for the jury to establish the identity of the body; 25 S. E. Rep. (S. C.) 113.

The presumption arising from the possession of the fruits of crime recently after its commission, which in all cases is one of fact rather than of law, is occasionally so strong as to render unnecessary any direct proof of what is called the *corpus delicti*. Thus, to borrow an apt illustration from Mr. Justice Maule, if a man were to go into the London docks quite sober, and shortly afterwards were to be found very drunk, staggering out of one of the cellars, in which above a million gallons of wine are stowed, "I think," says the learned judge, "that this would be reasonable evidence that the man had stolen some of the wine in the cellar, though no proof were given that any particular vat had been broached and that any wine had actually been missed." Dears. 284; 1 Tayl. Ev. § 122. In this case it was proved that a prisoner indicted for larceny was seen coming out of the lower

room of a warehouse in the London docks, in the floor above which a large quantity of pepper was deposited, and where he had no business to be. He was stopped by a constable, who suspected him from the bulky state of his pockets, and said, "I think there is something wrong about you;" upon which the prisoner said, "I hope you will not be hard upon me;" and then threw a quantity of pepper out of his pocket on the ground. The witness stated that he could not say whether any pepper had been stolen, nor that any pepper had been missed; but that which was found upon the prisoner was of like description with the pepper in the warehouse. It was held by all the judges that the prisoner, upon these facts, was properly convicted of larceny.

A confession alone ought not to be considered sufficient proof of the *corpus delicti*; 26 Miss. 157; 15 Wend. 147.

CORPUS JURIS CANONICI (Lat. the body of the canon law). The name given to the collections of the decrees and canons of the Roman church. See CANON LAW.

CORPUS JURIS CIVILIS. The body of the civil law. The collection comprising the Institutes, the Pandects or Digest, the Code, and the Novels of Justinian. See those several titles, and also CIVIL LAW for fuller information. The name is said to have been first applied to this collection early in the seventeenth century.

CORRECTION. Chastisement, by one having authority, of a person who has committed some offence, for the purpose of bringing him into legal subjection.

It is chiefly exercised in a parental manner by parents, or those who are placed *in loco parentis*. A parent may therefore justify the correction of the child either corporally or by confinement; and a schoolmaster, under whose care and instruction a parent has placed his child, may equally justify similar correction; but the correction in both cases must be moderate and in a proper manner; Com. Dig. *Pleader*, (3 M.) 19; Hawk. c. 60, s. 23, c. 62, s. 2, c. 29, s. 5; 2 Humph. 283; 2 Dev. & B. L. 365. See ASSAULT.

The master of an apprentice, for disobedience, may correct him moderately; 1 B. & C. 469; Cro. Car. 179; 2 Show. 289; 10 Mart. La. 38; but he cannot delegate the authority to another. A master has no right to correct his servants who are not apprentices; 10 Conn. 455; 2 Greenl. Ev. § 97; see ASSAULT for cases of undue correction.

Soldiers are liable to moderate correction from their superiors. For the sake of maintaining discipline in the navy, the captain of a vessel, belonging either to the United States or to private individuals, may inflict moderate correction on a sailor for disobedience or disorderly conduct; Ab. Sh. 160; 1 Ch. Pr. 73; 14 Johns. 119; 15 Mass. 365; 1 Bay 3; Bee 161; 1 Pet. Adm. 168; Moll. 209; 1 Ware 83. Such has been the general rule. But flogging and other degrading punishments are now forbidden in the army, navy, merchant service, and military prisons; R. S. §§ 1342, 1624, 4611, 1354.

The husband, by the old law, might give his wife moderate correction; 1 Hawk. P. C. 2. But in later times this power of correction began to be doubted; and a wife may now have security of the peace against her husband, or, in return, a husband against his wife; 1 Bla. Com. 444; Stra. 478, 875, 1207; 2 Lev. 128. See MARRIED WOMEN; HUSBAND.

Any excess of correction by the parent, master, officer, or captain, may render the party guilty of an assault and battery and liable to all its consequences; 4 Gray 36. See ASSAULT. In some prisons, the keepers have the right to correct the prisoners.

CORREGIDOR. In Spanish Law. A magistrate who took cognizance of various misdemeanors, and of civil matters. 2 White, New Rec. 53.

CORREI. In Civil Law. Two or more bound or secured by the same obligation.

Correi credendi. Creditors secured by the same obligation.

Correi debendi. Two or more persons bound as principal debtors to pay or perform. Ersk. Inst. 3. 3. 74; Calvinus, Lex.; Bell, Dict.

CORRESPONDENCE. The letters written by one person to another, and the answers thereto. See LETTER; COPYRIGHT.

CORRUPTION. An act done with an intent to give some advantage inconsistent with official duty and the rights of others.

It includes bribery, but is more comprehensive; because an act may be corruptly done though the advantage to be derived from it be not offered by another. Merlin, *Rép.*

Something against law: as, a contract by which the borrower agreed to pay the lender usurious interest. It is said, in such case, that it was corruptly agreed, etc.

CORRUPTION OF BLOOD. The incapacity to inherit, or pass an inheritance, in consequence of an attainder to which the party has been subject. Abolished by stats. 3 & 4 Will. IV. c. 106, and 33 & 34 Vict. c. 23; 1 Steph. Com. 446.

When this consequence flows from an attainder, the party is stripped of all honors and dignities he possessed, and becomes ignoble.

The constitution of the United States, art. 3, s. 3, n. 2, declares that "no attainder of treason shall work corruption of blood or forfeiture except during the life of the person attainted."

The act of July 17, 1862 (12 Stat. L. 589), for the seizure and condemnation of enemies' estates, with the resolution of the same date, does not conflict with this section, the forfeiture being only during the life of the offender; 9 Wall. 339; 11 *id.* 268; 18 *id.* 156, 163; 92 U. S. 202. See 4 Bla. Com. 388; 1 Cruise, Dig. 52; 3 *id.* 240, 378, 473; 1 Chit. Cr. L. 740.

CORSE-PRESENT. In Old English Law. A gift of the second best beast belonging to a man at his death taken along with the corpse and presented to the priest. Stat. 21 Hen. VIII. cap. 6; Cowel; 2 Bla. Com. 425.

CORSNED. In Old English Law. A piece of barley bread, which, after the pronunciation of certain imprecations, a person accused of crime was compelled to swallow.

A piece of cheese or bread of about an ounce weight was consecrated with an exorcism desiring of the Almighty that it might cause convulsions and paleness, and find no passage, if the man was really guilty, but might turn to health and nourishment if he was innocent. Spelman, Gloss. 439. It was then given to the suspected person, who at the same time received the sacrament. If he swallowed it easily, he was esteemed innocent; if it choked him, he was esteemed guilty. See 4 Bla. Com. 345.

CORTES. The name of the legislative assemblies of Spain and Portugal.

CORVEE. In French Law. Gratuitous labor exacted from the villages or communities, especially for repairing roads, constructing bridges, fortifications, etc.

Corvée seigneuriale are *services* due the lord of the manor. Guyot, *Rép. Univ.*; 3 Low. C. 1.

COSBERING. In Feudal Law. A prerogative or seignorial right of a lord, as to lie and feast himself and his followers at his tenants' houses. Cowel.

COSENING. In Old English Law. An offence whereby anything is done deceitfully, whether in or out of contracts, which cannot be fitly termed by any especial name. Called in the civil law *Stellionatus*. West, Symb. pt. 2, *Indictment*, § 68; Blount; 4 Bla. Com. 158.

COSINAGE (spelled, also, *Cousinage*, *Cosenage*). A writ to recover possession of an estate in lands when a stranger has entered and abated after the death of the grandfather's grandfather or of certain collateral relations. 3 Bla. Com. *186.

Relationship; affinity. Stat. 4 Hen. III. cap. 8; 3 Bla. Com. 186; Co. Litt. 160 *a*.

COST. The cost of an article purchased for exportation is the price paid, with all incidental charges paid at the place of exportation. 2 Wash. C. C. 493. Cost price is that actually paid for goods. 18 N. Y. 337.

COST-BOOK. In English Law. A book in which a number of adventurers who have obtained permission to work a lode and have agreed to share the enterprise in certain proportions, enter the agreement and from time to time the receipts and expenditures of the mine, the names of the shareholders, their respective accounts with the mine, and transfers of shares. These associations are called "Cost-book mining companies," and are governed by the general law of partnership. Lindl. Partn. *147.

COSTA RICA. A republic of Central America. The president is elected for four years. The single legislative chamber is elected for four years. The code of law is adopted from the Spanish code.

COSTS. In Practice. The expenses incurred by the parties in the prosecution or defence of a suit at law.

They are distinguished from fees in being an allowance to a party for expenses incurred in conducting his suit; whereas fees are a compensation to an officer for services rendered in the progress of the cause. 11 S. & R. 248.

No costs were recoverable by either plaintiff or defendant at common law. They were first given to plaintiff by the statute of Gloucester, 6 Edw. I. c. 1, which has been substantially adopted in all the United States.

A party can in no case recover costs from his adversary unless he can show some statute which gives him the right.

Statutes which give costs are not to be extended beyond the letter, but are to be construed strictly; 2 Stra. 1006, 1069; 3 Burr. 1287; 4 S. & R. 129; 1 Rich. 4.

They do not extend to the government; and therefore when the United States, or one of the several states, is a party they neither pay nor receive costs, unless it be so expressly provided by statute; 1 S. & R. 505; 8 *id.* 151; 3 Cra. 73; 2 Wheat. 395; 12 *id.* 546; 5 How. 29; 23 Ala. 579; 41 N. H. 238; 2 Tyler 44; and in actions of a public nature, conducted solely for the public benefit, costs are rarely given against public officers; 94 Ill. 589; 41 Mich. 182; 19 Wend. 50. This exemption is founded on the sovereign character of the state, which is subject to no process; 3 Bla. Com. 400; Cowp. 366; 3 Pa. 153. The right of the state to costs on conviction in criminal cases is generally declared by statute.

In many cases, the right to recover costs is made to depend, by statute, upon the amount of the verdict or judgment. Where there is such a provision, and the verdict is for less than the amount required by statute to entitle the party to costs, the right to costs, in general, will depend upon the mode in which the verdict has been reduced below the sum specified in the act. In such cases, the general rule is that if the amount be reduced by evidence of direct payment, the party shall lose his costs; but if by set-off or other collateral defence he will be entitled to recover them; 2 Stra. 1911; 4 Dougl. 448; 9 Moore, P. C. 623; 8 East 28, 347; 2 Price 19; 1 Taunt. 60; 4 Bingh. 169; 1 Dall. 308, 457; 13 S. & R. 287; 16 *id.* 253; 4 Pa. 330.

When a case is dismissed for want of jurisdiction over the person, no costs are allowed to the defendant unless expressly given by statute. The difficulty in giving costs, in such case, is the want of power. If the case be not legally before the court, it has no more jurisdiction to award costs than it has to grant relief; 2 W. & M. 417; 1 Wall. Jr. 187; 9 *id.* 650; 3 Sumn. 473; 15 Mass. 221; 16 Pa. 200; 3 Litt. 332; 3 N. H. 130; Wright, Ohio 417.

In equity, the giving of costs is entirely discretionary, as well with respect to the

period at which the court decides upon them as with respect to the parties to whom they are given.

In the exercise of their discretion, courts of equity are generally governed by certain fixed principles which they have adopted on the subject of costs. It was the rule of the civil law that *victus victori in expensis condemnatus est;* and this is the general rule adopted in courts of equity as well as in courts of law, at least to the extent of throwing it upon the failing party to show the existence of circumstances to displace the *prima facie* claim to costs given by success to the party who prevails; 3 Dan. Ch. Pr. 1515.

In patent cases in equity costs will not be allowed a plaintiff where some of the claims are withdrawn at the argument and some adjudged invalid, though others are sustained; 71 Fed. Rep. 886.

An executor or administrator suing at law or in equity in his representative capacity is not personally liable to the opposite party for costs in case he is unsuccessful, if the litigation were carried on in good faith for the benefit of the estate; 11 S. & R. 47; 15 *id.* 239; 23 Pa. 471. But the rule is otherwise where vexatious litigation is caused by the executor or administrator, and where he has been guilty of fraud or misconduct in relation to the suit; 5 Binn. 138; 1 Wms. Exec. 451; 7 Pa. 136, 137.

See DOUBLE COSTS; TREBLE COSTS. Consult Brightly; Leake; Merrifield; Sayer; Tidd, Costs; and the books of practice adapted to the laws of each state.

COSTS OF THE DAY. Costs incurred in preparing for trial on a particular day. Ad. Eq. 343.

In English practice, costs are ordered to be paid by a plaintiff, who neglects to go to trial according to notice; Mozley & W. Law Dict.; Lush, Pr. 496.

COSTS DE INCREMENTO (increased costs, costs of increase). Costs adjudged by the court in addition to those assessed by the jury. 13 How. 372.

The cost of the suit, etc., recovered originally under the statute of Gloucester is said to be the origin of costs *de incremento;* Bull. N. P. 328 *a.* Where the statute requires costs to be doubled in case of an unsuccessful appeal, costs *de incremento* stand on the same footing as jury costs; 2 Stra. 1048; TAXED COSTS. Costs were enrolled in England in the time of Blackstone as *increase* of damages; 3 Bla. Com. 399.

COTERELLI. Anciently, a kind of peasantry who were outlaws. Robbers. Blount.

COTERELLUS. A cottager.

Coterellus was distinguished from *cotarius* in this, that the *cotarius* held by socage tenure, but the *coterellus* held in mere villenage, and his person, issue, and goods were held at the will of the lord. Cowel.

COTLAND. Land held by a cottager, whether in socage or villenage. Cowel; Blount.

COTSETUS. A cottager or cottage-holder who held by servile tenure and was bound to do the work of the lord. Cowel.

COTTAGE, COTTAGIUM. In Old English Law. A small house without any land belonging to it, whereof mention is made in stat. 4 Edw. I.

But, by stat. 31 Eliz. cap. 7, no man may build such cottage for habitation unless he lay unto it four acres of freehold land, except in market-towns, cities, or within a mile of the sea, or for the habitation of laborers in mines, shepherds, foresters, sailors, etc. Twenty years' possession of cottage gives good title as against the lord; Bull. N. P. 103 *a*, 104. By a grant of a cottage the curtilage will pass; 4 Vin. Abr. 582.

COTTIER TENANCY. A species of tenancy in Ireland, constituted by an agreement in writing, and subject to the following terms: That the tenement consist of a dwelling-house with not more than half an acre of land; at a rental not exceeding 5*l.* a year; the tenancy to be for not more than a month at a time; the landlord to keep the house in good repair. Landlord and Tenant Act (Ireland), 23 & 24 Vict. c. 154, s. 81.

COUCHANT. Lying down. Animals are said to have been *levant* and *couchant* when they have been upon another person's land, damage feasant, one night at least. 3 Bla. Com. 9.

COUNCIL (Lat. *concilium*, an assembly). The legislative body in the government of cities or boroughs. An advisory body selected to aid the executive. See 14 Mass. 470; 3 Pick. 517; 4 *id.* 25.

A governor's council is still retained in some of the states of the United States; 70 Me. 570. It is analogous in many respects to the privy council (*q. v.*), of the king of Great Britain and of the governors of the British colonies, though of a much more limited range of duties.

Common council is a term frequently applied to the more numerous branch of the legislative bodies in cities.

The British parliament is the common council of the whole realm.

COUNSEL. The counsellors who are associated in the management of a particular cause, or who act as legal advisers in reference to any matter requiring legal knowledge and judgment.

The term is used both as a singular and plural noun, to denote one or more; though it is perhaps more common, when speaking of one of several counsellors concerned in the management of a case in court, to say that he is "of counsel."

Knowledge. A grand jury is sworn to keep secret "the commonwealth's *counsel*, their fellows', and their own."

COUNSELLOR AT LAW. An officer in the supreme court of the United States, and in some other courts, who is employed by a party in a cause to conduct the same on its trial on his behalf.

He differs from an attorney at law.

In the supreme court of the United States, the two degrees of attorney and counsel were at first kept separate, and no person was permitted to practise in both capacities, but the present practice is otherwise; Weeks, Att. 54. It is the duty of the counsel to draft or review and correct the special pleadings, to manage the cause on trial, and, during the whole course of the suit, to apply established principles of law to the exigencies of the

case ; 1 Kent 307. In England the term "counsel" is applied to a barrister.

Generally, in the courts of the various states the same person performs the duties of counsellor and attorney at law.

In New York, the rules established by the court of appeals, in September, 1877, provided for an examination and admission as a counsellor after two years' practice as an attorney ; Throop's Code § 56. The distinction is also preserved in New Jersey.

In giving their advice to their clients, counsel have duties to perform to their clients, to the public and to themselves. In such cases they have thrown upon them something which they owe to their administration of justice, as well as to the private interests of their employers. The interests propounded for them ought, in their own apprehension, to be just, or at least fairly disputable ; and when such interests are propounded, they ought not to be pursued *per fas et nefas;* 1 Hagg. Adm. 222. An attorney and counsellor is not an officer of the United States, he is an officer of the court. His right to appear for suitors and to argue causes is not a mere indulgence, revocable at the pleasure of the court, or at the command of the legislature. It is a right of which he can be deprived only by the judgment of the court, for moral or professional delinquency; *Ex parte* Garland, 4 Wall. 333.

See ATTORNEY AT LAW; PRIVILEGE; CONFIDENTIAL COMMUNICATIONS ; DISBARMENT OF ATTORNEYS.

COUNT (Fr. *comte ;* from the Latin *comes*). An earl.

It gave way as a distinct title to the Saxon earl, but was retained in countess, viscount, and as the basis of county. *Termes de la ley ;* 1 Bla. Com. 398. See COMES.

In Pleading (Fr. *conte*, a narrative). The plaintiff's statement of his cause of action.

This word, derived from the French *conte*, a narrative, is in our old law-books used synonymously with declaration ; but practice has introduced the following distinction. When the plaintiff's complaint embraces only a single cause of action, and he makes only one statement of it, that statement is called, indifferently, a declaration or count ; though the former is the more usual term. But when the suit embraces two or more causes of action (each of which, of course, requires a different statement), or when the plaintiff makes two or more different statements of one and the same cause of action, each several statement is called a count, and all of them, collectively, constitute the declaration. In all cases, however, in which there are two or more counts, whether there is actually but one cause of action or several, each count purports, upon the face of it, to disclose a distinct right of action, unconnected with that stated in any of the other counts.

One object proposed in inserting two or more counts in one declaration when there is in fact but one cause of action, is, in some cases, to guard against the danger of an insufficient statement of the cause, where a doubt exists as to the legal sufficiency of one or another of two different modes of declaring ; but the more usual end proposed in inserting more than one count in such case is to accommodate the statement to the cause, as far as may be, to the possible state of the proof to be exhibited on trial, or to guard, if possible, against the hazard of the proofs varying materially from the statement of the cause of action ; so that, if one or more of several counts be not adapted to the evidence, some other of them may be so ; Gould, Pl. c. 4, ss. 2, 3, 4 ; Steph. Pl. 266 ; *Doctrina Plac.* 178 ; 3 Com. Dig. 291 ; Dane, Abr. Index. In real actions, the declaration is usually called a count ; Steph. Pl. 29. See COMMON COUNTS.

COUNT AND COUNT-OUT. These words refer to the count of the house of commons by the speaker. Forty members, including the speaker, are required to constitute a quorum. Each day after parliament is opened, the speaker counts the house. If forty members are not present he waits till four o'clock, and then counts the house again. If forty members are not then present, he at once adjourns it to the following meeting day. May, Parl. Prac. 219.

COUNTER (spelled, also, *Compter*). The name of two prisons formerly standing in London, but now demolished. They were the Poultry Counter and Wood Street Counter. Cowel ; Whish. L. D. ; Coke, 4th Inst. 248.

COUNTER AFFIDAVIT. An affidavit made in opposition to one already made. This is allowed in the preliminary examination of some cases.

COUNTER-BOND. A bond to indemnify. 2 Leon. 90.

COUNTER-CLAIM. A liberal practice introduced by the reformed codes of procedure in many of the United States, and comprehending RECOUPMENT and SET-OFF, *q. v.*, though broader than either.

The New York code thus defines it :

The counter-claim must tend, in some way, to diminish or defeat the plaintiff's recovery, and must be one of the following causes of action against the plaintiff, or, in a proper case, against the person whom he represents, and in favor of the defendant, or of one or more defendants, between whom and the plaintiff a separate judgment may be had in the action :—

1. A cause of action arising out of the contract or transaction, set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action.

2. In an action on contract, any other cause of action on contract existing at the commencement of the action. N. Y. Code, 1889, § 501. See 21 N. Y. 191 ; 51 *id.* 327 ; 67 *id.* 48 ; 77 *id.* 282 ; 78 *id.* 325 ; 79 *id.* 575 ; 80 *id.* 560 ; 87 *id.* 550 ; 21 Hun 240 ; 8 How. Pr. 122, 335 ; 12 *id.* 310 ; 35 Wis. 618 ; 82 N. C. 356 ; 66 Ind. 498 ; 25 Minn. 210.

COUNTER-LETTER. An agreement to recovery where property has been passed by absolute deed with the intention that it shall serve as security only. A defeasance by a separate instrument. 11 Pet. 351.

COUNTER-SECURITY. Security given to one who has become security for another, the condition of which is, that if the one who first became surety shall be damnified, the one who gives the counter-security will indemnify him.

COUNTERFEIT. In Criminal Law. To make something false in the semblance

of that which is true. It always implies a fraudulent intent. It refers usually to imitations of coin or paper money. See Vin. Abr. *Counterfeit;* R. M. Charlt. 151; 1 Ohio 185; FORGERY.

COUNTERMAND. A change or recalling of orders previously given.

Express countermand takes place when contrary orders are given and a revocation of the prior orders is made.

Implied countermand takes place when a new order is given which is inconsistent with the former order,

When a command or order has been given, and property delivered, by which a right vests in a third person, the party giving the order cannot countermand it. For example, if a debtor should deliver to A a sum of money to be paid to B, his creditor, B has a vested right in the money, and, unless he abandon that right and refuse to take the money, the debtor cannot recover it from A. 1 Rolle, Abr. 32, pl. 13; Yelv. 164; Styles 296. See 3 Co. 26 *b*; 2 Ventr. 298; 10 Mod. 432; Vin. Abr. *Countermand* (A, 1), *Bailment* (D); 9 East 49; Bac. Abr. *Bailment* (D); Com. Dig. *Attorney* (B, 9), (C, 8); Dane, Abr. *Countermand.*

COUNTERPART. Formerly, each party to an indenture executed a separate deed: that part which was executed by the grantor was called the original, and the rest the counterparts. It is now usual for all the parties to execute every part; and this makes them all originals. 2 Bla. Com. 296.

In granting lots subject to a ground-rent reserved to the grantor, both parties execute the deeds, of which there are two copies: although both are original, one of them is sometimes called the counterpart. See 12 Vin. Abr. 104; Dane, Abr. Index; 7 Com. Dig. 443; Merlin, *Rép. Double Ecrit.*

COUNTERPLEA. **In Pleading.** A plea to some matter incidental to the main object of the suit, and out of the direct line of pleadings. Steph. Pl., Andr. ed. 165; 2 Wms. Saund. 45 *h.* Thus, *counterplea of oyer* is the defendant's allegations why oyer of an instrument should not be granted. *Counterplea of aid prayer* is the demandant's allegation why the vouchee of the tenant in a real action, or a stranger who asks to come in to defend his right, should not be admitted. *Counterplea of voucher* is the allegation of the vouchee in avoidance of the warranty after admission to plead. Counterpleas are of rare occurrence. *Termes de la Ley; Doctrina Plac.* 300; Com. Dig. *Voucher* (B, 1, 2); Dane, Abr.

COUNTRY. A word often used in pleading and practice. Usually signifies a jury, or the inhabitants of a district from which a jury is to be summoned. 3 Bla. Com. 349; 4 *id.* 349; Steph. Pl. 73, 78, 230.

COUNTY. One of the civil divisions of a country for judicial and political purposes. 1 Bla Com. 113. Etymologically, it denotes that portion of the country under the immediate government of a count. 1 Bla. Com. 116.

The United States are generally divided into counties. Counties are, in many of the states, divided into townships or towns. In the New England States, however, towns are the basis of all civil divisions, and the counties are rather to be considered as aggregates of towns, so far as their origin is concerned. In Pennsylvania, the state was originally divided into three counties by William Penn. See Proud's Hist. Pa. 234; 2 *id.* 258.

In some states, a county is considered a corporation; 1 Ill. 115; in others, it is held a quasi corporation; 16 Mass. 87; 9 Me. 88; 8 Johns. 385; 3 Munf. 102. In regard to the division of counties, see 6 J. J. Marsh. 147; 4 Halst. 357; 9 Cow. 640; 89 Pa. 419; 8 Baxt. 74, 141; 100 U. S. 548; 33 Ark. 191, 497; 5 Heisk. 294. A county may be required by act of legislature to build a public work outside the county limits, where it is of special interest to the people of the county; 104 Mass. 236; 50 Md. 245. The terms "county" and "people of the county" are, or may be, used interchangeably; 58 Mo. 175.

In the English law, this word signifies the same as *shire*,—county being derived from the French, and *shire* from the Saxon. Both these words signify a circuit or portion of the realm into which the whole land is divided, for the better government thereof and the more easy administration of justice. There is no part of England that is not within some county; and the shire-reeve (*sheriff*) was the governor of the province, under the *comes*, earl, or count.

COUNTY COMMISSIONERS. Certain officers generally intrusted with the superintendence of the collection of the county taxes and the disbursements made for the county. They are invested by the local laws with various powers. In some of the states they are called supervisors.

COUNTY CORPORATE. A city or town, with more or less territory annexed constituting a county by itself. 1 Bla. Com. 120. Something similar to this exists in this country in regard to Philadelphia, New York, and Boston. See 4 Mo. App. 347. They differ in no material points from other counties.

COUNTY COURT. **In English Law.** Tribunals of limited jurisdiction, which as now existing were originally established under the stat. 9 & 10 Vict. c. 95.

They had at their institution jurisdiction of actions for the recovery of debts, damages, and demands, legacies, and balances of partnership accounts where the sum sued for did not exceed twenty pounds. It has since been much extended, especially in cases where the parties gave assent in writing. See 3 Bla. Com. 35. They are now regulated by stat. 51 & 52 Vict. (1888) c. 43.

Tribunals of limited jurisdiction in the county of Middlesex, established under the statute 22 Geo. II. c. 33.

County courts were held in England from the earliest times and were of great importance; Laws of Edward the Elder, A. D. 901–924. The origin of these courts, among

the most ancient in England, is somewhat obscure, being ascribed by some writers to the reigning Edgar. This, however, being conjectural, serves to fix the earliest possible date. It is clear that William the Conqueror confirmed the ancient jurisdiction of these courts. They were held under the presidency of the sheriff once in every month. They had jurisdiction in civil, criminal, and ecclesiastical causes, the sheriff associating with himself a bishop or an archdeacon, if necessary, or other ecclesiastic or learned person to aid him. He also heard cases in the nature of appeals from the Hundred, Lathe, and Trithing courts. The judges were the freeholders of the county, summoned by the sheriff, and were called *sectatores* or *suitors* of the court. They decided all cases of law and fact, the sheriff not being, for that purpose, a judge. Probably their judgment was not required to be unanimous. Inderwick, The King's Peace. "And so is the county court holden to this day." Coke, 4th Inst. 259. In some cases an appeal lay to the king. See, generally, 3 Steph. Com. 452; 3 Bla. Com. 83; 1 Poll. & Maitl. 515, 521.

In American Law. Courts in many of the states of the United States and in Canada, of widely varying powers.

COUNTY PALATINE. A county possessing certain peculiar privileges.

The owners of such counties have kingly powers within their jurisdictions, as the pardoning crimes, issuing writs, etc. These counties have either passed into the hands of the crown, or have lost their peculiar privileges to a great degree. 1 Bla. Com. 117; 4 *id.* 431. The name is derived from *palatium* (palace), and was applied because the earls anciently had palaces and maintained regal state. Cowel; Spel.; 1 Bla. Com. 117. See COURTS OF THE COUNTIES PALATINE.

COUNTY SESSIONS. In England, the Court of General Quarter Sessions of the Peace held in every county once in every quarter of a year. Mozley & W. Law Dict.

COUPONS. Those parts of a commercial instrument which are to be *cut*, and which are evidence of something connected with the contract mentioned in the instrument. They are generally attached to bonds or certificates of loan, where the interest is payable at particular periods, and, when the interest is paid, they are cut off and delivered to the payor. In England, they are known as *warrants* or *dividend warrants*, and the securities to which they belong, debentures. 13 C. B. 372. In the United States they have been decided to be negotiable instruments, if payable to bearer or order, upon which suit may be brought though detached from the bond; 53 Ind. 191; 44 Pa. 63; 21 How. 529; 109 Mass. 88; 22 Gratt. 833; 14 Wall. 282; 20 Wall. 583; 106 U. S. 589; Jones, R. R. Sec. § 320; 43 Me. 232; 22 Am. Rep. 315; 82 N. C. 382; 12 S. C. 200. Otherwise, in 1 Biss. 105, if the bond to which the coupons were attached was not negotiable; see 43 Me. 232; and otherwise if not payable to bearer or order; 66 N. Y. 14; see 26 Conn. 121. In England the question has not been directly decided, but it has been held that they are not promissory notes, and therefore do not require a stamp; 13 C. B. 373. Dividend warrants of the Bank of England made payable to a particular person, but not containing words of transfer, were held not to be negotiable, notwithstanding they had been so by custom for sixty years; 9 Q. B. 396. A purchaser of overdue coupons takes only the title of his vendor; 18 Gratt. 750; 1 Hughes 410. Negotiable coupons are entitled to days of grace; 66 N. Y. 14; Jones, R. R. Sec. § 326; *contra*, 18 Gratt. 773; 2 Dan. Neg. Instr., 3d ed. § 1490 *a*.

Interest on coupons may be recovered in a suit on the coupons; 44 Pa. 75; 3 McLean 472; 92 U. S. 502; 96 *id.* 51; 57 N. H. 397; 65 N. C. 234; 41 Barb. 9; 4 A. & E. Encyc. of Law 439. The *rate* of interest provided for in the bond continues on the coupon till it is merged in judgment; 96 U. S. 51; 112 Mass. 53; 2 Nev. 199; 25 Ohio St. 621; *contra*, 22 How. 118; 32 Md. 501; 10 R. I. 223. See Jones, R. R. Sec. § 336. A suit on the coupon is not barred by the Statute of Limitations unless a suit on the bond would be barred; 14 Wall. 282; otherwise, when the coupons have passed into the hands of the party who does not hold the bonds; 20 Wall. 583. As to practice in actions on coupons, see 9 Wall. 477.

See Jones, Railroad Securities; Clemens, Corporate Securities; Cavanaugh, Money Securities; Daniel, Negotiable Instruments.

COUR DE CASSATION. In French Law. The supreme judicial tribunal and court of final resort, established 1790, under the title of *Tribunal de Cassation;* it received its present name 1802. It is composed of forty-nine counsellors and judges, including a first president and three presidents of chamber, an attorney-general and six advocates-general, one head registrar and four deputy registrars appointed by the head registrar, and a certain number of ushers. Jones, French Bar 22; Guyot, *Rép. Univ.*

The jurisdiction of the court is only on error shown in the proceedings of the lower courts in matters of law, taking the facts as found by the lower courts.

COURSE. The direction of a line with reference to a meridian.

Where there are no monuments, the land is usually described by courses and distances and those mentioned in the patent or deed will fix the boundaries. But when the lines are actually marked, they must be adhered to though they vary from the course mentioned in the deeds. See BOUNDARY.

COURSE OF TRADE. What is usually done in the management of trade or business. A statute exempting from distress property deposited with a tavern-keeper "in the usual course of business," only includes property deposited by a guest for safekeeping; 5 Blackf. 489. Carriages used for carrying the band and performers

of a circus in a street parade, are not carriages "used solely for the conveyance of any goods or burdens in the course of trade;" L. R. 9 Exch. 25.

Men are presumed to act for their own interest, and to pursue the way usually adopted by men generally: hence it is presumed in law that men in their actions will pursue the usual course of trade.

COURSE OF THE VOYAGE. By this term is understood the regular and customary track, if such there be, which a ship takes in going from one port to another, and the shortest way. Marsh. Ins. 185; Phill. Ins. 981.

COURT (Fr. *cour*, Dutch, *koert*, a yard). **In Practice.** A body in the government to which the public administration of justice is delegated.

The presence of a sufficient number of the members of such a body regularly convened in an authorized place at an appointed time, engaged in the full and regular performance of its functions. 20 Ala. 446; 20 Ark. 77.

The place where justice is judicially administered. Co. Litt. 58 *a*; 3 Bla. Com. 23, 25. See 45 Ia. 501.

The judge or judges themselves, when duly convened.

The term is used in all the above senses, though but infrequently in the third sense given. The application of the term—which originally denoted the place of assembling—to denote the assemblage, strikingly resembles the similar application of the Latin term *curia* (if, indeed, it be not a mere translation), and is readily explained by the fact that the earlier courts were merely assemblages, in the court-yard of the baron or of the king himself, of those who were qualified and whose duty it was so to appear at stated times or upon summons. Traces of this usage and constitution of courts still remain in the courts baron, the various courts for the trial of impeachments in England and the United States, and in the control exercised by the parliament of England and the legislatures of the various states of the United States over the organization of courts of justice, as constituted in modern times. Indeed, the English parliament is still the *High Court of Parliament*, and in Massachusetts the united legislative bodies are entitled, as they (and the body to which they succeeded) have been from time immemorial, the *General Court*.

In England, however, and in those states of the United States which existed as colonies prior to the revolution, most of these judicial functions were early transferred to bodies of a compacter organization, whose sole function was the public administration of justice. The power of impeachment of various high officers, however, is still retained by the legislative bodies both in England and the United States, and is, perhaps, the only judicial function which has ever been exercised by the legislative bodies in the newer states of the United States. These more compact bodies are the *courts*, as the term is used in its modern acceptance.

The one common and essential feature in all courts is a judge or judges—so essential, indeed, that they are even called *the court*, as distinguished from the accessory and subordinate officers; 3 Ind. 239; 53 Mo. 173; see 19 Vt. 478. Courts of record are also provided with a recording officer, variously known as clerk, prothonotary, register, etc.: while in all courts there are counsellors, attorneys, or similar officers recognized as peculiarly suitable persons to represent the parties actually concerned in the causes, who are considered as officers of the court and assistants of the judges, together with a variety of ministerial officers, such as sheriffs, constables, bailiffs, tipstaves, criers, etc. For a consideration of the functions of the various members of a court, see the various appropriate titles, as JURY, SHERIFF, etc.

Courts are said to belong to one or more of the following classes, according to the nature and extent of their jurisdiction, their forms of proceeding, or the principles upon which they administer justice, viz.:—

Admiralty. See ADMIRALTY.

Appellate, which take cognizance of causes removed from another court by appeal or writ of error. See APPEAL; APPELLATE JURISDICTION; DIVISION OF OPINION.

Civil, which redress private wrongs. See JURISDICTION.

Criminal, which redress public wrongs, that is, crimes or misdemeanors.

Ecclesiastical. See ECCLESIASTICAL COURTS.

Of equity, which administer justice according to the principles of equity. See EQUITY; COURT OF EQUITY; COURT OF CHANCERY.

Of general jurisdiction, which have cognizance of and may determine causes various in their nature.

Inferior, which are subordinate to other courts. 18 Ala. 521; also, those of a very limited jurisdiction.

Of law, which administer justice according to the principles of the common law.

Of limited or special jurisdiction, which can take cognizance of a few specified matters only.

Local, which have jurisdiction of causes occurring in certain places only, usually the limits of a town or borough, or, in England, of a barony.

Martial. See COURT-MARTIAL.

Not of record, those which are not courts of record.

Of original jurisdiction, which have jurisdiction of causes in the first instance. See JURISDICTION.

Of record. See COURT OF RECORD.

Superior, which are those of immediate jurisdiction between the inferior and supreme courts; also, those of controlling as distinguished from those of subordinate jurisdiction. 4 Bosw. 547. In Pennsylvania a court created in 1895, having jurisdiction of appeals from the lower courts in certain cases of lesser magnitude. In some states, as Delaware, the *nisi prius* court of first instance for civil cases in the county or other primary judicial district.

Supreme, which possess the highest and controlling jurisdiction; also, in some states, a court of higher jurisdiction than the superior courts, though not the court of final resort.

See COURT OF RECORD; also various titles following.

COURT OF ADMIRALTY. See ADMIRALTY; UNITED STATES COURTS.

COURT OF ANCIENT DEMESNE. **In English Law.** A court of peculiar constitution, held by a bailiff appointed by the king, in which alone the tenants of the king's demesne could be impleaded. 2 Burr. 1046; 1 Spence, Eq. Jur. 100; 2 Bla.

Com. 99; 1 Report Eng. Real Prop. Comm. 28, 29; 1 Steph. Com. 224; 1 Poll. & Maitl. 367; 3 & 4 Will. IV. c. 74, §§ 4, 5, 6.

COURT OF APPEAL, HER MAJESTY'S. In England, one of the two section of the supreme court of judicature, established by the Judicature Acts of 1873 and 1875 (*q. v.*).

COURT OF APPEALS. In American Law. An appellate tribunal which, in Kentucky, Maryland, and New York, is the court of last resort. In Delaware and New Jersey, it is known as the court of errors and appeals; in Virginia and West Virginia, the supreme court of appeals; in Texas there is a court of civil appeals, and in Illinois, Indiana, Missouri, Pennsylvania, and the United States there are appellate courts sitting in judicial districts, all of which are inferior to the supreme court.

COURT OF APPRAISERS OF THE UNITED STATES. Nine general appraisers are appointed by the president of the United States with the advice and consent of the senate, who are employed at such ports as the secretary of the treasury shall from time to time direct, who supervise such appraisements and classification for duties as may be deemed needful to secure uniform appraisements at the several ports; U. S. Rev. Stat. 1 Supp. § 12. At ports where there is no appraiser, the dutiable value of imported merchandise is determined by the customs officer to whom is committed the estimation and collection of duties. A board of three general appraisers is stationed at New York, to the decision of which the collector or importer may appeal, if dissatisfied with the decision of the general appraiser, provided, that the owner, importer, consignee, or agent shall give notice to the collector in writing within two days after the decision of the general appraiser; § 12. A further right of appeal is granted from the decision of the collector as to the amount of duties to be collected upon imported merchandise, by giving notice to the collector in writing after payment of charges, setting forth distinctly and specifically the reasons for the objection thereto, which notice, payment, and invoice, and all papers and exhibits connected therewith, the collector transmits to the board of appraisers at New York or to a board of any three general appraisers who may be appointed by the secretary of the treasury. Should the owner, importer, consignee, or agent be dissatisfied with the decision of this board of appraisers, they may, within thirty days after such decision, apply to the circuit court of the United States, within the district in which the matter arises, for a review of the questions of law and of fact involved in the decision. And there is a further right of appeal to the supreme court of the United States whenever the attorney-general shall apply for it within thirty days. See Act June 10, 1890, U. S. Rev. Stat. 1 Supp. p. 744.

COURT OF ARBITRATION OF THE CHAMBER OF COMMERCE OF NEW YORK. Organized in 1874, for the settlement of controversies of a mercantile nature in the city of New York. Where all the parties are regular members of the chamber of commerce, either may summon the opposite party before this court. Other parties may voluntarily submit to its decision such questions arising in the port of New York. An official arbitrator presides, but others may be named by the parties to sit with him, and counsel may be employed. The decision of this court is final, and is in the form of an award by the arbitrator. N. Y. Laws, 1874, c. 278, and 1875, c. 495.

COURT OF ARCHDEACON. The most inferior of the English ecclesiastical courts, from which an appeal generally lies to that of the bishop. 3 Bla. Com. 64; 3 Steph. Com. 305.

COURT OF ARCHES (L. Lat. *curia de arcubus*). **In English Ecclesiastical Law.** A court of appeal, and of original jurisdiction.

The most ancient consistory court belonging to the archbishop of Canterbury for the trial of spiritual causes, the judge of which is called the *dean of the arches*, because he anciently held his court in the church of St. Mary *le Bow* (*Sancta Maria de arcubus*,—literally, "St. Mary *of arches*"), so named from the style of its steeple, which is raised upon pillars built *archwise*, like so many bent bows. *Termes de la Ley.* It is now held, as are also the other spiritual courts, in the hall belonging to the College of Civilians, commonly called Doctor's Commons.

Its proper jurisdiction is only over the thirteen peculiar parishes belonging to the archbishop in London; but, the office of dean of the arches having been for a long time united with that of the archbishop's principal official, the judge of the arches, in right of such added office, receives and determines appeals from the sentences of all inferior ecclesiastical courts within the province. 3 Bla. Com. 64; 3 Steph. Com. 306; Whart. Law Dict. *Arches Court.* Many suits are also brought before him as original judge, the cognizance of which properly belongs to inferior jurisdictions within the province, but in respect of which the inferior judge has waived his jurisdiction under a certain form of proceeding known in the common law by the denomination of *letters of request.* 3 Steph. Com. 306; 2 Chitty, Gen. Pr. 496; 2 Add. Eccl. 406.

From the court of arches an appeal formerly lay to the pope, and afterwards, by statute 25 Hen. VIII. c. 19, to the king in chancery (that is, to a court of delegates appointed under the king's great seal), as supreme head of the English church, but now, by 2 & 3 Will. IV. c. 92, and 3 & 4 Will. IV. c. 41, to the judicial committee of the privy council; 3 Bla. Com. 65; 3 Steph. Com. 306.

A suit is commenced in the ecclesiastical court by citing the defendant to appear, and exhibiting a libel containing the complaint against him, to which he answers. Proofs are then adduced, and the judge

pronounces a decree upon hearing the arguments of advocates, which is then carried into effect.

Consult Burn, Humphrey, Phill., Smith, Eccl. Law; Brett, Com. book xii.; Reeve, Eng. Law; 3 Bla. Com. 65; 3 Steph. Com. 306.

COURTS OF ASSIZE AND NISI PRIUS. In English Law. Courts composed of two or more commissioners, called judges of assize (or of assize and *nisi prius*), who are twice in every year sent by the queen's special commission on *circuits* all round the kingdom, to try, by a jury of the respective counties, the truth of such matters of fact as are then under dispute in the courts of Westminster Hall; there being, however, as to London and Middlesex, this exception, that, instead of their being comprised within any circuit, courts of *nisi prius* are held there for the same purpose, in and after every term, at what are called the London and Westminster sittings.

These judges of assize came into use in the room of the ancient justices in eyre (*justiciarii in itinere*), who were regularly established, if not first appointed, by the Parliament of Northampton, A. D. 1176 (22 Hen. II.), (the first of these of whom we have any record, were appointed in 1170), with a delegated power from the king's great court or *aula regis*, being looked upon as members thereof; though the present justices of assize and *nisi prius* are more immediately derived from the stat. Westm. 2, 13 Edw. I. c. 30, and consist principally of the judges of the superior courts of common law, being assigned by that statute out of the king's sworn justices, associating to themselves one or two discreet knights of each county. By stat. 27 Edw. I. c. 4 (explained by 12 Edw. II. c. 3), assizes and inquests are allowed to be taken before any one justice of the court in which the plea is brought, associating with him one knight or other approved man of the county: by stat. 14 Edw. III. c. 16, inquests of *nisi prius* may be taken before any justice of either bench (though the plea be not depending in his own court), or before the chief baron of the exchequer, if he be a man of the law, or, otherwise, before the justices of assize, so that one of such justices be a judge of the king's bench or common pleas, or the king's sergeant sworn; and, finally, by 2 & 3 Vict. c. 22, all justices of assize may, on their respective circuits, try causes pending in the court of exchequer, without issuing (as it had till then been considered necessary to do) a separate commission from the exchequer for that purpose. 3 Steph. Com. 352; 3 Bla. Com. 57, 58.

There are eight circuits (formerly seven), viz.: the Home, Midland, Norfolk, Oxford, Northern, Western, North Wales, and South Wales. A general commission was issued twice a year to the judges mentioned (of the superior courts of common law at Westminster), two of whom were assigned to every circuit. The judges had four several commissions, viz.: of *the peace;* of *oyer and terminer;* of *gaol delivery;* and of *nisi prius.* There were formerly five, including the commission of assize; but the abolition of assizes and other real actions has thrown that commission out of force. The commission of *nisi prius* was directed to the judges, the clerks of assize, and others; and by it civil causes in which issue had been joined in any one of the superior courts were tried in circuit by a jury of twelve men of the county in which the venire was laid, and on return of the verdict to the court above—usually on the first day of the term following—the court gave judgment on the fifth day after, allowing the four intermediate days to either party, if dissatisfied with the verdict, to move for a new trial. 3 Steph. Com. 514, 515; 3 Bla. Com. 58, 59. Where courts of this kind exist in the United States, they are instituted by statutory provision. 4 W. & S. 404. See OYER AND TERMINER; GAOL DELIVERY; COURTS OF OYER AND TERMINER AND GENERAL GAOL DELIVERY; NISI PRIUS; COMMISSION OF THE PEACE.

COURT OF ATTACHMENTS. The lowest of the three courts held in the forests. It has fallen into total disuse.

The highest court was called Justice in Eyre's Seat, or familiarly Justice Seat; the middle, the Swanimote; and the lowest, the Attachment. Wharton, Law Dict. *Attachment of the Forest.*

The Court of Attachments was to be held before the verderers of the forest once in every forty days, to inquire of all offenders against vert and venison, by receiving from the foresters or keepers their attachments or presentments *de viridi et venatione*, enrolling them, and certifying them under their seals to the court of justice-seat, or Swanimote; for this court could only inquire of offenders; it could not convict them; 3 Bla. Com. 171; FOREST LAWS.

COURT OF AUGMENTATION. A court established by 27 Hen. VIII. c. 27, for managing the revenues and possessions of all monasteries whose income was under two hundred pounds a year (which by an act of parliament of the same session had been given to the king), and for determining suits relating thereto.

It was called "The Court of the Augmentations of the Revenues of the King's Crown" (from the *augmentation* of the revenues of the crown derived from the suppression of the monasteries), and was a court of record, with one great seal and one privy seal,—the officers being a chancellor, who had the great seal, a treasurer, a king's attorney and solicitor, ten auditors, seventeen receivers, with clerk, usher, etc.

All dissolved monasteries under the above value, with some exceptions, were in survey of the court, the chancellor of which was directed to make a yearly report of their revenues to the king. The court was dissolved in the reign of queen Mary, but the Office of Augmentation remained long after; and the records of the court are now at the Public Record Office, in the keeping of the master of the rolls, stat. 1 & 2 Vict. c. 94, and may be searched on payment of a fee. Eng. Cyclopædia; Cowel.

COURT, BAIL. See BAIL COURT.

COURT OF BANKRUPTCY. A court of record, in England, with jurisdiction in bankruptcy, primary and appellate, and which is declared a court of law and equity for that purpose. The nature of its constitution may be learned from the early sections of the Bankrupt Law Consolidation Act, 1849. The judgments of this

court may be examined, on appeal, by a vice-chancellor, and successively by the lord-chancellor and the house of lords, if he deem the question of sufficient difficulty or importance; 3 Bla. Com. 428. There is a court of bankruptcy in London, established by 1 & 2 Will. IV. c. 56, and 5 & 6 Will. IV. c. 29, s. 21; and courts of bankruptcy for different districts are established by 5 & 6 Vict. c. 122, which are branches of the London court. 2 Steph. Com. 199, 200; 3 *id.* 426. The Bankruptcy Act of 1869 constitutes two distinct jurisdictions: the London district, and the country district, comprising the rest of England. The former has all the powers of the superior courts of common law and equity, and the judge may reverse, vary, or affirm any order of a local bankruptcy court; Brown; Robson, Bkcy.

By the judicature acts, 1873 and 1875 (*q. v.*) the court of bankruptcy was consolidated into the supreme court of judicature. It has a court with officers and offices of its own.

COURT BARON. A domestic court, incident to every manor, to be held by the steward within the manor, for redressing misdemeanors and nuisances therein, and for settling disputes among the tenants relating to property. It is not a court of record. 1 Poll. & M. 580.

Customary court baron is one appertaining entirely to copyholders. See CUSTOMARY COURT BARON.

Freeholders' court baron is one held before the freeholders who owe suit and service to the manor. It is the court-baron proper.

These courts have now fallen into great disuse in England; and their jurisdiction is practically abolished by the County Courts Act, 30 and 31 Vict. c. 142, s. 28; 3 Steph. Com. 279–231. In the state of New York such courts were held while the state was a province. See charters in Bolton's Hist. of New Chester. The court has derived its name from the fact that it was the court of the baron or lord of the manor. 3 Bla. Com. 33, n.; see Fleta, lib. 2, c. 53; though it is explained by some as being the court of the freeholders, who were in some instances called barons. Co. Litt. 58 *a*.

COURT OF CHANCERY, or CHANCERY. A court formerly existing in England and still existing in several of the United States, which possesses an extensive equity jurisdiction.

The name is said by some to be derived from that of the chief judge, who is called a chancellor; others derive both names directly from the *cancelli* (bars) which in this court anciently separated the press of people from the officers. See 3 Bla. Com. 46, n.; Story, Eq. Jur. 40; CANCELLARIUS.

In American Law. A court of general equity jurisdiction.

The terms equity and chancery, court of equity and court of chancery, are constantly used as synonymous in the United States. It is presumed that this custom arises from the circumstance that the equity jurisdiction which is exercised by the courts of the various states is assimilated to that possessed by the English courts of chancery. Indeed, in some of the states it is made identical therewith by statute, so far as conformable to our institutions.

Separate courts of chancery or equity exist in a few of the states; in others, the courts of law sit also as courts of equity; in others, equitable relief is administered under the forms of the common law; and in others, the distinction between law and equity has been formally abolished or never existed. The federal courts exercise an equity jurisdiction as understood in the English courts at the time of the revolution; Miller, Const. U. S. 318; independent of local state law; *id.;* 2 Sumn. 401; and the remedies are not according to state practice but as distinguished and defined in that country from which we derive our knowledge of those principles; 3 Wheat. 211. whether the state courts in the district are courts of equity or not; 2 McLean 568; 15 Pet. 9; 11 How. 669.

In English Law. Formerly the highest court of judicature next to parliament. Prior to the judicature acts it was the superior court of chancery, called distinctively "The High Court of Chancery," and consisted of six separate tribunals, viz.: the court of the lord high chancellor of Great Britain; the court of the master of the rolls, or keeper of the records in chancery; the court of appeal in chancery, the three separate courts of the vice-chancellors.

The jurisdiction of this court was fourfold.

The common-law or ordinary jurisdiction. By virtue of this the lord-chancellor was a privy councillor and prolocutor of the house of lords. The writs for a new parliament issued from this department. The Petty Bag Office was in this jurisdiction. It was a common-law court of record, in which pleas of *scire facias* to repeal letters-patent were exhibited, and many other matters were determined, and whence all original writs issued. See 11 & 12 Vict. c. 94; 12 & 13 Vict. c. 109.

The statutory jurisdiction included the power which the lord-chancellor exercised under the *habeas corpus* act, and by which he inquired into charitable uses, but did not include the equitable jurisdiction.

The specially delegated jurisdiction included the exclusive authority which the lord-chancellor and lords justices of appeal had over the persons and property of idiots and lunatics.

The equity or extraordinary jurisdiction was either *assistant* or *auxiliary* to the common law, including discovery for the promotion of substantial justice at the common law, preservation of testimony of persons not litigants relating to suits or questions at law, removal of improper impediments and prevention of unconscientious defences at common law, giving effect to and relieving from the consequences of common-law judgments; *concurrent* with the common law, including the remedial correction of fraud, the prevention of fraud by injunction, accident, mistake, account, dower, interpleader, the delivery up of documents and specific chattels, the specific performance of agreements; or *exclusive*, relating to trusts, infancy, the equitable rights of wives, legal and equitable mortgages, the assignment of choses in

action, partition, the appointment of receivers, charities, or public trusts. Whart. Law Dict.

By the Judicature Acts (*q. v.*) this court was merged in the supreme court of judicature, and all its jurisdiction vested therein.

The inferior courts of chancery are the equity courts of the Palatine Counties, the courts of the Two Universities, the lord-mayor's courts in the city of London, and the court of chancery in the Isle of Man. See 18 & 19 Vict. c. 48, and the titles of these various courts. Consult Story, Eq. Jur.; Dan. Ch. Pr.; Spence, Eq. Jur.; COURTS OF EQUITY; EQUITY.

COURT OF THE CHIEF JUSTICE IN EYRE. The highest of the courts of the Forest, held every three years, by the chief justices, to inquire of purprestures or encroachments, assorts, or cultivation of forest land, claims to franchises, parks, warrens, and vineyards in the forest, as well as claims of the hundred, claims to the goods of felons found in the forest, and any other civil questions that might arise within the forest limits. But it had no criminal jurisdiction, except of offences against the forest laws. In the exercise of this, he passed sentences upon offenders convicted by the verderers in Swanimote (*q. v.*) and performed all the duties of a justice in eyre (*q. v.*). Forty days' notice was given of the holding of this court. It was called also the court of justice seat (*q. v.*). Inderwick, The King's Peace 152.

COURT OF CHIVALRY. In English Law. An ancient military court, possessing both civil and criminal jurisdiction touching matters of arms and deeds of war.

As a court of civil jurisdiction, it was held by the lord high constable of England while that office was filled, and the earl-marshal, jointly, and subsequently to the attainder of Stafford, duke of Buckingham, in the time of Henry VIII., by the earl-marshal alone. It had cognizance, by statute 13 Ric. II. c. 2, "of contracts and other matters touching deeds of arms and war, as well out of the realm as within it." This jurisdiction was of importance while the English kings held territories in France.

As a court of criminal jurisdiction, it could be held only by the lord high constable and earl-marshal jointly. It had jurisdiction over "pleas of life and member arising in matters of arms and deeds of war, as well out of the realm as within it."

It was not a court of record, could neither fine nor imprison, 7 Mod. 137, and has fallen entirely into disuse; 3 Bla. Com. 68; 4 *id.* 268.

COURTS CHRISTIAN. Ecclesiastical courts, which see.

COURTS OF THE CINQUE PORTS. In English Law. Courts of limited local jurisdiction, formerly held before the mayor and jurats (aldermen) of the Cinque Ports; from which a writ of error lay to the lord-warden in his court of Shepway, and from this court to the king's bench. By the 18 & 19 Vict. c. 48, and 20 & 21 Vict. c. 1, the jurisdiction and authority of the lord-warden of the Cinque Ports and constable of Dover Castle, in or in relation to the administration of justice in actions, suits, or other civil proceedings, at law or in equity, are abolished; but a jurisdiction in cases of salvage is still retained; 57 and 58 Vict. c. 60; 2 Steph. Com. 499, n.; 3 Bla. Com. 79; 3 Steph. Com. 347, n.; and an appeal lies in admiralty causes from the county courts to the court of admiralty of the Cinque Ports, by 31 & 32 Vict. c. 71. See CINQUE PORTS.

COURT OF CLAIMS. See UNITED STATES COURTS.

COURT OF THE CLERK OF THE MARKET. In English Law. A tribunal incident to the market held in the suburbs of the king's court. The *clericus mercati hospitii regis* was the incumbent of an honorable office pertinent to the ancient custom of holding such markets. The clerk in early times witnessed verbal contracts; later he adjudicated on prices of corn, bread, and wine and other commodities as fixed by the justices of the peace; inquired as to the correctness of weights and measures in every city, town, or borough, subject to appeal to the lord high steward, who could fine him for extortion and send him to the tower for a third offence. The clerk also measured land in case of dispute, and he had power to send bakers, brewers, and others to the pillory for unlawful dealings. See Inderwick, The King's Peace 104.

The jurisdiction over weights and measures formerly exercised by the clerk of the market was taken from him by stat. 5 & 6 Will. IV. c. 63; 9 M. & W. 747; 4 Steph. Com. 323.

COURT OF COMMISSIONERS OF SEWERS. See COMMISSIONERS OF SEWERS.

COURT OF COMMON PLEAS. In American Law. A court of original and general jurisdiction for the trial of issues of fact and law according to the principles of the common law.

Courts of this name exist in some of the states of the United States, and frequently have a criminal as well as civil jurisdiction. They are, in general, courts of record, being expressly made so by statute in Pennsylvania, April 14, 1834, § 18. In Pennsylvania they exercise an equity jurisdiction also, as well as that at common law. Courts of substantially similar powers to those indicated in the definition exist in all the states, under various names.

In English Law. Formerly one of the three superior courts of common law at Westminster.

This court, which is sometimes called, also, Bancus Communis, Bancus, and Common Bench, was a branch of the *curia regis*, and was at its insti-

tution ambulatory, following the household of the king. In the eleventh clause of Magna Charta, it is provided that it shall be held at some fixed place, which is Westminster. The establishment of this court at Westminster, and the consequent construction of the *Inns of Court* and gathering together of the common-law lawyers, enabled the law itself to withstand the attacks of the canonists and civilians. It derived its name from the fact that the causes of *common people* were heard there. It had exclusive jurisdiction of real actions as long as those actions were in use, and had also an extensive and, for a long time, exclusive jurisdiction of all actions between subjects. This latter jurisdiction, however, was gradually encroached upon by the king's bench and exchequer, with which it afterwards had a concurrent jurisdiction in many matters. Formerly none but serjeants at law were admitted to practise before this court *in banc*; 6 Bingh. N. C. 235; but, by statutes 6 & 7 Vict. c. 18, § 61, 9 & 10 Vict. c. 54, all barristers at law have the right of "practice, pleading, and audience."

It consisted of one chief and four puisne or associate justices.

It had a civil, common-law jurisdiction, concurrent with the king's bench and exchequer, of personal actions and actions of ejectment, and a peculiar or exclusive jurisdiction of real actions, actions under the Railway and Canal Traffic Act, 17 & 18 Vict. c. 31, the registration of judgments, annuities, etc., 1 & 2 Vict. c. 110; 2 & 3 Vict. c. 11; 3 & 4 Vict. c. 82; 18 Vict. c. 15; respecting fees for conveyances under 3 & 4 Will. IV. c. 74; the examination of married women concerning their conveyances, 11 & 12 Vict. c. 70; 17 & 18 Vict. c. 75; 19 & 20 Vict. c. 108, § 73; and of appeals from the revising barristers' court, 6 & 7 Vict. c. 18. Whart. Law Dict.

Appeals formerly lay from this court to the king's bench; and by statutes 11 Geo. IV. and 1 Will. IV. c. 70, appeals for errors in law were afterwards taken to the judges of the king's bench and barons of exchequer in the exchequer chambers, from whose judgment an appeal lay only to the house of lords. 3 Bla. Com. 40.

The Judicature Act transferred the jurisdiction of this court to the Common Pleas division of the High Court of Justice; 3 Steph. Com. 353; and it was to be exercised by five of the judges of that division at least, whereof the Lord Chief Justice of England, or the Lord Chief Justice of the Common Pleas, or the Lord Chief Baron of the Exchequer, should be one; *ibid.* But by order in council, made in 1880 under § 32 of that act, the Common Pleas division was merged in the Queen's Bench division. See JUDICATURE ACTS.

COURTS OF CONSCIENCE. See COURTS OF REQUESTS.

COURT FOR CONSIDERATION OF CROWN CASES RESERVED. A court established by stat. 11 & 12 Vict. c. 78, composed of such of the judges of the superior courts of Westminster as were able to attend, for the consideration of questions of law reserved by any judge in a court of oyer and terminer, gaol delivery, or quarter sessions, before which a prisoner had been found guilty by verdict; such question being stated in the form of a special case. Moz. & W. Dict.; 4 Steph. Com. 442.

COURT, CONSISTORY. See CONSISTORY COURT.

COURT OF CONVOCATION. In English Ecclesiastical Law. A convocation or ecclesiastical synod, which is in the nature of an ecclesiastical parliament.

There is one for each province. They are composed respectively of the archbishop, all the bishops, deans, and archdeacons of their province, with one proctor, or representative, from each chapter, and, in the province of Canterbury, two proctors for the beneficed parochial clergy in each diocese, while in the province of York there are two proctors for each archdeaconry. In York the convocation consists of only one house; but in Canterbury there are two houses, of which the archbishop and bishops form the upper house, and the lower consists of the remaining members of the convocation. In this house a prolocutor, performing the duty of president, is elected. These assemblies meet at the time appointed in the queen's writ. The convocation has long been summoned *pro forma* only, but is still, in fact, summoned before the meeting of every new parliament, and adjourns immediately afterwards, without proceeding to the dispatch of any business.

The purpose of the convocation is stated to be the enactment of canon law, subject to the license and authority of the sovereign, and consulting on ecclesiastical matters.

In their judicial capacity, their jurisdiction extends to matters of heresy, schisms, and other mere spiritual or ecclesiastical causes,—an appeal lying from their judicial proceedings to the queen in council, by stat. 2 & 3 Will. IV. c. 92.

Cowel; Bac. Abr. *Ecclesiastical Courts*, A, 1; 1 Bla. Com. 279; 2 Steph. Com. 525, 668; 2 Burn, Eccl. Law, 18 *et seq.*; Encyc. Britt. *sub voc.*; Brett, Com. Book XII.

COURT OF THE CORONER. In English Law. A court of record, to inquire, when any one dies in prison, or comes to a violent or sudden death, by what manner he came to his end. 4 Steph. Com. 323; 4 Bla. Com. 274; now generally known as an inquest. In England, it is regulated by stat. 50 & 51 Vict. (1887) c. 71. See CORONER.

COURT FOR THE CORRECTION OF ERRORS. See SOUTH CAROLINA.

COURTS OF THE COUNTIES PALATINE. In English Law. A species of private court which appertains to the counties palatine of Lancaster and Durham.

They are local courts, which formerly had exclusive jurisdiction in law and equity of all cases arising within the limits of the respective counties. The judges who held these courts sat by special commission from the owners of the several franchises and under their seal, and all process was taken in the name of the owner of the franchise, though subsequently to the 27 Hen. VIII. c. 24 it ran in the king's name. See COUNTY PALATINE.

The Judicature Act of 1873 transfers the jurisdiction of the court of common pleas of Lancaster and the court of pleas of Durham to the High Court of Justice. See JUDICATURE ACTS. But the chancery court at Lancaster is expressly retained by § 95 of the act. 1 Steph. Com. 133; 3 *id.* 634. The jurisdiction of the Durham chancery

court is now regulated by stat. 52 & 53 Vict. (1889) c. 47; and that of the Lancaster chancery court by stat. 13 & 14 Vict. (1850) c. 43, 17 & 18 Vict. (1854) c. 82, and 52 & 53 Vict. (1890) c. 23.

COURT OF DELEGATES. In English Law. A court of appeal in ecclesiastical and admiralty suits, formerly the great court of appeal in ecclesiastical causes, now abolished by 2 & 3 Will. IV. c. 92, and its functions transferred to the Judicial Committee of the Privy Council. Cowel; 3 Bla. Com. 66, 67; 3 Steph. Com. 307, 308.

COURT FOR DIVORCE AND MATRIMONIAL CAUSES. In English Law. A court which had the jurisdiction formerly exercised by the ecclesiastical courts in respect of divorces *a mensa et thoro*, suits of nullity of marriage, suits of jactitation of marriage, suits for restitution of conjugal rights, and all suits, causes, and matters matrimonial.

It consisted of the lord chancellor and the justices of the queen's bench, the common pleas, the exchequer, and the judge of the court of probate, who was entitled judge ordinary.

The judge ordinary exercised all the powers of the court, except petitions for dissolving or annulling marriages and applications for new trials of matters of fact, bills of exception, special verdict and special cases, for hearing which excepted cases he must be joined by two of the other judges. Provision was made for his absence by authorizing the lord chancellor to appoint one of certain judicial persons to act in such absence. Juries were summoned to try matters of fact, and such trials were conducted in the same manner as jury trials at common law. See stat. 20 & 21 Vict. c. 85; 21 & 22 Vict. c. 108; 22 & 23 Vict. c. 61. It is now merged in the High Court of Justice by the Judicature Act, *q. v.*

COURT OF THE DUCHY OF LANCASTER. In English Law. A court of special jurisdiction, which has jurisdiction of all matters of equity relating to lands holden of the king in right of the duchy of Lancaster.

It is held by the chancellor or his deputy, is a court of equity jurisdiction and not of record. It is to be distinguished from the court of the county palatine of Lancaster. 3 Bla. Com. 78. See COURTS OF THE COUNTIES PALATINE.

COURT OF EQUITY. A court which administers justice according to the principles of equity.

As to the constitution and jurisdiction of such courts, see COURT OF CHANCERY.

Such courts are not, strictly speaking, courts of record except when made so by statute; Yelv. 226; 9 S. & R. 252. Their decrees touch the person only; 3 Cai. 36; but are conclusive between the parties; 8 Conn. 268; 1 Stock. 302; 6 Wheat. 109. See 2 Bibb 149. And as to the personalty, their decrees are equal to a judgment; 2 Madd. 355; 2 Salk. 507; 1 Vern. 214; 3 Cai. 35; and have preference according to priority; 3 P. Wms. 401, n.; Cas. *temp.* Talb. 217; 4 Bro. P. C. 287; 4 Johns. Ch. 638. See Chase, Bla. Com. 843, n. 3. They are admissible in evidence between the parties; 2 Leigh 474; 13 Miss. 783; 1 Fla. 409; 10 Humphr. 610; and see 3 Litt. 248; 8 B. Monr. 493; 5 Ala. 254; 2 Gill 21; 12 Mo. 112; 2 Ohio 551; 9 Rich. 454; when properly authenticated; 2 A. K. Marsh. 290; and come within the provisions of the constitution for authentication of judicial records of the various states for use as evidence in other states; Pet. C. C. 352.

An action may be brought at law on a decree of a foreign court of chancery for an ascertained sum; 1 Campb. 253; Hempst. 197; but not for an unascertained sum; 3 Cai. 37, n.; but *nil debet* or *nul tiel record* is not to be pleaded to such an action; 9 S. & R. 252. See EQUITY.

COURT OF ERROR. An expression applied especially to the court of exchequer chamber and the house of lords, as taking cognizance of *error* brought. Moz. & W. Dict. 3 Steph. Com. 333. It is applied in some of the United States to the court of last resort in the state.

COURT OF EXCHEQUER. In English Law. A superior court of record, administering justice in questions of law and revenue.

It was the lowest in rank of three superior common-law courts of record, and had jurisdiction originally only of cases of injury to the revenue by withholding or non-payment. The privilege of suing and being sued in this court in personal actions was extended to the king's accountants, and then, by a fiction that the plaintiff was a debtor of the king, to all personal actions. It had formerly an equity jurisdiction and there was then an equity court; but, by statute 5 Vict. c. 5, this jurisdiction was transferred to the court of chancery.

It consisted of one chief and four puisne judges or barons,

As a court of revenue, its proceedings were regulated by 22 & 23 Vict. c. 1, § 9.

As a court of common law, it administered redress between subject and subject in all actions whatever, except real actions.

The appellate jurisdiction from this court was to the judge of the king's bench and common pleas sitting as the court of exchequer chamber, and from this latter court to the house of lords; 3 Steph. Com. 338–340; 3 Bla. Com. 44–46. The jurisdiction of this court is transferred by the Judicature Act of 1873 to the exchequer division of the high court of justice. See JUDICATURE ACTS.

In Scotch Law. A court which formerly had jurisdiction of matters of revenue, and a limited jurisdiction over cases between the crown and its vassals where no questions of title were involved.

This court was established by the statute 6 Anne, c. 26, and its processes resembled those in the English court of exchequer. It is now merged in the court of sessions; but the name is still applied to this branch of the latter court, which is held by two of

the judges acting in rotation. Pat. Com. 1055, n. The proceedings are regulated by stat. 19 & 20 Vict. c. 56.

COURT OF EXCHEQUER CHAMBER. In English Law. A court for the correction and prevention of errors of law in the three superior common-law courts of the kingdom.

A court of exchequer chamber was first erected by statute 31 Edw. III. c. 12, to determine causes upon writs of error from the common-law side of the exchequer court. It consisted of the lord chancellor, lord treasurer, and the justices of the king's bench and common pleas. A second court of exchequer chamber was instituted by statute 27 Eliz. c. 8, consisting of the justices of the common pleas and the exchequer, which had jurisdiction in error of cases commenced in the king's bench. By statutes 11 Geo. IV. and 1 Will. IV. c. 70, these courts were abolished and the court of exchequer chamber substituted in their place. It is now merged in the Court of Appeals, under the Judicature Acts, *q. v.*

As a court of debate, it was composed of the judges of the three superior courts of law, to whom is sometimes added the lord chancellor. To this court questions of unusual difficulty or moment were referred before judgment from either of the three courts.

As a court of appeals, it consisted of the judges of two of the three superior courts of law (common bench, king's bench, and exchequer) sitting to decide writs of error from the other two courts. 3 Bla. Com. 56, 57; 3 Steph. Com. 333, 356.

From the decisions of this court a writ of error lay to the House of Lords; but no such appeal lies from the court of appeal under the new act.

COURT OF FACULTIES. In Ecclesiastical Law. A tribunal in England, belonging to the archbishop.

It does not hold pleas in any suits, but creates rights to pews, monuments, and other mortuary matters. It has also various other powers under 25 Hen. VIII. c. 21, in granting licenses, faculties, dispensations, etc., of different descriptions; as, a license to marry, a faculty to erect an organ in a parish church, to level a churchyard, to remove bodies previously buried; and it may also grant dispensations to eat flesh on days prohibited, or to ordain a deacon under age, and the like. The archbishop's office in this tribunal is called *magister ad facultates;* Co. 4th Inst. 337; 2 Chit. Gen. Pr. 507.

COURTS OF THE FOREST. Courts held for the enforcement of the forest laws. The lowest of these was the Woodmote, or Court of Attachments (*q. v.*), held every forty days by the Verderers, to receive presentments and bind over the accused. The next was the Swanimote (*q. v.*), held thrice a year, to inquire of presentments and charges, and convict offenders, but without power to punish them. It was composed of the Verderers and presided over by the Steward of the Forest. The highest was the Court of the Chief Justice (*q. v.*), held once in three years, to decide all claims to franchises, etc., in the forest as well as of purprestures and the like, and to pass sentence on those convicted by the Verderers in Swanimote. There was also a Court of Survey of Dogs (*v.* Court of Regard), held by the Regarders of the Forest every three years for the lawing of dogs. Inderwick, The King's Peace, c. 4. See FOREST LAWS.

COURT OF GENERAL QUARTER SESSIONS OF THE PEACE. In American Law. A court of criminal jurisdiction, so-called in many states.

In English Law. A court of criminal jurisdiction, in England, held in each county once in every quarter of a year, but in the county of Middlesex twice a month. 4 Steph. Com. 317–320.

It is held before two or more justices of the peace, one of whom was a justice of the *quorum.*

The stated times of holding sessions are fixed by stat. 11 Geo. IV. and 1 Will. IV. c. 70, § 35. When held at other times than quarterly, the sessions are called "general sessions of the peace."

As to the jurisdiction of the various sessions, see 5 & 6 Vict. c. 38; 7 & 8 Vict. c. 71; 9 & 10 Vict. c. 25; 4 Bla. Com. 271.

COURT OF GREAT SESSIONS IN WALES. A court formerly held in Wales; abolished by 11 Geo. IV. and 1 Will. IV. c. 70, and the Welsh judicature incorporated with that of England. 3 Bla. Com. 77; 3 Steph. Com. 317, n.

COURT OF HIGH COMMISSION. See HIGH COMMISSION COURT.

COURT-HOUSE. The building occupied for the purposes of a court of record. The term may be used of a place temporarily occupied for the sessions of a court, though not the regular court-house; as, a church used when the court-house was occupied by troops; 55 Mo. 181; and see 59 Mo. 52; and where the court-house was burned down, sales required by law to be at its door must be held at the ruins of the door; 71 Ill. 350.

COURT, HUNDRED. See HUNDRED COURT.

COURT OF HUSTINGS. In English Law. The county court in the city of London.

It is held nominally before the lord mayor, recorder, and aldermen; but the recorder is practically the sole judge. It has an appellate jurisdiction of causes in the sheriff's court of London. A writ of error lies from the decisions of this court to certain commissioners (usually five of the judges of the superior courts of law), from whose judgment a writ of error lies to the house of lords. No merely personal actions can be brought in this court. See 3 Bla. Com. 80, n.; 3 Steph. Com. 293, n.; Madox, Hist. Exch. c. 20; Co. 2d Inst. 327; Calth. 131. Since the abolition of all real and mixed actions except ejectment, the jurisdiction of this court has fallen into comparative desuetude. Pulling on Cust. Lond.; Moz. & W. Dict.

In American Law. A local court in some parts of the state of Virginia. 6 Gratt. 696.

COURT FOR THE TRIAL OF IMPEACHMENTS. A tribunal for determining the guilt or innocence of any person properly impeached. In England, the House of Lords, and in this country, generally, the more select branch of the legislative assembly, constitutes a court for the trial of impeachments. A peer could always be impeached for any crime, and although Blackstone lays it down that a commoner cannot be impeached for a capital offence, but only for a high misdemeanor, the opinion seems to have prevailed that he could be impeached for high treason; 4 Bla. Com. 260; 4 Steph. Com. 299; May, Parl. Prac. c. 23. See IMPEACHMENT.

COURT FOR THE RELIEF OF INSOLVENT DEBTORS IN ENGLAND. In English Law. A local court which had its sittings in London only, which received the petitions of insolvent debtors and decided upon the question of granting a discharge.

It was held by the commissioners of bankruptcy; and its decisions, if in favor of a discharge, were not reversible by any other tribunal. See 3 Steph. Com. 426; 4 *id.* 287, 288.

This court was abolished by the Bankruptcy Act of 1861, which was repealed in 1869, and all the former powers of the court were vested in the court of bankruptcy in London, which was merged in the high court of justice by the Judicature Act of 1873, § 16. 3 Steph. Com. 346; 32 & 33 Vict. c. 83.

COURT OF INQUIRY. In English Law. A court sometimes appointed by the crown to ascertain the propriety of resorting to ulterior proceedings against a party charged before a court-martial. See 2 Steph. Com. 590, note (z); 1 Coler. Bla. Com. 418, n.; 2 Brod. & B. 130. Also a court for hearing the complaints of private soldiers. Moz. & W. Dict.; Simmons, Cts. Mart. § 341.

In American Law. A court constituted by authority of the articles of war, invested with the power to examine into the nature of any transaction, accusation, or imputation against any officer or soldier. The said court shall consist of one or more officers, not exceeding three, and a judge-advocate, or other suitable person, as a recorder, to reduce the proceedings and evidence to writing; all of whom shall be sworn to the performance of their duty. It exists also in the navy; U. S. Rev. Stat. §§ 1342, 1624.

COURT OF JUSTICE SEAT. In English Law. The principal of the forest courts.

It was held before the chief justice in eyre, or his deputy, to hear and determine all trespasses within the forest, and all claims of franchises, liberties, privileges, and all pleas and causes whatsoever, therein arising. It might also try presentments in the inferior courts of the forests, and give judgment upon conviction of the Swanimote. After presentment made or indictment found, the chief justice might issue his warrant to the officers of the forest to apprehend the offenders. It might be held every third year; and forty days' notice was to be given of its sitting.

It was a court of record, and might fine and imprison for offences within the forest. A writ of error lay from it to the court of queen's bench to rectify and redress any maladministration of justice; or the chief justice in eyre might adjourn any matter of law into that court.

These justices in eyre were instituted by King Henry II., in 1184.

These courts were formerly very regularly held; but the last court of justice seat of any note was held in the reign of Charles I., before the earl of Holland. After the restoration another was held, *pro formâ* only, before the earl of Oxford. But since the era of the revolution of 1688 the forest-laws have fallen into total disuse; 3 Steph. Com. 439–441; 3 Bla. Com. 71–73; Co. 4th Inst. 291. See FOREST LAWS.

COURT OF JUSTICIARY. In Scotch Law. A court of general criminal and limited civil jurisdiction.

It consists of the lord justice general, the lord justice clerk, and five other members of the court of sessions. The kingdom is divided into three circuits, in each of which two sessions, of not less than three days each, are to be held annually. A term may be held by any two of the justices, or by the lord justice general alone, or in Glasgow, by a simple justice; except in Edinburgh, where three justices constitute a quorum, and four generally sit in important cases.

Its criminal jurisdiction extends to all crimes committed in any part of the kingdom; and it has the power of reviewing the sentences of all inferior criminal courts, unless excluded by statute. Alison, Pr. 25.

Its civil jurisdiction on circuits is appellate and final in cases involving not more than twelve pounds sterling. See Paterson, Comp. § 940, n. *et seq.*; Bell, Dict.; Alison, Pr. 25; 20 Geo. II. c. 43; 23 Geo. III. c. 45; 30 Geo. III. c. 17; 1 Will. IV. c. 69, § 19; 11 & 12 Vict. c. 70, § 8. For amendments to the procedure of this court see 31 & 32 Vict. c. 95. See 35 Am. Law Reg. 619.

COURT OF KING'S BENCH. In English Law. The supreme court of common law in the kingdom, now merged in the High Court of Justice under the Judicature Act of 1873, § 16. See JUDICATURE ACTS.

It was one of the successors of the *aula regis* and received its name, it is said, because the king formerly sat in it in person, the style of the court being *coram rege ipso* (before the king himself). During the reign of a queen it was called the Queen's Bench, and during Cromwell's protectorate it was called the Upper Bench. Its jurisdiction

was originally confined to the correction of crimes and misdemeanors which amounted to a breach of the peace, including those trespasses which were committed with force (*vi et armis*), and in the commission of which there was, therefore, a breach of the peace. By aid of a fiction of the law, the number of actions which might be alleged to be so committed was gradually increased, until the jurisdiction extended to all actions of the case, of debt upon statutes or where fraud was alleged, and, finally, included all personal actions whatever, and the action of ejectment. See ASSUMPSIT; ARREST; ATTACHMENT. It was, from its constitution, ambulatory and liable to follow the king's person, all process in this court being returnable "*ubicunque fuerimus in Anglia*" (wherever in England we the sovereign may be), but has *for some centuries* been held at Westminster.

It consisted of a lord chief justice and four puisne or associate justices, who were, by virtue of their office, conservators of the peace and supreme coroners of the land.

The *civil* jurisdiction of the court was either *formal* or *plenary*, including personal actions and mixed action of ejectment; *summary*, applying to annuities and mortgages, 15 & 16 Vict. cc. 55, 76, 219, 220, arbitrations and awards, cases under the Habeas Corpus Act, 31 Car. II. c. 2; 56 Geo. III. c. 100, cases under the Interpleader Act, 1 & 2 Will. IV. c. 58, officers of the court, warrants of attorney, cognovits, and judges' orders for judgment; *auxiliary*, including answering a special case, enforcing judgments of inferior courts of record, prerogative, mandamus to compel inferior courts or officers to act, 17 & 18 Vict. c. 125, §§ 75–77, prohibition, quo warranto, trying an issue in fact from a court of equity or a feigned issue; or *appellate*, including appeals from decisions of justices of the peace giving possession of deserted premises to landlords, 11 Geo. II. c. 19, §§ 16, 17, writs of false judgment from inferior courts not of record, but proceeding according to the course of the common law, appeals by way of a case from the summary jurisdiction of justices of the peace on questions of law, 20 & 21 Vict. c. 43; Order of Court of Nov. 25, 1857. See Whart. Law Dict.; Crabb, Hist.

Its *criminal* jurisdiction extended to all crimes and misdemeanors whatever of a public nature, it being considered the *custos morum* of the realm. Its jurisdiction was so universal that an act of parliament appointing that all crimes of a certain denomination should be tried before certain judges did not exclude the jurisdiction of this court, without negative words. It might also proceed on indictments removed into that court out of the inferior courts by certiorari.

COURT LANDS. See DEMESNE.

COURT LEET. In English Law. A court of record for a particular hundred, lordship, or manor, holden therein before the steward of the leet, for the punishment of petty offences and the preservation of the peace. Kitchin, Courts Leet.

These courts were established as substitutes for the sheriff's tourn in those districts which were not readily accessible to the sheriff on the tourn. The privilege of holding them was a franchise subsisting in the lord of the manor by prescription or charter, and might be lost by disuse. The court leet took cognizance of a wide variety of crimes, ranging from the very smallest misdemeanors to, but excluding, treason. For some of these offences of a lower order, punishment by fines, amercements, or other means might be inflicted. For the higher crimes, they either found indictments which were to be tried by the higher courts, or made presentment of the case to such higher tribunals. They also took *view of frank-pledge*. Among other duties for the keeping of the peace, the court assisted in the election of, or, in some cases, elected certain municipal officers in the borough to which the leet was appended.

This court has fallen almost totally into disuse. Its duties were mainly, however, those of the trial of the smaller offences or misdemeanors, and presentment of the graver offences. These presentments might be removed by certiorari to the king's bench and an issue there joined; 4 Bla. Com. 273; Greenw. County Courts 308 *et seq.*; Kitchin, Courts Leet; Powell, Courts Leet; 1 Reeve, Hist. Eng. Law 7. See Inderwick, The King's Peace 11; 1 Poll. & Maitl. 568; 4 Steph. Com., 11th ed. 306.

COURT OF THE LORD HIGH STEWARD. In English Law. A court instituted for the trial of peers or peeresses indicted for treason, felony, or misprision of either.

This court can be held only during a recess of parliament, since the trial of a peer for either of the above offences can take place, during a session of that body, only before the High Court of Parliament. It consists of a lord high steward (appointed in modern times *pro hac vice* merely) and as many of the temporal lords as may desire to take the proper oath and act. And all the peers qualified to sit and vote in parliament are to be summoned at least twenty days before the trial; Stat. 7 Will. III. c. 3.

The lord high steward, in this court, decides upon matters of law, and the lords triers decide upon the questions of fact.

The course of proceedings is to obtain jurisdiction of the cause by a writ of certiorari removing the indictment from the queen's bench or court of oyer and terminer where it was found, and then to go forward with the trial before the court composed as above stated. The guilt or innocence of the peer is determined by a vote of the court, and a majority suffices to convict; but the number voting for conviction must not be less than twelve. The manner of proceeding is much the same as in trials by jury; but no special verdict can be rendered.

A peer indicted for either of the above offences may plead a pardon in the queen's bench, but can make no other plea there. If indicted for any less offence, he must be tried by a jury before the ordinary courts of justice; 4 Bla. Com. 261–265. See HIGH COURT OF PARLIAMENT.

COURT OF THE LORD HIGH STEWARD OF THE UNIVERSITIES. In English Law. A court constituted for the trial of scholars or privileged persons connected with the university

at Oxford or Cambridge who are indicted for treason, felony, or mayhem.

The court consists of the lord high steward, or his deputy nominated by the chancellor of the university and approved of by the lord high chancellor of England. The steward issues a precept to the sheriff, who returns a panel of eighteen freeholders, and another to the university bedels, who return a panel of eighteen matriculated laymen. From these panels a jury *de medietate* is selected, before whom the cause is tried. An indictment must first have been found by a grand jury, and cognizance claimed thereof at the first day. 3 Bla. Com. 83; 4 *id.* 277; 1 Steph. Com. 67; 3 *id.* 299; 4 *id.* 325. See CHANCELLORS' COURTS OF THE UNIVERSITIES.

COURT OF THE STEWARD OF THE KING'S HOUSEHOLD. In English Law. A court which had jurisdiction of all cases of treason, misprision of treason, murder, manslaughter, bloodshed, and other malicious strikings whereby blood is shed, occurring in or within the limits of any of the palaces or houses of the king, or any other house where the royal person is abiding.

It was created by statute 33 Hen. VIII. c. 12, but long since fell into disuse. 4 Bla. Com. 276, 277, and notes.

COURT OF MAGISTRATES AND FREEHOLDERS. In American Law. The name of a court in South Carolina for the trial of slaves and free persons of color for criminal offences. Now abolished.

COURT OF THE MARSHALSEA. In English Law. A court which had jurisdiction of causes to which the domestic servants were parties.

It was held by the steward of the king's household, as judge, and the marshal was the ministerial officer, and held pleas of trespasses committed within twelve miles of the sovereign's residence (called the verge of the court), where one of the parties was a servant of the king's household, and of all debts, contracts, and covenants, where both parties were servants as above. Where one of the parties only was of the king's household, a jury of the country was summoned; in the other case, the inquest was composed of men of the household only. This court was merged, in the time of Charles I., in the Palace Court, and abolished by 12 & 13 Vict. c. 101, § 13; 3 Steph. Com. 317, n. See PALACE COURT.

COURT-MARTIAL. A military or naval tribunal, which has jurisdiction of offences against the law of the service, military or naval, in which the offender is engaged.

The original tribunal, for which courts-martial are a partial substitute, was the Court of Chivalry, which title see. These courts exist and have their jurisdiction by virtue of the military law, the court being constituted and empowered to act in each instance by authority from a commanding officer. The general principles applicable to courts-martial in the army and navy are essentially the same; and for consideration of the exact distinctions between them reference must he had to the works of writers upon these subjects. Courts-martial for the regulation of the militia are held in the various states under local statutes, which resemble in their main features those provided for in the army of the United States; and when in actual service the militia, like the regular troops, are subject to courts-martial, composed, however, of militia officers.

As to their constitution and jurisdiction, these courts may belong to one of the following classes:—

General, which have jurisdiction over every species of offence of which courts-martial have jurisdiction. They are to be composed in the United States of not less than five nor more than thirteen commissioned officers of suitable rank, according to the exigencies of the service (U. S. R. S. 237, art. 75), and in England of not less than thirteen commissioned officers, except in special cases, and usually do consist of more than that number.

Regimental, which have jurisdiction of offences not capital, occurring in a regiment or corps. They consist in the United States of three commissioned officers; and are appointed by the commanding officer. In England they consist of not less than three commissioned officers and may be summoned by any commanding officer, without regard to rank; Stat. 44 & 45 Vict. (1881) c. 58. The jurisdiction of this class of courts-martial extends only to offences less than capital committed by those below the rank of commissioned officers, and their decision is subject to revision by the commanding officer of the division, regiment, or detachment, by the officer who appointed them, or by certain superior officers.

Garrison, which have jurisdiction of some offences not capital, occurring in a garrison, fort, or barracks. They are of the same constitution as to number and qualifications of members as regimental courts-martial. Their limits of jurisdiction in degree are the same, and their decisions are in a similar manner subject to revision.

The U. S. Rev. Stat. § 1342, contain the rules and articles of war governing the army and, *inter alia*, provide:—

Art. 72. Any general officer, commanding an army, a territorial division, or a department, or colonel commanding a separate department, may appoint general courts-martial whenever necessary either in time of peace or in time of war. But when any such commander is the accuser or prosecutor of any officer under his command, the court shall be appointed by the president; and its proceedings and sentence shall be sent directly to the secretary of war, by whom they shall be laid before the president for his approval or orders in the case. (As amended by act of 1884, July 5; U. S. Rev. St. 1 Suppl. 463, c. 224.)

Art. 73. In time of war the commander of a division or of a separate brigade of troops, shall be competent to appoint a general court-martial. But when such commander is the accuser or prosecutor of any person under his command, the court shall be appointed by the next higher commander.

Art. 74. Officers who may appoint a court-martial shall be competent to appoint a judge-advocate for the same.

U. S. Rev. Stat. § 1624 contain the articles governing the navy and, *inter alia*, it is provided :—

Art. 26. "Summary courts-martial may be ordered upon petty officers and persons of inferior ratings by the commander of any vessel, or by the commandant of any navy-yard, naval station, or marine barracks to which they belong, for the trial of offences which such officer may deem deserving of greater punishment than such commander or commandant is authorized to inflict, but not sufficient to require trial by a general court-martial." A paymaster's clerk in the navy, regularly appointed and assigned to duty on a receiving ship, is subject to trial and conviction, and sentence and imprisonment by general court-martial, for a violation of section 1624 of the Revised Statutes ; 158 U. S. 109.

Art. 27. A summary court-martial shall consist of three officers not below the rank of ensign, as members, and of a recorder. The commander of a ship may order any officer under his command to act as such recorder.

Art. 38. General courts-martial may be convened by the president, the secretary of the navy, or the commander-in-chief of a fleet or squadron ; but no commander of a fleet or squadron in the waters of the United States shall convene such court without express authority from the president.

Art. 39. A general court-martial shall consist of not more than thirteen nor less than five commissioned officers as members; and as many officers, not exceeding thirteen, as can be convened without injury to the service, shall be summoned on every such court. But in no case, where it can be avoided without injury to the service, shall more than one-half, exclusive of the president, be junior to the officer to be tried. The senior officer shall always preside, and the others shall take place according to their rank.

The decision of the commanding officer as to the number that can be convened without injury to the service is conclusive ; 12 Wheat. 19.

By act of 1890, October 1, U. S. Rev. St. 1 Supp. 878, c. 1259, any enlisted man guilty of an offence, cognizable by a garrison or regimental court-martial shall be brought within twenty-four hours before a summary court, composed of the line officers second in rank of the post or station or of the command of the alleged offender ; but the offender may, if he chooses, object to a hearing by the summary court, and request a trial by court-martial. Where a person accused under article 43 of the articles for the government of the Navy (R. S. § 1624) is already in custody to await the result of a court of inquiry, the article is sufficiently complied with by delivering a copy of the charges against him immediately after the secretary of the Navy has informed him of that result and has ordered a court-martial to convene to try him ; 158 U. S. 109.

The jurisdiction of such courts is limited to offences against the military law (which title see) committed by individuals in the service ; 12 Johns. 257 ; see De Hart, Courts-Mart. 28 ; Ives, Mil. L. 37 ; 3 Wheat. 212 ; 3 Am. Jur. 281 ; which latter term includes sutlers, retainers to the camp, and persons serving with the army in the field ; 60th Art. of War ; De Hart, Courts-Mart. 24, 25. See V. Kennedy, Courts-Mart. 3. But while a district is under martial law, by proclamation of the executive, as for rebellion, they may take jurisdiction of offences which are cognizable by the civil courts only in time of peace ; 11 Op. Att.-Gen. 137 ; V. Kennedy, Courts-Mart. 14. This rule is said by American writers to apply where the army passes into a district where there are no civil courts in existence ; Benet, Mil. Law 15.

The act of March 3, 1863, did not make the jurisdiction of military tribunals exclusive of that of the state courts in the *loyal* states ; but otherwise in the rebellious states when in the military occupation of the United States ; 97 U. S. 509.

Military commissions organized during the late war, in a state not invaded and not engaged in rebellion, in which the federal courts were open and not obstructed in the exercise of their judicial functions, had no jurisdiction to convict, for a criminal offence, a citizen, who was neither a resident of a rebellious state, nor a prisoner of war, nor a person in the military or naval service ; and congress could not invest them with any such power ; *Ex parte* Milligan, 4 Wall. 2. Cases arising in the land and naval forces, or in the militia in time of war or public danger, are excepted from the right of trial by jury ; *ibid.*

In regard to the jurisdiction of naval courts-martial over civil crimes committed at sea, see 1 Term 548 ; 3 Wheat. 212 ; 10 *id.* 159 ; 7 Hill 95 ; 1 Kent 341, n. Naval courts-martial in England are now governed by the Naval Discipline Act of 1866 (29 & 30 Vict. c. 109) and its amendments of 1884 (47 & 48 Vict. c. 39) ; 2 Steph. Com. 589–598.

The court must appear from its record to have acted within its jurisdiction ; Ives, Mil. L. 35 ; 3 S. & R. 590 ; 1 Rawle 143 ; 11 Pick. 442 ; 19 Johns. 7 ; 25 Me. 168 ; 1 M'Mull. 69 ; 13 How. 134. A want of jurisdiction either of the person, 1 Brock. 324, or of the offence, will render the members of the court and officers executing its sentence trespassers ; 3 Cra. 331. See MILITARY LAW ; MARTIAL LAW. So, too, the members are liable to a civil action if they admit or reject evidence contrary to the rules of the common law ; 2 Kent 10 ; V. Kennedy, Courts-Mart. 13 ; or award excessive or illegal punishment ; V. Kennedy, Courts-Mart. 13.

The decisions of general courts-martial are subject to revision by the commanding officer, the officer ordering the court, or by the president or sovereign, as the case may

be; 11 Johns. 150. No sentence extending to the loss of life or to the dismissal of a commissioned or warrant officer shall be carried into effect until confirmed by the president: U. S. R. S. § 1624, art. 53. The decision and sentence of a court martial, having jurisdiction of the person accused and of the offence charged, and acting within the scope of its lawful powers, cannot be reviewed or set aside by writ of *habeas corpus;* 158 U. S. 109. Consult Encyc. Brit. *sub voc.;* Benét; De Hart, and also Adye; Defalon; Hough; J. Kennedy; V. Kennedy; M'Arthur; Macnaghten; Macomb; Simmons; Tytler, Courts-Martial; Brickhimer; Ives; Merrill; Winthrop, Mil. Law; Opinions Att.-Gen. *passim.*

COURT OF NISI PRIUS. In American Law. A court of original civil jurisdiction in the city and county of Philadelphia, held by one of the judges of the supreme court of the state. Abolished by the constitution of 1874; art. 5, § 1. See NISI PRIUS; COURTS OF ASSIZE AND NISI PRIUS.

COURT OF ORDINARY. In American Law. A court which has jurisdiction of the probate of wills and the regulation of the management of decedents' estates.

Such a court exists in Georgia (see Code Ga. 1882, §§ 318–340), and formerly existed in New Jersey, South Carolina, and Texas, but has been replaced by the court of probate or district court, *q. v.* See 2 Kent 409; ORDINARY.

COURT OF ORPHANS. In English Law. The court of the lord mayor and aldermen of London, which had the care of those orphans whose parents died in London and were free of the city.

By the custom of London this court was entitled to the possession of the person, lands, and chattels of every infant whose parent was free of the city at the time of his death and who died in the city. The executor or administrator of such deceased parent was obliged to exhibit inventories of the estate of the deceased, and give security to the chamberlain for the orphan's part or share. It is now said to be fallen into disuse. 2 Steph. Com. 313; Pull. Cust. Lond. 196, *Orphans' Court.*

COURT OF OYER AND TERMINER. In American Law. The name of courts of criminal jurisdiction in several of the states of the American Union, as in Delaware and Pennsylvania.

They were abolished in New York Dec. 31, 1895, and in New Jersey by acts of March 14 and 22, 1895. In Pennsylvania they are held at the same time with the court of quarter sessions, as a general rule, and by the same judges. In Delaware they are specially called by a precept from the judges when there are capital felonies to be tried, and consist of the chief justice and three associate judges of the state.

COURTS OF OYER AND TERMINER AND GENERAL GAOL DELIVERY. In English Law. Tribunals for the examination and trial of criminals.

They are held before commissioners selected by the queen, among whom are usually two justices of the superior courts at Westminster, twice in every year in all the counties of England except the four northern, where they are held once only, and Middlesex and parts of other counties, over which the central criminal court has jurisdiction.

Under the commission of *oyer and terminer* the justices try indictments previously found at the same assizes for treason, felony, or misdemeanors. Under the commission of *general gaol delivery* they may try and deliver every prisoner who is in gaol when the judges arrive at the circuit town, whenever or before whomsoever indicted or for whatsoever crime committed. These commissioners are joined with those of *assize* and *nisi prius* and the commission *of the peace.* 3 Steph. Com. 352. See COURTS OF ASSIZE AND NISI PRIUS.

In American Law. Courts of criminal jurisdiction in some states. See COURT OF OYER AND TERMINER.

COURT OF PALACE AT WESTMINSTER. This court had jurisdiction of personal actions arising within twelve miles of the palace at Whitehall. Abolished by 12 & 13 Vict. c. 101; 3 Steph. Com. 317, n.

COURT OF PECULIARS. In English Law. A branch of the court of arches, to which it is annexed.

It has jurisdiction of all ecclesiastical causes arising in the peculiars of Canterbury or other dioceses which are exempt from the ordinary's jurisdiction and subject to that of the metropolitan only. The court of arches has an appellate jurisdiction of causes tried in this court. 3 Bla. Com. 65; 3 Steph. Com. 306. See PECULIARS.

COURT OF PIE-POWDER, PYPOWDERS, or PIEPOUDRE (Fr. *pied*, foot, and *poudre*, dust, or *puldreaux*, old French pedler). **In English Law.** A court of special jurisdiction in every fair or market, said to have been so called because the several disputes which arose were adjudged with a dispatch that suited the convenience of transitory suitors,—the men with "dusty feet."

The word *piepoudre*, spelled also *piedpoudre* and *pypowder*, has been considered as signifying dusty feet, pointing to the general condition of the feet of the suitors therein; Cowel; Blount; or as indicating the rapidity with which justice is administered, as rapidly as dust can fall from the foot; Co. 4th Inst. 472; or pedler's feet, as being the court of such chapmen or petty traders as resorted to fairs. It was not confined to fairs or markets, but might exist, by custom, in cities, boroughs, or vills for the collection of debts and the like; Cro. Jac. 313; Cro. Car. 46; 2 Salk. 604. It was held before the steward of him who was entitled to the tolls from the market. It has fallen into disuse.

In an enumeration of common-law institutions which he claims were derived from the Roman law, Mr. Semmes claims that

these courts owe both their origin and their name to the Roman law, "as will be seen by referring to the code l. 3, tit. 3, *De Pedaneis Judicibus.*" Address, Am. Bar. Assn. Rep. 1886, p. 197.

The *civil* jurisdiction extended to all matters of contract arising within the precinct of the fair or market during the continuance of the particular fair or market at which the court was held, the plaintiff being obliged to make oath as to the time and place. The cases were mostly trade disputes, and accordingly the decisions were law made by merchants, and a good deal of interest attached to them as decisions by juries of experts; 1 Social England 464. Disputes only could be determined which arose *in the fair* and *in fair time;* Inderwick, King's Peace 105.

The *criminal* jurisdiction embraced all offences committed at the particular fair or market at which the court was held. An appeal lay to the courts at Westminster. See Barrington, Stat. 337; 3 Bla. Com. 32; 3 Steph. Com. 317, n.; Skene, *de verb. sig. Pede pulverosus;* Bracton 334.

COURT OF POLICIES OF INSURANCE. A court of special jurisdiction which took cognizance of cases involving claims made by those insured upon policies in the city of London.

It was organized by a commission issued yearly by the lord chancellor, by virtue of 43 Eliz. c. 12, and 13 & 14 Car. II. c. 23, to the judge of the admiralty, the recorder of London, two doctors of the civil law, two common-law lawyers, and eight merchants, empowering any three of them (one being a civilian or barrister) to determine in a summary way all causes concerning policies in the city of London. The jurisdiction was confined to actions brought by assured persons upon policies of insurance on merchandise; and an appeal lay by way of a bill to the court of chancery. The court has been long disused, and was formally abolished by stat. 26 & 27 Vict. c. 125. 3 Bla. Com. 74; 3 Steph. Com. 317, n.; Crabb, Hist. Eng. Law 503.

COURT PREROGATIVE. See PREROGATIVE COURT.

COURT OF PROBATE. In American Law. A court which has jurisdiction of the probate of wills and the regulation of the management and settlement of decedents' estates, as well as a more or less extensive control of the estates of minors and other persons who are under the especial protection of the law. In some states, this court has also a limited jurisdiction in civil and criminal actions. For the states in which such courts exist, and the limits of their jurisdiction, see the articles on the various states.

In English Law. A court in England, established under the Probate Act of 1857, having exclusive jurisdiction of testamentary causes or proceedings relating to the validity of wills and the succession to the property of persons deceased intestate. 2 Steph. Com. 192; 3 *id.* 346. See stat. 20 & 21 Vict. c. 77; 21 & 22 Vict. c. 95. This court is now merged in the High Court of Justice under the Judicature Act of 1873. See JUDICATURE ACTS.

COURT OF PYPOWDER. See COURT OF PIE-POWDER.

COURT OF QUARTER SESSIONS OF THE PEACE. In American Law. A court of criminal jurisdiction in the state of Pennsylvania.

There is one such court in each county of the state. Its sessions are, in general, held at the same time and by the same judges as the *court of oyer and terminer and general gaol delivery.*

COURT OF QUEEN'S BENCH. See COURT OF KING'S BENCH.

COURT OF RECORD. A judicial organized tribunal having attributes and exercising functions independently of the person of the magistrate designated generally to hold it, and proceeding according to the course of the common law. 8 Metc. 171, per Shaw, C. J.

A court where the acts and proceedings are enrolled in parchment for a perpetual memorial and testimony. 3 Bla. Com. 24.

A court which has jurisdiction to fine and imprison, or one having jurisdiction of civil causes above forty shillings, and proceeding according to the course of the common law. 37 Me. 29.

All courts are either *of record* or *not of record.* The possession of the right to fine and imprison for contempt was formerly considered as furnishing decisive evidence that a court was a court of record; Co. Litt. 117 *b*, 260 *a*; 1 Salk. 144; 12 Mod. 388; 2 Wms. Saund. 101 *a*; Viner, Abr. *Courts;* and it is said that the erection of a new tribunal with this power renders it by that very fact a court of record; 1 Salk. 200; 12 Mod. 388; 1 Woodd. Lect. 98; 3 Bla. Com. 24, 25; but every court of record does not possess this power; 1 Sid 145; 3 Sharsw. Bla. Com. 25, n. The mere fact that a permanent record is kept does not, in modern law, stamp the character of the court; since many courts, as probate courts and others of limited or special jurisdiction, are obliged to keep records and yet are held to be courts not of record. See 11 Mass. 510; 22 Pick. 430; 1 Cow. 212; 3 Wend. 268; 10 Pa. 158; 5 Ohio 545; 7 Ala. 351; 25 *id.* 540. The definition first given above is taken from the opinion of Shaw, C. J., in 8 Metc. 171, with an additional element not required in that case for purposes of distinction, and is believed to contain all the distinctive qualities which can be said to belong to all courts technically of record at modern law.

Courts may be at the same time of record for some purposes and not of record for others; 23 Wend. 376; 6 Hill 590; 8 Metc. 168.

Courts of record have an inherent power, independently of statutes, to make rules for the transaction of business; but such rules must not contravene the law of the land; 1 Pet. 604; 3 S. & R. 253; 8 *id.* 336; 2 Mo. 98. They can be deprived of their jurisdiction by express terms of denial only; 9 S. & R. 298; 2 Burr. 1042; 1 W. Bla. 285. Actions upon the judgments of such courts may, under the statutes of limitations of some of the states of the United States, be brought after the lapse of the period of limitation for actions on simple

contracts; and this provision has given rise to several determinations of what are and what are not courts of record. See 22 Pick. 430; 6 Gray 515; 6 Hill 590; 1 Cow. 212; 25 Ala. N. S. 540; 37 Me. 29.

Under the naturalization act of the United States, "every court of record in a state having common-law jurisdiction and a seal and a clerk or prothonotary" has certain specified powers. As to what the requirements are to constitute a court of record under this act, see 8 Pick. 168; 23 Wend. 375.

A writ of error lies to correct erroneous proceedings in a court of record; 3 Bla. Com. 407; 18 Pick. 417; but will not lie unless the court be one, technically, of record; 11 Mass. 510. See WRIT OF ERROR.

COURT OF REGARD. In English Law. One of the forest courts, in England, held every third year, for the lawing or expeditation (*q. v.*) of dogs, to prevent them from running after deer. It is now obsolete. 3 Steph. Com. 440; 3 Bla. Com. 71, 72; Inderwick, King's Peace 151.

COURTS OF REQUESTS (called otherwise *courts of conscience*). **In English Law.** Courts of special jurisdiction, constituted by act of parliament in the city of London and other towns, for the recovery of small debts.

They were courts *not of record*, and proceeded in a summary way to examine upon oath the parties and other witnesses, without the aid of a jury, and made such order as is consonant to equity and good conscience.

They had jurisdiction of causes of debt generally to the amount of forty shillings, but in many instances to the amount of five pounds sterling.

The courts of requests in London consisted of two aldermen and four common councilmen, and was formerly a court of considerable importance, but was abolished, as well as all other courts of request, by the Small Debts Act, 9 & 10 Vict. c. 95, and the order in council of May 9, 1847, and their jurisdiction transferred to the county courts.

The court of requests before the king in person was virtually abolished by 16 Car. I. c. 10. See 3 Steph. Com. 449, and note (j); Bacon, Abr. *Courts in London;* COUNTY COURTS.

COURT ROLLS. The rolls of a manor, containing all acts relating thereto. While belonging to the lord of the manor, they are not in the nature of public books for the benefit of the tenant. Scriven on Copyholds. See COPYHOLD.

COURT OF SESSION. In Scotch Law. The supreme court of civil jurisdiction in Scotland.

The full title of the court is *council and session.* It was first established in 1425. In 1469 its jurisdiction was transferred to the king's council, which in 1503 was ordered to sit in Edinburgh. In 1532 the jurisdiction of both courts and the joint title were transferred to the present court. The regular number of judges was fifteen; but an additional number of justices might be appointed by the crown to an unlimited extent. This privilege was renounced by 10 Geo. I. c. 19.

It consists of thirteen judges, formerly of fifteen, and is divided into an inner and an outer house.

The inner house is composed of two branches or chambers, of co-ordinate jurisdiction, each consisting of four judges, and called respectively the first division and the second division. The first division is presided over by the lord president or lord justice general, the second by the lord justice clerk. The outer house is composed of five separate courts, each presided over by a single judge, called a lord ordinary.

All causes commence before a lord ordinary, in general; and the party may select the one before whom he will bring his action, subject to a removal by the lord president in case of too great an accumulation before any one or more lords ordinary. See Bell, Dict.; Erskine, Prin. L. Scotl. (18th ed.); Paterson, Comp. § 1055, n. *et seq.*

COURT OF SESSIONS. In American Law. A court of criminal jurisdiction existing in some of the states of the United States.

COURT OF SHERIFF'S TOURN. See SHERIFF'S TOURN.

COURT OF STANNERIES. See STANNARY COURTS.

COURT OF STAR-CHAMBER. In English Law. A court which was formerly held by divers lords spiritual and temporal, who were members of the privy council, together with two judges of the courts of common law.

It was of very ancient origin, was new-modelled by the 3 Hen. VII. c. 1 and 21 Hen. VIII. c. 20, and was finally abolished, after having become very odious to the people, by the 16 Car. I. c. 10. The name *star-chamber* is of uncertain origin. It has been thought to be from the Saxon *steoran*, to govern, alluding to the jurisdiction of the court over the crime of cosenage; and has been thought to have been given because the hall in which the court was held was full of windows, Lambard, Eiren. 148; or because the roof was originally studded with gilded stars, Coke, 4th Inst. 66; or, according to Blackstone, because the Jewish covenants (called starrs or stars, and which, by a statute of Richard I., were to be enrolled in three places, one of which was near the exchequer) were originally kept there, 4 Bla. Com. 266, n. The derivation of Blackstone receives confirmation from the fact that this location (near the exchequer) is assigned to the *star-chamber* the first time it is mentioned. The word *star* acquired at some time the recognized signification of inventory or schedule. Stat. Acad. Cont. 32; 4 Sharsw. Bla. Com. 266, n.

The legal jurisdiction of this court extended originally to riots, perjuries, misbehavior of sheriffs, and other notorious misdemeanors. It acted without the assistance of a jury. See Hudson, *Court of Star Chamber* (printed at the beginning of the second volume of the *Collectanea Juridica*); 4 Bla. Com. 266, and notes; 4 Steph. Com. 308–310; 12 Amer. Law Rev. 21.

COURT OF THE STEWARD AND MARSHAL. See COURT OF MARSHALSEA.

COURT OF SWANIMOTE or SWEINMOTE (spelled, also, *Swainmote, Swain-gemote;* Saxon, *swang,* an attend-

ant, a freeholder, and *mote* or *gemote*, a meeting).

In English Law. One of the forest courts, now obsolete, held before the verderers, as judges, by the steward, thrice in every year,—the sweins or freeholders within the forest composing the jury.

This court had jurisdiction to inquire into grievances and oppressions committed by the officers of the forest, and also to receive and try presentments certified from the court of attachments, certifying the cause, in turn, under the seals of the jury, in case of conviction, to the court of justice seat for the rendition of judgment. Cowel; 3 Bla. Com. 71, 72; 3 Steph. Com. 317, n. See Ind. King's Peace 150; FOREST LAWS.

COURTS OF THE TWO UNIVERSITIES. In English Law. See CHANCELLOR'S COURTS OF THE TWO UNIVERSITIES.

COURTS OF THE UNITED STATES. See UNITED STATES COURTS.

COURT OF WARDS AND LIVERIES. In English Law. A court of record in England, which had the supervision and regulation of inquiries concerning the profits which arose to the crown from the fruits of tenure, and to grant to heirs the delivery of their lands from the possession of their guardians.

The Court of the King's Wards was instituted by stat. 32 Hen. VIII. c. 46, to take the place of the ancient *inquisitio post mortem*, and the jurisdiction of the restoration of lands to heirs on their becoming of age (livery) was added by statute 33 Hen. VIII. c. 22, when it became the Court of Wards and Liveries. It was abolished by statute 12 Car. II. c. 24.

The jurisdiction extended to the superintendence of lunatics and idiots in the king's custody, granting licenses to the king's widows to marry, and imposing fines for marrying without license; 4 Reeve, Hist. Eng. Law 259; Crabb, Hist. Eng. Law 468; 1 Steph. Com. 183, 192; 4 *id.* 40; 2 Bla. Com. 68, 77; 3 *id.* 258.

COURTESY. See CURTESY.

COUSIN. The son or daughter of the brother or sister of one's father or mother.

The issue, respectively, of two brothers or two sisters, or of a brother and a sister.

Those who descend from the brother or sister of the father of the person spoken of are called paternal cousins; maternal cousins are those who are descended from the brothers or sisters of the mother. See 2 Brown, Ch. 125; 1 Sim. & S. 301; 3 Russ. 140; 9 Sim. 386, 457. The word is still applied in Devonshire to a nephew. 1 Ves. Jr. 73.

COUSINAGE. See COSINAGE.

COUSTUM (Fr.). Custom; duty; toll. 1 Bla. Com. 314.

COUSTUMIER (Fr.). A collection of customs and usages in the old Norman law. See GRAND COUTUMIER.

COUTHUTLAUGH. He that willingly receives an outlaw and cherishes or conceals him. In ancient times he was subject to the same punishment as the outlaw. Blount.

COVENABLE (L. Fr.). Convenient; suitable. Anciently written *convenable*.

COVENANT (Lat. *convenire*, to come together; *conventio*, a coming together. It is equivalent to the *factum conventum* of the civil law).

In Contracts. An agreement between two or more persons, entered into by deed, whereby one of the parties promises the performance or non-performance of certain acts, or that a given state of things does or shall, or does not or shall not, exist.

A contract under seal; a deed.

Affirmative covenants are those in which the covenantor declares that something has been already done, or shall be done in the future.

Affirmative covenants do not operate to deprive covenantees of rights enjoyed independently of the covenants; Dyer 19 *b*; 1 Leon. 251.

Covenants against incumbrances. See COVENANT AGAINST INCUMBRANCES.

Alternative covenants are disjunctive covenants.

Auxiliary covenants are those which do not relate directly to the principal matter of contract between the parties, but to something connected with it. Those the scope of whose operations is in *aid* or *support* of the principal covenant. If the principal covenant is void, the auxiliary is discharged; Anstr. 256; Prec. Chanc. 475.

Collateral covenants are those which are entered into in connection with the grant of something, but which do not relate immediately to the thing granted: as, to pay a sum of money in gross, that the lessor shall distrain for rent on some other land than that which is demised, to build a house on the land of some third person, or the like. Platt, Cov. 69; Shepp. Touchst. 161; 4 Burr. 2439; 3 Term 393; 2 J. B. Moore 164; 5 B. & Ald. 7; 2 Wils. 27; 1 Ves. 56.

Concurrent covenants are those which are to be performed at the same time. When one party is ready and offers to perform his part, and the other refuses or neglects to perform his, he who is ready and offers has fulfilled his engagement, and may maintain an action for the default of the other, though it is not certain that either is obliged to do the first act; Platt, Cov. 71; 2 Selw. N. P. 443; Dougl. 698; 18 E. L. & Eq. 81; 4 Wash. C. C. 714; 16 Mo. 450.

Declaratory covenants are those which serve to limit or direct uses. 1 Sid. 27; 1 Hob. 224.

Dependent covenants are those in which the obligation to perform one is made to depend upon the performance of the other. Covenants may be so connected that the right to insist upon the performance of one of them depends upon a prior performance on the part of the party seeking enforcement. Platt, Cov. 71; 2 Selw. N. P. 443; Steph. N. P. 1071; 1 C. B. N. S. 646; 6 Cow. 296; 2 Johns. 209; 2 W. & S. 227; 8 S. & R. 268; 4 Conn. 3; 24 *id.* 624; 11 Vt. 549; 17

Me. 232 ; 3 Ark. 581 ; 1 Blackf. 175 ; 6 Ala. 60 ; 3 Ala. N. S. 330. To ascertain whether covenants are dependent or not, the intention of the parties is to be sought for and regarded, rather than the order or time in which the acts are to be done, or the structure of the instrument, or the arrangement of the covenant ; 2 Pars. Contr. 645 ; 1 Wms. Saund. 320, n. ; 7 Term 130 ; 5 B. & P. 223 ; 36 E. L. & Eq. 358 ; 4 Wash. C. C. 714 ; 4 Rawle 26 ; 2 W. & S. 227 ; 2 Johns. 145 ; 5 N. Y. 247 ; 1 Root 170 ; 4 Rand. 352. See note to Cutter *v.* Powell, Smith Lead. Cas.

Disjunctive covenants. Those which are for the performance of one or more of several things at the election of the covenantor or covenantee, as the case may be. Platt, Cov. 21 ; 1 Duer N. Y. 209.

Executory covenants are those whose performance is to be future. Shepp. Touchst. 161.

Express covenants are those which are created by the express words of the parties to the deed declaratory of their intention ; Platt, Cov. 25. The formal word covenant is not indispensably requisite for the creation of an express covenant ; 2 Mod. 268 ; 5 Q. B. 683 ; 8 J. B. Moore 546 ; 12 East 182, n. ; 1 Bibb 379 ; 3 Johns. 44 ; 4 Conn. 508 ; 1 Harr. Del. 233. The words "I oblige," "agree," 1 Ves. 516 ; 2 Mod. 266, "I bind myself," Hardr. 178 ; 3 Leon. 119, have been held to be words of covenant, as are the words of a bond ; 1 Ch. Cas. 194. Any words showing the intent of the parties to do or not to do a certain thing, raise an express covenant ; 13 N. H. 513. But words importing merely an order or direction that other persons should pay a sum of money, are not a covenant ; 6 J. B. Moore 202, n. (*a*).

Covenants for further assurance. See COVENANT FOR FURTHER ASSURANCE.

Covenants for quiet enjoyment. See COVENANT FOR QUIET ENJOYMENT.

Covenants for title are those covenants in a deed conveying land which are inserted for the purpose of securing to the grantee and covenantee the benefit of the title which the grantor and covenantor professes to convey.

Those in common use in England are four in number—of *right to convey*, for *quiet enjoyment*, against *incumbrances*, and for *further assurance*—and are held to run with the land ; the covenant for *seisin* has not been generally in use in modern conveyances in England ; Rawle, Cov. § 24. In the United States there is, in addition, a covenant of *warranty*, which is more commonly used than any of the others. In the United States what are "often called 'full covenants' are the covenants for seisin, for right to convey, against incumbrances, for quiet enjoyment, sometimes for further assurance, and, almost always, of warranty—this last often taking the place of the covenant for quiet enjoyment ;" Rawle, Cov. § 27. The covenants of seisin, for right to convey, and against incumbrances, are generally held to be *in præsenti ;* if broken at all, they are broken as soon as made ; Rawle, Cov. 318 ; 4 Kent 471 ; 6 Cush. 128 ; 3 Washb. R. P. 478 ; see Mitch. R. P. 448 ; 36 Me. 170 ; and the various titles below for a fuller statement of the law relative to the different covenants for title.

Implied covenants or *covenants in law* are those which arise by intendment and construction of law from the use of certain words having a known legal operation in the creation of an estate, so that after they have had their primary operation in the creation of the estate, the law gives them a secondary force, by implying an agreement on the part of the grantor to protect and preserve the estate so by these words already created ; 1 C. B. 429 ; Bacon, Abr. *Covenant*, B ; Rawle, Cov. § 270, n. In Co. Litt. 139 *b*, it is said that "of covenants there be two kinds : a covenant personal and a covenant real ; a covenant in deed and a covenant in law." In a conveyance of lands in fee, the words "grant, bargain, and sell," imply certain covenants ; see 4 Kent 473 ; and the word "give" implies a covenant of warranty during the life of the feoffor ; 10 Cush. 134 ; 2 Caines 193 ; 9 N. H. 222 ; 7 Ohio 394 ; (but this covenant and that implied from the word "grant" are abolished in England by 8 & 9 Vict. c. 106, § 14) ; and in a lease the use of the words "grant and demise ;" Co. Litt. 384 ; 4 Wend. 502 ; "grant ;" Freem. 367 ; Cro. Eliz. 214 ; 1 P. & D. 360 ; "demise ;" 4 Co. 80 ; 10 Mod. 162 ; 9 N. H. 222 ; 15 N. Y. 327 ; "demisement ;" 1 Show. 79 ; 1 Salk. 137 ; raise an implied covenant on the part of the lessor, as do "yielding and paying ;" 9 Vt. 151 ; on the part of the lessee. In regard to the covenants arising to each grantee by implication on sale of an estate with conditions, in parcels to several grantees, see 23 Barb. 153.

Covenants in deed. Express covenants.

Covenants in gross. Such as do not run with the land.

Covenants in law. Implied covenants.

Illegal covenants are those which are expressly or impliedly forbidden by law. Covenants are absolutely void when entered into in violation of the express provisions of statutes ; 5 H. & J. 193 ; 5 N. H. 96 ; 4 S. & R. 159 ; 4 Halst. 252 ; or if they are of an immoral nature ; 3 Burr. 1568 ; 1 B. & P. 340 ; 3 T. B. Monr. 35 ; against public policy ; 4 Mass. 370 ; 7 Me. 113 ; 5 Halst. 87 ; 3 Day 145 ; 5 W. & S. 315 ; 6 Miss. 769 ; 2 McLean 464 ; 4 Wash. C. C. 297 ; 11 Wheat. 258 ; in general restraint of trade ; 21 Wend. 166 ; 7 Cow. 307 ; 6 Pick. 206 ; or fraudulent as between the parties ; 4 S. & R. 483 ; 5 Mass. 16 ; or as to third persons ; 3 Day 450 ; 14 S. & R. 214 ; 3 Caines 213 ; 2 Johns. 286 ; 15 Pick. 49.

Independent covenants are those the necessity of whose performance is determined entirely by the requirements of the covenant itself, without regard to other covenants between the parties relative to the same subject-matter or transactions or series of transactions.

Covenants are generally construed to be independent ; Platt, Cov. 71 ; 2 Johns. 145 ;

10 *id.* 204; 21 Pick. 438; 3 Bingh. N. S. 355; unless the undertaking on one side is *in terms* a condition to the stipulation of the other, and then only consistently with the intention of the parties; 3 Maule & S. 308; 10 East 295, 530; or unless dependency results from the nature of the acts to be done, and the order in which they must necessarily precede and follow each other in the progress of performance; Willes 496; or unless the non-performance on one side goes to the entire substance of the contract, and to the whole consideration; 1 Seld. 247. If once independent, they remain so; 19 Barb. 416.

Inherent covenants are those which relate directly to the land itself, or matter granted. Shepp. Touchst. 161. Distinguished from collateral covenants.

If real, they run with the land; Platt, Cov. 66.

Intransitive covenants are those the duty of performing which is limited to the covenantee himself, and does not pass over to his representative.

Joint covenants are those by which several parties agree to do or perform a thing together, or in which several persons have a joint interest as covenantees. 26 Barb. 63; 16 How. 580; 1 Gray 376; 10 B. Monr. 291. They may be in the negative; 35 Me. 260.

Negative covenants are those in which the party obliges himself *not* to do or perform some act. Courts are unwilling to construe a negative covenant a condition precedent, inasmuch as it cannot be said to be performed till a breach becomes impossible; 2 Wms. Saund. 156; 1 Mod. 64; 2 Kebl. 674.

Obligatory covenants are those which are binding on the party himself. 1 Sid. 27; 1 Kebl. 337. They are distinguished from declaratory covenants.

Personal Covenants. See PERSONAL COVENANT.

Principal covenants. Those which relate directly to the principal matter of the contract entered into between the parties. They are distinguished from auxiliary.

Real covenants. See REAL COVENANT.

Covenants of rights to convey. See COVENANT OF RIGHT TO CONVEY.

Covenants of seisin. See COVENANT OF SEISIN.

Covenants to stand seized, etc. See COVENANT TO STAND SEIZED TO USES.

Transitive covenants are those personal covenants the duty of performing which passes over to the representatives of the covenantor.

Covenants of warranty. See COVENANT OF WARRANTY.

Covenants are subject to the same rules as other contracts in regard to the qualifications of *parties*, the *assent* required, and the nature of the *purpose* for which the contract is entered into. See PARTIES; CONTRACTS.

No peculiar words are needed to raise an express covenant; 12 Ired. 145; 1 C. & M. 657; 5 Q. B. 683; 3 Ex. 237, per Parke, B.; and by statute in Alabama, Arkansas, Delaware, Illinois, Indiana, Mississippi, Missouri, Montana, Nevada, New Mexico, Pennsylvania, and Texas, the words *grant*, *bargain*, and *sell*, in conveyances in fee, unless specially restricted, amount to covenants that the grantor was seized in fee, freed from incumbrances done or suffered by him, and for quiet enjoyment against his acts; 4 Kent 473; 2 Binn. 95; 23 Mo. 151, 174; 17 Ala. N. S. 198; 1 Sm. & M. 611; 19 Ill. 235; 15 Ark. 289; but do not imply any general warranty of title in Alabama, Arkansas, Pennsylvania, and North Carolina; 4 Kent 474; 22 Ark. 72; 1 Murph. 343; 2 Ala. N. S. 535. In Iowa, by the statute of 1843, the same rule was authorized, and upon this it was held that all covenants were express; 2 Green 525; but no such provisions are to be found in the revised code of 1884. In Ohio the statute of 1795 was almost exactly copied from the Pennsylvania statute, but was repealed in 1824 and reenacted in substance, and entirely repealed in 1831, and the latest Revised Statutes (1884), like those of Iowa, are silent on the subject. The Wisconsin statute, providing that no covenant shall be implied, makes an exception in the case of the short form of conveyance provided by statute, and declares that such a deed shall have the effect of a conveyance in fee simple to the grantee, his heirs and assigns, etc.; Rev. Stat. 1878. In Tennessee there is no statutory provision as to implied covenants, but a statutory short form of conveyance was held to authorize the broadest construction of the granting words unless their effect was specially limited by the instrument itself; 5 Lea 100. In California and North and South Dakota the same rule substantially is prescribed by statute in the first-named state, the implied covenants do not run with the land; 37 Cal. 183. In Georgia a covenant of general warranty is held to include covenants of a right to convey, quiet enjoyment, and freedom from incumbrances; 64 Ga. 632. See generally on this subject, Rawle, Cov. § 286.

Describing lands in a deed as bounded on a street of a certain description raises a covenant that the street shall be of that description; 7 Gray 563; and that the purchaser shall have the use thereof; 5 Md. 314; 23 N. H. 261; which binds subsequent purchasers from the grantor; 7 Gray 83.

In New York it is provided by statute that no covenants can be implied in any conveyance of real estate; 4 Kent 469; but this provision does not extend to leases for years; 11 Paige 566; 42 N. Y. 174.

The New York statute has been enacted in Michigan, Minnesota, Oregon, Wisconsin, and Wyoming, and no covenants for title seem to be implied in states other than those above named. In some cases where the covenants relate to lands, the rights and liabilities of the covenantor, or covenantee, or both, pass to the assignee of the thing to which the covenant relates. In such cases the covenant is said to run with the land. If rights pass the *benefit* is said to run; if liabilities, the *burden*. Only real covenants run with the land, and these only when the covenant has entered into the consideration for which the land, or

some interest therein to which the covenant is annexed, passed between the covenantor and the covenantee; 2 Sugd. Vend. 468, 484; 2 M. & K. 535; 19 Pick. 449, 464; 24 Barb. 366; 45 Me. 474; See 1 Washb. R. P. 526; and they die with the estate to which they are annexed; 3 Jones, N. C. 12; 13 Ired. 193; but an estoppel to deny passage of title is said to be sufficient; 3 Metc. Mass. 124; and the passage of mere possession, or defeasible estate without possession, enables the covenant to run; 23 Mo. 151, 174.

It is said by some authorities that the benefit of a covenant to do acts upon land of the covenantee, made with the 'covenantee and his assigns," will run with the land though no estate passed between the covenantor and covenantee; Rawle, Cov. 335; Year B. 42 Edw. III. 13; 3 Den. 301; 8 Gratt. 403; but the weight of authority is otherwise; 2 Sugd. Vend. 468; Platt, Cov. 461. Covenants concerning title generally run with the land; 3 N. J. 260; except those that are broken before the land passed; 4 Kent 473; 30 Vt. 692. See COVENANT OF SEISIN, etc. "*Until breach*, covenants for title, without distinction between them, run with the land to heirs and assigns. But while this is well settled, a strong current of American authority has set in favor of the position that the covenants for seisin, for right to convey, and, perhaps, against incumbrances, are what are called covenants *in præsenti*,—if broken at all, their breach occurs at the moment of their creation. . . . . These covenants, it is held, are then turned into a mere right of action, which is not assignable at law and can neither pass to an heir, a devisee, or a subsequent purchaser. A distinction is considered, by this class of cases, to exist, in this respect, between the covenants first named, and those for quiet enjoyment, of warranty, and for further assurance, which are held to be prospective in their character;" Rawle, Cov. §§ 204, 205. See also 2 Johns. 1.

Covenants in leases, by virtue of the statute 32 Hen. VIII. c. 34, which has been reenacted in most of the states, are assignable as respects assignees of the reversion and of the lease. The lessee continues liable on express covenants after an assignment by him, but not on implied ones; 4 Term 98; but he is liable to the assignee of the lessor on implied covenants, at common law; Platt, Cov. 532; 2 Sugd. Vend. 466; Burton, R. P. § 855. See 1 Washb. R. P. 526.

In case of the assignment of lands in parcels, the assignees may recover *pro rata*, and the original covenantee may recover according to his share of the original estate remaining; 2 Sugd. Vend. 503; Rawle, Cov. § 215; 36 Me. 170; 27 Pa. 288; 3 Metc. Mass. 87; 8 Gratt. 407; 9 B. Monr. 58. But covenants are not, in general, apportionable; 27 Pa. 288.

See Spencer's case, 1 Sm. Lead. Cas. 206.

In Practice. A form of action which lies to recover damages for breach of a contract under seal. It is one of the *brevia formata* of the register, and is sometimes a concurrent remedy with *debt*, though never with *assumpsit*, and is the only proper remedy where the damages are unliquidated in nature and the contract is under seal; Fitzh. N. B. 340; Chit. Pl. 112, 113; 2 Steph. N. P. 1058.

The action lies, generally, where the covenantor does some act contrary to his agreement, or fails to do or perform that which he has undertaken; 4 Dane, Abr. 115; or does that which disables him from performance; Cro. Eliz. 449; 15 Q. B. 88; 23 Pick. 455.

To take advantage of an oral agreement modifying the original covenant in an essential point, the covenant must be abandoned and assumpsit brought; 27 Pa. 429; 24 Vt. 347.

The venue is local when the action is founded on privity of estate; 2 Steph. N. P. 1148; 1 Wms. Saund. 241 *b*, n.; and transitory when it is founded upon privity of contract. As between original parties to the covenant, the action is transitory; and, by the statute 32 Hen. VIII. c. 34, an action of covenant by an assignee of the reversion against a lessor, or by a lessee against the assignee of the reversion, is also transitory; 1 Chit. Pl. 274.

The declaration must, at common law, aver a contract under seal; 2 Ld. Raym. 1536; and either make profert thereof or excuse the omission; 3 Term 151; at least of such part as is broken; 4 Dall. 436; 4 Rich. 196; and a breach or breaches; 15 Ala. 201; 5 Ark. 263; 4 Dana 381; 6 Miss. 229; which may be by negativing the words of the covenant in actions upon covenants of seisin and right to convey; Rawle, Cov. § 176; or according to the legal effect; but must set forth the incumbrance in case of a covenant against incumbrances; *id.* § 86; and must allege an eviction in case of warranty; *id.* § 155. The disturbance must be averred to have been under lawful title; *id.* No consideration need be averred or shown, as it is said to be implied from the seal; but performance of an act which constitutes a condition precedent to the defendant's covenant, if there be any such, must be averred; 1 Chit. Pl. 116; 2 Greenl. Ev. § 235; 26 Ala. N. S. 748. The damages laid must be large enough to cover the real amount sought to be recovered; 3 S. & R. 364, 567.

There is no plea of general issue in this action. Under *non est factum*, the defendant may show any facts contradicting the making of the deed; 1 Seld. 422; 1 Mich. 438; as, personal incapacity; 2 Campb. 272; that the deed was fraudulent; Lofft 457; was not delivered; 4 Esp. 255; or was not executed by all the parties; 6 Maule & S. 341.

Non infregit conventionem and *nil debet* have both been held insufficient; Com. Dig. *Pleader*, 2 V, 4. As to the effect of covenant performed, see COVENANTS PERFORMED. In respect to the damages to be recovered, see DAMAGES.

The judgment is that the plaintiff recover a named sum for the damages which he has

sustained by reason of the breach or breaches of covenant, together with costs.

COVENANT TO CONVEY. A covenant by which the covenantor undertakes to convey to the covenantee the estate described in the covenant, under certain circumstances.

This form of conditional alienation of lands is in frequent use in several of the United States; 14 Pa. 308; 19 Barb. 639; 4 Md. 498; 11 Ill. 194; 19 Ohio 347. Substantially the same effect is secured as by a conveyance and a mortgage back for the purchase-money, with this important difference, however, that the title of course remains in the covenantor until he actually executes the conveyance.

The remedy for breach may be by action on the covenant; 29 Pa. 264; but the better remedy is said to be in equity for specific performance; 1 Grant 230.

It is satisfied only by a perfect conveyance of the kind bargained for; 19 Barb. 639; otherwise where an imperfect conveyance has been accepted; 4 Md. 498.

COVENANT FOR FURTHER ASSURANCE. One by which the covenantor undertakes to do such reasonable acts in addition to those already performed as may be necessary for the completion of the transfer made, or intended to be made, at the requirement of the covenantee. It relates both to the title of the vendor and to the instrument of conveyance to the vendee, and operates as well to secure the performance of all acts for supplying any defect in the former, as to remove all objections to the sufficiency and security of the latter. Platt Cov. 341.

The covenant is of frequent occurrence in English conveyances; but its use in the United States seems to be limited to some of the middle states; 2 Washb. R. P. 648; 10 Me. 91; 4 Mass. 627; 10 Cush. 134. It is customary in railroad and other corporation mortgages.

The covenantor, in execution of his covenant, is not required to do unnecessary acts; Yelv. 44; 9 Price 43. He must in equity grant a subsequently acquired title; 2 Ch. Cas. 212; 1 Eq. Cas. Abr. 26; 2 P. Wms. 630; must levy a fine; 16 Ves. 366; 5 Taunt. 427; 4 Maule & S. 188; must remove a judgment or other incumbrance; 5 Taunt. 427; but a mortgagor with such covenant need not release his equity; 1 Ld. Raym. 36. It may be enforced by a bill in equity for specific performance, or an action at law to recover damages for the breach; 2 Co. 3 *a*; 6 Jenk. Cas. 24; Platt, Cov. 353; Rawle, Cov. § 362; 2 Washb. R. P. 666.

COVENANT AGAINST INCUMBRANCES. One which has for its object security against those rights to, or interests in, the land granted which may subsist in third persons to the diminution of the value of the estate, though consistently with the passing of the fee by the deed of conveyance. For what constitutes an incumbrance, see INCUMBRANCE.

The mere existence of an incumbrance constitutes a breach of this covenant; 2 Washb. R. P. 658; 20 Ala. 137; without regard to the knowledge of the grantee; 2 Greenl. Ev. § 242; 27 Vt. 739; 8 Ind. 171; 10 *id.* 424.

Such covenants, being *in præsenti*, do not run with the land in Massachusetts and most of the other states; but the rule is otherwise, either by statute or decision in *Maine*, 1883, p. 697, tit. 9, § 18; 72 Me. 369; *Colorado*, R. S. 1883, 172; *Georgia*, Code 1882, 672; *New York*, 13 Johns. 105; 29 Barb. 339; *Ohio*, 10 Ohio 327; *Minnesota*, 25 Minn. 496; *Missouri*, 44 Mo. 512; 2 McCrary 356; *Indiana*, 5 Blackf. 232; *Wisconsin*, 22 Wis. 495 (reversing the rule adopted in 5 Wis. 17); *Iowa*, 36 Ia. 232; *South Carolina*, 1 N. & McC. 104; *Vermont*, 52 Vt. 639; and possibly in Michigan. See Rawle, Cov. § 212. If the covenant is so linked with another covenant as to have a prospective operation it runs with the land; *id.* This covenant is usually coupled with that of seisin in considering this question, but it was not treated as running with the land in this country so readily as the latter; Rawle, Cov. § 212.

Yet the incumbrance may be of such a character that its enforcement may constitute a breach of the covenant of warranty; as in case of a mortgage; 4 Mass. 349; 17 *id.* 586; 8 Pick. 547; 22 *id.* 494.

The measure of damages is the amount of injury actually sustained; 7 Johns. 358; 5 Me. 94; 12 Mass. 304; 3 Cush. 201; 20 N. H. 369; 25 *id.* 229; Rawle, Cov. § 188.

The covenantee may extinguish the incumbrance and recover therefor, at his election, in the absence of agreement; 4 Ind. 533; 19 Mo. 480; 25 N. H. 229. See COVENANT; REAL COVENANT.

COVENANT OF NON-CLAIM. A covenant sometimes employed, particularly in the New England States, and in deeds of extinguishment of ground rents in Pennsylvania, that neither the vendor, nor his heirs, nor any other person, etc., shall claim any title in the premises conveyed. Rawle, Cov. § 22. It is substantially the same as the covenant of warranty, *q. v.*; *ibid.* § 231.

COVENANT NOT TO SUE. One entered into by a party who has a cause of action at the time of making it, by which he agrees not to sue the party liable to such action.

A *perpetual* covenant not to sue is one by which the covenantor agrees not to sue the covenantee at any time. Such a covenant operates as a release to the covenantee, and may be pleaded as such. Cro. Eliz. 623; 12 Mod. 415; 7 Mass. 153; 17 *id.* 623; 3 Ind. 473; 34 L. J. Q. B. 25. And see 11 S. & R. 149.

A covenant of this kind with one of several, jointly and severally bound, will not protect the others so bound; 12 Mod. 551; 6 Munf. 6; 1 Conn. 139; 4 Me. 421; 2 Dana 107; 17 Mass. 623. It is equivalent to a release with a reserve of remedies, and hence is properly used in composition deeds in preference to a release, which discharges all sureties and co-debtors; 3 B. & C. 361.

A covenant by one of several partners not

to sue cannot be set up as a release in an action by all; 3 P. & D. 149.

A *limited* covenant not to sue, by which the covenantor agrees not to sue for a limited time, does not operate a release; and a breach must be taken advantage of by action; Carth. 63; 1 Show. 46; 2 Salk. 573; 11 Q. B. 852; 6 Wend. 471; 5 Cal. 501. See 29 Ala. N. S. 322, as to requisite consideration.

See Leake, Contr. 928.

COVENANT FOR QUIET ENJOYMENT. An assurance against the consequences of a defective title, and of any disturbances thereupon. Platt, Cov. 312; 11 East 641; Rawle, Cov. § 91. By it, when general in its terms, the covenantor stipulates at all events; 1 Mod. 101; to indemnify the covenantee against all acts committed by virtue of a paramount title; Platt, Cov. 313; 4 Co. 80 *b*; Cro. Car. 5; 3 Term 584; 6 *id.* 66; 3 Duer, N. Y. 464; 2 Jones, N. C. 203; Busb. 384; 3 N. J. 260; not including the acts of a mob; 19 Miss. 87; 2 Strobh. 366; nor a mere trespass by the lessor; 10 N. Y. 151.

But this rule may be varied by the terms of the covenant: as where it is against acts of a particular person; Cro. Eliz. 212; 5 Maule & S. 374; 1 B. & C. 29; or those "claiming or pretending to claim;" 10 Mod. 383; 1 Ventr. 175; or molestation by any person. See 21 Miss. 87.

It has practically superseded the ancient doctrine of warranty as a guaranty of title, in English conveyances; 2 Washb. R. P. 661; but the latter is more common in conveyances in America; Rawle, Cov. § 91.

It occurs most frequently in leases; 1 Washb. R. P. 325; Rawle, Cov. § 91; and is usually the only covenant used in such cases; it is there held to be raised by the words grant, demise, lease, yielding and paying, give, etc.; 1 P. & D. 360; 9 N. H. 222; 15 N. Y. 327; 6 Bingh. 656; 4 Kent 474, n.; and exists impliedly in a parol lease; 20 E. L. & Eq. 374; 3 N. J. 260; see 1 Duer, N. Y. 176. It is usual in ground-rent deeds in Pennsylvania; Rawle, Cov. § 91.

COVENANT OF RIGHT TO CONVEY. An assurance by the covenantor that the grantor has sufficient capacity and title to convey the estate which he by his deed undertakes to convey.

In modern English conveyancing, this covenant has taken the place of the covenant of seisin; 2 Washb. R. P. 648. It is said to be the same as a covenant of seisin; 10 Me. 91; 4 Mass. 627; but is not necessarily so, as it includes the capacity of the grantor; T. Jones 195; 2 Bulstr. 12; Cro. Jac. 358.

The breach takes place on execution of the deed, if at all; Freem. 41; 5 Halst. 20; and the covenantee need not wait for a disturbance to bring suit; 5 Taunt. 426; but a second recovery of damages cannot be had for the same breach; Platt, Cov. 310; 1 Maule & S. 365; 4 *id.* 53.

COVENANT OF SEISIN. An assurance to the grantee that the grantor has the very estate, both in quantity and quality, which he professes to convey. Platt, Cov. 306. It has given place in English conveyancing to the covenant of right to convey, but is in use in several states of the United States. 2 Washb. R. P. 648.

In England; 1 Maule & S. 355; 4 *id.* 53; and in several states of the United States; *e. g.* Colorado, Georgia, New York, Ohio, Minnesota and other states (see Rawle, Cov. § 211); by decisions; 5 Blackf. 232: 17 Ohio 52; 22 Wis. 495; 32 Ia. 317; 40 Mo. 512; or by statute; 2 Washb. R. P. 650; this covenant runs with the land, and may be sued on for breach by an assignee; in other states it is held that a mere covenant of *lawful seisin* does not run with the land, but is broken, if at all, at the moment of executing the deed; 4 Mass. 408, 439, 627; 10 Cush. 134; 2 Barb. 303; 2 Me. 269; 2 Dev. 30; 8 Gratt. 396; 5 Sneed 119; 7 Ind. 673; 27 Ill. 482; 37 Cal. 188; 23 Ark. 590. See discussion of this subject with authorities cited in COVENANT AGAINST INCUMBRANCES.

A covenant for *indefeasible seisin* is everywhere held to run with the land; 2 Vt. 328; 2 Dev. 30; 4 Dall. 439; 5 Sneed 123; 14 Johns. 248; 14 Pick. 128; 10 Mo. 467; and to apply to all titles adverse to the grantor's; 2 Washb. R. P. 656.

A covenant of *seisin* or *lawful seisin*, in England and most of the states, is satisfied only by an indefeasible seisin; Rawle, Cov. § 41; 7 C. B. 310; 22 Vt. 106; 15 N. H. 176; 6 Conn. 374; 23 *id.* 349; while in other states possession under a claim of right is sufficient; 3 Vt. 403; 10 Cush. 134; 4 Mass. 408; 2 *id.* 439; 51 Me. 567; 69 *id.* 510; 27 Ill. 229; 4 Neb. 133; 26 Mo. 92; 3 Ohio 211, 525.

A covenant of seisin, of whatever form, is broken at the time of the execution of the deed if the grantor has no possession either by himself or another; and no rights can pass to the assignee of the grantee; 2 Johns. 1; 2 Vt. 327; 5 Conn. 497; 14 Pick. 170; 17 Ohio 60; 8 Gratt. 397; 4 Cra. 430; 36 Me. 170; 24 Ala. N. S. 189; 4 Kent 471; 2 Washb. R. P. 656.

The existence of an outstanding life-estate; 22 Vt. 106; a material deficiency in the amount of land; 1 Bay 256; see 24 Miss. 597; non-existence of the land described; 16 Pick. 68; the existence of fences or other fixtures on the premises belonging to other persons, who have a right to remove them; 1 N. Y. 564; 7 Pa. 122; 30 Vt. 752; 19 Ia. 427; or of a paramount right in another to divert a natural spring; 38 Vt. 471; or to prevent the grantee from damming water to a certain height when that right is reserved to him by his deed; 20 Wis. 293; 29 Ind. 96; concurrent seisin of another as tenant in common; 12 Me. 389; 43 *id.* 567; adverse possession of a part by a stranger; 7 Johns. 376; a conveyance by one of two tenants in common of the entire estate (so far as his half is concerned); 38 Vt. 464; constitute a breach of this covenant. But the existence of such easements or incumbrances as do not affect the seisin

of the purchaser does not constitute a breach of the covenant; Rawle, Cov. § 59. For instance, the existence of a highway over a part of the land; 15 Johns. 449; 1 Pa. 336; 1 Conn. 103; 16 Ind. 340; or of a judgment, mortgage, or right of dower; Rawle, Cov. § 59; 2 J. J. Marsh. 430; 10 Ohio 383; 7 Johns. 380; (otherwise if the mortgagee has entered; Rawle, Cov. § 59); the removal of fixtures; 45 N. Y. 792. But see 6 Cush. 124.

In the execution of a power, a covenant that the power is subsisting and not revoked is substituted; Platt, Cov. 309.

COVENANT TO STAND SEISED TO USES. A covenant by means of which under the statute of uses a conveyance of an estate may be effected. Burton, R. P. §§ 136, 145.

Such a covenant cannot furnish the ground for an action of covenant broken, and in this respect resembles the ancient real covenants.

The consideration for such a covenant must be relationship either by blood or marriage; 2 Washb. R. P. 129; Chal. R. P. 383. See 2 Seld. 342.

As a mode of conveyance it has fallen into disuse; though the doctrine is often resorted to by courts in order to give effect to the intention of the parties who have undertaken to convey lands by deeds which are insufficient for the purpose under the rules required in other forms of conveyance; 2 Washb. R. P. 155; 2 Sand. Uses 79, 83; 4 Mass. 136; 18 Pick. 397; 5 Me. 232; 11 Johns. 351; 5 Yerg. 249.

COVENANT OF WARRANTY. An assurance by the grantor of an estate that the grantee shall enjoy the same without interruption by virtue of paramount title. 2 Jones, N. C. 203; 3 Duer, N. Y. 464; 58 Barb. 36; 3 Hill, S. C. 304.

It is not in use in English conveyances, but is in general use in the United States; 2 Washb. R. P. 659; and in several states is the *only* covenant in general use; Rawle, Cov. § 21; 4 Ga. 593; 8 Gratt. 353; 6 Ala. 60.

A special warranty is not a covenant against incumbrances; 83 Va. 157. See 4 Dall. 436.

The form in common use is as follows:—"And I the said [grantor], for myself, my heirs, executors, and administrators, do covenant with the said [grantee], his heirs and assigns, that I will, and my heirs, executors, and administrators shall, *warrant* and *defend* the same to the said [grantee], his heirs and assigns forever, against the lawful claims and demands of all persons [or, of all persons claiming by, through, or under me, but against none other]," [or other special covenant, as the case may be]. When *general*, it applies to lawful adverse claims of all persons whatever; when *special*, it applies only to certain persons or claims to which its operation is limited or restricted; 2 Washb. R. P. 665. See a form in Rawle, Cov. § 21, n.

This limitation may arise from the nature of the subject-matter of the grant; 8 Pick. 547; 19 *id.* 341; 5 Ohio 190; 9 Cow. 271.

Such covenants give the covenantee and grantee the benefit of subsequently acquired titles; 11 Johns. 91; 9 Cow. 271; 6 Watts 60; 9 Cra. 43; 13 N. H. 389; 1 Ohio 190; 3 Pick. 52; 24 *id.* 324; 3 Metc. 121; 13 Me. 281; 20 *id.* 260; to the extent of their terms; 12 Vt. 39; 3 Metc. 121; 9 Cow. 271; 34 Me. 483; but not if an interest actually passes at the time of making the conveyance upon which the covenant may operate; 3 McLean 56; 9 Cow. 271; 12 Pick. 47; 5 Gratt. 157; in case of terms for years, as well as conveyances of greater estates; Wms. R. P. 229; 2 Washb. R. P. 478; 4 Kent 261, n.; Cro. Car. 109; 4 Wend. 502; 1 Johns. Cas. 90; as against the grantor and those claiming under him; 2 Washb. R. P. 479; including purchasers for value; 14 Pick. 224; 5 N. H. 533; 5 Me. 231; 12 Johns. 201; 9 Cra. 53; but see 4 Wend. 619; 18 Ga. 192. And this principle does not operate to prevent the grantee's action for breach of the covenant, if evicted by such title; 1 Gray 195; 25 Vt. 635; 12 Me. 499. See 33 Me. 346. A deed of land is not void as between the parties because of a want of consideration, and such want is no answer to an action upon a breach of covenant of warranty; 154 Mass. 389.

In case of a *release* of right and title, covenants limited to those claiming under the grantor do not prevent the assertion by the grantor of a subsequently acquired title; 26 N. H. 401; 4 Wend. 300; 5 Gray 328; 11 Ohio 475; 14 Me. 351; 43 *id.* 432; 14 Cal. 472.

It is a real covenant, and runs with the estate in respect to which it is made, into the hands of whoever becomes the owner; 2 Washb. R. P. 659; Chal. R. P. 279; 4 Sneed 52; 82 Va. 702; 40 La. Ann. 827; against the covenantor and his personal representatives; 27 Pa. 288; 3 Zabr. 260; see 142 N. Y. 78; to the extent of assets received, and cannot be severed therefrom; 13 Ired. 193.

The covenant of warranty and that of seisin or of right to convey are not equivalent covenants. Defect of title will sustain an action upon the latter, while disturbance of possession is requisite to recover upon the former; 131 U. S. 75. Grantors having made an express contract of warranty, cannot set up knowledge of vice in their title, to exonerate themselves from the obligation of their contract; 138 U. S. 595.

The action for breach should be brought by the owner of the land and, as such, assignee of the covenant at the time it is broken; 4 Johns. 89; 19 Wend. 334; 2 Mass. 455; 7 *id.* 444; 3 Cush. 219; 10 Me. 81; 5 T. B. Monr. 357; 12 N. H. 413; but may be by the original covenantee, if he has satisfied the owner; 5 Cow. 137; 3 Cush. 222; 5 T. B. Monr. 357; 1 Conn. 244; 1 Dev. & B. 94; 10 Ga. 311; 26 Vt. 279.

To constitute a breach there must be an eviction by paramount title; Rawle, Cov. § 131; 6 Barb. 165; 5 Harr. Del. 162; 11 Rich. 80; 13 La. Ann. 390, 499; 5 Cal. 262; 4 Ind. 174; 6 Ohio St. 525; 26 Mo. 92; 17 Ill. 185; 36 Me. 455; 14 Ark. 309; 35 Neb. 521; 26

S. W. Rep. (Tex). 443; 41 Vt. 296; which may be constructive; 12 Me. 499; 17 Ill. 185; 36 *id.* 69; and it is sufficient if the tenant yields to the true owner, or if, the premises being vacant, such owner takes possession; 5 Hill 599; 4 Mass. 349; 8 Ill. 162; 5 Ired. 393; 40 Minn. 94; 98 N. C. 239; 40 La. Ann. 837; 39 Cal. 360; 33 N. J. L. 328. See 4 Halst. 139. But in such case the grantee must prove the existence and assertion of such paramount, outstanding, hostile title; 16 Or. 383; 51 Ill. 377; 47 Ind. 256; 66 Me. 557; 108 Mass. 276; 40 Vt. 43; and assume the burden of proof with as much particularity as if suing in ejectment; Rawle, Cov. § 136; 32 Ia. 76; 51 Tex. 178; unless the adverse right has been established by a judgment or decree in a suit of which the covenantor had been properly notified; Rawle, Cov. § 136; in which case the judgment or decree will be conclusive evidence of the validity of the paramount title; *id.* See *id.* § 123 *et seq.*

Exercise of the right of eminent domain does not render the covenantee liable; 31 Pa. 37; 71 *id.* 83; 25 Cal. 452; 10 Cush. 134; 3 Wheat. 452.

When the covenantee is threatened with eviction, it is usual and proper for him to give notice to the covenantor to appear and defend the suit. If it appears on the record that the covenantor received the notice or if he defends the suit, recovery therein will be conclusive against him in an action by the covenantee; otherwise the question of notice will go to the jury on the facts. If no notice was given, the record of the adverse suit is not even *prima facie* evidence that the adverse title was paramount. Notice of the adverse suit is not indispensable to a recovery against the covenantor; Rawle, Cov. § 125.

As to the measure of damages for an eviction, see MEASURE OF DAMAGES.

COVENANTS PERFORMED. In Pleading. A plea to an action of covenant, in use in the state of Pennsylvania, whereby the defendant, upon proper notice to the plaintiff, may give anything in evidence which he might have pleaded. 4 Dall. 439; 2 Yeates 107; 15 S. & R. 105. And this evidence, it seems, may be given in the circuit court without notice, unless called for; 2 Wash. C. C. 456.

COVENANTEE. One in whose favor a covenant is made. Shepp. Touch. 150.

COVENANTOR. One who becomes bound to perform a covenant.

COVENTRY ACT. The common name for the statute 22 & 23 Car. II. c. 1,—it having been enacted in consequence of an assault on Sir John Coventry in the street, and slitting his nose, in revenge, as was supposed, for some obnoxious words uttered by him in parliament.

By this statute it is enacted that if any person shall, of malice aforethought, and by lying in wait, unlawfully cut or disable the tongue, put out an eye, slit the nose, cut off the nose or lip, or cut off or disable any limb or member, of any other person, with intent to maim or disfigure him, such person, his counsellors, aiders, and abettors, shall be guilty of felony without benefit of clergy. The act was repealed in England by the 9 Geo. IV. c. 31. The provision now in force on this subject is the 24 & 25 Vict. c. 100, § 18; 4 Steph. Com. 80, n.

COVERT BARON. A wife. So called from being under the protection of her husband, baron, or lord. 1 Bla. Com. 442.

COVERTURE. The condition or state of a married woman.

During coverture the civil existence of the wife is, for many purposes, merged in that of her husband; 2 Steph. Com. 263–272. See ABATEMENT; PARTIES; MARRIED WOMEN.

COVIN. A secret contrivance between two or more persons to defraud and prejudice another in his rights. Co. Litt. 357 *b*; Comyns, Dig. *Covin*, A; 1 Viner, Abr. 473; 28 Conn. 166. See COLLUSION; DECEIT; FRAUD.

COW. In a penal statute which mentions both cows and heifers, it was held that by the term cow must be understood one that had had a calf. 2 East, Pl. Cr. 616; 1 Leach 105. See 6 Humph. 285.

COWARDICE. Pusillanimity; fear; misbehavior through fear in relation to some duty to be performed before an enemy. O'Brien, Court M. 142.

By both the army and navy regulations of the United States this is an offence punishable in officers or privates with death, or such other punishment as may be inflicted by a court-martial; Rev. Stat. §§ 1342, 1624.

CRAFT. Art or skill; dexterity in particular manual employment, hence the occupation or employment itself; manual art; a trade. Webster.

This word is also now applied to all kinds of sailing vessels. 21 Gratt. 693. See 23 L. J. Rep. 156; 3 El. & Bl. 888.

CRANAGE. A toll paid for drawing merchandise out of vessels to the wharf: so called because the instrument used for the purpose is called a crane. 8 Co. 46.

CRANK. Some strange action; a caprice; a whim; a crotchet; a vagary.

Violent of temper; subject to sudden cranks. Carlyle. The word has no necessarily defamatory sense; 29 Fed. Rep. 827.

CRASTINUM, CRASTINO (Lat. tomorrow). On the day after. The return day of writs is made the second day of the term, the first day being some saint's day, which gives its name to the term. In the law Latin, *crastino* (the morning, the day after) would then denote the return day. 2 Reeve, Hist. Eng. Law 56. In the United States the return day is the first day of the term.

CRAVE. To ask; to demand.

The word is frequently used in pleading: as, to crave oyer of a bond on which the

suit is brought; and in the settlement of accounts the accountant-general craves a credit or an allowance. 1 Chit. Pr. 520. See OYER.

CRAVEN. A word denoting defeat, and begging the mercy of the conqueror.

It was used (when used) by the vanquished party in trial by battle. Victory was obtained by the death of one of the combatants, or if either champion proved *recreant*,—that is, yielded, and pronounced the horrible word "*craven*." Such a person became infamous, and was thenceforth unfit to be believed on oath. 3 Bla. Com. 340. See WAGER OF BATTLE.

CREANCE. In French Law. A claim; a debt; also belief, credit, faith. 1 Bouvier, Inst. n. 1040.

CREANSOR. A creditor. Cowel.

CREATE. To create a charter is to make an entirely new one, and differs from renewing, extending, or continuing an old one. 21 Pa. 188; 1 Gilm. 672; 16 Barb. 188. See 65 Me. 500; 45 Vt. 154.

CREDENTIALS. In International Law. The instruments which authorize and establish a public minister in his character with the state or prince to whom they are addressed. If the state or prince receive the minister, he can be received only in the quality attributed to him in his credentials. They are as it were his letter of attorney, his mandate patent, *mandatum manifestum*. Vattel, liv. 4, c. 6, § 76.

CREDIBILITY. Worthiness of belief. The credibility of witnesses is a question for the jury to determine, as their competency is for the court; Best, Ev. § 76; 1 Greenl. Ev. §§ 49, 425; Tayl. Ev. 1257.

CREDIBLE WITNESS. One who, being competent to give evidence, is worthy of belief. 5 Mass. 229; 17 Pick. 154; 2 Curt. Eccl. 336.

In deciding upon the credibility of a witness, it is always pertinent to consider whether he is capable of knowing thoroughly the thing about which he testifies; whether he was actually present at the transaction; whether he paid sufficient attention to qualify himself to be a reporter of it; and whether he honestly relates the affair fully as he knows it, without any purpose or desire to deceive, or to suppress or add to the truth.

In some of the states, wills must be attested by credible witnesses. In several of the states, *credible witness* is used, in certain connections, as synonymous with *competent witness*, and in Connecticut, in a statute providing for the certification of copies of records, it refers to a witness giving testimony under the sanction of the witness's oath; 26 Conn. 416; 18 Ga. 40; 2 Bail. 24; 9 Pick. 350; 12 Mass. 358; 83 Ky. 350; 58 N. H. 8; Jarm. Wills 124.

CREDIT. The ability to borrow, on the opinion conceived by the lender that he will be repaid.

A debt due in consequence of a contract of hire or borrowing of money.

The time allowed by the creditor for the payment of goods sold by him to the debtor.

That which is due to a merchant, as distinguished from debit, that which is due by him.

That influence connected with certain social positions. 20 Toullier, n. 19.

In a statute making credits the subject of taxation, the term is held to mean the excess of the sum of all legal claims and demands, whether for money or other valuable thing, or for labor or services, due or to become due to the person liable to pay taxes thereon, when added together (estimating every such claim or demand at its true value in money) over and above the sum of all legal *bona fide* debts owing by such person; 37 Ohio St. 123.

See, generally, 5 Taunt. 338; 3 N. Y. 344; 24 *id.* 64, 71; 51 Cal. 243.

As to the "full faith and credit" to be given in one state to the records, etc., of another state, see FOREIGN JUDGMENTS; CONFLICT OF LAWS.

CREDIT, BILL OF. See BILL OF CREDIT.

CREDITOR. He who has a right to require the fulfilment of an obligation or contract.

A person to whom any obligation is due. 37 N. J. L. 300. See 2 Root 261.

Preferred creditors are those who, in consequence of some provision of law, are entitled to some special privilege in the order in which their claims are to be paid.

CREDITOR, JUDGMENT. One who has obtained a judgment against his debtor, under which he can enforce execution.

CREDITORS' BILL. A bill in equity, filed by one or more creditors, for the purpose of collecting their debts out of assets, or under circumstances as to which an execution at law would not be available. They are usually filed by and on behalf of him or themselves and all other creditors who shall come in under the decree. They may be either against the debtor in his lifetime or for an account of the assets and a due settlement of the estate of a decedent.

They are divided by Bispham into two classes, numbered in the order here stated. In bills of what he terms the second class, or those which in effect seek for the administration of a decedent's estate, the usual decree against the executor or administrator is *quod computet;* that is to say, it directs the master to take the accounts between the deceased and all his creditors, and to cause the creditors, upon due public notice, to come before him to prove their debts at a certain place and within a limited time; and it also directs the master to take an account of all the personal estate of the deceased in the hands of the executor or administrator, and the same to be applied in payment of the debts and other charges in a due course of administration; 1 Story, Eq. Jur. 546–549.

Generally speaking, this jurisdiction has been transferred to probate courts in most of the states, but in some states the original jurisdiction of equity over the administration of estates remains unabridged by the statutes and concurrent with that of probate courts. These states are Alabama, Illinois, Iowa, Kentucky, Maryland, Mississippi, New Jersey, North Carolina, Rhode Island, Virginia, and the District of Columbia, and this rule also applies in the federal

courts. In certain other states the jurisdiction of the probate courts is virtually exclusive. These states are Connecticut, Indiana, Maine, Massachusetts, Michigan, Nebraska, Nevada, New Hampshire, Oregon, and Pennsylvania. In some other states the equitable jurisdiction is ancillary and corrective. These states are Arkansas, California, Georgia, Kansas, Missouri, New York, Ohio, South Carolina, Tennessee, Texas, Vermont, and Wisconsin. This classification, which is given in 3 Pom. Eq. Jur. § 1154, is said to be a rough grouping with still considerable diversity among the individuals composing each class.

Creditors' suits of the other class are brought while the debtor is living and for the collection of a debt against him. This jurisdiction had its origin in the inadequacy of common-law remedies by writs of execution. These writs at common law often did not extend to estates and interests which were equitable in their nature, and creditors' suits were therefore permitted to be brought where the relief at common law by execution was ineffectual, as for the discovery of assets, to reach equitable and other interests not subject to levy and sale at law, and to set aside fraudulent conveyances.

Statutes in England and America have extended the common-law remedies and provided adequate legal relief in many cases where formerly a resort to equity was necessary; Pom. Eq. Jur. § 1415.

The jurisdiction of a court of chancery in suits brought by judgment creditors to enforce the collection of their judgments, after having exhausted their remedy at law, although it may have previously existed, is in some states expressly declared and particularly defined by statutes.

Before a creditor can resort to the equitable estate of his debtor, he must first obtain judgment and seek to collect the debt by execution; exhausting his remedy at law; 140 U. S. 106; 99 *id.* 398; 111 *id.* 110; 52 Ill. 98; 80 *id.* 79; 44 Ga. 466; and it must appear that a judgment has been recovered, execution issued thereon and returned "*nulla bona;*" 117 Ill. 477; 111 U. S. 110; but this rule is said to be too general; 3 Pom. Eq. Jur. § 1415; it probably would not apply where the judgment was a lien; *id.;* 54 Miss. 79. A judgment cannot be questioned upon a creditor's bill brought to secure its payment; 8 Wall. 370.

Creditors cannot attack the interest of third parties, alleged to have been obtained by fraud, until they have gained a standing in court by legal proceedings; 62 Mich. 532; 75 Iowa 713; 78 Ga. 194; 86 Ky. 206.

Judgments of the federal court cannot be made the basis of a creditor's bill in a state court; 128 Ill. 304; *contra*, 42 Neb. 350; 39 Pac. Rep. (Kan.) 727. The plaintiff in a creditor's bill is not concluded by sworn answers of defendant; 40 Ill. App. 405.

A creditor's bill is not maintainable against a debtor and his fraudulent grantee, after the return of an execution satisfied; 80 Me. 461. A judgment creditor's bill may be framed for the double purpose of aiding an execution and to reach property not open to execution; 71 Mich. 431. Where other creditors are permitted to intervene on a creditor's bill, all are entitled to share *pro rata* in the fund available for payment of debts; 153 Pa. 189. See Puterbaugh, Pl. & Pr. A creditor's bill will lie against municipal corporation, though the same be not subject to garnishment. See 28 Chicago Leg. News 356.

State statutes authorizing suits in the nature of creditors' bills against corporations do not give the federal courts jurisdiction to entertain such suits when the creditor has not first exhausted his legal remedy, since the equity jurisdiction of those courts cannot be enlarged by a state statute; 60 Fed. Rep. 341; 8 C. C. A. 652; nor will such a bill lie to obtain the seizure of the property of an insolvent corporation which has failed to collect stock subscriptions and executed an illegal trust deed, as these facts do not change the rule of those courts that simple contract creditors cannot obtain the aid of equity to effect the seizure of the debtor's property and its application to their claims; 150 U. S. 371. But see 35 Cent. L. J. 207.

See Bisph. Eq. 525–528; 121 U. S, 44; 4 Harv. L. Rev. 99; 5 *id.* 101; Ad. Eq. 250.

CREEK. **In Maritime Law.** Such little inlets of the sea, whether within the precinct or extent of a port or without, as are narrow passages, and have shore on either side of them. Callis, Sew. 56; 5 Taunt. 705.

Such inlets that though possibly for their extent and situation they might be ports, yet they are either members of or dependent upon other ports.

In England the name arose thus. The king could not conveniently have a customer and comptroller in every port or haven. But such custom-officers were fixed at some eminent port; and the smaller adjacent ports became by that means creeks, or appendants of that port where these custom-officers were placed. 1 Chit. Com. Law, 726; Hale, *de Portibus Maris*, pt. 2, c. 1, vol. 1, p. 46; Comyns, Dig. *Navigation* (C); Callis, Sew. 34.

A small stream, less than a river. 12 Pick. 184; Cowp. 86; 38 N. Y. 103.

A creek passing through a deep level marsh and navigable by small craft, may, under legislative authority, be obstructed by a dam, or wholly filled up and converted into house-lots,—such obstructions not being in conflict with any act of congress regulating commerce; 2 Pet. 245; 1 Pick. 180; 21 *id.* 344; 3 Metc. Mass. 202; 2 Stockt. 211. See 4 B. & Ald. 589.

CREMATION. The act or practice of reducing a corpse to ashes by means of fire. Act Pa. 1891, June 8; P. L. 212.

To burn a dead body instead of burying it is not a misdemeanor unless it is so done as to amount to a public nuisance. If an inquest ought to be held upon a dead body it is a misdemeanor so to dispose of the body as to prevent the coroner from holding an inquest; L. R. 12 Q. B. D. 247. In L. R. 20 Ch. D. 659, it was doubted as to whether it is lawful to burn a body, but the

question was not decided. See 43 Alb. L. J. 140. See DEAD BODY.

CREMENTUM COMITATUS. The increase of the county. The increase of the king's rents above the old vicontiel rents for which the sheriffs were to account. Wharton, Dict.

CREPUSCULUM. Daylight; twilight. The light which immediately precedes or follows the rising or setting of the sun. 4 Bla. Com. 224. Housebreaking during the period in which there is sunlight enough to discern a person's face (*crepusculum*) is not burglary; Co. 3d Inst. 63; 1 Russell, Cr. 820; 3 Greenl. Ev. § 75.

CRETIO. Time for deliberation allowed an heir (usually 100 days), to decide whether he would or would not take an inheritance. Calvinus, Lex.; Taylor, Gloss.

CREW. The word crew used in a statute in connection with *master*, includes officers as well as seamen. 3 Sumn. 209–212; 1 Law Rep. 63. Sometimes also the master is included; 6 Rob. (La.) 534; but a passenger would not be; 1 W. & M. 231.

CRIER (Norman, to proclaim). An officer whose duty it is to make the various proclamations in court, under the direction of the judges. The office of crier in chancery is now abolished, in England. Wharton.

CRIM. CON. An abbreviation for criminal conversation, of very frequent use, denoting adultery; unlawful sexual intercourse with a married woman. Bull. N. P. 27; Bacon, Abr. *Marriage* (E) 2; 4 Blackf. 157; 3 Bla. Com. 139.

The term is used to denote the act of adultery in a suit brought by the husband of the married woman with whom the act was committed, to recover damages of the adulterer. That the plaintiff connived at or assented to his wife's infidelity, or that he prostituted her for gain, is a complete answer to the action. But the fact that the wife's character for chastity was bad before the plaintiff married her, that he lived with her after he knew of the criminal intimacy with the defendant, that he had connived at her intimacy with other men, or that the plaintiff had been false to his wife, only go in mitigation of damages; 4 N. H. 501; 55 Pa. 77; as will the fact that the wife willingly consented or threw herself in the way of her paramour; 70 Ind. 520.

The wife cannot maintain an action for criminal conversation with her husband; and for this, among other reasons, because her husband, who is *particeps criminis*, must be joined with her as plaintiff. But the husband may maintain the action after a divorce granted; 2 Bish. Marr. Div. & Sep. § 727; 1 Hill, N. Y. 63. This action is rare in the United States, and has been abolished in England by the Divorce Act, 20 & 21 Vict. c. 85, s. 59. The husband may, however, in suing for a divorce, claim damages from the adulterer; 3 Steph. Com, 437. The right to an action for damages is not barred by the fact that the act was done by violence, and that a criminal action will lie; 44 Mich. 245. See article 15 Am. L. Reg. N. S. 451.

Where a wife sought a divorce and obtained a decree, for cruelty, the husband making no defense, but he subsequently sued another man for criminal conversation with her, alleging an act as known to him before the divorce suit, the court held that this would have been a perfect defense to the suit for divorce, and the decree therefor was conclusive against its existence and a complete bar to the civil action; 56 Mich. 291. See CASE.

CRIME. An act committed or omitted in violation of a public law forbidding or commanding it.

A wrong which the government notices as injurious to the public, and punishes in what is called a criminal proceeding in its own name. 1 Bish. Cr. Law § 43. See 4 Denio 260; 6 Ark. 187, 461; Clark, Cr. Law 1.

The word crime generally denotes an offence of a deep and atrocious dye. When the act is of an inferior degree of guilt, it is called a misdemeanor; 4 Bla. Com. 4. Crime, however, is often used as comprehending *misdemeanor* and even as synonymous therewith, and also with *offence;* in short, as embracing every indictable offence; T. U. P. Charlt. 235; 60 Ill. 168; 31 Wis. 383; 9 Wend. 212; 24 How. 102; 32 N. J. L. 189, 144; 39 Hun 510; 102 N. Y. 583; but it is not synonymous with felony; 113 Pa. 379.

Crimes are defined and punished by statutes and by the common law. Most common-law offences are as well known and as precisely ascertained as those which are defined by statutes: yet, from the difficulty of exactly defining and describing every act which ought to be punished, the vital and preserving principle has been adopted that all immoral acts which tend to the prejudice of the community are punishable criminally by courts of justice; 2 East 5, 21; 7 Conn. 386; 5 Cow. 258; 3 Pick. 26.

There are no common-law offences against the United States; 144 U. S. 677. See COMMON LAW.

There can be no constructive offences, and before a man can be punished, his case must be plainly and unmistakably within the statute; 134 U. S. 624; 158 U. S. 282.

Deliberation and premeditation to commit crime need not exist in the criminal's mind for any fixed period before the commission of the act; 159 U. S. 510.

A crime *malum in se* is an act which shocks the moral sense of the community as being grossly immoral and injurious. With regard to some offences, such as murder, rape, arson, burglary, and larceny, there is but one sentiment in all civilized countries, which is that of unqualified condemnation. With regard to others, such as adultery, polygamy, and drunkenness, in some communities they are regarded as *mala in se;* while in others they are not even *mala prohibita.*

An offence is regarded as strictly a *malum prohibitum* only when, without the prohibition of a statute, the commission or omission of it would in a moral point of view be regarded as indifferent. The criminality of the act or omission consists not in the simple perpetration of the act, or the neglect to perform it, but in its being a violation of a positive law.

It is not only just, but it has been found

necessary, to have the severity of punishment proportioned to the enormity of crimes. Different opinions are entertained as to what should be the highest in degree. In England, there are at present only two crimes for which the death penalty is enforced; namely, treason and murder. In Scotland, by act of 1887, 50 and 51 Vic. chap. 38, it is enacted that capital sentences shall be abolished, except on conviction of murder or offences against the act 10 Geo. IV. chap. 38, by which a variety of attempts to commit murder are considered capital. In the United States the death penalty is enforced by statutes of the different states as follows:—

In Alabama, Delaware, Georgia, Maryland, and West Virginia, for treason, murder, arson, and rape.

In Alaska, Arizona, Kansas, New Jersey, Mississippi, Montana, New York, North Dakota, Oregon, and South Dakota, for treason and murder.

In Colorado, Idaho, Illinois, Iowa, Massachusetts, Minnesota, Nebraska, New Hampshire, New Mexico, Nevada, Ohio, Oklahoma, Pennsylvania, Utah, and Washington, for murder.

In Kentucky and Virginia, for murder, rape, and treason.

In Vermont, arson, treason, and murder.

In Florida, Missouri, South Carolina, Texas, and Tennessee, for murder and rape.

In North Carolina, for arson, rape, burglary, and murder.

In Indiana, for treason, murder, and arson, if death result.

In California, treason, murder, and train-wrecking.

Capital punishment has been abolished in Maine, Rhode Island (except where a person shall commit murder while imprisoned for life, when he shall be hanged), Wisconsin, and except for treason in Michigan. R. I. Pub. Stat. (1882), 667; Wis. Act of 1853, n. 100; Mich. Rev. Stat. 1846; Maine Laws (1887), p. 104. In 1888, the legislature of New York substituted electricity as the means of executing criminals, instead of hanging, and a recent act has been passed in Ohio for the same purpose.

There are three degrees of murder according to the statute laws of Minnesota and Wisconsin, and two degrees in Alabama, Arkansas, California, Connecticut, Delaware, Indiana, Iowa, Maine, Maryland, Massachusetts, Michigan, Missouri, New Hampshire, New Jersey, Ohio, Oregon, Pennsylvania, Tennessee, Texas, and Virginia. In some of the other states murder remains as at common law, and in some it is somewhat modified by statute.

Crimes are sometimes classified according to the degree of punishment incurred by the commission of them.

They are more generally arranged according to the nature of the offence.

The following is, perhaps, as complete a classification as the subject admits:—

Offences against the sovereignty of the state. 1. Treason. 2. Misprision of treason.

Offences against the lives and persons of individuals. 1. Murder. 2. Manslaughter. 3. Attempts to murder or kill. 4. Mayhem. 5. Rape. 6. Robbery. 7. Kidnapping. 8. False imprisonment. 9. Abduction. 10. Assault and battery. 11. Abortion. 12. Cruelty to children.

Offences against public property. 1. Burning or destroying public property. 2. Injury to the same.

Offences against private property. 1. Arson. 2. Burglary. 3. Larceny. 4. Obtaining goods on false pretences. 5. Embezzlement. 6. Malicious mischief.

Offences against public justice. 1. Perjury. 2. Bribery. 3. Destroying public records. 4. Counterfeiting public seals. 5. Jail-breach. 6. Escape. 7. Resistance to officers. 8. Obstructing legal process. 9. Barratry. 10. Maintenance. 11. Champerty. 12. Contempt of court. 13. Oppression. 14. Extortion. 15. Suppression of evidence. 16. Compounding felony. 17. Misprision of felony.

Offences against the public peace. 1. Challenging or accepting a challenge to a duel. 2. Unlawful assembly. 3. Rout. 4. Riot. 5. Breach of the peace. 6. Libel.

Offences against chastity. 1. Sodomy. 2. Bestiality. 3. Adultery. 4. Incest. 5. Bigamy. 6. Seduction. 7. Fornication. 8. Lascivious carriage. 9. Keeping or frequenting house of ill-fame.

Offences against public policy. 1. False currency. 2. Lotteries. 3. Gambling. 4. Immoral shows. 5. Violations of the right of suffrage. 6. Destruction of game, fish, etc. 7. Nuisance.

Offences against the currency, and public and private securities. 1. Forgery. 2. Counterfeiting. 3. Passing counterfeit money.

Offences against religion, decency, and morality. 1. Blasphemy. 2. Profanity. 3. Sabbath-breaking. 4. Obscenity. 5. Cruelty to animals. 6. Drunkenness. 7. Promoting intemperance. See 2 Sharsw. Bla. Com. 42.

Offences against the public, individuals, or their property. 1. Conspiracy.

CRIME AGAINST NATURE. Sodomy or buggery. 10 Ind. 355.

CRIMEN FALSI. In Civil Law. A fraudulent alteration, or forgery, to conceal or alter the truth, to the prejudice of another. This crime may be committed in three ways, namely: by forgery; by false declarations or false oath,—perjury; by acts, as by dealing with false weights and measures, by altering the current coin, by making false keys, and the like; see Dig. 48. 10. 22; 34. 8. 2; Code 9. 22; 2. 5. 9. 11. 16. 17. 23. 24; Merlin, *Répert.*; 1 Bro. Civ. Law 426; 1 Phill. Ev. 26; 2 Stark. Ev. 715.

At Common Law. Any crime which may injuriously affect the administration of justice, by the introduction of falsehood and fraud. 1 Greenl. Ev. § 373; 13 Ga. 97; 29 Ohio 351, 358; 55 Ala. 239; 4 Sawy. 211.

The meaning of this term at common law is not well defined. It has been held to include forgery; 5 Mod. 74; perjury, subornation of perjury; Co. Litt. 6 *b*; Comyns,

Dig. *Testmoigne* (A 5) ; suppression of testimony by bribery or conspiracy to procure the absence of a witness ; Ry. & M. 434 ; conspiracy to accuse of crime : 2 Hale, Pl. Cr. 277 ; 2 Leach 496 ; 3 Stark. 21 ; 2 Dods. 191 ; barratry ; 2 Salk. 690. The effect of a conviction for a crime of this class is infamy, and incompetence to testify ; 80 Va. 288. Statutes sometimes provide what shall be such crimes.

CRIMEN LÆSÆ MAJESTATIS. See LÆSA MAJESTAS.

CRIMINAL CONVERSATION. See CRIM. CON.

CRIMINAL INFORMATION. A criminal suit brought, without interposition of a grand jury, by the proper officer of the king or state. Cole, Cr. Inf. ; 4 Bla. Com. 398. See INFORMATION.

CRIMINAL INTENT. The intent to commit a crime ; malice, as evidenced by a criminal act. Black, Dict.

CRIMINAL LAW. That branch of jurisprudence which treats of crimes and offences.

From the very nature of the social compact on which all muncipal law is founded, and in consequence of which every man, when he enters into society, gives up part of his natural liberty, result those laws which, in certain cases, authorize the infliction of penalties, the privation of liberty, and even the destruction of life, with a view to the future prevention of crime and to insuring the safety and well-being of the public. *Salus populi suprema lex.*

The extreme importance of a knowledge of the criminal law is evident. For a mistake in point of law, which every person of discretion not only may know but is bound and presumed to know, is in criminal cases no defence. *Ignorantia eorum quæ quis scire tenetur non excusat.* This law is administered upon the principle that every one must be taken conclusively to know it without proof that he does know it ; per Tindal, C. J., in 10 Cl. & F. 210. See 11 Blatchf. 200 : 59 Ala. 57 ; 65 Me. 30 ; 39 N. J. L. 402. And this is true though the statute making an act illegal is of so recent promulgation as to make it impossible to know of its existence ; 8 Ala. 119 ; 8 Ga. 380 ; 1 Gall. C. C. 62. This doctrine has been carried so far as to include the case of a foreigner charged with a crime which was no offence in his own country ; 1 E. & B. 1 ; Dearsl. 51 ; 7 C. & P. 456 ; Russ. & R. 4. See 50 Ind. 341. And, further, the criminal law, whether common or statute, is imperative with reference to the conduct of individuals ; so that, if a statute forbids or commands a thing to be done, all acts or omissions contrary to the prohibition or command of the statute are offences at common law, and ordinarily indictable as such ; Hawk. Pl. Cr. bk. 2, c. 25, § 4 ; 8 Q. B. 883. See 15 M. & W. 404. An offence which may be the subject of criminal procedure is an act committed or omitted in violation of a public *law* either forbidding or commanding it ; 144 U. S. 677.

In seeking for the sources of our law upon this subject, when a statute punishes a crime by its legal designation, without enumerating the acts which constitute it, then it is necessary to resort to the common law for a definition of the crime with its distinctions and qualifications. So if an act is made criminal, but no mode of prosecution is directed or no punishment provided, the common law furnishes its aid, prescribing the mode of prosecution by indictment, and as a mode of punishment, fine, and imprisonment. This is generally designated the common law of England ; but it might now be properly called the common law of this country. It was adopted by general consent when our ancestors first settled here. So far, therefore, as the rules and principles of the common law are applicable to the administration of criminal law and have not been altered and modified by legislative enactments or judicial decisions, they have the same force and effect as laws formally enacted ; 5 Cush. 303, 304 ; 4 Metc. Mass. 358 ; 13 *id.* 69, 70. "The common law of crimes," says an able writer, "is at present that *jus vagum et incognitum* against which jurists and vindicators of freedom have strenuously protested. It is to be observed that the definitions of crimes, the nature of punishments, and the forms of criminal procedure originated, for the most part, in the principles of the most ancient common law, but that most of the unwritten rules touching crimes have been modified by statutes which assume the common-law terms and definitions as if their import were familiar to the community. The common law of crimes has, partly from humane and partly from corrupt motives, been pre-eminently the sport of judicial constructions. In theory, indeed, it was made for the state of things that prevailed in this island and the kind of people that inhabited it in the reign of Richard I. ; in reality, it is the patchwork of every judge in every reign, from Cœur de Lion to Victoria." Ruins of Time Exemplified in Hale's Pleas of the Crown, by Amos, Pref. x.

Some of the leading principles of the English and American system of criminal law are—*First.* Every man is presumed to be innocent until the contrary is shown; and if there is any reasonable doubt of his guilt, he is entitled to the benefit of the doubt. See 123 U. S. 623. *Second.* In general, no person can be brought to trial until a grand jury on examination of the charge has found reason to hold him for trial. 121 U. S. 1. *Third.* The prisoner is entitled to trial by a jury of his peers, who are chosen from the body of the people with a view to impartiality, and whose decision on questions of fact is final. *Fourth.* The question of his guilt is to be determined without reference to his general character. By the systems of continental Europe, on the contrary, the tribunal not only examines the evidence relating to the offence, but looks at the prob-

abilities arising from the prisoner's previous history and habits of life. *Fifth.* The prisoner cannot be required to criminate himself. (The general rule, however, now seems to be in jurisdictions where there is no statutory prohibition, that an accused person testifying in his own behalf may be cross-examined like any other witness; 131 N. Y. 651; 50 *id.* 240; 73 Mich. 10; 105 Ind. 469; 122 *id.* 527; 36 Kan. 90; 11 Nev. 17; 105 Ill. 413. See for a full discussion of this question, Rice, Ev. § 223 and note; 142 U. S. 547.) *Sixth.* He cannot be twice put in jeopardy for the same offence. See 142 U. S. 148; 131 *id.* 176. *Seventh.* He cannot be punished for an act which was not an offence by the law existing at the time of its commission; nor can a severer punishment be inflicted than was declared by law at that time.

CRIMINAL LAW AMENDMENT ACT. This act was passed in 1871, 34 & 35 Vict. c. 32, to prevent and punish any violence, threats, or molestation, on the part either of master or workmen, in the various relations arising between them. 4 Steph. Com. 241.

CRIMINAL LAW CONSOLIDATION ACTS. The stats. 24 & 25 Vict. cc. 94–100, passed in 1861, for the consolidation of the criminal law of England and Ireland. 4 Steph. Com. 227. These important statutes amount to a codification of the modern criminal law of England. See Bruce's Archb. Pl. & Ev. in Cr. Ca. 1875.

CRIMINAL LETTERS. In Scotch Law. A summons issued by the lord advocate or his deputies as the means of commencing a criminal process. It differs from an indictment, and is like a criminal information at common law.

CRIMINAL PROCEDURE. The method pointed out by law for the apprehension, trial, or prosecution, and fixing the punishment of those persons who have broken or violated, or are supposed to have broken or violated, the laws prescribed for the regulation of the conduct of the people of the community, and who have thereby laid themselves liable to fine or imprisonment, or both. A. & E. Encyc. Law. See PROCEDURE.

CRIMINAL PROCESS. Process which issues to compel a person to answer for a crime or misdemeanor. 1 Stew. 26.

CRIMINALITER. Criminally; on criminal process.

CRIMINATE. To exhibit evidence of the commission of a criminal offence.

It is a rule that a witness cannot be compelled to answer any question which has a tendency to expose him to a penalty, or to any kind of punishment, or to a criminal charge; 4 St. Tr. 6; 6 *id.* 649; 10 How. St. Tr. 1090; 1 Cra. 144; 2 Yerg. 110; 5 Day 260; 8 Wend. 598; 12 S. & R. 284; 18 Me. 272; 13 Ark. 307. Such a statement cannot be used to show guilt and a confession must be free and voluntary; 107 Mass. 180. If a defendant offers himself as a witness to disprove a criminal charge, he cannot excuse himself from answering on the ground that by so doing he may criminate himself; 122 Ill. 235. See CRIMINAL LAW.

An accomplice admitted to give evidence against his associates in guilt is bound to make a full and fair confession of the whole truth respecting the subject-matter of the prosecution; 10 Pick. 477; 2 Stark. Ev. 12, note; but he is not bound to answer with respect to his share in other offences, in which he was not concerned with the prisoner; 9 Cow. 721, note (a); 2 C. & P. 411.

CRIMP. One who decoys and plunders sailors under cover of harboring them. Wharton.

CRITICISM. The art of judging skilfully of the merits or beauties, defects or faults, of a literary or scientific composition, or of a production of art. When the criticism is reduced to writing, the writing itself is called a criticism.

Liberty of criticism must be allowed, or there would be neither purity of taste nor of morals. Fair discussion is essentially necessary to the truth of history and the advancement of science. That publication, therefore, is not a libel which has for its object not to injure the reputation of an individual, but to correct misrepresentations of facts, to refute sophistical reasoning, to expose a vicious taste for literature, or to censure that which is hostile to morality; 1 Campb. 351. As every man who publishes a book commits himself to the judgment of the public, any one may comment on his performance. If the commentator does not step aside from the work, or introduce fiction for the purpose of condemnation, he exercises a fair and legitimate right. The critic does a good service to the public who writes down any such vapid or useless publication as should never have appeared; and, although the author may suffer a loss from it, the law does not consider such loss an injury; because it is a loss which the party ought to sustain. It is the loss of fame and profit to which he was never entitled; 1 Campb. 358, n. See 1 Esp. 28; Stark. Lib. and Sl. 228–234; 4 Bingh. N. s. 92; 3 Scott 340; 1 Mood. & M. 74, 187; Cooke, Def. 52; 20 Q. B. D. 275. See LIBEL; SLANDER.

CROFT. A little close adjoining a dwelling-house, and enclosed for pasture and tillage or any particular use. Jacob, Law Dict. A small place fenced off in which to keep farm-cattle. Spelman, Gloss. The word is now entirely obsolete.

CROP. See EMBLEMENTS; AWAY-GOING CROP.

CROPPER. One who, having no interest in the land, works it in consideration of receiving a portion of the crop for his labor. 2 Rawle 12; 71 N. C. 7.

CROSS. A mark made by persons who are unable to write, instead of their names.

When properly attested, and proved to have been made by the party whose name is written with the mark, it is generally admitted as evidence of the person's signature.

The word intersect ordinarily means the same as to cross; literally to cut into or between. 45 Conn. 344.

CROSS-ACTION. An action by a defendant in an action, against the plaintiff in the same action, upon the same contract, or for the same tort. Thus, if Peter bring an action of trespass against Paul, and Paul bring another action of trespass against Peter, the subject of the dispute being an assault and battery, it is evident that Paul could not set off the assault committed upon him by Peter, in the action which Peter had brought against him; therefore a cross-action becomes necessary. 10 Ad. & E. 643.

CROSS-APPEAL. Where both parties to a judgment appeal therefrom, the appeal of each is called a cross-appeal as regards that of the other. 3 Steph. Com. 581.

CROSS-BILL. In Equity Practice. One which is brought by a defendant in a suit against a plaintiff in or against other defendants in the same suit, or against both, touching the matters in question in the original bill. Story, Eq. Pl. § 389; Mitf. Eq. Pl. 80. It is brought either to obtain a discovery of facts, in aid of the defence to the original bill, or to obtain full and complete relief to all parties, as to the matters charged in the original bill; 17 How. 595.

It is considered as a defence to the original bill, and is treated as a dependency upon the original suit; 1 Eden, Inj. 190; 3 Atk. 312; 19 E. L. & Eq. 325; 14 Ark. 346; 14 Ga. 674; 14 Vt. 208; 15 Ala. 501; 35 N. H. 251. It is usually brought either to obtain a necessary discovery, as, for example, where the plaintiff's answer under oath is desired; 3 Swanst. 474; 3 Y. & C. 594; 2 Cox, Ch. 109; or to obtain full relief for all parties, since the defendant in a bill could originally only pray for a dismissal from court, which would not prevent subsequent suits; 1 Ves. 284; 2 Sch. & L. 9, 11, n., 144, n. (z); 2 Stockt. 107; 14 Ill. 229; 20 Ga. 472; or where the defendants have conflicting interests; 9 Cow. 747; 1 Sandf. 108; 2 Wis. 299; but may not introduce new parties; 17 How. 130; unless affirmative relief is demanded and justice so requires; 37 W. Va. 376. It is also used for the same purpose as a plea *puis darrein continuance* at law; 2 Ball & B. 140; 2 Atk. 177, 553; 1 Stor. 218.

It should state the original bill, and the proceedings thereon, and the rights of the party exhibiting the bill which are necessary to be made the subject of a cross-litigation, on the grounds on which he resists the claims of the plaintiff in the original bill, if that is the object of the new bill; Mitf. Eq. Pl. 81; and it should not introduce new and distinct matters; 8 Cow. 361.

It should be brought before publication; 1 Johns. Ch. 62; 13 Ga. 478; and not after, —to avoid perjury; 7 Johns. Ch. 250; Nelson 103.

In England it need not be brought before the same court; Mitf. Eq. Pl. 81 *et seq.* For the rule in the United States, see 11 Wheat 446; Story, Eq. Pl. § 401; Dan. Ch. Pl. & Pr. 1549.

It is error to dismiss a cross-bill on demurrer in vacation without affording an opportunity to amend; 94 Ala. 236.

CROSS-COMPLAINT. This is allowed when a defendant has a cause of action against a co-defendant, or a person not a party to the action, and affecting the subject-matter of the action. The only real difference between a complaint and a cross-complaint, is, that the first is filed by the plaintiff and the second by the defendant. Both contain a statement of the facts, and each demands affirmative relief upon the facts stated. The difference between a counter-claim and a cross-complaint is that in the former the defendant's cause of action is against the plaintiff; and the latter, against a co-defendant, or one not a party to the action; 32 Ark. 290.

CROSS-DEMAND. A demand is so called which is preferred by B, in opposition to one already preferred against him by A.

CROSS-ERRORS. Errors assigned by the respondent in a writ of error.

CROSS-EXAMINATION. In Practice. The examination of a witness by the party opposed to the party who called him, and who examined, or was entitled to examine, him in chief. See 4 Alb. L. J. 100.

In England and some of the states of the United States, when a competent witness is called and sworn, the other party is ordinarily entitled to cross-examine him as to matters not covered by the direct examination; 1 Esp. 357; 17 Pick. 490; 2 Wend. 166, 483; 23 Ga. 154; 32 Miss. 405; see 3 C. & P. 16; 2 M. & R. 273; 23 Ga. 154; but see 122 Mass. 578; but it is held in other states and in the federal courts that the cross-examination is confined to facts and circumstances connected with matters stated in the direct examination; 3 Wash. C. C. 580; 14 Pet. 448; 16 S. & R. 77; 6 W. & S. 75; 2 Dutch. 463; 5 Cal. 450; 4 Iowa 477; 4 Mich. 67; 95 *id.* 360; 145 Ill. 538; 127 *id.* 652; 96 Cal. 113; 23 Neb. 706; 92 Pa. 112; 96 *id.* 436. But see 12 La. Ann. 826; 2 Pat. & H. 616. In Pennsylvania, a party who is a witness on his own behalf may be fully cross-examined on any relevant matter.

Inquiry may be made in regard to collateral facts in the discretion of the judge; 7 C. & P. 389; 5 Wend. 305; 97 Ala. 681; but not merely for the purpose of contradicting the witness by other evidence; 1 Stark. Ev. 164; 7 East 108; 2 Lew. C. C. 154, 156; 7 C. & P. 789; 16 Pick. 157; 8 Me. 42; 2 Gall. 51. And see 1 Exch. 91; 7 Cl. & F. 122; 4 Denio 502; 2 Ired. 346; 14 Pet. 461; 67 Hun 648. Considerable latitude should be allowed in cross-examining witnesses as to value, in order that the ground of their opinion may appear; 148 Mass. 326,

As to whether a witness not cross-ex-

amined after the close of his examination in chief may be recalled and cross-examined see 1 Greenl. Ev. § 447; 1 Stark. Ev. 164; 16 S. & R. 77; 17 Pick. 498; 104 Pa. 117.

A written paper identified by the witness as having been written by him may be introduced in the course of a cross-examination as a part of the evidence of the party producing it, if necessary for the purposes of the cross-examination; 16 Jur. 103; 8 C. & P. 369; 2 Brod. & B. 289.

A cross-examination as to matters not otherwise admissible in evidence entitles the party producing the witness to re-examine him as to those matters; 3 Ad. & E. 554; 17 Tex. 417. If the defendant be permitted on cross-examination to lead out new matter, constituting his own case, which he had not opened to the jury, to the injury of the plaintiff, it is ground for reversal; 114 Pa. 35; 104 *id.* 207.

Leading questions may be put in cross-examination; 1 Stark. Ev. 96; 1 Phill. Ev. 210; Tayl. Ev. 1223; 6 W. & S. 75. For some suggestions as to the propriety of cross-examination in various cases and the most expedient manner of conducting it, see 2 Pothier, Obl. Evans ed. 233; 1 Stark. Ev. 160, 161; Archb. Cr. Pl. 111.

The trial court has not such a discretion with regard to the extent and scope of the cross-examination of the defendant in a criminal cause as it is permitted to exercise in the examination of other witnesses; 96 Cal. 171. See 40 La. Ann. 589.

CROSS-REMAINDER. Where a particular estate is conveyed to several persons in common, or various parcels of the same land are conveyed to several persons in severalty, and upon the termination of the interest of either of them his share is to remain over to the rest, the remainders so limited over are said to be cross-remainders. In deeds, such remainders cannot arise without express limitation. In wills, they frequently arise by implication; 1 Prest. Est. 94; 2 Hilliard, R. P. 44; 4 Kent 201; Chal. R. P. 241.

CROSS-RULES. Rules entered where each of the opposite litigants obtained a rule *nisi*, as the plaintiff to increase the damages, and the defendant to enter a nonsuit. Wharton.

CROSSED-CHECK. See CHECK.

CROSSING. The intersection at grade of a public highway by another or by a railroad, or of one railroad by another.

It is generally the duty of a railroad company to construct, maintain, and repair the crossing where it intersects a public highway at grade; 42 Ia. 234. It is bound to keep the approaches in a safe condition; 52 Mich. 108. And it must so construct, repair, and improve the crossing as to meet the increasing wants of the people; 133 Mass. 185; 32 Conn. 241. The obligation to maintain the crossing begins when the railroad is located over it; 101 Pa. 192; 60 Wis. 264; and it is a continuing duty; 56 Pa. 280; 75 Ill. 524; 51 Me. 313. Having crossed a highway the railroad company must restore it to such a condition that its usefulness will not be unnecessarily impaired; 89 N. Y. 266; and it is liable for a failure to construct and maintain suitable crossings at all points where it intersects a public highway at grade; 42 Ia. 234; A. & E. Encyc. See, generally, 14 R. I. 108; GRADE-CROSSINGS.

CROWN. In England. A word often used for the sovereign.

CROWN CASES RESERVED. See COURT FOR CONSIDERATION OF CROWN CASES RESERVED.

CROWN DEBTS. Debts due to the crown, which are put, by various statutes, upon a different footing from those due to a subject.

CROWN LANDS. The demesne lands of the crown. See 29 & 30 Vict. c. 62; 2 Steph. Com. 534–536.

CROWN LAW. In England. Criminal law, the crown being the prosecutor.

CROWN OFFICE. The criminal side of the court of king's bench. The king's attorney in this court is called master of the crown office. 4 Bla. Com. 308.

CROWN SIDE. The criminal side of the court of king's bench. Distinguished from the pleas side, which transacts the civil business. 4 Bla. Com. 265; 4 Steph. Com. 308, 385.

CROWN SOLICITOR. In England. The solicitor to the treasury.

CRUDE. In its natural state; not cooked or prepared by fire or heat; undressed; not altered, refined or prepared for use by any artificial process; raw. 102 U. S. 198.

CRUEL AND UNUSUAL PUNISHMENT. See PUNISHMENT.

CRUELTY. *As between husband and wife.* Those acts which affect the life, the health, or even the comfort, of the party aggrieved, and give a reasonable apprehension of bodily hurt, are called cruelty. What merely wounds the feelings is seldom admitted to be cruelty, unless the act be accompanied with bodily injury, either actual or menaced. Mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention and accommodation, even occasional outbreaks of passion, will not amount to legal cruelty; 17 Conn. 189; *à fortiori*, the denial of such indulgences and particular accommodations, as are ordinarily considered necessaries, is not cruelty. The negative descriptions of cruelty are perhaps best adapted, under the infinite variety of cases that may occur, to illustrate what is not cruelty; 1 Hagg. Cons. 35; 4 Eccl. 238, 311, 312; 1 Hagg. Eccl. 733, 768, n.; 1 Add. Eccl. 29; 11 Jur. 490; 1 Hagg. Cons. 37, 458; 2 *id.* 154; 1 Phill. Eccl. 111, 132; 1 M'Cord 205; 2 J. J. Marsh. 324; 8 N. H. 307; 3 Mass. 321; 97 *id.* 378; 104 *id.* 197; 36 Ga. 286; 4 Wis. 135; 4 La. Ann. 137; 14 Tex. 356; 24 N. J. Eq.

195; 3 Dana 28; 37 Pa. 225; 48 *id.* 238; 66 *id.* 498; 57 Ind. 568; 18 Kan. 371, 419; 73 N. Y. 369; 30 N. J. Eq. 119, 215; 10 Phila. 58; 30 Gratt. 307; 88 Ill. 248; 138 *id.* 436; 146 *id.* 328; 40 Mich. 493; 1 Colo. App. 281; 109 N. C. 139; 23 Or. 226.

As instances of physical cruelty may be noted: an attempt to kill; 14 Cal. 512; 32 La. Ann. 644; an attempt to poison; 34 Ark. 37; 76 Iowa 443; 66 Pa. 494; choking; 114 Ind. 558; 79 Mich. 124; 57 Miss. 330; kicking; 19 Ala. 307; 116 Ill. 509; 88 Iowa 210; 83 Va. 806; whipping; 31 Ga. 625; 65 Md. 104; spitting in the face; 1 N. J. Eq. 474; Wright 557; communicating venereal disease; 94 Cal. 225; 16 R. I. 92; inexcusable neglect during sickness; 78 Iowa 691; 116 Ill. 509; 114 Ind. 558.

As instances of cruelty producing mental suffering: a false charge of adultery; 69 Ala. 84; 110 N. Y. 183; 130 Pa. 6; the commission of certain crimes, such as rape; 95 Cal. 430; keeping a mistress; [1891] Prob. 189; religious opinions, in certain cases; 74 Tex. 414; may be mentioned. See DIVORCE; LEGAL CRUELTY.

Cruelty towards weak and helpless persons takes place where a party bound to provide for and protect them either abuses them by whipping them unnecessarily, or by neglecting to provide for them those necessaries which their helpless condition requires. Exposing a person of tender years, under one's care, to the inclemency of the weather; 2 Campb. 650; keeping such a child, unable to provide for himself, without adequate food; 1 Leach 137; Russ. & R. 20; or an overseer neglecting to provide food and medical care to a pauper having urgent and immediate occasion for them; Russ. & R. 46, 47, 48; are examples of this species of cruelty.

The improper treatment and employment of children has of late years attracted much attention, and in many of the principal cities, beginning with New York, in April, 1875, societies for the prevention of cruelty to children have been formed, authorized to prosecute persons who maltreat children, or force them to pursue improper and dangerous employments; N. Y. Act of April 21, 1875; Delafield on Children, 1876. Stat. 42 & 43 Vict. c. 34 regulates certain employments for children. By the act of Congress of February 13, 1885, the association for the prevention of cruelty to animals for the District of Columbia, was authorized to extend its operation, under the name of the Washington Humane Society, to the protection of children as well as animals from cruelty and abuse, and the agents of the society have power to prefer complaints for the violation of any law relating to or affecting the protection of children. They may also bring before the court any child who is subjected to cruel treatment, abuse or neglect, or any child under sixteen years of age found in a house of ill-fame, and the court may commit such child to an orphan asylum or other public charitable institution, and any person wilfully or cruelly maltreating, or wrongfully employing such child, is liable to punishment. 23 Stat. L. 302.

Cruelty to animals is an indictable offence. A defendant was convicted of a misdemeanor for tying the tongue of a calf so near the root as to prevent its sucking, in order to sell the cow at a greater price, by giving to her udder the appearance of being full of milk while affording the calf all it needed; 6 Rog. Rec. N. Y. 62. A man may be indicted for cruelly beating his horse; 3 Rog. Rec. N. Y. 191; 4 Cra. 483; 3 Campb. 143; 9 L. T. R. N. S. 175; 7 Allen 579; 1 Aik. 226; 3 B. & S. 382; 44 N. H. 392; 4 Tex. App. 12, 234, 486; 4 Mo. App. 215; 52 *id.* 520; 85 Ill. 457; 150 Mass. 509. See 101 Mass. 34; 2 Curt. C. C. 194; 112 N. C. 887; 22 S. W. Rep. (Tex.) 39.

The treatment of animals has been the subject of much recent legislation, and, beginning with New York, societies have been organized in the United States and Europe for their protection, similar in their scope and power to those above referred to for children.

Under 12 and 13 Vict. c. 92, § 2, dishorning cattle is not an offence where the operation is skilfully performed; 16 Cox, Cr. Cas. 101. This practice is allowed in Pennsylvania; Act Pa. 1895, June 25, P. L. 286. In Massachusetts it was held that a fox is an animal in the sense of the statute, and a person letting loose a captive fox to be subjected to unnecessary suffering (for the purpose of being hunted by dogs) was liable to punishment; 145 Mass. 296. A common carrier by land or water from one state to another is liable to punishment for confining cattle, sheep, swine or other animals for a longer period than twenty-eight hours, without unloading them for rest, water and feeding, for at least five consecutive hours; U. S. Rev. Stat. §§ 4386–89.

CRUISE. A voyage or expedition in quest of vessels or fleets of the enemy which may be expected to sail in any particular track at a certain season of the year. The region in which these cruises are performed is usually termed the rendezvous, or cruising-latitude.

When the ships employed for this purpose, which are accordingly called *cruisers*, have arrived at the destined station, they traverse the sea backwards and forwards, under an easy sail, and within a limited space, conjectured to be in the track of their expected adversaries. Wesk. Ins.; Lex Merc. Red. 271, 284; Dougl. 509; Marsh. Ins. 196, 199, 520; 2 Gall. 268, 526.

CRY DE PAYS, CRY DE PAIS. A hue and cry raised by the country. This was allowable in the absence of the constable when a felony had been committed.

CRYER. See CRIER.

CUCKING-STOOL. An engine or machine for the punishment of scolds and unquiet women,

Called also a trebucket, tumbrill, and castigatory. Bakers and brewers were formerly also liable to the same punishment. Being fastened in the machine,

they were immersed over head and ears in some pool; Blount; Co. 3d Inst. 219; 4 Bla. Com. 168.

CUI ANTE DIVORTIUM (L. Lat. The full phrase was, *Cui ipsa ante divortium contradicere non potuit*, whom she before the divorce could not gainsay). **In Practice.** A writ which anciently lay in favor of a woman who had been divorced from her husband, to recover lands and tenements which she had in fee-simple, fee-tail, or for life, from him to whom her husband had aliened them during marriage, when she could not gainsay it; Fitzh. N. B. 240; 3 Bla. Com. 183, n.; Stearns, Real Act. 143; Booth, Real Act. 188. Abolished in 1833 by stat. 3 & 4 Will. IV. c. 27.

CUI IN VITA (L. Lat. The full phrase was, *Cui in vita sua, ipsa contradicere non potuit*, whom in his lifetime she could not gainsay). **In Practice.** A writ of entry which lay for a widow against a person to whom her husband had in his lifetime aliened her lands. Fitzh. N. B. 193. The object of the writ was to avoid a judgment obtained against the husband by confession or default. It is now of no use in England by force of the provisions of the statute 32 Hen. VIII. c. 28, § 6. See 6 Co. 8, 9; Booth, Real Act. 186. As to its use in Pennsylvania, see 3 Binn. Appx.; Rep. Comm. on Penn. Civ. Code, 1835, 90, 91. Abolished in England by 3 & 4 Will. IV. c. 27.

CUL DE SAC (Fr. bottom of a bag). A street which is open at one end only.

It seems not to be settled whether a *cul de sac* is to be considered a highway; but the authorities are generally to the contrary. See 11 East 376, note; 5 Taunt. 137; 5 B. & Ald. 456; Hawk. Pl. Cr. b. 1, c. 76, s. 1; Dig. 50. 16. 43; 43. 12. 1. § 13; 47. 10. 15. § 7.

In order to become a public highway by dedication, a way must be a thoroughfare, which a *cul de sac* could not be; Washb. Easements 182, 213.

CULPA. A fault; negligence. Jones, Bailm. 8.

Culpa is to be distinguished from *dolus*, the latter being a trick for the purpose of deception, the former merely a negligence. There are three degrees of *culpa: lata culpa*, gross fault or neglect; *levis culpa*, ordinary fault or neglect; *levissima culpa*, slight fault or neglect; and the definitions of these degrees are precisely the same as those in our law. Story, Bailm. § 18; 8 Allen 121; 49 N. H. 387. See NEGLIGENCE.

CULPABLE. This means not only criminal but censurable; and when the term is applied to the omission by a person to preserve the means of enforcing his own rights, censurable is more nearly equivalent. As he has merely lost a right of action which he might voluntarily relinquish, and has wronged nobody but himself, culpable neglect would seem to convey the idea of neglect for which he was to blame and is ascribed to his own carelessness, improvidence or folly. 8 Allen, 122.

CULPRIT. A person who is guilty, or supposed to be guilty, of a crime.

When a prisoner is arraigned, and he pleads not guilty, in English practice, the clerk, who arraigns him on behalf of the crown, replies that the prisoner is guilty, and that he is ready to prove the accusation. This is done by writing two monosyllabic abbreviations,—*cul. prit.* 4 Bla. Com. 339; 1 Chit. Cr. Law 416. See Christian's note to Bla. Com. cited; 3 Sharsw. Bla. Com. 340, n. 9. The technical meaning has disappeared, and the compound is used in the popular sense as above given.

CULTIVATED. A field may be cultivated ground, though lying fallow. 13 Ired. L. 36. See 4 Cow. 190.

CULVERTAGE. A base kind of slavery. The confiscation or forfeiture which takes place when a lord seizes his tenant's estate. Blount; Du Cange.

CUM ONERE (Lat.). With the burden; subject to the incumbrance; subject to the charge. A purchaser with knowledge of an incumbrance takes the property *cum onere*. Co. Litt. 231 *a*; 7 East 164; Paley, Ag. 175.

CUM TESTAMENTO ANNEXO (Lat.). With the will annexed. The term is applied to administration when there is no executor named in a will, or if he is named is incapable of acting, or where the executor named refuses to act.

CUMULATIVE EVIDENCE. That which goes to prove what has already been established by other evidence. 20 Conn. 305; 28 Me. 379; 24 Pick. 246; 43 Barb. 203; 43 Iowa 175.

Newly discovered evidence, if cumulative merely, is not sufficient ground for a new trial; 33 Neb. 731; 87 Ga. 244; 35 W. Va. 418; 3 Wyo. 680; 69 Miss. 152; 43 Ill. App. 301.

CUMULATIVE LEGACY. See LEGACY.

CUMULATIVE SENTENCES. See ACCUMULATIVE SENTENCES.

CUMULATIVE REMEDY. A remedy created by statute in addition to one which still remains in force.

CUNEATOR. A coiner. Du Cange. *Cuneare*, to coin. *Cuneus*, the die with which to coin. *Cuneata*, coined. Du Cange; Spelman, Gloss.

CURATE. One who represents the incumbent of a church, parson or vicar, and takes care of the church and performs divine services in his stead. An officiating temporary minister in the English church who represents the proper incumbent. Burn, Eccl. Law; 1 Bla. Com. 393. See CURE OF SOULS.

CURATIO (Lat.). **In Civil Law.** The power or duty of managing the property of him who, either on account of infancy or some defect of mind or body, cannot manage his own affairs. The duty of a curator or guardian. Calvinus, Lex.

CURATOR. In Civil Law. One legally appointed to take care of the interests of one who, on account of his youth, or defect of his understanding, or for some other

cause, is unable to attend to them himself ; a guardian.

There are curators *ad bona* (of property), who administer the estate of a minor, take care of his person, and intervene in all of his contracts ; curators *ad litem* (of suits), who assist the minor in courts of justice, and act as curators *ad bona* in cases where the interests of the curator are opposed to the interests of the minor. There are also curators of insane persons, and of vacant successions and absent heirs.

In Missouri the term has been adopted from the civil law and it is applied to the guardian of the ward's estate, as distinct from the guardian of his person ; 49 Mo. 117.

Under the Roman law, the guardian of a minor, both as to person or property, was called a tutor (*q. v.*) ; and if, after being of an age to exercise his rights, he needed a person to look after his rights, such person was called a curator. Sandars, Inst. Just. Introd. xl. A person who had attained the age of puberty was not required to have a curator, but if he had much property he was almost certain to have one, as it was part of his tutor's duty to urge him to do so ; *id.* 74 ; Dig. xxvi. 7. 5. 5.

Interim Curator. In England. A person appointed by justices of the peace to take care of the property of a felon convict until the appointment by the crown of an administrator for the same purpose ; Stat. 33 & 34 Vict. c. 23 ; 4 Steph. Com. 462 ; Mozl. & W. Dict.

CURATOR BONIS (Lat.). **In Civil Law.** A guardian to take care of the property. Calvinus, Lex.

In Scotch Law. A guardian for minors, lunatics, etc. Halkers, Tech. Terms ; Bell, Dict.

CURATOR AD HOC. A guardian for this special purpose.

A *curator ad hoc* can be appointed to proceed against the tutor for an accounting or his removal only when there is no undertutor ; 45 La. Ann. 1062.

CURATOR AD LITEM (Lat.). Guardian for the suit. In English law, the corresponding phrase is guardian *ad litem*.

CURATORSHIP. The office of a curator.

Curatorship differs from tutorship (*q. v.*) in this, that the latter is instituted for the protection of property in the first place, and secondly, of the person ; while the former is intended to protect, first, the person, and, secondly, the property. 1 *Leçons Elem. du Droit Civ. Rom.* 241.

CURATRIX. A woman who has been appointed to the office of a curator.

CURE BY VERDICT. See AIDER BY VERDICT.

CURE OF SOULS. The ordinary duties of an officiating clergyman.

Curate more properly denotes the incumbent in general who hath the *cure of souls* ; but more frequently it is understood to signify a clerk not instituted to the *cure of souls*, but exercising the spiritual office in a parish under the rector or vicar. 2 Burn, Eccl. Law 54 ; 1 H. Bla. 424.

CURFEW (French, *couvre*, to cover, and *feu*, fire). This is generally supposed to be an institution of William the Conqueror, who required, by ringing of the bell at eight o'clock in the evening, that all lights and fires in dwellings should then be extinguished. But the custom is evidently older than the Norman ; for we find an order of King Alfred that the inhabitants of Oxford should at the ringing of that bell cover up their fires and go to bed. And there is evidence that the same practice prevailed at this period in France, Normandy, Spain, and probably in most of the other countries of Europe. Henry, Hist. of Britain, vol. 3, 567. It was doubtless intended as a precaution against fires, which were very frequent and destructive when most houses were built of wood.

That it was not intended as a badge of infamy is evident from the fact that the law was of equal obligation upon the nobles of court and upon the native-born serfs. And yet we find the name of *curfew law* employed as a by-word denoting the most odious tyranny.

The curfew is spoken of by a recent writer in 1 Social England 373, as having been ordained by William I. in order to prevent nightly gatherings of the people of England.

It appears to have met with so much opposition that in 1103 we find Henry I. repealing the enactment of his father on the subject ; and Blackstone says that, though it is mentioned a century afterwards, it is rather spoken of as a time of night than as a still subsisting custom. Shakespeare frequently refers to it in the same sense. This practice is still pursued, in many parts of England and of this country, as a very convenient mode of apprising people of the time of night.

CURIA. In Roman Law. One of the divisions of the Roman people. The Roman people were divided by Romulus into three tribes and thirty *curia :* the members of each *curia* were united by the tie of common religious rites, and also by certain common political and civil powers. Dion. Hal. l. 2, p. 82 ; Liv. l. 1, cap. 13 ; Plut. *in Romulo*, p. 30 ; Festus Brisson, *in verb.*

In later times the word signified the senate or aristocratic body of the provincial cities of the empire. Brisson, *in verb.* ; Ortolan, *Histoire*, no. 25, 408 ; Ort. Inst. no. 125.

The senate-house at Rome ; the senate-house of a provincial city. Cod. 10. 31. 2 ; Spelman, Gloss.

In English Law. The king's court ; the palace ; the royal household. The residence of a noble ; a manor or chief manse ; the hall of a manor. Spelman, Gloss.

A court of justice, whether of general or special jurisdiction. Fleta, lib. 2, l. 72, § 1 ; Feud. lib. 1, 2, 22 ; Spelman ; Cowel ; 3 Bla. Com. c. iv. See COURT.

A court-yard or enclosed piece of ground ; a close. Stat. Edw. Conf. 1, 6 ; Bracton, 76, 222 *b*, 335 *b*, 356 *b*, 358 ; Spelman, Gloss. See CURIA CLAUDENDA.

The civil or secular power, as distinguished from the church. Spelman, Gloss.

CURIA ADVISARE VULT (Lat.). The court wishes to consider the matter.

In Practice. The entry formerly made upon the record to indicate the continuance of a cause until a final judgment should be rendered.

It is commonly abbreviated thus : *cur. adv. vult*, or *c. a. v.* Thus, from amongst

many examples, in Clement *v.* Chivis, 2 B. & C. 172, after the report of the argument we find "*cur. adv. vult*," then, "on a subsequent day judgment was delivered," etc.

CURIA CLAUDENDA (Lat.). **In Practice.** A writ which anciently lay to compel a party to enclose his land. Fitzh. N. B. 297.

CURIA REGIS (Lat.). The king's court. See AULA REGIA.

CURIALITY. In Scotch Law. Curtesy.

CURRENCY. This term is commonly used for whatever passes among the people for money, whether gold or silver coin or bank notes. 32 Ill. 74; 9 Mo. 697; 1 Ohio 115, 119; 1 Hask. 383; 16 Ia. 323; 47 Wis. 560. See 9 Cent. L. J. 488.

CURRENT MONEY. That which is in general use as a medium of exchange.

It means the same thing as currency of the country. 5 Lea 96.

The adjective "current," when qualifying money, is not the synonym of "convertible." It is employed to describe money which passes from hand to hand, from person to person, and circulates through the community and is generally received. Money is current which is received in the common business transactions, and is the common medium in barter and trade; 41 Ala. 321.

Current money means that money which is commonly used and recognized as such; current bank notes, such as are convertible into specie at the counter where they were issued. 1 Dall. 124; 7 Ark. 282; see 20 La. Ann. 368; 14 Mich. 501; 1 Yeates 349; 28 Ill. 332, 388; 32 *id.* 75; 9 Ind. 135; 3 T. B. Monr. 166; 21 La. Ann. 624; 64 N. C. 381; 41 Ala. 321.

CURSITOR. A junior clerk in the court of chancery, whose business it formerly was to write out from the register those forms of writs which issued of course. 1 Poll. & M. Hist. Engl. Law 174.

Such writs were called writs *de cursu* (of course), whence the name, which had been acquired as early as the reign of Edward III. The body of cursitors constituted a corporation, each clerk having a certain number of counties assigned to him. Coke, 2d Inst. 670; 1 Spence, Eq. Jur. 238. The office was abolished by 5 & 6 Will. IV. c. 82.

CURSITOR BARON. An officer of the court of exchequer, who is appointed by patent under the great seal to be one of the barons of the exchequer. The office was abolished by stat. 19 & 20 Vict. c. 86. Wharton, Dict., 2d Lond. ed.

CURTESY. The estate to which by common law a man is entitled, on the death of his wife, in the lands or tenements of which she was seised in possession in fee simple or in tail during their coverture, provided they have had lawful issue born alive which might have been capable of inheriting the estate. Chal. R. P. 314.

An estate for life which a husband takes at the death of his wife, having had issue by her born alive during coverture, in all lands of which she was seised in fact of an inheritable estate during coverture.

The right of the husband to enjoy during his life land of which his wife is at any time during coverture seised in fee simple (absolute or defeasible) or in fee tail, provided there was issue born alive to the marriage. Demb. Land Tit. § 109.

It is a freehold estate for the term of his natural life. 1 Washb. R. P. 127. In the common law the word is used in the phrases *tenant by curtesy*, or *estate by curtesy*, but seldom alone; while in Scotland of itself it denotes the estate. The phrase "tenant by the law of England" was also used, and is said to have been of earlier origin; 2 Poll. & M. Hist. of Engl. Law 412.

Some question has been made as to the derivation both of the custom and its name. It is said that the term is derived from *curtis*, a court, and that the custom, in England at least, is of English origin, though a similar custom existed in Normandy, and still exists in Scotland. 1 Washb. R. P. 128, n.; Wright, Ten. 192; Co. Litt. 30 *a*; 2 Bla. Com. 126; Ersk. Inst. 380; Grand Cout. de Normandie, c. 119. But a recent work considers this derivation "more ingenious than satisfactory," and suggests that it is possible to explain the phrase by "some royal concession," as "being reasonable enough." 2 Poll. & M. Hist. Engl. Law 412.

In Pennsylvania, by act of April 8, 1833, issue of the marriage is no longer necessary, so that the husband gains a freehold by the marriage itself; 10 Pa. 399; but the law applies only when the estate is devisable, not to an estate tail or defeasible fee; 152 Pa. 303. Ohio, Illinois, Kentucky, and Maine reduce the husband's life estate to one-third, calling it "dower," and dispense with birth of issue alive, while dower remains unchanged. In South Carolina and Georgia, curtesy has gone out of use, the husband having under the law greater benefits. Demb. Land Tit. § 109. Louisiana, Texas, California, Nevada, Washington, and Idaho, and Arizona and New Mexico have the "community" system and there is no curtesy; *id.* § 111. And in Indiana, Iowa, Minnesota, the Dakotas, Kansas, Colorado, Wyoming, and Mississippi, dower is applied by a forced lienship of the widow and there is no curtesy; *id.* § 108. See DESCENT AND DISTRIBUTION.

CURTILAGE. The enclosed space immediately surrounding a dwelling-house, contained within the same enclosure.

It is defined by Blount as a yard, backside, or piece of ground near a dwelling-house, in which they sow beans, etc., yet distinct from the garden. Blount; Spelman. By others it is said to be a waste piece of ground so situated. Cowel.

It has also been defined as "a fence or enclosure of a small piece of land around a dwelling-house, usually including the buildings occupied in connection with the dwelling-house, the enclosure consisting either of a separate fence or partly of a fence and partly of the exterior of buildings so within this enclosure." 10 Cush. 480.

It usually includes the yard, garden, or field which

is near to and used in connection with the dwelling. 83 Ala. 62. See 61 Ala. 58.

The term is used in determining whether the offence of breaking into a barn or warehouse is burglary. See 4 Bla. Com. 224; 1 Hale, Pl. Cr. 558; 2 Russell, Cr. 13; Russ. & R. 289; 1 C. & K. 84.

In Michigan the meaning of curtilage has been extended to include more than an enclosure near the house. 2 Mich. 250. See 31 N. J. L. 485; 17 N. Y. Sup. Ct. 151; 31 Me. 522; 140 Mass. 289.

CURTILLUM. The area or space within the enclosure of a dwelling-house. Spelman, Gloss.

CURTIS. The area about a building; a garden; a hut or farmer's house; a farmer's house with the land enrolled with it.

A village or a walled town containing a small number of houses.

The residence of a nobleman; a hall or palace.

A court; a tribunal of justice. 1 Washb. R. P. 120; Spelman, Gloss.; 3 Bla. Com. 320.

CUSTODES. Keepers; guardians; conservators.

Custodes pacis (guardians of the peace). 1 Bla. Com. 349.

Custodes libertatis Angliæ auctoritate parliamenti (guardians of the liberty of England by authority of parliament). The style in which writs and all judicial process ran during the grand rebellion, from the death of Charles I. till Cromwell was declared Protector. Jacob, Law Dict.

CUSTODIA LEGIS. In the custody of the law.

When property is lawfully taken, by virtue of legal process, it is in the custody of the law, and not otherwise; 7 Wis. 334.

Where a sheriff has taken under attachment more than enough property to satisfy it, the property is not in *custodia legis* in a sense that will prevent a levy by a U. S. marshal in a suit in the federal court, so as to give the latter creditor a lien on the excess after satisfying the first attachment; 57 Ark. 450. Nor are executions issued on void judgments and their returns admissible against subsequent attaching creditors, to show that the goods were in *custodia legis;* 51 Mo. App. 470.

For a collection of cases on property and funds in the custody of the courts not subject to attachment or garnishment, see 10 Lawy. Rep. Ann. 529, note.

CUSTODY. The detainer of a person by virtue of a lawful authority. 3 Chit. Pr. 355.

The care and possession of a thing.

Custody has been held to mean nothing less than actual imprisonment; 59 Pa. 320; 82 *id.* 306. See CUSTODIA LEGIS.

CUSTOM. Such a usage as by common consent and uniform practice has become the law of the place, or of the subject-matter, to which it relates.

Custom is a law established by long usage. 9 Wend. 349.

It differs from prescription, which is personal and is annexed to the person of the owner of a particular estate; while the other is local, and relates to a particular district. An instance of the latter occurs where the question is upon the manner of conducting a particular branch of trade at a certain place; of the former, where a certain person and his ancestors, or those whose estates he has, have been entitled to a certain advantage or privilege, as to have common of pasture in a certain close, or the like. 2 Bla. Com. 263. The distinction has been thus expressed: "While prescription is the making of a right, custom is the making of a law;" Laws. Us. & Cust. 15, n. 2.

General customs are such as constitute a part of the common law of the country and extend to the whole country.

Particular customs are those which are confined to a particular district; or to the members of a particular class; the existence of the former are to be determined by the court, of the latter, by the jury. Laws. Us. & Cust. 15, n. 3; see 23 Me. 90.

In general, when a contract is made in relation to matter about which there is an established custom, such custom is to be understood as forming part of the contract, and may always be referred to for the purpose of showing the intention of the parties in all those particulars which are not expressed in the contract; 2 Pars. Contr. 652, 663; 1 Hall 602; 2 Pet. 138; 5 Binn. 285; 19 Wend. 389; 1 M. & W. 476; L. R. 17 Eq. 358; 25 Me. 401; 7 D. C. 105.

Evidence of a usage is admissible to explain technical or ambiguous terms; 3 B. & Ad. 728; 3 Ind. App. 299; 156 Mass. 331. But evidence of a usage contradicting the terms of a contract is inadmissible; 2 Cr. & J. 244; 113 Mass. 136; 74 N. Y. 586; 1 W. Va. 69; 114 Ill. 28; 1 Misc. Rep. 399; 44 Minn. 153. Nor can a local usage affect the meaning of the terms of a contract unless it is known to both contracting parties; 144 U. S. 476; nor can it affect a contract made elsewhere; 140 U. S. 565.

"Merely that it varies the apparent contract is not enough to exclude the evidence, for it is impossible to add any material incident to the written terms of a contract, without altering its effect more or less. To fall within the exception of repugnancy the incident must be such as, if expressed in the written contract, would make it insensible or inconsistent;" *Per cur.* in 3 E. & B. 715. See Leake, Contr. 197; 7 E. & B. 274.

In order to establish a custom, it will be necessary to show its existence for so long a time that "the memory of man runneth not to the contrary," and that the usage has continued without any interruption of the right; for, if it has ceased for a time for such a cause, the revival gives it a new beginning, which will be what the law calls within memory. It will be no objection, however, that the exercise of the right has been merely suspended; 1 Bla. Com. 76; 2 *id.* 31; 14 Mass. 488; 3 Q. B. 581; 6 *id.* 383; L. R. 7 Q. B. 214; 80 Me. 500. See 32 Mo. App. 298.

It must also have been peaceably acquiesced in and not subject to dispute; for, as customs owe their origin to common consent, their being disputed, either at law or otherwise, shows that such consent was wanting; 2 Wend. 501; 3 Watts 178. In addition to this, customs must be reasonable and certain. A custom, for instance, that land shall descend to the most worthy

of the owner's blood is void; for how shall this be determined? But a custom that it shall descend to the next male of the blood, exclusive of females, is certain, and therefore good; 2 Bla. Com. 78; Browne, Us. & Cust. 21. See 43 Fed. Rep. 777.

Evidence of usage is never admissible to oppose or alter a general principle or rule of law so as, upon a given state of facts, to make the legal right and liabilities of the parties other than they are by law; Browne, Us. & Cust. 135, n; 2 Term 327; 19 Wend. 252; 6 Binn. 416; 16 C. B. N. S. 646; 10 Wall. 383; 104 Mass. 518; 85 Ala. 565; 112 N. Y. 530; but the rule is said by Mr. Lawson to extend no further than to usages which "conflict with an established rule of public policy, which it is not to the general interest to disturb." Laws. Us. & Cust. 486. With respect to a usage of trade, however, it is sufficient if it appears to be known, certain, uniform, reasonable, and not contrary to law; 3 Wash. C. C. 150; 7 Pet. 1; 5 Binn. 287; 8 Pick. 360; 4 B. & Ald. 210; 1 C. & P. 59; 87 Tenn. 350. See 159 Mass. 522. But if not directly known to the parties to the transaction, it will still be binding upon them if it appear to be so general and well established that knowledge of it may be presumed; 1 Cai. 43; 4 Stark. 452; 1 Dougl. 510. A usage of trade is sufficiently long continued if it has existed so long as to show that the parties to a contract meant to employ the expression in the sense defined by it; 32 Mo. App. 298. And one who seeks to avoid the effect of a notorious and uniform usage of trade must show that he was ignorant of it; 139 N. Y. 416. A local custom cannot supersede or modify a statute; 109 N. C. 539; 76 Hun 181.

See 26 L. J. Ex. 219; 9 Pick. 198; 2 Caines 219; 2 F. & F. 131; 14 Gray 210; 9 Wheat. 582; 8 S. & R. 533; S. C. 11 Am. Dec. 632; Dougl. 201; 4 Taunt. 848; 49 Ala. 465; 7 Mass. 36; L. R. 2 Ex. 101; 19 Wend. 386; 41 Md. 158; S. C. 20 Am. Rep. 66. See Lawson; Browne; Us. & Cust.; note to Wigglesworth *v.* Dallison, Sm. Lead. Cas.; [1892] Prob. 411; 91 Ga. 466. See USAGE.

CUSTOM OF MERCHANTS. A system of customs acknowledged and taken notice of by all nations, and which are, therefore, a part of the general law of the land. See LAW MERCHANT; 1 Chit. Bla. Com. 76, n. 9.

CUSTOM-HOUSE. A place appointed by law, in ports of entry, where importers of goods, wares, and merchandise are bound to enter the same, in order to pay or secure the duties or customs due to the government.

CUSTOM-HOUSE BROKER. A person authorized to act for parties, at their option, in the entry or clearance of ships and the transaction of general business. Wharton. See act of July 13, 1866, § 9, 14. U. S. Stat. L. 117.

CUSTOMARY COURT BARON. A court baron at which copyholders might transfer their estates, and where other matters relating to their tenures were transacted. 3 Bla. Com. 33.

This court was held on the manor, the lord or his steward sitting as judge. 1 Crabb, R. P. § 633. It might be held anywhere in the manor, at the pleasure of the judge, unless there was a custom to the contrary. It might exist at the same time with a court baron proper, or even where there were no freeholders in the manor.

A recent work doubts if there was a court for free men and a separate court for unfree men, though in Coke's day it was said that the lord of a manor had "a court baron" for free men and "a customary court" for his copyholders. The court rolls and manuals for stewards of the 13th and 14th centuries do not appear to show two courts; 1 Poll. & M. Hist. Engl. Law 580.

CUSTOMARY ESTATES. Estates which owe their origin and existence to the custom of the manor in which they are held. 2 Bla. Com. 149.

CUSTOMARY FREEHOLD. A class of freeholds held according to the custom of the manor, derived from the ancient tenure in villein socage. Holders of such an estate have a freehold interest, though it is not held by a freehold tenure. 2 Bla. Com. 149. In reference to customary freehold, outside the ancient demesne all the tenures of the non-freeholding peasantry are in law one tenure, tenure in villeinage; 1 Poll. & M. Hist. Engl. Law 384.

CUSTOMARY SERVICE. A service due by ancient custom or prescription only. Such is, for example, the service of doing suit at another's mill, where the persons resident in a particular place, by usage, time out of mind have been accustomed to grind corn at a particular mill. 3 Bla. Com. 234.

CUSTOMARY TENANTS. Tenants who hold by the custom of the manor. 2 Bla. Com. 149.

CUSTOMS. Taxes levied upon goods and merchandise imported or exported. Story, Const. § 949; Bacon, Abr. *Smuggling.*

The duties, toll, tribute, or tariff payable upon merchandise exported or imported. These are called customs from having been paid from time immemorial. Expressed in law Latin by *custuma*, as distinguished by *consuetudines*, which are usages merely. 1 Bla. Com. 314.

CUSTOMS OF LONDON. Particular regulations in force within the city of London, in regard to trade, apprentices, widows and orphans, etc., which are recognized as forming part of the English common law. 1 Bla. Com. 75; 3 Steph. Com. 588, and note. See DEAD MAN'S PART. The custom of London, as regards intestate succession, was abolished by 19 & 20 Vict. c. 94; as regards foreign attachment, it was extended to all England and Wales by the Common Law Procedure Act of 1854, ss. 60–67; and is the basis of the law on that subject in this country. See ATTACHMENT.

CUSTOM OF YORK. A custom of intestacy in the Province of York similar to that of London. Abolished by 19 & 20 Vict. c. 94.

CUSTOS BREVIUM (Lat.). Keeper of writs. An officer of the court of common pleas whose duty it is to receive and keep all the writs returnable to that court and put them upon file, and also to receive of the prothonotaries all records of *nisi prius*, called *posteas*. Blount. An officer in the king's bench having similar duties. Cowel; *Termes de la Ley*. The office is now abolished.

CUSTOS MARIS (Lat.). Warden or guardian of the seas. Among the Saxons, an admiral. Spelman, Gloss. *Admiralius*.

CUSTOS MOREUM. Applied to the court of queen's bench, as "the guardian of the morals" of the nation. 4 Steph. Com. 377.

CUSTOS PLACITORUM CORONÆ (Lat.). Keeper of the Pleas of the Crown (the criminal records). Said by Blount and Cowel to be the same as the *Custos Rotulorum*.

CUSTOS ROTULORUM (Lat.). Keeper of the rolls. The principal justice of the peace of a county, who is the keeper of the records of the county. 1 Bla. Com. 349. He is always a justice of the peace and *quorum*, is the chief civil officer of the king in the county, and is nominated under the king's sign-manual. He is rather to be considered a minister or officer than a judge. Blount; Cowel; Lambard, Eiren. lib. 4, cap. 3, p. 373; 4 Bla. Com. 272; 3 Steph. Com. 37.

CUSTUMA ANTIQUA SIVE MAGNA (Lat. ancient or great duties). The duties on wool, sheepskin or wool-pelts and leather exported were so called, and were payable by every merchant, stranger as well as native, with the exception that merchant strangers paid one-half as much again as natives. 1 Bla. Com. 314.

CUSTUMA PARVA ET NOVA (Lat.). An impost of threepence in the pound sterling on all commodities exported or imported by merchant strangers. Called at first the alien's duty, and first granted by stat. 31 Edw. I. Maddox, Hist. Exch. 526, 532; 1 Bla. Com. 314.

CUT. A wound made with a sharp instrument. 3 La. Ann. 512; 1 Russ. & R. 104. See 12 How. 9, 20.

CYNEBOTE. A mulct anciently paid, by one who killed another, to the kindred of the deceased. Spelman; Gloss.

CY PRES (L. Fr. as near as). The rule of construction applied to a will (but not to a deed) by which, where the testator evinces a general intention to be carried into effect in a particular mode which cannot be followed, the words shall be so construed as to give effect to the general intention. 3 Hare 12; 2 Term 254; 2 Bligh 49; Sugd. Pow. 60; 1 Spence, Eq. Jur. 532; Bisph. Eq. § 126; McGrath, *Cy Pres*.

The principle is applied to sustain wills in which perpetuities are attempted to be created, so that, if it can possibly be done, the devise is not regarded as utterly void, but is expounded in such a manner as to carry the testator's intention into effect as far as the law respecting perpetuities will allow. This is called a construction *cy pres*. Its rules are vague, and depend chiefly upon judicial discretion applied to the particular case. Sedgwick, Stat. Law 265; Story, Eq. Jur. §§ 1167 *et seq*. A limitation void because it offends the doctrine of perpetuity will be void altogether, and cannot be held under the *cy pres* rule of construction to be good as to that part which keeps within the period of perpetuity, and void only as to the excess; 142 Ill. 606.

See Tiedman, Real Property.

It is also applied to sustain devises and bequests for charities (*q. v.*). In its origin the doctrine was applied, in the exercise of the royal prerogative, delegated to the Lord Chancellor under the sign manual of the crown. Where there was a definite charitable purpose which was illegal and could not take place, the chancellor would substitute another. The judicial doctrine under this name is that if charity be the general substantial intention, though the mode provided for its execution fails, the English chancery will find some means of effectuating it, even by applying the fund to a different purpose from that contemplated by the testator, but as near to it as possible, provided only it be charitable; Bisph. Eq. § 129; Boyle, Char. 147, 155; Shelf. Mortm. 601; Beach, Wills 250; 3 Bro. Ch. 379; 4 Ves. 14; 7 *id.* 69, 82. Where a legacy is given to a charitable institution which exists at the testator's death, but ceases to exist before the legacy is paid over, it becomes the property of the charity on the death of the testator, and upon the charity ceasing to exist it is applicable to charitable purposes according to the doctrine of *cy pres;* [1891] 2 Ch. 236. Most of the cases carry the doctrine beyond what is allowed where private interests are concerned, and have in no inconsiderable degree to draw for their support on the prerogative of the crown and the statute of charitable uses; 43 Eliz. c. 4. This doctrine does not universally obtain in this country to the disinherison of heirs and next of kin. See CHARITABLE USES; 14 Allen 580; 1 Am. Law Reg. 538; 2 How. 127; 17 *id.* 369; 24 *id.* 465; 6 Wall. 337; 4 Wheat. 1; 8 N. Y. 548; 14 *id.* 380; 22 *id.* 70.

Where the perpetuity is attempted to be created by deed, all the limitations based upon it are void; Cruise, Dig. t. 38, c. 9, § 34. See, generally, 1 Vern. 250; 2 Ves. 336, 337, 364, 380; 3 *id.* 141, 220; 4 *id.* 13; Comyns, Dig. *Condition* (L, 1); 1 Roper, Leg. 514; Swinb. Wills pl. 4, § 7, a. 4, ed. 1590, p. 31; Dane, Abr. Index; Toullier, Dr. Civ. Fr. liv. 3, t. 3, n. 586, 595, 611; Domat, Lois Civ. liv. 6, t. 2, § 1; Shelf. Mortm.; Highmore, Mortm.

The *cy pres* doctrine has been repudiated by the states of North Carolina, Connecticut, Indiana, Iowa, Alabama, Maryland, Virginia, New York, South Carolina, and Pennsylvania, though in the last state it has been partially introduced by statute. But the doctrine has been approved in all the New England states except Connecticut; in Mississippi and Illinois, and in some states the question has not been decided; Bisph. Eq. § 130; 1 Dev. 276; 22 Conn. 31; 35 Ind. 198; 17 S. & R. 88; 63 Pa. 465; 93 *id.* 165; 34 N. Y. 584; 33 N. H. 296; 49 Me. 302; 50 Mo. 165; 5 C. E. Green 522; [1893] 2 Ch. 41; 38 Ala. 305; 150 Mass. 377; 147 *id.* 348; Tied. R. P.; 1 Spence, Eq. Jur. 532; 3 Hare 12.

CYROGRAPHARIUS. In Old English Law. A cyrographer. An officer of the common pleas court.

CYROGRAPHUM. A chirograph, which see.

D.

DACION. In Spanish Law. The real and effective delivery of an object in the execution of a contract.

DAILY. Every day; day by day. Web. Where a statute requires an advertisement to be published in a daily newspaper it is such if it uses the term "daily newspaper" in contradistinction to the term "weekly," "semi-weekly," or "tri-weekly" newspaper. The term was used and is to be understood in its popular sense, and in this sense it is clear that a paper which, according to its usual custom, is published every day of the week except one, is a daily newspaper; otherwise a paper which is published every day except Sunday would not be a daily newspaper. 45 Cal. 30.

DAM. A construction of wood, stone, or other materials, made across a stream of water for the purpose of confining it; a mole. See 23 Mich. 93; 19 N. J. Eq. 245.

It is an instrument for turning the water of a stream to the use of a mill, but it may not in fact have been used for that purpose at all, or if at all, in such a way as to affect the original rights of riparian owners on either hand. 44 N. H. 78.

The owner of a stream not navigable may erect a dam across it, provided he do not thereby materially impair the rights of the proprietors above or below to the use of the water in its accustomed flow; Gould, Waters 110, n.; 4 Mas. 401; 13 Johns. 212; 20 *id.* 90; 9 Pick. 528; 15 Conn. 366; 6 Pa. 32; 14 S. & R. 71; 3 N. H. 321; 127 Mass. 534; 69 Me. 19; 31 Gratt. 36; 49 Ia. 490; 28 Am. L. Reg. 147, n. He may even detain the water for the purposes of a mill, for a reasonable time, to the injury of an older mill,—the reasonableness of the detention in each particular case being a question for the jury; 12 Pa. 248; 17 Barb. 654; 28 Vt. 459; 25 Conn. 321; 2 Gray 394; 38 Me. 243; 64 *id.* 171; 99 Mass. 474; 38 Mich. 77; 53 N. H. 552. But he must not unreasonably detain the water; 6 Ind. 324; and the jury may find the constant use of the water by night and a detention of it by day to be an unreasonable use, though there be no design to injure others; 10 Cush. 367; see 77 N. Y. 525. Nor has such owner the right to raise his dam so high as to cause the stream to flow back upon the land of supra-riparian proprietors; 1 B. & Ald. 258; 1 S. & S. 203; 12 Ill. 201; 24 N. H. 364; 8 Cush. 595; 19 Pa. 134; 25 *id.* 519; 38 Me. 237; 59 Ga. 286; 124 Mass. 461. And see BACK-WATER. These rights may, of course, be modified by contract or prescription. See WATERCOURSE. If there be no license or act from which a license will necessarily follow, a person erecting a dam so as to flood the land of another, is a trespasser and acts at his peril; 77 Ga. 809.

When one side of the stream is owned by one person and the other by another, neither, without the consent of the other, can build a dam which extends beyond the *filum aquæ*, thread of the river, without committing a trespass; Cro. Eliz. 269; Holt 499; 12 Mass. 211; 4 Mas. 397; Angell, Waterc. 14, 104, 141; 69 Pa. 93. See *Lois des Bât.* p. 1, c. 3, s. 1, a. 3; Pothier, *Traité du Contrat de Société*, second app. 236; Hillier, Abr. Index; 7 Cow. 266; 2 Watts 327; 3 Rawle 90; 5 Pick. 175; 4 Mass. 401; 17 *id.* 289; 70 Me. 243.

On the ground of public policy many of the states have enacted statutes enabling persons to build dams on their own land, although in so doing the land of a higher riparian owner may be overflowed; and in some cases this permission is given although the party may own the land on one side only. In all these instances, however, a remedy is provided for assessing the damages resulting from such dam. See Angell, Waterc. §§ 482, 484.

The degree of care which a party who constructs a dam across a stream is bound to use, is in proportion to the extent of injury which will be likely to result to third persons provided it should prove insufficient. It is not enough that the dam is sufficient to resist ordinary floods; for if the stream is occasionally subject to great freshets, these must likewise be guarded against; and the measure of care required in such cases is that which a discreet person would use if the whole risk were his own; 5 Vt. 371; 3 Hill 531; 3 Denio 433; Ang. Waterc. 336; 107 Mass. 492; Washb. Easem. *288, *289; 67 Ind. 236; 51 Conn. 137.

If a mill-dam be so built that it causes a watercourse to overflow the surrounding country, where it becomes stagnant and unwholesome, so that the health of the

neighborhood is sensibly impaired, such dam is a public nuisance, for which its owner is liable to indictment; 4 Wis. 387. So it is an indictable nuisance to erect a dam so as to overflow a highway; 4 Ind. 515; 6 Metc. 433; see 12 R. I. 27; or so as to obstruct the navigation of a public river; 1 Stockt. 754; 3 Blackf. 136; 2 Ind. 591; 18 Barb. 277; 4 Watts 437; 38 Mich. 77; 57 Miss. 227; 32 Gratt. 684. See IRRIGATION.

DAMAGE. The loss caused by one person to another, or to his property, either with the design of injuring him, or with negligence and carelessness, or by inevitable accident.

He who has caused the damage is bound to repair it; and if he has done it maliciously he may be compelled to pay beyond the actual loss. When damage occurs by accident without blame to any one, the loss is borne by the owner of the thing injured: as, if a horse run away with his rider, without any fault of the latter, and injure the property of another person, the injury is the loss of the owner of the thing. When the damage happens by the act of God, or inevitable accident, as by tempest, earthquake, or other natural cause, the loss must be borne by the owner. See Comyns. Dig.; Sedgwick; Mayne; Field, Damages; 1 Rutherf. Inst. 399; see COMPENSATION; DAMAGES; MEASURE OF DAMAGES.

DAMAGE CLEER. The tenth part in the common pleas, and the twentieth part in the king's bench and exchequer courts, of all damages beyond a certain sum, which was to be paid the prothonotary or chief officer of the court in which they were recovered before execution could be taken out. At first it was a gratuity, and of uncertain proportions. Abolished by stat. 17 Car. II. c. 6. Cowel; *Termes de la Ley.*

DAMAGE FEASANT (French, *faisant dommage*, doing damage). A term usually applied to the injury which animals belonging to one person do upon the land of another, by feeding there, treading down his grass, corn, or other production of the earth. 3 Bla. Com. 6; Co. Litt. 142, 161; Com. Dig. *Pleader* (3 M, 26). By the common law, a distress of animals or things damage feasant is allowed. Gilb. Distr. 21; Poll. Torts 473, 478. It was also allowed by the ancient customs of France. 11 Toullier 402; Merlin, *Répert. Fourriere;* 1 Fournel, *Abandon.*

DAMAGED GOODS. Goods subject to duties, which have received some injury either in the voyage home, or while bonded in warehouse.

DAMAGES. The indemnity recoverable by a person who has sustained an injury, either in his person, property, or relative rights, through the act or default of another.

The sum claimed as such indemnity by a plaintiff in his declaration.

The injury or loss for which compensation is sought.

Compensatory damages. Those allowed as a recompense for the injury actually received.

Consequential damages. Those which, though directly, are not immediately, consequential upon the act or default complained of.

Double or treble damages. See MEASURE OF DAMAGES.

Exemplary damages. Those allowed for torts committed with fraud, actual malice, or deliberate violence or oppression, as a punishment to the defendant, and as a warning to other wrong doers. 22 S. E. Rep. (W. Va.) 58; Hale, Dam. 200; MEASURE OF DAMAGES.

General damages. Those which necessarily and by implication of law result from the act or default complained of.

Liquidated damages. See MEASURE OF DAMAGES.

Nominal damages. See MEASURE OF DAMAGES.

Punitive damages. See MEASURE OF DAMAGES.

Special damages. Such as arise directly, but not necessarily or by implication of law, from the act or default complained of.

These are either superadded to general damages, arising from an act injurious in itself, as when some particular loss arises from the uttering of slanderous words, actionable in themselves, or are such as arise from an act indifferent and not actionable in itself, but injurious only in its consequences, as when the words become actionable only by reason of special damage ensuing.

Unliquidated damages. See MEASURE OF DAMAGES.

Vindictive damages. See MEASURE OF DAMAGES.

In modern law, the term damages is not used in a legal sense to include the costs of the suit; though it was formerly so used. Co. Litt. 267 *a*; Dougl. 751.

The various classes of damages here given are those commonly found in the text-books and in the decisions of courts of common law. Other terms are of occasional use (as *resulting*, to denote consequential damages), but are easily recognizable as belonging to some one of the above divisions. The question whether damages are to be limited to an allowance compensatory merely in its nature and extent, or whether they may be assessed as a punishment upon a wrong-doer in certain cases for the injury inflicted by him upon the plaintiff, received much attention from the courts and was very fully and vigorously discussed by Greenleaf and Sedgwick, the latter of whom, though supporting the doctrine admitted that it was exceptional and anomalous and could not be logically supported; Sedgw. Dam. § 353. He attributes the origin of the principle to the rule making juries the judges of the damages; *id.* § 354. In cases of aggravated wrong there were large verdicts and the courts were powerless, although the early cases consisted mainly of setting them aside. Originating in the unrestrained expressions of judges in justifying verdicts, there grew up this doctrine of exemplary damages characterized as "a sort of hybrid between a display of ethical indignation, and the imposition of a criminal fine." The current of authorities set strongly (in numbers, at least) in favor of allowing punitive damages; 13 How. 363, and that rule of decision has prevailed in most of the states, though in some it is repudiated entirely; 53 Mich. 280; 114 Mass. 518; 11 Colo. 345; 11 Nev. 261; 56 N. H. 456; and in others the doctrine is also denied but exemplary damages were permitted on the ground that they were compensatory merely for mental suffering; 11 Nev. 350; 1 Wyo. 27. This rule prevailed in West Virginia; 31 W. Va. 220, 459; but was recently over-ruled; 22 S. E. Rep. (W. Va.) 58. The argument against such damages was based on the objection that it admits of the infliction of pecuniary punishment to an almost unlimited extent by an irresponsible jury, a view which is theoretically more obnoxious (supposing that there is no practical difference) than that which considers damages merely as a compensation, of the just

amount of which the jury may well be held to be proper judges. It also seemed to savor somewhat of judical legislation in a criminal department to extend such damages beyond those cases where an injury is committed to the feelings of an innocent plaintiff. See 2 Greenl. Ev. § 253; 2 Sedgw. Dam. 323; 1 Kent 630; 91 U. S. 465; Hale, Dam. 200; MEASURE OF DAMAGES.

It is, perhaps, hardly necessary to add that *direct* is here used in opposition to *remote*, and *immediate* to *consequential*.

In Pleading. In personal and mixed actions (but not in penal actions, for obvious reasons), the declaration must allege, in conclusion, that the injury is to the damage of the plaintiff, and must specify the amount of damages; Com. Dig. *Pleader* (C, 84); 10 Co. 116 *b*.

In personal actions there is a distinction between actions that sound in damages and those that do not; but in either of these cases it is equally the practice to lay damages. There is, however, this difference: that, in the former case, damages are the main object of the suit, and are, therefore, always laid high enough to cover the whole demand; but in the latter, the liquidated debt, or the chattel demanded, being the main object, damages are claimed in respect of the detention only of such debt or chattel, and are, therefore, usually laid at a small sum. The plaintiff cannot recover greater damages than he has laid in the conclusion of his declaration; Com. Dig. *Pleader* (C. 84); 10 Co. 117 *a*, *b*; Viner, Abr. *Damages* (R.); 1 Bulstr. 49; 2 W. Bla. 1300; 17 Johns. 111; 4 Denio 311; 8 Humphr. 530; 1 Ia. 336; 2 Dutch. 60. Where the jury returns a verdict for larger damages than are alleged or proved, it should be set aside; 66 Tex. 133.

In real actions no damages are to be laid, because in these the demand is specially for the land withheld, and damages are in no degree the object of the suit; Steph. Pl. 426; 1 Chit. Pl. 397–400.

General damages need not be averred in the declaration; nor need any specific proof of damages be given to enable the plaintiff to recover. The legal presumption of injury in cases where it arises is sufficient to maintain the action. Whether special damage be the gist of the action, or only collateral thereto, it must be particularly stated in the declaration, as the plaintiff will not otherwise be permitted to go into evidence of it at the trial, because the defendant cannot also be prepared to answer it. See 2 Sedgw. Dam. 606; 4 Q. B. 493; 11 Price 19; 7 C. & P. 804; 22 Pa. 471; 32 Me. 379; 23 N. H. 83; 21 Wend. 144; 4 Cush. 104, 408; 121 Mass. 393; 38 Cal. 689; 43 Conn. 562; 64 Vt. 442; 92 Mich. 304; 6 Wall. 578; 42 Ala. 176.

In Practice. To constitute a right to recover damages, the party claiming damages must have sustained a loss; the party against whom they are claimed must be chargeable with a wrong; the loss must be the natural and proximate consequence of the wrong.

There is no right to damages, properly so called, where there is no *loss*. A sum in which a wrong-doer is mulcted simply as punishment for his wrong, and irrespective of any loss caused thereby, is a "fine," or a "penalty," rather than damages. Damages are based on the idea of a loss to be compensated, a damage to be made good; 11 Johns. 136; 2 Tex. 460; 11 Pick. 527; 15 Ohio 726; 3 Sumn. 192; 4 Mass. 115; 91 Pa. 302; 104 Mass. 353; 16 Q. B. D. 613. See 142 N. Y. 391; Hale, Dam. 3. This loss, however, need not always be distinct and definite, capable of exact description or of measurement in dollars and cents. A sufficient loss to sustain an action may appear from the mere nature of the case itself. The law in many cases presumes a loss where a wilful wrong is proved; and thus also damages are awarded for injured feelings, bodily pain, grief of mind, injury to reputation, and for other sufferings which it would be impossible to make subjects of exact proof and computation in respect to the amount of the loss sustained; 2 Day 259; 3 H. & M'H. 510; 5 Ired. 545; 2 Humphr. 140; 15 Conn. 267; 8 B. Monr. 432; 94 Mich. 119; 112 N. C. 323; 39 Ill. App. 495; 82 Tex. 33. The rule is not that a loss must be proved by evidence, but that one must appear, either by evidence or by presumption, founded on the nature of the case.

There is no right to damages where there is no *wrong*. It is not necessary that there should be a tort, strictly so called,—a wilful wrong, an act involving moral guilt. The wrong may be either a wilful, malicious injury, as in the case of assault and battery, libel, and the like, or one committed through mere motives of interest, as in many cases of conversion of goods, trespasses on land, etc.; or it may consist in a mere neglect to discharge a duty with suitable skill or fidelity, as where a surgeon is held liable for malpractice, a sheriff for the escape of his prisoner, or a carrier for the neglect to deliver goods; or a simple breach of contract, as in case of refusal to deliver goods sold, or to perform services under an agreement; or it may be a wrong of another person for whose act or default a legal liability exists, as where a master is held liable for an injury done by his servant or apprentice, or a railroad company for an accident resulting from the negligence of its engineer. But there must be something which the law recognizes as a wrong, some breach of a legal duty, some violation of a legal right, some default or neglect, some failure in responsibility, sustained by the party claiming damages. For the sufferer by accident or by the innocent or rightful acts of another cannot claim indemnity for his misfortune. It is called *damnum absque injuria*, —a loss without a wrong, for which the law gives no remedy; Poll. Torts 22, 175; 15 Ohio 659; 11 Pick. 527; 11 M. & W. 755; 10 Metc. 371; 51 N. Y. 476; 38 N. J. L. 339; 53 N. H. 442; 60 Me. 175; 50 Barb. 316; 42 Md. 119. See 106 Mass. 194; L. R. 3 H. L. 330; 45 La. Ann. 1358; 140 N. Y. 267.

The obligation violated must also be one *owed to the plaintiff*. The neglect of a duty which the plaintiff had no legal right to

enforce gives no claim to damages. Thus, where the postmaster of Rochester, New York, was required by law to publish lists of letters uncalled for in the newspaper having the largest circulation, and the proprietors of the "Rochester Daily Democrat" claimed to have the largest circulation and to be entitled to the advertising, but the postmaster refused to give it to them, it was held that no action would lie against him for loss of the profits of the advertising. The duty to publish in the paper having the largest circulation was not a duty owed to the publisher of that paper. It was imposed upon the postmaster not for the benefit of publishers of newspapers, but for the advantage of persons to whom letters were addressed; and they alone had a legal interest to enforce it; 11 Barb. 135. See also, 17 Wend. 554; 11 Pick. 526.

Whether when the law gives judgment on a contract to pay money—*e. g.* on a promissory note—this is to be regarded as enforcing performance of the promise, or as awarding damages for the breach of it, is a question on which jurisconsults have differed. Regarded in the latter point of view, the default of payment is the wrong on which the award of damages is predicated.

The loss must be the *natural and proximate consequence* of the wrong; 2 Greenl. Ev. § 256; 2 Sedgw. Dam. 362; Field, Dam. 42; Hale, Dam. 4. Or, as others have expressed the idea, it must be the "direct and necessary," or "legal and natural," consequence. It must not be "remote" or "consequential." The loss must be the *natural* consequence. Every man is expected—and may justly be—to foresee the usual and natural consequences of his acts, and for these he may justly be held accountable; but not for consequences that could not have been foreseen; 17 Pick. 78; 3 Tex. 324; 13 Ala. N. S. 490; 28 Me. 361: 2 Wis. 427; 1 Sneed 515; 4 Blackf. 277; 6 Q. B. 928; 63 Hun 624; 62 Conn. 503; 134 N. Y. 471. See 152 Pa. 390, 394; 39 Fed. Rep. 440. It must also be the *proximate* consequence. Vague and indefinite results, remote and consequential, and thus uncertain, are not embraced in the compensation given by damages. It cannot be certainly known that they are attributable to the wrong, or whether they are not rather connected with other causes; 4 Jones, N. C. 163; 1 Sm. L. Cas. 302. See 64 Hun 209; 69 *id.* 202; 98 Cal. 45; 9 C. C. App. 134.

In cases of tort the rule has been thus stated: "The question is not what cause was nearest in time or place to the catastrophe. This is not the meaning of the maxim *causa proxima non remota spectatur*. The proximate cause is the efficient cause, the one that sets the other causes in operation. The causes that are merely incidental, or instruments of a superior or controlling agency, are not the proximate causes, and the responsible ones, though they may be nearer in time to the result. It is only when the causes are independent of each other that the nearest is, of course, to be charged with the disaster;" 95 U. S. 117. See CAUSA PROXIMA NON REMOTA SPECTATUR.

"The true inquiry is, whether the injury sustained was such as, according to common experience and the usual course of events, might reasonably be anticipated;" 118 Mass. 131. See L. R. 10 Q. B. 111; 4 Col. 344; S. C. 34 Am. Rep. 89, and note; 5 Ind. App. 444.

The foregoing are the general principles on which the right to recover damages is based. Many qualifying rules have been established, of which the following are among the more important instances. In an action for damages for an injury caused by negligence, the plaintiff must himself appear to have been free from fault; for if his own negligence in any degree contributed directly to produce the injury, he can recover nothing. The law will not attempt to apportion the loss according to the different degrees of negligence of the two parties; 1 C. & P. 181; 11 East 60; 7 Me. 51; 1 Ia. 407; 17 Pick. 284; 3 Barb. 49; 14 Ohio 364; 3 La. Ann. 441; 60 Mich. 403; though this rule has in some cases been relaxed in favor of the plaintiff; L. R. 1 Ap. Ca. 754; *e. g.*, if the injury would have occurred although the plaintiff had been free from negligence; 5 C. B. N. S. 585; 35 Ind. 463; 52 Mo. 434; 45 Vt. 72; or if the injury is wilful; 67 Ala. 533; 95 Ind. 263; 139 Ill. 596. See NEGLIGENCE. There is no right of action by an individual for damages sustained from a public nuisance, so far as he only shares the common injury inflicted on the community; 5 Co. 72. For any special loss occurred by himself alone, he may recover; 4 Maule & S. 101; 2 Bingh. 263; 1 Bingh. N. C. 222; 2 *id.* 281; 3 Hill, N. Y. 612; 22 Vt. 114; 7 Metc. 276; 1 Pa. 309; 17 Conn. 372; but in so far as the whole neighborhood suffer together, resort must be had to the public remedy; 7 Q. B. 339; 7 Metc. 276; 1 Bibb 293. Judicial officers are not liable in damages for erroneous decisions.

Where the wrong committed by the defendant amounted to a felony, the English rule was that the private remedy by action was stayed till conviction for the felony was had. This was in order to stimulate the exertions of private persons injured by the commission of crimes to bring offenders to justice. This rule has, however, been changed in some of the United States. Thus, in New York it is enacted that when the violation of a right admits of both a civil and criminal remedy, one is not merged in the other. And see 15 Mass. 336; 2 Stor. 59; Ware 78. A criminal prosecution and conviction for an assault and battery is not a bar to the recovery of punitive damages in a civil action for the same offence; but it may be shown in mitigation of damages; 151 Pa. 634; but see 64 Vt. 593. When a servant is injured through the negligence of a fellow-servant employed in the same enterprise or avocation, the common employer is not liable for damages. The servant, in engaging, takes the risk of injury from the negligence of his fellow-

servants; McKinn. Fellow-Serv. 18; 4 Metc. Mass. 49; 6 La. An. 495; 23 Pa. 384; 5 N. Y. 493; 15 Ga. 349; 15 Ill. 550; 3 Ohio St. 201; 5 Exch. 343. But this rule does not exonerate the master from liability for negligence of a servant in a different employment. See MASTER AND SERVANT. By the common law, no action was maintainable to recover damages for the death of a human being; 1 Campb. 493; 1 Cush. 475; 69 Tex. 192. But in England, by the 9 & 10 Vict. c. 93, known as Lord Campbell's Act, it has been provided that whenever the death of a person shall be caused by a wrongful act which would, if death had not ensued, have entitled the party injured to maintain an action, the party offending shall be liable notwithstanding the death. Similar statutes have been passed in several of the United States. See 15 N. Y. 432; 18 Mo. 162; 97 *id.* 253; 18 Q. B. 93; 77 Ga. 393; 39 Fed. Rep. 18.

Excessive or inadequate damages. Even in that large class of cases in which there is no fixed measure of damages, but they are left to the discretion of the jury, the court has a certain power to review the verdict, and to set it aside if the damages awarded are grossly excessive or unreasonably inadequate. The rule is, however, that a verdict will not be set aside for excessive damages unless the amount is so large as to satisfy the court that the jury have been misled by passion, prejudice, ignorance, or partiality; Field, Dam. 683; 19 Barb. 461; 9 Cush. 228; 16 B. Monr. 577; 22 Conn. 74; 27 Miss. 68; 10 Ga. 37; 6 Rich. 419; 1 Cal. 33, 363; 11 Gratt. 697; 2 Misc. Rep. 303; 69 Hun 346; 52 Fed. Rep. 87; 74 Ind. 520; 8 *id.* 165; 76 N. Y. 594; 85 Tenn. 400. But this power is very sparingly used; and cases are numerous in which the courts have expressed themselves dissatisfied with the verdict, but have refused to interfere, on the ground that the case did not come within this rule. See 3 Abb. Pr. 104; 22 Barb. 87; 20 Mo. 272; 15 Ark. 345; 6 Tex. 352; 16 Ill. 405; 2 Stor. 661; 1 Zabr. 183; 5 Mas. 197; 85 Wis. 102; 53 Minn. 341.

As a general rule, in actions of tort the court will not grant a new trial on the ground of the smallness of damages; 12 Mod. 150; 2 Stra. 940; 24 E. L. & Eq. 406; 23 Conn. 74. But they have the power to do so in a proper case; and in a few instances in which the jury have given no redress at all, when some was clearly due, the verdict has been set aside; 1 Cal. 450; 2 E. D. Sm. 349; 4 Q. B. 917.

An important case sustaining this view is reported in 5 Q. B. D. 78; s. c. 21 Alb. L. J. 62; there two verdicts of £7,000 and £16,000, respectively, were successively set aside as inadequate.

In the cases in which there is a fixed legal rule regulating the measure of damages, it must be stated to the jury by the presiding judge upon the trial. His failure to state it correctly is ground of exception; and if the jury disregard the instructions of the court on the subject, their verdict may be set aside. In so far, however, as the verdict is an honest determination of questions of fact properly within their province, it will not, in general, be disturbed. Sedgw. Dam. 604. See CONSEQUENTIAL DAMAGES; MEASURE OF DAMAGES. Consult Greenl. Ev.; Wood's Mayne; Field; Harris; Smith; Sutherland; T. Sedgwick and D. H. Sedgwick, Damages.

DAMNA (Lat. *damnum*). Damages, both inclusive and exclusive of costs.

DAMNATUS. In Old English Law. Condemned; prohibited by law; unlawful. *Damnatus coitus*, an unlawful connection. Black, L. Dict.

DAMNI INJURIÆ ACTIO (Lat.). **In Civil Law.** An action for the damage done by one who intentionally injured the beast of another. Calvinus, Lex.

DAMNOSA HÆREDITAS. A name given by Lord Kenyon to that species of property of a bankrupt which, so far from being valuable, would be a charge to the creditors: for example, a term of years where the rent would exceed the revenue.

The assignees are not bound to take such property; but they must make their election, and having once entered into possession they cannot afterwards abandon the property; 7 East 342; 3 Camph. 340.

DAMNUM (Lat.). That which is taken away; loss; damage; legal hurt or harm. Anderson, L. Dict.

DAMNUM ABSQUE INJURIA (Lat. injury without wrong). A wrong done to a man for which the law provides no remedy. Broom, Max. 1.

Injuria is here to be taken in the sense of *legal injury*; and where no malice exists, there are many cases of wrong or suffering inflicted upon a man for which the law gives no remedy; 2 Ld. Raym. 595; 11 M. & W. 755; 11 Pick. 527. Thus, if the owner of property, in the prudent exercise of his own right of dominion, does acts which cause loss to another, it is *damnum absque injuria*; 2 Barb. 168; 10 Metc. 371; 83 Pa. 144; see 113 *id.* 126; 10 M. & W. 109. A railroad company which exercises due care in blasting on its own land, in order to lay its tracks, is not liable for injury to adjoining property arising merely from the incidental jarring; 140 N. Y. 267.

So, too, acts of public agents within the scope of their authority, if they cause damage, cause simply *damnum absque injuria*; Sedgw. Dam. 29, 111; 8 W. & S. 85; 1 Pick. 418; 23 *id.* 360; 2 B. & Ald. 646; 1 Gale & D. 589; 4 Rawle 9; 2 Hill N. Y. 466; 14 Pa. 214; 9 Conn. 436; 4 N. Y. 195; 25 Vt. 49; 109 U. S. 395; 119 *id.* 284; 133 Mass. 489; 71 Me. 171. See 2 Zabr. 243; 1 Smith, Lead. Cas. 244; and Weeks on Doc. of Dam. Abs. Inj.

The state, in locating its public levees, acts in the exercise of its police powers, and private injury resulting therefrom is *damnum absque injuria*; 45 La. Ann. 1358.

DAMNUM FATALE. In Civil Law. Damages caused by a fortuitous event or inevitable accident; damages arising from the act of God.

Among these were included losses by shipwreck, lightning, or other casualty; also losses by pirates, or by *vis major*, by fire, robbery, and burglary; but theft was not numbered among these casualties. In general, bailees are not liable for such damages; Story, Bailm. 471.

DANEGELT. A tax or tribute imposed upon the English when the Danes got a footing in their island.

DANELAGE. The laws of the Danes which obtained in the eastern counties and part of the midland counties of England in the eleventh century. 1 Bla. Com. 65.

DANGERS OF THE RIVER. In a bill of lading this term means only the natural accidents incident to river navigation, and does not embrace such as may be avoided by the exercise of that skill, judgment, and foresight which are demanded from persons in a particular occupation. 35 Mo. 213. See 17 Fed. Rep. 478.

DANGERS OF THE SEA. See PERILS OF THE SEA.

DANGEROUS WEAPON. One dangerous to life. This must often depend upon the manner of using it, and the question should go to the jury. A distinction is made between a dangerous and a deadly weapon; 2 Curt. 241. A jackknife may be a dangerous weapon in fact, but whether it was such as matter of law was not decided; 119 Mass. 342. A heavy oak stick, three feet long and an inch thick, is a dangerous weapon but not a "deadly" weapon in the sense that from the use of it alone an attack would be as matter of law an aggravated assault under a Texas statute; 23 Tex. 579. See ARMS; CONCEALED WEAPONS.

DARREIN (Fr. *dernier*). Last. *Darrein continuance*, last continuance. See PUIS DARREIN CONTINUANCE; CONTINUANCE.

DARREIN PRESENTMENT. See ASSIZE OF DARREIN PRESENTMENT.

DARREIN SEISIN (L. Fr. last seisin). A plea which lay in some cases for the tenant in a writ of right. 3 Metc. Mass. 184; Jackson, Real Act. 285. See 1 Roscoe, Real Act. 206; 2 Prest. Abstr. 345.

DATE. The designation or indication in an instrument of writing of the time and place when and where it was made.

When the place is mentioned in the date of a deed, the law intends, unless the contrary appear, that it was executed at the place of the date; Plowd. 7 *b*. The word is derived from the Latin *datum* (given); because when the instruments were in Latin the form ran *datum*, etc. (given the —— day of, etc.).

A date is necessary to the validity of policies of insurance; but where there are separate underwriters, each sets down the date of his own signing, as this constitutes a separate contract; Marsh. Ins. 336; 2 Pars. Marit. Law 27. Written instruments generally take effect from the day of their date, but the actual date of execution may be shown, though different from that which the instrument bears; and it is said that the date is not of the essence of a contract, but is essential to the identity of the writing by which it is to be proved; 2 Greenl. Ev. §§ 12, 489, n.; Tayl. Ev. 186; 4 Cush. 403; 3 Wend. 233; 31 Me. 243; 32 N. J. L. 513; 70 Pa. 387; 91 *id.* 17; 17 E. L. & Eq. 548; 2 Greenl. Cruise, Dig. 618, n. See 100 Ill. 573; 19 L. J. Q. B. 435. And if the written date is an impossible one, the time of delivery must be shown; Shepp. Touchst. 72; Cruise, Dig. c. 2, s. 61.

A date in a note or bill is required only for the purpose of fixing the time of payment. If the time of payment is otherwise indicated, no date is necessary; 1 Ames, Bills and Notes 145, citing 8 Wend. 478; 4 Whart. 252. When a note payable at a fixed period after date has no date, a holder may fill the date with the day of issue; *ibid.*

It is usually presumed that a deed was delivered on the day of its date; but proof of the date of delivery must be given if the circumstances were such that collusion might be practised; Steph. Dig. Ev. 138; 77 Va. 92; 33 Gratt. 497; 112 Mo. 1. See 6 Bing. 296; 34 N. J. L. 93; 18 Me. 190. But this presumption does not hold in respect to deeds in fee, unattested and unacknowledged; 31 Barb. 155. Parol evidence is admissible to show that the date stated in the *in testimonium* clause of a mortgage deed of personal property is not its true date; 130 Mass. 355; 134 *id.* 52. There is a presumption as to a note that it was delivered on the day of its date; 107 Mass. 439.

In general, it is sufficient to insert the day, month, and year; but in recording deeds, and other recordable instruments, in Pennsylvania, in noting the receipt of a *fi. fa.*, or other writ of execution, the hour of reception must be given; 44 Pa. 438.

Where a date is given, both as a day of the week and a day of the month, and the two are inconsistent, the day of the month governs. Walk. 27.

In public documents, it is usual to give not only the day, the month, and the year of our Lord, but also the year of the United States, when issued by authority of the general government, or of the commonwealth, when issued under its authority.

See, generally, Bacon, Abr. *Obligations;* Com. Dig. *Fait* (B, 3); Cruise, Dig. tit. 32, c. 21, § 1; 1 Burr. 60; Dane, Abr. Index.

DATION. In Civil Law. The act of giving something. It differs from donation, which is a gift; dation, on the contrary, is giving something without any liberality; as, the giving of an office.

DATION EN PAIEMENT. In Civil Law. A giving by the debtor and receipt by the creditor of something in payment of a debt instead of a sum of money.

It is somewhat like the accord and satisfaction of the common law. 16 Toullier, n. 45; Pothier, *Vente*, n. 601. *Dation en paiement* resembles in some respects the contract of sale; *dare in solutum est quasi vendere*. There is, however, a very marked difference between a sale and a *dation en paiement*. *First.* The contract of sale is complete by the mere agreement of the parties; the *dation en paiement* requires a delivery of the thing given. *Second.* When the debtor pays a certain sum which he supposed he was owing, and he discovers he did not owe so much, he may recover back the excess; not so when property other than money has been given in payment. *Third.* He who has in good faith sold a thing of which he believed himself to be the owner, is not precisely required to transfer the property of it to the buyer; and while he is not troubled in the possession of the thing, he cannot pretend that the seller has not fulfilled his obligations. On the contrary, the *dation en paiement* is good only when the

debtor transfers to the creditor the property in the thing which he has agreed to take in payment; and if the thing thus delivered be the property of another, it will not operate as a payment. Pothier, *Vente*, nn. 602, 603, 604. See 1 Low. C. 53; 43 La. Ann. 952.

DATIVE. A word derived from the Roman law, signifying "appointed by public authority." Thus, in Scotland, an executor-dative is an executor appointed by a court of justice, corresponding to an English *administrator*. Mozley & W. Dict.

DAUGHTER. A female child; an immediate female descendant.

DAUGHTER-IN-LAW. The wife of one's son.

DAY. The space of time which elapses while the earth makes a complete revolution on its axis.

A portion of such space of time which, by usage or law, has come to be considered as the whole for some particular purpose.

The space of time which elapses between two successive midnights. 2 Bla. Com. 141.

That portion of such space of time during which the sun is shining.

Generally, in legal signification, the term included the time elapsing from one midnight to the succeeding one; 2 Bla. Com. 141; 89 Pa. 522; see 65 Ind. 589; but it is also used to denote those hours during which business is ordinarily transacted (frequently called a *business* day); 5 Hill 437; as well as that portion of time during which the sun is above the horizon (called, sometimes, a *solar* day), and, in addition, that part of the morning or evening during which sufficient of its light is above for the features of a man to be reasonably discerned; Co. 3d Inst. 63; 9 Mass. 154. Where a party is required to take action within a given number of days in order to secure or assert a right, the day is to consist of twenty-four hours, that is the popular and legal sense of the term; 107 Ill. 631.

By custom, the word *day* may be understood to include working-days only; 3 Esp. 121; 2 C. C. App. 650. In a similar manner only, a certain number of hours less than the number during which the work actually continued each day. 5 Hill 437.

Sundays and other public holidays falling within the number of days specified by a statute for the performance of an act, are often omitted from the computation, as not being judicial days; 1 Rob. (Va.) 676; 17 Gratt. 109; 12 Ga. 93; 46 Mo. 17; 92 Mich. 626; 145 Ill. 614; 55 Fed. Rep. 49; 2 C. C. App. 650. But see 31 Cal. 271. Where the last day of the six months within which an appeal or writ of error may be taken to review in the Circuit Court of Appeals, the judgment or decree of a lower court, falls on Sunday, the appeal cannot be taken or the writ sued out on any subsequent day; 4 C. C. App. 309. When the day of performance of contracts, other than instruments upon which days of grace are allowed, falls on Sunday, or other public holiday, it is not counted, and the contract may be performed on Monday; 20 Wend. 205; 27 N. J. L. 68; 50 Minn 303. See 1 Sandf. 664.

The time for completing commercial contracts is not limited to banking hours; 5 La. Ann. 514.

A day is generally, but not always, regarded in law as a point of time; and fractions will not be recognized; 2 B. & Ald. 586; 20 Vt. 653; 11 Mass. 204; 150 *id.* 158; 12 Colo. 285; 25 Fla. 371. And see 11 Conn. 17; 3 Op. Att. Gen. 82; 11 How. Pr. 193; 64 Pa. 240. See FRACTION OF A DAY.

It is said that there is no general rule in regard to including or excluding days in the computation of time from the day of a fact or act done, but that it depends upon the reason of the thing and the circumstances of the case; 9 Q. B. 141; 6 M. & W. 55; 15 Mass. 193; 19 Conn. 376; 5 Dak. 335; 12 Colo. 285. And see, also, 5 Co. 1 *a*; Dougl. 463; 4 Nev. & M. 378; 5 Metc. 439; 9 Wend. 346; 9 N. H. 304; 5 Ill. 420; 24 Pa. 272; 28 Atl. Rep. (N. J.) 578. Perhaps the most general rule is to exclude the first day and include the last; 153 Pa. 465; 54 Mo. App. 627; 150 Mass. 159; 12 A. & E. 635; 43 Conn. 56; 23 Mich. 1; 3 Den. 12. Such is the rule as to negotiable paper; 1 Dan. Neg. Instr. 496; 1 Pars. Bills & N. 385; 4 Am. L. Reg. N. S. 224 and note; 40 Pa. 372. See, generally, 2 Sharsw. Bla. Com. 141, n.

The rule now generally followed seems to be that not only in mercantile contracts, but also in wills and other instruments, and in the construction of statutes, the day of the date, or the day of the act from which a future time is to be ascertained, is to be excluded; 19 Conn. 376; 28 Barb. 284; 37 Mo. 574; 23 Ind. 48.

A statutory rule for computing time does not apply to ascertain the day, or the last day, on which a thing may be done, where such day is expressed by its date; 53 Minn. 269.

DAY BOOK. In Mercantile Law. An account-book in which merchants and others make entries of their daily transactions. This is generally a book of original entries, and, as such, may be given in evidence to prove the sale and delivery of merchandise or of work done.

DAY RULE. In English Practice. A rule or order of the court by which a prisoner on civil process, and not committed, is enabled, in term-time, to go out of the prison and its rule or bounds. Tidd. Pr. 961. Abolished by 5 & 6 Vict. c. 22.

DAYS IN BANK. In English Practice. Days of appearance in the court of common pleas, usually called *bancum*. They are at the distance of about a week from each other, and are regulated by some festival of the church.

By the common law, the defendant is allowed three full days in which to make his appearance in court, exclusive of the day of appearance or return-day named in the writ; 3 Bla. Com. 278. Upon his appearance, time is usually granted him for pleading; and this is called giving him day, or, as it is more familiarly expressed, a continuance. 3 Bla. Com. 316. When the suit is ended by discontinuance or by judgment for the defendant, he is discharged from further attendance, and is said to go thereof *sine die*, without day. See CONTINUANCE.

DAYS OF GRACE. Certain days allowed to the acceptor of a bill or the maker of a note in which to make payment, in addition to the time contracted for by the bill or note itself.

They are so called because formerly they were allowed as a matter of favor; but, the custom of merchants to allow such days of grace having grown into law, and been sanctioned by the courts, all bills of exchange are by the law merchant entitled to days of grace as of right. The statute of Anne making promissory notes negotiable confers the same right on those instruments. This act has been generally adopted

throughout the United States: and the days of grace allowed are three; 6 W. & S. 179; Chitty, Bills; Byles, Bills. Bank checks are due on presentation and are not entitled to days of grace; 36 Neb. 744. In Arkansas a bill payable at sight is entitled to grace; 53 Ark. 519; and on "demand" drafts in Arizona, Mississippi, Nebraska, Nevada, New Mexico, and South Dakota, grace is allowed.

The principle deducible from all the authorities is, that, as to every bill not payable on demand, the day on which payment is to be made to prevent dishonor is to be determined by adding three days of grace, where the bill itself does not otherwise provide, to the time of payment as fixed by the bill. This principle is formulated into a statutory provision in England in the bills of exchange act, 1882, 45 & 46 Vict. c. 61, § 14; 115 U. S. 383; 1 Pet. 31.

Where there is an established usage of the place where the bill is payable to demand payment on the fourth or other day instead of the third, the parties to it will be bound by such usage; 5 How. 317; 9 Wheat. 582; 1 Smith, Lead. Cas. 417. When the last day of grace happens on Sunday or a general holiday, as the Fourth of July, Christmas day, etc., the bill is due on the day previous, and must be presented on that day in order to hold the drawer and indorsers; Big. Bills & N. 90; 7 Wend. 460; 4 Dall. 127; 5 Binn. 541; 4 Yerg. 210; 10 Ohio 507; 1 Ala. 295; 3 N. H. 14; *contra*, 33 Neb. 646; unless changed by statute as in some states. Days of grace are, for all practical purposes, a part of the time the bill has to run, and interest is charged on them; 2 Cow. 712; 14 La. Ann. 265; 1 Dan. Neg. Instr. 489. According to the usage and custom of merchants to fix the liability of the indorser of negotiable paper, it should be protested on the last day of grace; 86 Tex. 299.

In computing the days of grace allowed in a bond for the payment of interest, the day when the interest became payable will not be counted; 49 N. J. Eq. 385. A bill payable in thirty days having been drawn and accepted on February 11th, of a leap year, the last day of grace falls on March 15th, the 29th of February being counted as a distinct day; 65 Ind. 582.

Our courts always assume that the same number of days are allowed in other countries; and a person claiming the benefit of a foreign law or usage must prove it; 13 N. Y. 290; 2 Vt. 129; 7 Gill & J. 78; 9 Pet. 33; 4 Metc. Mass. 203. When properly proved, the law of the place where the bill or note is payable prescribes the number of days of grace and the manner of calculating them; 1 Denio 367; Story, Pr. Notes §§ 216, 247. The tendency to adopt as laws local usages or customs has been materially checked; 8 N. Y. 190. By tacit consent, the banks in New York city have not claimed days of grace on bills drawn on them; but the courts refused to sanction the custom as law or usage; 25 Wend. 673.

According to law and usage, days of grace are allowed on bills payable at the places and in the countries following:—

United States of America, three days, except *California*, *Connecticut*, *Idaho*, *Illinois*, *Maine*, *Maryland*, *Massachusetts*, *Montana*, *New Jersey*, *New York*, *North Dakota*, *Ohio*, *Oregon*, *Pennsylvania*, *Utah*, *Vermont*, *Wisconsin*, and the *District of Columbia*, where no grace is allowed on time paper although in some of them three days are given on sight drafts.

Great Britain and *Ireland*, and *Australia*, three days.

France, none, protest one day after due date (*Bordeaux*, formerly ten days).

Germany, none, protest within two working days after due date (in *Berlin*, *Altona*, *Bremen*, *Frankfort*, and *Hamburg*, a different usage formerly prevailed, but not as to the last, within recent years).

Spain, none, protest within one day (in *Cadiz* it was formerly different).

Russia, ten days (but banks do not usually avail themselves of it); protest last day of grace.

Austria, *Belgium*, *Denmark*, *Italy*, *Sweden*, *Switzerland*, none, protest up to second day after due date.

Holland, *Portugal*, *Turkey*, *Poland*, *India*, *Japan*, *Argentine*, *Mexico*, none, protest one day after due date.

Brazil, none, protest on due date.

China, under consular jurisdiction.

The information as to foreign countries has been compiled for this work by the secretary of the London Institute of Bankers. As to the cities named, special inquiry is advised, when necessary.

Bankers' checks and demand notes or bills are payable on demand without grace. See 12 Am. L. Reg. N. S. 8; 36 Neb. 744.

DAYS OF THE WEEK. The courts will always take judicial notice of the days of the week; for example, when a writ of inquiry was stated in the pleadings to have been executed on the fifteenth of June, and upon an examination it was found to be Sunday, the proceeding was held to be defective; Fortesc. 373; Stra. 387.

DAYSMAN. An arbitrator, umpire, or elected judge. Cowel.

DAYWERE. As much arable land as could be ploughed in one day's work. Cowel.

DE ADMENSURATIONE. Of admeasurement.

Used of the writ of admeasurement of dower, which lies where the widow has had more dower assigned to her than she is entitled to. It is said by some to lie where either an infant heir or his guardian made such assignment at suit of the infant heir whose rights are thus prejudiced. 2 Bla. Com. 136; Fitzh. N. B. 348. It seems, however, that an assignment by a guardian binds the infant heir, and that after such assignment the heir cannot have his writ of admeasurement; 2 Ind. 388; 1 Pick. 314; 37 Me. 509; 1 Washb. R. P. 226.

Used also of the writ of admeasurement of pasture, which lies where the quantity of common due each one of several having rights thereto, has not been ascertained; 3 Bla. Com. 38. See ADMEASUREMENT OF DOWER.

DE ÆTATE PROBANDA (Lat. for proving age). A writ which lay to summon

a jury for the purpose of determining the age of the heir of a tenant *in capite* who claimed his estate as being of full age. Fitzh. N. B. 257.

DE ALLOCATIONE FACIENDA (Lat. for making allowance). A writ to allow the collectors of customs, and other such officers having charge of the king's money, for sums disbursed by them.

It was directed to the treasurer and barons of the exchequer.

DE ALTO ET BASSO. Of high and low. A phrase anciently used to denote the absolute submission of all differences to arbitration. Cowel.

DE ANNUA PENSIONE (Lat. of annual pension). A writ by which the king, having due unto him an annual pension from any abbot or prior for any of his chaplains which he will name who is not provided with a competent living, demands it of the said abbot or prior for the one that is named in the writ. Fitzh. N. B. 231; *Termes de la Ley, Annua Pensione.*

DE ANNUO REDITU (Lat. for a yearly rent). A writ to recover an annuity, no matter how payable. 2 Reeve, Hist. Eng. Law 258.

DE APOSTATA CAPIENDO (Lat. for taking an apostate). A writ directed to the sheriff for the taking the body of one who, having entered into and professed some order of religion, leaves his order and departs from his house and wanders in the country. Fitzh. N. B. 233; *Termes de la Ley, Apostata Capiendo.*

DE ARBITRATIONE FACTA (Lat. of arbitration had). A writ formerly used when an action was brought for a cause which had been settled by arbitration. Watson, Arb. 256.

DE ASSISA PROROGANDA (Lat. for proroguing assize). A writ to put off an assize issuing to the justices where one of the parties is engaged in the service of the king.

DE ATTORNATO RECIPIENDO (Lat. for receiving an attorney). A writ to compel the judges to receive an attorney and admit him for the party. Fitzh. N. B. 156 *b.*

DE AVERIIS CAPTIS IN WITHERNAM (Lat. for cattle taken in withernam). A writ which lies to take other cattle of the defendant where he has taken and carried away cattle of the plaintiff out of the country, so that they cannot be reached by replevin. *Termes de la Ley*; 3 Bla. Com. 149.

DE AVERIIS REPLEGIANDIS (Lat.). A writ to replevy beasts. 3 Bla. Com. 149.

DE AVERIIS RETORNANDIS (Lat. for returning cattle). Used of the pledges in the old action of replevin. 2 Reeve, Hist. Eng. Law 177.

DE BENE ESSE (Lat. formally; conditionally; provisionally). A technical phrase applied to certain acts deemed for the time to be well done, or until an exception or other avoidance. It is equivalent to provisionally, with which meaning the phrase is commonly employed. For example, a declaration is filed or delivered, special bail is put in, a witness is examined, etc., *de bene esse*, or provisionally; 3 Bla. Com. 383.

The examination of a witness *de bene esse* takes place where there is danger of losing the testimony of an important witness from death by reason of age or dangerous illness, or where he is the only witness to an important fact; 1 Bland, Ch. 238; 3 Bibb 204; 16 Wend. 601; 13 Ves. 261; 28 Ala. 141. In such case, if the witness be alive at the time of trial, his examination is not to be used; 2 Dan. Ch. Pr. 1111. See Haynes, Eq. 183; Mitf. Eq. Pl. 52, 149.

To declare *de bene esse* is to declare in a bailable action subject to the contingency of bail being put in; and in such case the declaration does not become absolute till this is done; Grah. Pr. 191.

When a judge has a doubt as to the propriety of finding a verdict, he may direct the jury to find one *de bene esse*; which verdict, if the court shall afterwards be of opinion that it ought to have been found, shall stand. Bac. Abr. *Verdict* (A). See, also, 11 S. & R. 84.

DE BIEN ET DE MAL. See DE BONO ET MALO.

DE BIENS LE MORT (Fr. of the goods of the deceased). Dyer 32.

DE BONIS ASPORTATIS (Lat. for goods carried away). The name of the action for trespass to personal property is trespass *de bonis asportatis.* Bull. N. P. 836; 1 Tidd, Pr. 5.

DE BONIS NON. See ADMINISTRATION.

DE BONIS PROPRIIS (Lat. of his own goods). A judgment against an executor or administrator which is to be satisfied from his own property.

When an executor or administrator has been guilty of a *devastavit*, he is responsible for the loss which the estate has sustained *de bonis propriis.* He may also subject himself to the payment of a debt of the deceased *de bonis propriis* by his false plea when sued in a representative capacity: as, if he plead *plene administravit* and it be found against him, or a release to himself when false. In this latter case the judgment is *de bonis testatoris si, et si non, de bonis propriis.* 1 Wms. Saund. 336 *b*, n. 10; Bacon, Abr. *Executor* (B, 3).

DE BONIS TESTATORIS (Lat. of the goods of the testator). A judgment rendered against an executor which is to be satisfied out of the goods or property of the testator: distinguished from a judgment *de bonis propriis.*

DE BONIS TESTATORIS AC SI (Lat. from the goods of the testator, *if he has any*, and, if *not, from those of the executor*). A judgment rendered where an executor falsely pleads any matter as a release, or, generally, in any case where he is to be charged in case his testator's estate is insufficient. 1 Wms. Saund. 366 *b*; Bacon, Abr. *Executor* (B, 3); 2 Archb. Pr. 148.

DE BONO ET MALO (Lat. for good or ill). A person accused of crime was said to put himself upon his country *de bono et malo*. The French phrase *de bien et de mal* has the same meaning.

A special writ of gaol delivery, one being issued for each prisoner: now superseded by the general commission of gaol delivery. 4 Bla. Com. 270.

DE CALCETO REPARENDO (Lat.). A writ for repairing a highway, directed to the sheriff, commanding him to distrain the inhabitants of a place to repair the highway. Reg. Orig. 154; Blount.

DE CARTIS REDDENDIS (Lat. for restoring charters). A writ to secure the delivery of charters; a writ of detinue. Reg. Orig. 159 *b*.

DE CATALLIS REDDENDIS (Lat. for restoring chattels). A writ to secure the return specifically of chattels detained from the owner. Cowel.

DE CERTIFICANDO. A writ requiring a thing to be certified. A kind of certiorari. Reg. Orig. 152.

DE CAUTIONE ADMITTENDA (Lat. for admitting bail). A writ directed to a bishop who refused to allow a prisoner to go at large on giving sufficient bail, requiring him to admit him to bail. Fitzh. N. B. 63 *c*.

DE COMMUNI DIVIDENDO. In Civil Law. A writ of partition of common property. See COMMUNI DIVIDENDO.

DE COMPUTO. Writ of account. A writ commanding a defendant to render a reasonable account to the plaintiff, or show cause to the contrary. The foundation of the modern action of account. Black, L. Dict.

DE CONTUMACE CAPIENDO. A writ issuing from the English court of chancery for the arrest of a defendant who is in contempt of the ecclesiastical court. 1 N. & P. 685; 5 Dowl. 213, 646; 5 Q. B. 335.

DE CURIA CLAUDENDA (Lat. of enclosing a court). An obsolete writ, to require a defendant to fence in his court or land about his house, where it was left open to the injury of his neighbor's freehold. 1 Crabb, R. P. 314; 6 Mass. 90.

DE DOMO REPARANDA (Lat.). The name of an ancient common-law writ, by which one tenant in common might compel his co-tenant to concur in the expense of repairing the property held in common. 8 B. & C. 269; 1 Thomas, Co. Litt. 216, note 17, and p. 787.

DE DONIS, THE STATUTE (more fully, *De Donis Conditionalibus*; concerning conditional gifts). The statute of Westminster the Second. 13 Edw. I. c. 1.

The object of the statute was to prevent the alienation of estates by those who held only a partial interest in the estate in such a manner as to defeat the estate of those who were to take subsequently. This was effected by providing that, in grants to a man and the heirs of his body or the heirs male of his body, the will of the donor should be observed according to the form expressed in the deed of gift (*per formam doni*); that the tenements so given should go, after the grantee's death, to his issue (or issue male), if there were any, and if none, should revert to the donor. This statute was the origin of the estate in fee tail, or estate tail, and by introducing perpetuities, it built up great estates and strengthened the power of the barons. See Bac. Abr. *Estates Tail*; 1 Cruise, Dig. 70; 1 Washb. R. P. 271. See CONDITIONAL FEE TAIL.

DE DOTE ASSIGNANDA (Lat. for assigning dower). A writ commanding the king's escheator to assign dower to the widow of a tenant *in capite*. Fitzh. N. B. 263, *c*.

DE DOTE UNDE NIHIL HABET (Lat. of dower in that whereof she has none). A writ of dower which lay for a widow where no part of her dower had been assigned to a widow. It is now much disused; but a form closely resembling it is still much used in the United States. 4 Kent 63; Stearns, Real Act. 302; 1 Washb. R. P. 230.

DE EJECTIONE CUSTODIÆ. A writ which lay for a guardian who had been forcibly ejected from his wardship. Reg. Orig. 162; Black, L. Dict.

DE EJECTIONE FIRMÆ. A writ which lay at the suit of the tenant for years against the lessor, reversioner, remainderman, or stranger who had himself deprived the tenant of the occupation of the land during his term. 3 Bla. Com. 199. Originally lying to recover damages only, it came to be used to recover the rest of the term, and then generally the possession of lands. Involving, in the question of who should have possession, the further question of who had the title, it gave rise to the modern action of ejectment. Brooke, Abr.; Adams, Ejectm.; 3 Bla. Com. 199 *et seq.*

DE ESTOVERIIS HABENDIS (Lat. to obtain estovers). A writ which lay for a woman divorced *a mensa et thoro* to recover her alimony or estovers. 1 Bla. Com. 441.

DE EXCOMMUNICATO CAPIENDO (Lat. for taking one who is excommunicated). A writ commanding the sheriff to arrest one who was excommunicated, and imprison him till he should become reconciled to the church. 3 Bla. Com. 102.

DE EXCOMMUNICATO DELIBERANDO (Lat. for freeing one excommuni-

cated). A writ to deliver an excommunicated person, who has made satisfaction to the church, from prison. 3 Bla. Com. 102.

DE EXONERATIONE SECTÆ. A writ to free the king's ward from suit in any court lower than the court of common pleas during the time of such wardship.

DE FACTO. Actually; in fact; in deed. A term used to denote a thing actually done.

An officer *de facto* is one who performs the duties of an office with apparent right, and under claim and color of an appointment, but without being actually qualified in law so to act. 37 Me. 423.

Where there is an office to be filled, and one acting under color of authority fills the office and discharges its duties, his actions are those of an officer *de facto*, and are binding on the public; 159 U. S. 596.

An officer in the actual exercise of executive power would be an officer *de facto*, and as such distinguished from one who, being legally entitled to such power, is deprived of it,—such a one being an officer *de jure* only. An officer holding without strict legal authority; 2 Kent 295. An officer *de facto* is frequently considered an officer *de jure*, and legal validity allowed his official acts; 10 S. & R. 250; 1 Coxe 318; 10 Mass. 290; 25 Conn. 278; 28 Wis. 364; 24 Barb. 587; 85 Me. 301; 19 N. H. 115; 2 Jones, N. C. 124; 55 Pa. 468; 45 Miss. 151; 8 How Pr. 363; 99 U. S. 20; 86 Ill. 283; 38 Conn. 449 (a very fully considered case); s. c. 9 Am. Rep. 409; 73 N. C. 546; 111 *id.* 729; 35 S. C. 192; 68 Mich. 273; 7 L. R. H. L. 894. But this is so only so far as the rights of the public and third persons are concerned. In order to sue or defend in his own right as a public officer, he must be so *de jure;* 89 Ill. 347. An officer *de facto* incurs no liability by his mere omission to act; 77 N. Y. 378; 59 How. Pr. 404; but see 108 Mass. 523; 101 U. S. 192.

An officer acting under an unconstitutional law, acts by color of title, and is an officer *de facto;* 56 Pa. 436. When a special judge is duly elected, qualifies, and takes possession of the office according to law, he becomes judge *de facto*, though his official oath is not filed as required by law; and the proceedings of the court, if unchallenged during his incumbency, cannot afterwards be questioned collaterally; 111 Mo. 542. See 65 Vt. 399; 49 Ark. 439; 96 Pa. 344; 86 Ill. 283.

Contracts and other acts of *de facto* directors of corporations are valid; Green's Brice, *Ultra Vires*, 522, n. c.; 70 N. C. 348; 35 Mo. 13; 21 Pa. 131.

An officer *de facto* is *prima facie* one *de jure;* 21 Ga. 217.

When the inspectors of an election fail to issue a certificate of election, one who has received the highest number of legal votes cast, and holding over as the present incumbent, has sufficient apparent authority or color of title to be considered an officer *de facto;* 67 Hun 169.

A government *de facto* signifies one completely, though only temporarily, established in the place of the lawful government; 42 Miss. 651, 703; 43 Ala. 204. See DE JURE; Austin, Jur. Lect. vi. p. 336.

A wife *de facto* only is one whose marriage is voidable by decree; 4 Kent 36.

Blockade *de facto* is one actually maintained; 1 Kent 44.

For a consideration of the validity of the acts of officers *de facto* see 34 Cent. Law J. 212.

DE FAIRE ECHELLE. In French Law. A clause commonly contained in the French policies of insurance, which is equivalent to a license for a vessel to touch and trade at intermediate ports. 14 Wend. 491.

DE HÆRETICO COMBURENDO (Lat. for burning a heretic). A writ which lay where a heretic had been convicted of heresy, had abjured, and had relapsed into heresy. It is said to be very ancient. 4 Bla. Com. 46.

DE HOMINE CAPTO IN WITHERNAM (Lat. for taking a man in withernam). A writ to take a man who had carried away a bondman or bondwoman into another country beyond the reach of a writ of replevin. 3 Bla. Com. 129.

DE HOMINE REPLEGIANDO (Lat. for replevying a man). A writ which lies to replevy a man out of prison, or out of the custody of a private person, upon giving security to the sheriff that the man shall be forthcoming to answer any charge against him. Fitzh. N. B. 66; 3 Bla. Com. 129. The statute—which had gone nearly out of use, having been superseded by the writ of *habeas corpus*—has been revived within a few years in some of the United States in an amended and more effectual form. It can be used only for the benefit of the person imprisoned. 1 Kent 404, n.; 34 Me. 136.

DE IDIOTA INQUIRENDO. An old common-law writ, long obsolete, to inquire whether a man be an idiot or not. 2 Steph. Com. 509.

DE INCREMENTO (Lat. of increase). Costs *de incremento*, costs of increase—that is, which the court assesses in addition to the damages established by the jury. See COSTS DE INCREMENTO.

DE INJURIA (Lat. The full term is, *de injuria sua propria absque tali causa*, of his own wrong without such cause; or, where part of the plea is admitted, *absque residuo causæ*, without the rest of the cause).

In Pleading. The replication by which in an action of tort the plaintiff denies the effect of excuse or justification offered by the defendant.

It can only be used where the defendant pleads matter merely in excuse and not in justification of his act. It is confined to those instances in which the plea neither denies the original existence of the right which the defendant is charged with having violated, nor alleges that it has been released

or extinguished, but sets up some new matter as a sufficient excuse or cause for that which would otherwise and in its own nature be wrongful. It cannot, therefore, be properly used when the defendant's plea alleges any matter in the nature of title, interest, authority, or *matter of record;* 8 Co. 66; 1 B. & P. 76; 4 Johns. 159, note; 1 Wend. 126; 25 Vt. 328; 12 Mass. 506; 38 N. J. L. 98; Steph. Pl. 276; Pep. Pl. 35.

The English and American cases are at variance as to what constitutes such legal authority as cannot be replied to by *de injuria.* Most of the American cases hold that this replication is bad whenever the defendant insists upon a right, no matter from what source it may be derived; and this seems to be the more consistent doctrine.

If the plea in any sense *justifies* the act, instead of merely excusing it, *de injuria* cannot be used; 4 Wend. 577; 1 Hill, N. Y. 78; 13 Ill. 80. The English cases, on the other hand, hold that an authority derived from a court *not of record* may be traversed by the replication *de injuria;* 3 B. & Ad. 2.

The plaintiff may confess that portion of a plea which alleges an authority in law or an interest, title, or matter of record, and aver that the defendant did the act in question *de injuria sua propria absque residuo causæ,* of his own wrong without the residue of the cause alleged; 1 Hill, N. Y. 78; 2 Am. Law Reg. 246; Steph. Pl. 276.

The replication *de injuria* puts in issue the whole of the defence contained in the plea; and evidence is, therefore, admissible to disprove any material averment in the whole plea; McKelv. Pl. 50; 8 Co. 66; 11 East 451; 10 Bingh. 157; 8 Wend. 129; 14 Wall. 613. See 2 Cr. M. & R. 338. In England, however, by a uniform course of decisions in their courts, evidence is not admissible under the replication *de injuria* to a plea, for instance, of *moderate castigavit* or *molliter manus imposuit,* to prove that an excess of force was used by the defendant; but it is necessary that such excess should be specially pleaded. There must be a new assignment; 2 Cr. M. & R. 338; 1 Bingh. 317; 1 Bingh. N. C. 380; 3 M. & W. 150.

In this country, on the other hand, though some of the earlier cases followed the English doctrine, later cases decide that the plaintiff need not plead specially in such a case. It is held that there is no new cause to assign when the act complained of is the same that is attempted to be justified by plea. Therefore the fact of the act being moderate is a part of the plea, and is one of the points brought in issue by *de injuria;* and evidence is admissible to prove an excess; 15 Mass. 351; 25 Wend. 371; 2 Vt. 474; 24 *id.* 218; 1 Zabr. 183.

Though a direct traverse of several points going to make up a single defence in a plea will be bad for duplicity, yet the general replication *de injuria* cannot be objected to on this ground, although putting the same number of points in issue; 3 B. & Ad. 1; 25 Vt. 330; 2 Bingh. N. C. 579; 3 Tyrwh. 491. Hence this mode of replying has a great advantage when a special plea has been resorted to, since it enables the plaintiff to traverse all the facts contained in any single point, instead of being obliged to rest his cause on an issue joined on one fact alone.

In England it is held that *de injuria* may be replied in assumpsit; 2 Bingh. N. C. 579.

In this country it has been held that the use of *de injuria* is limited to actions of tort; 2 Pick. 357. But in New Jersey it may be used in actions *ex contractu* wherever a special plea in excuse of the alleged breach of contract can be pleaded, as a general traverse to put in issue every material allegation in the plea; 38 N. J. L. 98. Whether *de injuria* can be used in actions of replevin seems, even in England, to be a disputed question. The following cases decide that it may be so used; 9 Bingh. 756; 3 B. & Ad. 2; *contra,* 1 Chit. Pl. 622.

The improper use of *de injuria* is held to be only a ground of general demurrer; 6 Dowl. 502; but see 3 M. & W. 230; 2 Pick. 357. Where it is improperly employed, the defect will be cured by a verdict; 5 Johns. 112; Hob. 76; 1 T. Raym. 50. See, generally, 11 Am. L. Reg. 577; Crogate's Case, 1 Sm. Lead. Cas. 247.

DE JUDAISMO, STATUTUM. The name of a statute passed in the reign of Edward I., which enacted severe penalties against the Jews. Barringt. Stat. 197.

DE JURE. Rightfully; of right; lawfully; by legal title. Contrasted with *de facto* (which see). 4 Bla. Com. 77.

Of right: distinguished from *de gratia* (by favor). By law: distinguished from *de æquitate* (by equity).

The term is variously applied; as, a king or officer *de jure,* or a wife *de jure.*

A government *de jure,* but not *de facto,* is one deemed lawful, which has been supplanted; a government *de jure* and also *de facto* is one deemed lawful, which is present or established; a government *de facto* is one deemed unlawful, but which is present or established. Any established government, be it deemed lawful or not, is a government *de facto.* Austin, Jur. sec. vi. 336. See DE FACTO.

DE LA PLUS BELLE (Fr. of the fairest). A kind of dower; so called because assigned from the best part of the husband's estate. It was connected with the military tenures, and was abolished, with them, by stat. 12 Car. II. cap. 24. Littleton § 48; 2 Bla. Com. 132, 135; Scrib. Dower 18; 1 Washb. R. P. 149, n.

DE LIBERTATIBUS ALLOCANDIS (Lat. for allowing liberties). A writ, of various forms, to enable a citizen to recover the liberties to which he was entitled. Fitzh. N. B. 229; Reg. Orig. 262.

DE LUNATICO INQUIRENDO (Lat.). The name of a writ directed to the sheriff, directing him to inquire by good and lawful men whether one therein named is a lunatic or not. See 4 Rawle 234; 5 Halst. 217; 6 Wend. 497; 19 Hun 292; 7 Abb. N. Cas. 425; 31 N. J. Eq. 203.

An inquisition in lunacy proceedings must show that the imbecility of the mind is such as to render the imbecile unfit for the government of himself and his property; 44 N. J. Eq. 564.

The English practice is now regulated by the Lunacy Acts (16 & 17 Vict. c. 70, and 25 & 26 Vict. c. 86), under which the lord chancellor, upon petition or information, grants a *commission* in the nature of this writ; 2 Steph. Com. 511. In the United States the practice is similar, and a commission of lunacy is appointed. In New York there is a state commissioner of lunacy. See Ray's Med. Jur. Ins.; Ordron. Jud. Asp. Ins. 225; 3 Abb. N. C. 187.

DE MANUCAPTIARE (Lat. of mainprize). A writ, now obsolete, directed to the sheriff, commanding him to take sureties for the prisoner's appearance,—usually called mainpernors—and to set him at large. Fitzh. N. B. 250; 1 Hale, Pl. Cr. 141; Coke, *Bail & Mainp.* c. 10; Reg. Orig. 268 *b*.

DE MEDIETATE LINGUÆ. See MEDIETATE LINGUÆ.

DE MEDIO (Lat. of the *mesne*). A writ in the nature of a writ of right, which lies where upon a subinfeudation the *mesne* (or middle) lord suffers his under-tenant or tenant *paravail* to be distrained upon by the lord paramount for the rent due him from the *mesne* lord. Booth, Real Act. 136; Fitzh. N. B. 135; 3 Bla. Com. 234; Co. Litt. 100 *a*.

DE MELIORIBUS DAMNIS (Lat.). Of the better damages. When a plaintiff has sued several defendants, and the damages have been assessed severally against each, he has the choice of selecting the best, as he cannot recover the whole. This is done by making an election *de melioribus damnis*.

DE MERCATORIBUS, THE STATUTE. The statute of Acton Burnell. See ACTON BURNELL.

DE MINIS. Writ of threats. A writ which lay where a person was threatened with personal violence, or the destruction of his property, to compel the offender to keep the peace. Reg. Orig. 88 *b*. 89; Fitzh. Nat. Brev. 79, G. 80; Black, L. Dict.

DE MODO DECIMANDI (Lat. of a manner of taking tithes).

A prescriptive manner of taking tithes, different from the general law of taking tithes in kind. It is usually by a compensation either in work or labor, and is generally called a *modus;* Cro. Eliz. 446; 2 P. Wms. 462; 2 Russ. & M. 102; 4 Y. & C. 269, 283; 2 Bla. Com. 29; 3 Steph. Com. 130.

DE NON DECIMANDO (Lat. of not taking tithes). An exemption by custom from paying tithes is said to be a prescription *de non decimando*. A claim to be entirely discharged of the payment of tithes, and to pay no compensation in lieu of them. Cro. Eliz. 511; 3 Bla. Com. 31.

DE NOVI OPERIS NUNCIATIONE (Lat.). **In Civil Law.** A form of injunction or interdict which lies in some cases for the party aggrieved, where a thing is intended to be done against his right. Thus, where one buildeth a house contrary to the usual and received form of building, to the injury of his neighbor, there lieth such an injunction, which being served, the offender is either to desist from his work or to put in sureties that he shall pull it down if he do not in a short time avow, *i. e.* show, the lawfulness thereof. Ridley, Civ. & Eccl. Law, pt. 1, c. 1, 8.

DE NOVO (Lat.). Anew; afresh. When a judgment upon an issue in part is reversed on error for some mistake made by the court in the course of the trial, a *venire de novo* is awarded, in order that the case may again be submitted to a jury.

DE ODIO ET ATIA (Lat. of hatred and ill will). A writ directed to the sheriff, commanding him to inquire whether a person charged with murder was committed upon just cause of suspicion, or merely *propter odium et atiam* (through hatred and ill will); and if upon the inquisition due cause of suspicion did not appear, then there issued another writ for the sheriff to admit him to bail. 3 Bla. Com. 128. This was one of the many safeguards by which the English law early endeavored to protect the innocent against the oppression of the powerful through a misuse of its forms. The writ was to issue of course to any one, without denial, and *gratis*. Bracton, l. 3, tr. 2, ch. 8; Magna Charta, c. 26; Stat. Westm. 2 (13 Edw. I.), c. 29. It was restrained by stat. Gloucester (6 Edw. I.), c. 9, and abolished by 28 Edw. III. c. 9, but revived, however, on the repeal of this statute, by the 42 Edw. III. c. 1; Co. 2d Inst. 43, 55, 315. It has now passed out of use. 3 Bla. Com. 129. See ASSIZE.

DE PARCO FRACTO (Lat. of pound-breach). A writ which lay where cattle taken in distress were rescued by their owner after being actually impounded. Fitzh. N. B. 100; 3 Bla. Com. 146; Reg. Orig. 116 *b*; Co. Litt. 47 *b*.

DE PARTITIONE FACIENDA (Lat. for making partition). The ancient writ for the partition of lands held by tenants in common.

DE PERAMBULATONE FACIENDA (Lat. for making a perambulation). A writ which lay where there was a dispute as to the boundaries of two adjacent lordships or towns, directed to the sheriff, commanding him to take with him twelve discreet and lawful knights of his county and make the perambulation and set the bounds and limits in certainty. Fitzh. N. B. 309, D. A similar provision exists in regard to town-lines in Connecticut, Maine, Massachusetts, and New Hampshire, by statute.

DE PLEGIIS ACQUIETANDIS (Lat. for clearing pledges). A writ which lay where one had become surety for another to pay a sum of money at a specified day, and the principal failed to pay it. If the surety was obliged to pay, he was entitled to this writ against his principal.

Fitzh. N. B. 37 C; 3 Reeve, Hist. Eng. Law 65.

DE PRÆROGATIVA REGIS (Lat. of the king's prerogative). The statute 17 Edw. I. st. 1, c. 9, defining the prerogatives of the crown on certain subjects, but especially directing that the king shall have ward of the lands of idiots, taking the profits without waste and finding them necessaries. 2 Steph. Com. 509.

DE PROPRIETATE PROBANDA (Lat. for proving property). A writ which issues in a case of replevin, when the defendant claims property in the chattels replevied and the sheriff makes a return accordingly. The writ directs the sheriff to summon an inquest to determine on the validity of the claim; and, if they find for the defendant, the sheriff merely returns their finding. The plaintiff is not concluded by such finding: he may come into the court and traverse it. Hamm. N. P. 456.

This writ has been superseded in England by the "summons to interplead;" in Pennsylvania and Delaware the "claim property bond" is a convenient substitute for the old practice, and similar to this is the practice under the New York Code. Morr. Repl. 304.

DE QUOTA LITIS (Lat). **In Civil Law.** A contract by which one who has a claim difficult to recover agrees with another to give a part, for the purpose of obtaining his services to recover the rest. 1 Duval, n. 201. See CHAMPERTY.

DE RATIONABILI PARTE BONORUM (Lat. of a reasonable part of the goods). A writ, long since obsolete, to enable the widow and children of a decedent to recover their proper shares of his personal estate. 2 Bla. Com. 492. The writ is said to be founded on the customs of the counties, and not on the common-law allowance. Fitzh. N. B. 122, L. See CUSTOM OF LONDON.

DE RATIONABILIBUS DIVISIS (Lat. for reasonable boundaries). A writ which lies to determine the boundaries between the lands of two proprietors which lie in different towns. The writ is to be brought by one against the other. Fitzh. N. B. 128, M; 3 Reeve, Hist. Eng. Law 48.

DE RECTO DE ADVOCATIONE (Lat. of right of advowson; called, also, *le droit de advocatione*). A writ which lay to restore the right of presentation to a benefice, for him who had an advowson, to himself and heirs in fee simple, if he was disturbed in the presentation. Year B. 39 Hen. VI. 20 *a*; Fitzh. N. B. 30, B.

DE REPARATIONE FACIENDA (Lat.). The name of a writ which lies by one tenant in common against the other, to cause him to aid in repairing the common property. 8 B. & C. 269.

DE RETORNO HABENDO (Lat.). The name of a writ issued after a judgment has been given in replevin that the defendant should have a return of the goods replevied.

The judgment for defendant at common law is *pro retorno habendo*. Plaintiff's pledges are also so called. See Morr. Repl.; REPLEVIN.

DE SALVA GUARDIA (Lat. of safeguard). A writ to protect the persons of strangers seeking their rights in English courts. Reg. Orig. 26.

DE SCUTAGIO HABENDO (Lat. of having scutage). A writ which lay in case a man held lands of the king by knight's service, to which homage, fealty, and escuage were appendant, to recover the services or fee due in case the knight failed to accompany the king to the war. It lay also for the tenant *in capite*, who had paid his fee, against his tenants. Fitzh. N. B. 83, C.

DE SECTA AD MOLENDINUM (Lat. of suit to a mill). A writ which lieth to compel one to continue his custom (of grinding) at a mill. 3 Bla. Com. 235; Fitzh. N. B. 122, M; 2 Reeve, Hist. Eng. Law 55.

DE SON TORT (Fr.). Of his own wrong. This term is usually applied to a person who, having no right to meddle with the affairs or estate of a deceased person, yet undertakes to do so, by acting as executor of the deceased. See EXECUTOR.

DE SON TORT DEMESNE (Fr.). Of his own wrong. See DE INJURIA.

DE SUPERONERATIONE PASTURÆ (Lat. of surcharge of pasture). A writ lying where one who had been previously impleaded in the county court was again impleaded in the same court for surcharging common of pasture, and the cause was removed to Westminster Hall. Reg. Jur. 36 *b*.

DE TALLAGIO NON CONCEDENDO (Lat. of not allowing talliage). The name given to the statutes 25 and 34 Edw. I., restricting the power of the king to grant talliage. Co. 2d Inst. 532; 2 Reeve, Hist. Eng. Law 104. See TALLIAGE.

DE UNA PARTE (Lat.). A deed *de una parte* is one where only one party grants, gives, or binds himself to do a thing to another. It differs from a deed *inter partes* (*q. v.*). See DEED POLL.

DE UXORE RAPTA ET ABDUCTA (Lat. of a wife ravished and carried away). A kind of writ of trespass. Fitzh. N. B. 89, O; 3 Bla. Com. 139.

DE VENTRE INSPICIENDO (Lat. of inspecting the belly). A writ to inspect the body where a woman feigns to be pregnant, to see whether she is with child. It lies for the heir presumptive to examine a widow suspected to be feigning pregnancy in order to enable a supposititious heir to obtain the estate. 1 Bla. Com. 456; 2 Steph. Com. 287; Cro. Eliz. 556; Cro. Jac. 685; 2 P. Wms. 693; 21 Viner, Abr. 547.

It lay also where a woman sentenced to death pleaded pregnancy; 4 Bla. Com. 395.

This writ has been recognized in America; 2 Chandl. Am. Cr. Tr. 381.

DE VICINETO (Lat. from the neighborhood). The sheriff was anciently directed in some cases to summon a jury *de vicineto*; 3 Bla. Com. 360.

DE WARRANTIA CHARTÆ (Lat. of warranty of charter). This writ lieth properly where a man doth enfeoff another by deed and bindeth himself and heirs to warranty. Now, if the defendant be impleaded in an assize, or in a writ of entry in the nature of an assize, in which actions he cannot vouch, then he shall have the writ against the feoffor or his heirs who made such warranty; Fitzh. N. B. 134, D; Cowel; *Termes de la Ley;* Blount; 3 Reeve, Hist. Eng. Law 55. Abolished by 3 & 4 Will. IV. c. 27.

DE WARRANTIA DIEI. A writ which lay for a party in the service of the king who was required to appear in person on a certain day, commanding the justices not to record his default, the king certifying to the fact of such service. Fitzh. N. B. 36.

DEACON. In Ecclesiastical Law. The lowest degree of holy orders in the Church of England. 2 Steph. Com. 660; Mozley & W.

DEAD BODY. A corpse.

There is no right of property, in the ordinary sense of the word, in a dead human body; Co. Inst. 202; 4 Bla. Com. 235; 99 Mass. 281; 10 R. I. 227; 31 Leg. Int. 268; 3 Edw. Ch. 155; 10 Cent. L. J. 303; 5 W. R. 318; 2 Wms. on Ex., 7th Am. ed. 165 n.; but there are rights attached to it which the law will protect; 10 Cent. L. J. 304; and for the health and protection of society, it is a rule of the common law, and this has been confirmed by statutes in civilized states and countries, that public duties are imposed upon public officers, and private duties upon the husband or wife and the next of kin of the deceased, to protect the body from violation and see that it is properly interred, and to protect it after it is interred; 1 Witthaus & Becker's Med. Jur. 297. The executors have a right to possession of it and it is their duty to bury it. 2 Wms. on Ex., 7th Am. ed. 165 n.; 10 Pick. 154; 42 Pa. 293. It was held in an English case that a direction by will as to the disposition of the testator's body cannot be enforced. In this case it was doubted as to whether it is lawful to burn a body, but the point was not decided; 20 L. R. Ch. D. 659; S. C. 21 Am. L. Reg. N. S. 508; but subsequently it was held that it was no misdemeanor to burn a body unless it was done in such a manner as to amount to a nuisance; 12 Q. B. D. 247.

The right to make testamentary direction concerning the disposal of the body has been conferred by statute in several states; *e. g.* New York, Maine, Oklahoma, and Minnesota. The question of the right of disposal of the body is ably discussed by Mr. R. S. Guernsey in 10 Cent. L. J. 303, 325, and he concludes upon the authorities that in the absence of testamentary disposition the right and duty of burial devolves upon relatives "as follows: 1. Husband or wife. 2. Children. 3. If none—(1) Father. (2) Mother. 4. Brothers and sisters. 5. Next of kin according to the course of the common law, according to the law of descent of personal property;" *id.* 327. Probably the rule may be fairly stated that there be no husband or wife of the deceased, the nearest of kin in order of right to administration is charged with the duty of burial.

Where a widow ordered a funeral of her husband, it was *held*, that she was liable for the expense, although she was an infant at the time, the court holding that the expenses fell under the head of necessaries, for which infants' estates are liable; 13 M. & W. 252.

The leaving unburied the corpse of a person for whom the defendant is bound to provide Christian burial, as a wife or child, is an indictable misdemeanor, if he is shown to have been of ability to provide such burial; 2 Den. 325. And every householder in whose house a dead body lies is bound by the common law, if he has the means to do so, to inter the body decently; and this principle applies where a person dies in the house of a parish or a union; 12 A. & E. 773. The expense for such burial may be paid out of the effects of deceased; 3 Camp. 298.

To disinter a dead body without lawful authority, even for the purpose of dissection, is a misdemeanor, for which the offender may be indicted at common law; 1 Russ. Cr. 414; 1 D. & R. 13; R. & R. 366, n. b; 4 Blackf. 328; 19 Pick. 304; 1 Greenl. 226. This offence is punished by statute in New Hampshire, in Vermont, in Massachusetts, in Wisconsin, in New York. See 1 Russ. 414, n. A. There can be no larceny of a dead body; 2 East, Pl. Cr. 652; 12 Co. 106; but may be of the clothes or shroud upon it; 13 Pick. 402; 12 Co. 113; Co. 3d Inst. 110; 1 Greenl. 226; 68 Mo. 208.

After the right of burial has once been exercised by the person charged with the duty of burial, or where such person has consented to the burial by another person, no right to the corpse remains except to protect it from unlawful interference; 43 N J. Eq. 140; 11 Phila. 303; 10 B. & S. 298. But see 130 Mass. 422. An autopsy may be made by a physician at the tomb of the deceased, under legal direction and at the request of the relatives, for the purpose of ascertaining whether a crime has been committed in producing death, and he does not render himself liable by removing and keeping in his possession a portion of the skull of the deceased at the direction of the coroner; 78 Wis. 483. It is the duty of the coroner after death by violence to cause an autopsy to be made; the surgeon who makes it can recover from the county for his labor; 34 Pa. 301; 86 Ind. 154; 38 N. Y. 964. The matter of ordering autopsies and dissections of dead bodies, or exhuming them for that purpose, has been regulated by statutes in nearly all the states of the

United States. See for collection of statutes relative to this entire subject, 1 Witthaus & Becker, Med. Jur. 304.

In England, where a son had removed, without leave, the body of his mother from the burial-ground of a congregation of Protestant dissenters, to bury it in church ground, it was held that he was guilty of a misdemeanor at common law, and that it was no defence to such a charge that his motives were pious and laudable; 1 Dearsl. & B. 160; s. c. 7 Cox, C. C. 214. But where the master of a workhouse, having as such the lawful possession of the bodies of paupers who died therein, and who therefore was authorized under the statute to permit the bodies of such paupers to undergo anatomical examination, unless to his knowledge the deceased person had expressed in his lifetime, in the manner therein mentioned, his desire to the contrary, "or unless the surviving husband or wife, or any known relative, of the deceased person, should require the body to be interred without such examination," in order to prevent the relatives of the deceased paupers from making this requirement, and to lead them to believe that the bodies were buried without dissection, showed the bodies to the relatives in coffins, and caused the appearance of a funeral to be gone through, and, having by this fraud prevented the relatives from making the requirement, then sold the bodies for dissection, he was held not to be indictable at common law; 1 Dearsl. & B. 590. When a *post mortem* examination is required by law, neither the coroner, nor the physician who performs it, nor the person in whose room it is held, will be liable to the relations of the deceased for injury to their feelings caused by the mutilations of the body; 32 Atl. Rep. (Md.) 177.

The preventing a dead body from being buried is also an indictable offence; 2 Term 734; 4 East 460; 1 Russ. Cr. 415, 416, note A. To inter a dead body found in a river, it seems, would render the offender liable to an indictment for a misdemeanor, unless he first sent for the coroner; 1 Ky. 250; or to cast it into a river without the rites of sepulchre; 1 Me. 226.

The purchaser of land upon which is located a burial ground may be enjoined from removing bodies therefrom, if he attempts to do so against the wishes of the relatives or next of kin of the deceased. Every interment is a concession of the privilege which cannot afterward be repudiated, and the purchaser's title to the ground is fettered with the right of burial; 2 Brewster (Pa.) 372. But the right of the municipal or state authorities, with the consent of the owner of the burial lot or in the execution of eminent domain, to remove dead bodies from cemeteries is well settled; 88 Pa. 42; 30 Ind. 482; 63 N. H. 17. To seize a dead body on pretence of arresting for debt is *contra bonos mores* and an extortion on the relatives; 4 East 460. And in some states there are statutes declaring it to be a misdemeanor to attach or seize under execution a dead body; Cal. Pen. Code § 295; Me. Rev. St. ch. 124, § 26; Mass. Pub. St. ch. 207, § 46; R. I. Pub. St. § 3222.

The law of Indiana (2 R. S. p. 473) prohibits the removal of a dead body without the consent of a near relative or of the deceased in his lifetime. The laws of Louisiana, California, Connecticut, Vermont, and Ohio, recognize the interest of the relatives of a deceased person in his body.

In 4 Bradf. Sur. 502, a learned report by S. B. Ruggles lays down these conclusions, substantially:—

1. Neither a corpse nor its burial is subject to ecclesiastical cognizance.

2. The right to bury a corpse and preserve it is a legal right.

3. Such right, in the absence of testamentary disposition, is in the next of kin (so in 13 Ind. 138).

4. The right to protect the corpse includes the right to preserve it by burial, to select the place of sepulture, and to change it at pleasure.

5. If the burial-place be taken for public use, the next of kin must be indemnified for removal and reinterring, etc. Approved by the Sup. Ct. N. Y. (1856).

A widow who allows her husband to be buried in a certain place may not disturb his remains; her right to the body of her deceased husband being terminated by the burial, and any further disposition of such body belonging thereafter exclusively to his next of kin; 43 Pa. 293. When one in accordance with his own wishes was buried in his own lot by his widow, and she removed his remains, she was ordered, in equity, to restore them; 10 R. I. 227; s. c. 14 Am. Rep. 672, and note. A son is not allowed to remove his father's remains against his mother's wishes; 18 Abb. N. C. 78; see 10 Alb. L. J. 70, with note. After interment, the control over a dead body is in the next of kin living. But if they differ about its disposal, equity will not help its removal. Where a corpse has been properly buried, it is doubtful if even the next of kin can remove it; 16 Am. L. Reg. 155, and note. Where a wife allowed her husband's remains to be placed temporarily in a vault in New York, and his father removed them to his own vault, *Held*, that, in the absence of a request by the deceased husband in his lifetime, the widow might control the place of burial, but that she could not, under the circumstances, disturb their repose and take them to Kentucky; Southworth *v.* Southworth, in the New York Superior Court, 1881, reported in an article on this subject in 17 Can. L. J. 184. The husband having in a time of great distress of mind after his wife's death consented to her burial in a lot of the husbands of two of her sisters, and sought to remove her body to the lot owned by himself and his co-heirs, the defendants, being the lot owners, refused permission, and on application for injunction to restrain their interference, it was held that he had never consented to her burial in the lot as a final resting place, and that the defendants might be required by a court of chan-

cery to permit the removal. Chief Justice Gray said: Neither the husband nor the next of kin, have, strictly speaking, any right of property in a dead body; but controversies between them as to the place of its burial are, in this country where there are no ecclesiastical courts, within the jurisdiction of a court of equity; 130 Mass. 423; 99 *id.* 281; 2 Bla. Com. 429; 60 How. Pr. 368.

See Bingh. Christ. Antiq.; Tyler, Am. Eccl. Law; Burton, The Burial Question; Cooley, Torts 280; The Law of Burials, Anon.; 1 Witthaus & Becker, Med. Jur. 297; note in 18 Abb. N. C. 75, containing a list of law literature on this and kindred topics; notes to Moak's Eng. Rep. 656; BURIAL; CEMETERY; CORPSE.

DEAD-BORN. A dead-born child is to be considered as if it had never been conceived or born; in other words, it is presumed it never had life, it being a maxim of the common law that *mortuus exitus non est exitus* (a dead birth is no birth). Co. Litt. 29 *b*. See 2 Paige, Ch. 35; 4 Ves. 334.

This is also the doctrine of the civil law. Dig. 50. 16. 129. *Non nasci, et natum mori, pari sunt* (not to be born, and to be born dead, are equivalent). La. Civ. Code, art. 28; Domat, liv. prél. t. 2, s. 1, nn. 4, 6.

DEAD FREIGHT. The amount paid by a charterer for that part of the vessel's capacity which he does not occupy although he has contracted for it.

When the charterer of a vessel has shipped part of the goods on board, and is not ready to ship the remainder, the master, unless restrained by his special contract, may take other goods on board, and the amount which is not supplied, required to complete the cargo, is considered *dead freight*. The dead freight is to be calculated according to the actual capacity of the vessel. 3 Chit. Com. Law 399; 2 Stark. 450; McCull. Com. Dic. See L. R. 6 Q. B. 528.

DEAD LETTERS. Letters transmitted through the mails according to direction, and remaining for a specified time uncalled for by the persons addressed, are called dead letters.

By the act to amend the laws relating to the post-office department, June 8, 1872, the postmaster-general is authorized to regulate the times at which undelivered letters shall be sent to the dead-letter office, and for their return to the writers; and to have published a list of undelivered letters—by writing, posting, or advertising—in his discretion. If advertised, it must be in the newspaper of largest circulation regularly published within the delivery, and in case of dispute as to the calculation of computing newspapers, the postmaster may receive evidence and decide upon the fact. If no daily paper is published within the delivery, then the list may be advertised in the daily paper of adjoining delivery. One cent to be paid the publisher for each letter advertised. Letters addressed in a foreign language may be advertised in the journal of that language most used. Such journal must be in the same or adjoining district.

Dead letters containing valuables shall be registered in the department; and if they cannot be delivered to the person addressed or to the writer, the contents, so far as available, shall be included in receipts of department, subject to reclamation within four years; and such letters, containing valuables not available, shall be disposed of as the postmaster-general shall direct; the proceeds therefrom to be turned into the Treasury as a part of the postal revenues. U. S. Rev. Stat. sec. 3938.

Foreign dead letters remain subject to treaty stipulations.

The postage on a return dead letter is two cents, the single rate, unless it is registered as valuable, when double rates are charged.

By the act of July 1, 1864, c. 197, sect. 13, the contents of dead letters which have been registered in the department, so far as available, shall be used to promote the efficiency of the dead-letter office.

Dead matter is thus classified by the post-office department: unclaimed or refused by the party addressed; that which, from its nature, as obscene or relating to lottery, cannot be delivered; fictitious or indefinite address; fraudulent. See POSTAGE.

DEADLY WEAPON. See DANGEROUS WEAPON; ARMS.

DEAD MAN'S PART. That portion of the personal estate of a person deceased which by the custom of London became the administrator's.

If the decedent left wife and children, this was one-third of the residue after deducting the widow's chamber; if only a widow, or only children, it was one-half; 1 P. Wms. 341; Salk. 246; if neither widow nor children, it was the whole; 2 Show. 175. This provision was repealed by the statute 1 Jac. II. c. 17, and the same made subject to the statute of distributions. 2 Bla. Com. 518. See CUSTOM OF LONDON.

DEAD'S PART. In Scotch Law. The part remaining over beyond the shares secured to the widow and children by law. Of this the testator had the unqualified disposal. Stair, Inst. lib. iii. tit. 4, § 24; Bell, Dict.; Paterson, Comp. §§ 674, 848, 902. See LEGITIM.

DEAD-PLEDGE. A mortgage; *mortuum vadium*.

DEAF AND DUMB. A person deaf and dumb is *doli capax;* but with such persons who have not been educated, and who cannot communicate their ideas in writing, a difficulty sometimes arises on the trial.

A case occurred of a woman deaf and dumb who was charged with a crime. She was brought to the bar, and the indictment was then read to her; and the question, in the usual form, was put, Guilty or not guilty? The counsel for the prisoner then rose, and stated that he could not allow his client to plead to the indictment until it was explained to her that she was at liberty to plead guilty or not guilty. This was attempted to be done, but was found impossible, and she was discharged from the bar *simpliciter*. Case of Jean Campbell, 1 Wh. & St. Med. Jur. § 468. When the party indicted is deaf and dumb, he may, if he understands the use of signs, be arraigned, and the meaning of the clerk who addresses him conveyed to him by signs, and his signs in reply explained to the court, so as to justify his trial and the infliction of punishment; 14 Mass. 207; 1 Leach 102; 1 Chit. Cr. L. 417. See 8 Jones, N. C. 136. It was formerly said that persons deaf and dumb were presumably idiots; 1 Hale, P. C. 34; but

that doctrine was formulated at a period when the subject of the education of such unfortunate persons had received little or no attention. Such, baldly stated, is unquestionably not the rule of law. One deaf and dumb is not *consequently* insane, and his capacity appearing, he may be tried; 1 Bish. Cr. L. § 395; the ordinary presumption of sound mind and criminal responsibility, as was said by Gilpin, C. J., in a case of homicide by a person so afflicted, "does not apply to a deaf and dumb person when charged with the commission of a crime. On the contrary, the legal presumption is then directly reversed; for in such case it is incumbent upon the prosecution to prove to the satisfaction of the jury that the accused had capacity and reason sufficient to enable him to distinguish between right and wrong as to the act at the time when it was committed by him, and had a knowledge and consciousness that the act he was doing was wrong and criminal and would subject him to punishment; 1 Houst. Cr. Rep. 291. In that case the prisoner was acquitted "under circumstances wherein plainly they would not have done it if he had been endowed with hearing and speech;" 1 Bish. Cr. L. § 395.

A person deaf and dumb may be examined as a witness, provided he can be sworn; that is, if he is capable of understanding the terms of the oath, and assents to it, and if, after he is sworn, he can convey his ideas, with or without an interpreter, to the court and jury; Phill. Ev. 14. If he is able to communicate his ideas perfectly by writing, he will be required to adopt that as the more satisfactory method; but, if his knowledge of that method is imperfect, he will be permitted to testify by means of signs; 1 Greenl. Ev. § 366; Tayl. Ev. 1170.

DEAF, DUMB, AND BLIND. A man born deaf, dumb, and blind was formerly considered an idiot (*q. v.*). Fitzh. N. B. 233; 1 Bla. Com. 304. But this is only a legal presumption and is open to be rebutted by evidence of capacity; *id.*, Sherwood's note 23; 1 Chit. Med. Jur. 301, 345; 4 Johns. Ch. 441; 3 Ired. 535.

DEAFFOREST. In Old English Law. To discharge from being forest. To free from forest laws.

DEALER. A dealer in the popular, and therefore in the statutory sense of the word, is not one who buys to keep, or makes to sell, but one who buys to sell again. 27 Pa. 494; 33 *id.* 385.

DEAN. In Ecclesiastical Law. An ecclesiastical officer, who derives his name from the fact that he presides over ten canons, or prebendaries, at least.

There are several kinds of deans, namely: deans of chapters; deans of peculiars; rural deans; deans in the colleges; honorary deans; deans of provinces.

DEAN AND CHAPTER. In Ecclesiastical Law. The council of a bishop, to assist him with their advice in the religious and also in the temporal affairs of the see. 3 Co. 75; 1 Bla. Com. 382; Co. Litt. 103, 300; *Termes de la Ley;* 2 Burn, Eccl. Law 120.

DEAN OF THE ARCHES. The presiding judge of the court of arches. He was also an assistant judge in the court of admiralty. 1 Kent 371; 3 Steph. Com. 727.

DEATH. The cessation of life. The ceasing to exist.

Civil death is the state of a person who, though possessing natural life, has lost all his civil rights, and as to them, is considered as dead.

A person convicted and attainted of felony and sentenced to the state prison for life is, in the state of New York, in consequence of the act of 29th of March, 1799, and by virtue of the conviction and sentence of imprisonment for life, to be considered as civilly dead; 6 Johns. 118; 4 *id.* 228, 260. And a similar doctrine anciently prevailed in other cases at common law in England. See Co. Litt. 133; 1 Sharsw. Bla. Com. 132, n.

Natural death is the cessation of life.

It is also used to denote a death which occurs by the unassisted operation of natural causes, as distinguished from a *violent* death, or one caused or accelerated by the interference of human agency.

In Medical Jurisprudence. The cause, phenomena, and evidence of violent death are of importance.

An ingenious theory as to the cause of death has been brought forward by Philip, in his work on Sleep and Death, in which he claims that to the highest form of life three orders of functions are necessary,—viz.: the muscular, nervous, and sensorial; that of these the two former are independent of the latter, and continue in action for a while after its cessation; that they might thus continue always, but for the fact that they are dependent on the process of respiration; that this process is a voluntary act, depending upon the will, and that this latter is embraced in the sensorial function. In this view, death is the suspension or removal of the sensorial function, and that leads to the suspension of the others through the cessation of respiration. Philip, Sleep & D.; Dean, Med. Jur. 413 *et seq.*

Its phenomena, or signs and indications. Real is distinguishable from apparent death by the absence of the heart-beats and respiration. These conditions are, however, not always easy to determine positively when the following tests may be applied:— 1. Temperature of body the same as the surrounding air. 2. Intermittent shocks of electricity at different tensions give no indications of muscular irritability. 3. Movements of the joints of the extremities and of the jaw showing more or less *rigor-mortis.* 4. A bright needle plunged into the biceps muscle and left there showing no signs of oxidation on withdrawal (Cloquet's test). 5. The opening of a vein showing that the blood has coagulated. 6. The subcutaneous injection of ammonia causing a dirty brown stain (Monte Verde's test). 7. A fillet applied to the arm causing no filling of the veins on the distal side of the fillet (Richardson's test). 8. "Diaphanous test"; after death there is an absence of the translucence seen in the living when the hand is held before a strong light with the fingers extended and in contact. 9. "Eye test"; after

death there is loss of pupillary reaction to light and to anydriatics, and there is also loss of corneal transparency; H. P. Loomis in Witthaus & Becker, Med. Jur.

Its evidence when produced by violence. This involves the inquiry as to the cause of death in all cases of the finding of bodies divested of life through unknown agencies. It seeks to gather all the evidence that can be furnished by the body and surrounding circumstances bearing upon this difficult and at best doubtful subject. It more immediately concerns the duties of the coroner, but is liable to come up subsequently for a more thorough and searching investigation. As this is a subject of great, general, and growing interest, no apology is deemed necessary for presenting briefly some of the points to which inquiry should be directed, together with a reference to authorities where the doctrines are more thoroughly discussed.

The first point for determination is, whether the death was the act of God or the result of violence. Sudden death is generally produced by a powerful invasion of the living forces that develop themselves in the *heart*, *brain*, or *lungs*—the first being called *syncope*, the second *apoplexy*, and the third *asphyxia*. Dean, Med. Jur. 426.

The last two are the most important to be understood in connection with the subject of persons found dead.

In *death from apoplexy*, the sudden invasion of the brain destroys innervation, by which the circulation is arrested, each side of the heart containing its due proportion of blood, and the cavities are all distended from loss of power in the heart to propel its contents. Death from apoplexy is disclosed by the appearances revealed by dissection, particularly in the brain.

Death by asphyxia is still more important to be understood. It is limited to cases where the heart's action is made to cease through the interruption of the respiration. It is accomplished by all the possible modes of excluding atmospheric air from the lungs. The appearances in the body indicating death from asphyxia are, violet discolorations, eyes prominent, firm, and brilliant, cadaveric rigidity early and well marked, venous system of the brain full of blood, lungs distended with thick dark-colored blood, liver, spleen, and kidneys gorged, right cavities of the heart distended, left almost empty.

Many indications as to whether the death is the act of God or the result of violence may be gathered from the position and circumstances in which the body is found. As thorough an examination as possible should be first made of the body before changing its position or that of any of the limbs, or varying in any respect its relations with surrounding bodies. This is more necessary if the death has been apparently caused by wounds. Then the wounds require a special examination before any change is made in position, in order from their nature, character, form, and appearance to determine the instrument by which they were inflicted, and also their agency in causing the death. Their relations with external objects may indicate the direction from which they were dealt, and, if incised, their extent, depth, vessels severed, and hemorrhage produced may be conclusive as to the cause of death.

A thorough examination should be made of the clothes worn by the deceased, and any parts torn or presenting any unusual appearance should be carefully noted. A list should be made of all articles found on the body, and of their state and condition. The body itself should undergo a very careful examination. This should have reference to the color of the skin, the temperature of the body, the existence and extent of the cadaveric rigidity of the muscular system, the state of the eyes and of the sphincter muscles, noting at the same time whatever swellings, ecchymoses, or livid, black, or yellow spots, wounds, ulcers, contusions, fractures, or luxations, may be present. The fluids that have exuded from the nose, mouth, ears, sexual organs, etc., should be carefully examined: and when the deceased is a female, it will be proper to examine the sexual organs with care, with a view of ascertaining whether before death the crime of rape had or had not been committed.

Another point to which the attention should be directed is, the state of the body in reference to the extent and amount of decomposition that may have taken place in it, with the view of determining when the death took place. This is sometimes important to identify the murderer. The period after death at which putrefaction supervenes became a subject of judicial examination in Desha's case, reported in Dean, Med. Jur. 423 *et seq.*, and more fully in 2 Beck, Med. Jur. 44 *et seq.* Another interesting inquiry, where persons are found drowned, is presented in the inquiry as to the existence of *adipocere*, a compound of a yellowish-white color, consisting of calcareous or ammoniacal soap, which is formed in bodies immersed in water in from eight weeks to three years from the cessation of life. Tayl. Med. Jur., Hartsh. ed. 542; 1 Ham. Leg. Med. 104.

Another point towards which it is proper to direct examination regards the situation and condition of the place where the body is found, with the view of determining two facts:—*first*, whether it be a case of homicide, suicide, or visitation of God; and, *second*, whether, if one of homicide, the murder occurred there or at some other place, the body having been brought there and left. The points to be noted here are whether the ground appears to have been disturbed from its natural condition; whether there are any, and what, indications of a struggle; whether there are any marks of footsteps, and, if any, their size, number, the direction to which they lead, and whence they came; whether any traces of blood or hair can be found; and whether any, or what, instruments or weapons, which could have caused death, are found in the vicinity; and all such instruments

should be carefully preserved, so that they may be identified. Dean, Med. Jur. 257 ; 2 Beck, Med. Jur. 107, nn. 136, 250.

As the decision of the question relating to the cause of death is often important and difficult to determine, it may be proper to notice some of its signs and indications in a few of the most prominent cases where it is induced by violence.

Death by drowning is caused by asphyxia from suffocation, by nervous or syncopal asphyxia, or by asphyxia from cerebral congestion.

In the first, besides other indications of asphyxia, the face is pale or violet, a frothy foam at the mouth, froth in the larynx, trachea, and bronchi, water in the trachea and, sometimes, in the ramifications of the bronchia, and also in the stomach. In the second, the face and skin are pale, the trachea empty, lungs and brain natural, no water in the stomach. In the third, the usual indications of death by apoplexy are found on examination of the brain. See 1 Ham. Leg Med. 120.

Death by hanging is produced by asphyxia suspending respiration by compressing the larynx, by apoplexy pressing upon the veins and preventing the return of blood from the head, by fracture of the cervical vertebræ, laceration of trachea or larynx, or rupture of the ligaments of the neck, or by compressing the nerves of the neck. The signs and indications depend upon the cause of death. Among these are, face livid and swollen, lips distorted, eyelids swollen, eyes red and projecting, tongue enlarged, livid, compressed, froth about the lips and nostrils, a deep ecchymosed mark of the cord about the neck, sometimes ecchymosed patches on different parts of the body, fingers contracted or clenched, and the body retaining its animal heat longer than in other modes of death.

Death by strangulation presents much the same appearances, the mark of the cord being lower down on the neck, more horizontal, and plainer and more distinctly ecchymosed.

Death by cold leaves few traces in the system. Pale surface, general congestion of internal organs, sometimes effused serum in the ventricles of the brain.

Death by burning presents a narrow white line surrounding the burnt spot; external to that, one of a deep-red tint, running by degrees into a diffused redness. This is succeeded in a few minutes by blisters filled with serum.

Death by lightning usually exhibits a contused or lacerated wound where the electric fluid entered and passed out. Sometimes an extensive ecchymosis appears,—more commonly on the back, along the course of the spinal marrow.

Death by starvation produces general emaciation ; eyes and cheeks sunken ; bones projecting ; face pale and ghastly ; eyes red and open ; skin, mouth, and fauces dry ; stomach and intestines empty; gall-bladder large and distended ; body exhaling a fetid odor ; heart, lungs, and large vessels collapsed ; early commencement of the putrefactive process.

These and all other questions relating to persons found dead will be found fully discussed in works on medical jurisprudence.

The Legal Consequences. Persons who have been once shown to have been in life are always presumed thus to continue until the contrary is shown ; so that the burden is on the party asserting the death to make proof of it ; 2 East 312 ; 2 Rolle 461. But proof of a long continued absence unheard from and unexplained will lay a foundation for presumption of death ; 155 Mass. 461 ; 83 Me. 289 ; 83 Ky. 219 ; but where an heir at law and devisee marries in the state and afterwards removes with their children to the west, and nothing is heard of him or them for forty-five or fifty years by any of their relations living in the state, the court will not instruct the jury to presume that they were all dead without issue ; 6 Houst. 447. Various periods of time are found in the adjudged cases to warrant such presumption. It was held to arise after twenty-seven years ; 3 Bro. C. C. 510 ; twenty years, sixteen years ; 5 Ves. 458 ; 155 Mass. 359 ; fourteen years ; 3 S. & R. 390 ; twelve years ; 18 Johns. 141 ; eleven years ; 7 Mackey 268. The general rule, as now understood, is that the presumption of the duration of life ceases at the expiration of seven years from the time when the person was last known to be living ; 1 Phil. Ev., 4th Am. ed. 640 ; 1 Greenl. Ev. § 41 ; Tayl. Ev. 216 ; 5 Johns. 263 ; 5 B. & Ad. 86 ; 11 Ky. L. Rep. 219 ; 126 Pa. 297 ; 69 Tex. 19. There are cases, however, where a presumption of death may be raised from even a shorter absence ; 45 Minn. 159 ; 125 N. Y. 610 ; and while seven years is the period in which the presumption of continued life ceases, yet this period may be shortened by proof of such facts and circumstances as, submitted to the test of experience, would force a conviction of death within a shorter period ; 71 Fed. Rep. 258 ; 97 U. S. 628 ; 130 Mass. 505 ; 18 Neb. 664 ; but the law raises no presumption as to the exact time of death ; 97 U. S. 628 ; 73 Wis. 170. See article in 2 Harv. L. Rev. ; 34 Sol. Journ. 247. It seems that such continued absence for seven years from the particular state of his residence, without showing an absence from the United States, is sufficient ; 10 Pick. 515 ; 1 Rawle 373 ; 1 A. K. Marsh. 278 ; 1 Penning. 167 ; 2 Bay 476 ; but the statutory presumption of the death of a person will not be received until all reasonable doubt of his death, at a given time, is removed ; 49 N. J. Eq. 420. There are cases, however, in which an absence of seven years will not raise a presumption of death without issue, as where it is probable that the failure to communicate with friends is intentional ; 66 Hun 266. See ESCHEAT.

The record of the probate of a will is not competent evidence of death ; 60 N. Y. 121 ; s. c. 19 Am. Rep. 144, and note. But it is held that where a foreign court of competent jurisdiction has made a grant of administration on the presumption of death,

such grant may be accepted by the court of probate as sufficient proof of the death; [1892] Prob. 255. A letter contained in an envelope requesting a return to the writer, if not called for, and showing the post office stamp that it had been returned to the writer, is admissible as affording ground for an inference, more or less strong, of the death of the addressee; 63 Vt. 667.

Questions of great doubt and difficulty have arisen where several persons, respectively entitled to inherit from one another, happen to perish all together by the same event, such as a shipwreck, a battle, or a conflagration, without any possibility of ascertaining who died first. In such cases the French civil code and the civil code of Louisiana lay down rules (the latter copying from the former) which are deduced from the probabilities resulting from the strength, age, and difference of sex of the parties.

If those thus perishing together were under fifteen, the eldest shall be presumed the survivor. If they were all above sixty, the youngest shall be presumed the survivor. If some were under fifteen and others above sixty, the former shall be presumed the survivors. If those who have perished together had completed the age of fifteen and were under sixty, the male shall be presumed the survivor where the ages are equal or the difference does not exceed one year. If they were of the same sex, that presumption shall be admitted which opens the succession in the order of nature; and thus the younger must be presumed to have survived the elder. French Civ. Code, art. 720–722; La. Civ. Code, art. 930–933; 76 Cal. 649.

The English common law has never adopted these provisions, or gone into the refinement of reasoning upon which they are based. It requires the survivorship of two or more to be proved by facts, and not by any settled legal rule or prescribed presumption. In some of the cases that have arisen involving this bare question of survivorship, the court have advised a compromise, denying that there was any legal principle upon which it could be decided. In others, the decision has been that they all died together, and that none could transmit rights to others; 1 W. Bla. 640; Fearne, Posth. Works 38, 39; 2 Phill. 261; Cro. Eliz. 503; 1 Metc. Mass. 308; 3 Hagg. Eccl. 748; 5 B. & Ad. 91; 1 Y. & C. Ch. 121; 1 Curt. 405, 429; 23 Kan. 276; 3 Redf. 87; [1892] Prob. 142; 73 Me. 403; that is, the one who bears the burden of proof of survivorship fails in his case; 75 N. Y. 78. Where a mother and daughter die in the same year, but there is no evidence of the precise date of the death of the mother, an assumption that she died before the daughter is not warranted; 81 Tex. 678.

Where the death of two or more persons result from a common disaster, the case must be determined upon its own peculiar facts and circumstances, whenever the evidence is sufficient to support a finding as to survivorship; 73 Wis. 445.

Where land has been sold on administration proceedings under a petition alleging the decease of a person because of his disappearance from home and failure to hear from him for a period of seven years, he cannot on his return recover it in ejectment against innocent purchasers who have taken possession and made valuable improvements; 5 Wash. St. 309.

As to contracts. These are, in general, not affected by the death of either party. The executors or administrators of the decedent are required to fulfil all his engagements, and may enforce all those in his favor. But to this rule there are the following exceptions, in which the contracts are terminated by the death of one of the parties:—

The contract of marriage. See MARRIAGE.

The contract of partnership. See PARTNERSHIP.

Those contracts which are altogether personal: as, where the deceased has agreed to accompany the other party to the contract on a journey, or to serve another; Pothier, Obl. c. 7, art. 3, §§ 2, 3; 24 Fed. Rep. 583; or to instruct an apprentice; Bacon, Abr. *Executor*, P; 1 Burn, Eccl. Law 82; Hamm. Partn. 157; Ans. Contr. 325; 1 Rawle 61; also an instance of this species of contract in 2 B. & Ad. 303. In all those cases where one is acting for another and by his authority, such as agencies and powers of attorney, where the agency or power is not coupled with an interest, the death of the party ordinarily works a revocation; 8 Wheat. 174; 83 Pa. 228. Where the power is to transfer stock, signed by the seller of the stock, it is not revoked by his death; 31 W. N. Cas. Pa. 502. See AGENCY.

As to torts. In general, when the tort feasor or the party injured dies, the cause of action dies with him; but when the deceased might have waived the tort and maintained assumpsit against the defendant, his personal representative may do the same thing. See ACTIO PERSONALIS MORITUR CUM PERSONA, where this subject is more fully examined.

As to crimes. When a person accused of crime dies before trial, no proceedings can be had against his representatives or his estate.

As to inheritance. By the death of a person seised of real estate or possessed of personal property, his property real and personal, after satisfying his debts, vests, when he has made a will, as he has directed by that instrument; but if he dies intestate, his real estate goes to his heirs at law under the statute of descents, and his personal to his administrators, to be distributed to the next of kin, under the statute of distributions.

In suits. At common law an original suit abated by reason of the death of the plaintiff; 6 Wait, Act. & Def. 400; 24 Miss. 192; but in most of the states and England it is otherwise, and the personal representatives may become parties and prosecute the suit; Wms. Ex., 7th Am. ed. pt. ii. b. iii. ch. 4, and American note thereto, pp. 91, 99. In one state, Delaware, there is a constitutional provision that no action shall abate by the death of a party; Del. Const. art. 6, § 18. The English practice and rules under

the procedure acts will be found in the chapter of Williams on Executors above cited and a reference to the American statutes in the note thereto. In case of the death of a plaintiff the usual practice is to make a suggestion of it to the court which is entered of record; and in case of the death of a defendant his executor or administrator may be made a party, either by *scire facias*, or motion for an order of revivor, or other proceeding for giving due notice to the representative, according to the varying practice of the several states. See ABATEMENT.

The death of a defendant will discharge the special bail; Tidd, Pr. 243; but when he dies after the return of the *ca. sa.* and before it is filed, the bail are fixed; 6 Term 284; 5 Binn. 332, 338; 2 Mass. 485; 12 Wheat. 604; 4 Johns. 407; 4 N. H. 29; 45 Ala. 52; 67 How. Pr. 173.

DEATH-BED DEED. A deed made by one who was at the time sick of a disease from which he afterwards died. Bell, Dict.

DEATH'S PART. See DEAD'S PART; DEAD MAN'S PART.

DEBAUCH. To corrupt one's manners, to make lewd, to mar or spoil; to seduce and vitiate a woman. 2 Hilt. 329.

In an action for damages for crim. con., the allegation being that defendant seduced and debauched the plaintiff's wife, *whereby* her affections were alienated, etc., if the charge of adultery be not proved, the word debauch in the petition will not support a verdict for damages for alienation of affection; 47 Iowa 409.

It is a word of French origin which has come into use in our language in the sense of enticing and corrupting.

DEBENTURE (from *debentur mihi*, Lat., with which various old forms of acknowledgments of debt commenced). A certificate given in pursuance of law, by the collector of a port of entry, for a certain sum due by the United States, payable at a time therein mentioned, to an importer for drawback of duties on merchandise imported and exported by him, provided the duties on the said merchandise shall have been discharged prior to the time aforesaid. U. S. Rev. Stat. §§ 3037–40.

In some government departments a term used to denote a bond or bill by which the government is charged to pay a creditor or his assigns the money due on auditing his account.

An instrument in writing, generally under seal, creating a definite charge on a definite or indefinite fund or subject of property, payable to a given person, etc., and usually constituting one of a series of similar instruments. Cavanagh, Mon. Sec. 267. See 56 L. J. R. Ch. D. 815; Brice, *Ultra Vires*, 2d ed. 279.

A charge in writing of certain property, with the repayment at a time fixed of money lent by a person therein named at a given interest. It is frequently resorted to by public companies to raise money for the prosecution of their undertakings. The period is usually three, five, or seven years, and the amounts £50, £100, or £500, or some amounts divisible by ten. Wharton.

It is difficult to find in the books any statement approaching a definition of this class of securities. As a rule, both text writers and courts content themselves with a statement of inability to define them. A late English writer says:—"No one seems to know exactly what debenture means;" Buckley, Companies Act 169; and Chitty, J., said in one case that "a debenture means a document which either creates a debt or acknowledges it, and any document which fulfils either of these conditions is a debenture;" 37 Ch. D. 260, 264; but in the same case North, J., would not go so far. In another case the same judge (Chitty) said: "The term itself imports a debt and acknowledgment of a debt, and generally if not always imports an obligation to pay;" 36 Ch. D. 215; and again in another case he thus expresses the doubt existing as to the exact legal idea involved in the expression: "So far as I am aware, the term debenture has never received any precise legal definition. It is, comparatively speaking, a new term. I do not mean a new term in the English language, because there is a passage in Swift (quoted in Latham's Dict.) where the term debenture is used." The lines referred to are:

> "You modern wits, should each man bring his claim,
> Have desperate *debentures* on your fame;
> And little would be left you, I'm afraid,
> If all your debts to Greece and Rome were paid."

And the judge continued: "But although it is not a term with any legal definition, it is a term which has been used by lawyers frequently with reference to instruments under acts of parliament, which, when you turn to the acts themselves, are not so described;" 56 L. J. Ch. 817.

An American authority on corporate securities says:—"Debentures, which are the commonest form of security issued by English corporations, are defined to be instruments under seal creating a charge according to their wording upon the property of the corporation, and to that extent conferring a priority over subsequent creditors and over existing creditors not possessed of such charge. This is the true and proper use of the term; although it is frequently applied on the one hand to instruments which do not confer a charge and which are nothing more nor less than ordinary unsecured bonds, and on the other to instruments which are more than a mere charge, being in effect mortgages, and are properly termed mortgage debentures;" Jones, Corp. B. & M. § 32.

In the case of an instrument engaging for the payment of "the amount of this debenture," with coupons for interest payable half-yearly, Grove, J., said: "In the several dictionaries which we are in the habit of consulting, no satisfactory definition can be found, and neither of the learned counsel has been able to afford us any. I do not remember the term being used otherwise than in an acknowledgment of indebtedness by a corporate body having power by act of parliament or otherwise to increase its capital by borrowing money." It was something different from a promissory note, having a different stamp duty, different form, and a special mode of paying interest. The paper was held a debenture and subject to a higher stamp duty than a promissory note. In the same case Lindley, J., said that what were known as debentures were of various kinds;—mortgage debentures which were charges on some kinds of property, debenture bonds which were not, debentures which were nothing more than an acknowledgment of indebtedness and "a thing like this which is something more;" 7 Q. B. D. 165.

Debentures may be issued by a single person, a firm, or corporation, and it is an attribute implied in the definition of debenture that the holders are entitled without priority among themselves. They are, it is said, usually made a primary charge on the corporate property or undertaking, and as such will have priority over judgments obtained by general creditors and over the claims of shareholders; Cav. Mon. Sec. 358.

"Such debentures are in effect statutory mortgages. . . . In England each creditor

is secured by a separate mortgage, while in America one secures all; and by statute in England, holders of mortgage debentures have no priority *inter se*." Jones, Corp. B. & M. Sec. 32.

Sometimes the nature of a debenture holder's charge is that of a floating mortgage or security attaching only to the subjects which are for the time being the property of the company, and not preventing the latter from disposing of the subject charged free from incumbrance; *id.;* L. R. 15 Ch. D. 465; 10 *id.* 530.

A debenture is distinguished (1) from a mortgage which is an actual transfer of property, (2) from a bond which does not directly affect property, and (3) from a mere charge on property which is individualized and does not form part of a series of similar charges; Cav. Mon. Sec. 267, citing L. R. 10 Ch. D. 530, 681; 15 *id.* 465; 21 *id.* 762; L. R. 7 App. Cas. 673. Debentures strictly so called differ from mortgages in not conferring on the grantee the legal title or any of the ordinary rights of ownership of the property upon which the charge is created. A leading American writer says of this class of securities as understood in England that the charge created by them confers only equitable rights either as against other creditors or as against the corporation creating them. It is a test whether an instrument is a debenture or mortgage to ascertain whether the holder has any legal right to interfere with the company's use or control of the property in whatever way it pleases. If the instrument confers a charge which can be protected and enforced only in equity it is strictly a debenture; Jones, Corp. B. & M. § 32. See 10 H. L. C. 191. Of course, the effect and extent of the charge depend entirely upon the language used; L. R. 2 Ch. D. 337.

A debenture holder in England differs from a mortgagee in that the latter has a lien upon tolls and traffic receipts and may have a receiver appointed while the former has not; Jones, Corp. B. & M. § 232; 2 Ir. Eq. 524; L. R. 7 Ch. 655.

Debentures issued by an English company owning land in Italy and binding their "assets, property, and effects" were held to create no mortgage or lien; 26 W. R. 123; and debenture bonds, principal and interest payable to bearer, secured by mortgage of the company to certain persons as trustees for the holders, which was void for non-recording, were held to create no charge; 19 Q. B. D. 568.

Where a company had power "to issue bonds, debentures, or mortgage debentures," which would entitle holders to be paid *pari passu* out of the company's property, evidences of debt expressed as "obligations" by which the company bound "themselves and their successors and all their estate property, etc.," were held to be debentures and to create a charge; 10 Ch. Div. 530.

Where a number of debentures are sealed one after another in numerical order they *prima facie* rank in priority accordingly, but if it is so provided, they rank *pari passu;* 21 Ch. D. 762; 38 *id.* 156, 171; Buckley, Companies Acts 172.

Debentures are not issued until they are delivered; *id.;* 34 Ch. D. 58.

The exact nature of debentures has been much discussed in England as arising in cases where the question was whether a paper required registration under the Bills of Sales Act which excepted from its provisions "debentures" issued by any mortgage, loan, or other incorporated company and secured upon the capital stock or goods, chattels, and effects of such company.

A memorandum of agreement which contained a covenant by a company to pay to each of nine persons, who were mentioned in it as lenders, the sum set opposite their names *pari passu*, and charged all the property of the company, was a debenture; per Chitty, J., 36 Ch. D. 215; and the covering deed which usually accompanies debentures as a security for the payment of the debentures when due is not a debenture; 34 Ch. D. 43.

A mere memorandum in writing by a coal and fireclay working and brick-making company, of a deposit with bankers of title deeds, as a security for balances due or to become due, but which did not admit any specific debt, or contain an agreement to pay otherwise than by an agreement to execute a legal mortgage, was not a debenture; 37 Ch. D. 281.

The act referred to speaks of "debentures issued . . . and secured upon," and an English writer of authority considers that this means a borrowing money for the benefit of several lenders; Buckley, Companies Acts 170; but it has been held that the statutory term debenture applied when there were several lenders but only one security given for the benefit of all; 36 Ch. D. 215; it may consist of one document, not necessarily of a series of documents; *id.;* and a single security to a single lender, not purporting in terms to be a debenture, was one in law; 37 Ch. D. 260. A security to a lender on some part of a company's property is not one, while an issue secured upon its entire stock in trade and undertaking is, and between these two is to be sought the line of demarcation; Buckley, Companies Acts 172.

See 7 Ry. & Corp. L. J. 518.

DEBENTURE BONDS. See DEBENTURES.

DEBENTURE STOCK. An issue of stock usually irredeemable and transferable in any amount, not including a fraction of a pound.

The terminability and fixity in amount of debentures being inconvenient to lenders has led to their being in many cases superseded by debenture stock. Whart. Lex.

The issue of debenture stock is not borrowing at all; it is the sale, in consideration of a sum of money, of the right to receive a perpetual annuity; 9 Ch. D. 337; Buckley, Companies Acts 172; and none the less so if redeemable at the option of the company; *id.*

DEBIT ET DETINET (Lat. he owes and withholds). **In Pleading.** An action of *debt* is said to be in the *debet et detinet* when it is alleged that the defendant owes and unjustly withholds or detains the debt or thing in question.

The action is so brought between the contracting parties. See DETINET.

DEBET ET SOLET (Lat. he owes and is used to). Where a man sues in a writ of right or to recover any right of which he is for the first time disseised, as of a suit at a mill or in case of a writ of *quod permittat*, he brings his writ in the *debet et solet*. Reg. Orig. 144 *a*; Fitzh. N. B. 122, M.

DEBIT. A term used in book-keeping, to express the left hand page of the ledger, or of an account to which are carried all the articles supplied or amounts paid on the subject of an account, or that are charged to that account.

The balance of an account where it shows that something remains due to the party keeping the account.

An amount which is set down as a debt or owing.

DEBITA FUNDI (Lat.). **In Scotch Law.** Debts secured on land. Bell, Dict.

DEBITA LAICORUM (Lat.). Debts of the laity. Those which may be recovered in civil courts.

DEBITUM IN PRÆSENTI SOLVENDUM IN FUTURO (Lat.). An obligation of which the binding force is complete and perfect, but of which the performance cannot be required till some future period.

DEBT (Lat. *debere*, to owe; *debitum*, something owed). **In Contracts.** A sum of money due by certain and express agreement. 3 Bla. Com. 154. See 2 Wash. C. C. 386.

All that is due a man under any form of obligation or promise. 3 Metc. Mass. 522. See 91 Pa. 402.

Any claim for money. Penn. Stat. March 21, 1806, § 5.

Active debt. One due to a person. Used in the civil law.

Ancestral debt. One of an ancestor which the law compels the heir to pay. 16 Pet. 25; A. & E. Encyc.

Doubtful debt. One of which the payment is uncertain. *Clef des Lois Romaines.*

Fraudulent debt. A debt created by fraud implies confidence and deception. It implies that it arose out of a contract, express or implied, and that fraudulent practices were employed by the debtor, by which the creditor was defrauded. 28 Ohio St. 628.

Hypothecary debt. One which is a lien upon an estate.

Judgment debt. One which is evidenced by matter of record.

Liquid debt. One which is immediately and unconditionally due.

Passive debt. One which a person owes.

Privileged debt. One which is to be paid before others in case a debtor is insolvent.

The privilege may result from the *character* of the *creditor*, as where a debt is due to the United States; or the *nature* of the *debt*, as funeral expenses, etc. See PREFERENCE; PRIVILEGE; LIEN; PRIORITY; DISTRIBUTION.

Specialty. A debt by specialty or special contract is one whereby a sum of money becomes, or is acknowledged to be, due by deed or instrument under seal; 2 Bla. Com. 465; 51 Vt. 86.

A debt may be evidenced by matter of record, by a contract under seal, or by a simple contract. The distinguishing and necessary feature is that a fixed and specific amount is owing and no future valuation is required to settle it; 3 Bla. Com. 154; 2 Hill 220.

See ACCORD AND SATISFACTION; BANKRUPTCY; COMPENSATION; CONFUSION; DEFEASANCE; DELEGATION; DISCHARGE OF A CONTRACT; EXTINCTION; EXTINGUISHMENT; FORMER RECOVERY; LAPSE OF TIME; NOVATION; PAYMENT; RELEASE; RESCISSION; SET-OFF.

In Practice. A form of action which lies to recover a sum certain. 2 Greenl. Ev. 279; Andr. Steph. Pl. 77, n.

It lies wherever the sum due is certain or ascertained in such a manner as to be readily reduced to a certainty, without regard to the manner in which the obligation was incurred or is evidenced; 3 Sneed 145; 1 Dutch. 506; 26 Miss. 521; 3 McLean 150; 2 A. K. Marsh. 264; 1 Mas. 243; 13 Wall. 531; 97 U. S. 546; 110 Pa. 569.

It is thus distinguished from *assumpsit*, which lies as well where the sum due is uncertain as where it is certain, and from *covenant*, which lies only upon contracts evidenced in a certain manner.

It is said to lie in the *debt* and *detinet* (when it is stated that the defendant owes and detains) or in the *detinet* (when it is stated merely that he detains). Debt in the *detinet* for goods differs from detinue, because it is not essential in this action, as in detinue, that the specific property in the goods should have been vested in the plaintiff at the time the action is brought. Dy. 24 *b*.

It is used for the recovery of a debt *eo nomine* and *in numero*; though damages, which are in most instances merely nominal, are usually awarded for the detention; 1 H. Bla. 550; Cowp. 588.

The action lies in the debet and detinet to recover money due, on a *record* or a *judgment* of a court of record; Salk. 109; 17 S. & R. 1; 27 Vt. 20; 10 Tex. 24; 21 Vt. 569; 1 Dev. 378; 1 Conn. 402; although a foreign court; 18 Ohio 430; 3 Brev. 325; 15 Me. 167; 2 Ala. 85; 1 Blackf. 16; 3 J. J. Mar. 600; 12 Me. 94; see 6 How. 44; on *statutes* at the suit of the party aggrieved; 15 Ill. 39; 22 N. H. 234; 11 Ala. N. S. 346; 11 Ohio 130; 10 Watts 382; 1 Scamm. 290; 2 McLean 195; 8 Pick. 514; 18 Wall. 516; or a common informer; 2 Cal. 243; 16 Ala. N. S. 214; 8 Leigh 479; including awards by a statutory commission; 11 Cush. 429; on *specialties*; 1 Term 40; 9 Mo. 218; 7 Ala. 772; 3 Ill. 14; 3 T. B. Monr. 204; 5 Gill 103; 3 Gratt. 350; 32 N. H. 446; 16 Ill. 79; 10 Humphr. 367; including a recognizance; 1 Hempst. 290; 21 Conn. 81; 8 Blackf. 527; 26 Me. 209; see 15 Ill. 221; 6 Cush. 138; 20 Ala. N. S. 68; 15 Ohio 65; on a promissory note; 1 Ark. 165; 36 Pa. 538; on a bill of

exchange ; 8 Leigh 50 ; on *simple contracts*, whether express ; 26 Miss. 521 ; 17 Ala. N. S. 634 ; 1 Humphr. 480 ; although the contract might have been discharged on or before the day of payment in articles of merchandise ; 4 Yerg. 171 ; or implied ; Bull. N. P. 167 ; 18 Pick. 229 ; 10 Yerg. 452 ; 28 Me. 215 ; 1 Hempst. 181 ; 14 N. H. 414 ; to recover a specific reward offered ; 1 N. J. 310. An action of debt is the proper remedy of a landlord against his tenant in possession to recover a statutory penalty for wilfully cutting trees without the owner's consent ; 11 So. Rep. (Ala.) 743 ; and also in favor of the beneficiaries in a certificate of membership in a mutual benefit association ; 23 Ill. App. 341 ; but it does not lie on a decree of foreclosure, which orders the money secured by the mortgage to be paid, or in default thereof the mortgaged premises to be sold and the proceeds paid into court ; 15 R. I. 202.

It lies in the detinet for goods ; Dy. 24 *b* ; 1 Hempst. 290 ; 3 Mo. 21 ; Hard. 508 ; and by an executor for money due the testator ; 1 Wms. Saund. 1 ; 4 Maule & S. 120 ; see 10 B. Monr. 247 ; 7 Leigh 604 ; or against him on the testator's contracts ; 8 Wheat. 642.

The *declaration*, when the action is founded on a *record*, need not aver consideration. When it is founded on a *specialty*, it must contain the specialty ; 11 S. & R. 238 ; but need not aver consideration ; 16 Ill. 79 ; 65 Vt. 431 ; but when the action is for rent, the deed need not be declared on ; 14 N. H. 414. When it is founded on a simple contract, the consideration must be averred ; and a liability or agreement, though not necessarily an express promise to pay, must be stated ; 2 Term 28, 30.

The *plea* of *nil debet* is the general issue when the action is on a simple contract, on statutes, or where a specialty is matter of inducement merely ; 2 Mass. 521 ; 11 Johns. 474 ; 13 Ill. 619 ; 6 Ark. 250 ; 18 Vt. 241 ; 3 McLean 163 ; 15 Ohio 372 ; 8 N. H. 22 ; 33 Me. 268 ; 1 Ind. 146 ; 23 Miss. 233. *Non est factum* is the common plea when on specialty, denying the execution of the instrument ; 2 Ld. Raym. 1500 ; 2 Ia. 320 ; 4 Strobh. 38 ; 5 Barb. 449 ; 8 Pa. 467 ; 7 Blackf. 514 ; 3 Mo. 79 ; and *nul tiel record* when on a record, denying the existence of the record ; 16 Johns. 55 ; 23 Wend. 293 ; 6 Pick. 232. As to the rule when the judgment is one of another state, see 33 Me. 268 ; 3 J. J. Marsh. 600 ; 7 Cra. 481 ; 4 Vt. 58 ; 2 South. 778 ; 2 Ill. 2 ; 2 Leigh 172 ; as well as the titles FOREIGN JUDGMENT, CONFLICT OF LAWS. Other matters must, in general, be pleaded specially ; 1 Ind. 174.

The *judgment* is, generally, that the plaintiff receive his debt and costs when for the plaintiff, and that the defendant receive his costs when for the defendant ; 20 Ill. 120 ; 1 Ia. 99 ; 4 How. Miss. 40. See 8 S. & R. 263. It is reversible error to render judgment not only for the debt sued on, but for damages, as in assumpsit and for interest on the judgment ; 3 Utah 451. See JUDGMENT.

DEBTEE. One to whom a debt is due ; a creditor : as, debtee executor. 3 Bla. Com. 18.

DEBTOR. One who owes a debt ; he who may be constrained to pay what he owes.

DEBTOR'S ACT, 1869. The statute 32 & 33 Vict. c. 62, abolishing imprisonment for debt in England, and for the punishment of fraudulent debtors. 2 Steph. Com. 159–164. (Not to be confounded with the Bankruptcy Act of 1869.) Mozl. & W. Dict.

DEBTOR'S SUMMONS. In English Law. A summons issuing from a court having jurisdiction in bankruptcy, upon the creditor proving a liquidated debt of not less than 50*l.*, which he has failed to collect after reasonable effort, stating that if the debtor fail, within one week if a trader, and within three weeks if a non-trader, to pay or compound for the sum specified, a petition may be presented against him, praying that he may be adjudged a bankrupt. Bkcy. Act, 1869, s. 7 ; Robson, Bkcy. ; Mozl. & W. Dict.

DECALOGUE. The ten commandments.

DECANATUS, DECANIA, DECANA (Lat.). A town or tithing, consisting originally of ten families of freeholders. Ten tithings compose a hundred. 1 Bla. Com. 114.

Decanatus, a deanery, a company of ten. Spelman, Gloss. ; Calvinus, Lex.

Decania, *Decana*, the territory under the charge of a dean.

DECANUS (Lat.). A dean ; an officer having charge of ten persons. In Constantinople, an officer who has charge of the burial of the dead. Nov. Jus. 43, 59 ; Du Cange. The term is of extensive use, being found with closely related meanings in the old Roman, the civil, ecclesiastical, and old European law. It is used of civil and ecclesiastical as well as military affairs. There were a variety of *decani*.

Decanus monasticus, the dean of a monastery.

Decanus in majori ecclesia, dean of a cathedral church.

Decanus militaris, a military captain of ten soldiers.

Decanus episcopi, a dean presiding over ten parishes.

Decanus friborgi, dean of a fribourg, tithing, or association of ten inhabitants. A Saxon officer, whose duties were those of an inferior judicial officer. Du Cange ; Spelman, Gloss. ; Calvinus, Lex.

DECAPITATION (Lat. *de*, from, *caput*, a head). The act of beheading. In some countries a method of capital punishment.

DECEDENT. A deceased person.

The signification of the word has become more extended than its strict etymological meaning. Strictly taken, it denotes a dying person, but is always used in the more extended sense given, denoting any deceased person, testate or intestate.

DECEIT. A fraudulent misrepresentation or contrivance, by which one man de-

ceives another, who has no means of detecting the fraud, to the injury and damage of the latter. It need not be made in words, if the impression be made on the mind of the other party, upon which he acts, without the exact expression in words of the understanding sought to be created; 17 C. B. N. S. 482; 29 Mich. 229.

Fraud, or the intention to deceive, is the very essence of this injury; for if the party misrepresenting was himself mistaken, no blame can attach to him; Poll. Torts 353; 61 Ill. 373; 36 Pac. Rep. (Kan.) 978; 45 Ill. App. 244. The representation must be made *malo animo;* but whether or not the party is himself to gain by it is wholly immaterial.

It may be by the deliberate assertion of a falsehood to the injury of another, by failure to disclose a latent defect, or by concealing an apparent defect; but, as a rule, mere silence on the part of one party to a transaction as to facts which are important to the other is not deceit, if he is under no obligation to disclose them; Big. Torts 12; L. R. 6 H. L. 377; 93 U. S. 631. See CAVEAT EMPTOR.

The party deceived must have been in a situation such as to have no means of detecting the deceit. But see 52 Kan. 221.

A person cannot sustain an action for deceit where no harm comes to him; 47 Minn. 225; 2 Misc. Rep. 257; nor can he where he does not rely on the misrepresentations; 86 Wis. 427.

To entitle a party to maintain an action for deceit by means of false representations, he must, among other things, show that the defendant made false and fraudulent assertions, in regard to some fact or facts material to the transaction in which he was defrauded, by means of which he was induced to enter into it; that the misrepresentations related to alleged facts or to the condition of things as then existent. It is not every representation relating to the subject-matter of the contract which will render it void or enable the aggrieved party to maintain his action for deceit. It must be as to matters of fact substantially affecting his interests, not as to matters of opinion, judgment, probability, or expectation; 18 Pick. 95.

In order to constitute deceit it is necessary either that the false representations should be known by the person making them to be untrue, or that he should have no reason to believe them true. Mere ignorance of their falsity is no excuse; 42 Ga. 88; see 78 Ill. 65; 59 Ind. 379; 106 Mass. 77; 28 Mich. 53; 45 N. H. 422; 68 N. Y. 426. Deceit may be committed not only with the careful intention of one who knows what he asserts to be true or false, but also with the reckless intention of one who does not know what he represents to be true or false, but who, for one reason or another, is willing that his reckless representations should be believed; 9 Colo. 33; 53 N. J. Law 77; 13 Pet. 26; 31 N. W. Rep. (Minn.) 360, and cases cited.

The mere expression of opinion is not deceit, though untrue and made in most positive language; 3 T. R. 51; 2 East 92; 63 N. C. 304; but the expression of opinion as knowledge may render one liable for fraud; 42 Vt. 121. Thus a cattle-dealer who expresses an apparent opinion as to the weight of cattle he desires to sell, knowing it to be untrue, is guilty of deceit; 34 Wis. 62.

Though false representations as to the value of land are not alone sufficient to sustain an action for damages, yet if in connection with others as to the net revenues derived, they are sufficient to support such an action; 66 Hun 633; 54 Fed. Rep. 320; and an action for false representation as to title, in a sale of lands, may be maintained though the deed contains no covenants; 54 Fed. Rep. 87.

An action for deceit can only be based upon the misrepresentation of matters of fact, not of matters of law; unless the party who made the misrepresentation did it with knowledge both of the law and of the other's ignorance of it; 31 Ala. 434; 33 Ill. 238; 119 *id.* 567; 69 Ind. 1; L. R. 4 Ch. D. 702; 19 Tex. 303; 91 U. S. 45.

If the party complaining of misrepresentations had the same sources of information as the one who made them, he must avail himself of his means of knowledge, or he cannot recover; 13 Wall. 379; 107 Mass. 364. But a contracting party may rely upon *express* statements of fact, the truth of which is known or presumed to have been known to the other party, even where the means of information are open to him; Big. Torts 26; especially when the representation has a natural tendency to prevent investigation or is made the basis of the contract; *id.;* where one contracting party has a mental or physical infirmity, or where the parties do not stand upon an equal footing, the duty of investigating the truth of statements may be less; *id.* 28.

The plaintiff must also have acted upon the representation, and sustained injury by so doing; 4 H. & N. 225; 22 Me. 131; 34 Miss. 432; 30 Pa. 401; 63 N. H. 218; and they must have been made to him; 17 How. 183; 34 Miss. 432; 154 Mass. 286. One who purchases stock in the market, upon the faith of a prospectus received from persons not connected with the corporation, cannot enforce a liability against the directors for false representations therein; L. R. 6 H. L. 377; but where a prospectus is put out by a company to sell its stock, any one of the public may act on it; Big. Torts 33.

The false representations upon which deceit is predicated must also, in order to support the action, be material and relevant, and be the determining factor of the transactions; L. R. 2 Ch. 611; 5 De G., M. & G. 126; 36 Ark. 362; 89 Ill. 29; 50 Ia. 687; 127 Mass. 217; 66 N. Y. 558.

Where the effect of the misrepresentations was to bring the parties into relations with each other, express evidence of an intent to defraud is unnecessary; but where by false representations one suffers damage in a transaction with a third person, there must be express evidence that the party making the representation intended it to be acted on, or that the plaintiff was justified

in assuming that he so intended ; 3 Term 51 ; Big. Torts 31.

An honest belief in a misrepresentation which the maker does not know to be false, and which it is not shown that he should know to be false by using proper care to ascertain its truth, is a complete defence, L. R. 14 App. Cas. 337, reversing 37 Ch. D. 541 ; but one who makes a representation positively, without knowing whether it is false or true, is liable for deceit ; L. R. 7 H. L. 102 ; 29 Mich. 359.

To tell half the truth and to conceal the other half, amounts to a false statement, and differs in no respect from the case of false representations ; 62 Ill. 501 ; 128 U. S. 333, 388 ; 24 Mich. 335 ; L. R. 6 H. L. 403 ; 35 Vt. 156.

An action of tort for deceit in the sale of property does not lie for false and fraudulent representations concerning profits that may be made from it in the future ; 5 Allen 324. While an honest belief in the truth of representations is a defence to an action for deceit at common law, it is no defence to a bill in equity to set aside the transaction ; 7 Beav. 149 ; 25 Fed. Rep. 361 ; 86 Ill. 142 ; 103 Mass. 356 ; 44 Miss. 477. It is also a ground for objecting to the enforcement of the contract, and even for a rescission of the contract upon the ground of mistake ; Big. Torts 23.

Private corporations are held liable for the wrongful acts and neglect of their agents or servants, done in the course of their employment ; 49 Md. 241. In England the rule is that if the person has been induced to purchase shares of a corporation by misrepresentations of its directors and suffers damage thereby, he must bring an action of deceit against such directors individually ; while in the United States it seems to be the rule that a corporation may be sued in such cases ; 2 Allen 1 ; 77 N. C. 233 ; 23 How. 381 ; 78 Ga. 586 ; 2 Black 722 ; 43 N. J. L. 288. "If the director of a company puts shares forth into the world, and deliberately adopts a scheme of falsehood and fraud, the effect of which is that parties buy the shares in consequence of the falsehood," the action for deceit lies ; Pollock, C. B., in 4 H. & N. 538 ; 2 Q. B. D. 48. See also 2 M. & W. 519 ; 3 B. & Ad. 114.

The general principles on which the right of action for deceit is based are those stated in Webb's Poll. Torts 355 :—

"To create a right of action for deceit there must be a statement made by the defendant, or for which he is answerable as principal, and with regard to that statement all the following conditions must concur :

"It is untrue in fact.

"The person making the statement, or the person responsible for it, either knows it to be untrue, or is culpably ignorant (that is, recklessly and consciously ignorant) whether it be true or not.

"It is made to the intent that the plaintiff shall act upon it, or in a manner apparently fitted to induce him to act upon it.

"The plaintiff does act in reliance on the statement in the manner contemplated or manifestly probable, and thereby suffers damage.

"There is no cause of action without both fraud and actual damage, or the damage is the gist of the action.

"And according to the general principles of civil liability, the damage must be the natural and probable consequence of the plaintiff's action on the faith of the defendant's statement.

"The statement must be in writing and signed in one class of cases, namely, where it amounts to a guaranty ; but this requirement is statutory, and as it did not apply to the court of chancery, does not seem to apply to the high court of justice in its equitable jurisdiction."

The remedy for a deceit, unless the right of action has been suspended or discharged, is by an action of trespass on the case. The old writ of deceit was brought for acknowledging a fine, or the like, in another name, and, this being a perversion of law to an evil purpose and a high contempt, the act was laid *contra pacem*, and a fine imposed upon the offender. See Brooke, Abr. *Disceit ;* Viner, Abr. *Disceit.*

When two or more persons unite in a deceit upon another, they may be indicted for a conspiracy. See, generally, 1 Rolle, Abr. 106 ; Com. Dig. ; 1 Viner, Abr. 560 ; 8 *id.* 490 ; Bigelow, Torts 9 ; Cooley, Torts 554.

It has been held that an action will not lie for fraudulent misrepresentations of a vendor of real estate as to the price he paid therefor ; 11 Am. Rep. 218 ; s. c. 60 Me. 578 ; 102 Mass. 217 ; 133 N. Y. 590 ; 29 Minn. 91 ; 80 Ind. 472 ; nor ordinarily for false statements as to value of stock ; 11 Am. Rep. 379 ; s. c. 56 N. Y. 83 ; nor for a false certificate of classification of a sailing yacht ; 60 Law J. Q. B. 526 ; nor a representation that a stallion would not produce sorrel colts ; 54 N. W. Rep. (Ia.) 437.

False representations concerning the financial responsibility of another, made for the purpose of procuring him credit, negligently and carelessly, without investigation, when investigation would disclose their falsity, imply a fraudulent intent and are actionable ; 59 Fed. Rep. 338. See COMMERCIAL AGENCY.

In an action of deceit in inducing plaintiff by false representations to take an assignment of a lease executed by one who has no title to the land, no offer of restitution need be made ; 88 Ga. 629. But one who seeks to rescind a contract of sale because of fraud, but retains the property so sold, cannot maintain an action for deceit ; 2 Misc. Rep. 257.

DECEM TALES (Lat. ten such). **In Practice.** A writ requiring the sheriff to appoint ten like men (*apponere decem tales*), to make up a full jury when a sufficient number do not appear. See TALES DE CIRCUMSTANTIBUS.

DECEMVIRI LITIBUS JUDICANDIS. Ten judges (five being senators and five knights), appointed by Augustus to act

as judges in certain cases. Calvinus, Lex.; Anthon, Rom. Ant.

DECENNARIUS (Lat.). One who held one-half a virgate of land. Du Cange, One of the ten freeholders in a *decennary*. Du Cange; Calvinus, Lex.

Decennier. One of the *decennarii*, or ten freeholders making up a tithing. Spelman, Gloss.; Du Cange, *Decenna;* 1 Bla. Com. 114. See DECANUS.

DECENNARY (Lat. *decem*, ten). A district originally containing ten men with their families.

King Alfred, for the better preservation of the peace, divided England into counties, the counties into hundreds, and the hundreds into tithings or decennaries: the inhabitants whereof, living together, were sureties or pledges for each other's good behavior. One of the principal men of the latter number presided over the rest, and was called the chief pledge, borsholder, borrow's elder, or tithingman.

DECIES TANTUM (Lat.). An obsolete writ, which formerly lay against a juror who had taken money for giving his verdict. Called so, because it was sued out to recover from him ten times as much as he took.

DECIMÆ (Lat.). The tenth part of the annual profit of each living, payable formerly to the pope. There were several valuations made of these livings at different times. The *decimæ* (tenths) were appropriated to the crown, and a new valuation established, by 26 Hen. VIII. c. 3; 1 Bla. Com. 284.

DECIMATION. The punishment of every tenth soldier by lot.

DECISION. **In Practice.** A judgment given by a competent tribunal. The French lawyers call the opinions which they give on questions propounded to them, decisions. See Inst. 1. 2. 8; Dig. 1. 2. 2; 29 Ind. 170; 36 Wis. 434; also JUDGMENT.

The terms "opinions" and "decisions" are often confounded, yet there is a wide difference between them. A decision of a court is its judgment; the opinion is the reason given for that judgment. 13 Cal. 27.

DECLARANT. One who makes a declaration.

DECLARATION. **In Pleading.** A specification, in a methodical and logical form, of the circumstances which constitute the plaintiff's cause of action. 1 Chit. Pl. 248; Co. Litt. 17 *a*, 303 *a*; Bacon, Abr. *Pleas* (B); Comyns, Dig. *Pleader*, C, 7; Lawes, Pl. 35; Steph. Pl. 36; 6 S. & R. 28.

In real actions, it is most properly called the *count;* in a personal one, the declaration; Steph. Pl. 36; *Doctr. Plac.* 83; Lawes, Pl. 33. See Fitzh. N. B. 16 *a*, 60 *d*. The latter, however, is now the general term,—being that commonly used when referring to real and personal actions without distinction; 3 Bouvier, Inst. n. 2815.

In an action at law, the declaration answers to the bill in chancery, the libel (*narratio*) of the civilians, and the allegations of the ecclesiastical courts.

It may be *general* or *special:* for example, in debt on a bond, a declaration counting on the penal part only is *general;* one which sets out both the bond and the condition and assigns the breach is *special;* Gould, Pl. c. 4, § 50.

The *parts* of a declaration are the *title* of the court and term; the *venue*, see VENUE; the *commencement*, which contains a statement of the names of the parties and the character in which they appear, whether in their own right, the right of another, in a political capacity, etc., the mode in which the defendant has been brought into court, and a brief recital of the form of action to be proceeded in; 1 Saund. 318, n. 3, 111; 6 Term 130; if a person is doing business under a firm name, he properly sues on an account growing out of such business in his individual name; 83 Mich. 226; 93 Ala. 92; the *statement* of the cause of action, which varies with the facts of the case and the nature of the action to be brought, and which may be made by means of one or of several counts; 3 Wils. 185; 2 Bay 206; one count may incorporate by reference, certain general averments which are in a previous count in the same pleading; 94 Cal. 49; see COUNT; the *conclusion*, which in personal and mixed actions should be to the damage (*ad damnum*, which title see) of the plaintiff; Comyns, Dig. *Pleader* (C, 84); 10 Co. 116 *b*, 117 *a*; 1 M. & S. 236; unless in *scire facias* and in penal actions at the suit of a common informer, but which need not repeat the capacity of the plaintiff; 5 Binn. 16, 21; the *profert* of letters testamentary in case of a suit by an executor or administrator; Bacon, Abr. *Executor* (C); Dougl. 5, n.; 1 Day 305; and the *pledges of prosecution*, which are generally disused, and, when found, are only the fictitious persons, John Doe and Richard Roe.

The *requisites* or *qualities* of a declaration are that it must correspond with the process; and a variance in this respect was formerly the subject of a plea in abatement, see ABATEMENT; it must contain a statement of all the facts necessary in point of law to sustain the action, and no more; Co. Litt. 303 *a*; Plowd. 84, 122; Pep. Pl. 8. See 2 Mass. 363; Cowp. 682; 6 East 422; Viner, Abr. *Declaration;* 45 La. Ann. 935. The omission of a complaint to allege a material fact is cured where such fact is shown by the answer; 33 Ill. App. 91.

The circumstances must be stated with certainty and truth as to *parties;* 3 Cai. 170; 1 M. & S. 304; 3 B. & P. 559; 6 Rich. 390; 8 Tex. 109; 4 Munf. 430; 1 Campb. 195; *time* of occurrence, and in personal actions it must, in general, state a time when every material or traversable fact happened; 36 N. H. 252; 3 Ind. 484; 3 Zabr. 309; 3 McLean 96; see 15 Barb. 550; and when a venue is necessary, time must also be mentioned; 5 Term 620; Com. Dig. *Pleader* (C, 19); 5 Barb. 375; 4 Den. 80; though the precise time is not material; 2 Dall. 346; 3 Johns. 43; 25 Ala. N. S. 469; unless it constitute a material part of the contract declared upon, or where the date, etc., of a written contract is averred; 4 Term 590; 2 Campb. 307, 308, n.; 36 N. H. 252; 3 Zabr. 309; or in eject-

ment, in which the demise must be stated to have been made after the title of the lessor of the plaintiff and his right of entry accrued; 2 East 257; 1 Johns. Cas. 283; the place, see VENUE; and, generally, as to particulars of the demand, sufficient to enable the defendant to ascertain precisely the plaintiff's claim; 2 B. & P. 265; 2 Saund. 74 *b*; 12 Ala. N. S. 567; 2 Barb. 643; 35 N. H. 530; 32 Miss. 17; 1 Rich. 493.

In Evidence. A statement made by a party to a transaction, or by one having an interest in the existence of some fact in relation to the same.

Such declarations are regarded as original evidence and admissible as such—*first*, when the fact that the declaration was made is the point in question; 4 Mass. 702; 11 Wend. 110; 1 Conn. 387; 2 B. & Ad. 845; 1 Mood. & R. 2, 8; 9 Bingh. 359; 4 Bingh. N. C. 489; 1 Br. & B. 269; *second*, including expressions of bodily feeling, where the existence or nature of such feelings is the object of inquiry, as expressions of affection in actions for crim. con.; 1 B. & Ald. 90; 8 Watts 355; see 4 Esp. 39; 2 C. & P. 22; 7 *id.* 198; 132 Mass. 439; representations by a sick person of the nature, symptoms, and effects of the malady under which he is laboring; 6 East 188; 4 M'Cord 38; 8 Watts 355; see 9 C. & P. 275; 7 Cush. 581; 30 Ala. N. S. 562; 23 Ga. 17; 27 Mo. 279; 30 Vt. 377; 54 Ill. 485; in prosecution for rape, the declarations of the woman forced; 1 Russ. Cr. 565; Tayl. Ev. 507. 517; 2 Stark. 241; 18 Ohio 99; *third*, in cases of pedigree, including the declarations of deceased persons nearly related to the parties in question; 3 Russ. & M. 147; 2 C. & K. 701; 1 Cr. M. & R. 919; 1 De G. & S. 40; 1 How. 231; 4 Rand. 607; 3 Dev. & B. 91; 18 Johns. 37; 2 Conn. 347; 4 N. H. 371; 84 Ky. 403; 113 Mass. 267; family records; 8 B. & C. 813; 5 Cl. & F. 24; 7 Scott, N. R. 141; 2 Dall. 116; 1 Pa. 381; 8 Johns. 128; and see 13 Ves. 514; 1 Pet. 328; 5 S. & R. 251; 4 Mas. 268; *fourth*, cases where the declaration may be considered as a part of the *res gestæ*; Steph. Dig. Ev. art. 27; 36 N. H. 167, 353; 16 Tex. 74; 6 Fla. 13; 41 Me. 149. 432; 14 Cox, Cr. Cas. 341; S. C. 28 Engl. Rep. 587 and note; 20 Ga. 452; 157 Mass. 9; 95 Ala. 598; 63 Hun 634; 148 Pa. 566; 49 Ohio St. 25; 80 Wis. 590; 95 Mich. 412; 147 U. S. 150; 132 Ind. 387; including those made by persons in the possession of land; 5 B. & Ad. 223; 9 Bingh. 41; 1 Bingh. N. C. 430; 8 Q. B. 243; 16 M. & W. 497; 2 Pick. 536; 17 Conn. 539; 4 S. & R. 174; 2 M'Cord 241; 16 Me. 27; 2 N. H. 287; 15 *id.* 546; 1 Ired. 482; 10 Ala. N. S. 355; 6 Hill. 405; 30 Vt. 29; 19 Ill. 31; 30 Miss. 589; 35 Neb. 58; see 33 Pa. 411; 27 Mo. 220; 28 Ala. N. S. 236; 9 Ind. 323; and entries made by those whose duty it was to make such entries. See 1 Greenl. Ev. §§ 115–123; 1 Smith, Lead. Cas. 142; 100 Pa. 159.

Declarations regarded as secondary evidence or hearsay are yet admitted in some cases: *first*, in matters of general and public interest, common reputation being admissible as to matters of public interest; 14 East 329, n.; 1 M. & S. 686; 6 M. & W. 234; 19 Conn. 250; but reputation amongst those only connected with the place or business in question, in regard to matters of general interest merely; 1 Cr. M. & R. 929; 2 B. & Ad. 245; and the matter must be of a *quasi* public nature; 1 East 357; 14 *id.* 329, n.; 10 B. & C. 657; 1 M. & S. 77; 1 Mood. & M. 416; 10 Pet. 412; 16 La. 296; see REPUTATION; *second*, in cases of ancient possession where ancient documents are admitted, if found in a place in which and under the care of persons with whom such papers might reasonably be expected to be found; 17 Wend. 371; 74 Me. 56; 117 U. S. 255; 108 Ill. 248; if they purport to be a part of the transaction to which they relate; 1 Greenl. Ev. § 144; ANCIENT WRITINGS; *third*, in case of declarations and entries made against the interest of the party making them, whether made concurrently with the act or subsequently; 1 Taunt. 141; 3 Brod. & B. 132; 3 B. & Ad. 893; 40 Ill. App. 442; 49 Minn. 255; 82 Tex. 22; 136 N. Y. 384; 72 Mich. 630; and see 1 Phill. Ev. 293; Gresl. Eq. Ev. 221; but such declarations and entries, to be so admitted, must appear or be shown to be against the pecuniary interest of the party making them; 1 C. & P. 276; 11 Cl. & F. 85; 2 Jac. & W. 789; 3 Bingh. N. C. 308, 320; but letters written and signed by deceased, or a memorandum made by him, are not admissible by a party claiming under him if not shown to have been communicated to the party claiming adversely; 66 Hun 28; *fourth*, dying declarations.

Dying declarations, made in cases of homicide where the death of the deceased is the subject of the charge and the circumstances of the death are the subject of the dying declarations, are admissible; Steph. Dig. Ev. § 26; 2 B. & C. 605; 1 Leach 267, 378; 2 Mood. & R. 53; 2 Johns. 31; 15 *id.* 286; 1 Meigs 265; 4 Miss. 655; see 4 C. & P. 233; 91 Ga. 729; if made under a sense of impending death; 2 Leach 563; 6 C. & P. 386, 631; 5 Cox, Cr. Cas. 318; 11 Ohio 424; 2 Ark. 229; 3 Cush. 181; 9 Humphr. 9, 24; 115 Mo. 452; 50 Kan. 666; 90 Ga. 117; 64 Conn. 293. And see 3 C. & P. 269; 6 *id.* 386; 2 Va. 78, 111; 3 Leigh 786; 1 Hawks 442; 28 Eng. Rep. 587; 14 Am. L. Rev. 817; 111 N. C. 695; 91 Tenn. 617. It is not necessary that the declarant state that he is expecting immediate death; it is enough if, from all the circumstances, it satisfactorily appears that such was the condition of his mind at the time of the declarations; 24 Kan. 189; and the question of whether made under a sense of impending death is a question exclusively for the court; 31 Fla. 514. The declaration may have been made by signs; 1 Greenl. Ev. § 161 *b*; and in answer to questions; 7 C. & P. 238; 2 Leach 563; 3 Leigh 758. The substance only need be given by the witness; 11 Ohio 424; 8 Blackf. 101; but the declaration must have been complete; 3 Leigh 786; 146 U. S. 140; and the circumstances under which it was made must be shown to the court; 1 Stark. 521; 3 C. & P. 629; 7 *id.* 187; 1 Hawks

444 ; 2 Gratt. 594 ; 16 Miss. 401 ; 2 Hill 619, Such declarations are inadmissible when the witness does not pretend to give either the words or substance of what the deceased said, or all that he said ; 118 Mo. 491. The admissibility of the declaration is not affected by the fact that subsequently to their being made and before death the declarant entertained a belief in recovery; 14 Cox, Cr. Cas. 565 ; s. c. 28 Engl. Rep. 587, and note ; 23 Or. 555.

Declarations, to be admissible as original evidence, must have been made at the time of doing the act to which they relate ; 3 Conn. 250 ; 16 Miss. 722 ; 9 Paige 611 ; 23 Ga. 193 ; 8 Metc. 436 ; 6 Me. 266 ; 36 N. H. 353 ; 14 S. & R. 275 ; 1 B. & Ad. 135. And see 3 Metc. Mass. 199 ; 4 Fla. 104 ; 3 Humphr. 315 ; 24 Vt. 363 ; 21 Conn. 101 ; 133 Ind. 243. For cases of entries in books, see 1 Binn. 234 ; 9 S. & R. 285 ; 13 Mass. 427 ; 10 Am. Rep. 22 ; s. c. 36 Ind. 280.

To authorize their admission as secondary evidence, the declarant must be dead : 11 Price 162 ; 1 C. & K. 58 ; 12 Vt. 178 ; and the declaration must have been made before any controversy arose ; 13 Ves. Ch. 514 ; 3 Campb. 444 ; 10 B. & C. 657 ; 4 M. & S. 486 ; 1 Pet. 328. It must also appear that the declarant was in a condition or situation to know the facts, or that it was his duty to know them ; 2 J. & W. 464 ; 9 B. & C. 935 ; 4 Q. B. 137 ; 2 Sm. Lead. Cas. 193, n. The test to be applied to dying declarations to determine their admissibility is whether a living witness would have been permitted to testify to the matters contained in the declaration ; 24 Or. 61.

The declarations of an agent respecting a subject-matter, with regard to which he represents the principal, bind the principal ; Story, Ag. §§ 134–137 ; 1 Phill. Ev. 381 ; Mech. Ag. 714 ; 2 Q. B. 212 ; 3 Harring. 299 ; 20 N. H. 165 ; 31 Ala. N. S. 33 ; 6 Gray 450 ; 133 N. Y. 298 ; 158 Mass. 185 ; 39 Ill. App. 422 ; if made in the line of his duty and within the scope of his authority ; 156 Mass. 289 ; 92 Mich. 252 ; 48 Minn. 305 ; if made during the continuance of the agency with regard to a transaction then pending ; 8 Bingh. 451 ; 5 Wheat. 336 ; 6 Watts 487 ; 14 N. H. 101 ; 30 Vt. 29 ; 11 Rich. 367 ; 24 Ga. 211 ; 31 Ala. N. S. 33 ; 7 Gray 92, 345 ; 4 E. D. Smith 165 ; 8 Utah 41 ; see 3 Rob. La. 201 ; 8 Metc. 44 ; 19 Ill. 456 ; and similar rules extend to partners' declarations ; 1 Greenl. Ev. § 112 ; 31 Ala. N. S. 26 ; 36 N. H. 167 ; 52 N. W. Rep. (Minn.) 386. See PARTNER.

Where several defendants are all interested in the relief prayed against them, admissions of one of them, made against his own interest, are admissible in evidence to affect him, although they would not be evidence to affect his co-defendants ; 88 Ga. 541. See 109 Mo. 9 ; 49 Minn. 322 ; 3 Ind. App. 339.

Declarations made over a telephone are admissible, if the witness testifies that he recognized the declarant's voice : 31 Tex. Cr. Rep. 349. See 97 Mo. 473 ; TELEPHONE.

When more than one person is concerned in the commission of a crime, as in cases of riots, conspiracies, and the like, the declarations of either of the parties, made *while acting in the common design*, are evidence against the whole ; 3 B. & Ald. 566 ; 1 Stark. 81 ; 2 Pet. 358 ; 10 Pick. 497 ; 30 Vt. 100 ; 32 Miss. 405 ; 9 Cal. 593 ; 32 Tex. Cr. Rep. 568 ; 64 Cal. 293 ; but the declarations of one of the rioters or conspirators made *after the accomplishment of their object* and when they no longer acted together, are evidence only against the party making them ; 2 Russ. Cr. 572 ; Rosc. Cr. Ev. 324 ; Whart. Ev. 1205 ; 1 Ill. 269 ; 1 Mood. & M. 501 ; 150 U. S. 93 ; 144 *id.* 309. And see 2 C. & P. 232 ; 7 Gray 1, 46. If one of two persons accused of having together committed a crime of murder makes a voluntary confession in the presence of the other, under such circumstances that he would naturally have contradicted it if he did not assent, the confession is admissible in evidence against both ; 156 U. S. 51.

See HEARSAY EVIDENCE ; BOUNDARY ; REPUTATION ; PEDIGREE ; CONFESSION.

In Scotch Law. The prisoner's statement before a magistrate.

When used on trial, it must be proved that the prisoner was in his senses at the time of making it, and made it of his own free will ; 2 Hume 328 ; Alison, Pr. 557. It must be signed by the witnesses present when it was made ; Alison, Pr. 557, and by the prisoner himself ; Arkl. Just. 70. See Paterson, Comp. §§ 952, 970.

Declaration by debtor of inability to pay his debts. In England a formal declaration of this character is an act of bankruptcy, under sec. 6 of the Bankruptcy Act of 1869 ; Robson, Bkcy.

DECLARATION OF INDEPENDENCE. A public act by which, through the Continental Congress, the thirteen British colonies in America declared their independence, in the name and by the authority of the people, on the fourth day of July, 1776, wherein are set forth :—

Certain natural and inalienable rights of man; the uses and purposes of governments; the right of the people to institute or to abolish them ; the sufferings of the colonies, and their right to withdraw from the tyranny of the king of Great Britain ;

The various acts of tyranny of the British king ;

The petitions for redress of those injuries, and the refusal to redress them ; the recital of an appeal to the people of Great Britain, and of their being deaf to the voice of justice and consanguinity ;

An appeal to the Supreme Judge of the world for the rectitude of the intentions of the representatives ;

A declaration that the United Colonies are, and of right ought to be, free and independent states ; that they are absolved from all allegiance to the British crown, and that all political connection between them and the state of Great Britain is and ought to be dissolved ;

A pledge by the representatives to each other of their lives, their fortunes, and their sacred honor.

The effect of this declaration was the establishment of the government of the United States as free and independent.

DECLARATION OF INTENTION. The act of an alien who goes before a court of record and in a formal manner declares that it is *bona fide* his intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty whereof at the time he may be a citizen or subject. See Rev. Stat. §§ 2165, 2174.

This declaration must, in ordinary cases, be made at least two years before his admission. *Id.* But there are exceptions to this rule. See NATURALIZATION.

DECLARATION OF PARIS. A declaration respecting international maritime law set forth by the leading powers of Europe at the Congress of Paris in April, 1856. The several articles are:—

1. Privateering is and remains abolished.
2. The neutral flag covers enemy's goods, except contraband of war.
3. Neutral goods, except contraband of war, are not liable to confiscation under a hostile flag.
4. Blockades, to be binding, must be effective. Twiss, Law of Nations, part ii. s. 86.

DECLARATION OF TRUST. The act by which an individual acknowledges that a property, the title of which he holds, does in fact belong to another, for whose use he holds the same.

The instrument in which such an acknowledgment is made.

Such a declaration is not always in writing; though it is highly proper it should be so; Hill, Trust. 49, note y; Sugden, Pow. 200; 1 Washb. R. P. See Tiedm. Eq. Jur. 296; FRAUDS, STATUTE OF; TRUST.

DECLARATION OF WAR. The public proclamation of the government of a state, by which it declares itself to be at war with a foreign power which is named, and which forbids all and every one to aid or assist the common enemy.

The power of declaring war is vested in congress by the constitution, art. 1, s. 8, § 12. There is no form or ceremony necessary except the passage of the act. A manifesto stating the causes of the war is usually published; but war exists as soon as the act takes effect. It was formerly usual to precede hostilities by a public declaration communicated to the enemy, and to send a herald to demand satisfaction. Potter, Grec. Ant. b. 3, c. 7; Dig. 49. 15. 24. But that is not the practice of modern times.

In some countries, as England, the power of declaring war is vested in the king; but he has no power to raise men or money to carry it on,—which renders the right almost nugatory.

Civil wars are never declared; Boyd's Wheat. Int. Law 355. See 2 Black 669. Many recent wars have been begun without this formality. A war *de facto* can exist without it; L. R. 4 P. C. 179.

DECLARATORY. Something which explains or ascertains what before was uncertain or doubtful: as, a declaratory statute, which simply declares or explains the law or the right, as it stood previous to the statute; Sedgw. Stat. & Const. L. 28; they are usually passed to put an end to a doubt as to what the law is, and declare what it is and what it has been. 1 Bla. Com. 86. Very many of the state statutes in this country are declaratory of the common law, and were not passed to quiet a doubt but to incorporate into the law of the state well-settled common-law principles. See STATUTES.

DECLARE. Often used of making a positive statement, as "declare and affirm." 17 N. J. L. 432. To assert; to publish; to utter; to announce clearly some opinion or resolution. 90 Pa. 121. For its use in pleading, see DECLARATION.

DECLINATION. In Scotch Law. A preliminary plea objecting to the jurisdiction on the ground that the judge is interested in the suit.

DECLINATORY PLEA. A plea of sanctuary or of benefit of clergy. 4 Bla. Com. 333. Abolished, 6 & 7 Geo. IV. c. 28, s. 6; Mozl. & W. Dict. See BENEFIT OF CLERGY.

DECOCTION. The operation of boiling certain ingredients in a fluid for the purpose of extracting the parts soluble at that temperature; the product of this operation.

In a case in which the indictment charged the prisoner with having administered to a woman a decoction of a certain shrub called savin, it appeared that the prisoner had administered an *infusion*, and not a decoction. The prisoner's counsel insisted that he was entitled to an acquittal on the ground that the medicine was misdescribed; but it was held that infusion and decoction are *ejusdem generis*, and that the variance was immaterial. 3 Camp. 74, 75.

DECOCTOR. In Roman Law. A bankrupt; a person who squandered the money of the state. Calvinus, Lex.; Du Cange.

DECOLLATIO. Decollation; beheading.

DECONFES. In French Law. A name formerly given to those persons who died without confession, whether they refused to confess or whether they were criminals to whom the sacrament was refused. *Droit de Canon*, par M. l'Abbé André; Dupin, Gloss. to Loisel's Institutes.

DECOY. A pond used for the breeding and maintenance of water-fowl. 11 Mod. 74, 130; 3 Salk. 9; Holt 14; 11 East 571.

DECOY LETTER. A letter prepared and mailed on purpose to detect offenders against the postal and revenue laws. 5 Dill. 39.

The use of decoy letters by inspectors of mails for the purpose of ascertaining the depredations upon the mails is proper and justifiable as a means to that end; 40 Fed. Rep. 752.

A postal employé who takes from the

mail under his charge a package containing things of value, though placed in the mail as a decoy and addressed to a person having no existence, is punishable, under R. S. secs. 3891, 5467, for taking a letter or package entrusted to him; 48 Fed. Rep. 802; 38 *id.* 106; 40 *id.* 752; *contra*, 35 *id.* 407, 890. The fact that they were decoy letters is immaterial on a prosecution for embezzlement; 42 Fed. Rep. 891.

The offence of sending letters by mail giving information where obscene pictures can be obtained does not lose its criminal character, though the letters were sent in response to a decoy letter, since it does not appear that the accused was solicited to use the mails and thus to commit an offence; 50 Fed. Rep. 528.

A decoy letter placed in a sealed envelope and addressed to a fictitious person in a place where there was no post-office was wrapped up in a newspaper, enclosed in an ordinary paper wrapper, sealed and properly stamped and directed as the envelope inside the packet, and in this condition was handed by a post-office inspector and placed by him as a decoy in a basket kept for improperly illegibly addressed mail matter. It was held that this was not a mailing of the packet, and that it did not become mail matter; 30 Fed. Rep. 818. A letter with a fictitious address which cannot be delivered is "not intended to be conveyed by mail" within the meaning of R. S. sec. 3891, providing a penalty for embezzling; 35 *id.* 407.

DECREE. In Practice. The judicial decision of a litigated cause by a court of equity. It is also applied to the determination of a cause in courts of admiralty and probate. It is accurate to use the word judgment as applied to courts of law and decree to courts of equity, although the former term is now used in a larger sense to include both. There is, however, a distinction between the two which is well understood, and may wisely be preserved as tending to keep before the mind the distinction between the two jurisdictions—quite as fundamental with respect to the final determination of a cause as to the forms of procedure and the principles of jurisprudence applied by the two tribunals. Even the modern tendency of courts of law to avail themselves of equitable forms of procedure and principles of decision has left undisturbed the well-defined line of demarcation between the *judgment* at law and the *decree* in equity. It is well stated by an able writer, thus:—"A judgment at law was either simply for the plaintiff or for the defendant. There could be no qualifications or modifications of the judgment. But such a judgment does not always touch the true justice of the cause or put the parties in the position they ought to occupy. While the plaintiff may be entitled, in a given case, to general relief, there may be some duty connected with the subject of litigation which he owes to the defendant, the performance of which, equally with the fulfilment of *his* duty by the defendant, ought, in a perfect system of remedial law, to be exacted. This result was attained by the *decree* of a court of equity which could be so moulded, or the execution of which could be so controlled and suspended, that the relative duties and rights of the parties could be secured and enforced;" Bisph. Eq. § 7.

It necessarily springs from the nature of the chancery jurisdiction that its determinations should be cast in a mould differing, *toto cœlo*, from a judgment at law, and it would hardly be an exaggeration to say that the essential character of the decree, as described by the author quoted, is to be found in the literal application of the fundamental maxim, "He who seeks equity must do equity." Accordingly, it is said that a court of equity will always reach, by a direct decree, what would otherwise be accomplished by a circuity of proceedings; 4 Del. Ch. 410. And even when a complainant is entitled to relief which it is inequitable to grant except upon a condition to be performed by him springing from an obligation of equity and good conscience, though not from legal right, a chancellor may make a decree only upon such condition; 8 Wall. 557; Bisph. Eq. § 43. In such case, when something remains to be done by the party in order to entitle him to relief, while no present decree can be made, as the decree must be absolute and final and not contingent, the court will enter an interlocutory decree and suspend the entry of a final decree until the performance of such condition; 3 Del. Ch. 124; and in default thereof in a reasonable time dismiss the bill; 4 *id.* 43. The doctrine of the wife's equity is a familiar instance of this principle.

Decrees are either interlocutory or final. In the strictest sense all decrees are interlocutory until signed and enrolled; 2 Dan. Ch. Pr., 6th Am. ed. 987, n. 1; but it is not in this sense that the terms are in practice used. But while there is a distinction well understood it is not always easy of exact definition. The existence of the two classes is, however, necessary in American chancery courts, as the right of appeal is frequently confined to final decrees, as in the federal courts. The former is entered on some plea or issue arising in the cause which does not decide the main question; the latter settles the matter in dispute; and a final decree has the same effect as a judgment at law; 2 Madd. 462; 1 Ch. Ca. 27; 2 Vern. 89; 4 Brown, P. C. 287. See 7 Viner, Abr. 394; 7 Comyns, Dig. 445; 1 Belt, Suppl. Ves. 223; 28 Cal. 75, 85. For forms of decrees, see Seton, Decrees; 2 Dan. Ch. Pr. 986.

Final Decree. One which finally disposes of a cause, so that nothing further is left for the court to adjudicate. See 2 Dan. Ch. Pr. 994, n.

A decree which determines the particular cause. It is not confined to those which terminate all litigation on the same right; 1 Kent 316.

A decree which disposes ultimately of the suit. Ad. Eq. 375. After such decree has been pronounced, the cause is at an end,

and no further hearing can be had; *id.* 388; Beach, Mod. Eq. Pr. 789.

Prior to the establishment of the circuit courts of appeals there was an appeal to the United States supreme court only from final decrees of the circuit courts; U. S. Rev. Stat. § 692; and the same is still true of appeals from those courts; U. S. Rev. Stat. 1 Supp. 903; except that special provision is made for an appeal within a limited time from an order granting or refusing an injunction; *id.* 904. Accordingly, the question what is a final decree is one of constant occurrence and importance as determining the jurisdiction of the appellate courts. The same question arises under the constitutional and statutory regulations of appeals in many of the states, although in some of them the right of appeal is not limited to final decrees; *e. g.* Delaware, where it is extended to interlocutory decrees or orders, if prayed before the first day of the following term, while it may be taken from a final decree within two years after it is signed.

Another reason why the distinction is important is that a final decree, entered of record and not directed to be without prejudice, is a bar to another bill filed between the same parties for the same subject-matter; 2 Del. Ch. 27.

Where the whole law of a case is settled by a decree, and nothing remains to be done, unless a new application be made at the foot of the decree, the decree is a final one so far as respects a right of appeal; 12 Wall. 86; and so is a decree dismissing a bill with costs, although they be afterwards taxed and decree entered for them; 139 U. S. 549; but a decree of foreclosure and sale is not final in the sense which allows an appeal from it so long as the amount due upon the debt must be determined, and the property to be sold ascertained and defined; 23 Wall. 405; see 45 N. J. Eq. 77; but a decree for foreclosure and sale of mortgaged premises is final and may be appealed from without waiting for the return and confirmation of the sale by a decretal order; 4 How. 503.

A decree fixing the priority of claims against an insolvent corporation, and directing the sale of its property for their payment, is a final decree within equity rule 88, relating to rehearings; 1 C. C. App. 535. A decree is final which disposes of every matter of contention between the parties, except as to the amount of one item, and refers the case to a master to ascertain that; 140 U. S. 52.

If the decree decides the rights to property and orders it to be delivered up or sold, or adjudges a sum of money to be paid, and the party is entitled to have such decree carried into immediate execution, it is a final decree; 6 How. 203. In such cases it is held that the decree is final upon the merits, and the ulterior proceedings, as in the foreclosure case, constitute but a mode of executing the original decree; 4 *id.* 503.

The multiplicity of cases on this subject is too great for citation here, but the principle applied is illustrated by those cited, and as to a particular case the course of decisions must be critically examined. Cases will be found collected in notes to U. S. Rev. Stat. § 692 and to 2 Dan. Ch. Pr., 6th Am. ed. ch. xxvi. sec. 1. See Foster, Federal Practice; Field, Federal Courts; JUDGMENT.

Interlocutory Decree. An adjudication or order made upon some point arising during the progress of a cause which does not determine finally the merits of the question or questions involved. Neither the courts nor the text-writers have satisfactorily defined this term. As was well said by Baldwin, J., "The difficulty is in the subject itself; for, by various gradations, the interlocutory decree may be made to approach the final decree, until the line of discrimination becomes too faint to be readily perceived." 1 Rob. Va. 27. The real matter of importance is to define what is a final decree, and that being done, it may be generally stated that every other order or decree made during the progress of a cause in chancery is interlocutory. The test which is to be derived from the cases can hardly be better stated than in a late case, thus:

Where something more than the ministerial execution of the decree as rendered is left to be done, the decree is interlocutory, and not final, even though it settles the equities of the bill; 135 U. S. 232.

As every decree *inter partes* is either final or interlocutory, all that has been said upon the former head, with the citations, must also be read in connection with this.

Decree Pro Confesso. An order or decree of a court of chancery that the allegations of the bill be taken as confessed, as against a defendant in default, and permitting the plaintiff to go on to a hearing *ex parte*.

"A decree *pro confesso* is one entered when the defendant has made default by not appearing in the time prescribed by the rules of court. A decree *nisi* is drawn by the plaintiff's counsel, and is entered by the court as it is drawn. A decree, when the bill is taken *pro confesso*, is pronounced by the court after hearing the pleadings and considering the plaintiff's equity;" Freem. Judg. § 11.

Such a decree is also entered when the defendant, having appeared, has not answered. The effect of such a decree is that the facts set forth in the bill are taken as true, and a decree made thereon according to the equity of the case. It was formerly the practice to put the plaintiff to his proof of the substance of the bill; 4 Johns. Ch. 547; 1 Dan. Ch. Pr., 5th Am. ed. 517, n.; but the practice of taking the bill *pro confesso* is now generally established; *id.* 518; and the subject is, in most courts of chancery, provided for, and the practice thereon regulated by rule of court.

The usual modern practice is substantially that provided for by Equity Rule 19 of the United States courts. Upon motion, it appearing from the record that the facts warrant it, an *order* is entered that the bill be

taken *pro confesso*, and the cause proceeds *ex parte*, and the court may proceed to a decree after thirty days from the entry of the order; 1 Dan. Ch. Pr. 525, note.

Such a decree cannot be entered when the bill contains a great lack of precision; 2 J. J. Marsh. 155; but only when the allegations of the bill are specific, and the defendant has been properly served; 30 Ill. 25; 47 *id.* 353; 3 Ind. 316; 122 Mass. 302.

When only one defendant answers, but he disproves the whole case made by the bill, a decree *pro confesso* cannot be entered against those who fail to answer; 27 Va. 483.

A decree *pro confesso* cannot be safely entered against an infant; 30 Beav. 148; 8 Pet. 128; 56 Ala. 612; 74 Ala. 415; 43 Ill. 239; 44 *id.* 503; 65 Me. 352; 44 Miss. 296; 21 N. H. 470; 3 Johns. Ch. 367; 8 N.Y. 9; 8 Ohio 372; though this is sometimes done, on consent of his solicitor; 116 Mass. 377.

In Legislation. In some countries, as in France, some acts of the legislature or of the sovereign, which have the force of law are called *decrees:* as, the Berlin and Milan decrees.

In Scotch Law. A final judgment or sentence of court by which the question at issue between the parties is decided.

DECREE IN ABSENCE. In Scotch Law. Judgment by default or *pro confesso*.

DECREE NISI. In English Law. A decree for a divorce, not to take effect till after such time, not less than six months from the pronouncing thereof, as the court shall from time to time direct. During this period any person may show cause why the decree should not be made absolute; 29 Vict. c. 32, s. 3; 23 & 24 Vict. c. 144, s. 7; 2 Steph. Com. 281; Mozl. & W. Dict.

The term is also sometimes applied to a decree entered provisionally to become final at a time therein named, unless cause is shown to the contrary.

DECREE OF CONSTITUTION. In Scotch Law. Any decree by which the extent of a debt or obligation is ascertained.

The term is, however, usually applied especially to those decrees which are required to found a title in the person of the creditor in the event of the death of either the debtor or the original creditor. Bell, Dict.

DECREE DATIVE. In Scotch Law. The order of a court of probate appointing an administrator.

DECREE OF FORTHCOMING. In Scotch Law. The decree made after an arrestment ordering the debt to be paid or the effects to be delivered up to the arresting creditor. Bell, Dict.

DECREE OF LOCALITY. In Scotch Law. The decree of a teind court allocating stipend upon different heritors. It is equivalent to the apportionment of a tithe rent-charge.

DECREE OF MODIFICATION. In Scotch Law. A decree of the teind court modifying or fixing a stipend.

DECREE OF REGISTRATION. In Scotch Law. A proceeding by which the creditor has immediate execution. It is somewhat like a warrant of attorney to confess judgment. 1 Bell, Com. 1. 1. 4.

DECREET. In Scotch Law. The final judgment or sentence of court by which the question at issue between the parties is decided.

Decreet absolutor. One where the decision is in favor of the defendant.

Decreet condemnator. One where the decision is in favor of the plaintiff. Erskine, Inst. 4. 3. 5.

DECREET ARBITRAL. In Scotch Law. The award of an arbitration. The form of promulgating such award. Bell, Dict. *Arbitration;* 2 Bell, Hou. L. 49.

DECREPIT (Fr. *décrépit;* Lat. *decrepitus*). Infirm; disabled, incapable, or incompetent, from either physical or mental weakness or defects, whether produced by age or other cause, to such an extent as to render the individual comparatively helpless in a personal conflict with one possessed of ordinary health and strength. 16 Tex. App. 11.

DECRETALES BONIFACII OCTAVI. A supplemental collection of the canon law, published by Boniface VIII. in 1298, called, also, *Liber Sextus Decretalium* (Sixth Book of the Decretals). 1 Kaufm. Mackeldey, Civ. Law 82, n. See DECRETALS.

DECRETALES GREGORII NONI. The decretals of Gregory the Ninth. A collection of the laws of the church, published by order of Gregory IX. in 1227. It is composed of five books, subdivided into titles, and each title is divided into chapters. They are cited by using an X (or *extra*); thus, *Cap. & X de Regulis Juris*, etc. 1 Kaufm. Mackeld. Civ. Law 83, n.; Butler, Hor. Jur. 115.

DECRETALS. In Ecclesiastical Law. Canonical epistles, written by the pope alone, or by the pope and cardinals, at the instance or suit of one or more persons, for the ordering and determining some matter in controversy, and which have the authority of a law in themselves.

The decretals were published in three volumes. The first volume was collected by Raymundus Barcinius, chaplain to Gregory IX., about the year 1227, and published by him to be read in schools and used in the ecclesiastical courts. The second volume is the work of Boniface VIII., compiled about the year 1298, with additions to and alterations of the ordinances of his predecessors. The third volume is called the Clementines, because made by Clement V., and was published by him in the council of Vienna, about the year 1308. To these may be added the Extravagantes of John XXII. and other bishops of Rome, which, relatively to the others, are called *Novellæ Constitutiones*. Ridley's View, etc. 99, 100; 1 Fournel, *Hist. des Avocats* 194, 195.

The false decretals were forged in the names of the early bishops of Rome, and first appeared about A. D. 845–850. The author of them is not known. They are mentioned in a letter written in the name of the council of Quierzy, by Charles the Bald, to the bishops and lords of France. See Van Espen Fleury, *Droit de Canon*, by André.

The decretals constitute the second division of the *Corpus Juris Canonici.*

DECRETAL ORDER. In Chancery Practice. An order made by the court of chancery, upon a motion or petition, in the nature of a decree. 2 Dan. Ch. Pr. 638.

DECRETUM GRATIANI. A collection of ecclesiastical law made by Gratian, a Bolognese monk, in the year 1151. It is the oldest of the collections constituting the *Corpus Juris Canonici.* 1 Kaufm. Mackeld. Civ. Law 81; 1 Bla. Com. 82; Butler, Hor. Jur. 113.

DECRY. To cry down; to destroy the credit of. It is said that the king may at any time decry the coin of the realm. 1 Bla. Com. 278.

DECURIO. In Roman Law. One of the chief men or senators in the provincial towns. The *decuriones*, taken together, had the entire management of the internal affairs of their towns or cities, with powers resembling in some degree those of our modern city councils. 1 Spence, Eq. Jur. 54; Calvinus, Lex.

DEDBANA. An actual homicide or manslaughter. Toml.

DEDI (Lat. I have given). A word used in deeds and other instruments of conveyance when such instruments were made in Latin.

The use of this word formerly carried with it a warranty in law, when in a deed: for example, if in a deed it was said, "*dedi* (I have given), etc., to A B," there was a warranty to him and his heirs. But this is no longer so. 8 & 9 Vict. c. 106, s. 4. Brooke, Abr. *Guaranty*, pl. 85. The warranty thus wrought was a special warranty, extending to the heirs of the feoffee during the life of the donor only. Co. Litt. 384 *b*; 4 Co. 81; 5 *id.* 17; 3 Washb. R. P. 671. *Dedi* is said to be the aptest word to denote a feoffment; 2 Bla. Com. 310. The future, *dabo*, is found in some of the Saxon grants. 1 Spence, Eq. Jur. 44. See GRANT.

DEDI ET CONCESSI (Lat. I have given and granted). The aptest words to work a feoffment. They are the words ordinarily used, when instruments of conveyance were in Latin, in charters of feoffment, gift, or grant. These words were held the aptest; though others would answer; Co. Litt. 384 *b*; 1 Steph. Com. 114; 2 Bla. Com. 53, 316. See COVENANT.

DEDICATION. An appropriation of land to some public use, made by the owner, and accepted for such use by or on behalf of the public. 23 Wis. 416; 33 N. J. L. 13; 95 Cal. 463.

Express dedication is that made by deed, vote, or declaration.

Implied dedication is that presumed from an acquiescence in the public use.

To be valid it must be made by the owner of the fee; 5 B. & Ald. 454; 3 Sandf. 502; 4 Campb. 16; 84 Ala. 215; or, if the fee be subject to a naked trust, by the equitable owner; 6 Pet. 431; 1 Ohio St. 478; and to the public at large; 22 Wend. 425; 2 Vt. 480; 10 Pet. 662; 11 Ala. N. S. 63. In making the appropriation, no particular formality is required, but any act or declaration, whether written or oral, which clearly expresses an intent to dedicate, will amount to a dedication, if accepted by the public, and will conclude the donor from ever after asserting any right incompatible with the public use; Washb. Easem. 133; 11 M. & W. 827; 5 C. & P. 460; 6 Pet. 431; 22 Wend. 450; 25 Conn. 235; 19 Pick. 405; 2 Vt. 480; 9 B. Monr. 201; 12 Ga. 239; 27 Mo. 211; 23 Tex. 94; 95 Cal. 463; 148 Pa. 367; 35 W. Va. 554; 44 La. Ann. 931; 96 Ala. 272; 133 Ind. 331; the vital principle of the dedication being the intention, which must be unequivocally manifested, and clearly and satisfactorily appear; 40 Minn. 284; 84 Ala. 215; 78 Cal. 9; 42 Kan. 203. A mere acquiescence by the owner of land in its occasional and varying use for travel by the public is insufficient to establish a dedication thereof, as a street by adverse user; 135 Pa. 256; 152 *id.* 368. And, without any express appropriation by the owner, a dedication may be presumed from twenty years' use of his land by the public, with his knowledge; 22 Ala. N. S. 190; 19 Conn. 250; 11 Metc. 421; 3 Zabr. 150; 4 Ind. 518; 17 Ill. 249; 26 Pa. 187; or from any shorter period, if the use be accompanied by circumstances which favor the presumption, the fact of dedication being a conclusion to be drawn, in each particular case, by the jury, who as against the owner have simply to determine whether by permitting the public use he has intended a dedication; 5 Taunt. 125; 6 Wend. 651; 9 How. 10; 10 Ind. 219; 4 Cal. 114; 17 Ill. 416; 30 E. L. & Eq. 207. See 51 Minn. 381. But this presumption, being merely an inference from the public use, coupled with circumstances indicative of the owner's intent to dedicate, is open to rebuttal by the proof of circumstances indicative of the absence of such an intent; 4 Cush. 332; 25 Me. 297; 9 How. 10; 4 B. & Ad. 447; 7 C. & P. 578; 8 Ad. & E. 99; 110 Mo. 260; 63 Hun 628; 134 U. S. 84.

The death of the owner is a revocation of a proffered dedication of streets, and an acceptance thereafter by the village gives it no right in the streets; 67 Hun 546. Where one who has offered to dedicate land for a public street, conveys such land before his offer is accepted, the conveyance operates as a revocation of the offer; 141 Ill. 89; 100 Cal. 302.

Without acceptance, a dedication is incomplete. In the case of a highway, the question has been raised whether the public itself, or the body charged with the repair, is the proper party to make the acceptance. In England, it has been decided that an acceptance by the public, evidenced by mere use, is sufficient to bind the parish to repair, without any adoption on its part; 5 B. & Ad. 469; 2 N. & M. 583. See 3 Steph. Com. 130. In this country there are cases in which the English rule seems to be recognized; 1 R. I. 93; 23 Wend. 103; though the

weight of decision is to the effect that the towns are not liable, either for repair or for injuries occasioned by the want of repair, until they have themselves adopted the way thus created, either by a formal acceptance or by indirectly recognizing it, as by repairing it or setting up guide-posts therein; Thomp. Highw. 52; 13 Vt. 424; 6 N. Y. 257; 8 Gratt. 632; 2 Ind. 147; 3 Cush. 290; 35 W. Va. 554; 89 Va. 401; 69 Hun 86; 152 Pa. 494; 84 Ala. 224; 69 Tex. 449; Ang. Highw. 111. It has been held that the acceptance, improvement, and user by a city of a street or a portion of a street as platted is equivalent to an acceptance of the whole tract platted; 110 Mo. 618.

In order that a plat showing lots, blocks, and streets may operate as a common-law dedication of an easement in the streets to the public, there must be an acceptance by the public in a reasonable time; 86 Mich. 567. See STREET; BRIDGE; HIGHWAY.

The authorities above cited relate chiefly to the dedication of land for a highway. But a dedication may be made equally well to any other purpose which is for the benefit of the public at large, as for a square, a common, a landing, a cemetery, a school, or a monument; and the principles which govern in all these cases are the same, though they may be somewhat diversified in the application, according as they are invoked for the support of one or another of these objects; 6 Hill 407; 11 Pa. 444; 18 Ohio 18; 2 Ohio St. 107; 12 Ga. 239; 4 N. H. 537; 1 Wheat. 469; 2 Watts 23; 1 Spenc. 86; 8 B. Monr. 234; 3 Sandf. 502; 7 Ind. 641; 2 Wis. 153; 93 Cal. 43; 154 Mass. 323.

DEDIMUS ET CONCESSIMUS (Lat. we have given and granted). Words used by the king, or where there were more grantors than one, instead of *dedi et concessi*.

DEDIMUS POTESTATEM (Lat. we have given power). The name of a writ to commission private persons to do some act in the place of a judge: as, to administer an oath of office to a justice of the peace, to examine witnesses, and the like. Cowel; Com. Dig. *Chancery* (K, 3), (P, 2), *Fine* (E, 7); Dane, Abr. Index; 2 Bla. Com. 351.

DEDIMUS POTESTATEM DE ATTORNO FACIENDO (Lat.). The name of a writ which was formerly issued by authority of the crown in England to authorize an attorney to appear for a defendant, and without which a party could not, until the statute of Westminster 2 (*infra*), appear in court by attorney.

By statute of Westminster 2, 13 Edw. I. c. 10, all persons impleaded may make an attorney to sue for them, in all pleas moved by or against them, in the superior courts there enumerated. 3 M. & G. 184, n.

DEDITITII (Lat.). **In Roman Law.** Criminals who had been marked in the face or on the body with fire or an iron so that the mark could not be erased, and were subsequently manumitted. Calvinus, Lex.

DEDUCTION FOR NEW. In Maritime Law. The allowance (usually one-third) on the cost of repairing a damage to the ship by the extraordinary operation of the perils of navigation, the renovated part being presumed to be better than before the damage. In some parts, by custom or by express provision in the policy, the allowance is not made on a new vessel during the first year, or on a new sheathing, or on an anchor or chain-cables; 1 Phill. Ins. § 50; 2 *id.* §§ 1369, 1431, 1433; Benecke & S. Av. 167, n. 238; 2 S. & R. 229; 1 Cai. 573; 18 La. 77; 2 Cra. 218; 21 Pick. 456; 5 Cow. 63.

DEED. A written instrument under seal, containing a contract or agreement which has been delivered by the party to be bound and accepted by the obligee or covenantee. Co. Litt. 171; 2 Bla. Com. 295; Shepp. Touchst. 50.

A writing containing a contract sealed and delivered to the party thereto. 3 Washb. R. P. 239.

A writing under seal by which lands, tenements, or hereditaments are conveyed for an estate not less than a freehold. 2 Bla. Com. 294.

A writing or instrument, written on paper or parchment, sealed and delivered, to prove and testify the agreement of the parties whose deed it is to the things contained in the deed. 35 W. Va. 647. See 73 Tex. 129.

Any instrument in writing under seal, whether it relates to the conveyance of real estate or to any other matter,—as, for instance, a bond, single bill, agreement, or contract of any kind,—is as much a deed as is a conveyance of real estate, and, after delivery and acceptance, is obligatory; 2 S. & R. 504; 5 Dana 365; 2 Miss. 154. The term is, however, often used in the latter sense above given, and perhaps oftener than in its more general signification.

Deeds of feoffment. See FEOFFMENT.

Deeds of grant. See GRANT.

Deeds indented are those to which there are two or more parties who enter into reciprocal and corresponding obligations to each other. See INDENTURE.

Deeds of release. See RELEASE; QUIT-CLAIM.

Deeds poll are those which are the act of a single party and which do not require a counterpart. See DEED POLL.

Deeds under the statute of uses. See BARGAIN AND SALE; COVENANT TO STAND SEISED; LEASE AND RELEASE.

According to Blackstone, 2 Com. 318, deeds may be considered as *conveyances at common law*,—of which the original are feoffment; gift; grant; lease; exchange; partition: the derivative are release; confirmation; surrender; assignment; defeasance,—or *conveyances which derive their force by virtue of the statute of uses:* namely, covenant to stand seized to uses; bargain and sale of lands; lease and release; deed to lead and declare uses; deed of revocation of uses.

For a description of the various forms in use in United States, see 2 Washb. R. P. 607.

Requisites of. Deeds must be upon *paper* or parchment; 5 Johns. 246; must be completely written before delivery: 1 Hill, S. C. 267; 6 M. & W. 216, Am. ed. note; 3 Washb. R. P. 239; but see 21 Or. 211; BLANK; must be between competent *parties*, see PARTIES; and certain classes are excluded from holding lands, and, consequently, from being grantees in a deed; see 1 Washb. R. P. 73;

2 *id.* 564; must have been made without restraint; 13 Mass. 371; 2 Bla. Com. 291; must contain the *names* of the grantor and grantee; 2 Brock. 156; 19 Vt. 613; 12 Mass. 447; 14 Mo. 420; 13 Ohio 120; 14 Pet. 322; 1 McLean 321; 2 N. H. 525; but a variance in the names set forth in the deed will not invalidate it; 148 Pa. 216; must relate to suitable property; Browne, Stat. Frauds § 6; 3 Washb. R. P. 331; must contain the *requisite parts*, see *infra;* must be *sealed;* 6 Pet. 124; Thornt. Conv. 205; see 12 Cal. 166; 98 N. C. 558; (*i. e.* in order to constitute it a *deed*, though an unsealed instrument may operate as a conveyance of land; Mitchell, R. P. 453;) and should, for safety, be *signed*, even where statutes do not require it; 3 Washb. R. P. 239; but see 66 Tex. 142. Previous to the Statute of Frauds, signing was not essential to a deed, provided it was sealed. The statute makes it so; 2 Bla. Com. 306; *contra*, Shep. Touch. n. (24), Preston's ed., which latter is of opinion that the statute was intended to affect parol contracts only, and not deeds. See Wms. R. P. 152; 2 Q. B. 580.

They must be *delivered* (see DELIVERY) and *accepted;* 8 Ill. 177; 1 N. H. 353; 5 *id.* 71; 20 Johns. 187; 13 Cent. L. J. 222; 85 Ia. 149; 38 Minn. 395. A deed may be delivered by doing something and saying nothing, or by saying something and doing nothing, or it may be by both; 16 Or. 437. But if the deed is delivered without the consent of the grantor it is of no effect; 145 U. S. 317. Deeds conveying real estate must in most states of the United States be *acknowledged* and *recorded*. See ACKNOWLEDGMENT; RECORD. In Pennsylvania this is unnecessary to its validity as between the parties; 146 Pa. 451.

The requisite number of *witnesses* is also prescribed by statute in most of the states. See ATTESTATION.

Formal parts. The *premises* embrace the statement of the parties, the consideration, recitals inserted for explanation, description of the property granted, with the intended exceptions. The *habendum* begins at the words "to have and to hold," and limits and defines the estate which the grantee is to have. The *reddendum*, which is used to reserve something to the grantor, see EXCEPTION; the *conditions*, see CONDITION; the *covenants*, see COVENANT; WARRANTY; and the *conclusion*, which mentions the execution, date, etc., properly follow in the order observed here; 3 Washb. R. P. 365.

The *construction* of deeds is favorable to their validity; the principal includes the incident; punctuation is not regarded; a false description does not harm; the construction is least favorable to the party making the conveyance or reservation; the *habendum* is rejected if repugnant to the rest of the deed. Shepp. Touchst. 89; 3 Kent 422.

All the terms of a deed should be construed together; 98 N. C. 299; 82 Va. 685; 138 U. S. 226; and the words therein should be taken most strongly against the party using them; 131 U. S. 75; 84 Ala. 313; where two clauses in a deed are repugnant, the first prevails; 83 Va. 238; and if possible a deed should be so construed as to give it effect; 69 Tex. 153.

The *lex rei sitæ* governs in the conveyance of lands, both as to the requisites and forms of conveyance. See LEX REI SITÆ.

Recitals in deeds of payment of the considerations expressed therein are not proof of such payments as against persons not parties thereto; 142 U. S. 417; nor is a consideration always necessary to the validity of a deed of land; 73 Tex. 129. An alteration in the description of property in a deed cannot be made without re-execution, reacknowledgment, and redelivery, after the deed has been delivered and recorded; 148 U. S. 21.

Much of the English law in reference to the possession and discovery of title-deeds has been rendered useless in the United States by the system of registration, which prevails so universally.

Consult Preston; Wood; Thornton, Conveyancing; Greenleaf's Cruise, Dig.; Washburn; Hilliard; Williams; Tiedeman, Real Property; Barton, Deeds; Leake, Land Laws; Dembitz, Land Titles.

DEED TO DECLARE USES. A deed made after a fine or common recovery, to show the object thereof.

DEED TO LEAD USES. A deed made before a fine or common recovery, to show the object thereof.

DEED POLL. A deed which is made by one party only.

A deed in which only the party making it executes it or binds himself by it as a deed. 3 Washb. R. P. 311.

The term is now applied in practice mainly to deeds by sheriffs, executors, administrators, trustees, and the like.

The distinction between deed poll and indenture has come to be of but little importance. The ordinary purpose of a deed poll is merely to transfer the rights of the grantor to the grantee. It was formerly called *charta de una parte*, and usually began with these words,—*Sciant præsentes et futuri quod ego*, A, etc.; and now begins, "Know all men by these presents that I, A B, have given, granted, and enfeoffed, and by these presents do give, grant, and enfeoff," etc. Cruise, Dig. tit. 32, c. 1, s. 23. See INDENTURE.

DEEM. To decide; to judge; to sentence. When by statute certain acts are deemed to be crimes of a particular nature, they are such crimes, and not a semblance of it, nor a mere fanciful approximation to or designation of the offence. 132 Mass. 247.

DEEMSTERS. Judges in the Isle of Man, who decide all controversies without process, writings, or any charges. These judges were chosen by the people, and are said by Spelman to be two in number. Spelman, Gloss.; Camden, Brit.; Cowel; Blount.

DEFALCATION. The act of a defaulter.

The reduction of the claim of one of the contracting parties against the other, by deducting from it a smaller claim due from the former to the latter.

The law operates this reduction in certain cases; for, if the parties die or are insolvent, the balance between them is the only claim; but if they are solvent and alive, the defendant may or may not defalcate at his choice. See SET-OFF. For the etymology of this word, see Brackenbridge, Law Misc. 186. Defalcation was unknown at common law; 1 Rawle 291.

DEFAMATION. The speaking or writing words of a person so as to hurt his good fame, *de bona fama aliquid detrahere.* Written defamation is termed libel, and oral defamation slander.

The provisions of the law in respect to defamation, written or oral, are those of a civil nature, which give a remedy in damages to an injured individual, or of a criminal nature, which are devised for the security of the public. Heard, Lib. & Sl. § 1.

In England, besides the remedy by action, proceedings might formerly be instituted in the ecclesiastical court for redress of the injury. The punishment for defamation, in this court, was payment of costs and penance enjoined at the discretion of the judge. When the slander had been privately uttered, the penance might be ordered to be performed in a private place; when publicly uttered, the sentence was to be in public, as in the church of the parish of the defamed party, in time of divine service; and the defamer was required publicly to pronounce that by such words—naming them—as set forth in the sentence he had defamed the plaintiff, and, therefore, that he did beg pardon, first of God, and then of the party defamed, for uttering such words. Clerk's Assist. 225; 3 Burn. Eccl. Law, *Defamation*, pl. 14; 2 Chit. Pr. 471; Cooke, Def. This jurisdiction was taken away in England by 18 & 19 Vict. c. 41, and in Ireland by 23 & 24 Vict. c. 32.

If words are false, injurious, and uttered *malo animo*, they are actionable; 40 La. Ann. 423; words that, according to their usual construction and common acceptance, are construed as insults, and tend to violence and breach of the peace, are actionable, whether written or spoken; 84 Va. 664; 74 Ia. 563; 70 Md. 328; 71 Wis. 427; 98 N. C. 131; 147 Mass. 438; 152 Pa. 187; 51 Fed. Rep. 424; as is the publication of anything which tends to hold a person up to contempt and ridicule; 76 Ga. 280; but under the common law there was no redress for defamatory words unless they imputed a crime, or related to a man's profession or trade; 17 Or. 259.

If a publication does not contain a libellous charge, no action will lie therefor, no matter what its author intended; 119 Ind. 244; and where the language is so vague and uncertain, that it could not have been intended to be used in reference to any particular person or persons, it is not actionable; 40 Minn. 291. In publishing a libel a man is presumed to intend the natural consequences of his act; 57 Conn. 73. A false publication that a business firm is insolvent is libellous *per se;* 116 Mo. 226.

When the truth is relied upon in justification of a libel, to constitute a complete defence, it must be as broad as the defamatory accusation; 37 Minn. 285. One may show in mitigation of a libel that the violent conduct and language of the other provoked him to the use of the words charged; 75 Mich. 402. See LIBEL; SLANDER.

DEFAULT. The non-performance of a duty, whether arising under a contract or otherwise.

By the fourth section of the English statute of frauds, 29 Car. II. c. 3, it is enacted that "no action shall be brought to charge the defendant upon any special promise to answer for the debt, *default*, or miscarriage of another person, unless the agreement," etc., "shall be in writing," etc.

In Practice. The non-appearance of a plaintiff or defendant at court within the time prescribed by law to prosecute his claim or make his defence.

When the plaintiff makes default, he may be nonsuited; and when the defendant makes default, judgment by default is rendered against him. Comyns, Dig. *Pleader*, E 42, B. 11. See article JUDGMENT BY DEFAULT; 7 Viner, Abr. 429; *Doctr. Plac.* 208; Grah. Pr. 631. See as to what will excuse or save a default, Co. Litt. 259 *b*; 29 Iowa 245.

DEFEASANCE. An instrument which defeats the force or operation of some other deed or of an estate. That which is in the same deed is called a condition; and that which is in another deed is a defeasance. Comyns, Dig. *Defeasance.*

The defeasance may be subsequent to the deed in case of things executory; Co. Litt. 237 *a*; 2 Saund. 43; but must be a part of the same transaction in case of an executed contract; Co. Litt. 236 *b*; 1 N. H. 39; 3 Mich. 482; 7 Watts 401; 21 Ala. N. S. 9. Yet, where an instrument of defeasance is executed subsequently in pursuance of an agreement made at the time of making the original deed, it is sufficient; 2 Washb. R. P. 489; as well as where a deed and the defeasance bear different dates but are delivered at the same time; Devl. Deeds 1102; 13 Pick. 411; 31 Pa. 131; 7 Me. 435; 13 Ala. 246. The instrument of defeasance must *at law* be of as high a nature as the principal deed; 22 Pick. 526; 7 Watts 261, 401; 43 Me. 206. It must recite the deed it relates to, or at least the most material part thereof; and it is to be made between the same persons that were parties to the first deed; 43 Me. 371. Defeasances of deeds conveying real estate are generally subject to the same rules as deeds, as to record and notice to purchasers: 3 Wend. 208; 14 *id.* 63; 17 S. & R. 70; 12 Mass. 456; 38 Me. 447; 40 *id.* 381; but in some states actual notice is not sufficient without recording; Mich. Rev. Stat. 261; Minn. Stat. at Large, 1873, 34, § 23.

In equity, a defeasance could be proved by parol and a deed, absolute on its face, shown to be in legal effect a mortgage; 3 W. & S. 338; 115 Pa. 254; but such evidence must be clear, explicit, and unequivocal, and the parol defeasance must be shown to have been contemporaneous with the deed; *id.* In Pennsylvania, all defeasances are now required to be in writing, executed as deeds and recorded within sixty days after the deed. Act of June 8, 1881.

DEFECT. The want of something required by law.

In pleading, matter sufficient in law must be deduced and expressed according to the forms of law. Defects in matters of substance cannot be cured, because it does not appear that the plaintiff is entitled to recover; but when the defects are in matter of form, they are cured by a verdict in favor of the party who committed them; 2 Wash. C. C. 1; 1 Hen. & M. 153; 16 Pick. 128, 541; 12 Conn. 455; 1 Pet. 76; 2 Green, N. J. 133; 4 Blackf. 107; 2 McL. 35; Bacon, Abr. *Verdict*, X. See 31 Ohio St. 15; 50 Barb. 55; 40 Wis. 373.

DEFECTUM, CHALLENGE PROPTER. See CHALLENGE.

DEFECTUM SANGUINIS. See ESCHEAT.

DEFENCE. Torts. A forcible resistance of an attack by force.

A man is justified in defending his person, that of his wife, children, and servants, and for this purpose he may use as much force as may be necessary, even to killing the assailant, remembering that the means used must always be proportioned to the occasion, and that an excess becomes itself an injury; 3 M. & W. 150; 69 Miss. 478; 93 Cal. 476; 30 Fla. 142; 27 Tex. App. 562; 49 Ark. 543; 86 Ky. 39; but it must be in defence, and not in revenge; 1 C. & M. 214; 11 Mod. 43; Poll. Torts 255; 35 S. C. 283; for one is not justified in shooting another, if such other party is retreating or has thrown away his weapon; 129 Ind. 587; nor is a mere threat to take one's life, with nothing more, a sufficient defence or excuse for committing homicide; 35 S. C. 197.

A man may also repel force by force in defence of his personal property, against one who manifestly intends or endeavors, by violence or surprise, to commit a known felony, as robbery, by any force short of taking the aggressor's life; 1 Bish. New Cr. L. § 875; or short of wounding or the employment of a dangerous weapon; 148 Mass. 529. In the latter case, Holmes, J., said:— "We need not consider whether this explanation is quite adequate. There are weighty decisions which go further than those above cited, and which can hardly stand on the right of self-defence, but involve other considerations of policy." See 42 Ill. App. 427.

With respect to the defence or protection of the possession of real property, although it is justifiable even to kill a person in the act of attempting to commit a forcible felony, as burglary or arson, yet this justification can only take place when the party in possession is wholly without fault; 1 Hale, Pl. Cr. 440, 444; 1 East, Pl. Cr. 259, 277. And where an illegal forcible attack is made upon a dwelling-house with the intention merely of committing a trespass, and not with any felonious intent, it is generally lawful for the rightful occupant to oppose it by force; 7 Bing. 305; 20 Eng. C. L. 139. See, generally, 1 Chit. Pr. 589; Grotius, lib. 2, c. 1; Rutherford, Inst. b. 1, c. 16; 2 Whart. Cr. L. § 1019; Bishop; Clark; Wharton, Criminal Law; Thompson, Cases of Self-Defence; ASSAULT; SELF-DEFENCE.

In Pleading and Practice. The denial of the truth or validity of the complaint. A general assertion that the plaintiff has no ground of action, which is afterwards extended and maintained in the plea. 3 Bla. Com. 296; Co. Litt. 127; 33 Ind. 448.

In this sense it is similar to the *contestatio litis* of the civilians, and does not include justification. In a more general sense it denotes the means by which the defendant prevents the success of the plaintiff's action, or, in criminal practice, the indictment. The word is commonly used in this sense in modern practice.

Half defence was that which was made by the form "defends the force and injury, and says" (*defendit vim et injuriam, et dicit*).

Full defence was that which was made by the form "defends the force and injury when and where it shall behoove him, and the damages, and whatever else he ought to defend" (*defendit vim et injuriam quando et ubi curia consideravit, et damna et quicquid quod ipse defendere debet, et dicit*), commonly shortened into "defends the force and injury when," etc. 8 Term 632; 3 B. & P. 9, n.; Co. Litt. 127 *b*; Willes 41. It follows immediately upon the statement of appearance, "comes" (*venit*), thus: "comes and defends." By a general defence the propriety of the writ, the competency of the plaintiff, and the jurisdiction of the court were allowed; by defending the force and injury, misnomer was waived; by defending the damages, all exceptions to the person of the plaintiff; and by defending either when, etc., the jurisdiction of the court was admitted. 3 Bla. Com. 298.

The distinction between the forms of half and full defence was first lost sight of; 8 Term 633; Willes 41; 3 B. & P. 9; 2 Saund. 209 *c*; and no necessity for a technical defence exists, under the modern forms of practice.

Formerly, in criminal trials for capital crimes the prisoner was not allowed counsel to assist in his defence; 1 Ry. & M. 166; 3 Campb. 98; 4 Sharsw. Bla. Com. 356, n. This privilege was finally extended to all persons accused of felonies in England, by 6 & 7 Will. IV. c. 114; and in the United States by statute or universal practice; 3 Whart, Cr. L. § 3004.

DEFENDANT. A party sued in a personal action. The term does not in strictness apply to the person opposing or denying the allegations of the demandant in a real action, who is properly called the tenant. The distinction, however, is very commonly disregarded; and the term is further frequently applied to denote the person called upon to answer, either at law or in equity, and as well in criminal as civil suits.

See 8 Dana 41; 11 Ohio 374; 9 Ill. 20; 10 Paige 290; 16 Wis. 169; 118 Mass. 470; 122 *id.* 8; 56 L. J. R. Ch. D. 400; 54 Ala. 440.

DEFENDANT IN ERROR. The distinctive term appropriate to the party against whom a writ of error is sued out.

DEFENDEMUS (Lat. we will defend). A word anciently used in feoffments or gifts, whereby the donor and his heirs were bound to *defend* the donee against any servitude or incumbrance on the thing granted, other than contained in the donation. Cowel.

DEFENDER. In Scotch and Canon Law. A defendant.

DEFENDER (Fr.). To deny; to defend; to conduct a suit for a defendant; to forbid; to prevent; to protect.

DEFENERATION. The act of lending money on usury. Wharton.

DEFENSA. A park or place fenced in for deer, and defended as a property and peculiar for that use and service. Cowel.

DEFENSE AU FOND EN DROIT (called, also, *défense en droit*). A demurrer. 2 Low. C. 278. See, also, 1 Low. C. 216.

DEFENSE AU FOND EN FAIT. The general issue. 3 Low. C. 421.

DEFENSIVE ALLEGATION. In Ecclesiastical Practice. The answer of the party defending to the allegations of the party moving the cause. 3 Bla. Com. 100.

DEFENSIVE WAR. A war in defence of national right,—not necessarily defensive in its operations. 1 Kent 50.

DEFENSOR. In Civil Law. A defender; one who takes upon himself the defence of another's cause, assuming his liabilities.

An advocate in court. In this sense the word is very general in its signification, including *advocatus, patronus, procurator*, etc. A tutor or guardian. Calvinus, Lex.

In Old English Law. A guardian or protector. Spelman, Gloss. The defendant; a warrantor. Bracton.

In Canon Law. The advocate of a church. The patron. See ADVOCATUS. An officer having charge of the temporal affairs of the church. Spelman, Gloss.

DEFENSOR CIVITATUS (Lat. defender of the state).

In Roman Law. An officer whose business it was to transact certain business of the state.

Those officers were so called who, like the tribunes of the people at first, were chosen by the people in the large cities and towns, and whose duty it was to watch over the order of the city, protect the people and the *decuriones* from all harm, protect sailors and naval people, attend to the complaints of those who had suffered injuries, and discharge various other duties. As will be seen, they had considerable judicial power. Du Cange; Schmidt, Civ. Law, Introd. 16.

DEFERRED STOCK. See STOCK.

DEFICIT (Lat. is wanting). The deficiency whch is discovered in the accounts of an accountant, or in the money which he has received.

DEFINITION (Lat. *de*, and *finis*, a boundary; a limit). An enumeration of the principal ideas of which a compound idea is formed, to ascertain and explain its nature; that which denotes and points out the substance of a thing. Ayliffe, Pand. 59.

Definitions are always dangerous, because it is always difficult to prevent their being inaccurate, or their becoming so: *omnis definitio in jure civili periculosa est, parum est enim ut non subverti possit.*

All ideas are not susceptible of definition, and many legal terms cannot be defined. This inability is frequently supplied, in a considerable degree, by descriptions.

The meaning of ordinary words, when used in acts of parliament, is to be found, not so much in a strict etymological propriety of language, nor even in popular use, as in the subject or occasion on which they are used, and the object which is intended to be attained; L. R. 1 Ex. D. 143; for words used with reference to one set of circumstances may convey an intention quite different from what the self same set of words used in reference to another set of circumstances would or might have produced; L. R. 3 App. Cas. 68.

For a list of definitions of various words and phrases, as found in the reports, etc., which are not the subject of separate titles, see WORDS; MAXIMS.

DEFINITIVE. That which terminates a suit; final. A definitive sentence or judgment is put in opposition to an interlocutory judgment.

A distinction has been drawn in the United States supreme court between a final and a definitive judgment in regard to the condemnation of a prize in a court of admiralty; 1 Cra. 103; but for all practical purposes a definitive judgment or decree is final; 84 Pa. 238; 96 *id.* 420. See DECREE; JUDGMENT.

DEFLORATION. The act by which a woman is deprived of her virginity.

When this is done unlawfully and against her will, it bears the name of rape (which see); when she consents, it is fornication (which see); or if the man be married it is adultery on his part; 2 Greenl. Ev. § 48; 21 Pick. 509; 36 Me. 261; 11 Ga. 53; 2 Dall. 124.

DEFORCEMENT. The holding any lands or tenements to which another has a right.

In its most extensive sense the term includes any withholding of any lands or tenements to which another person has a right; Co. Litt. 277; 17 Conn. 212; so that this includes as well an abatement, an intrusion, a disseisin, or a discontinuance, as any other species of wrong whatsoever, by which the owner of the freehold is kept out of possession. But, as contradistinguished from the former, it is only such a detainer of the freehold from him who has the right of property as falls within none of the injuries above mentioned; 3 Bla. Com. 173; Archb. Civ. Pl. 13; Dane, Abr. Index.

In Scotch Law. The opposition given, or resistance made, to messengers or other officers while they are employed in executing the law.

This crime is punished by confiscation of

movables, the one half to the king and the other to the creditor at whose suit the diligence is used; Erskine, Pr. 4. 4. 32.

DEFORCIANT. One who wrongfully keeps the owner of lands and tenements out of the possession of them. 2 Bla. Com. 350.

DEFORCIARE. To withhold lands or tenements from the rightful owner. This is a word of art which cannot be supplied by any other word. Co. Litt. 331 *b*; 3 Thomas, Co. Litt. 3; Bract. lib. 4, 238; Fleta, lib. 5, c. 11.

DEFOSSION. The punishment of being buried alive. Black, L. Dict.

DEFRAUD. To defraud is to withhold from another that which is justly due to him, or to deprive him of a right by deception or artifice. 12 Barb. 186.

DEFRAUDACION. In Spanish Law. The crime committed by a person who fraudulently avoids the payment of some public tax.

DEFUNCT. Dead; a deceased person.

DEGRADATION. In Ecclesiastical Law. The act of depriving a priest of his orders or benefices or of both, either by word of mouth or by public reproach, and a solemn ceremony of stripping from the offender the vestments of his office.

The mode of proceeding in the trial of clergymen is determined by canons in the various dioceses.

The same term is applied to the loss, by a peer, of his rank as such, as when he is deprived thereof by act of parliament. 2 Steph. Com. 608. Degradation must be distinguished from disqualification for bankruptcy, under stat. 34 & 35 Vict. c. 50.

DEGRADING. Sinking or lowering a person in the estimation of the public.

As to compelling a witness to answer questions tending to degrade him, see WITNESS; 13 Howell, St. Tr. 17, 334; 16 *id.* 161; 1 Phill. Ev. 269. To write or print of a man what will degrade him in society is a libel; 1 Dowl. 674; 2 M. & R. 77.

DEGREE (Fr. *degré*, from Lat. *gradus*, a step in a stairway; a round of a ladder).

A remove or step in the line of descent or consanguinity.

As used in law, it designates the distance between those who are allied by blood: it means the relations descending from a common ancestor, from generation to generation, as by so many steps. Hence, according to some lexicographers, we obtain the word pedigree (*q. v.*) *par degrez* (by degrees), the descent being reckoned *par degrez*. Minshew. Each generation lengthens the line of descent one degree; for the degrees are only the generations marked in a line by small circles or squares, in which the names of the persons forming it are written. See CONSANGUINITY; LINE; Ayliffe, Parerg. 209; Toullier, *Droit. Civ. Franc.* liv. 3, t. 1, c. 3, n. 158; Aso & M. Inst. b. 2, t. 4, c. 3, § 1.

In criminal law, the word is used to distinguish different grades of guilt and punishment attached to the same act, committed under different circumstances, as murder in the first and second degrees.

The state or civil condition of a person. 15 Me. 122.

The ancient English statute of additions, for example, requires that in process, for the better description of a defendant, his *state*, *degree*, or *mystery* shall be mentioned.

An honorable state or condition to which a student is advanced in testimony of proficiency in arts and sciences.

They are of pontifical origin. See 1 Schmidt, Thesaurus, 144; Vicat, *Doctores*; Minshew, Dict. *Bacheler*; Merlin, *Répertoire Univ.*; Van Espen. pt. 1, tit. 10; Giannone, *Istoria di Napoli*, lib. xi. c. 2, for a full account of this matter.

For the degrees of negligence, see NEGLIGENCE; BAILEE; BAILMENT.

DEHORS (Fr. out of; without). Something out of the record, agreement, will, or other thing spoken of; something foreign to the matter in question. See ALIUNDE.

DEI JUDICUM (Lat. the judgment of God). A name given to the trial by ordeal.

DEJACION. In Spanish Law. A general term applicable to the surrender of his property to his creditors by an insolvent. The renunciation of an inheritance. The release of a mortgage upon payment, and the abandonment of the property insured to the insurer.

DEJERATION (Lat.). A taking of a solemn oath. Wharton.

DEL CREDERE COMMISSION. One under which the agent, in consideration of an additional payment, engages to insure to his principal not only the solvency of the debtor, but the punctual discharge of the debt. 21 W. R. 465; L. R. 6 Ch. App. 397; and he is liable, in the first instance, without any demand from the debtor. But the principal cannot sue the *del credere* factor until the debtor has refused or neglected to pay; 1 Term 112; Paley, Ag. 39. See Pars. Contr.; Story; Wharton; Mechem, Agency.

He is virtually a surety; 8 Ex. 40; and the purchaser is the primary debtor; 7 Misc. Rep. 582. He is distinguished from other agents by the fact that he guarantees that those persons to whom he sells shall perform the contracts which he makes with them; L. R. 6 Ch. 403.

DELATE. In Scotch Law. To accuse. Bell, Dict.

DELATIO. In Civil Law. An accusation or information. Du Cange; Calvinus, Lex.

DELATOR. An accuser or informer. Du Cange.

DELATURA. In Old English Law. The reward of an informer. Whishaw.

DELAWARE. The name of one of the original states of the United States of America, being the first to adopt the constitution.

In 1623, Cornelius May, with some Dutch emigrants, established a trading-house, but the settlers soon removed to North river. Ten years afterwards

De Vries arrived at Cape Henlopen, but the natives shortly destroyed the settlement. In the spring of 1638 the Swedes under Minuit established a settlement at the mouth of the Minquas river, which was called by them the Christiana, in honor of their queen. They purchased all the lands from Cape Henlopen to the falls near Trenton, and named the country New Sweden. Stuyvesant, the Dutch governor of New York, ended the Swedish authority in 1654. The Dutch held the country until 1664, when it fell into the hands of the English, and was granted by Charles II. to his brother James, Duke of York. In 1682, William Penn obtained a patent from the Duke of York, releasing all his title claimed through his patent from the crown to a portion of the territory. By this grant Penn became possessed of New Castle and the land lying within a circle of twelve miles around it, and subsequently of a tract of land beginning twelve miles south of New Castle and extending to Cape Henlopen. In consequence of a dispute between Penn and Lord Baltimore, the south and west lines, dividing his possessions from Maryland, were traced in 1761, under a decree of Lord-Chancellor Hardwicke, by the surveyors Mason and Dixon; and this line, extended westward between Maryland and Pennsylvania, has become historical as *Mason and Dixon's line* (*q. v.*).

Delaware was divided into three counties, called New Castle, Kent, and Sussex, and by enactment of Penn was annexed to Pennsylvania under the name of The Three Lower Counties upon Delaware. These counties remained for twenty years a part of Pennsylvania, each county sending six delegates to the general assembly. They separated in 1703, with the consent of the proprietary, and were governed by a separate legislature of their own, pursuant to the liberty reserved to them by a clause of their original charter. Delaware was the first state to ratify the federal constitution, on December 7, 1787.

In 1776 a state constitution was framed, a second in 1792, and a third in 1831, which remained in force until 1897. The agitation for constitutional changes was begun before 1850, and in 1853 a convention was held and a constitution adopted which was, on submission to a popular vote, defeated. After the civil war the efforts to obtain a convention were resumed, but were unsuccessful until 1896.

The present constitution was adopted June 4, 1897, by a constitutional convention which was duly called to meet in December, 1896, delegates having been elected at the general election of that year. The constitution contains the usual declaration of rights, no change being made in that article.

The changes made by this constitution are very radical. There is a veto power vested in the governor, but the general power of appointing state and county officers is taken from the executive, and all important officers are to be elected, except judges, who are appointed by the governor and confirmed by the senate for twelve years, in lieu of for life as formerly. There are provisions for state boards of pardons, agriculture, and health; district, not county, representation; restrictions on special legislation; detailed regulation of elections, with stringent provisions as to bribery, and a system of registration, prepayment of poll-tax being replaced by a registration fee; and local option by districts.

The Legislative Power.—The general assembly, which meets biennially, consists of a senate and a house of representatives.

The senate is composed of seventeen senators, chosen for four years by the citizens residing in the several senatorial districts. They must be twenty-seven years of age.

The house of representatives is composed of thirty-five members, chosen for two years by the citizens residing in the several districts. They must be twenty-four years of age.

The districts are described in the constitution. There are two senators and five representatives from the city of Wilmington, and five senators and two representatives from the remaining part of New Castle County, and from each of the other counties. Senators and representatives must have a residence of three years in the state and one year in the district.

The Executive Power.—*The governor* is chosen by the citizens of the state for the term of four years. He must be thirty years old, and have been for twelve years next before his election a citizen and resident of the United States, the last six of which he must have lived in the state, unless absent on business of the state or the United States.

He is commander-in-chief of the army and navy of the state and of the militia, and may appoint all officers whose appointment is not otherwise provided for, with a consent of a majority of all the senators elected. He may fill vacancies in the recess of the senate, except that for judicial appointments a special session must be called.

A lieutenant-governor is elected having the same term and qualifications, and if both offices are vacant, the secretary of state, attorney-general, president *pro tempore* of the senate or speaker of the house succeed in that order.

The secretary of state is appointed by the governor and confirmed by the senate; the attorney-general and insurance commissioner are elected for four years, and the state treasurer and auditor of accounts, for two. Sheriffs and coroners are elected for two years and other county officers for four.

The Judicial Power.—*The supreme court* consists of the chancellor, who presides; the chief justice, who presides in the absence of the chancellor; and four associate judges, one at large, and three, of whom one must reside in each county, termed resident associate judges. Appeals from chancery are heard by the chief justice and associate judges, and writs of error or appeals in election cases, by the chancellor and such law judges as did not sit in the cause below. This court has a general appellate jurisdiction. Three constitute a quorum.

The superior court is the court of law of original civil jurisdiction, held in each county. It is vested with jurisdiction of all causes of a civil nature at common law.

The court of oyer and terminer has jurisdiction of all capital crimes, and of manslaughter, and of being an accessory to such crimes.

The court of general sessions is the county court of general criminal jurisdiction in other cases except those exclusively cognizable before justices of the peace. It acts also as court of general jail delivery, and, for the purpose of indictment, commitment for trial, or holding to bail, has jurisdiction of crimes and offences cognizable before the court of oyer and terminer.

The three courts last mentioned are composed of the chief justice and the four associate judges, who are authorized to designate those of their number who shall hold the courts in the several counties. Whenever practicable, three shall sit, but no more; and two are a quorum, except in the court of oyer and terminer, where three are required.

Prosecutions for fraud or bribery at general or primary elections are to be tried on information, after examination and commitment before a judge or justice of the peace, and trial by the court without grand or petit jury, with an appeal to the supreme court. Neither conviction, nor affirmance of one, in such case, can be had without the concurrence of all the trial judges.

The court of chancery is held by the chancellor. It is to hear and decree all matters in equity, including injunctions to stay suits at law and prevent waste, according to the course of chancery practice in England. But these powers are to be exercised only when no adequate remedy exists at law. In cases where matters of fact are in dispute, the cause is to be remitted to the superior court, to be tried by a jury. But this is construed to be only a provision for the ordering of an issue for trial by jury in accordance with the chancery practice of England, and not as limiting the discretion of the court in such cases, or as providing for a trial of facts by jury in equity cases as a matter of right.

The orphans' court in each county consists of the chancellor and the associate judge residing in that county. It appoints and removes guardians, and has the general superintendence of the estates of minors, except that guardians' accounts are passed before the register of wills with the right of exception to be heard by the orphan's court. This court also has jurisdiction for the sale of intestate real estate, and the sale of land of decedents to pay debts and to hear and determine exceptions to accounts of executors and administrators passed before the register of wills. There is an appeal from this court to the superior court, in cases of a division of opinion, or affecting the right to or value of real estate, or guardians' accounts.

The register of wills in each county exercises the powers of a probate court, admitting wills to probate, granting administration, and passing accounts of executors, administrators, and guardians; with appeal in cases of probate, or refusal thereof, to the superior court, and exception to accounts to the orphans' court. He may also order an issue of *de-*

visavit vel non to be tried by a jury at the bar of the superior court.

Justices of the peace have a jurisdiction of actions arising from contracts, of trespass where the amount involved does not exceed one hundred dollars, of cases under the process of forcible entry and detainer, and a civil jurisdiction, generally, where the amount involved is not over one hundred dollars. They may issue search-warrants, and may punish breaches of the peace, in cases which are not aggravated, by a fine not exceeding ten dollars. If the case be aggravated, the justice must bind over the offender for trial by the higher court.

DELAY. To procrastinate; detain or stop; to prolong.

A carrier who receives live-stock for shipment cannot escape liability for injuries by delay in their transportation, on the ground that there was an unusual rush of business on its road; 3 Tex. Civ. App. 8; see 49 Ill. App. 443; but it is liable for an unreasonable delay; 53 Mo. App. 473; 50 Fed. Rep. 567. In an action for damages for delay in transporting cattle, the difference in the market value of the cattle at the place of destination, at the time they should have arrived, and the time they did arrive, is the measure of damages; 82 Tex. 608.

When a telegraph company receives a message to transmit at a time when it cannot be sent because of a storm and broken wires, and does not inform the sender of such inability, it will not be relieved from liability for special damages for failure to transmit it within a reasonable time because of such storm; 8 Ind. App. 246; 55 Fed. Rep. 738. See TELEGRAPH.

DELECTUS PERSONÆ (Lat. the choice of the person). The right of a partner to decide what new partners, if any, shall be admitted to the firm. Story, Partn. §§ 5, 195.

This doctrine excludes even executors and representatives of partners from succeeding to the state and condition of partners; 7 Pick. 237; 3 Kent 55; Colly. Partn. §§ 8, 113, n.; Lind. Partn. 590.

In Scotch Law. The personal preference which is supposed to have been exercised by a landlord in selecting his tenant, by the members of a firm in making choice of partners, in the appointment of persons to office, and other cases. Nearly equivalent to personal trust, as a doctrine in law. Bell, Dict.

DELEGATE (Lat. *delegare*, to choose from). One authorized by another to act in his name; an attorney.

A person elected, by the people of an organized territory of the United States, to congress, who has a seat in congress and a right of debating, but not of voting. Ord. July 13, 1787; 2 Story, U. S. Laws 2076.

A person elected to any deliberative assembly. It is, however, in this sense generally limited to occasional assemblies, such as conventions and the like, and does not usually apply to permanent bodies, as houses of assembly, etc. In Maryland the most numerous branch of the Legislature is called the House of Delegates.

DELEGATION. In Civil Law. A kind of novation by which the original debtor, in order to be liberated from his creditor, gives him a third person, who becomes obliged in his stead to the creditor or to the person appointed by him. See NOVATION.

Perfect delegation exists when the debtor who makes the obligation is discharged by the creditor.

Imperfect delegation exists when the creditor retains his rights against the original debtor. 2 Duvergnoy, n. 169.

It results from the definition that a delegation is made by the concurrence of at least three parties, viz.: the party delegating—that is, the ancient debtor who procures another debtor in his stead; the party delegated, who enters into the obligation in the place of the ancient debtor, either to the creditor or to some other person appointed by him; and the creditor, who, in consequence of the obligation contracted by the party delegated, discharges the party delegating. Sometimes there intervenes a fourth party; namely, the person indicated by the creditor in whose favor the person delegated becomes obliged, upon the indication of the creditor and by the order of the person delegating. Pothier, Obl. pt. 3, c. 2, art. 6; 48 Miss. 454. See La. Civ. Code 2188, 2189; 14 Wend. 116; 20 Johns. 76; 5 N. H. 410; 11 S. & R. 179.

The party delegated is commonly a debtor of the person delegating, and, in order to be liberated from the obligation to him, contracts a new one with his creditor. In this case there is a novation both of the obligation of the person delegating, by his giving his creditor a new debtor, and of the person delegated, by the new obligation which he contracts. Pothier, Obl. pt. 3, c. 2, art. 6, § 2.

In general, where the person delegated contracts a valid obligation to the creditor, the delegant is entirely liberated, and the creditor has no recourse against him in case of the substitute's insolvency. There is an exception to this rule when it is agreed that the debtor shall at *his own risk* delegate another person; but even in that case the creditor must not have omitted using proper diligence to obtain payment whilst the substitute continued solvent. Pothier, Obl. pt. 3, c. 2.

Delegation differs from transfer and simple indication. The transfer which a creditor makes of his debt does not include any novation. It is the orginal debt which passes from one of the parties, who makes the transfer, to the other, who receives it, and only takes place between these two persons, without the consent of the debtor necessarily intervening. Again, when the debtor indicates to the creditor a person from whom he may receive payment of the debt, and to whom the debtor gives the creditor an order for the purpose, it is merely a mandate, and neither a transfer nor a novation. So, where the creditor indicates a person to whom his debtor may pay the money, the debtor does not contract any

obligation to the person indicated, but continues the debtor of his creditor who made the indication. Pothier, Obl. pt. 3, c. 2. See NOVATION.

At Common Law. The transfer of authority from one or more persons to one or more others.

Any person, *sui juris*, may delegate to another in authority to act for him in a matter which is lawful and otherwise capable of being delegated; Comyns, Dig. *Attorney*, c. 1; 9 Co. 75 *b*; Story, Ag. § 6.

When a bare power or authority has been given to another, the latter cannot, in general, delegate that authority, or any part of it, to a third person, for the obvious reason that the principal has relied upon the intelligence, skill, and ability of his agent, and cannot have the same confidence in a stranger; Story, Ag. § 13; 2 Kent 633; Broom, Leg. Max. 839; 5 Pet. 390; 3 Stor. 411, 425; 1 McMull. 453; 15 Pick. 303, 307; 23 Wend. 485; 11 G. & J. 58; 5 Ill. 127, 133; 35 W. Va. 300; 62 Hun 369; 2 Misc. Rep. 397. A power to delegate his authority may, however, be given to the agent by express terms of substitution; 1 Hill 505. And sometimes such power is implied, as in the following cases: *First*, when, by the law, such power is indispensable in order to accomplish the end proposed: as, for example, when goods are directed to be sold at auction, and the law forbids such sales except by licensed auctioneers; 6 S. & R. 386. *Second*, when the employment of such substitute is in the ordinary course of trade: as, where it is the custom of trade to employ a shipbroker or other agent for the purpose of procuring freight and the like; 2 M. & S. 301; 2 B. & P. 438; 3 Johns. Ch. 167, 178; 6 S. & R. 386. *Third*, when it is understood by the parties to be the mode in which the particular thing would or might be done; 3 Chit. C. L. 206; 9 Ves. 234, 251, 252; 1 M. & S. 484; 2 *id.* 301, 303, note. See 53 Fed. Rep. 936. *Fourth*, when the powers thus delegated are merely mechanical in their nature; 1 Hill 501; Sugd. Pow. 176.

As to the form of the delegation, for most purposes it may be either in writing, not under seal, or verbally without writing; or the authority may be implied. When, however, the act is required to be done under seal, the delegation must also be under seal unless the principal is present and verbally or impliedly authorizes the act; Story, Ag. § 51; Mech. Ag. 81; 5 Cush. 483.

Judicial power cannot be delegated; 3 Brev. 500; 112 N. C. 141; a statute authorizing an attorney to sit in the place of a judge who was disqualified, by reason of prejudice or interest, is void; 39 Wis. 390; S. C. 20 Am. Rep. 50. See 3 Dutch. 622; Cooley, Const. Lim. 117.

Legislative power cannot be delegated by the legislature to any other body or authority; 62 Me. 62, 451; 43 Tex. 41; 72 Pa. 491; 45 Mo. 458; 26 Vt. 362; 4 Harring. 479; 8 N. Y. 483; Cooley, Const. Lim. 141; 45 Fed. Rep. 178; 50 *id.* 406; 47 Mo. App. 125; see 143 U. S. 649; but the taking effect of a statute may be made to depend upon some subsequent event; 7 Cra. 382; 60 Me. 356; 23 Md. 449; 42 Conn. 583; 43 Iowa 252. The grant by congress to the secretary of war prescribing rules for the use of canals owned or operated by the government is not a delegation of legislative power, and the rules prescribed by him have the force of law and persons violating the same are subject to criminal punishment therefor; 74 Fed. Rep. 207. The question of the adoption or rejection of a general law cannot be referred to the vote of the people. It is usual, however, to confer certain legislative functions upon muncipal corporations, and this practice has been constantly upheld.

The state government may delegate to a municipal corporation part of its own powers, but these powers cannot be delegated by the corporation, unless the authority to delegate is specially granted by the legislature, nor can the corporation divest itself of the discretion vested by the statute; 44 La. 809.

Acts (commonly called local-option laws) permitting the people of a locality to accept or reject for themselves particular police regulations, have been upheld as constitutional; 72 Pa. 491; s. c. 13 Am. Rep. 716; 119 Mass. 199; 42 Ind. 547; *contra*, 6 Pa. 507; 4 Harring. 479; 33 Ia. 134; s. c. 11 Am. Rep. 115; 62 Mo. 168. See Cooley, Const. Lim. 150; 60 Conn. 97.

DELESTAGE. In French Marine Law. A discharging of ballast from a vessel. Black, L. Dict.

DELIBERATE. To examine, to consult, in order to form an opinion. Thus, a jury deliberate as to their verdict.

DELIBERATION. The act of the understanding by which a party examines whether a thing proposed ought to be done or not to be done, or whether it ought to be done in one manner or another.

The deliberation relates to the end proposed, to the means of accomplishing that end, or to both. It is a presumption of law that all acts committed are done with due deliberation,—that the party intended to do what he has done. But he may show the contrary. In contracts, for example, he may show that he has been taken by surprise (*q. v.*); and when a criminal act is charged, he may prove that it was an accident, and not with deliberation,—that, in fact, there was no intention or will. See 18 Am. Dec. 778, n.

By the use of this word in describing the crime of murder in the first degree, the idea is conveyed that the perpetrator weighs the motives for the act, and its consequences, the nature of the crime, or other things connected with his intentions, with a view to a decision thereon, that he carefully considers all these, and the act is not suddenly committed; 28 Ia. 524. See 66 Mo. 13; 91 *id.* 502; 35 Mich. 16. See INTENTION; WILL.

In Legislation. Council or consultation touching some business in an assembly having the power to act in relation to it.

DELICT. In Civil Law. The act by

which one person, by fraud or malignity, causes some damage or tort to some other.

In its most enlarged sense, this term includes all kinds of crimes and misdemeanors, and even the injury which has been caused by another, either voluntarily or accidentally, without evil intention. But more commonly by delicts are understood those small offences which are punished by a small fine or a short imprisonment.

Private delicts are those which are directly injurious to a private individual.

Public delicts are those which affect the whole community in their hurtful consequences.

Quasi delicts are the acts of a person, who, without malignity, but by an inexcusable imprudence, causes an injury to another. Pothier, Obl. n. 116; Erskine, Pr. 4. 4. 1.

DELICTUM (Lat.). A crime or offence; a tort or wrong, as in actions *ex delicto*. 1 Chit. Pl. A challenge of a juror *propter delictum* is for some crime or misdemeanor that affects his credit and renders him infamous. 3 Bla. Com. 363; 2 Kent 241. Some offence committed or wrong done. 1 Kent 552; Cowp. 199, 200. A state of culpability. Occurring often, in the phrase "*in pari delicto melior est conditio defendentis.*" So, where both parties to a broken contract have been guilty of unlawful acts, the law will not interfere, but will leave them *in pari delicto*. 2 Greenl. Ev. § 111.

DELIMIT. To mark or lay out the limits or boundary line of a territory or country.

DELINQUENT. In Civil Law. He who has been guilty of some crime, offence, or failure of duty.

DELIRIUM FEBRILE. In Medical Jurisprudence. A form of mental aberration incident to febrile disease, and sometimes to the last stages of chronic diseases.

The aberration is mostly of a subjective character, maintained by the inward activity of the mind rather than by outward impressions. "Regardless of persons or things around him, and scarcely capable of recognizing them when aroused by his attendants, the patient retires within himself, to dwell upon the scenes and events of the past, which pass before him in wild and disorderly array, while the tongue feebly records the varying impressions, in the form of disjointed, incoherent discourse, or of senseless rhapsody." Ray, Med. Jur. 346. It comes on gradually, being first manifested by talking while asleep, and by a momentary forgetfulness of persons and things on waking. Fully aroused, however, the mind becomes clear and tranquil, and so continues until the return of sleep, when the same incidents recur. Gradually the mental disorder becomes more intense, and the intervals between its returns of shorter duration, until they disappear altogether. Occasionally the past is revived with wonderful vividness, and acquirements are displayed which the patient, before his illness, had entirely forgotten. Instances are related of persons speaking in a language which, though acquired in youth, had long since passed from their memory. See the definition of delirium by Bland, Ch., in Owing's case, 1 Bland, Ch. 386.

The only acts which are liable to be affected by delirium are wills, which are often made in the last illness during the periods when the mind is apparently clear. Under such circumstances it may be questioned whether the apparent clearness was or was not real; and it is a question not always easily answered. In the early stages of delirium the mind may be quite clear, no doubt, in the intervals, while it is no less certain that there comes a period at last when no really lucid interval occurs and the mind is reliable at no time. The person may be quiet, and even answer questions with some degree of pertinence, while a close examination would show the mind to be in a dreamy condition and unable to appreciate any nice relations. In all these cases the question to be met is, whether the delirium which confessedly existed before the act left upon the mind no trace of its influence; whether the testator, calm, quiet, clear, and coherent as he seemed, was not quite unconscious of the nature of the act he was performing. The state of things implied in these questions is not fanciful. In every case it may possibly exist, and the questions must be met.

After obtaining all the light which can be thrown on the mental condition of the testator by nurses, servants, and physicians, then the character of the act itself and the circumstances which accompany it require a careful investigation. If it should appear that the mind was apparently clear, and that the act was a rational act rationally done, consistent one part with another, and in accordance with wishes or instructions previously expressed, and without any appearance of foreign influence, then it would be established. A different state of things would to that extent raise suspicion and throw discredit on the act. Yet at the very best it will occasionally happen, so dubious sometimes are the indications, that the decision will be largely conjectural. 1 Hagg. Eccl. 146, 253, 502, 577; 2 *id.* 142; 3 *id.* 790; 1 Lee, Eccl. 130; 2 *id.* 229. See INSANITY.

DELIRIUM TREMENS (called, also, *mania-a-potu*). **In Medical Jurisprudence.** A form of mental disorder, usually accompanied by tremor, incident to habits of intemperate drinking, which generally appears as a sequel to a period of unusual excess or after a few days' abstinence from stimulating drink. It may also be caused by an accident, fright, or acute inflammatory disease, such as pneumonia.

The nature of the connection between this disease and abstinence is not yet clearly understood. Where the former succeeds a broken limb, or any other severe accident that confines the patient to his bed and obliges him to abstain, it would seem as if its development were favored by the constitutional disturbance then existing. In other cases, where the abstinence is apparently voluntary, there is some reason to suppose that it is really the incubation of the disease, and not its cause.

Its approach is generally indicated by a slight tremor and faltering of the hands and lower extremities, a tremulousness of the voice, a certain restlessness and sense of anxiety which the patient knows not how to describe or account for, disturbed sleep, and impaired appetite. These symptoms having continued two or three days, at the end of which time they have usually increased in severity, the patient ceases to sleep altogether, and soon becomes delirious at intervals. After a while the delirium becomes constant, as well as the utter absence of sleep. There is usually an elevation of temperature of two or three degrees. This state of watchfulness and delirium continues three or four days, when, if the patient recover, it is succeeded by sleep, which at first appears in uneasy and irregular naps, and lastly in long, sound, and refreshing slumbers. When sleep does not supervene about this time, the disease proves fatal.

The mental aberration of delirium tremens is marked by some peculiar characters. Almost invariably the patient manifests feelings of fear and suspicion, and labors under continual apprehensions of being made the victim of sinister designs and practices. He imagines that people have conspired to rob and murder him, and insists that he can hear them in an adjoining room arranging their plans and preparing to rush upon him, or that he is forcibly detained and prevented from going to his own home. One of the most common hallucinations in this disease is that of constantly seeing devils, snakes, or vermin around him and on him. Under the influence of the terrors inspired by these notions, the wretched patient often endeavors to cut his throat, or jump out of the window, or murder his wife, or some one else whom his disordered imagination identifies with his enemies.

Delirium tremens must not be confounded with other forms of mental derangement which occur in connection with intemperate habits. Hard drinking

may produce a paroxysm of maniacal excitement, or a host of hallucinations and delusions, which disappear after a few days' abstinence from drink and are succeeded by the ordinary mental condition. In U. S. *v.* McGlue, 1 Curt. 1, for instance, the prisoner was defended on the plea that the homicide for which he was indicted was committed in a fit of delirium tremens. There was no doubt that he was laboring under some form of insanity; but the fact, which appeared in evidence, that his reason returned before the recurrence of sound sleep, rendered it very doubtful whether the trouble was delirium tremens, although in every other respect it looked like that disease.

By repeated decisions the law has been settled in this country that delirium tremens annuls responsibility for any act that may be committed under its influence: provided, of course, that the mental condition can stand the tests applied in other forms of insanity. The law does not look to the remote causes of the mental affection; and the rule on this point is, that if the act is not committed under the immediate influence of intoxicating drinks, the plea of insanity is not invalidated by the fact that it is the result of drinking at some previous time. Such drinking may be morally wrong; but the same may be said of other vicious indulgences which give rise to much of the insanity which exists in the world; Whart. Cr. L. § 48; 57 Tenn. 178; 50 Ala. 149; 40 Ind. 233; 2 Cra. 158; 19 Mich. 401; 12 Tex. 500; 64 Ind. 435; 1 Curt. 1; 5 Mas. 28; State *v.* Wilson, Ray, Med. Jur. 520; 9 Houst. 369; 105 Cal. 486; 26 S. W. Rep. (Tex.) 396. In England, the existence of delirium tremens has been admitted as an excuse for crime for the same reasons; Reg *v.* Watson and Reg *v.* Simpson, 2 Tayl. Med. Jur. 599; 14 Cox, Cr. Cas. 565. In the case of Birdsall, 1 Beck, Med. Jur. 808, it was held that delirium tremens was not a valid defence, because the prisoner knew, by repeated experience, that indulgence in drinking would probably bring on an attack of the disease; see also in 19 Mich. 401.

DELIVERANCE. In Practice. A term used by the clerk in court to every prisoner who is arraigned and pleads *not guilty*, to whom he wishes a good *deliverance*. In modern practice this is seldom used.

DELIVERY. In Conveyancing. The transfer of a deed from the grantor to the grantee, or some person acting in his behalf, in such a manner as to deprive the grantor of his right to recall it at his option.

An *absolute* delivery is one which is complete upon the actual transfer of the instrument from the possession of the grantor.

A *conditional* delivery is one which passes the deed from the possession of the grantor, but is not to be completed by possession in the grantee, or a third person as his agent, until the happening of a specified event. A delivery in this manner is an *escrow* (*q. v.*).

No particular form is required to effect a delivery. It may be by acts merely, by words merely, or by both combined; but in all cases an intention that it shall be a delivery must exist; Comyns, Dig. *Fait* (A); 1 Wood. Conv. 193; 6 Sim. 31; 11 Vt. 621; 18 Me. 391; 2 Pa. 191; 12 Johns. 536; 20 Pick. 28; 4 J. J. Marsh. 572; 141 Ill. 400; 38 Minn. 443; 69 Tex. 513; 16 Or. 437.

"Although a delivery is essential to the transfer of title under a deed, no formality, either of words or action, is necessary to constitute it. Anything which signifies the intention of the grantor to part with his control or dominion over the paper, so that it may become a muniment of title in the grantee, operates as a legal delivery. The question of delivery is purely one of intention. With respect to the measure of proof required, a difference is recognized in the cases depending upon the character of the deed, whether it be voluntary or made to give effect to a sale. In the former case the intention to part with the control of the deed is not presumed and a delivery must be proved strictly. . . . But if the conveyance be for a valuable consideration and absolute on its face, the intention to consummate the conveyance by the delivery of the deed as a muniment of title is inferred from the grantor's parting with the possession of it, whether it be to the grantee directly or to some third person—if he part with it without any condition or reservation." Bates, Ch., in 4 Del. Ch. 326. In the absence of direct evidence, the delivery of a deed will be presumed from the concurrent acts of the parties recognizing a transfer of title; 94 U. S. 405; 160 Pa. 336; 148 Ill. 426. So long as a deed is within the control and subject to the dominion and authority of the grantor, there is no delivery, without which there can be no deed; 37 W. Va. 725. The possession of a deed by the grantee therein, is *prima facie* evidence of its delivery; 32 Fla. 264; 70 Hun 600; 98 Ala. 470. The deed of a corporation was said to be delivered by affixing the corporate seal; Co. Litt. 22, n., 36, n.; Cro. Eliz. 167; 2 Rolle, Abr. *Fait* (I).

It may be made by an agent as well as by the grantor himself; 9 Mass. 307; 4 Day 66; 5 B. & C. 671; 2 Washb. R. P. 579; or to an agent previously appointed; 6 Metc. 356; or subsequently recognized; 22 Me. 121; 14 Ohio 307; but a subsequent assent on the part of the grantee will not be presumed; 9 Ill. 177; 1 N. H. 353; 15 Wend. 656. See, also, 9 Mass. 307; 4 Day 66; 2 Ired. Eq. 557. Where a father in purchasing land has the deed executed in the name of his minor son, the delivery of the deed to the father is sufficient delivery to the son; 107 Mo. 101.

The delivery of a deed to a third person for the grantee's benefit, followed by an assertion of title by the grantee, is a good delivery; 146 Ill. 262; as is also such a delivery where the third person is to be custodian, but where the deed is not to go into force until after the grantor's death; 68 Hun 490.

To complete a delivery, acceptance must take place, which may be presumed from the grantee's possession; 1 Har. & J. 319; 4 Pick. 518; 2 Ala. 136; 1 N. H. 353; 4 Fla. 359; 108 Mo. 110; 1 Zabr. 379; from the relationship of a person holding the deed to the grantee; 7 Ill. 557; 1 Johns. Ch. 240, 456; and from other circumstances; 18 Conn. 257; 5 Watts 243. The execution and registration of a deed, and delivery of it to the register for that purpose, do not vest the title in the grantee; he must first ratify these acts; 3 Wall. 636; 10 Mass. 456; 3 Metc. 281; 55 N. W. Rep (Ia). 326; but see 87 Mich. 349; but they are *prima facie* evidence of delivery; 79 Pa. 15; 91 Tenn. 147; 94 Mich. 204.

There can ordinarily be but one valid delivery; 12 Johns. 536; 20 Pick. 28; which can take place only after complete execution; 2 Dev. 379; 148 U. S. 21. But there

must be one; 2 Harring. 197; 16 Vt. 563; 2 Washb. R. P. 581; Mitch. R. P. 464; and from that one the deed takes effect; 12 Mass. 455; 4 Yeates 278; 18 Me. 190. See 1 Denio 323.

The delivery of a deed in escrow contrary to the condition is voidable; 2 W. N. C. Pa. 504; but it cannot be avoided, as against a *bona fide* purchaser, without proof by the most unexceptionable testimony, of facts which avoid the title; and the *onus* of showing such facts is on the grantor; 10 Pa. 285.

In Contracts. The transfer of the possession of a thing from one person to another.

Originally, delivery was a clear and unequivocal act of giving possession, accomplished by placing the subject to be transferred in the hands of the transferree or his avowed agent, or in their respective warehouses, vessels, carts, and the like; but in modern times it is frequently symbolical, as by delivery of the key to a room containing goods; 5 Johns. 335; 1 Yeates 529; 2 Ves. Sen. 445; 1 East 192; see, also, 7 East 558; 3 B. & P. 233; 158 Mass. 592; by marking timber on a wharf, or goods in a warehouse, or by separating and weighing or measuring them; 2 Vt. 374; 40 N. J. L. 581; 69 Md. 537; or otherwise constructive, as by the delivery of a part for the whole; 23 Vt. 265; 9 Barb. 416; 11 Cush. 282; 39 Me. 496; 3 B. & P. 69. And see, as to what constitutes a delivery, 4 Mass. 661; 71 N. Y. 291; 89 Ill. 218; 89 Va. 1; 90 Tenn. 306; 74 Ia. 506; [1892] 1 Q. B. 582.

Where goods are ordered by a foreign merchant, the title passes, on a delivery to a carrier for shipment, subject only to the right of stoppage *in transitu;* 88 Pa. 264; 156 Mass. 221; 37 Fed. Rep. 268; 117 Ind. 132; 7 Mont. 150; 50 Mo. App. 18; 98 Ala. 176; but such is not a delivery to the vendee where he dies before they reach their destination; 62 Mich. 349. Where the vendor takes the bill of lading deliverable to the order of himself, or of his agent, it prevents the property from passing to the intended vendee until delivery; 50 Ark. 20; Blackb. Sales 130.

Delivery is not necessary at common law to complete a sale of personal property as between the vendor and vendee; Benj. Sales § 315; as a sale passes title as soon as the bargain is struck without any delivery or payment; 143 U. S. 346; but as against third parties possession retained by the vendor raises a presumption of fraud conclusive according to some authorities; 1 Cra. 309; 2 Munf. 341; 4 M'Cord 294; 1 Ov. 91; 14 B. Monr. 533; 18 Pa. 113; 4 Harr. 458; 2 Ill. 296; 1 Halst. 155; 5 Conn. 196; 12 Vt. 653; 4 Fla. 219; 9 Johns. 337; 1 Campb. 332; 48 Pa. 413; 73 Cal. 399; 122 Pa. 25; others holding it merely strong evidence of fraud to be left to the jury; 3 B. & C. 368; 5 Rand. 211; 1 Bail. 568; 3 Yerg. 475; 3 J. J. Marsh. 643; 4 N. Y. 303, 580; 2 Metc. 99; 18 Me. 127; 5 La. Ann. 1; 1 Tex. 415; but delivery *is* necessary, in general, where the property in goods is to be transferred in pursuance of a previous contract; 1 Taunt. 318; 16 Me. 49; 1 Pars. Contr. 235; and also in case of a *donatio causa mortis;* 3 Binn. 370; 2 Ves. Ch. 120; 9 *id.* 1; 64 Cal. 346; 158 Mass. 592; 3 Misc. Rep. 277. To give validity to a gift, there must be such a delivery of the subject thereof as works an immediate change in the dominion of the property; 45 Mo. App. 160. The rules requiring actual full delivery are subject to modification in the case of bulky articles; 5 S. & R. 19; 12 Mass. 400; 16 Me. 49. See, also, 3 Johns. 399; 13 *id.* 294; 1 Dall. 171; 2 N. H. 75; 7 Oreg. 49; 59 Pa. 464; 2 Kent 508.

The word delivery is used in different senses, which should be borne in mind in considering the cases. Sometimes it denotes transfer of *the property in* the chattel and sometimes transfer of *the possession of* the chattel. When used in the latter sense it may refer either to the *formation* of the contract, or to the *performance* of it. When it refers to the delivery of possession in the performance of the contract, the buyer is sometimes spoken of as being in *possession* although he has only the right of possession, while the actual custody remains with the vendor.

A condition requiring delivery may be annexed as a part of any contract of transfer; 19 Me. 147.

In the absence of contract, the amount of transportation to be performed by the seller to constitute delivery is determined by general usage.

See Browne, Stat. of Frauds; Story; Benjamin, Sales; Parsons, Contr.

In Medical Jurisprudence. The act of a woman giving birth to her offspring.

Pretended delivery may present itself in three points of view. *First*, when the female who feigns has never been pregnant. When thoroughly investigated, this may always be detected. There are signs which must be present and cannot be feigned. An enlargement of the orifice of the uterus, and a tumefaction of the organs of generation, should always be present, and if absent are conclusive against the fact. 2 *Annales d'Hygiène*, 227. *Second*, when the pretended pregnancy and delivery have been preceded by one or more deliveries. In this case attention should be given to the following circumstances: the mystery, if any, which has been affected with regard to the situation of the female; her age; that of her husband; and, particularly, whether aged or decrepit. *Third*, when the woman has been actually delivered, and substitutes a living for a dead child. But little evidence can be obtained on this subject from a physical examination.

Concealed delivery generally takes place when the woman either has destroyed her offspring or it was born dead. In suspected cases the following circumstances should be attended to: *First*, the proofs of pregnancy which arise in consequence of the examination of the mother. When she has been pregnant, and has been delivered, the usual signs of delivery, mentioned below, will be present. A careful investigation as to the woman's appearance before and since the delivery will have some weight; though such evidence is not always to be relied upon, as such appearances are not unfrequently deceptive. *Second*, the proofs of recent delivery. *Third*, the connection between the supposed state of parturition and the state of the child that is found; for if the age of the child do not correspond to that time, it will be a strong circumstance in favor of the mother's innocence. A redness of the skin and an attachment of the umbilical cord to the navel indicate a recent birth. Whether the child was living at its birth, belongs to the subject of infanticide.

The usual signs of delivery are very well collected

in Beck's excellent treatise on Medical Jurisprudence, and are here extracted :—

If the female be examined within three or four days after the occurrence of delivery, the following circumstances will generally be observed: greater or less weakness, a slight paleness of the face, the eye a little sunken and surrounded by a purplish or dark-brown colored ring, and a whiteness of the skin like that of a person convalescing from disease. The belly is soft, the skin of the abdomen is lax, lies in folds, and is traversed in various directions by shining reddish and whitish lines, which especially extend from the groin and pubes to the navel. These lines have sometimes been termed *lineæ albicantes*, and are particularly observed near the umbilical region, where the abdomen has experienced the greatest distension. The breasts become tumid and hard, and, on pressure, emit a fluid which at first is serous and afterwards gradually becomes whiter. The areolæ round the nipples are dark colored. The external genital organs and vagina are dilated and tumefied throughout the whole of their extent, from the pressure of the fœtus. The uterus may be felt through the abdominal parietes, voluminous, firm, and globular, and rising nearly as high as the umbilicus. Its orifice is soft and tumid, and dilated so as to admit two or more fingers. The fourchette, or anterior margin of the perinæum, is sometimes torn, or it is lax, and appears to have suffered considerable distension. A discharge (termed the lochial) commences from the uterus, which is distinguished from the menses by its pale color, its peculiar and well-known smell, and its duration. The lochia are at first of a red color, and gradually become lighter until they cease.

These signs may generally be relied upon as indicating recent delivery: yet it requires much experience in order not to be deceived by appearances.

The lochial discharge might be mistaken for menstruation, or leucorrhœa, were it not for its peculiar smell; though this is not absolutely characteristic.

Relaxation of the soft parts arises as frequently from menstruation as from delivery; but in these cases the os uteri and vagina are not so much tumefied, nor is there that tenderness and swelling. The parts are found pale and flabby when all signs of contusion disappear, after delivery, and this circumstance does not follow menstruation.

The presence of milk, though a usual sign of delivery, is not always to be relied upon; for this secretion may take place independent of pregnancy.

The wrinkles and relaxations of the abdomen which follow delivery may be the consequence of dropsy, or of lankness following great obesity. This state of the parts is also seldom striking after the birth of the first child, as they shortly resume their natural state. Positive proof of the occurrence of birth is furnished only by the discovery of parts of the ovum. In most cases the demonstration by the microscope of shreds of the deciduæ with large, nucleated and fatty cells is of itself a sure proof; Winckle, quoted by Witthaus & Becker.

See, generally, 1 Beck, Med. Jur. c. 7, p. 206; 1 Chit. Med. Jur. 411; Ryan, Med. Jur. c. 10, p. 133; 1 Briand, *Méd. Lég.* lière partie, c. 5; Whart. & S.; Witthaus & Becker, Med. Jur.

DELUSION. In Medical Jurisprudence. A symptom of mental disease, in which persons believe things to exist which exist only, or in the degree they are conceived of only, in their own imaginations, with a persuasion so fixed and firm that neither evidence nor argument can convince them to the contrary. A faulty belief concerning a subject capable of physical demonstration, out of which the person cannot be reasoned by adequate means for the time being. 1 Wood, American Text Book of Med. See HALLUCINATION.

The individual is, of course, insane. For example, should a parent unjustly persist, without the least ground, in attributing to his daughter a coarse vice, and use her with uniform unkindness, there not being the slightest pretence or color of reason for the supposition, a just inference of insanity or delusion would arise in the minds of a jury; because a supposition long entertained and persisted in, after argument to the contrary, and against the natural affections of a parent, suggest that he must labor under some morbid mental delusion; Whart. Cr. L. § 37; Whart. & S. Med. Jur.; 1 Redf. Wills; Ray, Med. Jur. § 20; Shelf. Lun. 296; 3 Add. Eccl. 70, 90, 180; 1 Hagg. Eccl. 27. See 10 Fed. Rep. 170; Mann, Med. Jur. of Insan. 58.

Where one "labors under a partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if under the influence of his delusion he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment." This is the rule as stated by the English judges, cited in 1 Whart. Cr. L. § 37. Shaw, C. J., in 7 Metc. 500, says: "Monomania may operate as an excuse for a criminal act," when "the delusion is such that the person under its influence has a real and firm belief of some fact, not true in itself, but which, if it were true, would excuse his act; as where the belief is that the party killed had an immediate design upon his life, and under that belief the insane man kills in supposed self-defence. A common instance is where he fully believes that the act he is doing is done by the immediate command of God, and he acts under the delusive but sincere belief that what he is doing is by the command of a superior power, which supersedes all human laws and the laws of nature."

Where a testator was laboring under a delusion that his brother was exercising his muscle preparatory to killing him, that of itself would not justify a rejection of his will on the ground of unsound mind; 64 Hun 639. A person persistently believing supposed facts which have no real existence, against all evidence and probability, and conducting himself on the assumption of their existence, is, so far as such facts are concerned, under an insane delusion; 95 Mich. 332.

DEMAIN. See DEMESNE.

DEMAND. A claim; a legal obligation.

Demand is a term of art of an extent greater in its signification than any other word except claim. Co. Litt. 291; 2 Hill 220; 9 S. & R. 124; 6 W. & S. 226.

A release of all demands is, in general, a release of all covenants, real or personal, conditions, whether broken or not, annuities, recognizances, obligations, contracts, and the like; 3 Pa. 120; 2 Hill 228; but does not discharge rent before it is due, if it be a rent incident to the reversion; for the rent was not only not due, but the consideration—the future enjoyment of the lands—for which the rent was to be given was not executed; 1 Lev. 99; Bac. Abr. *Release*, I. See 10 Co. 128; 23 Pick. 295; 7 Md. 375; 79 Ga. 555.

In Practice. A requisition or request to do a particular thing specified under a

claim of right on the part of the person requesting.

In causes of action arising ex contractu it is frequently necessary, to secure to the party all his rights and to enable him to bring an action, that he should make a demand upon the party bound to perform the contract or discharge the obligation. Thus, where property is sold to be paid for on delivery, a demand must be made before bringing an action for non-delivery, and proved on trial; 5 Term 409; 3 M. & W. 254; 39 Ill. App. 158; 67 Hun 505; but not if the seller has incapacitated himself from delivering them; 5 B. & Ald. 712; 2 Bibb 280; 1 Vt. 25; 4 Mass. 474; 3 Wend. 556; 2 Me. 303; 5 Munf. 1; and this rule and exception apply to contracts for marriage; 2 Dowl. & R. 55; 1 Chit. Pr. 57, note (n), 438, note (e). Nor is a demand necessary where it is to be presumed that it would have been unavailing; 38 Minn. 545; 39 Kan. 31. Where a selling price has been agreed on, the bringing of a suit therefor is a sufficient demand for the money claimed; 1 Misc. Rep. 509. A demand of rent is necessary before re-entry for non-payment; 92 Tenn. 161. But where rent is payable on the first day of the month, no demand of the rent on the day it falls due is necessary to entitle the landlord to maintain an action therefor; 128 Mass. 483; 99 *id.* 388. See RE-ENTRY. No demand is in general necessary on a promissory note before bringing an action; but after a tender demand must be made of the sum tendered; 1 Campb. 181, 474; 1 Stark. 323. A note payable "on call" may be sued on without demand; 83 Ala. 595; but a demand and notice of non-payment are essential to fix the liability of endorsers unless waived; 1 App. D. C. 171. Where a mortgagor has resolved to default on an interest coupon and provides no funds to pay it, the holder is not required to present it for payment before bringing suit; 161 Pa. 391.

In cases arising ex delicto, a demand is frequently necessary. Thus, when the wife, apprentice, or servant of one person has been harbored by another, the proper course is to make a demand of restoration before an action brought, in order to constitute the party a wilful wrong-doer unless the plaintiff can prove an original illegal enticing away; 2 Lev. 63; 5 East 39; 4 J. B. Moo. 12.

So, too, in cases where the taking of goods is lawful but their subsequent detention becomes illegal, it is absolutely necessary, in order to secure sufficient evidence of a conversion on the trial, to give a formal notice of the owner's right to the property and possession, and to make a formal demand in writing of the delivery of such possession to the owner. See TROVER; CONVERSION. And when a nuisance has been erected or continued by a man on his own land, it is advisable, particularly in the case of a private nuisance, to give the party notice, and request him to remove it, either before an entry is made for the purpose of abating it or an action is commenced against the wrong-doer; and a demand is always indispensable in cases of a continuance of a nuisance originally created by another person; 2 B. & C. 302; Cro. Jac. 555; Poll. Torts 314; 5 Co. 100; 5 Viner, Abr. 506; 1 Ayliffe, Pand. 497; Bac. Abr. *Rent*, I.

In cases of contempts, as where an order to pay money or to do any other thing, has been made a rule of court, a demand for the payment of the money or performance of the thing must be made before an attachment will be issued for a contempt; 1 Cr. M. & R. 88, 459; 4 Tyrwh. 369; 2 Scott 193; 1 H. & W. 216.

Demand should be made by the party having the right, or his authorized agent; 2 B. & P. 464 *a*; 1 Bail. 193; 2 Mas. 77; 18 N. H. 75; 55 Ind. 122; of the person in default, in cases of torts; 8 B. &. C. 528; 7 Johns. 302; 30 Conn. 237; 46 Barb. 183; in case of rent; 2 Washb. R. P. 321, 322; and at a proper time and place in case of rents; Wood, Landl. & Ten. 1034; 3 Wend. 230; 17 Johns. 66; 4 N. H. 251; 15 *id.* 68; 4 Harr. & M'H. 135; 21 Pick. 389; 56 Ind. 554; in cases of notes and bills of exchange; Pars. Notes & B.

As to the allegation of a demand in a declaration, see 1 Chit. Pl. 322; 2 *id.* 84; 1 Wms. Saund. 33, note 2; 65 Hun 43; Com. Dig. *Pleader*.

DEMAND IN RECONVENTION. A demand which the defendant institutes in consequence of that which the plaintiff has brought against him. Used in Louisiana. La. Pr. Code, art. 374.

DEMANDANT. The plaintiff or party who brings a real action. Co. Litt. 127; Com. Dig. See REAL ACTION.

DEMEMBRATION. In Scotch Law. Maliciously cutting off or otherwise separating one limb from another. 1 Hume 323; Bell, Dict.

DEMENS (Lat.). One who has lost his mind through illness or some other cause One whose faculties are enfeebled. Dean, Med. Jur. 481. See DEMENTIA.

DEMENTIA. In Medical Jurisprudence. That form of insanity which is characterized by mental weakness and decrepitude, and by total inability to reason correctly or incorrectly.

The mind dwells only in the past, and the thoughts succeed one another without any obvious bond of association. Delusions, if they exist, are transitory, and leave no permanent impression: and for everything recent the memory is exceedingly weak. In mania, the action of the mind is marked by force, hurry, and intensity; in dementia, by slowness and weakness. It is the natural termination of many forms of insanity. Occasionally it occurs in an acute form in young subjects; and here only it is curable. In old men, in whom it often occurs, it is called senile dementia, and it indicates the breaking down of the mental powers in advance of the bodily decay. It is this form of dementia only which gives rise to litigation; for in the others the incompetency is too patent to admit of question. It cannot be described by any positive characters, because it differs in the different stages of its progress, varying from simple lapse of memory to complete inability to recognize persons or things. And it must be borne in mind that often the mental infirmity is not so serious as might be supposed at first sight. Many an old man who seems to be scarcely conscious of what is passing around him, and is guilty of frequent breaches of decorum, needs only to have his atten-

tion aroused to a matter in which he is deeply interested, to show no lack of vigor or acuteness. In other words, the mind may be damaged superficially (to use a figure), while it may be sound at the core. And therefore it is that one may be quite oblivious of names and dates, while comprehending perfectly well his relations to others and the interests in which he was concerned. It follows that the impressions made upon casual or ignorant observers in regard to the mental condition are of far less value than those made upon persons who have been well acquainted with his habits and have had occasion to test the vigor of his faculties.

Senile dementia or the imbecility caused by the decay of old age is often the ground on which the wills of old men are contested, and the conflicting testimony of observers, the proofs of foreign influence, and the indications of mental capacity all combine to render it no easy task to arrive at a satisfactory conclusion. The only general rule of much practical value is that competency must be always measured, not by any fancied standard of intellect, but solely by the requirements of the act in question. A small and familiar matter would require less mental power than one complicated in its details and somewhat new to the testator's experience. Less capacity would be necessary to distribute an estate between a wife and child than between a multitude of relatives with unequal claims upon his bounty. Such is the principle; and the ends of justice cannot be better served than by its correct and faithful application. Of course, there will always be more or less difficulty; but generally by discarding all legal and metaphysical subtleties and following the leading of common sense, it will be satisfactorily surmounted.

The legal principles by which the courts are governed are not essentially different whether the mental incapacity proceed from dementia or mania. If the will coincides with the previously expressed wishes of the testator, if it recognizes the claims of those who stood in near relation to him, if it shows no indication of undue influence,—if, in short, it is a rational act rationally done,—it will be established though there may have been considerable impairment of mind. 2 Phill. Eccl. 449; 3 Wash. C. C. 580; 4 *id.* 262; 44 N. H. 531; 151 Ill. 103; 40 N. E. Rep. (Ind.) 70; 51 N. J. Eq. 233; 5 Misc. Rep. 199; 83 Hun 327; 84 *id.* 1591; 165 Pa. 586; 166 *id.* 630.

This species of *dementia* is also frequently alleged and proved as a ground of impeaching deeds. This particular form of mental disease may result either in total incompetency, such as is produced by any form of insanity, or a greatly defective capacity, though short of total insanity, in which the court scrutinizes the act, and sustains it only when there is found to have been capacity sufficient for the act in question and entire freedom of will. Consequently such cases usually include the two elements of mental incompetency of some degree and undue influence; and probably a majority of the cases in which the aid of equity is sought to set aside deeds on the ground of undue influence involve also the question of the existence of *senile dementia* to a greater or less extent. The principle upon which courts of equity deal with this class of persons is neither as a matter of course to affirm or avoid their acts, but to protect them in the exercise of such capacity as they have. It will scrutinize their transactions; considering the nature of the act done, the inducements leading to it, and the attending circumstances and influences. If the conscience of the court is satisfied that such a grantor comprehended the nature and consequences of the transaction, and exercised a deliberate and free judgment, it will be sustained; but if the nature of the act or the attending circumstances justify the conclusion that the grantor's weakness has been taken advantage of, the deed will be set aside in equity however valid it might be at law; 1 Bro. Ch. 560; 1 Knapp 73; 5 Dana 181; 12 B. Monr. 55; 2 Dev. & B. Eq. 241; 1 Ohio St. 54; 4 Sneed 497. The United States Supreme Court says:—"It may be stated as settled law, that whenever there is great weakness of mind in a person executing a conveyance of law, arising from age, sickness, or any other cause, though not amounting to absolute disqualification, and the consideration given for the property is grossly inadequate—a court of equity will . . . interfere and set the conveyance aside;" 94 U. S. 511; 1 Sto. Eq. Jur. § 238; Bisph. Eq. 288. For a thorough examination and discussion of the subject in a case of *senile dementia* in which a deed was set aside, see 5 Del. Ch. 374. In that case Saulsbury, Ch., thus stated the principle upon which courts of equity deal with such cases: "In cases of alleged mental incapacity, the test is whether the party had the ability to comprehend in a reasonable manner the nature of the affair in which he participated. This is the rule in the absence of fraud. . . . This ability so to comprehend necessarily implies the power to understand the character, legal conditions, and effect of the act performed. . . . The cause of mental weakness is immaterial. It may arise from injury to the mind, temporary illness, or excessive old age. In such cases any unfairness will be promptly redressed." In a very similar case a deed was set aside on the ground of mental incapacity of the grantor by reason of senile dementia or dotage, by Bland, Ch., whose opinion contains an elaborate discussion of the different species of dementia, which he classifies as, Idiocy, Delirium, Lunacy, and Dotage, under which latter term he describes senile dementia; 1 Bland, Ch. 370. See 1 Redf. Wills; 3 Am. L. Reg. N. S. 449, article by Judge Redfield; 2 Ham. Leg. Med. 116; INSANITY.

DEMESNE (Lat. *dominicum*). Lands of which the lord had the absolute property or ownership; as distinguished from feudal lands, which he held of a superior. 2 Bla. Com. 104; Cowel. Lands which the lord retained under his immediate control, for the purpose of supplying his table and the immediate needs of his household; distinguished from that farmed out to tenants, called among the Saxons *bordlands*. Blount; Co. Litt. 17 *a*.

Own; original. *Son assault demesne*, his (the plaintiff's) original assault, or assault in the first place. 2 Greenl. Ev. § 633; 3 Bla. Com. 120, 306.

DEMESNE AS OF FEE. A man is said to be seised *in his demesne as of fee* of a corporeal inheritance, because he has a property *dominicum* or *demesne* in the *thing* itself. 2 Bla. Com. 106. But when he has no dominion in the thing itself, as in the case of an incorporeal hereditament, he is said to be *seised* as of fee, and not in his *demesne* as of fee; Littleton § 10; 17 S. & R. 196; Jones, Land Tit. 166.

Formerly it was the practice in an action on the case—*e. g.* for a nuisance to real estate—to aver in the declaration the seisin of the plaintiff in demesne as of fee; and this is still necessary, in order to estop the record with the land, so that it may run with or attend the title; Archb. Civ. Pl. 104; Co. Entr. 9, pl. 8; 1 Saund. 346. But such an action may be maintained on the possession as well as on the seisin; although the effect of the record in this case upon the title would not be the same; Steph. Pl. 322; 4 Term 718; 2 Wms. Saund. 113 *b*; Cro. Car. 500, 575.

DEMESNE LANDS. A phrase meaning the same as *demesne*.

DEMESNE LANDS OF THE CROWN. That share of lands reserved to the crown at the original distribution of landed property, or which came to it afterwards by forfeiture or otherwise. 1 Bla. Com. 286; 2 Steph. Com. 550.

DEMI-MARK. A sum of money (6*s.* 8*d.*, 3 Bla. Com. App. v.) tendered and paid into court in certain cases in the trial of a writ of right by the grand assize. Co. Litt. 294 *b*; Booth, Real Act. 98.

It was paid by the tenant to obtain an inquiry by the grand assize into the time of the demandant's seisin; 1 Reeve, Hist. Eng. Law 429; Stearns, Real Act. 378. It compelled the demandant to begin; 3 Chit. Pl. 1373. It is unknown in American practice; 13 Wend. 546.

DEMI-VILL. Half a tithing.

DEMIDIETAS. A word used in ancient records for a moiety, or one-half.

DEMISE. A conveyance, either in fee, for life, or for years.

A lease or a conveyance for a term of years. According to Chief Justice Gibson, the English word demise, though improperly used as a synonyme for *concessi* or *demisi*, strictly denotes a posthumous grant, and no more. 5 Whart. 278. See 4 Bingh. N. C. 678; 5 How. Pr. 71.

In a conveyance, the word "demise" imports in law a covenant for quiet enjoyment; 9 N. H. 219; 1 M. G. & S. 429; it implies a power to lease; 8 Cow. 36. See 109 Mass. 235; COVENANT.

A term nearly synonymous with death, appropriated in England especially to denote the decease of the king or queen.

DEMISE OF THE CROWN. The natural dissolution of the king.

The term is said to denote in law merely a transfer of the property of the crown. 1 Bla. Com. 249. By demise of the crown we mean only that, in consequence of the disunion of the king's natural body from his body politic, the kingdom is transferred or demised to his successor, and so the royal dignity remains perpetual. Plowd. 117, 234.

A similar result, viz.: the perpetual and continuous existence of the office of president of the United States, has been secured by the constitution and subsequent statutes. 1 Sharsw. Bla. Com. 249.

DEMISE AND RE-DEMISE. An old form of conveyance by mutual leases made from one to another on each side of the same land, or of something issuing from it. A lease for a given sum—usually a mere nominal amount—and a release for a larger rent. Toullier; Whishaw; Jacob.

DEMOCRACY. That form of government in which the people rule.

But the multitude cannot actually rule: an unorganic democracy, therefore, one that is not founded upon a number of institutions each endowed with a degree of self-government, naturally becomes a one-man government. The basis of the democracy is equality, as that of the aristocracy is privilege; but equality of itself is no guarantee for liberty, nor does equality constitute liberty. Absolute democracies existed in antiquity and the middle ages: they have never endured for any length of time. On their character, Aristotle's Politics may be read to the greatest advantage. Lieber, in his Civil Liberty, dwells at length on the fact that mere equality, without institutions of various kinds, is adverse to self-government; and history shows that absolute democracy is anything rather than a convertible term for liberty. See ABSOLUTISM; GOVERNMENT.

DEMONETIZE. To divest of the character of standard money; to withdraw from use as currency. Stand. Dict.

DEMONSTRATIO (Lat.). Description; addition; denomination. Occurring often in the phrase *falsa demonstratio non nocet* (a false description does not harm). 2 Bla. Com. 382, n.; 2 P. Wms. 140; 1 Greenl. Ev. § 291; Wigr. Wills 208, 233.

DEMONSTRATION (Lat. *demonstrare*, to point out). Whatever is said or written to designate a thing or person.

Several descriptions may be employed to denote the same person or object; and the rule of law in such cases is that if one of the descriptions be erroneous it may be rejected, if, after it is expunged, enough will remain to identify the person or thing intended. For *falsa demonstratio non nocet*. The meaning of this rule is, that if there be an adequate description with convenient certainty of what was contemplated, a subsequent erroneous addition will not vitiate it. The complement of this maxim is, *non accipi debent verba in demonstrationem falsam quæ competent in limitationem veram*; which means that if it stand doubtful upon the words whether they import a false reference or demonstration, or whether they be words of restraint that limit the generality of the former words, the law will

never intend error or falsehood. If, therefore, there is some object wherein all the demonstrations are true, and some wherein part are true and part false, they shall be intended words of true limitation to ascertain that person or thing wherein all the circumstances are true; 4 Exch. 604; 8 Bingh. 244; Broom, Leg. Max. 490; 7 Cush. 460.

The rule that *falsa demonstratio* does not vitiate an otherwise good description applies to every kind of statement of fact. Some of the particulars of an averment in a declaration may be rejected if the declaration is sensible without them and by their presence is made insensible or defective; Yelv. 182.

In Evidence. That proof which excludes all possibility of error.

DEMONSTRATIVE LEGACY. A pecuniary legacy coupled with a direction that it be paid out of a specific fund.

A bequest of a sum of money payable out of a particular fund or thing. A pecuniary legacy given generally, but with a demonstration of a particular fund as the source of its payment. 118 Ind. 147; 17 Ohio St. 413. See 47 Ala. 547; 56 Md. 120.

Such a bequest differs from a specific legacy in this, that if the fund out of which it is payable fails for any cause, it is nevertheless entitled "to come on the estate as a general legacy; and it differs from a general legacy in this, that it does not abate in that class, but in the class of specific legacies." 63 Pa. 312, per Sharswood, J. A bequest of "$2,000 of the South Ward Loan of Chester," where the testator owned $10,000 of the loan, was held demonstrative; 58 Fed. Rep. 718. So, also, "25 shares of capital stock of the State Bank," etc., the testator owning 25 shares; 1 Ired. Eq. 309; had the testator said "my" 25 shares, it would have been a specific legacy; *id.* So of a gift of 25½ canal shares of which the testator owned 15½, all of which he sold before his death; 2 Beav. 515. The criterion in all the cases is whether it was the testator's intention to give the specific security then owned by him, or, on the other hand, to give nothing distinctly severed from his estate, but rather such a sum as would suffice to buy the securities named; *id.* See 2 White & T. Lead. Cas. 646; 3 Am. Dec. 667; 2 Y. & C. 90; 28 N. Y. 61; 49 Md. 356.

DEMPSTER. In Scotch Law. A doomsman. One who pronounced the sentence of court. 1 Howell, St. Tr. 937.

DEMURRAGE. The delay of a vessel by the freighter beyond the time allowed for loading, unloading, or sailing.

Payment for such delay.

The amount due by the freighter or charterer to the owner of the vessel for such delay. 5 E. & B. 755; Abb. Adm. Dec. 548; 19 Fed. Rep. 144.

Demurrage may become due either by the ship's detention for the purpose of loading or unloading the cargo, either before or during or after the voyage, or in waiting for convoy; 3 Kent 159; Abbott, Shipp. 192; Pars. Mar. Law; 26 N. Y. 85; 134 *id.* 143; 1 Holmes 290; 49 Fed. Rep. 107; 65 Hun 625; 1 C. C. A. 85; Porter, Bills of L. 356.

Where neither the charter nor the bill of lading contained any provisions as to demurrage, and the master made no formal protest against the delay, but signed the bill of lading without objection and did not bring suit until long after, demurrage could not be recovered; 1 C. C. A. 237.

Under the terms of a charter where demurrage was to be paid for each working day beyond the days allowed for loading, the time lost by reason of storms before the beginning of the lay days, or after their expiration, could not be deducted in computing the demurrage; 2 C. C. A. 656.

The term "working days" in maritime affairs means calendar days, on which the law permits work to be done, and excludes Sundays and legal holidays, but not stormy days; 2 C. C. A. 650. But see 142 N. Y. 279, where it was held that Sundays are properly included in computing demurrage, when demurrage has begun to run. Where there are no agreed demurrage days for loading the case is one of implied contract to load with reasonable diligence; 74 Fed. Rep. 247. See LAY DAYS.

DEMURRER (Lat. *demorari*, Old Fr. *demorrer*, to stay; to abide). **In Pleading.** An allegation, that, admitting the facts of the preceding pleading to be true, as stated by the party making it, he has yet shown no cause why the party demurring should be compelled by the court to proceed further. A declaration that the party demurring will *go no further*, because the other has shown nothing against him; 5 Mod. 232; Co. Litt. 71 *b*. It imports that the objecting party will not proceed, but will wait the judgment of the court whether he is bound so to do; Co. Litt. 71 *b*; Steph. Pl. 61; Pep. Pl, 11.

In Equity. An allegation of a defendant, which, admitting the matters of fact alleged by the bill to be true, shows that as they are therein set forth they are insufficient for the plaintiff to proceed upon or to oblige the defendant to answer; or that, for some reason apparent on the face of the bill, or on account of the omission of some matter which ought to be contained therein, or for want of some circumstances which ought to be attendant thereon, the defendant ought not to be compelled to answer to the whole bill, or to some certain part thereof. Mitf. Eq. Pl. 107.

On demurrer a bill must be taken as true, and matter in avoidance is not available; 57 Fed. Rep. 433.

A demurrer may be either to the relief asked by the bill, or to both the relief and the discovery; 5 Johns. Ch. 184; 10 Paige, Ch. 210; but not to the discovery alone where it is merely incidental to the relief; 2 Bro. Ch. 123; 1 Y. & C. 197; 1 S. & S. 83. It is said by Langdell (Eq. Pl. 60) that every proper demurrer is to relief alone; and that while it always, if well taken, pro-

tects the defendant from giving any discovery, that is a legal consequence merely. As to exceptions to avoid self-crimination, see 3 Johns. Ch. 407; 1 Hayw. 167; 2 H. & G. 332; 6 Day 361. If it goes to the whole of the relief, it generally defeats the discovery if successful; 2 Bro. Ch. 319; 3 Edw. Ch. 117; Saxt. 358; Walk. Ch. 35; 5 Metc. 525; otherwise, if to part only; Ad. Eq. 334; Story, Eq. Pl. § 545; 10 Paige, Ch. 210.

It may be brought either to original or supplemental bills; and there are peculiar causes of demurrer in the different classes of supplemental bills; 2 Madd. 387; 4 Sim. 76; 3 Hare 476; 3 P. Wms. 284; 4 Paige, Ch. 259; 7 Johns. Ch. 250; 13 Pet. 6, 14; Story, Eq. Pl. § 611.

Demurrers are *general*, where no particular cause is assigned except the usual formulary that there is no equity in the bill, or *special*, where the particular defects are pointed out; Story, Eq. Pl. § 455; Dan. Ch. Pr. 586. General demurrers are used to point out defects of substance; special, to point out defects in form. "The terms have a different meaning [in equity] from what they have at common law;" Langd. Eq. Pl. 58.

The defendant may demur to part of the bill; 2 Barb. Ch. 106; and plead or answer to the residue, or both plead and answer to separate parts thereof; 3 P. Wms. 80; 6 Johns. Ch. 214; 4 Wis. 54; taking care so to apply them to different and distinct parts of the bill that each may be consistent with the others; 3 M. & C. 653; 1 Keen 389; 23 Miss. 304; Story, Eq. Pl. § 442; but if it be to the whole bill, and a part be good, the demurrer must be overruled; 27 Miss. 419; 5 Ired. Eq. 86; 29 Me. 273; 12 Metc. 323; 36 W. Va. 582. If it is to the whole bill it cannot be sustained if, for any equity apparent in the bill, complainants are entitled to relief; 101 Ala. 607, 752; 43 Fed. Rep. 450. A general demurrer to a bill must be overruled unless it appears that on no possible state of the evidence could a decree be made; 55 Fed. Rep. 892; 62 Mich. 480.

Demurrers lie only for matter apparent on the face of the bill, and not upon any new matter alleged by the defendant; Beames, Ord. in Ch. 26; 6 Sim. 51; 2 Sch. & L. 637; 5 Fla. 110; 3 Halst. Ch. 440; 54 Fed. Rep. 63. Demurrers are not applicable to pleas or answers. If a plea or answer is bad in substance, it may be shown on hearing; and if the answer is insufficient in form, exceptions should be filed; Story, Eq. Pl. §§ 456, 864, Langd. Eq. Pl. 58; 54 Miss. 341; 14 N. J. Eq. 254.

Demurrers to relief are usually brought for causes relating to the *jurisdiction*, as that *the subject* is not cognizable *by any court*, as in some cases under political treaties; 1 Ves. 371; 2 Pet. 253; but see 5 Pet. 1; 8 *id.* 436; 1 Wheat. 304; 2 *id.* 259; 10 *id.* 181; 1 Wash. C. C. 322; certain cases of confiscation; 3 Ves. 424; 10 *id.* 354; see 3 Dall. 199; and questions of boundaries; Story, Eq. Pl. 347; 1 Ves. 446; as to law in the United States, see 6 Cra. 158; 4 Dall. 3; 5 Pet. 284; 14 *id.* 210; or *that it is not cognizable* by a court of equity; 1 S. & S. 227; 6 Beav. 165; 30 N. H. 446; 19 Me. 124; 7 Cra. 68; 16 Ga. 541; 16 Mo. 543; 8 Ired. Eq. 123; 21 Miss. 93; L. R. 8 Ch. App. 369; *or that some other* court of equity has jurisdiction properly; 4 Wheat. 1; 6 Cra. 158; 7 Ga. 243; 2 Paige, Ch. 402; 1 Ves. 203; *or that some other court* has jurisdiction properly; 3 Dall. 382; 8 Pet. 148; 30 N. H. 444; 2 How. 497; *to the person*, as that the plaintiff is not entitled to sue, by reason of personal disability, as infancy, idiocy, etc.; Jac. 377; bankruptcy and assignment; 8 Sim. 28, 76; 1 Y. & C. 172; or has no title to sue in the character in which he sues; 2 P. Wms. 369; 4 Johns. Ch. 575; *to the substance of the bill*, as that the matter is *too trivial;* 4 Johns. Ch. 183; 3 Ohio St. 457; 1 Vern. 359; that the *plaintiff* has *no interest* in the matter; Mitf. Eq. Pl. 154; 2 Bro. Ch. 322; 2 S. & S, 592; 4 Russ, 225, 244; 1 Johns. Ch. 305; 30 Me. 419; 29 W. Va. 256; 87 Va. 249; or that the *defendant* has no such *interest;* Story, Eq. Pl. § 519; 2 Bro. Ch. 332; 5 Madd. 19; 3 Barb. 485; 10 Wheat. 384; or that the bill is *to enforce a penalty;* 1 Young 308; 4 Bro. Ch. 434; *to the frame and form of the bill*, as that there is a defect or want of form; Mitf. Eq. Pl. 206; 5 Russ. 42; 11 Mo. 42; or that the bill is multifarious; Story, Eq. Pl. § 530, n.; 2 S. & S. 79; 4 Harring. 9; 2 Gray 471; 3 How. 412; 4 Edw. 592; that there is a want or misjoinder of plaintiffs; 1 P. Wms. 428; 4 Russ. 272; 2 Paige, Ch. 281; 4 *id.* 510; 3 Cra. 220; 8 Wheat. 451; 5 Fla. 110; 5 Duer 168; 2 Gray 467; 1 Jones, N. C. 40; 4 Fla. 11; for a misjoinder of parties defendant where those only can demur who are improperly joined; 98 Mich. 657; or where laches affirmatively appear on the face of a bill; 54 Fed. Rep. 63; but laches as an equitable defence cannot be raised on demurrer; 65 Vt. 611.

Demurrers to discovery may be brought for most of the above causes; 9 Sim. 180; 12 Beav. 423; 2 Stor. 59; 1 Johns. Ch. 547; and, generally, that the plaintiff has no right to demand the discovery asked for, either in whole or in part; 8 Ves. 398; 2 Russ. 564; or to ask it of the defendant; Story, Eq. Pl. § 570. "A demurrer to discovery is not, in its nature, a pleading at all, but a mere statement in writing that the defendant refuses to answer certain allegations or charges in the bill, for reasons which appear upon the face of the bill, and which the demurrer points out." Langd. Eq. Pl. 61. See Beach, Mod. Eq. Pr. 239; DISCOVERY.

The effect of a demurrer when allowed is to put an end to the suit, unless it is confined to a part of the bill or the court gives the plaintiff leave to amend; 13 Ill. 31; it is within the discretion of the court whether the defendant will be ruled to answer after overruling a demurrer; and it may enter a decree against him at once, or hear evidence, or refer to a master to take evidence before entering a decree; 41 Ill. App.

439 ; 145 Ill. 433. If overruled, the defendant must make a fresh defence by answer ; 12 Mo. 132 ; unless he obtain permission to put in a plea ; Ad. Eq. 336. It admits the facts which are well pleaded ; 20 How. 108 ; and the jurisdiction ; 28 Vt. 470 ; 4 R. I. 285 ; 1 Stockt. 434 ; 4 Md. 72. But the demurrer admits the facts in the bill only for the purpose of argument on the demurrer ; if the demurrer is overruled the plaintiff must proceed to prove his bill ; Langd. Eq. Pl. 60. The court will sometimes disallow the demurrer without deciding that the bill is good, reserving that question till the hearing ; *ibid.*

Under rule 31 of the Rules of Practice for courts of equity of the United States as laid down by the supreme court, no demurrer shall be allowed to be filed unless upon a certificate of counsel that in his opinion it is well founded in point of law, and supported by the affidavit of the defendant, that it is not interposed for delay. The supreme court has held that a demurrer lacking these is fatally defective and a decree *pro confesso* may be entered unless something takes place between the filing of the demurrer and the decree, to take away the right ; 149 U. S. 574.

At Law. A *general* demurrer is one which excepts to the sufficiency of a previous pleading in general terms, without showing specifically the nature of the objection; and such demurrer is sufficient when the objection is on matter of substance ; Steph. Pl. 159 ; Co. Litt. 72 *a* ; 1 Dutch. 506 ; 11 Ark. 12 ; 2 Ia. 532 ; 2 Barb. 160 ; 82 Tex. 146. A court, after overruling a general demurrer to a complaint on the ground that it does not state a cause of action, may in its discretion enter final judgment on the demurrer ; and this judgment will be a bar to any other suit for the same cause of action ; 111 U. S. 472.

A *special demurrer* is one which excepts to the sufficiency of the pleadings on the opposite side, and shows specifically the nature of the objection and the particular ground of exception ; Co. Litt. 72 *a*. An objection to a complaint, on the ground of ambiguity or uncertainty, can be taken only by special demurrer ; 96 Cal. 602 ; as must be a demurrer to a plea on the ground of duplicity ; 64 Vt. 212 ; but see 99 Ala. 541.

It is necessary where the objection is to the form, by the statutes 27 Eliz. c. 5 and 4 Anne, c. 16 ; 18 Ark. 347 ; 6 Md. 210 ; 20 Ohio 100. Under a special demurrer the party may, on the argument, not only take advantage of the particular faults which his demurrer specifies, but also of all objections in substance.

It is not enough that a special demurrer object in general terms, that the pleading is "uncertain, defective, and informal," or the like, but it is necessary to show in what respect it is uncertain, defective, and informal ; 1 Wms. Saund. 161, n. 1, 337 *b*, n. 3 ; Steph. Pl. 159, 161 ; 1 Chit. Pl. 642.

A demurrer may be for insufficiency either in substance or in form ; that is, it may be either on the ground that the case shown by the opposite party is essentially insufficient, or on the ground that it is stated in an inartifical manner ; Hob. 164 ; 48 Fed. Rep. 241. But such a demurrer does not raise the question of the jurisdiction of the court ; 48 Ohio St. 554. It lies to any of the pleadings, except that there may not be a demurrer to a demurrer ; Salk. 219 ; Bacon, Abr. *Pleas* (N 2). But it will not lie to a supplemental complaint ; 131 Ind. 373 ; while it will to a supplemental answer ; 134 Ind. 614. Demurrer may be to the whole or a part of the pleading ; but if to the whole, and a part be good, the demurrer will be overruled ; 13 East 76 ; 3 Caines 89, 265 ; 5 Johns. 476 ; 13 *id.* 264, 402 ; 11 Cush. 348 ; 23 Miss. 548 ; 2 Curt. C. C. 97 ; 2 Paine 545 ; 14 Ill. 77 ; 2 Md. 284 ; 81 Wis. 301 ; 94 Ala. 226. But see 6 Fla. 262 ; 4 Cal. 327 ; 9 Ind. 241 ; 6 Gratt. 130 ; 8 B. Monr. 400. The objection must appear on the face of the pleadings ; 2 Saund. 364 ; 29 Vt. 354 ; or upon oyer of some instrument defectively set forth therein ; 2 Saund. 60, n. ; 1 Misc. Rep. 364. A joint demurrer by two defendants to a declaration for want of a cause of action should be overruled if the declaration sets forth a cause of action as to either of them ; 88 Ga. 308 ; 144 Ill. 213.

A demurrer does not reach vagueness and uncertainty in a complaint, but they must be remedied by a motion to make more specific and certain ; 130 Ind. 131 ; 3 Ind. App. 312 ; 92 Ky. 72 ; 51 Fed. Rep. 669.

Where the want of jurisdiction in a federal court is apparent on the face of the petition, it may be taken advantage of by demurrer ; 146 U. S. 202.

For the various and numerous causes of demurrer, reference must be had to the law of each state.

As to the effect of a demurrer. It admits all such matters of fact as are sufficiently pleaded ; Com. Dig. *Pleader* (A 5) ; 4 Ia. 63 ; 14 Ga. 8 ; 9 Barb. 297 ; 7 Ark. 282 ; 6 Wash. 315 ; 7 Misc. Rep. 1. Its office was to test the sufficiency of the preceding pleading both as to form and substance, and it was resorted to by either party who believed that the pleading of the other party was insufficient either because the declaration did not show a good cause of action or the plea did not set up a legal defence ; but it does not admit mere epithets charging fraud and allegations of legal conclusions ; 144 U. S. 75 ; nor an erroneous averment of law ; 97 Ala. 491. On demurrer the court consider the whole record, and give judgment according to the legal right for the party who on the whole seems the best entitled to it ; 4 East 502 ; 8 Ark. 224 ; 2 Mich. 276 ; 7 How. 706 ; 28 Ala. N. S. 637 ; 31 N. H. 22 ; 39 Me. 426 ; 16 Ill. 269. For example, on a demurrer to the replication, if the court think the replication bad, but perceive substantial fault in the plea, they will give judgment, not for the defendant, but for the plaintiff ; 2 Wils. 150 ; 7 How. 706 ; provided the declaration be good ; but if the declaration also be bad in substance, then, upon the same principle, judgment would be given for the defendant ; 5 Co.

29 *a*. The court will not look back into the record to adjudge in favor of an apparent right in the plaintiff, unless the plaintiff have himself put his action upon that ground; 5 B. & Ald. 507. If, however, the plaintiff demur to a plea in abatement, and the court decide against the plea, they will give judgment of respondeat ouster, without regard to any defect in the declaration; Carth. 172; 4 R. I. 110; 13 Ark. 335; 14 Ill. 49. A party waives his demurrer by not calling for action thereon; 83 Tex. 97.

In Practice. *Demurrer to evidence* is a declaration that the party making it, generally the plaintiff, will not proceed, because the evidence offered on the other side is not sufficient to maintain the issue; 28 Ala. N. S. 637. Upon joinder by the opposite party, the jury is generally discharged from giving any verdict; 1 Archb. Pr. 186; and the demurrer being entered on record is afterwards argued and decided by the court in banc; and the judgment there given upon it may ultimately be brought before a court of error; Andr. Steph. Pl. 180. See 2 H. Bla. 187; Gould, Pl. c. 9, part 2, § 47. It admits the truth of the evidence given and the legal deductions therefrom; 14 Pa. 275; 111 N. C. 175. As to the right so to demur, and the practice, see 4 Ia. 63. All facts proved and legitimate inferences therefrom must be admitted; 35 S. W. Rep. (Tenn.) 560; and if the evidence is *prima facie* insufficient the demurrer is sustained; 33 S. W. Rep. (Mo.) 161; otherwise if there is some evidence on each material point; 2 Kan. App. 711; 45 Pac. Rep. (Kan.) 100. In criminal trials it is entirely discretionary with the court whether it will entertain a demurrer to the evidence, even though counsel for the prisoner and state should both consent to it; 29 Fla. 439.

A demurrer to the evidence in an equity case has the same effect as in a law case, and concedes every fact which such evidence tends to prove, and every inference fairly deducible from the facts proved; 113 Mo. 340. There is an increasing tendency towards the adoption of the demurrer to evidence in practice and in many states it takes the place of a motion for a non-suit. For a full discussion of the subject see 32 L. R. A. 354, where the authorities are collected.

Demurrer to interrogatories is the reason which a witness tenders for not answering a particular question in interrogatories; 2 Swanst. 194. It is not, strictly speaking, a demurrer, except in the popular sense of the word; Gresl. Eq. Ev. 61. The court are judicially to determine its validity. The witness must state his objection very carefully; for these demurrers are held to strict rules, and are readily overruled if they cover too much; 2 Atk. 524; 1 Y. & J. 132.

DEMURRER BOOK. In English Practice. A transcript of all the pleadings that have been filed or delivered between the parties made upon the formation of an issue at law. 3 Steph. Com. 511; Lush, Pr. 787.

DEMURRER TO EVIDENCE. See DEMURRER.

DEMY SANKE, DEMY SANGUE. Half-blood. A corruption of *demi-sang*.

DEN AND STROND. Liberty for ships and vessels to run aground or come ashore (strand themselves). Cowel.

DENARII. An ancient general term for any sort of *pecunia numerata*, or ready money. The French use the word *denier* in the same sense: *payer de ses propres deniers*.

DENARIUS DEI. God's penny; earnest money. A certain sum of money which is given by one of the contracting parties to the other as a sign of the completion of the contract. See EARNEST.

It differs from *arrhæ* in this, that the latter is a part of the consideration, while the *denarius Dei* is no part of it. 1 Duvergnoy, n. 182; 3 *id.* n. 49; *Répert. de Jur.*, *Denier à Dieu*.

DENIAL. In Pleading. A traverse of the statement of the opposite party; a defence.

DENIER A DIEU. In French Law. A sum of money which the hirer of a thing gives to the other party as evidence, or for the consideration of the contract, which either party may annul within twenty-four hours, the one who gave the *denier à Dieu* by demanding, and the other by returning it. See DENARIUS DEI.

DENIZATION. The act by which a foreigner becomes a subject of a country, but without the rights either of a natural-born subject or of one who has become naturalized. It has existed from an early period, and is effected only by letters patent from the sovereign. Denization has no retrospective operation; a denizen is in an intermediate position between an alien and a natural-born subject, and partakes of both these characters. He may ordinarily take lands by purchase, but not by inheritance; and his issue born before denization cannot inherit from him, but his issue born after it may; Cockburn, Nationality 27; Morse, Citizenship 106. See 20 Wend. 352.

DENIZEN. In English Law. An alien born who has obtained, *ex donatione legis*, letters patent to make him an English subject.

He is intermediate between a natural-born subject and an alien. He may take lands by purchase or devise,—which an alien cannot; but he is incapable of taking by inheritance. 1 Bla. Com. 374.

But now in England, by the Naturalization Act of 1870, an alien can take, hold, and dispose of every description of property, in all respects as a natural-born subject.

In South Carolina, and perhaps in other states, this civil condition is well known to the law, having been created by statute.

The right of making denizens is not exclusively vested in the king, for it is possessed by parliament, but is scarcely ever exercised but by royal power. It may be effected by conquest; 7 Co. 6 *a*; 2 Ventr. 6; Com. Dig. *Alien* (D 1); Chitty, Com. Law 120. See DENIZATION.

In the common law, the word denizen is sometimes applied to a natural-born subject. Co. Litt. 129 *a*; 6 Pet. 101, 116.

DENMARK. A kingdom of Europe. It is a hereditary monarchy, and has a responsible ministry. The legislature, in conjunction with the sovereign, is called the Rigsdag or Diet, and it consists of the Landsthing or upper house and the Folkething. The Landsthing consists of 66 members, part life nominees of the crown and part elected for eight years. The Folkething consists of 102 members elected for three years. The Rigsdag must meet annually for two months. For the administration of justice the high courts are the supreme tribunals of the kingdom with a president and 12 ordinary and 7 extraordinary members. There is a superior tribunal for the isles and Copenhagen consisting of a president and 16 members, and a tribunal for Jutland at Viborg consisting of a president and 8 members, and a tribunal of commerce and navigation consisting of a president and 35 members.

DENOUNCEMENT. In Mexican Law. A judicial proceeding for the forfeiture of land held by an alien.

Though real property might be acquired by an alien in fraud of the law, that is without observing its requirements, he nevertheless retained his right and title to it, liable to be deprived of it by the proper proceedings of denouncement, which in its substantive characteristics was equivalent to the inquest of office found, at common law. 26 Cal. 477; 1 *id.* 63; 3 Wheat. 563.

DENUNCIATION. In Civil Law. The act by which an individual informs a public officer, whose duty it is to prosecute offenders, that a crime has been committed. See 1 Bro. Civ. Law 447; Ayliffe, Parerg. 210; Pothier, Proc. Cr. sect. 2, § 2.

DENUNTIATIO. In Old English Law. A public notice or summons. Bracton 202 *b*.

DEODAND. Any personal chattel whatever, animate or inanimate, which is the immediate cause of the death of a human creature. It was forfeited to the king to be distributed in alms by his high almoner "for the appeasing," says Coke, "of God's wrath." The word comes from *Deo dandum*, a thing that must be offered to God.

A Latin phrase which is attributed to Bracton has, by mistranslation, given rise to some erroneous statements in some of the authors as to what are deodands. *Omnia quæ ad mortem movent*, although it evidently means all things which *tend* to produce death, has been rendered *move to death*,—thus giving rise to the theory that things in motion only are to be forfeited. A difference, however, according to Blackstone, existed as to how much was to be sacrificed. Thus, if a man should fall from a cartwheel, the cart being stationary, and be killed, the wheel only would be deodand: while, if he was run over by the same wheel in motion, not only the wheel but the cart and the load became deodand. And this, even though it belonged to the dead man. Horses, oxen, carts, boats, mill-wheels, and cauldrons were the commonest deodands. The common name for it was the "bana," the slayer. In the thirteenth century the common practice was that the thing itself was delivered to the men of the township where the death occurred, and they had to account to the king's officers. In very early records the justices in eyre named the charitable purpose, to which the money was to be applied; 2 Poll. & Maitl. 471. In 1840, a railway company in England was amerced £2,000, as a deodand. Deodands were not abolished till 1846; Statute 9 & 10 Vict. c. 62. See 1 Bla. Com. 301; 2 Steph. Com. 551. Originally deodands went to the Crown, to be applied to charitable uses; they were often granted to lords of manors. The value was fixed, generally very low, by the coroner's jury. The Law's Lumber Room 60.

No deodand accrues in the case of a felonious killing; 1 Q. B. 818; 1 G. & D. 211, 481; 9 Dow. 1048.

DEPARTMENT. A portion of a country.

In France, the country is divided into departments, which are somewhat similar to the counties in this country. The United States have been divided into military departments, including certain portions of the country. 1 Pet. 293.

A portion of the agents employed by the executive branch of the United States government, to whom a specified class of duties is assigned.

The *department of state* is intrusted with such matters relating to correspondences, commissions, and instructions to or with public ministers and consuls of the United States, or to negotiations with public ministers from foreign states or princes, or to memorials or other applications from foreign public ministers or other foreigners, or to such matters respecting foreign affairs as the president of the United States shall assign to said department. U. S. Rev. Stat. § 202. It has custody and charge of the seal of the United States, and of the seal of the department of state, and of all of the books, papers, records, etc., in and appertaining to the department, or any that may hereafter be acquired by it; *id.* § 203.

The principal officer is a secretary, appointed by the president; he shall conduct the business of the department in such manner as the president shall direct. An assistant secretary, and a second assistant secretary of state, each of whom are appointed by the president, a chief and various subordinate clerks, appointed by the secretary, are employed in the duties of the department; U. S. Rev. Stat. § 200. By the act of 1890, July 11; 26 Stat. L. 228; the appointment of a third assistant is authorized.

The *department of the treasury* has charge of the services relating to the finances. It is the duty of the secretary to digest and prepare plans for the improvement and management of the revenue, and for the support of public credit; to prepare and report estimates of the public revenue and the public expenditures; to superintend the collection of the revenue; to decide on the forms of keeping and stating accounts and making returns, and to grant, under limitations established by law, all warrants for moneys to be issued from the treasury in pursuance of appropriations by law; to execute such services relative to the sale of lands belonging to the United States as may by law be required of him; to make report and give information to either branch of the legislature, in person or in writing, respecting all matters referred to him by the senate or house of representatives, or which shall appertain to his office; and, generally, to perform all such services relative to the finances as he shall be directed to perform. The offices consist of a secretary, who is the head of the department, a comptroller, six auditors, a treasurer, a register, a commissioner of customs, a commissioner of internal revenue, a comptroller of the currency, a solicitor, three assistant secretaries, a director of the mint, and numerous subordinate clerks. There are also assistant treasurers, appointed by the president, to reside in several of the more important cities of the United States. There is also a lighthouse board attached to this department. U. S. Rev. Stat. §§ 248, 4653; 28 Stat. L. 170.

The *department of war* is intrusted with duties relating to military commissions, the land forces, and warlike stores of the United States.

The chief officer is a secretary, appointed by the president. There are also an assistant secretary, a

chief clerk and numerous subordinate clerks. U. S. Rev. Stat. § 214.

The *department of justice* is presided over by the attorney-general, who is assisted by the solicitor-general and four assistant attorneys-general, and by solicitors for certain departments.

The attorney-general is required to give his advice and opinion upon questions of law whenever required by the president or the head of any executive department, and on behalf of the United States to procure proper evidence for, and conduct, prosecute, or defend all suits in the supreme court or in the court of claims, in which the United States or any officer thereof, as such officer, is a party or may be interested. He exercises general superintendence and direction over the attorneys and marshals of all the districts in the United States and territories, and has power to employ and retain such attorneys and counsellors-at-law as he may think necessary to assist the district attorneys in the discharge of their duties. U. S. Rev. Stat. § 346.

The *post office department* has the general charge of matters relating to the postal service, the establishment of post-offices, appointment of postmasters, and the like.

The chief officer is the postmaster-general. There are also four assistant postmasters-general, a chief clerk, and various superintendents, chief of division and inferior clerks. U. S. Rev. Stat. §§ 394–396; 1 Supp. 927. The assistant postmasters-general are appointed by the president, with the consent of the senate.

The *department of the navy* is intrusted with the execution of such orders as may be received from the president relative to the procurement of naval stores and materials and the construction, armament, and equipment of vessels of war, as well as all other matters connected with the naval establishment of the United States. U. S. Rev. Stat. §§ 417, 3660–7.

The chief officers are a secretary and assistant secretary, appointed by the president: the secretary is to appoint such clerks as may be necessary, of the classes specified by the statutes. U. S. Rev. Stat. §§ 169, 416.

There are in the navy department eight bureaus, each with a chief and a number of clerks, viz.: a bureau of yards and docks; a bureau of equipment and recruiting; a bureau of navigation; a bureau of ordnance; a bureau of construction and repair; a bureau of steam engineering; a bureau of provisions and clothing; a bureau of medicine and surgery. U. S. Rev. Stat. § 419.

The *department of the interior* has general supervisory and appellate powers over the office of the commissioner of patents; in relation to the land office; over the commissioner of Indian affairs; over the commissioner of pensions; over the census, education, and publications; over the mines of the United States; over the commissioner of public buildings; over the government hospitals and asylums.

The chief officers are a secretary and an assistant secretary, appointed by the president, etc., and a chief and other clerks, appointed by the secretary, including a chief and other clerks in each of the bureaus among whom the duties of the department are divided. U. S. Rev. Stat. §§ 437 *et seq.*

The *department of agriculture* is presided over by a secretary of agriculture, appointed by the president, by and with the advice and consent of the senate. He has one assistant. The design and duties of this department are to acquire and diffuse among the people of the United States useful information on subjects connected with agriculture, and to procure, propagate, and distribute among the people new and valuable seeds and plants. Act 1889, Feb. 9; 25 Stat. L. 659.

DEPARTURE. In Maritime Law. A deviation from the course prescribed in the policy of insurance. It may be justifiable; 7 Cra. 100; 1 Paine 247. See 51 Pa. 143; DEVIATION.

In Pleading. The statement of matter in a replication, rejoinder, or subsequent pleading, as a cause of action or defence, which is not pursuant to the previous pleading of the same party, and which does not support and fortify it; 2 Wms. Saund. 84 *a*, n. 1; 2 Wils. 98; Co. Litt. 304 *a*. It is not allowable, as it prevents reaching an issue; 49 Ind. 111; 13 N. Y. 83, 89; 2 Wms. Saund. *a*, n. 1; Steph. Pl. 410; 1 M. & S. 395. It is to be taken advantage of by demurrer, general; 5 D. & R. 295; 14 Johns. 132; McKel. Pl. 57; 2 Caines 320; 16 Mass. 1; or special; 2 Saund. 84; Com. Dig. *Pleader* (F 10); 77 Md. 64.

A departure is cured by a verdict in favor of him who makes it, if the matter pleaded by way of departure is a sufficient answer in substance to what has been before pleaded by the opposite party; that is, if it would have been sufficient if pleaded in the first instance: 2 Saund. 84; 1 Lilly, Abr. 444.

DEPARTURE IN DESPITE OF COURT. This took place where the tenant, having once made his appearance in court upon demand, failed to reappear when demanded; Co. Litt. 139 *a*. As the whole term is, in contemplation of law, but a single day, an appearance on any day, and a subsequent failure to reappear at any subsequent part of the term, is such a departure; 8 Co. 62 *a*; 1 Rolle, Abr. 583; Metc. Yelv. 211.

DEPENDENCY. A territory distinct from the country in which the supreme sovereign power resides, but belonging rightfully to it, and subject to the laws and regulations which the sovereign may think proper to prescribe.

It differs from a *colony*, because it is not settled by the citizens of the sovereign or mother state; and from *possession*, because it is held by other title than that of mere conquest. For example, Malta was considered a dependency of Great Britain in the year 1813. 3 Wash. C. C. 286. See Act of Cong. Mch. 1, 1809, commonly called the non-importation law.

DEPENDENT PROMISE. One which it is not the duty of the promisor to perform until some obligation contained in the same agreement has been performed by the other party. Hamm. Partn. 17, 29, 30, 109; Harr. Cont. 152. See CONTRACT; COVENANT; INDEPENDENT PROMISE.

DEPONENT. One who gives information, on oath or affirmation, respecting some facts known to him, before a magistrate; he who makes a deposition. 47 Me. 248.

DEPORTATION. In Roman Law. A perpetual banishment, depriving the banished of his rights as a citizen: it differed from relegation (*q. v.*) and exile (*q. v.*). 1 Bro. Civ. Law 125, n.; Inst. 1. 12. 1; Dig. 48. 22. 14. 1.

In Modern Law. "The removal of an alien out of the country, simply because his presence is deemed inconsistent with the public welfare, and without any punishment being imposed or contemplated, either under the laws of the country out of which he is sent, or under those of the country to which he is taken." 149 U. S. 709. It differs from *transportation* (*q. v.*), which is by way of punishment of one convicted of an offence against the laws of the country; and from *extradition* (*q. v.*), which is the surrender to another country of one accused of an offence against its laws, there to be tried, and, if found guilty, punished; *id.*

The right of a nation to expel or deport foreigners who have not been naturalized or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country; 149 U. S. 698; in the same opinion the supreme court says, by a divided court, that this right exists even though such persons be subjects of a friendly power and have acquired a domicile in this country. This case follows Vattel, Law of Nations § 230; Ortolan, *Dipl. de la Mer* 297; 1 Phill. Int. L. § 220; Bar. Int. Law (Gillespie's ed.) 708. In England, the only question has been whether the power of deportation could be exercised by the king without the consent of parliament. It was formerly exercised by the king, but in later times by parliament. See 2 Inst. 57; 1 Bla. Com. 260; 6 Law Quart. Rev. 27. A British colonial governor has exercised it; 1 Moore, P. C. 460. See App. Cas. (1891) 272.

Congress may exercise the power through the executive, or may call in the judiciary to ascertain contested facts; 149 U. S. 698.

DEPOSE. To deprive an individual of a public employment or office against his will. Wolffius, Inst. § 1063. The term is usually applied to the deprivation of all authority of a sovereign.

To give testimony under oath. See DEPOSITION.

DEPOSIT. A naked bailment of goods to be kept for the depositor without reward, and to be returned when he shall require it. Jones, Bailm. 36, 117; 9 Mass. 470; 40 Vt. 380.

A bailment of goods to be kept by the bailee without reward, and delivered according to the object or purpose of the original trust. Story, Bailm. § 41; 42 Miss. 544.

A contract by which one of the contracting parties gives a thing to another to keep, who is to do so gratuitously and obliges himself to return it when he shall be requested. See 3 L. R. P. C. C. 101.

An *irregular deposit* arises where one deposits money with another for safekeeping, in cases where the latter is to return, not the specific money deposited, but an equal sum.

A *quasi deposit* arises where one comes lawfully into possession of the goods of another by finding.

A depositary is bound to take only ordinary care of the deposit, which will of course vary with the character of the goods to be kept, and other circumstances; Edw. Bailm. 43. See 14 S. & R. 375; 17 Mass. 479; 3 Mas. 132; 2 Ad. & E. 526; 1 B. & Ald. 59. While gross negligence on the part of a gratuitous bailee is not fraud, it is in effect the same thing; 100 U. S. 699. He has, in general, no right to use the thing deposited; Bac. Abr. *Bailment*, D; unless in cases where permission has been given or may from the nature of the case be implied; Story, Bailm. § 90; Jones, Bailm. 80, 81. He is bound to return the deposit *in individuo*, and in the same state in which he received it: if it is lost, or injured, or spoiled, by his fraud or gross negligence, he is responsible to the extent of the loss or injury; Jones, Bailm. 36, 46, 120; 17 Mass. 479; 2 Hawks 145; 1 Dane, Abr. c. 17, art. 1 and 2; 87 Mich. 209. He is also bound to restore, not only the thing deposited, but any increase or profits which may have accrued from it; if an animal deposited bear young, the latter are to be delivered to the owner; Story, Bailm. § 99.

In the case of irregular deposits, as those with a banker, the relation of the banker to his customer is that of debtor and creditor, and does not partake at all of a fiduciary character. It ceases altogether to be the money of the depositor, and becomes the money of the banker. It is his to do what he pleases with it, and there is no trust created; Edw. Bailm. 41, 45; 17 Wend. 94; 1 Mer. 568; 33 N. E. Rep. (Ohio) 1054; 138 Ill. 596; 33 Fla. 429; 104 U. S. 64. See 37 N. J. E. 18. The legal remedy is a suit at law for debt: the balance cannot be reached by a bill in equity; 2 H. L. Cas. 39; except in some cases of insolvency, when a fund can be followed; 11 Phila. 511. See 1 C. C. App. 598. The banker is not liable for interest unless expressly contracted for; and the deposit is subject to the statute of limitations; 2 H. L. Cas. 39; 139 N. Y. 514.

Deposits in the civil law are divisible into two kinds—necessary and voluntary. A necessary deposit is such as arises from pressing necessity; as, for instance, in case of a fire, a shipwreck, or other overwhelming calamity; and thence it is called *miserabile depositum*. La. Civ. Code 2935. A voluntary deposit is such as arises without any such calamity, from the mere consent or agreement of the parties. Dig. 16. 3. 2.

This distinction was material in the civil law in respect to the remedy, for in voluntary deposits the action was only *in simplum*, in the other *in duplum*, or twofold, whenever the depositary was guilty of any default. The common law has made no such distinction. Jones, Bailm. 48.

Deposits are again divided by the civil law into simple deposits and sequestrations: the former is when there is but one party depositor (of whatever number composed), having a common interest; the latter is where there are two or more depositors, having each a different and adverse interest. These distinctions do not seem to have become incorporated into the common law. See Story, Bailm. § 41. See BAILMENT.

Where goods, for the recovery of which an action has been brought, are converted into money, which is, by consent of all parties, placed in the hands of an officer of the court, it is at the risk of one party as much as the other; 6 Wash. 603.

Deposit is sometimes used as equivalent to or in the sense of earnest (*q. v.*), when made by way of a forfeiture to bind a bargain. In such case it is forfeited on a breach "even if as a deposit and in part payment of the purchase money," and it cannot be recovered back unless circumstances make it inequitable to retain it; 53 L. J. Ch. 1061; 27 Ch. D. 89. See BAILMENT.

DEPOSITARY. A person entrusted with anything by another for safekeeping; a trustee; fiduciary; one to whom goods are bailed to be held without recompense. Stand. Dict.

DEPOSITION. The testimony of a witness reduced to writing, in due form of law,

by virtue of a commission or other authority of a competent tribunal, or according to the provisions of some statute law, to be used on the trial of some question of fact in a court of justice. 3 Blatchf. 456; 23 N. J. L. 49.

Depositions were not formerly admitted in common-law courts, and were afterwards admitted from necessity, where the oral testimony of a witness could not be obtained. But in courts of chancery this is generally the only testimony which is taken; Ad. Eq. 363. In some of the United States, however, both oral testimony and depositions are used, the same as in courts of common law.

In criminal cases, in the United States, depositions cannot be used without the consent of the defendant; 3 Greenl. Ev. § 11; 15 Miss. 475; 4 Ga. 335.

The constitution of the United States provides that in all criminal prosecutions "the accused shall enjoy the right to be confronted with the witnesses against him." Amend. art. 6. This principle is recognized in the constitutions or statutes of most of the states of the Union. 3 Greenl. Ev. § 11; Cooley, Const. Lim. 387.

In some of the states, provision is made for the taking of depositions by the accused. Conn. Comp. Stat. art. 6, § 162; 3 Greenl. Ev. § 11.

Provision has been made for taking depositions to be used in civil cases, by an act of congress and by statute in most of the states.

The Rev. Stat. §§ 863–876, directs that when, in any civil cause depending in any district in any court of the United States, the testimony of any person shall be necessary who shall live at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of such district, and to a greater distance from the place of trial than as aforesaid, before the time of trial, or is ancient, or very infirm, the deposition of such person may be taken, *de bene esse*, before any justice or judge of any of the courts of the United States, or any commissioner of a circuit court, or any clerk of a district or circuit court, or before any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, or judge of a county court or court of common pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, or interested in the event of the cause; provided that a notification in writing from the party or his attorney, to the adverse party, to be present at the taking of the same, and to put interrogatories, if he think fit, be first made out and served on the adverse party, or his attorney, as either may be nearest. And in all cases *in rem*, the person having the agency or possession of the property at the time of the seizure shall be deemed the adverse party until a claim shall have been put in; and whenever, by reason of the absence from the district, and want of an attorney of record, or other reason, the giving of the notice herein required shall be impracticable, it shall be lawful to take such depositions as there shall be urgent necessity for taking, upon such notice, as any judge authorized to hold courts in such circuit or district shall think reasonable and direct. Any person may be compelled to appear and depose, as provided by this section, in the same manner as witnesses may be compelled to appear and testify in court. And every person deposing as aforesaid shall be carefully examined and cautioned, and sworn or affirmed to testify to *the whole truth*, and shall subscribe the testimony by him or her given, after the same shall be reduced to writing, which shall be done only by the magistrate taking the deposition, or by the deponent in his presence. And the depositions so taken shall be retained by such magistrate until he deliver the same with his own hand into the court for which they are taken, or shall, together with a certificate of the reasons as aforesaid of their being taken, and of the notice, if any given, to the adverse party, be by him the said magistrate sealed up and directed to such court, and remain under his seal until opened in court. But unless it appears to the satisfaction of the court that the witness is then dead or gone out of the United States, or to a greater distance than one hundred miles from the place where the court is sitting, or that, by reason of age, sickness, bodily infirmity, or imprisonment, he is unable to travel and appear at court, such deposition shall not be used in the cause. Provided that nothing herein shall be construed to prevent any court of the United States from granting a *dedimus potestatem*, to take depositions according to common usage, when it may be necessary to prevent a failure or delay of justice,—which power they shall severally possess; nor to extend to depositions taken *in perpetuam rei memoriam*, which, if they relate to matters that may be cognizable in any court of the United States, a circuit court, on application thereto, made as a court of equity, may, according to the usages in chancery, direct to be taken.

In any cause before a court of the United States, it shall be lawful for such court, in its discretion to admit in evidence any deposition taken *in perpetuam rei memoriam*, which would be so admissible in a court of the state wherein such cause is pending, according to the laws thereof.

The act of January 24, 1827, authorizes the clerk of any court of the United States within which a witness resides, or where he is found, to issue a subpœna to compel the attendance of such witness; and a neglect of the witness to attend may be punished by the court whose clerk has issued the subpœna, as for a contempt. And when papers are wanted by the parties litigant, the judge of the court within which they are may issue a subpœna *duces tecum*, and enforce obedience by punishment as for a contempt. Rev. Stat. §§ 863–875; see 92 U. S. 1; Desty, Fed. Proc.

No witness shall be required, under the provisions of either of the two preceding sections, to attend at any place out of the county where he resides, nor more than forty miles from the place of his residence, to give his deposition, nor shall any witness be deemed guilty of contempt for disobeying any subpœna directed to him by virtue of either of the said sections, unless his fee for going to, returning from, and one day's attendance at the place of examination are paid or tendered to him at the time of the service of the subpœna. See Rev. Stat. § 870, etc.

Section 863 Rev. Stat. above quoted, relating to depositions *de bene esse*, applies to equity as well as to common-law causes; 36 Fed. Rep. 183. When a party is represented by counsel at the taking of a deposition and takes part in the examination, that must be regarded as a waiver of irregularities in taking it; 158 U. S. 271.

A clerical mistake in making out a commission which in no way misled the opposite party or affected his rights, is no valid ground for the suppression of the deposition; 149 U. S. 981.

The statutes of some states provide that courts may issue commissions to take depositions; others, that the parties may take them by giving notice of the time and place of taking the deposition to the opposite party. The privilege of taking them is generally limited to cases where the witness lives out of the state or at a distance from the court, or where he is sick, aged, about to leave the state, or where, from some other cause, it would be impossible or very inconvenient for him to attend in person. If the deposition is not taken according to the requirements of the statute authorizing it, it will, on objection being made by the opposite party, be rejected. See, generally, Weeks, Depositions.

In Ecclesiastical Law. The act of depriving a clergyman, by a competent tribu-

nal, of his clerical orders, to punish him for some offence and to prevent his acting in future in his clerical character. Ayliffe, Parerg. 206.

DEPOSITO. In Spanish Law. A real contract by which one person confides to the custody of another an object on the condition that it shall be returned to him whenever he shall require it.

DEPOSITOR. He who makes a deposit.

DEPOSITUM. A species of bailment. See DEPOSIT.

DEPREDATION. In French Law. The pillage which is made of the goods of a decedent.

DEPRIVATION. In Ecclesiastical Law. A censure by which a clergyman is deprived of his parsonage, vicarage, or other ecclesiastical promotion or dignity. See Ayliffe, Parerg. 206. 1 Bla. Com. 393. See DEGRADATION.

DEPRIVE. Referring to property taken under the power of eminent domain, it means the same as "take." 21 Pa. 167.

The constitution contains no definition of this word "deprive" as used in the Fourteenth Amendment. To determine its signification, therefore, it is necessary to ascertain the effect which usage has given it, when employed in the same or a like connection; 94 U. S. 123. See DUE PROCESS OF LAW; EMINENT DOMAIN; PRIVILEGES AND IMMUNITIES.

DEPUTY. One authorized by an officer to exercise the office or right which the officer possesses, for and in place of the latter.

In general, ministerial officers can appoint deputies, Comyns, Dig. *Officer* (D 1), unless the office is to be exercised by the ministerial officer in person; and when the office partakes of a judicial and ministerial character, although a deputy may be made for the performance of ministerial acts, one cannot be made for the performance of a judicial act; a sheriff cannot, therefore, make a deputy to hold an inquisition, under a writ of inquiry, though he may appoint a deputy to serve a writ. Sometimes, however, a general deputy or under-sheriff is appointed, who possesses, by virtue of his appointment, authority to execute all the ordinary duties of sheriff, and may even appoint, in the name of the sheriff, a special deputy; 12 N. J. L. 159; 2 Johns. C3.

In general, a deputy has power to do every act which his principal might do; but a deputy cannot make a deputy. See 9 Ia. 87; 9 Mo. 183; 20 Wall. 111.

A deputy should always act in the name of his principal. The principal is liable for the deputy's acts performed by him as such, and for the neglect of the deputy; 3 Dane, Abr. c. 76, a. 2; and the deputy is liable himself to the person injured for his own tortious acts; Dane, Abr. Index; Com. Dig. *Officer* (D), *Viscount* (B). See 7 Viner, Abr. 556; L. R. 3 Q. B. Div. 741; 8 Jones, L. 62.

DERAIGN. The literal meaning of the word seems to be, to disorder or displace, as deraignment out of religion; stat. 31, Hen. VIII. c. 6. But it is generally used in the common law for to prove, as, to deraign the warranty; Glanv., lib. 2, c. 6.

DERELICT. Abandoned; deserted; cast away.

Land left uncovered by the receding of water from its former bed. 2 Rolle, Abr. 170; 2 Bla. Com. 262; 1 Crabb, R. P. 109.

When so left by degrees, the derelict land belongs to the owner of the soil adjoining; but when the sea retires suddenly, it belongs to the government; 2 Bla. Com. 262; 1 Bro. Civ. Law 239; 1 Sumn. 328, 490; 1 Gall. 133; Bee 62, 178, 260; Ware 332.

Personal property abandoned or thrown away by the owner in such manner as to indicate that he intends to make no further claim thereto. 2 Bla. Com. 9; 2 Reeve, Hist. Eng. Law 9; 1 C. B. 112; Broom, Max. 261; 1 Ohio 81; 2 Schoul. Per. Prop. 8; 12 Ga. 473. Dereliction or renunciation properly requires both the intention to abandon and external action. Thus the casting overboard of articles in a tempest to lighten the ship is not dereliction, as there is no intention of abandoning the property in the case of salvage. Nor does the mere intention of abandonment constitute dereliction of property without a throwing away or removal, or some other external acts; 74 Me. 455.

It applies as well to property abandoned at sea as on land; 1 Mas. 373; 1 Sumn. 207, 336; 2 Kent 357. A vessel which is abandoned and deserted by her crew without any purpose on their part of returning to the ship, or any hope of saving or recovering it by their own exertions, is derelict; 2 Pars. Mar. Law 615; 20 E. L. & Eq. 607; 2 Cra. 240; Olc. 77; Newson, Salvage; 1 Newb. 329, 421; 3 Ware 65; 14 Wall. 336; Bee 260.

The title of the owner to property lying at the bottom of the sea is not divested, however long it may remain there; 38 Fed. Rep. 503; "because as goods lying at the bottom, they always await their owner;" *id.;* after another has taken them, the owner must follow them within a year and a day; *id.;* 5 Co. 105; 1 B. & Ad. 141, where the law is fully discussed; 3 Black Book, Adm. 439.

A vessel at least six miles from shore submerged from midship to bow, her running rigging overboard and snarled fast, her boat gone, her cabin, etc., full of water, a distress flag set, and deserted by her crew, who had left no sign of an intention to return and were not visible, is *prima facie* derelict, though she was anchored and her master was intending to return to save her and had telegraphed for a wrecking vessel; 37 Fed. Rep. 233.

However long goods thrown overboard may have been on the ocean, they do not become derelict by time, but will be restored on the payment of salvage, unless there was a voluntary intention to abandon them; Bee 82. See SALVAGE.

DERIVATIVE. Coming from another; taken from something preceding; sec-

ondary; as, derivative title, which is that acquired from another person.

There is considerable difference between an original and a derivative title. When the acquisition is original, the right thus acquired to the thing becomes property, which must be unqualified and unlimited, and, since no one but the occupant has any right to the thing, he must have the whole right of disposing of it. But with regard to derivative acquisition it may be otherwise; for the person from whom the thing is acquired may not have an unlimited right to it, or he may convey or transfer it with certain reservation of right. Derivative title must always be by contract.

Derivative conveyances are those which presuppose some precedent conveyance, and serve only to enlarge, confirm, alter, restrain, restore, or transfer the interest granted by such original conveyance. 3 Bla. Com. 324.

DEROGATION. The partial abrogation of a law. To derogate from a law is to enact something which impairs its utility and force; to abrogate a law is to abolish it entirely.

DESAFUERO. In Spanish Law. An irregular action committed with violence against law, custom, or reason.

DESCEND. To pass by succession; as when the estate vests by operation of law in the heirs immediately upon the death of the ancestor. 128 Mass. 40. · See DESCENT AND DISTRIBUTION.

DESCENDANTS. Those who have issued from an individual, including his children, grandchildren, and their children to the remotest degree. Ambl. 327; 2 Bro. Ch. 30, 230; 1 Roper, Leg. 115.

The descendants from what is called the direct descending line. The term is opposed to that of ascendants.

There is a difference between the number of ascendants and descendants which a man may have; every one has the same order of ascendants, though they may not be exactly alike as to numbers, because some may be descended from a common ancestor. In the line of descendants they fork differently according to the number of children, and continue longer or shorter as generations continue or cease to exist. Many families become extinct, while others continue: the line of descendants is, therefore, diversified in each family.

DESCENT AND DISTRIBUTION. The division among those legally entitled thereto of the real and personal property of intestates, the term *descent* being applied to the former and *distribution* to the latter. *Descent* is the devolution of real property to the heir or heirs of one who dies intestate; the transmission by succession or inheritance.

Title by descent is the title by which one person, upon the death of another, acquires the real estate of the latter as his heir at law. 2 Bla. Com. 201; Com. Dig. *Descent*.

It was one of the principles of the feudal system that on the death of the tenant in fee the land should *descend*, and not *ascend*. Hence the title by inheritance is in all cases called descent, although by statute law the title is sometimes made to ascend.

The English doctrine of primogeniture, by which by the common law the eldest son and his issue take the whole real estate, has been universally abolished in this country. So, with few exceptions, has been the distinction between male and female heirs.

The rules of descent are applicable only to real estates of inheritance. Estates for the life of the deceased, of course, terminate on his death; estates for the life of another are governed by peculiar rules.

Distribution is the division by order of the court or legal representative having authority, among those entitled thereto, of the residue of the personal estate of an intestate, after payment of the debts and charges.

The term is sometimes used to denote the division of a residue of both real and personal estate, and also the division of an estate according to the terms of a will, but neither use is accurate, the term being technically applied only to personal estate.

The title to real estate vests in the heirs by the death of the owner; the legal title to personal estate, by such death, vests in the executor or administrator, and is transferred to the persons beneficially interested, by the distribution; 4 Conn. 347.

Terms of years, and other estates less than freehold, are regarded as personal estate, and, on the death of the owner, vest in his executor or administrator.

The rules of descent and distribution are prescribed by the statute laws of the several states; and, although they correspond in some respects, it is doubtful whether in any two they are precisely alike.

Property in real estate and its transmission by descent as by alienation or devise is governed by the *lex rei sitæ* (*q. v.*), but the law of the domicil of the decedent governs in the distribution of his personal estate, unless otherwise provided by statute. See DOMICIL; CONFLICT OF LAWS. In *Alabama*, *Arkansas*, *California*, *Colorado*, *Connecticut*, *North Dakota*, *Florida*, *Georgia*, *Illinois*, *Indiana*, *Iowa*, *Kansas*, *Louisiana*, *Michigan*, *Minnesota*, *Mississippi*, *Missouri*, *Montana*, *Nebraska*, *Nevada*, *New Hampshire*, *New Mexico Ty.*, *Ohio*, *Oklahoma Ty.*, *Pennsylvania*, *South Carolina*, *South Dakota*, *Texas*, *Utah*, *Vermont*, *Washington*, and *Wyoming*, the rules for the distribution of personal property are, by statute, essentially the same as those of the descent of real estate, where no distinction is made between real estate, ancestral and non-ancestral, and, where such distinction is made, of real estate non-ancestral; the rule is substantially the same, also, in *Arizona Ty.*, *Kentucky*, *Maine*, and *Wisconsin*; Me. Rev. Stat. 1884, p. 73; Ky. Gen. Stat. (1873), p. 371; Wisc. Rev. Stat. (1878) § 3935; Am. Rev. Stat. § 1459.

The following is the order of descent of real estate and (except where otherwise stated) the distribution of personal property of persons dying intestate in the several states and territories of the United States. The statutes on this subject are constantly liable to change and amendment, and should consequently be consulted with reference to cases requiring the application of the local laws of a particular state. This summary, however, affords an opportunity for a general view of the subject and comparison of the systems which are generally found to differ, for the most part, rather in groups of states, than to be circumscribed merely by state lines.

ALABAMA. Subject to the payment of debts, charges, and dower: 1. Children and their descendants. 2. Brothers or sisters or their descendants. 3. Father, if living; if not, to the mother. 4. Next of kin of equal degree, equally. 5. Husband or wife. 6. Escheat to the State. Personal estate differs only from real in case of the wife of intestate; who takes all if there are no children; one-half if but one child; if more than one and not more than four, a child's part; if more than four, one-fifth. Of a wife's separate estate, the husband takes one-half of personalty absolutely and the

use of the realty for life unless he has been deprived of control over it by decree in chancery. Lineal descendants in equal degree represent their ancestors: that is, children of a deceased child, brother, or sister, inherit in equal parts the share which such deceased child, brother, or sister would have inherited if living; the grandchildren of such deceased child, brother, or sister taking in equal parts the share their parents would have inherited if living. No representation among collaterals except with the descendants of brothers and sisters of the intestate. 7. No distinction between whole and half blood, except that, in case the inheritance was ancestral, those not of the blood of the ancestor are excluded as against those of the same degree. Posthumous children of intestate inherit as if born in his lifetime, but there is no right of inheritance in any other person unless born at the time of his death. Illegitimate children inherit from the mother as if legitimate. Degrees of kindred are computed according to the civil law. Code, 1886, §§ 1915–1920; Acts, 1892–3, p. 1055.

ARIZONA. (*a*) Where there is no surviving husband or wife: 1. Children and their descendants. 2. Father and mother equally, but if only one survive, to him or her one-half and the other to brothers and sisters, or if none the whole. 3. Brothers and sisters and their descendants. 4. If none, the estate is divided into two portions one of which goes to the paternal and the other to the maternal grandfather and grandmother in equal portions, and if one of either be dead his or her portion to his or her descendants; should there be no descendants, the whole half portion to the survivor, and if no grandfather or grandmother the whole estate passes to their descendants, and so on to nearest lineal ancestor and descendants of such ancestor. (*b*) If there be a surviving husband or wife, he or she takes one-third of the personal property and one-third of the real estate for life with remainder to children or their descendants. If no child or children the survivor takes all the personal property and one-half the lands without remainder to any one; the other half goes to the next of kin in the order above enumerated; provided, that if neither father nor mother survive the husband or wife takes all. There is no distinction as to ancestral descent, all being held as if by purchase. Those of the half-blood take one-half as much as those of the same degree of the whole blood if there are both; but if all are of the half-blood they take equally. There is no corruption of blood or forfeiture by reason of casualty or suicide; and no right of inheritance to any person other than children or lineal descendants, unless in being and capable of taking at the death of the intestate. Rev. Stat. 1887, § 1459. There is no dower or curtesy.

ARKANSAS. 1. Children and their descendants equally, including posthumous children. 2. Father, then mother. 3. Brothers and sisters, and their descendants. 4. Grandfather, grandmother, uncles, and aunts, and their descendants, in equal parts; and so on, passing to the nearest lineal ancestor and his descendants. 5. If no such kindred, husband or wife; and in default of these it escheats to the state. 6. Descendants in all cases take by right of representation, where of different degrees. 7. A paternal estate to the father and his heirs; and a maternal estate to the mother and her heirs; but an acquired estate goes to the father for life, remainder to the collateral kindred; and in default of father, then to the mother for life, and remainder to collateral heirs. 8. In default of father and mother, where there is no near kindred, lineal or collateral, first to brothers and sisters of the father and their descendants; then to those of the mother. 9. The half-blood inherits equally with the whole blood in the same degree; but if the estate be ancestral, it goes to those of the blood of the ancestor from whom it was derived. 10. In all cases not provided for by the statute, the inheritance descends according to the course of the common law. Posthumous children of the intestate inherit as if born in his lifetime, but other posthumous children not born at his death do not inherit from him. Illegitimate children are capable of inheriting and transmitting inheritance on the part of the mother as if legitimate, and if recognized by the father and he inter-marry with the mother they shall be legitimate. An heir at law may be made by declaration in writing acknowledged and recorded. Advancements are reckoned as against shares, *pro tanto*, but not for education and maintenance or gift otherwise than for settlement in life. Dig. Stats. 1894, §§ 2470–2493.

CALIFORNIA. 1. If there be a surviving husband or wife, and only one child, or the issue of one child, in equal shares to such husband or wife and child, or issue of such child. If more than one child, or one and the issue of one or more, one-third to husband or wife, and the remainder to the children or issue of such by right of representation. Or if no child living, then to lineal descendants equally, if in the same degree, otherwise by right of representation. If no surviving husband or wife, then to the issue equally with representation. 2. If no issue, then in equal shares to the surviving husband or wife and to the intestate's father and mother, and if either be dead to the survivor. If no father or mother, then one-half in equal shares to the brothers and sisters of the intestate, and the issue of such by right of representation. If no surviving issue, husband, or wife, to the father and mother equally or the survivor. 3. If no issue, husband, wife, father, nor mother, to brothers and sisters, and children of such by right of representation. 4. If there be a surviving husband or wife, and no issue, father, mother, brother, or sister, the whole goes to the surviving husband or wife. 5. If none of these, to the next of kin in equal degree, those claiming through the nearest ancestor to be preferred to those claiming through one more remote. 6. If there be several children, or one child and the issue of one or more, and any such surviving child die under age and unmarried, the estate of such child which came from such deceased parent passes to the other children of the same parent and the issue of such by right of representation. 7. If all the other children be dead, in such case, and any of them have left issue, then the estate descends to such issue equally if in the same degree, otherwise by right or representation. 8. If decedent be a widow or widower and leave no kindred and the estate or any portion of it was common property of such decedent and his or her deceased spouse, while living, it goes to the father of such deceased spouse, or if he be dead, to the mother. If there be neither, then in the brothers and sisters of such deceased spouse in equal shares and to the lawful issue of any deceased brother or sister of such deceased spouse. 9. If the intestate leave no husband or wife, nor kindred, the estate escheats to the state for the use of the common schools. 10. The degrees of kindred are computed according to the rules of the civil law (24 Cal. 73); and kindred of the half-blood inherit equally with those of the whole blood in the same degree, unless the estate come from an ancestor, in which case those not of the blood of such ancestor are excluded. Code, 1886, §§ 1386, 1394.

COLORADO. 1. One-half to the husband or wife and one-half to the children surviving and their legal representatives; but if there be no children, then the whole to the surviving husband or wife. 2. To the father, then to the mother. 3. To the brothers and sisters, or their descendants. 4. To the grandfather, grandmother, uncles, aunts, and their descendants, the descendants taking, collectively, the share of their immediate ancestors in equal parts. 5. If none, then to the nearest lineal ancestors and their descendants, the descendants collectively, taking the share of their immediate ancestor in equal parts. 6. Children and descendants of children of the half-blood, inherit as children and descendants of the whole blood; collateral relatives of the half-blood inherit only half the measure of collateral relatives of the whole blood, if there be any of the last class living. Illegitimate children recognized by the father to be his inherit as if born in wedlock if the parents subsequently marry. Divorce of parents does not affect the right of previously begotten children to inherit. Dower and curtesy are abolished; certain chattels (or at their option their value) are allowed to the widow. Colorado Ann. Stats. 1891, §§ 1524–1530.

CONNECTICUT. 1. One-third to the wife (unless she shall have been otherwise endowed before marriage) during her life, and the residue to the children and their legal representatives, excepting children who shall receive estate by settlement, equal to the shares of the others, and excepting that children advanced by settlement not equal to the shares of the rest shall have so much as shall make the shares equal. 2. Brothers and sisters of the intestate of the whole blood and their representatives. 3. Parent or parents of the intestate. 4. Brothers and sisters of the half-blood, and their representatives.

5. Next of kin in equal degree, kindred of the whole blood to take in preference to kindred of the half-blood, in equal degree, and no representatives to be admitted among collaterals after the representatives of brothers and sisters. 6. Estates which came to the intestate from his parent, ancestor, or other kindred go—(1) to the brothers and sisters of the intestate of the blood of the person or ancestor from whom such estate came or descended; (2) to the children of such person or ancestor and their representatives; (3) to the brothers and sisters of such person or ancestor and their representatives; (4) if there be none such, then it is divided as other real estate. 7. If a minor leave no lineal descendants, nor brothers or sisters of the whole blood, nor their descendants, his estate goes—(1) to next of kin of the blood of the person from whom the estate came; (2) to next of kin generally, and in ascertaining the next of kin, the rule of the civil law is adopted. Gen. Stat. 1888, §§ 630-632. A requirement that no estate may be given by deed or will except to persons in being or their immediate issue or descendants, is repealed; Laws, 1895, ch. 249; and if a minor die intestate before marriage without issue, his portion of the estate shall be distributed as if he died in the lifetime of the parent; *id.* ch. 230. On death of husband or wife intestate without children the survivor takes absolutely $2000, and one-half of the remainder of the estate; *id.* ch. 217.

DELAWARE. *Real estate* descends—1. Children and their issue by right of representation, 2. Brothers and sisters of the whole blood, and their issue by right of representation; estates from a parent or ancestor, go, in default of issue, to brothers and sisters of the blood of such parent or ancestor. 3. Father. 4. Mother. 5. Next of kin in equal degree, and their issue by representation: provided that collateral kindred claiming through a nearer common ancestor are preferred to those claiming through one more remote. 6. The descent of intestate real estate is subject to curtesy and dower, the widow taking one-half if there is no issue, otherwise one-third; if the wife die having had no issue the husband takes one-half for life. Rev. Code, 1893, p. 641.

The order of distribution of *personal estate* is: 1. Children and issue of any deceased. 2. Brothers and sisters of the whole blood and the issue of any deceased. 3. Father. 4. Mother. 5. Next of kin, in equal degree, and lawful issue of such kin as shall have died before the intestate. Provided, that a husband shall take the whole residue, or a widow shall be entitled absolutely if there be no issue; if there be issue of the intestate, the husband and such issue divide equally, share and share alike (Act May 8, 1895); or if no issue, but brothers, sisters, or other kin, to one-half part such residue; or, if there be no kin to the intestate, to the whole of such residue.

Distribution among children, brothers, or other kin in equal degree must be in equal portions; but the issue of such of them as shall have died before the intestate shall take according to stocks, by right of representation; and this rule holds although the distribution be entirely among such issue. Rev. Code, 1893, p. 678.

DISTRICT OF COLUMBIA. The rules of descent and distribution are the same as in Maryland. Comp. Stats. 1894, pp. 32, 192.

FLORIDA. The rules of descent and distribution are substantially the same as in Virginia. Rev. Stat. 1892, § 1820.

GEORGIA. 1. If no children or their issue, to husband or wife. 2. If children, husband or wife and children take *per capita*, descendants of children *per stirpes*, but if more than five shares, the wife takes one-fifth, but if she elects to take dower she has no further interest in realty. 2. Children, including posthumous children equally and their descendants, by right of representation. 3. Brothers and sisters. Half blood on paternal side equally with the whole blood. If no brother or sister of whole blood or of half-blood on paternal side then those of half-blood on maternal side. No right of representation among collaterals further than children or grandchildren of brothers and sisters. 4. Father, or if none the mother, equally with brothers and sisters; if the mother has married again she takes nothing unless the intestate is her only child, in which case she takes as if she were still a widow. 5. Next of kin, paternal and maternal being on the same footing. 6. First cousins, uncles, and aunts inheriting equally with them. 7. Degrees are ascertained by the canon law as adopted and enforced by English courts prior to July 4, 1776. Code, § 2484; Acts, 1883, p. 64; Acts, 1894, p. 104.

IDAHO. If a surviving husband or wife and only one child, or the lawful issue of one child, they take in equal shares. If there is a surviving husband or wife and more than one child living, or one child living and the lawful issue of one or more deceased children, one-third goes to the surviving husband or wife, and the remainder in equal shares to the children and issue of any deceased child by right of representation; but if there be no child of the decedent living at his death the remainder goes to all of his lineal descendants, who, if all in the same degree, share equally, otherwise by right of representation. If no surviving husband or wife, but issue, the whole estate goes to such, and if there is more than one child living, or one child living and the lawful issue of one or more deceased children, then in equal shares to the children or child living, and the issue of the deceased child or children by right of representation. If no issue, one-half to the surviving husband or wife and the other half to decedent's father or mother in equal shares, and if either be dead, the whole of said half goes to the other; and if there be no father or mother, then one-half goes in equal shares to the brothers and sisters of the decedent and to the children of any deceased brother or sister. If there is no issue, husband or wife, the estate goes to his father and mother in equal shares, or if either be dead, then to the other. If there be neither issue, husband, wife, father or mother, then in equal shares to the brothers and sisters of the decedent and to the children of any deceased brother or sister. If the decedent leaves a husband or wife, but neither issue, father, mother, brother nor sister, the whole estate to surviving husband or wife; if no issue, surviving husband or wife, father, mother, brother, or sister, it goes to the next of kin in equal degrees, except when there are two or more collateral kindred in equal degree, claiming through different ancestors, those claiming through the nearest are preferred. If the decedent leave several children or one child and the issue of one or more, and any such surviving child dies under age, and unmarried, all the estate that came to the deceased child by such inheritance descends in equal shares to the other children of the same parent and to the issue of such other children who are dead, by right of representation. If at the death of such child under age and unmarried, all the other children of his parents are also dead, and any have left issue, such estate descends to the issue of all the other children of the same parent. On the death of the husband intestate one-half of the entire community property belongs to the wife and the remainder to his descendants according to right of representation, but if the decedent be the wife the entire community property belongs to the husband. If the decedent be a widow or widower and leave no kindred, and the estate or any portion of it was common property of such decedent and his or her deceased spouse, such shall go to the father of such deceased spouse, or if he be dead, to the mother. If there be no father nor mother, then it goes to the brothers and sister of such deceased spouse in equal shares and to the lawful issue if any deceased brother or sister. If the decedent leave no husband, wife or kindred and there be no heirs to take his estate, the same shall be paid into the treasury for the support of the common schools. Rev. Stat. (1887), p. 645.

ILLINOIS. 1. To children and their descendants by right of representation. 2. If no children or their descendants or widow or surviving husband then to the parents, brothers, and sisters and their descendants, in equal parts,—allowing to each parent a child's part, or to the survivor of them, if one be dead, a double portion; and if there be no parent, then the whole to the brothers and sisters and their descendants. 3. Where there is a widow or surviving husband and no children or their descendants, then one-half of the real estate and all of the personal estate to the widow or surviving husband and the other half of the real estate descends as when there are no issue. 4. If there be a widow or surviving husband and also child or children or their descendants the widow or surviving husband shall receive one-third of the personal estate. 5. If there be none of the above-mentioned persons, then in equal parts to the next of kin in equal degree, computed by the rules of civil law; and there is no representation among collaterals, except with the descendants of the brothers and sisters of the intestate; and there is

no distinction between the kindred of the whole and the half-blood. 6. Where there is a widow or surviving husband and no kindred, he or she takes the whole estate. 7. Where there are no kindred and no widow or surviving husband the estate escheats to the county wherein the same, or a greater portion thereof, is situated. Starr & Curtis, Anno. Stats. 1896, p. 1426.

INDIAN TERRITORY. Governed by the statutes of Arkansas.

INDIANA. 1. Children and their descendants equally, if in the same degree; if not, *per stirpes*, provided that, if there be only grandchildren, they shall inherit equally. 2. If no descendants, then half to the father and mother, as joint tenants, or to the survivor; and the other half to the brothers and sisters and their issue. 3. If there be no father and mother, the brothers and sisters or descendants take the whole, as tenants in common. If there be no brothers or sisters or descendants of them, it goes to the father and mother as joint tenants; and if either be dead, to the other. 4. If there be none of these, if the inheritance came from the paternal line, then it goes—(1) to the paternal grandfather and grandmother, as joint tenants, or the survivor of them; (2) to the uncles and aunts and their issue; (3) to the next of kin in equal degree among the paternal kindred; (4) if none of these, then to the maternal kindred in the same order. 5. Maternal inheritances go to the maternal kindred in the same manner. 6. Estates not ancestral descend in two equal parts to the paternal and to the maternal kindred, and on failure of either line the other takes the whole. 7. Kindred of the half-blood inherit equally with those of the whole blood, except that ancestral estates go only to those of the blood of the ancestor: provided that on failure of such kindred, other kindred of the half-blood inherit as if they were of the whole blood. 8. When the estate came to the intestate by gift or by conveyance, in consideration of love and affection, and he dies without issue, it reverts to the donor, if he be still living, saving to the widow or widower her or his rights therein: provided that the husband or wife of the intestate shall have a lien thereon for the value of their lasting improvements. 9. In default of heirs, it escheats to the state for the use of the common schools. 10. Curtesy and dower are abolished, and the widow takes one-third of the estate in fee-simple, free from all demands of creditors: provided that when the real estate exceeds in value ten thousand dollars she takes one-fourth only, and when it exceeds twenty thousand dollars, one-fifth only. In case there is a widow and children, she takes a share of the personal property, equal to a child, provided her share shall not be reduced below one-third. 11. When the widow marries again, she cannot alienate the estate; and if during such marriage she die, the estate goes to her children by the former marriage, if any there be. 12. When the estate, real and personal, does not exceed five hundred dollars, the whole goes to the widow. 13. A surviving husband inherits one-third of the real estate of the wife. 14. If a husband die, leaving a widow and only one child, the real estate descends one-half to each. 15. When a husband or wife dies, leaving no child, but a father or mother, or either of them, then three-fourths of the estate goes to the widow or widower, and one-fourth to the father and mother jointly, or the survivor of them; but if it does not exceed one thousand dollars, the whole to the widow or widower. 16. If there be no child or parent, the whole goes to the surviving husband or wife. Horner's Anno. Stats. 1896, §§ 2467–2511.

The statute of this state is very peculiar and requires close attention not only to its provisions but also to the decisions in which the same have been construed.

IOWA. 1. To children and their issue by right of representation. 2. If no issue, one-half to parents, and the other half to the wife; if no wife, the whole to the parents, or the survivor of them. 3. If both parents be dead, their portion goes, in the same manner as if they or either of them had outlived the intestate, to their heirs. 4. If heirs are not thus found the uninherited portion passes to the wife or her heirs, or if one wife be living and one dead, equally between the wife living and the heirs of the deceased wife by representation. 5. If there be no heirs, the estate escheats to the state. Rev. Stat. 1888, §§ 3657–3665.

KANSAS. Subject to certain provisions regarding homesteads, which are exempt from distribution; 1. one-half to the widow or surviving husband and the other half to children or their issue. 2. If no children or issue, the whole to the widow or surviving husband. 3. Parents or survivor. 4. If neither parent living the estate passes as if they had outlived the intestate and died in possession. Dower and curtesy are abolished. Illegitimate children inherit from the mother, and she from them, and they also inherit from the father if recognized by him and he from them if the recognition be mutual. Gen. Stat. Kan. 1889, ch. 33. Laws, 1891, ch. 111.

KENTUCKY. 1. Children and their descendants. 2. Parents if both living, one moiety each; but if only one, the whole. 3. Brothers and sisters and their descendants. 4. One moiety to the paternal and the other to the maternal kindred in the following order: 5. Grandfather and grandmother equally if both living, if not to the survivor. 6. Uncles and aunts and their descendants. 7. Great-grandparents. 8. Brothers and sisters of grandparents and their descendants, and so on in other cases without end, passing to nearest lineal ancestors and their descendants. 9. If no kindred of one parent, the whole goes to that of the other. If no paternal, nor maternal, kindred, the whole goes to husband or widow, or in case of their death to their kindred. 10. Descendants take *per stirpes*. 11. Collaterals of the half-blood inherit one-half as much as those of the whole. Ancestral inheritance is recognized but not beyond grandparents, uncles and aunts. Husband and wife each one-half of personal estate of the other. Barb. & Carr. Stat. 1894, ch. 39, p. 543.

LOUISIANA. 1. Children and their issue; if in equal degree, *per capita*; otherwise, *per stirpes*. 2. Parents one moiety; and the other moiety to brothers and sisters and their issue. If one parent be dead, his or her share goes to the brothers and sisters of the deceased, who then have three-fourths. If both parents be dead, the whole goes to the brothers and sisters and their issue. 3. Brothers and sisters of the same marriage, share equally. If of different marriage, the portion is divided equally between the paternal and maternal lines of the intestate, the german brothers and sisters taking a part in each line. If the brothers and sisters are on one side only, they take the whole, to the exclusion of all relations of the other line. 4. If there be no issue, nor parent, nor brothers, nor sisters, nor their issue, then the inheritance goes to the *ascendants* in the paternal and maternal lines one moiety to each,—those in each line taking *per capita*. If there is in the nearest degree but one ascendant in the two lines, he excludes all others of a remoter degree, and takes the whole. 5. If there be none of the heirs above mentioned, then the inheritance goes to the collateral relations of the intestate,—those in the nearest degree excluding all others. If there are several persons in the same degree, they take *per capita*. 6. Representation takes place *ad infinitum* in the direct descending line, but does not take place in favor of ascendants,—the nearest in degree always excluding those of a degree superior or more remote. 7. In the collateral line, representation is admitted in favor of the issue of the brothers and sisters of the intestate, whether they succeed in concurrence with the uncles and aunts, or whether the brothers and sisters, being dead, their issue succeed in equal or unequal degrees. 8. When representation is admitted, the partition is made *per stirpes*; and if one root has produced several branches, the subdivision is also made by roots in each branch, and the members of the branch take between themselves *per capita*. Civ. Code, 1889, art. 886–914.

MAINE. 1. Children and their issue by representation. If no child be living at the time of his death, to all his lineal descendants; equally if all are of same degree, if not by representation. 2. If no such issue, it descends to his father and mother in equal shares. 3. If no such issue or father, it descends one-half to his mother, and the remainder in equal shares to his brothers and sisters, and when a brother or sister has deceased, to his or her children or grandchildren by representation. 4. If no issue, father, brother, or sister, it descends to his mother to the exclusion of the issue of deceased brothers and sisters. 5. If no such issue, father, mother, brother or sister, it descends to his next of kin of equal degree; when they claim through different ancestors, preferring those claiming through the nearer. 6. If a minor dies unmarried leaving property inherited from a parent, it descends to the other children of the same parent in equal share, and to their issue by representation. 7. If no kindred, it de-

scends to the surviving husband or wife; otherwise it escheats to the state. 8. Degrees of kindred are computed according to the civil law, the half-blood inheriting equally with the whole blood of equal degree. Rev. Stat. 1884, p. 610; Laws, 1889, p. 189. With respect to all persons married since May 1, 1895 (and as to those after January 1, 1897), dower and curtesy are abolished, but the interest of husband or wife in the real estate of the other must be barred, as dower and curtesy have been barred hitherto, and the order of descent (and distribution, except as stated) is as follows: 1. The widow or widower one-third if issue, one-half if no issue, and if no kindred the whole. 2. Subject to the foregoing, the remainder or the whole, as the case may be, to children and their issue, by representation; if no child to lineal descendants, equally if of the same degree, otherwise by representation. 3. If no issue to father and mother equally. 4. If only one of these, he or she takes one-half and the remainder in either case to brothers and sisters and their issue by representation. 5. If there be no brothers and sisters the father or mother takes the whole to the exclusion of issue of brothers or sisters. 6. To next of kin in equal degree, those claiming through a nearer ancestor being preferred. 7. Property of an unmarried minor, inherited from either parent, descends to the other children of the same parent and their issue, in equal shares if of the same degree, otherwise by representation. 8. Escheat to state. Illegitimate children are heirs of the mother in any case and of parents who marry and of the father if adopted by him by writing duly acknowledged. Adopted children are heirs unless otherwise specially provided. Pub. Law, 1895, ch. 157. Personal property, except an allotment to widow is distributed in the same manner except that life insurance is no part of the estate, but descends one-third to the widow and remainder to issue; if no widow the whole to issue, if no issue the whole to widow. Rev. Stat. 1884, p. 612.

MARYLAND. *Real estate* descends—1. Children and their descendants. 2. If no issue, a paternal estate to the father. 3. To the brothers and sisters of the intestate of the blood of the father and their descendants. 4. To the grandfather on the part of the father, if living, otherwise to his descendants in equal degree; and if none to the father of such grandfather and his descendants, and so on to the next lineal male paternal ancestor and his descendants, without end. And if there be no paternal ancestor, nor descendants of any, then to the mother and the kindred on her side in the same manner as above directed. 5. If no issue, a maternal estate to the mother; then to the brothers and sisters of her blood and their descendants; and if none of these, to her kindred in the same order as above; and in default of maternal kindred, then to the paternal kindred in the same manner as above directed. 6. An acquired estate, when there is no issue, descends —(1) to brothers and sisters of the whole blood, and their descendants in equal degree; (2) then to the brothers and sisters of the half-blood and their descendants; (3) if none to the father; (4) if no father, to the mother; (5) if neither, to the paternal grandfather and his descendants in equal degree; then to the maternal grandfather and his descendants in equal degree; then to the paternal great-grandfather and his descendants in the same manner, and so on, alternating and giving preference to the paternal ancestor. 7. If no kindred, then to the surviving wife or husband, and their kindred, as an estate by purchase; and if the intestate has had more husbands or wives than one, all of whom are dead, then to their kindred in equal degree, equally. 8. No distinction between brothers and sisters of the whole and half-blood, all being descendants of the same father, where the estate descended on the part of the father, nor where all are descendants of the same mother, the estate descending on her part. 9. Children take by representation; but no representation is admitted among collaterals after brothers' and sisters' children. Pub. Gen. Laws, 1888, pp. 808–814. *Personal property* is distributed as follows: To the widow, the whole if no child, parent, grandchild, brother or sister or child of a brother or sister; one-third, if children or descendants thereof; or one-half if a parent or brother or sister or child of a brother or sister. Subject thereto 1. Children and descendants, by representation, advancements except for maintenance, education or settlement being reckoned in the surplus and charged against the child advanced, but not to give an advantage to the widow by being brought into the reckoning. 2. Father. 3. Brothers and sisters equally and their descendants by representation. 4. If none, mother, and if no father the mother takes an equal share with brothers and sisters and their descendants. 5. All collateral relations in equal degree; no representation amongst such and no distinction between the whole and half-blood. 6. If no collaterals, to grandfather; and if two grandfathers, they shall take alike; and a grandmother, in case of the death of her husband (the grandfather), shall take as he might have done. If any person entitled to distribution shall die before the same be made, his or her share shall go to his or her representatives. Posthumous children of intestates take as if born before the decease of the intestate; but no other posthumous relation shall be considered as entitled to distribution in his or her own right. The illegitimate child or children of any female, and the issue of such child or children, shall be capable to take real or personal estate from their mother, or from each other, in like manner as if born in lawful wedlock. If there be no relations of the intestate within the fifth degree,—which degree shall be reckoned by counting down from the common ancestor to the more remote,—the whole surplus escheats to the state for the use of the public schools of the county in which administration was granted. A representative not more remote than brother's or sister's children may afterwards claim payment. 2 Pub. Gen. Laws, 1888, pp. 1356–9.

MASSACHUSETTS. *Real estate* descends subject to debts—1. In equal shares to his children and the issue of any deceased child by right of representation; and if there is no child of the intestate living at his death, then to all his other lineal descendants, —equally, if they are all of the same degree of kindred, otherwise according to the right of representation. 2. If he leaves no issue, then to his father and mother in equal shares. 3. If he leaves no issue nor mother, then to his father. 4. If he leaves no issue nor father, then to his mother. 5. If he leaves no issue and no father nor mother, then to his brothers and sisters and to their issue by representation, or if all in the same degree, equally. 6. If he leaves no issue and no father, mother, brother, nor sister, then to his next of kin in equal degree: except that when there are two or more collateral kindred in equal degree but claiming through different ancestors, those claiming through the nearest ancestor shall be preferred to those claiming through the more remote. 7. If the intestate leaves a widow and no kindred, the estate descends to the widow. And if the intestate is a married woman and leaves no kindred, her estate descends to her husband. 8. If the intestate leaves no kindred, and no widow, nor husband, the estate escheats to the commonwealth. Pub. Stat. 1882, pp. 740, 748. When there are no issue, the widow of the intestate takes the real estate in fee to the amount of five thousand dollars, and also takes one-half the other real estate of which her husband died seised for her life. If the intestate be a married woman, her surviving husband holds the lands for his life as tenant by curtesy, and should there be no issue living he holds one-half her lands for life, and takes in fee real estate to the amount of five thousand dollars. Illegitimate children inherit from the mother and she from them, and should she be dead, then through her to her heirs at law. Subject to certain allowances provided for by law, to a widow and minor children (as to which, see 155 Mass. 141), *personal estate* is distributed as real estate, except that a husband is entitled to the whole, and a widow to one-third, if there be issue, otherwise the whole to the amount of five thousand dollars, and one-half the excess above ten thousand dollars. Pub. Stat. 1882, ch. 135; Supp. Pub. Stat. ch. 276.

MICHIGAN. *Real estate* descends: 1. To children (including posthumous children), and issue, by representation. 2. Lineal descendants equally if in the same degree, otherwise by representation. 3. If surviving husband or widow one-half, remainder to parents equally, or to the survivor of them, but if no husband or widow, the whole to parents or the survivor. 4. Brothers and sisters and their issue by representation, subject to the said provision for the husband or widow, which is in lieu of dower. 5. Next of kin, those claiming through the nearest ancestor preferred. 6. Husband or wife. 7. Escheat to state for primary school fund. The share of any deceased minor child dying unmarried passes to other children of the same parent and their issue, by

representation if those who take are not of the same degree. Illegitimate children inherit from their mother, but not through her, and she inherits from them and her kindred through her from them. Subsequent marriage of parents or acknowledgment by the father duly recorded legitimatizes a child. Degrees are computed by the civil law, and the half-blood takes equally except from an ancestor not of the same blood. Howell's Stats. § 5772 *a*; Pub. Act, 1893, p. 323. *Personal estate* is distributed as follows: The husband or widow takes one-third if there is more than one child; if only one child, one-half; if none, all up to one thousand dollars; the excess to be divided between the husband or widow and the father, or if he be dead, his share passes to the mother, brothers, and sisters and their issue, share and share alike. If no such relations, to the husband or widow. In other cases as real estate. Howell's Stats. § 5847.

MINNESOTA. If issue, the husband or widow takes one-third in fee-simple, dower and curtesy being abolished; subject thereto:—1. Children, and their issue by representation. 2. If no child or issue of such, a surviving husband or wife takes the whole. 3. Father. 4. Mother. 5. Brothers and sisters, and their issue by representation. 6. Next of kin, in equal degree; those who claim through the nearest ancestor being preferred. 7. The share of any child dying under age, and unmarried, inherited from a deceased parent shall descend in equal shares to the other children of the same parent, and to the issue of any who have died, by representation. 8. Escheat to the state. 9. Degrees of kindred computed according to the civil law, and kindred of the half-blood inherit equally with the whole blood, unless the inheritance is by descent, devise or gift of some ancestor, in which case all those who are not of the blood of such ancestor shall be excluded. The homestead passes to widow for life, remainder to children and issue; if no widow, to children and issue, or if none, as other real estate. 2 Pub. Stat. 1894, §§ 4469–4477. Personal property same as real, except certain provisions for widow and minor children. When an adopted child dies intestate, any property received by him from adopting parents shall go to relatives through such parents; property from natural parents shall pass as if there were no adoption; Laws, 1895, ch. 221.

MISSISSIPPI. 1. To children and their descendants in equal parts by representation. 2. To brothers and sisters and their descendants in the same manner. 3. If none of these, to the father and mother equally, or to the survivor. 4. To the next of kin in equal degree, computing by the rules of the civil law. 5. There is no representation among collaterals except with the descendants of the brothers and sisters of the intestate. 6. There is no distinction between the half and the whole blood, except that the whole blood is preferred to the half-blood, in the same degree. 7. A surviving wife or husband takes the whole when there are no children or issue, and when there are such, takes a child's part in fee simple. 8. Escheat to state. Hotchpot prevails. If husband or wife has property equal in value to the homestead, and the deceased is without children by the survivor, children by a former marriage take the homestead. One who wilfully causes or procures the death of another shall not inherit real or personal property from such decedent, but the same shall descend as though such person had never been in being. Ann. Code, 1892, §§ 1543, 1554.

MISSOURI. 1. To children or their descendants in equal parts. 2. If none, the father, mother, brothers, and sisters, and their descendants, in equal parts. 3. If none of these, husband or wife. 4. Grandfather, grandmother, uncles, and aunts, and their descendants, in equal parts. 5. Great-grandfathers, great-grandmothers, and their descendants, in equal parts; and so on, passing to the nearest lineal ancestors, and their children and their descendants, in equal parts. 6. If there be no kindred above named, nor any husband or wife, capable of inheriting, then the estate goes to the kindred of the wife and husband of the intestate, in the like course as if such wife or husband had survived the intestate and then died entitled to the estate. 7. Collaterals of the half-blood inherit only half as much as those of the whole blood; but if all such collaterals be of the half-blood, they have whole portions, only giving to the ascendants double portions. 8. When all are of equal degree of consanguinity to the intestate, they take *per capita*; if of different degrees, *per stirpes*. Rev. Stat. 1889, p. 1022. If a married woman die without descendants, the husband is entitled to one-half of her real and personal property absolutely, subject to her debts; Laws, 1895, p. 169; and the husband of a wife dying intestate has the same right over her personal property as the widow over her husband's; *id.* p. 85.

MONTANA. The rules of descent and distribution are the same as in California. Montana, C. C. § 1850–71.

NEBRASKA. *Real estate* descends—1. In equal shares to children and to the representatives of a deceased child by right of representation, and if no child or children be living, then to all the lineal descendants, equally if in the same degree, if not by representation. 2. If no issue, then to the widow for life, and after her death to father, and if there be no widow then to the father. 3. To brothers and sisters and their issue by representation, and if a mother, she takes equally with brothers and sisters. 4. To the mother, to the exclusion of children of deceased brothers and sisters. 5. Next of kin in equal degrees, those claiming through the nearest ancestor preferred. 6. If no other kindred but a widow, the widow takes the estate. 7. Escheats. Illegitimate children inherit from the mother and shall be considered the heirs of any person who shall, in writing, acknowledge himself to be the father of such child or children, and they shall in all cases be considered the heirs of the mother and she of such child; if she be dead the property of such child goes to her heirs at law. Degrees of kindred are computed according to the civil law, and kindred of the half blood inherit equally with those of the whole blood, unless the inheritance was ancestral, in which case all those who are not of the blood of such ancestor are excluded. Advancements are reckoned, but should the advancement of any child exceed his portion of an estate, he will not be required to refund such excess. *Personal estate* is distributed in the same manner as real property, excepting certain provisions for widow and minor children; Comp. Stat. 1895, § 2546.

NEVADA. 1. If there be a surviving husband or wife and only one child, or its issue, in equal shares to each of them. If more than one child, or one child living and the issue of one or more others, one-third to the husband or wife and the remainder in equal shares to the children and their issue by representation. If there be no child living, the remainder goes to all the intestate's lineal descendants, those of the same degree of kindred sharing equally, the others by representation. 2. If there be no issue, it goes to the surviving husband or wife and the father in equal shares. If no issue, nor husband or wife, it goes to the father. 3. If no issue, husband, wife, nor father, then in equal shares to the brothers and sisters, and their children by representation, provided that the mother shall take an equal share. 4. If no issue, husband, wife, nor father, and no brother or sister, it goes to the mother to the exclusion of the issue of deceased brothers or sisters. 5. If none of these survive, the whole estate goes to the surviving husband or wife. 6. The estate goes next to the nearest descendant of equal degree, those claiming through the nearest ancestor being preferred. 7. The same provision is made for the distribution of the estate of an unmarried child as in Minnesota. 8. If there be no husband, wife, nor kindred, the estate escheats to the state for the support of the schools. Gen. Stats. (1885) § 2981. Upon the death of the wife, the entire community property goes to the husband, unless she has been abandoned by him without cause, in which case he only takes one-half, and the other half, unless devised by the wife, goes to her kindred by representation. On the death of the husband if there be issue the widow takes one-half, otherwise, all, unless she has separated from him without cause of divorce, in which case she takes no part of it. Laws, 1873, p. 183, as amended, March 2, 1881.

NEW HAMPSHIRE. Subject to any right of dower or curtesy and to homestead rights, 1. To children and the legal representatives of such of them as are dead. 2. If no issue, to the father. 3. If no issue or father, in equal shares to the mother, and the brothers and sisters, or their representatives. 4. To the next of kin in equal shares. 5. If the intestate be a minor and unmarried, his estate, derived by descent or devise from his father or mother, goes to his brothers or sisters, or their representatives, to the exclusion of the other parent. 6. No

representation is admitted among collaterals beyond the degree of brothers' and sisters' grandchildren. 7. In default of heirs, it escheats to the state. Illegitimate children inherit from the mother equally with legitimate, and she from them. Pub. Stat. 1891, pp. 548, 549.

NEW JERSEY. *Real estate* descends—1. To children and their issue, by right of representation to the remotest degree. 2. To brothers and sisters of the whole blood, and their issue, in the same manner. 3. To the father, unless the inheritance came from the part of the mother, in which case it descends as if the father had previously died. 4. To the mother for life, and after her death to go as if the mother had previously died. 5. If there be no such kindred, then to brothers and sisters of the half-blood and their issue by right of representation; but if the estate came from an ancestor, then only to those of the blood of such ancestor, if any be living. 6. If there be none of these, then to the next of kin in equal degree,—subject to the restriction as to ancestral estates. 7. And if any person die, without leaving any person as hereinbefore mentioned, capable of inheriting the same, but leaving a husband or wife, the same shall descend and go to said husband or wife in fee-simple. Rev. Stat. pp. 297, 293; Laws, 1894, p. 209. The *personal estate* is distributed as follows: 1. One-third to the widow and the residue to children, or their representatives, if dead. Advancements are reckoned and charged. 2. If no children, one-half to the widow and the residue to next of kin of equal degree or their representatives. No representation among collaterals after brothers' and sisters' children. 3. If no widow to the children, or if none to next of kin as aforesaid. 4. Illegitimate children inherit from the mother if there are no legitimate ones. If the intestate is a married woman the husband takes the whole. Rev. Stat. p. 784. If there are no relations entitled to administration the estate is invested and the income given to the poor. Supp. R. S. p. 293.

NEW MEXICO. Of the marriage community all property brought into it or acquired separately by the surviving husband or wife constitutes his or her separate estate; of that acquired jointly the survivor takes one-half. The remainder of the acquest property and the separate estate of the decedent is divided as follows: One-fourth to the survivor and the residue in equal shares to the children or their heirs, or if none all to the wife; if no wife the portion which would have gone to her shall go to the parents of decedent or the survivor if one be dead. If both parents be dead the estate is disposed of as if they had outlived the intestate and died in possession, and so on through the ascending ancestors and their issue. If heirs are not thus found the portion uninherited shall go to the heirs of the wife according to like rules, and if there were more than one wife it is divided among the heirs of all, by representation, and finally it shall escheat to the territory. Posthumous children inherit and illegitimate ones take from the mother and the mother from them. They inherit from the father only when in default of legitimate children and where duly recognized by him. When the recognition has been mutual he may inherit from them but the mother is preferred to him. They are legitimated by marriage of the parents. Advancements are charged. Proceeds of life insurance are not subject to debts except by special contract in writing. Comp. Laws, 1884; Laws, 1889, ch. 90.

NEW YORK. *Real estate* descends—1. To lineal descendants. 2. To father. 3. To mother. 4. To collateral relatives. Subject, however, to these rules: (1) Lineal descendants, in equal degree, take in equal parts; if of unequal degree, by representation; (2) The preceding rule applies to all descendants of unequal degrees: so that those who are in the nearest degree of consanguinity take the share which would have descended to them had all the descendants in the same degree been living, and the children in each degree take the share of their parents; (3) If there be no descendants, the father takes the whole, unless the inheritance came from the mother, and she be living; but if she be dead, it goes to the father for life, and the remainder to the brothers and sisters of the intestate and their descendants; or if there be none living, to the father in fee; (4) If there be no descendants and no father, or a father not entitled to take as above, then the inheritance descends to the mother for life, and the remainder to the brothers and sisters of the intestate and their descendants, by representation; but if there be none such, then to the mother in fee. (5) If there be no father or mother capable of inheriting the estate, it descends, in the cases hereafter specified, to the collateral relatives,—in equal parts if of equal degree, however remote. (6) If all the brothers and sisters of the intestate be living, the inheritance descends to them; but if some be dead, leaving issue, the issue take by right of representation; and the same rule applies to all the direct lineal descendants of brothers and sisters, to the remotest degree. (7) If there be no heirs entitled to take under either of the preceding sections, the inheritance, if the same shall have come to the intestate on the part of his father, shall descend to brothers and sisters of the father in equal shares, and their issue, by right of representation. In all cases the inheritance is to descend in the same manner as if all such brothers and sisters had been brothers and sisters of the intestate. (8) If there be no brothers and sisters, nor descendants of such, of the father's side, then the inheritance goes to the brothers and sister of the mother and their descendants, in the same manner. (9) Where the inheritance has come to the intestate on the part of his mother, the same descends to the brothers and sisters of the mother and to their descendants; and if there be no such, to those of the father, as before prescribed. (10) Property not acquired from either father or mother, descends to collaterals on both sides in equal shares. (11) Relatives of the half-blood inherit equally with the whole blood, unless the inheritance came to the intestate by descent, devise, or gift of some one of his ancestors,—in which case none inherit who are not of the blood of that ancestor. (12) In all cases not otherwise provided for, the inheritance descends according to the course of the common law. (13) Real estate held in trust for any other person, if not devised by the person for whose use it is held, descends to his heirs, according to the preceding rules. (14) Posthumous and legally adopted children inherit; and illegitimate children inherit both real and personal property from the mother if she has no lawful descendants. Birdseye, Rev. Stat. 1889, pp. 858–61. Rev. Stat. 1896 (Banks & Brothers' ed.), p. 1824. The *personal estate* of an intestate shall be distributed to the widow, children, or next of kin to the deceased, in manner following. One-third to the widow, if any, and the residue in equal portions among the children, and their representatives if deceased; if no children, nor any legal representatives of them, one moiety to the widow, and the other to the next of kin of the deceased, entitled under the provisions of this section; if a widow, and no descendant, parent, brother or sister, nephew or niece, the widow shall be entitled to the whole: but if there be a brother or sister, nephew or niece, and no descendant or parent, the widow shall be entitled to a moiety as above provided, and to the whole where it does not exceed two thousand dollars; if the residue exceed that sum, she shall receive, in addition to her moiety, two thousand dollars, and the remainder shall be distributed to the brothers and sisters and their representatives. In case there be no widow then to the children, and their representatives, or if none then the whole to the next of kin in equal degree to the deceased, and their legal representatives. If the deceased shall leave no children and no representative of them, and no father, and shall leave a widow and a mother, the moiety not distributed to the widow in equal shares to his mother and brothers and sisters, or their representatives; and if there be no widow, the whole in like manner to the mother and to the brothers and sisters, or the representatives of such brothers and sisters. If a father and no child or descendant, the father shall take a moiety if there be a widow, and the whole if there be none. If a mother and no child, descendant, father, brother, sister, or representative of a brother or sister, the mother, if there be a widow, shall take a moiety, and the whole if none. And if the deceased was illegitimate, and left a mother and no child or descendant or widow, such mother shall take the whole, and shall be entitled to letters of administration in exclusion of all other persons. And if the mother of such deceased be dead, his relatives on the part of the mother shall take as if the deceased had been legitimate, and be entitled to letters of administration in the same order. Descendants or next of kin in equal degree share equally, and when of unequal degrees of kindred, by representation. No representation among collaterals after brothers' and sisters' children. Relatives of the half-blood and their representatives take equally with those of the whole blood in the same degree. Descendants and next of

kin of the deceased begotten before his death, but born thereafter, take in the same manner as if they had been born in the lifetime of the deceased and had survived him. Bliss, Code, 1895, § 2732.

NORTH CAROLINA. *Real estate* descends—1. Inheritances lineally descend to the issue of the person who died last seised, but do not lineally ascend, except as hereinafter stated. 2. Females inherit equally with males, and younger with older children; but advancements are charged against shares of children. 3. Lineal descendants represent their ancestors 4. On failure of lineal descendants, where the inheritance has been transmitted by descent or otherwise from an ancestor to whom the intestate was an heir, it goes to the next collateral relations of the blood of that ancestor, subject to the two preceding rules. 5. When the inheritance is not so derived, or the blood of such ancestor is extinct, then it goes to the next collateral relation of the person last seised, whether of the paternal or maternal line, subject to the same rules. 6. Collateral relations of the half-blood inherit equally with those of the whole blood, and the degrees of relationship are computed according to the rules which prevail in descents at common law: provided, that, if there be no issue, nor brother, nor sister, nor issue of such, the inheritance vests in the father, if living, and if not, then in the mother, if living. 7. If there be no heirs, the widow is deemed such, and inherits. 8. An estate for the life of another is deemed an inheritance; and a person is deemed to have been seised, if he had any right, title, or interest in the inheritance. Posthumous children inherit if born within ten lunar months; and illegitimate children inherit from, but not through the mother, but their estates descend as if they were legitimate. 1 Code, 1883, pp. 503–10. The *personal estate* is distributed as follows: If there are not more than two children, one-third to the widow and the residue equally to the children, and their representatives. If more than two children, the widow shall share equally with all the children, and be entitled to a child's part. If no child nor legal representative of a deceased child, one-half of the estate to the widow, and the residue equally to the next of kin in equal degree, and to their legal representatives. If there be no child nor legal representative of a deceased child nor any of the next of kin of the intestate, then the widow, if there be one, shall be entitled to all the personal estate of such intestate. If no widow, in equal portions among all the children, and their legal representatives. If neither widow nor children, nor any legal representative of children, equally to the next of kin in equal degree, and to their legal representatives. But if, after the death of the father, and in the lifetime of the mother, any children shall die intestate, without wife or children, every brother and sister, and the representatives of them, shall have an equal share with the mother of the deceased child. The personalty of an intestate married woman passes to her husband. Code, 1883, § 1478–87; Pub. Laws, 1893, p. 75.

NORTH DAKOTA. Excluding homestead and exemptions, real estate and personal property descend as follows: 1. If there be a husband or wife and only one child, or issue, in equal shares, the issue of deceased child by representation, if more than one child, such children or their issue by representation take two-thirds. 2. If no issue, all to the surviving husband or wife, unless the estate exceed five thousand dollars, in which case the excess is divided equally between the survivor and the father, if no father, then to the mother. 3. If no issue, husband or wife, to the father, and should he be dead, to the mother, who takes to the exclusion of issue of deceased brothers and sisters. 4. If none of the abovementioned kindred, the whole estate goes to the surviving husband or wife to the exclusion of issue of deceased brothers and sisters. 5. If no issue, husband or wife, father or mother, to brothers and sisters and the issue of such as are deceased by representation. 6. Next of kin in equal degrees, those claiming through the nearest ancestor preferred, the share of a deceased child dying a minor and unmarried goes to his brothers and sisters equally and their issue by representation. 7. If there be no kindred, the estate escheats to the school fund of the state. The degree of kindred is established by generations, and each generation is considered a degree. The children of the half-bloo linherit equally with the whole blood, unless the estate came by descent, gift or devise of some one of his ancestors, when the half-blood are excluded. The homestead property descends to the surviving husband or wife, or if none, to the decedent's minor child or children until the youngest reaches majority. When the homestead estate is fully satisfied, the property is distributed as other property. Dower and curtesy are abolished. Rev. Code, 1895, § 3742.

OHIO. An estate from any ancestor, descends—1. To the children, or their representatives. 2. To the husband or wife, relict of the intestate, during his or her natural life. 3. To the brothers and sisters of the intestate of the blood of the ancestor, whether of the whole or half-blood, or their representatives. 4. To the ancestor from whom the estate came by deed or gift, if living. 5. To the children of such ancestor or their legal representatives; if none, to the husband or wife, relict of such ancestor, if a parent of decedent, for life; and on his or her death, or if there be none such, to the brothers and sisters of such ancestor, or their representatives; and if there be none such, then to the brothers and sisters of the intestate of the half-blood and their representatives, though not of the blood of the ancestor from whom the estate came. 6. To the next of kin to the intestate, of the blood of the ancestor from whom the estate came. 7. If the estate came not by descent, devise, or deed of gift, it descends as follows:—(1) To the children of the intestate and their representatives; (2) To the husband or wife of the intestate; (3) To the brothers and sisters of the whole blood and their representatives; (4) To brothers and sisters of the half-blood and their legal representatives; (5) To the father, or, if the father be dead, to the mother; (6) To the next of kin to and of the blood of the intestate. 8. If there be no kindred, then to the surviving husband or wife as an estate of inheritance; and if there be no such relict, it escheats to the state. Rev. Stat. 1890, §§ 4158–4160.

OKLAHOMA. 1. To the surviving husband or wife, one-half, if there be but one child, and one-third if more than one, or the issue of one or more deceased, such issue taking *per capita*, and if no such issue, to all his lineal descendants who take equally if in the same degree, and by representation if in different degrees. 2. If no husband or wife, all the estate in equal shares to children living, and to the issue of deceased children by representation. 3. If no issue, in equal shares to surviving husband or wife and to father, and if he be dead, his share to be divided equally between mother, and brothers and sisters, and to the issue of deceased brothers and sisters by representation. 4. If no issue, nor husband or wife, nor brothers or sisters, to the mother to the exclusion of issue of deceased brothers and sisters. 5. If no issue, nor father or mother, nor brothers and sisters, to the surviving husband or wife. 6. If none of the above-mentioned kindred, to the next of kin, the descendants of the nearest ancestor being preferred. The share of a deceased unmarried minor child is divided equally between his brothers and sisters and their descendants by representation. 7. If no kindred the estate escheats to the territory for the school fund. Dower and curtesy are abolished. Illegitimate children inherit from the mother and from the father, when acknowledged by him in writing, and the mother is the heir of her illegitimate child, unless so acknowledged, when the father has preference. The issue of all marriages, either null in law or dissolved by divorce, are legitimate. No distinction is made between the whole and the half-blood, unless the inheritance came to the intestate by descent, gift, or devise of one of his ancestors, in which case kindred of the half-blood are excluded. Advancements are reckoned, but excessive advancements are not to be refunded. Dower and curtesy are abolished. Comp. Laws, 1893, § 6239.

OREGON. *Real estate* descends—1. To the children and their issue by representation, and if no children, to all the other lineal descendants equally if of the same degree of kindred, otherwise by representation. 2. To the widow or husband. 3. To the father. 4. To the brothers and sisters and their issue by representation; but a mother, if living, receives an equal share with the brothers and sisters. 5. To the mother, to the exclusion of the issue of deceased brothers or sisters. 6. To the next of kin in equal degree, preferring those claiming through the nearest ancestor. 7. The portion of a child dying under age and without issue, descends to the other children of the intestate. 8. To the state. 2 Ann. Laws, Oreg. pp. 1382, 1383. The personal

estate, subject to sundry allowances to the widow and minor children, is distributed in the same manner and order as real estate, except that the surviving husband or wife takes one-half if there is issue, otherwise the whole. Laws, 1893, p. 195.

PENNSYLVANIA. *Real estate* descends—1. To children and their descendants; equally, if they are all in the same degree; if not, then by representation, the issue in every case taking only such share as would have descended to the parent, if living. 2. In default of issue, then to the father and mother during their joint lives and the life of the survivor of them; and after them to the brothers and sisters of the intestate of the whole blood, and their children by representation. 3. If there be none of these, then to the next of kin, being the descendants of brothers and sisters of the whole blood. 4. If none of these, to the father and mother, if living, or the survivor of them, in fee. 5. In default of these, to the brothers and sisters of the half-blood and their children by representation. 6. In default of all persons above described, then to the next of kin of the intestate. 7. Before the act of 27th April, 1855, no representation among collaterals was allowed after brothers' and sisters' children; but by that act it was permitted to the grandchildren of brothers and sisters, and the children of uncles and aunts. 8. No person can inherit an estate unless he is of the blood of the ancestor from whom it descended, or by whom it was given or devised to the intestate. 9. In default of known heirs or kindred, the estate is vested in the surviving husband or wife. 10. In default of these it escheats to the state. Adult persons may be adopted as heirs, prior to this act only minors could be; Act of May 9, 1889. Dower and curtesy attach to both legal and equitable estates, and the latter if no children be born, when if born they would have inherited. The wife is entitled to one-third of the personalty absolutely, and the husband share and share alike with children, or if only collaterals the wife takes one-half the personalty absolutely and one-half of the realty, and the mansion house for life, and the husband the whole of the personalty absolutely and the realty for life. Subject to this, the children and issue take the *personal estate* equally, or if none, the father and mother, and if none of these, it passes as real estate. 1 Pepper & Lewis, Dig. pp. 2407, 2413. Act of April 8, 1833.

RHODE ISLAND *Real estate* descends—1. Children or descendants. 2. Father. 3. Mother, brothers, and sisters, and descendants. 4. If none, in equal moieties to paternal and maternal kindred, each in the following courses:—(1) to the grandfather; (2) to the grandmother, uncles, and aunts, on the same side, and their descendants; (3) to the great-grandfathers, or great-grandfather; (4) to the great-grandmothers, or great-grandmother, and the brothers and sisters of the grandfathers and grandmothers and their descendants, and so on without end,—passing first to the nearest lineal male ancestors, and for want of them to the lineal female ancestors in the same degree, and the descendants of such male and female lineal ancestors. 5. No right accrues to any persons, other than children of the intestate, unless such persons be in being, and capable, in law, to take as heirs, at the time of the intestate's death. 6. When the inheritance is directed to go by moieties, as above, to paternal and maternal kindred, if there be no such kindred on the one part, the whole goes to the other part; and if there be none of either part, the whole goes to the husband or wife of the intestate; and if the wife or husband be dead, it goes to his or her kindred in the like course as if such husband or wife had survived the intestate and then died entitled to the estate. 7. The descendants of any person deceased inherit the estate which such person would have inherited had such person survived the intestate. 8. If the estate came by descent, gift or devise, from the parent or other kindred of the intestate, and such intestate die without children, it goes to the next of kin to the intestate, of the blood of the person from whom such estate came or descended, if any there be. Gen. Stat. 1873, p. 389. In default of heirs, the estate is taken possession of by the town where it may be. Pub. Stat. 1882, p. 489; Gen. Laws, 1896, p. 733. The *personal estate* of decedents is distributed in the manner following:—*first*, one-half part thereof to the widow of the deceased forever, if the intestate died without issue; *second*, one-third part thereof to the widow of the deceased forever, if the intestate died leaving issue; *third*, the residue shall be distributed amongst the heirs of the intestate, in the same manner as real estates descend and pass by this chapter, but without having any respect to the blood of the person from whom such personal estate came or descended. If deceased was a married woman her husband takes the whole. Pub. Stat. 1882, p. 490.

SOUTH CAROLINA. The estate descends—1. One-third to the widow in fee, the remainder to the children, including posthumous children. Lineal descendants represent their parents. 2. If there be no issue or other lineal descendant, then one-half goes to the widow, and the other half to the father, or, if he be dead, to the mother, and the brethren of the whole blood, so that such mother or father and each brother and sister shall receive an equal share. 3. If there be neither issue nor parent, then one-half goes to the widow, and the other half to the brothers and sisters and their issue by representation. 4. If there be no issue, nor parent, nor brother, nor sister of the whole blood, but a widow, and a brother or sister of the half-blood, and a child or children of a brother or sister of the whole blood, then the widow takes one moiety, and the other is divided equally between the brothers and sisters of the half-blood, and the children of the brothers and sisters of the whole blood,—the children of every deceased brother or sister of the whole blood taking among them a share equal to the share of a brother or sister of the half-blood. But if there be no brother or sister of the half-blood, then a moiety of the estate descends to the child or children of the deceased brother or sister; and if there be no child of the whole blood, then to the brothers and sisters of the half-blood. 5. If there be no issue, nor parent, nor brother, nor sister of the whole blood, nor their children, nor any brother nor sister of the half-blood, then one-half goes to the widow and the other half to the lineal ancestors; but if there be none of these, then the widow takes two-thirds and the residue goes to the next of kin. 6. If there be no widow, her share in each of the preceding cases goes to the residue. 7. On the decease of the wife, the husband takes the same share in his wife's estate that she would have taken in his had she survived him, and the remainder goes in the same manner as above described in case of the intestacy of a man. 8. If there be no widow nor issue, but a surviving parent and brothers and sisters, then it goes in equal shares to the father, or, if he be dead, to the mother, and to the brothers and sisters and their issue by representation. 9. If there be no issue, parent, nor brother, nor sister of the whole blood, nor their children, nor brother nor sister of the half-blood, nor lineal ancestor, nor next of kin, the whole goes to the surviving husband or wife. 1 Rev. Stat. 1893, pp. 679, 680. Dower is unprovided for and curtesy is abolished by statute, but the widow is entitled to claim dower, if she renounce the provisions made for her as stated.

SOUTH DAKOTA. The laws of descent and distribution are the same as in North Dakota. C. C. § 777; Comp. Laws, § 3401.

TENNESSEE. *Real estate* descends—1. Without reference to the source of his title—(1) to all the sons and daughters equally, and to their descendants by right of representation; (2) if there be none of these, and either parent be living, then to such parent. 2. If the estate was acquired by the intestate, and he died without issue—(1) to his brothers and sisters of the whole and half-blood, born before or after his death, and to their issue by representation; (2) in default of these, to the father and mother as tenants in common; (3) if both be dead, then in equal moieties to the heirs of the father and mother in equal degree, or representing those in equal degree, of relationship to the intestate; but if these are not in equal degree, then to the heirs nearest in blood, or representing those nearest in blood, to the intestate, in preference to others more remote. 3. When the land came by gift, devise, or descent from a parent or the ancestor of a parent, and he died without issue—(1) if there be brothers and sisters of the paternal line of the half-blood, and such also of the maternal line, then it descends to the brothers and sisters on the part of the parent from whom the estate came, in the same manner as to brothers and sisters of the whole blood, until the line of such parent is exhausted of the half-blood, to the exclusion of the other line; (2) if no brothers or sisters, then to the parent, if living, from whom or whose ancestors it came, in preference to the other parent; (3) if both be dead, then to the heirs of the parent from whom or whose ancestor it came. 4. The same rules of descent are observed in lineal descendants

and collaterals respectively, when the lineal descendants are further removed from their ancestor than grandchildren, and when the collaterals are further removed than children of brothers and sisters. 5. If there be no heirs, then to the husband or wife in fee-simple. A posthumous child, born within ten calendar months after death of an intestate, takes equally with other children. Illegitimate children take from the mother, and the share of such child dying a minor and unmarried passes to other children of the mother, and if there be no such other children, then to the heirs of the mother (Acts 1885), but a child of color cannot take from a father if such father were white; Acts 1866-67, ch. 36, § 10. Advancements are reckoned, and, should such advancement exceed the share allowed by the laws of descent, it shall be collated and brought into contribution in the distribution of the personal estate. *Personal estate* is distributed, as follows: 1. Widow, and children and their descendants, the widow taking the share of one child. 2. If no children or issue, all to the widow. 3. If no widow to the children equally, or if one be dead to the issue of such by representation. 4. If no children or widow to the father. 5. To mother and brothers and sisters, the mother sharing equally with them, but if no brothers and sisters or issue of such, all to the mother. 6. If no mother, all to brothers and sisters equally or to their issue by representation. 7. If none of the above mentioned kindred then to the next of kin of equal degree, equally. There is no representation among collaterals after the children of brothers and sisters. Stats. 1871, § 2429; 1 Stat. 1871, § 2420; Code, 1874, § 3278.

TEXAS. The estate descends—1. To children and their descendants. 2. To father and mother in equal portions; but if one be dead, then one-half to the survivor and the other to brothers and sisters and their descendants: but if there be none of these, then the whole goes to the surviving father or mother. 3. If there be neither father nor mother, then the whole to the brothers and sisters of the intestate and their descendants. 4. If there be no kindred aforesaid, then the estate descends in two moieties, one to the paternal and the other to the maternal kindred in the following course—(1) to the grandfather and grandmother equally; (2) if only one of these be living, then one-half to each survivor and the other to the descendants of the other; (3) if there be no such descendants, then the whole to the surviving grandparent; (4) if there be no such, then to the descendants of the grandfather and grandmother, passing to the nearest lineal ancestors. 5. There is no distinction between ancestral and acquired estates. 6. If there be a surviving husband or wife, and a child or children and their issue, such survivor takes one-third of the estate for life, with remainder to children or their descendants and one-third of the personal property. 7. If no issue or descendants, then the surviving husband or wife takes half the land, without remainder over and all of the personal property, and the other half passes according to the preceding rules, unless there be no issue, father or mother, brothers and sisters, or descendants of such, in which case the survivor takes the whole estate. The community property, however acquired during marriage, passes to the surviving husband or wife, if there be no issue. Heirs of the half-blood take only one-half the portion of those of the whole blood, unless all the heirs are of the half blood; in such case they take equally. Advancements are reckoned and charged. Illegitimate children inherit from the mother and transmit to her, and if the father and mother afterwards marry, such child is legitimated and capable of taking from the father. The issue of marriages deemed null at law are legitimate. 8. Among collaterals, those of the half-blood inherit only half as much as those of the whole blood; but if all be of the half-blood, they have whole portions. 9. If all relations are in the same degree, they take *per capita*; otherwise, *per stirpes*. Sayles, T. Civ. Stat. 1889, art. 1645-1652.

UTAH. The estate descends—1. If the decedent be a resident and the head of a family, to the surviving family in equal shares. 2. If the decedent leave a husband or wife, and only one child, or the issue of one child, each of them is to have equal shares, but if there be more than one child living, or the issue of such, then the one-third to the surviving husband or wife for life, the remainder to such children or their issue by right of representation. 3. If there be no children living, the remainder goes to all the lineal descendants equally if of the same degree of kindred, otherwise by representation. If there be no husband or wife, but issue, the whole goes to such. 4. If there be a husband or wife and a mother, and no issue, in equal shares to the mother and husband or wife, but if the estate came from the father, the father takes half instead of the mother. 5. If there be no mother or issue, then the brothers and sisters take half the estate, their issue taking by representation, and the father, if living, receiving a brother's share. 6. If no issue, nor husband or wife, the mother receives the whole estate, unless it came to the decedent from the father, in which event he takes it. 7. If there be a mother or father and no issue, and no husband or wife or father or brother or sister, one-half of the estate goes to the mother or father, the other to the issue of any deceased brother or sister. 8. If there be a husband or wife and no issue, nor father or mother, brother or sister, the estate goes to the surviving husband or wife. 9. If there be brothers and sisters alone surviving, the estate goes to them in equal shares, their issue taking by representation. 10. If there be none of these, the estate passes to the next of kin, in equal degree, those claiming through the nearest ancestor being preferred. 11. The portion of any child of the decedent who dies unmarried descends to his brothers and sisters and their issue by representation. 12. If there be no husband, wife, or kindred, the estate escheats to the state for the common schools. Comp. Laws, 1884, pp. 73, 74. By the act of March 10, 1892, it was provided that all property, real, personal, or mixed, of persons dying, or who have died, intestate and without heirs in this state at the time of death, shall escheat to the state for the benefit of the common schools. Laws, 1892, p. 62. Illegitimate children may inherit from the mother and she from them, but they cannot inherit from the father, or receive any distributive share in his estate; but this does not apply to the issue of any Mormon marriages born prior to Jan. 1, 1883, who have been legitimatized, nor to any illegitimate child, born within twelve months after March 3, 1888.

VERMONT. The estate descends—1. In equal shares to his children, or their representatives. 2. If the deceased leave no issue, the surviving husband or wife is entitled to the whole forever, if the estate does not exceed the sum of two thousand dollars. If it exceeds this sum, then he or she is entitled to such sum and one-half of the remainder of the estate; and the remainder descends as the whole would if no husband or widow had survived; and if there be no kindred, the surviving husband or wife is entitled to the whole. 3. If there be no issue nor surviving husband or wife, the mother takes the whole. 4. If there be neither of these, it goes to the brothers and sisters equally, and their representatives. 5. If none of the relatives above named survive, then in equal shares to the next of kin, in equal degree; but no person is entitled by right of representation. 6. The degrees of kindred are computed according to the rules of the civil law, and the half-blood inherits equally with the whole blood. 7. If there be no kindred, it escheats to the town for the use of the schools. Rev. Laws, 1880, §§ 2230-2237; Laws, 1895, ch. 56. The homestead, at the death of the owner, vests in his widow and minor children who hold their interest during minority, and if there are none it vests in the widow. R. L. §§ 2179-2200.

VIRGINIA. *Real estate* descends—1. To children and their descendants. 2. If there be none such, to the father. 3. If no father, to the mother and brothers and sisters and their descendants. 4. If there be none of those, then one-half goes to the paternal, the other to the maternal, kindred, as follows:—(1) to the grandfather; (2) to the grandmother, uncles and aunts on the same side, and their descendants; (3) to the great-grandfathers or great-grandfather; (4) to the great-grandmothers, or great-grandmother, and the brothers and sisters of the grandfathers and grandmothers, and their descendants; and so on, passing to the nearest lineal male ancestors, and for want of these, to the nearest lineal female ancestors in the same degree, and their descendants. 5. If there be no paternal kindred, the whole estate goes to the maternal kindred; and *vice versa*. 6. If there be neither paternal nor maternal kindred, the whole goes to the husband or wife of the intestate: and if the husband or wife be dead, their kindred take the estate, in the same manner as though they had survived the intestate, and died. 7. Collaterals of the half-blood inherit only half as much as those of the whole blood. But if all the collaterals be of the half blood, the ascending

kindred (if any) have double portions. 8. When the estate goes to children, or to the mother, brothers and sisters, or to the grandmothers, uncles and aunts, or to any of his female lineal ancestors, with the children of his deceased lineal ancestors, male and female, in the same degree, they take *per capita*; but if the degrees are unequal, they take *per stirpes*. Code, 1887, p. 619, 620. Personal estate follows the same course of distribution with the following exceptions: The *personal estate* of an infant shall be distributed as if he were an adult. If the intestate was a married woman, her husband shall be entitled to the whole surplus of the personal estate. If the intestate leave a widow and issue by her, the widow shall be entitled to one-third of the said surplus; if a widow but no issue by her, she shall be entitled absolutely to such of the personal property in the said surplus as shall be acquired by the intestate in virtue of his marriage with her and remain in kind at his death: she shall also be entitled, if the intestate leave issue by a former marriage, to one third, if no issue to one-half of the residue of such surplus. To the commonwealth shall accrue all the personal estate of every decedent, of which there is no other distributee. In making title by descent, it shall be no bar to a party that any ancestor through whom he derives his descent from the intestate, is or hath been an alien. Va. Code, 1887, §§ 2551, 2557, 2558.

WASHINGTON. The estate descends—1. If the decedent leaves a surviving husband or wife and only one child, in equal shares to each. 2. If more than one child, one-third to the surviving husband or wife and the remainder to the children in equal shares; and to the children of a deceased child by right of representation. 3. If there be no issue, one-half to the surviving consort, and one-half to the father and mother, or to the survivor of them. If there be no father nor mother, then one-half goes in equal shares to the brothers and sisters of the deceased and the children of such; but if no issue, husband or wife survive, then it goes to the father and mother. 4. To the brothers and sisters in equal shares. 5. To the surviving consort. 6. To the next of kin, those claiming through the nearest ancestor being preferred to those claiming through one more remote. 7. If there be no husband, wife, or kindred, the estate escheats to the state for the support of the common schools. 1 Gen. Stat. 1891, § 1480. Title to real estate vests in heirs or devisees immediately after death of owner, subject to rightful claims and to rights of executor or administrator; Laws, 1895, ch. 105. Community property, one-half to surviving husband or wife and the other half according to testamentary disposition, or if none, to legitimate issue of his, her or their bodies, or in default thereof to the survivor subject to community debts, family allowance, and expenses of administration. Dower and curtesy are abolished. 1 Hill's Codes, § 1481.

In WEST VIRGINIA, the rules of descent and distribution are the same as in Virginia. Code, 1891, p. 665.

WISCONSIN. Subject to dower, curtesy, and homestead rights, real estate descends—1. To children and their descendants by representation. 2. Widow or surviving husband. 3. Parents or the survivor. 4. Brothers and sisters and their children, by representation. 5. Next of kin; those claiming through the nearest ancestor being preferred. 6. Escheat to state for capital of school fund. If any person die, leaving children, or one child and the issue of others, the share of any such surviving child, dying under age and not having been married, descends in equal shares to the other children of the same parent, and to their issue by representation; or if all the other children of such deceased parent are also dead, and any of them have left issue, then to all the issue of other children of the same parent equally, if in the same degree of kindred to the said child, otherwise by representation. Degrees of kindred are computed according to the rules of the civil law; and kindred of the half-blood inherit equally with those of the whole blood, in the same degree, unless the inheritance be ancestral, in which case those who are not of the blood of such ancestor are excluded. Supp. R. S. § 2270; Laws, 1893, ch. 28. The homestead passes clear of debts if no issue to widow absolutely, otherwise during widowhood, and then to issue, who also take if there is no widow. § 2271. Subject to allowances to a widow and minor children or to orphan children, the distribution of personal property is the same, except that when there is a widow and issue the former takes a child's share. § 3935.

WYOMING. The estate descends and is distributed—One-half to the surviving husband or wife, and the residue to the surviving children or the descendants of children; if there be no children, nor descendants thereof, three-fourths to the surviving husband or wife, and one-fourth to the mother and father or the survivor of them; provided that if the estate does not exceed in value $10,000, then the whole thereof descends to the surviving husband or wife, absolutely. Dower and tenancy by curtesy are abolished. Except in cases above enumerated, the estate descends—1. To the surviving children and the descendants of children by representation. 2. To the father, mother, and brothers and sisters and their descendants by representation. 3. To the grandfather, grandmother, uncles, aunts, and their descendants by representation. 4. Children of the half-blood inherit the same as those of the whole blood, but collateral relations of the half-blood only half as much as those of the whole blood if there be any of the last-named living. Rev. Stat. 1887, pp. 534, 535.

DESCRIPTIO PERSONÆ. Description of the person. In wills, it frequently happens that the word heir is used as a *descriptio personæ*: it is then a sufficient designation of the person. In criminal cases, a mere *descriptio personæ* or addition, if false, can be taken advantage of only by plea in abatement; 1 Metc. 151. A legacy "to the eldest son" of A would be a designation of the person. See 1 Roper, Leg. c. 2.

The description contained in a contract of the persons who are parties thereto.

In all contracts under seal there must be some *designatio personæ*. In general, the names of the parties appear in the body of the deed, "between A B, of, etc., of the one part, and C D, of, etc., of the other part," being the common formula. But there is a sufficient designation and description of the party to be charged if his name is written at the foot of the instrument; 1 Ld. Raym. 2; 1 Salk. 214; 2 B. & P. 339.

When a person is described in the body of the instrument by the name of James, and he signs the name of John, on being sued by the latter name he cannot deny it; 3 Taunt. 505; Cro. Eliz. 897, n. (*a*). See 11 Ad. & E. 594; 3 P. & D. 271.

DESCRIPTION. An account of the accidents and qualities of a thing. Ayliffe, Pand. 60.

A written account of the state and condition of personal property, titles, papers, and the like. It is a kind of inventory, but is more particular in ascertaining the exact condition of the property, and is without any appraisement of it.

In Pleading. One of the rules which regulate the law of variance is that allegations of matter of *essential description* should be proved as laid. It is impossible to explain with precision the meaning of these words; and the only practical mode of understanding the extent of the rule is to examine some of the leading decisions on the subject, and then to apply the reasoning or ruling contained therein to other analogous cases. With respect to criminal law, it is clearly established that the name or nature of the property stolen or damaged is matter of essential description. Thus, for example, if the charge is one of firing a stack of hay, and it turns out to have

been a stack of wheat, or if a man is accused of stealing a drake, and it is proved to have been a goose, or even a duck, the variance is fatal. 1 Tayl. Ev. § 233; Steph. Cr. Proc. 177.

The strict rule of pleading which formerly required exact accuracy in the description of premises sought to be recovered, has, in modern practice, been relaxed, and a general description of the property held to be good. The provisions of state statutes as to the description of the premises by metes and bounds, have been held to be only directory, and a description by name where the property is well known is often sufficient; 127 U. S. 480.

DESERTION. In Criminal Law. An offence which consists in the abandonment of the public service, in the army or navy, without leave.

An absence without leave, with the intention of returning, will not amount to desertion; 115 Mass. 336; 2 Sumn. 373; 3 Story 108.

The articles of war, U. S. Rev. Stat. § 1342, provide as follows:

Every soldier who deserts the service of the United States shall be liable to serve for such period as shall, with the time he may have served previous to his desertion, amount to the full term of his enlistment; and such soldier shall be tried by a court-martial and punished, although the term of his enlistment may have elapsed previous to his being apprehended and tried. Art. 48.

By the articles of war it is enacted that any officer or soldier who, having received pay, or having been duly enlisted in the service of the United States, deserts the same, shall in time of war suffer death, or such other punishment as a court-martial may direct; and in time of peace, any punishment, excepting death, which a court-martial may direct. Art. 20.

By the articles for the government of the navy, art. 4, it is enacted that the punishment of death, or such punishment as a court-martial may adjudge, may be inflicted on any person in the naval service who in time of war deserts or entices others to desert; and by art. 8, such punishment as a court-martial may adjudge, may be inflicted on any person in the navy, who in time of peace deserts or entices others to desert.

The act by which a man abandons his wife and children, or either of them.

Wilful desertion, as the term is applied in actions for divorce, is the voluntary separation of one of the married parties from the other, or the voluntary refusal to renew a suspended cohabitation, without justification either in the consent or wrongful conduct of the other. 17 Or. 542.

On proof of desertion, the courts possess the power under statute, in many states, to compel support of the wife. And a continued desertion by either husband or wife, after a certain lapse of time, entitles the party deserted to a divorce, in most states.

There must, however, be an actual and intentional withdrawal from matrimonial cohabitation for a statutory period, against the consent of the abandoned party and without justification; Tiffany, Dom. Rel. 181; and an intention to desert in the mind of the offender; 43 Conn. 313; 30 Gratt. 307; 89 Pa. 173; Bish. Mar. Div. & Sep. 1687-1734; 5 Q. B. D. 31; 69 Law T. 617; 160 Mass. 258; where parties continue to live together as husband and wife and other marital duties are observed, a refusal to occupy the same bed does not by itself constitute desertion; 39 Minn. 258.

Desertion is established by proof of a refusal to commence cohabitation; 57 Ia. 370; Wright 223; a refusal to renew cohabitation, on request of the other party; 29 Ala. 719; 31 Me. 342; 45 N. J. Eq. 498; 130 N. Y. 192; 89 Pa. 173; causing a separation, by driving the other away, or by cruel conduct which has that effect; 14 Ct. of Sess. Cas. (4th series) 443; 37 Ala. 393; 125 Ill. 510; 4 Bush 682; 33 Md. 328; 99 Mass. 493; 54 Mich. 492; 41 N. J. Eq. 202; 46 N. J. Eq. 490; a refusal by the wife to follow the husband when he changes his residence; 14 Cal. 654; 87 Ill. 250; 29 N. J. Eq. 96; 163 Pa. 649. But a separation by mutual consent is not desertion; 3 L. R. P. & D. 129; 7 Prob. Div. 17; 50 Mich. 49; 48 N. J. Eq. 549; Wright 284; 49 Pa. 249; 86 Va. 768; 53 Wis. 153; neither is non-cohabitation; 13 Ala. 145; 44 Mass. 257; Wright 469; 21 W. Va. 445; nor a refusal by the husband to follow the wife to a new residence; for it is her duty to follow him; 17 N. H. 251. See DOMICIL.

Mere non-support is not always desertion; 33 N. J. Eq. 7; 1 Hun 444; but if the husband have the means to support his wife, and does not do so, this is a wilful desertion; 58 N. H. 266; but see 135 Pa. 459.

It is not yet settled whether the refusal of sexual intercourse is desertion. The true rule seems to be that it is, in the absence of specific statutory provisions qualifying the meaning of the term; 87 Ga. 471; 17 Oreg. 542; 1 Bish. Mar. & Div. § 1670; *contra*, 28 Atl. Rep. (N. J.) 467. See 138 Ill. 436; 97 Mass. 327; 112 Mass. 298; 39 Minn. 258; 83 Wis. 553.

Involuntary absence, on account of sickness or business, if not prolonged beyond such a time as is reasonable or necessary, will not constitute desertion; 1 P. & M. 641; 1 Swab. & T. 88; 3 *id.* 547; 42 Ill. App. 504; 131 Pa. 552. See 9 L. R. A. 696, n.; Tiffany; Schouler, Dom. Rel.; DIVORCE.

DESERTION OF A SEAMAN. The abandonment, by a sailor, of a ship or vessel, in which he had engaged to perform a voyage, before the expiration of his time, and without leave.

Where a seaman signs articles for a voyage, agreeing to go to the port where the vessel is lying to join her, and fails to do so, he is a deserter; 53 Fed. Rep. 551.

Desertion without just cause renders the sailor liable on his shipping articles for damages, and, will, besides, work a forfeiture of his wages previously earned; 3 Kent 155. It has been decided in England that leaving the ship before the completion of the voyage is not desertion, in case,—*first*, of the seaman's entering the public service, either voluntarily or by impressment; and, *second*, when he is compelled to leave it by the inhuman treatment of the captain; 2 Esp. 269; 1 Bell, Com. 514; 2 C. Rob. 232. And see 1 Sumn. 373; 2 Pet. Adm. 393; 3 Story 109.

To justify the forfeiture of a seaman's wages for absence for more than forty-eight hours, under the provisions of the act of congress of July 20, 1790, an entry in the log-book of the fact of his absence, made by the officer in charge of it on the day on which he absented himself, and giving the name of the absent seaman as absent without permission, is indispensable; 2 Pars. Sh. & Adm. 101; 1 Wash. C. C. 48; Gilp. 212, 296.

Receiving a marine again on board, and his return to duty with the assent of the master, is a waiver of the forfeiture of wages previously incurred; 1 Pet. Adm. 160.

DESERVING. Worthy or meritorious, without regard to condition or circumstances. In no sense of the word is it limited to persons in need of assistance, or objects which come within the class of charitable uses. 130 Mass. 211.

DESIGN. As a term of art, "the giving of a visible form to the conceptions of the mind, or in other words to the invention." 4 Wash. C. C. 48. See COPYRIGHT; PATENTS. Plan, scheme, or intention carried into effect. 1 Sumn. 434. A project, an idea. 3 H. & N. 301.

As used in an indictment, see 2 Mass. 128.

DESIGNATIO PERSONÆ. See DESCRIPTIO PERSONÆ.

DESIGNATION. The expression used by a testator to denote a person or thing, instead of the name itself.

A bequest of the farm which the testator bought of a person named, or of a picture which he owns, painted by a certain artist, would be a designation of the thing.

DESIRE. The word desire, in a will, raises a trust, where the objects of that desire are specified; 1 Cai. 84.

DESLINDE. **In Spanish Law.** The act of determining and indicating the boundaries of an estate, county, or province.

DESMEMORIADOS. **In Spanish Law.** Persons without memory. White, New Recop. lib. 1, tit. 2, c. 1, § 4.

DESPACHEURS. The name given, in some countries, to persons appointed to settle cases of average. Ord. Hamb. t. 21, art. 10.

DESPATCHES. Official communications of official persons on the affairs of government.

In general, the bearer of despatches is entitled to all the facilities that can be given him, in his own country, or in a neutral state; but a neutral cannot, in general, be the bearer of despatches of one of the belligerent parties; 6 C. Rob. 465. See 2 Dods. 54; 1 Edw. 274.

DESPERATE. Of which there is no hope.

This term is used frequently in making an inventory of a decedent's effects, when a debt is considered so bad that there is no hope of recovering it. It is then called a desperate debt, and, if it be so returned, it will be *prima facie* considered as desperate. See Toll. Ex. 248; 2 Wms. Ex. 644; 1 Chitt. Pr. 580; 11 Wend. 365.

DESPITUS. A contemptible person. Fleta, l. 4, c. 5, § 4.

DESPOIL. This word involves in its signification, violence or clandestine means, by which one is deprived of that which he possesses. 1 Cal. 268.

DESPOT. This word, in its original and most simple acceptation, signifies *master and supreme lord;* it is synonymous with monarch; but taken in bad part, as it is usually employed, it signifies a tyrant.

DESPOTISM. That abuse of government where the sovereign power is not divided, but united in the hands of a single man, whatever may be his official title. It is not, properly, a form of government. Toullier, Dr. Civ. Fr. tit. prél. n. 32; Ruth-erf. Inst. b. 1, c. 20, § 1.

DESRENABLE. Unreasonable. Britton, c. 121.

DESTINATION. The intended application of a thing.

For example, when a testator gives to a hospital a sum of money to be applied in erecting buildings, he is said to give a destination to the legacy. Mill-stones taken out of a mill to be picked, and to be returned, have a destination, and are considered real estate, although detached from the freehold. Heirlooms, although personal chattels, are, by their destination, considered real estate; and money agreed or directed to be laid out in land is treated as real property; 3 Wheat. 577; 2 Bell, Com. 2; Erskine, Inst. 2. 2. 14; Fonbl. Eq. b. 1, c. 6, § 9. See EASEMENT; FIXTURES.

In Common Law. The port at which a ship is to end her voyage is called her port of destination. Pardessus, n. 600.

The phrases "port of destination" and "port of discharge" are not equivalent; 5 Mass. 404. See 66 Me. 65.

DESTROY. In the act of congress punishing with death any one destroying vessels, it means to unfit the vessel for service, beyond the hopes of recovery, by ordinary means. 1 Wash. C. C. 363; 4 Dall. 412.

A will burned, cancelled, or torn, *animo revocandi* is *destroyed;* 2 Nott & McC. 272. The scratching out of the signature with a knife, in England, has been held to be tearing or otherwise *destroying* a will in the sense of the statute; 56 L. J.R. Pr. & D. 96.

DESUETUDE. Disuse.

DETAIL. **In Military Law.** One who belongs to the army, but is only detached, or set apart, for the time to some particular duty or service, and who is liable at any time, to be recalled to his place in the ranks. 39 Ala. 379.

DETAINER. Detention. The act of keeping a person against his will, or of

withholding the possession of goods or other personal or real property from the owner.

Detainer and detention are very nearly synonymous. If there be any distinction, it is perhaps that detention applies rather to the act considered as a fact, detainer to the act considered as something done by some person. Detainer is more frequently used with reference to real estate than in application to personal property.

All illegal detainers of the person amount to false imprisonment, and may be remedied by *habeas corpus*. Hurd, Hab. Corp. 209.

A detainer or detention of goods is either lawful or unlawful; when lawful, the party having possession of them cannot be deprived of it. It is legal when the party has a right to the property, and has come lawfully into possession. It is illegal when the taking was unlawful, as in the case of forcible entry and detainer, although the party may have a right of possession; but in some cases the detention may be lawful, although the taking may have been unlawful; 3 Pa. 20. So also the detention may be unlawful although the original taking was lawful: as when goods were distrained for rent, and the rent was afterwards paid; or when they were pledged, and the money borrowed and interest was afterwards paid; or, as in another case, if one borrow a horse, to ride from A to B, and afterwards detain him from the owner, after demand, such detention is unlawful, and the owner may either retake his property, or have an action of replevin or detinue; 1 Chit. Pr. 135. In these and many other like cases the owner should make a demand, and, if the possessor refuses to restore them, trover, detinue, or replevin will lie, at the option of the plaintiff. In some cases the detention becomes criminal although the taking was lawful, as in embezzlement.

There may also be a detainer of land; and this is either lawful and peaceable, or unlawful and forcible. The detainer is lawful where the entry has been lawful and the estate is held by virtue of some right. It is unlawful and forcible where the entry has been unlawful and with force, and it is retained by force against right; or even where the entry has been peaceable and lawful, if the detainer be by force and against right; as, if a tenant at will should detain with force after the will has determined, he will be guilty of a forcible detainer; 2 Chitt. Pr. 238; Com. Dig. *Detainer*, B 2; 8 Cow. 216; 1 Hall 240; 4 Johns. 198; 4 Bibb 501. See 45 Ala. 421; 54 Mo. 437; 83 Ill. 473. A forcible detainer is a distinct offence from a forcible entry; 8 Cow. 216. See FORCIBLE ENTRY AND DETAINER.

In Practice. A writ or instrument, issued or made by a competent officer, authorizing the keeper of a prison to keep in his custody a person therein named. A detainer may be lodged against one within the walls of a prison, on what account soever he is there; Com. Dig. *Process*, E (3 B). This writ was superseded by 1 & 2 Vict. c. 110, §§ 1, 2.

DETECTIVE. One whose business it is to watch, and furnish information concerning, alleged wrongdoers by adroitly investigating their haunts and habits. In England they are usually police officers in plain clothes, and are the successors of the Bow Street runners. In this country there are usually detectives in the police department of the large cities, but the term is applied more particularly to the persons engaged in the detection of crime and the prosecution of such investigations as in England are made through the private inquiry offices. The latter correspond to the private detective agencies in the United States.

One who joins a conspiracy for the purpose of robbery, in order to expose it, and honestly carries out the plan, is not an accessory before the fact, though he encourages the others to the commission of the crime, with the intent that they shall be punished; 157 Pa. 13. See 84 Pa. 187; Tayl. Ev. § 971; Whart. Cr. Ev. § 440.

DETENTION. The act of retaining and preventing the removal of a person or property.

The detention may be occasioned by accidents, as the detention of a ship by calms, or by ice; or it may be hostile, as the detention of persons or ships in a foreign country by order of the government. In general, the detention of a ship does not change the nature of the contract; and therefore sailors will be entitled to their wages during the time of the detention; 1 Bell, Com., 5th ed. 517; Mackeldey, Civ. Law § 210; 2 Pars. Sh. & Adm. 63. See DETAINER.

DETERMINABLE. Liable to come to an end by the happening of a contingency: as, a determinable fee.

DETERMINABLE FEE (also called a *qualified* or *base fee*). One which has a qualification subjoined to it, and which must be determined whenever the qualification annexed to it is at an end. A limitation to a man and his heirs on the part of his father affords an example of this species of estate; Littleton § 254; Co. Litt. 27 *a*, 220; 1 Prest. Est. 449; 2 Bla. Com. 109; Cruise, Dig. tit. 1, § 82. See 1 Washb. R. P. 62; 35 Wis. 36.

DETERMINATE. That which is ascertained; what is particularly designated: as, if I sell you my horse Napoleon, the article sold is here determined. This is very different from a contract by which I sell you a horse, without a particular designation of any horse.

DETERMINATION. The decision of a court of justice. See DECREE; JUDGMENT.

The end, the conclusion, of a right or authority: as, the determination of a lease, Com. Dig. *Estates by Grant* (G 10, 11, 12). The phrase "determination of will" is used of the putting an end to an estate at will. 2 Bla. Com. 146.

The determination of an authority is the end of the authority given; the end of the return-day of a writ *determines* the authority of the sheriff: the death of the principal *determines* the authority of a mere attorney.

DETERMINE. To come to an end. To bring to an end. 2 Bla. Com. 121; 1 Washb. R. P. 380.

DETINET (Lat. *detinere*, to detain; *detinet*, he detains). **In Pleading.** An action of *debt* is said to be in the *detinet* when it is alleged merely that the defendant withholds or unjustly detains from the plaintiff the thing or amount demanded.

The action is so brought by an executor, 1 Wms. Saund. 1; and so between the contracting parties when for the recovery of such things as a ship, horse, etc.; 3 Bla. Com. 156.

An action of *replevin* is said to be in the detinet when the defendant retains possession of the property until after judgment in the action; Bull. N. P. 52; Chit. Pl. 145.

It is said that anciently there was a form of writ adapted to bringing the action in this form; but it is not to be found in any of the books; 1 Chit. Pl. 145.

In some of the states of the United States, however, the defendant is allowed to retain possession upon giving a bond similar to that required of the plaintiff in the common-law form; the action is then in the detinet; 3 Sharsw. Bla. Com. 146, n.: 5 W. & S. 556; 8 Ark. 510; 2 Sandf. 68; 13 Ill. 315; 1 Dutch. 390. The jury are to find the value of the chattels in such case, as well as the damage sustained. See DEBET ET DETINET; DETINUIT.

DETINUE (Lat. *detinere*,—*de*, and *tenere*,—to hold from; to withhold).

In Practice. A form of action which lies for the recovery, in specie, of personal chattels from one who acquired possession of them lawfully but retains it without right, together with damages for the detention. 3 Bla. Com. 151.

It is generally laid down as necessary to the maintenance of this action that the original taking should have been lawful, thus distinguishing it from replevin, which lies in case the original taking is unlawful. Brooke, Abr. *Detinue*, 21, 36, 63. It is said, however, by Chitty, that it lies in cases of tortious taking, except as a distress, and that it is thus distinguished from replevin, which lay originally only where a distress was made, as was claimed, wrongfully; 1 Chit. Pl. 112. See 3 Sharsw. Bla. Com. 152. In England this action has yielded to the more practical and less technical action trover, but was formerly much used in the slaveholding states of the United States for the recovery of slaves; 4 Munf. 72; 4 Ala. 221; 3 Bibb 510; 1 Ov. 187; 10 Ired. 124.

The action lies only to recover such goods as are capable of being identified and distinguished from all others; Andr. Steph. Pl. 79, n.; Com. Dig. *Detinue*, B, C; Co. Litt. 286 *b*; 1 J. J. Marsh. 500; 15 B. Monr. 479; 2 Greene 266; 5 Sneed 562; in cases where the defendant had originally lawful possession, which he retains without right; 12 Ala. 279; 2 Mo. 45; 4 B. Monr. 365; 11 Ala. N. S. 322; as where goods were delivered for application to a specific purpose; 4 B. & P. 140; but a tort in taking may be waived, it is said, and detinue brought; 2 A. K. Marsh. 268; 14 Mo. 491; 15 Ark. 235. That it lies whether the taking was tortious or not, see 18 Ala. 151; 9 Ala. N. S. 780; 1 Mo. 749. It may be maintained for the recovery of a policy of insurance where it has been paid for, but is withheld by the agent who wrote it; 40 Ill. App. 132. The property must be in existence at the time; 2 Dana 332; 1 Ala. N. S. 203; 1 Ired. 523; see 13 Mo. 612; 12 Ark. 368; but need not be in the possession of the defendant; 1 Dana 110; 5 Yerg. 301; 3 Miss. 304; 19 Ala. N. S. 491; 23 Mo. 389; 18 B. Monr. 86. See 4 Dev. & B. 458; 10 Ired. 124.

The plaintiff must have had actual possession, or a right to immediate possession; 2 Mo. 45; 1 Wash. Va. 308; 4 Bibb 518; 7 Ala. N. S. 189; 6 Ired. 88; 2 Jones, N. C. 168; 2 Md. Ch. Dec. 178; 34 Neb. 93; but a special property, as that of a bailee, with actual possession at the time of delivery to the defendant, is sufficient; 2 Wms. Saund. 47 *b*; 9 Leigh 158; Cam. & N. 416; 1 Miss. 315; 4 B. Monr. 365; 2 Mo. 45; 22 Ala. 534. A mere equitable claim reserved by a vendor on the sale of personal property for the unpaid purchase money, is not sufficient title to authorize a recovery in detinue; 94 Ala. 616. Either want of title in the plaintiff or the absence of actual possession in defendant, when the action was brought, will prevent plaintiff's recovery, as constructive possession in defendant from the fact that he had the title is not sufficient; 36 W. Va. 423. A demand is not requisite except to entitle the plaintiff to damages for detention between the time of the demand and that of the commencement of the action; 4 Bibb 340; 14 Mo. 491; 3 Litt. 46; 3 Munf. 122; 12 Ala. N. S. 135; 19 S. E. Rep. (N. C.) 599. See 90 Ala. 253.

The *declaration* may state a bailment or trover; though a simple allegation that the goods came to the defendant's hands is sufficient; Brooke, Abr. *Detinue*, 10. The bailment or trover alleged is not traversable; Brooke, Abr. *Detinue*, 1, 2, 50. It must describe the property with accuracy; 2 Ill. 206; 13 Ired. 172; 2 Greene, Ia. 266.

The *plea* of *non detinet* is the general issue, and special matter may be given in evidence under it; Co. Litt. 283; 16 E. L. & Eq. 514; 2 Munf. 329; 6 Humphr. 108; 94 Ala. 616; including title in a third person; 3 Dana 422; 12 Ala. N. S. 823; eviction, or accidental loss by a bailee; 3 Dana 36. The plea of not guilty is not appropriate; 40 Ill. App. 132.

The defendant in this action frequently prayed garnishment of a third person, who he alleged owned or had an interest in the thing demanded; but this he could not do without confessing the possession of the thing demanded, and making privity of bailment; Brooke, Abr. *Garnishment*, 1, *Interpleader*, 3. If the prayer of garnishment was allowed, a *sci. fa.* issued against the person named as garnishee. If he made default, the plaintiff recovered against the defendant the chattel demanded, but no damages. If the garnishee appeared, and the plaintiff made default, the garnishee recovered. If both appeared, and the plaintiff recovered, he had judgment against the defendant for the chattel demanded, and a distringas in execution; and against the

garnishee a judgment for damages, and a *fi. fa.* in execution.

The judgment is in the alternative that the plaintiff recover the goods, or the value thereof if he cannot have the property itself; 7 Ala. N. S. 189; 5 Munf. 166; 1 Bibb 434; 7 B. Monr. 421; 8 Humphr. 406; 5 Mo. 430; 4 Ired. Eq. 118; 7 Gratt. 343; 4 Tex. 184; 34 W. Va. 639; with damages for the detention; 1 Ired. 523; 13 Mo. 612; 8 Gratt. 578; 16 Ala. N. S. 271; and full costs. One cannot recover as damages both rent or hire and the ordinary wear and tear of the property sued for, as rent and hire include ordinary wear and tear; 90 Ala. 253.

The verdict and judgment must be such that a special remedy may be had for a recovery of the goods detained, or a satisfaction in value for each parcel in case they or either of them cannot be returned; 7 Ala. N. S. 189, 807; 2 Humphr. 59; 5 Miss. 489; 4 Dana 58; 3 B. Monr. 313.

DETINUE OF GOODS IN FRANK MARRIAGE. A writ formerly available to a wife after a divorce, for the recovery of the goods given with her in marriage. Moz. & W. Dict.

DETINUIT (Lat. he detained).

In Pleading. An action of replevin is said to be in the *detinuit* when the plaintiff acquires possession of the property claimed by means of the writ. The right to retain is, of course, subject in such case to the judgment of the court upon his title to the property claimed; Bull. N. P. 521.

The declaration in such case need not state the value of the goods; 6 Blackf. 469; 7 Ala. N. S. 189.

The judgment in such case is for the damage sustained by the unjust taking or detention, or both, if both were illegal, and for costs; 4 Bouvier, Inst. n. 3562.

DEUTEROGAMY. A second marriage after the death of a former husband or wife.

DEVASTATION. Wasteful use of the property of a deceased person: as, for extravagant funeral or other unnecessary expenses. 2 Bla. Com. 508.

DEVASTAVIT. The mismanagement and waste by an executor, administrator, or other trustee, of the estate and effects trusted to him as such, by which a loss occurs.

Devastavit by direct abuse takes place when the executor, administrator, or trustee sells, embezzles, or converts to his own use goods intrusted to him; Com. Dig. *Administration* (I 1); 101 U. S. 327; releases a claim due to the estate; 3 Bacon, Abr. 700; Cro. Eliz. 43; 7 Johns. 404; 9 Mass. 352; or surrenders a lease; 2 Johns. Cas. 376; 3 P. Wms. 330; 68 N. C. 537; below its value. These instances sufficiently show that any wilful waste of the property will be considered a direct *devastavit*. See 64 Cal. 35.

Devastavit by mal-administration most frequently occurs by the payment of claims which were not due nor owing, or by paying others out of the order in which they ought to be paid, or by the payment of legacies before all the debts are satisfied; 4 S. & R. 394; 5 Rawle 266; 110 Mass. 195; 84 Va. 731.

Devastavit by neglect. Negligence on the part of an executor, administrator, or trustee may equally tend to the waste of the estate as the direct destruction or mal-administration of the assets, and render him guilty of a *devastavit*. The neglect to sell the goods at a fair price, within a reasonable time, or, if they are perishable goods, before they are wasted, will be a *devastavit;* and a neglect to collect a doubtful debt which by proper exertion might have been collected will be so considered. Bacon, Abr. *Executors*, L. See 5 Misc. Rep. 560; 127 Pa. 360; 83 Va. 361, 791; 79 Ga. 260.

The law requires from trustees good faith and due diligence, the want of which is punished by making them responsible for the losses which may be sustained by the property intrusted to them: when, therefore, a party has been guilty of a *devastavit*, he is required to make up the loss out of his own estate. See Com. Dig. *Administration*, I; Belt, Suppl. to Ves. 209; 39 Pa. 218; 160 *id.* 13; 1 Johns. 396; 1 Cai. Cas. 96; Bacon, Abr. *Executors*, L; 11 Toullier 58. The return of *nulla bona testatoris nec propria* and *a devastavit* to the writ of execution *de bonis testatoris*, in an action against an executor or administrator, is called a *devastavit*. Upon this return the plaintiff may forthwith sue out an execution against the person or property of the executor or administrator in as full a manner as in an action against him sued in his own right. This is not, however, a common use of the word; Brown, Dict.

DEVENERUNT (Lat. *devenire*, to come to). A writ, now obsolete, directed to the king's escheators when any one of the king's tenants *in capite* dies, and when his son and heir dies within age and in the king's custody, commanding the escheat, or that by the oaths of twelve good and lawful men they shall inquire what lands or tenements by the death of the tenant have come to the king. Dy. 360; Keilw. 199 *a*; Blount; Cowel.

DEVEST OR DIVEST. To deprive, to take away; opposite to *invest*, which is to deliver possession of anything to another. Wharton.

DEVIATION. In Insurance. Varying from the risks insured against, as described in the policy, without necessity or just cause, after the risk has begun. 1 Phill. Ins. § 977; 1 Arn. Ins. 415.

Any unnecessary or unexcused departure from the usual or general mode of carrying on the voyage insured. 15 Am. L. Rev. 108. See also 9 Mass. 436.

The mere intention to deviate is not a deviation, and if not carried into effect will not vitiate a policy or exempt insurers from a loss happening before the vessel arrives

at the dividing port; 3 Cra. 357; 6 *id.* 29. Usage, in like cases, has a great weight in determining the manner in which the risk is to be run,—the contract being understood to have implied reference thereto in the absence of specific stipulations to the contrary; 2 Pars. Ins. 6; 38 Me. 414; 30 Pa. 334; 18 Mo. 193; 19 N. Y. 372; 11 Fed. Rep. 181. A variation from risks described in the policy from a necessity which is not inexcusably incurred does not forfeit the insurance; 1 Phill. Ins. § 1018; as to seek an intermediate port for repairs necessary for the prosecution of the voyage; 1 Phill. Ins. § 1019; changing the course to avoid disaster; 1 Phill. Ins. § 1023; 2 Mas. 234; delay in order to succor the distressed at sea; 6 East 54; 2 Cra. 240, 258; if the object is to save life, otherwise, to save property merely; 1 Spra. 141; 2 Wash. C. C. 80; 1 Sumn. 338; damage merely in defence against hostile attacks; 1 Phill. Ins. § 1030; or in taking measures to repel such attacks; 2 Mas. 230. "Liberty to touch" at a particular port, reserved in the policy, does not imply liberty to remain for trading, which, if it involves delay, may amount to deviation; 7 *id.* 26; nor to touch and stay at a port out of the course when within the usage of the trade; 2 Pai. 82; Wall. C. Ct. 58.

Necessity alone will sanction a deviation, and the latter must be strictly commensurate with the power compelling; 7 Cra. 26; the smallest deviation without necessity discharges the underwriters, though the loss be not the immediate consequence of the deviation; 2 Wash. 254.

This subject is fully treated in 15 Am. L. Rev. 108.

Change of risk in insurance against fire, so as to render the insured subject, or its surroundings, or the use made of it, different from those specified in the application, will discharge the underwriters; Biddle, Ins. 710; 2 N. Y. 210; 7 Cush. 175; 19 Pa. 45; 13 B. Monr. 282; 23 Mo. 453; 4 Zabr. 447; 1 Dutch. 54; 4 Wis. 20.

Change of risk under a life-policy in contravention of its express provisions will defeat it, in like manner; 1 Phill. Ins. § 1039; though such a policy does not appear to have any implied conditions other than those relative to fraud common to all contracts.

The effect of a deviation in all kinds of insurance is to discharge the underwriters, whether the risk is thereby enhanced or not; and the doctrine applies to lake and river navigation as well as that of the ocean; 1 Phill. Ins. § 987; 2 Pars. Ins. 5. See INSURANCE.

In Contracts. A change made in the progress of a work from the original plan agreed upon.

When the contract is to build a house according to the original plan, and a deviation takes place, the contract must be traced as far as possible, and the additions, if any have been made, must be paid for according to the usual rate of charging; 3 B. & Ald. 47. And see 14 Ves. 413; 6 Johns. Ch. 38; 3 Cra. 270; 9 Pick. 298; Chit. Contr. 168.

The Civil Code of Louisiana, provides that when an architect or other workman has undertaken the building of a house by the job, according to a plot agreed on between him and the owner of the ground, he cannot claim an increase of the price agreed on, on the plea of the original plot having been changed and extended, unless he can prove that such changes have been made in compliance with the wishes of the proprietor.

DEVICE. That which is devised or formed by design, a contrivance, an invention. 59 Ala. 91. See PATENT.

DEVISAVIT VEL NON. In Practice. The name of an issue sent out of a court of chancery, or one which exercises chancery or probate jurisdiction, to a court of law, to try the validity of a paper asserted and denied to be a will, to ascertain whether or not the testator did devise, or whether or not that paper was his will; 7 Bro. P. C. 437; 2 Atk. 424; 5 Pa. 21.

An application for an issue *devisavit vel non* is properly denied where the decided weight of evidence is in favor of the testamentary capacity of testatrix, and it appears that the two sons in whose favor the will was made cared for their mother and her estate, while the two who had been disinherited, attempted to have her declared insane; 157 Pa. 465.

DEVISE. A gift of real property by a last will and testament.

The term devise, properly and technically, applies only to real estate; the object of the devise must, therefore, be that kind of property; 1 Hill, Abr. c. 36, 62; 21 Barb. 561. But it is also sometimes improperly applied to a bequest or legacy. See 4 Kent 489; 8 Viner, Abr. 41; Com. Dig. *Estates by Devise.* Although the word "devise" is more specially appropriate to a gift of lands, yet the terms "bequest" and "devise" are used indifferently, and legatees may take under a devise of lands, if the context of the will shows that such was the testator's intention; 21 N. H. 515; 58 Pa. 427.

A general devise of lands will pass a reversion in fee, even though the testator has other lands which will satisfy the words of the devise, and although it be highly improbable that he had in mind such reversion; 3 P. Wms. 56; 3 Bro. P. C. 408; 4 Bro. Ch. 338; 1 Metc. Mass. 281; 8 Ves. 256.

A general devise will pass leases for years, if the testator have no other real estate upon which the will may operate; but if he have both lands in fee and lands for years, a devise of all his lands and tenements will commonly pass only the lands in fee-simple; Cro. Car. 293; 1 Ed. Ch. 151; 6 Sim. 99. But if a contrary intention appear from the will, it will prevail; 5 Ves. 540; 9 East 448.

Testator "gave, devised and bequeathed all his furniture, goods, chattels and effects, whatsoever the same may be and wheresoever situate." It was held that giving expression to the word "devise," in connection with the other terms of the will, that the gift passed all the property of the testator, whether real or personal; [1891] 3 Ch. 389.

A devise in a will can never be regarded as the execution of a power, unless that intention is manifest: as, where the will would otherwise have nothing upon which it could operate. But the devise to have that operation need not necessarily refer to the power in express terms. But where there is an *interest* upon which it can operate, it shall be referred to that, unless some other intention is obvious; 6 Co. 176; 6 Madd. 190; 4 Kent 334; 1 Jarm. Wills 628.

The devise of all one's lands will not generally carry the interest of a mortgagee, in premises, unless that intent is apparent: 2 Vern. 621; 3 P. Wms. 61; 1 Jarm. Wills, 633. The fact that the mortgagee is in possession is sometimes of importance in determining the purpose of the devise. But many cases hold that the interest of a mortgagee or trustee will pass by a general devise of all one's land, unless a contrary intent be shown; 13 Johns. 537; 8 Ves. 407; 1 J. & W. 494. But see 9 B. & C. 267. This is indeed the result of the modern decisions, 4 Kent 539; 1 Jarm. Wills 638. It seems clear that a devise of one's mortgages will pass the beneficial title of the mortgagee; 4 Kent 539.

Devises may be contingent or vested, after the death of the testator. They are contingent when the vesting of any estate in the devisee is made to depend upon some future event, in which case, if the event never occur, or until it does occur, no estate vests under the devise. But when the future event is referred to merely to determine the time at which the devisee shall come into the use of the estate, this does not hinder the vesting of the estate at the death of the testator; 1 Jarm. Wills, c. xxvi., and numerous cases cited. The law favors that construction of the will which will vest the estate; 21 Pick. 311; 1 W. & S. 205. But this construction must not be carried to such an extent as to defeat the manifest intent of the testator; 21 Pick. 311; 7 Metc. 171. Where the estate is given absolutely, but only the time of possession is deferred, the devisee or legatee acquires a transmissible interest although he never arrive at the age to take possession; 1 Ves. Sen. 44, 59, 118; 4 Pick. 198; 7 Metc. 173. See LAPSED DEVISE; WILL; LEGACY; CHARGE.

DEVISEE. A person to whom a devise has been made.

All persons who are *in rerum natura*, and even embryos, may be devisees, unless excepted by some positive law. But the devisee must be in existence, except in case of devises to charitable uses; Story, Eq. Jur. §§ 1146, 1160; 2 Washb. R. P. 688; 2 How. 127; 4 Wheat. 33, 49. See CHARITABLE USES. In general, he who can acquire property by his labor and industry may receive a devise; Cam. & N. 353. *Femes covert*, infants, aliens, and persons of non-sane memory may be devisees; 4 Kent 506; 2 Wms. Ex. 269, n.; 1 Harr. Del. 524. Corporations in England and in some of the United States can be devisees only to a limited extent; 2 Washb. R. P. 687.

DEVISOR. A testator. One who devises real estate.

Any person who can sell an estate may, in general, devise it; and there are some disabilities to a sale which are not such to a devise.

DEVOIR. Duty. It is used in the statute of 2 Ric. II. c. 3, in the sense of duties or customs.

DEVOLUTION. In Ecclesiastical Law. The transfer, by forfeiture, of a right and power which a person has to another, on account of some act or negligence of the person who is vested with such right or power; for example, when a person has the right of presentation and he does not present within the time prescribed, the right devolves on his next immediate superior. Ayliffe, Parerg. 331. See 3 App. Cas. 520.

DEVOLVE. To pass from a person dying to a person living. 1 Mylne & K. 648.

DI COLONA. In Maritime Law. The contract which takes place between the owner of a ship, the captain, and the mariners, who agree that the voyage shall be for the benefit of all. The term is used in the Italian law. Targa, cc. 36, 37; Emerigon, Mar. Loans, s. 5.

The New England whalers are owned and navigated in this manner and under this species of contract. The captain and his mariners are all interested in the profits of the voyage in certain proportion, in the same manner as the captain and crew of a privateer, according to the agreement between them. Such agreements were very common in former times, all the mariners and the masters being interested in the voyage. It is necessary to know this in order to understand many of the provisions of the laws of Oleron, Wisbuy, the Consolato del Mare, and other ancient codes of maritime and commercial law. Hall, Mar. Loans 42.

DICTATE. To pronounce, word by word, what is meant to be written by another. It is thus defined in the Louisiana code, which provides that the testator may dictate his will; 6 Mart. N. S. 143. The presentation, by testator, of an instrument which he has caused to be written, declaring it to be his will, may sometimes supply the want of dictation; 16 La. Ann. 219.

DICTATOR. In Roman Law. A magistrate at Rome invested with absolute power. His authority over the lives and fortunes of the citizens was without bounds. His office continued but for six months. Hist. de la Jur. Dig. 1. 2. 18, 1. 1. 1.

DICTORES. Arbitrators.

DICTUM (also, *Obiter Dictum*). An opinion expressed by a court, but which, not being necessarily involved in the case, lacks the force of an adjudication.

It frequently happens that, in assigning its opinion upon a question before it, the court discusses collateral questions and expresses a decided opinion upon them. Such opinions, however, are frequently given without much reflection or without previous

argument at the bar; and as, moreover, they do not enter into the adjudication of the point at issue they have only that authority which may be accorded to the opinion, more or less deliberate, of the individual judge who announces it. Chase, Bla. Com. 36, n. It may be observed that in recent times, particularly in those jurisdictions where appeals are largely favored, the ancient practice of courts in this respect is much modified. Formerly, judges aimed to confine their opinion to the precise point involved, and were glad to make that point as narrow as it might justly be. Where appeals are frequent, however, a strong tendency may be seen to fortify the judgment given with every principle that can be invoked in its behalf,—those that are merely collateral, as well as those that are necessarily involved. In some courts of last resort, also, when there are many judges, it is not unfrequently the case that, while the court come to one and the same conclusion, the different judges may be led to that conclusion by different views of the law, so that it becomes difficult to determine what is to be regarded as the principle upon which the case was decided and what shall be deemed mere *dicta*.

It is not easy to define the term with such precision as to afford an exact criterion by which to decide when the language of a court or judge is entitled to be considered as a precedent and followed as an authority. Judicial references to the subject indicate that expressions which would be included under the term *dicta* are nevertheless afterwards treated by other courts with respect if not with the binding force of adjudicated cases. Possibly no better definition can be found than that of Folger, J., in 62 N. Y. 68: "*Dicta* are the opinions of a judge which do not embody the resolution or determination of the court, and, made without argument or full consideration of the point, are not the professed, deliberate determinations of the judge himself; *obiter dicta* are such opinions uttered by the way, not upon the point or question pending, as if turning aside for the time from the main topic of the case to collateral subjects."

The general rule, broadly stated by the United States supreme court, is that to make an opinion a decision "there must have been an application of the judicial mind to the precise question necessary to be determined to fix the rights of the parties, . . . and, therefore, this court has never held itself bound by any part of an opinion which was not needful to the ascertainment of the question between the parties." Per Curtis, J., in 16 How. 287. And in Cohen *v.* Virginia, when the case of Marbury *v.* Madison was very earnestly pressed upon the attention of the court, Marshall, C. J., said: "It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent case when the very point is presented;" 6 Wheat. 399. In 3 How. 292, Catron, J., dissenting, strongly criticised the majority of the court for a long discussion of the power of a court as to which they decided that they had no authority to review its decisions. In a later case the same court said, in reference to an allusion to the opinion in a case previously decided, "This was the only question before the court and the decision is authority only to the extent of the case before it; . . . if more was intended by the judge who delivered the opinion it was purely *obiter;*" 96 U. S. 211. The great powers and peculiar functions included in the constitutional powers of that court, as well as the conclusiveness of its judgments as declarations of constitutional contruction, make it not only proper but essential that its decisions should be confined to the points necessarily involved in the case and embraced in the argument. And the same reasons not only warrant but require a rigid exclusion of mere *dicta* from the category of authorities. The reason for the enforcement of the rule, as against expressions of opinion upon points not fairly raised by the case, is very well stated by the supreme court of Pennyslvania: "What I have said or written outside of the case trying, or shall say or write in such circumstances, may be taken as my opinion at the time, without argument or full consideration; but I will not consider myself bound by it when the point is fairly trying and fully argued and considered." Per Huston, J., 17 S. & R. 287.

According to the more rigid rule, any expression of opinion however deliberate upon a question however fully argued, if not essential to the disposition that was made of the case, may be regarded as a *dictum;* but it is, on the other hand, said that it is difficult to see why, in a philosophical point of view, the opinion of the court is not so persuasive on all the points which were so involved in the cause that it was the duty of counsel to argue them, and which were deliberately passed over by the court, as if the decision had hung upon but one point; 1 Abbott, N. Y. Dig. pref. iv. And a judicious text writer has said that "the line must not be too sharply drawn;" Wells, Res. Adj. & Sta. Dec. § 581. The fact that a decision might have been rested upon a different ground, and even a more satisfactory one, does not place the actual decision, on a ground arising, in the category of a *dictum;* 4 Heisk. 419.

But even when the point ruled was not directly and necessarily in issue, there are distinctions drawn as to the relative authority of judicial expressions of opinion comprehended under the general term *dicta*, as used in its broadest sense. An expression of opinion upon a point involved in a case, argued by counsel and deliberately passed upon by the court, though not essential to the disposition of the case, if a *dictum*, should be considered as a judicial *dictum* as distinguished from a mere *obiter dictum*, i. e. an expression originating alone with the judge writing the opinion, as an argument or illustration; 60 Wis. 264. What was, in strictness, a *dictum* of Mr. Justice McLean has been extensively commented on, treated, and in several cases followed, as an authority. The suit was on a bond of a U. S. officer, and the question was when a resignation took effect, it being claimed that for default after resignation

the surety was not liable. The court held the resignation to be a conditional one, and went on to discuss the right of resignation and the necessity of acceptance or power of rejection, reaching the conclusion that an unqualified resignation required no acceptance and would have discharged the surety; 1 McLean 509. This case having been cited to that point it was contended that it was a mere *dictum*. After defining *dictum* the supreme court of Nevada held "that while technically such, it was not liable to the objections usually urged,—it was the expression of opinion on a point argued, and entitled to far more weight than an ordinary *dictum* on a point not discussed and remotely connected with the case." 3 Neb. 566. The same case was followed in 6 Cal. 28; 49 Ala. 402; and is commented on and treated as an authority without being characterized as a *dictum* in 103 U. S. 471 and 31 N. J. L. 107.

So also it has been held, with respect to a court of last resort, that all that is needed to render its decision authoritative is that there was an application of the judicial mind to the precise question adjudged; and that the point was investigated with care and considered in its fullest extent; 5 Md. 488; and that when a question of general interest is involved, and is fully discussed and submitted by counsel, and the court decides the question with a view to settle the law, the decision cannot be considered a *dictum*; *id.*

When a question is involved in the case, though not in the particular phase of it, at the time before the court, the language of the court is not a mere *dictum*. When a will was offered for probate the question of its validity, so far as regarded charitable uses, was involved, and what was said as to that was not *obiter*; 107 U. S. 174; although a point may not have been exhaustively argued a decision upon it cannot be said to be *obiter dictum* when it was upon a question raised by a demurrer upon which the court distinctly expressed an opinion; 26 Md. 488.

The expressions of courts and judges which fall within the general designation of *dicta* are accorded more or less weight as they agree with, or run counter to, the current of authority, and, like the adjudications of courts in other jurisdictions, not direct authorities, they are always considered with reference to the judicial reputation and experience of their authors. Referring to a case cited in a *dictum* Lord Mansfield said, "This *dictum* of Lord C. J. Holt's is no formed decisive resolution; no adjudication; no professed or deliberate determination . . ."; then after citing cases *contra* he continued, "therefore this mere *obiter dictum* ought not to weigh against the settled direct authority of the cases which have been deliberately and upon argument determined the other way." 2 Burr. 2064. "*Dicta* of judges upon matters not argued or directly before them, have had more importance attached to them than, in my opinion, they ought to have had; but such expressions, falling from such a man as Lord Hardwicke, may be safely relied upon to show that, at that time, the idea of a larger legacy being adeemed by a smaller portion was not familiar to his mind. It is the more important to keep this *dictum* of Lord Hardwicke in mind because another *dictum* of that very eminent judge . . . is relied upon in support of the supposed rule." Ld. Ch. Cottenham, in 1 Russ. 27. Consult 1 Phill. Eccl. 406; 1 Eng. Eccl. 129; Ram, Judgm. 36; Willes 666; 1 H. Bla. 53; 2 B. & P. 375; 7 Pa. 287; 3 B. & Ald. 341; 2 Bingh. 90. The doctrine of the courts of France on this subject is stated in 11 Toullier 177, n. 133.

In French Law. The report of a judgment made by one of the judges who has given it. Pothier, Proc. Civ. pl. 1, c. 5, art. 2.

DIEM CLAUSIT EXTREMUM (Lat. he has closed his last day,—died). A writ which formerly lay on the death of a tenant *in capite*, to ascertain the lands of which he died seised, and reclaim them into the king's hands. It was directed to the king's escheators. Fitzh. N. B. 251, K; 2 Reeve, Hist. Eng. Law 327.

A writ of the same name, issuing out of the exchequer after the death of a debtor of the king, to levy the debt of the lands or goods of the heir, executor, or administrator. *Termes de la Ley.* This writ is still in force in England. 3 Steph. Com. 667.

DIES (Lat.). A day; days. Days for appearance in court. Provisions or maintenance for a day. The king's rents were anciently reserved by so many days' provisions. Spelman, Gloss.; Cowel; Blount.

DIES AMORIS (Lat.). A day of favor. If obtained after a default by the defendant, it amounted to a waiver of the default. Co. Litt. 135 *a*; 2 Reeve, Hist. Eng. Law 60. The appearance day of the term, or *quarto die post*, was also so called.

DIES COMMUNES IN BANCO (Lat.). Regular days for appearance in court; called, also, common return-days. 2 Reeve, Hist. Eng. Law 57.

DIES DATUS (Lat. a day given). A day or time given to a defendant in a suit, which is in fact a continuance of the cause. It is so called when given before a declaration. When it is allowed afterwards, it assumes the name of imparlance, which see.

Dies datus in banco, a day in bank. Co. Litt. 135. *Dies datus partibus*, a continuance; *dies datus prece partium*, a day given on prayer of the parties.

DIES DOMINICUS. The Lord's day; Sunday.

DIES FASTI (Lat.). **In Roman Law.** Days on which courts might be held and judicial and other business legally transacted. Calvinus, Lex.; Anthon, Rom. Ant. 3 Bla. Com. 275, 424.

DIES GRATIÆ (Lat.). **In Old English Law.** Days of grace. Co. Litt. 134 *b*.

DIES NEFASTI (Lat.). **In Roman Law.** Days on which it was unlawful to transact judicial affairs, and on which the courts were closed. Anthon, Rom. Ant.; Calvinus, Lex.; 1 Kaufmann, Mackeld. 24; 3 Bla. Com. 275.

DIES NON (Lat.). An abbreviation of the phrase *dies non juridicus*, universally used to denote nonjudicial days. Days during which courts do not transact any business; as, Sunday, or the legal holidays. 3 Chitty, Gen. Pr. 104; W. Jones 156. Sunday was the original *dies non*, but in many states days declared by statute to be legal holidays are also such, but the decisions on this subject depend largely upon the terms and scope of the statutes, many of which apply solely to the presentment and payment of commercial paper, and others include a prohibition of judicial business and provide for the closing of public offices.

A distinction was made in 9 Co. 66 between judicial and ministerial acts performed on a *dies non;* this was overruled in 1 Stra. 337; but the distinction now obtains; 5 Cent. L. J. 26. And under a statute forbidding the transaction of any judicial business on Sunday or a legal holiday, the issuing on such a day of an attachment by a county judge for a claim not due was held to be "judicial" business and void; 54 N. W. Rep. (Neb.) 258; but an attachment for a claim past due was held to be valid, as a ministerial, and not a judicial act; 55 N. W. Rep. (Neb.) 227.

It has usually been held that a verdict may be received on a *dies non;* 3 Watts 56; 14 Ind. 39; 23 Tex. App. 42; 32 Tex. Cr. R. 119; but a judgment entered on such verdict on the same day is void; 8 Ill. 363; 15 Johns. 118. See 36 Ind. 466; 34 N. H. 202; 17 Pick. 106; 74 N. C. 187; 92 Tenn. 476; 36 Neb. 218. A judgment by confession entered upon December 25, a legal holiday, is not void; 45 Ill. App. 326. In Kentucky although Thanksgiving day is a legal holiday, it is not treated as the Christian Sabbath, except as to commercial paper, and where money becomes due on such a day, the debtor is in default if he fails to pay on that day; 85 Ky. 88. A bill of exceptions signed on Sunday is void; 137 Ind. 697. Warrants for treason, felony, and breach of the peace may be executed on Sunday; 74 N. C. 187. Where public policy or the prevention of irremediable wrong requires it, the courts may sit on Sunday and issue process; 13 Am. L. Reg. N. S. 747; S. C. 64 Ill. 243. See a full article on this title in 7 So. L. Rev. N. S. 697. See SUNDAY; HOLIDAYS.

DIES NON JURIDICUS (Lat.). Nonjudicial days. See DIES NON.

DIES PACIS (Lat. day of peace). The year was formerly divided into the days of the peace of the church and the days of the peace of the king,—including in the two divisions all the days of the year. Crabb, Hist. Eng. Law 35.

DIES A QUO (Lat.). **In Civil Law.** The day from which a transaction begins. Calvinus, Lex.; 1 Kaufm. Mackeld. Civ. Law 168.

DIES UTILES (Lat.). Useful or available days. Days in which an heir might apply to the judge for an inheritance. Cooper, Inst.; Calvinus, Lex.; Du Cange.

DIETA (Lat.). A day's journey; a day's work; a day's expenses. A reasonable day's journey is said to be twenty miles, by an old computation. Cowel; Spelman, Gloss.; Bracton 235 *b*; 3 Bla. Com. 218.

DIET. A general assembly is sometimes so called on the continent of Europe. 1 Bla. Com. 147.

DIETS OF COMPEARANCE. In Scotland. The days within which parties in civil and criminal prosecutions are cited to appear. Bell.

DIGEST. A compilation arranged in an orderly manner.

The name is given to a great variety of topical compilations, abridgments, and analytical indices of reports, statutes, etc. When reference is made to *the Digest*, the Pandects of Justinian are intended, they being the authoritative compilation of the civil law. As to this Digest and the mode of citing it, see PANDECTS. Other digests are referred to by their distinctive names. For some account of digests of the civil and canon law, and those of Indian law, see CIVIL LAW, CODE, and CANON LAW.

The digests of English and American law are for the most part deemed not authorities, but simply manuals of reference, by which the reader may find his way to the original cases which are authorities. 1 Burr. 364; 2 Wils. 1, 2. Some of them, however, which have been the careful work of scholarly lawyers, possess an independent value as original repositories of the law. Bacon's Abridgment, which has long been deservedly popular in this country, and Comyns's Digest, also often cited, are examples of these. The earlier English digests are those of Statham (Hen. VI.), Fitzherbert, 1516, Brooke, 1573, Rolle, Danvers, Nelson, Viner, and Petersdorf. Of these Rolle and Viner are still not unfrequently cited, and some others rarely. The several digests by Coventry & Hughes, Harrison, Fisher, Jacobs, and Chitty, together with the subsequent annual digests of Emden and of Mews, afford a convenient index for the American reader to the English reports. In most of the United States one or more digests of the state reports have been published, and in some of them digests or topical arrangements of the statutes. There are also digests of the federal reports, the federal statutes, and one known as the United States Digest, with the annual volumes from 1873 to 1889 and the American Digest and the General Digest subsequent to that date, which cover the reports of the federal and state courts together. Dane's Abridgment of American Law has been commended by high authority (Story's article in N. Am. Rev. July, 1826), but it has not maintained a position as a work of general use. There are also numerous digests of cases on particular titles of the law.

DIGGING. Has been held as synonymous with excavating, and not confined to the removal of earth. 1 N. Y. 316.

DIGNITARY. In Ecclesiastical Law. An ecclesiastic who holds a dignity or benefice which gives him some preeminence over mere priests and canons, such as a bishop, archbishop, prebendary, etc. Swift; Burn, Law Dict.

DIGNITIES. In English Law. Titles of honor.

They are considered as incorporeal hereditaments. The character of our government forbids their admission into the republic.

DILACION. **In Spanish Law.** The time granted by law or by the judge to parties litigant for the purpose of answering a demand or proving some disputed fact.

DILAPIDATION. A species of ecclesiastical waste which occurs whenever the incumbent suffers any edifices of his ecclesiastical living to go to ruin or decay. It is either voluntary, by pulling down, or permissive, by suffering the church, parsonage-houses, and other buildings thereunto belonging, to decay. And the remedy for either lies either in the spiritual court, where the canon law prevails, or in the courts of common law. It is also held to be good cause of deprivation if the bishop, parson, or other ecclesiastical person dilapidates buildings or cuts down timber growing on the patrimony of the church, unless for necessary repairs; and that a writ of prohibition will also lie against him in the common-law courts. 3 Bla. Com. 91.

DILATORY DEFENCE. **In Chancery Practice.** One the object of which is to dismiss, suspend, or obstruct the suit, without touching the merits, until the impediment or obstacle insisted on shall be removed.

DILATORY PLEA. One which goes to defeat the particular action brought, merely, and which does not answer as to the general right of the plaintiff. See PLEA.

DILIGENCE. The degree of care and attention which the law exacts from a person in a particular situation or a given relation to another person. The word finds its most frequent application in the law of Bailments and of Negligence. Indeed it may be termed the correlative of negligence.

In the law of bailment, three degrees of diligence have been recognized, viz.: slight, ordinary, and great.

In order to avoid liability for negligence either in contract or tort it is said to be a "general rule that every one is bound to exercise due care towards his neighbors in his acts and conduct, or rather omits or falls short of it at his peril; the peril, namely, of being liable to make good whatever harm may be a proved consequence of the default;" Poll. Torts 533. What constitutes "due diligence" depends very much upon the facts of each particular case. It will depend upon the relation of the parties and the obligations which the law implies from it, the risk or danger, either apparent or which may be apprehended by the exercise of his faculties by a man of ordinary prudence.

The failure or omission to exercise due diligence is sometimes a ground of liability both in contract and tort, as when there is a misfeasance in the execution of a contract from which there results a common-law liability. 1 Chit. Pl. 135. See NEGLIGENCE; BAILEE.

In Scotch Law. Process. Execution. *Diligence against the heritage.* A writ of execution by which the creditor proceeds against the real estate of the debtor.

Diligence incident. A writ or process for citing witnesses and examining havers. It is equivalent to the English subpœna for witnesses and rule or order for examination of parties and for interrogatories.

Diligence to examine havers. A process to obtain testimony: equivalent to a bill of discovery in chancery, or a rule to compel oral examination and a *subpœna duces tecum* at common law.

Diligence against the person. A writ of execution by which the creditor proceeds against the person of the debtor: equivalent to the English *ca. sa.*

Second diligence. Second letters issued where the first have been disregarded. A similar result is produced in English practice by the attachment for contempt.

Summary diligence. Diligence issued in a summary manner, like an execution of a warrant of attorney, *cognovit actionem*, and the like, in English practice.

Diligence against witnesses. Process to compel the attendance of witnesses: equivalent to the English subpœna. See Paterson, Comp.; Bell.

DIME (Lat. *decem*, ten). A silver coin of the United States, of the value of ten cents, or one-tenth of the dollar.

DIMINUTION OF THE RECORD. **In Practice.** Incompleteness of the record of a case sent up from an inferior to a superior court.

When this exists, the parties may suggest a diminution of the record, and pray a writ of *certiorari* to the justices of the court below to certify the whole record; Tidd, Pr. 1109; 1 S. & R. 472; Co. Entr. 232; 8 Viner, Abr. 552; Cro. Jac. 597; Cro. Car. 91; 1 Ala. 20; 4 Dev. 575; 1 D. & B. 382; 1 Munf. 119. See CERTIORARI.

DIOCESE. The territorial extent of a bishop's jurisdiction. The circuit of every bishop's jurisdiction. Co. Litt. 94; 1 Bla. Com. 111; 2 Burn, Eccl. Law 158.

DIOCESAN COURTS. See CONSISTORY COURTS.

DIPLOMA. An instrument of writing, executed by a corporation or society, certifying that a certain person therein named is entitled to a certain distinction therein mentioned.

It is usually granted by learned institutions to their members or to persons who have studied in them.

Proof of the seal of a medical institution and of the signatures of its officers thereto affixed, by comparison with the seal and signatures attached to a diploma received by the witness from the same institution, has been held to be competent evidence of the genuineness of the instrument, although the witness never saw the officers write their names; 25 Wend. 469.

This word, which is also written duploma, in the civil law signifies letters issued by a prince. They are so called it is supposed, *a duplicatis tabellis*, to which Ovid is thought to allude, 1 Amor. 12, 2, 27,

when he says, *Tunc ego vos duplices rebus pro nomine sensi.* Sueton. in Augustum, c. 26. Seals also were called Diplomata. Vicat, *Diploma.*

DIPLOMACY. The science which treats of the relations and interests of nations with nations.

DIPLOMATIC AGENTS. Public officers who have been commissioned according to law to superintend and transact the affairs of the government which has employed them, in a foreign country. Vattel, liv. 4, c. 5.

The agents were formerly of divers orders and known by different denominations. Those of the first order were almost the perfect representatives of the government by which they were commissioned: such were legates, nuncios, internuncios, ambassadors, ministers, plenipotentiaries. Those of the second order did not so fully represent their government: they were envoys, residents, ministers, *chargés d'affaires,* and consuls. The classification of these agents, now so far sanctioned as to be considered a rule of international law, was agreed upon at the Congress of Vienna in 1815 and modified by that of Aix-la-Chapelle in 1818. There are (1) ambassadors, ordinary and extraordinary, legates, and nuncios; (2) envoys, ministers, or others accredited to sovereigns; (3) ministers resident, accredited to sovereigns; (4) *chargés d'affaires,* and other diplomatic agents accredited to ministers of foreign affairs (whether bearing the title of minister or not), and consuls charged with diplomatic duties. See the several titles and Davis, Int. Law ch. vii.

DIPLOMATICS. The art of judging of ancient charters, public documents, or diplomas, and discriminating the true from the false. Encyc. Lond.

DIPSOMANIA. In Medical Jurisprudence. A mental disease characterized by an uncontrollable desire for intoxicating drinks. An irresistible impulse to indulge in intoxication, either by alcohol or other drugs. 19 Neb. 614. How far the law will hold a party responsible for acts committed while the mind is overwhelmed by the effects of liquor so taken is an open question. See DRUNKENNESS.

DIRECT. Straightforward; not collateral. 6 Blatchf. 533. The direct line of descent is formed by a series of relationships between persons who descend successively one from the other.

Evidence is termed *direct* which applies immediately to the fact to be proved, without any intervening process as distinguished from *circumstantial,* which applies immediately to collateral facts supposed to have a connection, near or remote, with the fact in controversy.

The examination in chief of a witness is called the direct examination.

DIRECTING THE VERDICT. See VERDICT; JURY.

DIRECTION. The order and government of an institution; the persons who compose the board of directors are jointly called the direction.

Direction, in another sense, is nearly synonymous with instruction (*q. v.*).

In Practice. The instruction of a jury by a judge on a point of law, so that they may apply it to the facts before them. See CHARGE.

That part of a bill in chancery which contains the address of the bill to the court: this must, of course, contain the appropriate and technical description of the court. See BILL.

DIRECTOR OF THE MINT. An officer appointed by the president of the United States, by and with the advice and consent of the senate. He is the chief officer of the bureau of the mint and is under the general direction of the secretary of the treasury. He has the control and management of the mint, the superintendence of the officers and persons employed therein, and the general regulation and superintendence of the business of the several branch mints and of the assay offices. Act of Congress, Feb. 12, 1873, U. S. Rev. Stat. § 343.

DIRECTORY STATUTE. See STATUTE.

DIRECTORS. Persons appointed or elected according to law, authorized to manage and direct the affairs of a corporation or company. The directors collectively form the board of directors.

They are generally invested with certain powers by the charter of the corporation, and it is believed that there is no instance of a corporation created by statute without provision for such a board of control, whether under the name of directors, or, as they are sometimes termed, managers or trustees, —the latter designation being more frequent in religious or charitable corporations. A recent comprehensive work on corporations states that the author has likewise found no instance in which these officers were wanting; 3 Thomp. Corp. § 3850. But the power to elect directors has been held to be inherent and not dependent upon statute; 62 Wis. 590.

As to the nature of the office and its powers very different views have been held, and each is sustained by high authority. They have been held to be the corporation itself "to all purposes of dealing with others" and not to "exercise a delegated authority in the sense which applies to agents or attorneys;" Shaw, C. J., in 2 Metc. 163. Another view, and probably the one which is the best settled conclusion of judicial opinion in this country, is that they are general agents; 61 Pa. 202; 48 Vt. 266; 86 Ill. 220; 13 N. Y. 599; 24 Conn. 591; 3 Thomp. Corp. § 3968. The question is of importance with respect to the power of directors to act outside of the home state of the corporation, in order to do which, they must act as agents: 13 Pet. 519; 11 Ind. 398; 6 Conn. 428. They are undoubtedly, in a certain sense, agents, but they are agents of the corporation, not of the stockholders;

they derive their powers from the charter. They alone have the management of the affairs of the corporation, free from direct interference on the part of the stockholders; 5 W. & S. 246; 12 Wheat. 113; 1 Disn. 84. The stockholders cannot perform any acts connected with the ordinary affairs of the corporation; 12 Barb. 27, 63; the delegation of powers to the directors excludes control by the stockholders; 2 Col. 565. See 8 Wheat. 357; 2 Cai. 381; 33 Cal. 11.

It has been said that directors are special agents of the corporation, and not general agents; 52 Barb. 389; and this is the view which it is said that in England "the ingenuity of the bench has been taxed to demonstrate;" 3 Thomp. Corp. § 3969; Lindl. Partn., 4th ed. 249. Among the cases relied on as supporting this view are, 6 Exch. 796; 8 C. B. 849; 6 H. L. Cas. 401; L. R. 5 Eq. 316; but the distinction has been said not to be very satisfactory; per Comstock, J., in 13 N. Y. 599. See Green's Brice, *Ultra Vires* 470, n. Although the weight of authority is as stated, it is nevertheless important to keep in view the different theories held, in order to weigh accurately the authorities upon the powers of directors, and to distinguish between them when they are to be applied to a particular case. Directors have no common-law powers; 3 Thomp. Corp. § 3978; but only granted ones, although in dealing with corporations courts sometimes ascribe to the directors certain powers, termed implied powers, which, however, in fact amount to no more than a recognition by the courts of the usages of business and acts done in the course of business; *id.* But they have no power to make changes in the fundamental law of the corporation, their relation to it being analogous to that of a legislature to the constitution of the state; *id.* § 3979. Accordingly, their power to make such changes must be derived from the charter. They may not change the membership or capital of the corporation by increasing either; 18 Wall. 233; 3 Whart. 228; 72 Mo. 424; or reducing the capital; 3 La. 568; R. M. T. Charlt. 260; nor make by-laws unless specially authorized; 56 Mo. App. 145; nor request or accept amendments to the charter; 9 La. Ann. 341; 44 Mo. 570; 18 N. J. Eq. 178; 2 Conn. 579; (but see *contra*, 1 Disney, Ohio 84, which is doubted, 3 Thomp. Corp. § 3980, n. 7). They may alien property in the course of business; 3 Thomp. Corp. § 3984 (and see note on this subject 59 Am. Rep. 466); or mortgage corporate property; 13 Metc. 497; 36 Vt. 452; 35 Me. 491; 14 Allen 381; 19 N. Y. 207; or make an assignment for the benefit of creditors; 8 Gill 59; and see Thomp. Corp. chs. 145 and 146, which discusses this subject and the validity of preferential assignments by directors in favor of others and of themselves. They cannot give away corporate property; 48 Pa. 29; 24 Me. 490; nor sell the stock at less than par; 1 Biss. 246; in money or money's worth; 7 Mo. App. 210 (but see 139 U. S. 417; 2 Thomp. Corp. § 1665; STOCK); nor, as a general rule, become surety, accommodation indorser, or guarantor; 3 Thomp. Corp. § 3990; but under urgent necessity their assumption of a debt of another to secure from the common creditors an extension for themselves has been held justified; 34 Vt. 134. See 23 How. 381. In the usual course of business they have a general power to borrow money; 8 Wheat. 338; 12 S. & R. 256; and secure it by assigning securities owned by the corporation; 79 Wis. 31; and one so dealing with them is not affected with knowledge of a breach of trust by them; 37 Fed. Rep. 394. They may make, accept, or indorse negotiable paper; 13 Pick. 291; 21 *id.* 270; 29 Me. 133; but a single director is not authorized to make corporate notes; 41 Barb. 575. They may determine the salaries of officers of the corporation; 37 Vt. 608. Under the English decisions the powers of corporations with respect to borrowing money, and making notes are now restricted; 3 Thomp. Corp. § 3989, n. 3.

As to the effect of *ultra vires* acts of directors, the general principle is that they do not bind the corporation or the stockholders unless ratified or unless circumstances of equitable estoppel exist; 3 Thomp. Corp. § 3999; which see for a discussion of this subject and also, *id.* § 5967, and ULTRA VIRES. Their acts are not voidable for mere errors of judgment; 43 Fed. Rep. 483; 13 Colo. 534; even though absurd, if honest; 71 Pa. 11; 86 Ky. 330.

While directors are not strictly trustees, yet they occupy a fiduciary position; 21 Wall. 616; 59 Me. 277; 48 Cal. 398; 54 N. Y. 314; 2 Black 715; 71 Pa. 11; 5 Sawy. 403; 8 Baxt. 108; 1 Edw. Ch. 513; 9 Bush 468; S. C. Zinn, Cas. on Trusts 466, and 4 Am. Corp. Cas. 404; 14 Mich. 477; 8 Kan. 466; 24 N. J. Eq. 463; 30 W. Va. 443; Moraw. Priv. Corp. 513; and by some very leading authorities they are termed trustees; Walworth, Ch., in 3 Paige 222; Hardwicke, Ld. Ch., in 2 Atk. 400. The director of a corporation cannot buy the corporate property at a judicial sale; 2 Pa. Dist. R. 629. Directors also occupy a fiduciary relation to creditors, for whom they have been said to be *quasi* trustees, and when the corporation becomes insolvent, they become trustees for the creditors and stockholders; 1 Holmes 433; 53 Cal. 306; 37 Tex. 660. When directors of an insolvent corporation confessed a judgment against it in favor of one of themselves to give him an advantage by priority of lien over another creditor, about to obtain judgment, the preference was not permitted and the two judgments were placed upon the same footing; 9 Fed. Rep. 532. See Thomp. Liab. of Dir. 397; 18 Ohio St. 169. Directors are held personally responsible for acts of misfeasance or gross negligence, or for fraud and breach of trust; L. R. 5 H. L. 480; 50 Vt. 477; 71 Pa. 11; 68 Law T. 380; 3 Fed. Rep. 817; 17 Cent. L. J. (N. J. Ch.) 433. An action to enforce this responsibility must be brought on behalf of all the stockholders, and not by a single one; 83 Pa. 19; and cannot be brought by a creditor; 8 W. Va. 530. Di-

rectors are not liable for the fraud of agents employed by them ; 26 W. R. 147 ; Thomp. Liab. of Dir. 355.

It is their duty to use their best efforts to promote the interests of the stockholders, and they cannot acquire any adverse interests ; 4 Dill. 330 ; 53 Cal. 466 ; s. c. 31 Am. Rep. 62 ; 59 Me. 277 ; 21 Kan. 365. A director may become a creditor of a corporation, where his action is not tainted with fraud or other improper act ; 37 Fed. Rep. 394. It is said to be the rule that contracts made by a director with his company are voidable ; L. R. 6 H. L. 189 ; 4 Dill. 330 ; 79 Pa. 168 ; 36 Mich. 263 ; 91 U. S. 587 ; 44 Cal. 106. In many instances the courts have held them absolutely void. In a leading English case in the house of lords the view was taken that the directors were agents of the corporation and could not be permitted to enter into engagements or have any personal interest which might possibly conflict with the interests of the corporation, and that no question could be raised as to the fairness or unfairness of such a contract ; 1 McQ. H. L. (Sc.) 461 ; and in several American cases taking this view it is considered that directors were subject to the rule applying to all persons standing in relations of trust and involving duties inconsistent with their dealing with the trust property as their own ; 22 N. Y. 327 ; 36 Ind. 60 ; 64 Wis. 639. A recent high authority says, "there is no sound principle of law or equity which prohibits" such contracts, if entered into in good faith, and where there is a quorum of directors on the other side of the contract present, so that the adoption of the measure does not depend on the vote of the interested director, and even in the latter case the contract is good at law. Because, however, he is on both sides of it equity will closely scrutinize it and set it aside if it violates the good faith which the circumstances require ; 3 Thomp. Corp. § 4059 ; but in many cases contracts of a corporation with directors, fairly made, have been upheld ; 43 Fed. Rep. 483 ; 51 *id.* 33 ; 113 U. S. 322 ; 134 *id.* 688 ; 80 N. Y. 527 ; 43 Mich. 105 ; 47 Conn. 47. The true rule to be ascertained from the cases is probably, that as to such contract there is a presumption of invalidity which casts upon the party claiming under such contracts the burden of showing that no undue advantage was taken or resulted from the relation, and the evidence must clearly show such fairness and good faith ; 134 N. Y. 240 ; 122 *id.* 177 ; 125 *id.* 263 ; 103 U. S. 651 ; 146 *id.* 536 ; 30 N. J. Eq. 702. Accordingly, the more reasonable view is that first stated, and it is supported by the weight of American authority ; 3 Thomp. Corp. § 4061 ; but courts holding the extreme view that such contracts are void will not enforce the fairest contract if the corporation exercises the option to set it aside ; *id.*

Some courts take the view that in all cases of such contracts their nature and terms and the circumstances under which they were made must be taken into consideration, and that after having been subjected to careful scrutiny they will be enforced if for the benefit of the corporation ; 56 Ia. 178 ; 41 Fed. Rep. 736 ; 123 Pa. 503 ; 19 Vt. 187. A corporation acting in good faith and with the sole object of continuing a business which promises to be successful, may give a mortgage to directors who have lent their credit to it, in order to induce a continuance of that credit, and to obtain renewals of maturing paper at a time when it is in fact a going business and expects to continue in business, although its assets may not in fact equal its indebtedness; 157 U. S. 312. See, generally, on the subject of contracts between the directors and the corporation, 3 Thomp. Corp. §§ 4059 to 4075. Note by J. C. Harper, 20 Fed. Rep. 175, and one by Francis Wharton, 17 *id.* 53. This rule extends even to cases where a majority of directors in one corporation contract with another corporation in which they are directors ; Green's Brice, *Ultra Vires* 479, n. ; 93 Mo. 485. In a leading case on this subject a railroad company desired to purchase the property of a canal company, both companies having the same president, who by a purchase of a majority of the stock of the canal company at nominal rates obtained the election of directors favorable to the railroad company. Through legal proceedings, which were in fact collusive, the railroad company purchased the canal property at a price which was alleged by stockholder and creditor to be grossly inadequate. On bill filed to set aside the sale the court said : —"Without attempting to decide as to the power of directors, in the absence of authority given by the stockholders, to fix a price or compensation for the property so sought to be appropriated, it is enough to say that this is not such an agreement as equity will sustain. There was not only such a gross inadequacy of price as to shock the moral sense, but there was, in effect, a sale by a trustee to himself, or to his own use and benefit. This equity will never permit, not even where there is good faith and an adequate consideration. Here there was neither. The vendor and purchaser were in the same interest. As directors of the canal company it was the *duty* of the president and his associates to obtain the *highest* price for the property ; while as stockholders of the railroad company it was their *interest* to get it as *low* as possible. It was in effect, a sale by the railroad company to itself ;" 18 Ohio St. 169. The same principles are supported by many authorities ; 2 Black 715; 43 Wis. 433 ; 38 N. J. L. 505 ; 79 Pa. 168 ; 47 Ia. 641.

In some cases the question has arisen as to the effect of a minority only of the directors being interested in both companies. A contract made between two corporations through their respective boards of directors is not voidable at the discretion of one of the parties thereto from the mere circumstance that a minority of its board of directors are also directors of the other company ; 34 Ohio St. 450. In that case the court said that upon the most diligent research it had been unable to find a case hold-

ing such a contract invalid or voidable from the mere circumstance that a minority of the directors of one company are also directors of the other company, and, "in our judgment, where a majority of the board are not adversely interested and have no adverse employment, the right to avoid the contract or transaction does not exist without proof of fraud or unfairness;" *id.;* 10 Fed. Rep. 413, 433; 77 Ill. 226. With respect to the rule just stated, however, Mr. J. C. Harper, in a note on this general subject, says:—

"It may be questioned, from the authorities heretofore referred to, and the general tendency of decisions upon the relations of directors and other officers to the stockholders and creditors, whether the foregoing will be accepted as the correct view of the effect of the presence of an adversely interested minority. It is respectfully suggested that the stockholders and creditors contracted for a full board of impartial disinterested directors;" 20 Fed. Rep. 180. This view is sustained by many courts; in another case it was said: "A director whose personal interests are adverse to those of the corporation has no right to be or act as a director. As soon as he finds that he has personal interests in conflict with those of the company he ought to resign;" 18 Ohio St. 183. In considering the same subject McCrary, J., said:—"Besides, where shall we draw the line? If the presence of two interested directors in the board at the time of the ratification does not vitiate the act, would the presence of a larger number of such directors have that effect, and, if so, what number;" 2 Fed. Rep. 879; and on appeal his decision as to the voidability of the contract was affirmed and the supreme court per Miller, J., said, "We concur with the circuit judge that no such contract as this can be enforced in a court of equity where it is resisted and its immorality is brought to light. . . . Such contracts are not absolutely void, but are voidable at the election of the parties affected by the fraud. It may often occur that, notwithstanding the vice of the transaction, namely, the directors or trustees, or a majority of them, being interested in opposition to the interest of those whom they represent, and in reality parties to both sides of the contract, that it may be one which those whose confidence is abused may prefer to ratify or submit to. It is, therefore, at the option of these latter to avoid it, and, until some act of theirs indicates such a purpose, it is not a nullity;" 109 U. S. 524.

Arrangements made by directors of a railroad company to secure from it unusual advantages through the medium of a new company in which they are to be stockholders, and which is to receive valuable contracts from the railroad company in the profits of which they would share, are not to be enforced by the courts; 103 U. S. 651, affirming 4 Dill. 330; such contracts cannot be made or ratified by a board of directors including members of the construction company and are void; 109 U. S. 522; but a recovery may be had on such a contract for work actually benefitting the railroad company, on *quantum meruit; id.*

In dealing with third parties, directors have all the powers conferred upon them by the charter. Third parties, without notice, are not bound to know of limitations placed upon directors by by-laws or otherwise; Brice, *Ultra Vires* 474; L. R. 5 Ch. 288; 12 Cush. 1; 1 Woolw. 40; but see 62 N. Y. 240; 17 Mass. 1. They cannot delegate matters in which they are bound to use their discretion; Green's Brice, *Ultra Vires* 490; Moraw. Priv. Corp. 536; 21 N. H. 149. See 96 U. S. 341; 2 Metc. 163; 19 N. Y. 207. The powers of directors of eleemosynary corporations are much greater than those of moneyed corporations; 41 Mo. 578. As to the power of directors to transfer all the corporate property for the purpose of winding up the company, see 5 W. & S. 249.

Unless the charter provides otherwise, directors need not be chosen from among the stockholders; L. R. 5 Ch. Div. 306; 22 Ohio St. 354. Directors *de facto* are, presumably, directors *de jure*, and their contracts bind the company; L. R. 7 Ch. 587. A director who is permitted to act as such after he has sold all his stock, is a director *de facto*, and the proceedings of the board in which he takes part are valid as to third persons; 4 Misc. Rep. 570.

In the absence of a provision of the charter or of a special contract, a director is not entitled to compensation; 39 N. Y. 202; 71 Ill. 200; 55 Ia. 104; 39 Am. Rep. 167; and he cannot recover therefor even where a resolution to compensate him has been passed after the services were rendered; 29 Pa. 534; 49 *id.* 118; 40 Ind. 361; 27 Conn. 170. But it is otherwise, when the services were outside of the line of his duty as an officer, under the charter and by-laws; as obtaining a right of way, soliciting subscriptions, etc.; 87 Ill. 447; 49 Mo. 389; 3 Misc. Rep. 325; 74 Mich. 226. The supreme court of Pennsylvania, in a suit by a director elected to serve without compensation, to recover a sum allowed to him by resolution after the services were rendered said: "We regard it as contrary to all sound policy to allow the director of a corporation elected to serve without compensation, to recover payment for services performed by him in that capacity, or as incidental to his office. It would be a sad spectacle to see the managers of any corporation, ecclesiastical or lay, civil or eleemosynary, assembling together and parcelling out among themselves the obligations or other property of the corporation in payment for their past services;" 29 Pa. 536. This doctrine has, however, been disapproved by the supreme court of Kansas, which said: "We think the rule is, in the absence of positive restrictions, that, when no salary is prescribed, one appointed to an executive office, like that of cashier, is entitled to reasonable compensation for his services, and that the directors have power to fix the salary after the expiration of the term of office, and this, though such appointee is also a director,

and continues to be such while holding the independent office;" 20 Fed Rep. 183, note. There is undoubtedly no implied promise to pay such an officer either for regular or extra services, and the underlying principle has been stated by the supreme court of Massachusetts in terms quoted with approval by the supreme court of the United States: "Thus, directors of banks and of many other corporations usually receive no compensation. In such cases, however valuable the services may be, the law does not raise an implied contract to pay by the party who receives the benefit of them. To render such party liable as a debtor under an implied promise, it must be shown, not only that the services were valuable, but also that they were rendered under such circumstances as to raise the fair presumption that the parties intended and understood that they were to be paid for; or, at least, that the circumstances were such that a reasonable man, in the same situation with the person who receives and is benefitted by them, would and ought to understand that compensation was to be paid for them;" 130 Mass. 391; 137 U. S. 98. See Pierce, R. R. 31 and notes, where the cases on this point are collected.

Where five members constituted a board of directors of which three were a quorum, action taken by three directors present at a meeting, upon a majority vote, was held to be valid; 19 N. J. Eq. 402; s. c. 3 Am. Corp. Cas. 592. See QUORUM.

To make a legal board of directors, they must meet at a time when and a place where every other director has the opportunity of attending to consult and be consulted with; and there must be a sufficient number present to constitute a quorum; 3 La. 574; 13 *id.* 527. See 11 Mass. 288; 5 Litt. 45; 12 S. & R. 256; 1 Pet. 46. The fact that notice of a special meeting of the board was not given as provided by the by-laws of a corporation is immaterial, if all the members of the board were in fact present and participated in the proceedings; 53 Minn. 381. See 35 Fed. Rep. 161.

The fact that a stockholder contemplates, if elected a director, to vote for an arrangement by which another corporation will control the company, cannot, though such an arrangement be illegal, affect the validity of his election; 49 Ohio St. 668.

Provision is usually made, in the act under which a company is incorporated, for the election of directors. Such election usually takes place once a year, and is generally by a vote of the stockholders.

DIRIMANT IMPEDIMENTS. Those bars which annul a consummated marriage.

DISABILITY. The want of legal capacity. See ABATEMENT; DEVISE; DEED; INFANCY; INSANITY; LIMITATION; MARRIAGE; PARTIES.

DISABLING STATUTES (also called the *Restraining Statutes*). The acts of 1 Eliz. c. 19, 13 Eliz. c. 10, 14 Eliz. cc. 11, 14, 18 Eliz. c. 11, and 43 Eliz. c. 29, by which the power of ecclesiastical or eleemosynary corporations to lease their lands was restricted. 2 Bla. Com. 319, 321; Co. Litt. 44 *a*; 2 Steph. Com. 735.

DISAFFIRMANCE. The act by which a person who has entered into a voidable contract, as, for example, an infant, disagrees to such contract and declares he will not abide by it.

Disaffirmance is expressed or implied:—the former, when the declaration that the party will not abide by the contract is made in terms; the latter, when he does an act which plainly manifests his determination not to abide by it: as, where an infant made a deed for his land, and on coming of age he made a deed for the same land to another; 2 D. & B. 320; 10 Pet. 58; 13 Mass. 371, 375.

DISAFFOREST. To restore to their former condition lands which have been turned into forests. To remove from the operation of the forest laws. 2 Bla. Com. 416.

DISAVOW. To deny the authority by which an agent pretends to have acted, as when he has exceeded the bounds of his authority.

It is the duty of the principal to fulfil the contracts which have been entered into by his authorized agent; and when an agent has exceeded his authority he ought promptly to disavow such act, so that the other party may have his remedy against the agent. See AGENT; PRINCIPAL.

DISBAR. In England, to expel a barrister from the bar. Wharton.

In the United States, to deprive a person of the right to practise as an attorney at law.

An attorney in England is said to be stricken from the rolls. As disbarring is a very extreme penalty, suspension is more frequent. See ATTORNEY. A lawyer can be disbarred only for misconduct in his professional capacity or respecting his professional character. He cannot be disbarred for theft, perjury, and the like offences, without a formal indictment, trial, and conviction. The office of an attorney is his property and he cannot be deprived of it unless by judgment of his peers and the law of the land; 95 Pa. 220.

Courts have jurisdiction and power upon their own motion without formal complaint or petition, in a proper case, to strike the name of an attorney from the roll, provided he has had reasonable notice and an opportunity to be heard. 95 Pa. 220; 54 Wis. 379; 107 U. S. 265.

The complaint must affect the official character of the attorney; 68 Ill. 157; 40 Am. Rep. 637. The offence need not be an indictable one; but its character must be such as to show the attorney unfit to be trusted with the powers of the profession; 30 L. J. (Q. B.) 32; 10 Bush. Ky. 592; 2 Cra. C. C. 60; 5 Rawle 191. But ignorance of the law is not a cause for disbarment; 24 N. H. 149. Disrespect to the court may be

a cause if it is very gross; 24 Fed. Rep. 726; and any breach of fidelity to the court is good ground; 82 N. Y. 161; 71 Me. 288. So also bringing a divorce suit without authority and acting in fraudulent collusion with the husband to procure the divorce without consent or knowledge of the wife; 6 Tex. 55; perjury or subornation of perjury; 10 M. & W. 28; or violation of confidence of client; 71 Me. 288. On being convicted of felony an attorney loses his right to practise in court without an order removing him; 5 Daly, N. Y. 465. Neither pardon for felony nor a satisfactory settlement with the injured party affects the court's power to disbar; 64 Me. 140; 93 Pa. 116; Weeks, Attys. § 83.

An unsigned advertisement that divorces could be procured for reasons unknown to the law, and without reference to the residences of the parties, is cause for disbarment; 79 Ill. 148.

See, generally, Archbold, Practice, Chitty's ed. 148; 1 Tidd, Pr., 9th ed. 89; 6 East 126; L. R. 3 Q. B. 543; 5 B. & Ald. 1088.

DISBURSEMENT. Money paid out by an executor, guardian, or trustee, on account of the fund in his hands. The necessary expenditures incurred in an action, and which, under the codes of procedure of some of the states, are included in the costs, are also so called. But see 41 Ala. 267; 9 Abb. Pr. o. s. 111.

DISCEPTIO CAUSÆ (Lat.). **In Roman Law.** The argument of a cause by the counsel on both sides. Calvinus, Lex.

DISCHARGE. In Practice. The act by which a person in confinement under some legal process, or held on an accusation of some crime or misdemeanor, is set at liberty; the writing containing the order for his being so set at liberty is also called a discharge.

The discharge of a defendant, in prison under a *ca. sa.*, when made by the plaintiff, has the operation of satisfying the debt, the plaintiff having no other remedy; 4 Term 526.

But when the discharge is in consequence of the insolvent laws, or the defendant dies in prison, the debt is not satisfied. In the first case the plaintiff has a remedy against the property of the defendant acquired after his discharge, and in the last case against the executors or administrators of the debtor. Bacon, Abr. *Execution*, D; Bingham, *Execution* 266.

The word has still other uses. Thus, we speak of the discharge of a surety, whereby he is released from his liability; of a debt; of a contract; of lands, or money in the funds, from an incumbrance; of an order of a court of justice, when such order is vacated; 2 Steph. Com. 107, 161. We also speak of a discharge in bankruptcy; 121 U. S. 457; 142 *id.* 381; 48 Fed. Rep. 789.

DISCHARGE OF A JURY. See JURY.

DISCLAIMER. A disavowal; a renunciation; as, for example, the act by which a patentee renounces part of his title of invention.

Of Estates. The act by which a party refuses to accept an estate which has been conveyed to him. Thus, a trustee is said to disclaim who releases to his fellow-trustees his estate, and relieves himself of the trust; 1 Hill, R. P. 354; 13 Conn. 83; 6 Cow. 616.

Of Tenancy. The act of a person in possession, who denies holding the estate of the person who claims to be the owner. 2 Nev. & M. 672. An affirmation, by pleading or otherwise, in a court of record, that the reversion is in a stranger. It works a forfeiture of the lease at common law; Co. Litt. 251; 1 Cruise, Dig. 109; Woodf. Landl. & T. 360; but not, it is said, in the United States; 1 Washb. R. P. 93. Equity will not aid a tenant in denying his landlord's title; 1 Pet. 486.

In Patent Law. A declaration in writing, filed under the patent laws, by an inventor whose claim as filed covers more than that of which he was the original inventor, renouncing such parts as he does not claim to hold. See PATENT.

In Pleading. A renunciation by the defendant of all claim to the subject of the demand made by the plaintiff.

IN EQUITY. It must, in general, be accompanied by an answer; 10 Paige, Ch. 105; 2 Russ. 458; 2 Y. & C. 546; 9 Sim. 102; 2 Bland, Ch. 678; and always when the defendant has so connected himself with the matter that justice cannot be done otherwise; 9 Sim. 102. It must renounce all claim in any capacity and to any extent; 6 G. & J. 152. It may be to part of a bill only, but it must be clearly a separate and distinct part of the bill; Story, Eq. Pl. § 839; Beach, Mod. Eq. Pr. 282. A disclaimer may, in general, be abandoned, and a claim put in upon subsequent discovery of a right; Cooper, Eq. Pl. 310.

AT LAW. *In real actions*, a disclaimer of tenancy or estate is frequently added to the plea of non-tenure; Littleton § 391; 10 Mass. 64. The plea may be either in abatement or in bar; 13 Mass. 439; 7 Pick. 31; as to the whole or any part of the demanded premises; Stearns, Real Act. 193.

At common law it is not pleaded as a bar to the action, nor is it strictly a plea in abatement, as it does not give the plaintiff a better writ. It contains no prayer for judgment, and is not concluded with a verification. It is in effect an offer by the plaintiff to yield to the claim of the demandant and admit his title to the land; Stearns, Real Act. 193. It cannot, in general, be made by a person incapable of conveying the land. It is equivalent to a judgment in favor of the demandant, except when costs are demanded; 13 Mass. 439; in which case there must be a replication by the demandant; 6 Pick. 5; but no formal replication is requisite in Pennsylvania; 5 Watts 70; 3 Pa. 367. And see 1 Washb. R. P. 93.

DISCONTINUANCE OF ESTATES. An alienation made or suffered

by the tenant in tail, or other tenant seised in *autre droit*, by which the issue in tail, or heir, or successor, or those in reversion or remainder, are driven to their action, and cannot enter.

The term discontinuance is used to distinguish those cases where the party whose freehold is ousted can restore it only by action, from those in which he may restore it by entry; Co. Litt. 325 *a*; 3 Bla. Com. 171; Ad. Ej. 35; Bac. Abr.; Viner, Abr.

Discontinuances of estates, prior to their express abolition, had long become obsolete, and they are now abolished by 3 & 4 Will. IV. c. 27, and 8 & 9 Vict. c. 106; Moz. & W. Dic.; 1 Steph. Com. 510, n.

DISCONTINUANCE. In Pleading. The chasm or interruption which occurs when no answer is given to some material matter in the preceding pleading, and the opposite party neglects to take advantage of such omission. See Com. Dig. *Pleader*, W.; Bac. Abr. *Pleas*, P. It is distinguished from insufficient pleading by the fact that the pleading does not profess to answer all the preceding pleading in a case of discontinuance: 1 Wms. Saund. 28, n. It constitutes error, but may be cured after verdict, by 32 Hen. VIII. c. 80, and after judgment by *nil dicit*, confession, or *non sum informatus* under 4 Anne, c. 16. See, generally, 1 Saund. 28; 4 Rep. 62 *a*; 56 N. H. 414.

In Practice. The chasm or interruption in proceedings occasioned by the failure of the plaintiff to continue the suit regularly from time to time, as he ought; 3 Bla. Com. 296; 52 Miss. 467; 56 N. H. 416; 71 Ala. 215. The entry upon record of a discontinuance has the same effect. The plaintiff cannot discontinue after demurrer joined and entered, or after verdict or writ of inquiry, without leave of court; Cro. Jac. 35; 1 Lilly, Abr. 473; 8 C. C. App. 437; but see 7 Wash. 407; although he can notwithstanding the interposition of a counterclaim; 17 N. Y. Sup. 844; and is generally liable for costs when he discontinues, though not in all cases. See 1 Johns. 143; 18 *id.* 252; 1 Cai. 116; 48 Mo. 235; 12 Wend. 402; Com. Dig. *Pleader* (W 5); Bac. Abr. *Plea* (5 P).

DISCONTINUOUS SERVITUDE. An easement made up of repeated acts instead of one continuous act, such as right of way, drawing water, etc. See EASEMENT.

DISCOUNT. In Contracts. Interest reserved from the amount loaned at the time of making a loan. An allowance sometimes made for prompt payment. As a verb, it is used to denote the act of giving money for a bill of exchange or promissory note, deducting the interest; 6 Ohio St. 527; 15 *id.* 87; 13 Conn. 248; 48 Mo. 189; 8 Wheat. 338; 14 Ala. 677; 42 Md. 592.

In an ordinary commercial document, discount means rebate of interest and not "true" or mathematical discount; [1896] 2 Ch. 320.

A discount by a bank means *ex vi termini* a deduction or drawback made upon its advances or loans of money upon negotiable paper or other evidences of debt, payable at a future day, which are transferred to the bank. It is the difference between the price and the amount of the debt, the evidence of which is transferred; 104 U. S. 276; 8 Wheat. 350.

The taking of legal interest in advance is not usurious; but it is only allowed for the benefit of trade and where the bill or note discounted is meant for circulation and is for a short term; 2 Cow. 678, 712; 3 Wend. 408.

There is a difference between *buying* a bill and *discounting* it. The former word is used when the seller does not indorse the bill and is not accountable for its payment. See Pothier, *De l'Usure*, n. 128; 3 Pet. 40; Blydenburgh, Usury; Sewell, Banking; 14 Ala. 668; 7 How. Pr. 144. The true discount for a given sum, for a given time, is such a sum as will in that time amount to the interest of the sum to be discounted. Wharton.

In Practice. A set-off or defalcation in an action. Viner, Abr. *Discount*. But see 1 Metc. Ky. 597.

DISCOVERT. Not covert; unmarried. The term is applied to a woman unmarried, or widow,—one not within the bonds of matrimony.

DISCOVERY. (Fr. *découvrir*, to uncover, to discover). The act of finding an unknown country.

The nations of Europe adopted the principle that the discovery of any part of America gave title to the government by whose subjects or by whose authority it was made, as against all European governments. This title was to be consummated by possession; 8 Wheat. 543; 16 Pet. 367; 2 Washb. R. P. 518.

By the law of nations, dominion of new territory may be acquired by discovery and occupation as well as by cession or conquest; 137 U. S. 202.

An invention or improvement. See PATENT. Also used of the disclosure by a bankrupt of his property for the benefit of creditors.

In Practice. The disclosure of facts resting in the knowledge of the defendant, or the production of deeds, writings, or things in his possession or power, in order to maintain the right or title of the party asking it, in some other suit or proceeding.

It was originally an equitable form of procedure, and a bill of discovery, strictly so called, was brought to assist parties to suits in other courts. Every bill in equity is in some sense a bill of discovery, since it seeks a disclosure from the defendant, on his oath of the truth of the circumstances constituting the plaintiff's case as propounded in his bill; Story, Eq. Jur. § 1483; but the term is technically applied as defined above. See 4 R. I. 450; 2 Stockt. Ch. 273. Many important questions have arisen out of the exercise of this power by equity; but these are of comparatively little practical importance in England and many of the states of the United States, where parties may be made witnesses and compelled to produce books and papers in courts of law; 3 Steph. Com. 598; 17 & 18 Vict. c. 125.

Such bills are greatly favored in equity, and are sustained in all cases where some well-founded objection does not exist against

the exercise of the jurisdiction; Story, Eq. Jur. § 1488; 8 Conn. 528; 2 H. & G. 382. See 17 Mass. 117; 22 Me. 207; 4 Hen. & M. 478; 3 Md. Ch. Dec. 418; 40 Ill. App. 616. Some of the more important of the objections are, —*first*, that the subject is not cognizable in any municipal court of justice; Story, Eq. Jur. § 1489; *second*, that the court will not lend its aid to obtain a discovery for the particular court for which it is wanted, as where the court can itself compel a discovery; 2 Ves. 451; 2 Edw. Ch. 605; 37 N. H. 55; *third*, that the plaintiff is not entitled by reason of personal disability; *fourth*, that the plaintiff has no title to the character in which he sues; 4 Paige, Ch. 639; *fifth*, that the value of the suit is beneath the dignity of the court; *sixth*, that the plaintiff has no interest in the subject-matter or title to the discovery required; 2 Bro. Ch. 321; 4 Madd. 193; Cooper, Eq. Pl. c. 1, § 4; 2 Metc. Mass. 127; 17 Me. 404; 10 Ky. L. Rep. 980; or that an action for which it is wanted will not lie; 3 Bro. Ch. 155; 1 Bligh, N. S. 120; 3 Y. & C. 255; see 1 Phill. Ch. 209; *seventh*, that the defendant is not answerable to the plaintiff, but that some other person has a right to call for the discovery; *eighth*, that the policy of the law exempts the defendant from the discovery, as on account of the peculiar relations of the parties; 2 Y. & C. 107; 8 E. L. & Eq. 89; 35 *id.* 283; 3 Paige, Ch. 36; in case of arbitrators; 2 Vern. 380; 3 Atk. 529; *ninth*, that the defendant is not bound to discover his own title; Bisph. Eq. 561; 1 Vern. 105; 6 Whart. 141; see 61 Conn. 593; or that he is a *bona fide* purchaser without notice of the plaintiff's claim; 2 Edw. Ch. 81; 3 M. & K. 581; 8 Sim. 153; 5 Mas. 269; 1 Sumn. 506; 7 Pet. 252; 7 Cra. 2; 6 Paige, Ch. 323; and see 33 Vt. 252; 1 Stockt. 82; *tenth*, that the discovery is not material in the suit; 2 Ves. 491; 1 Johns. Ch. 548; *eleventh*, that the defendant is a mere witness; 2 Bro. Ch. 332; 3 Edw. Ch. 129; but see 2 Ves. 451; 1 Sch. & L. 227; 11 Sim. 305; 1 Paige, Ch. 37; *twelfth*, that the discovery called for would criminate the defendant,

The suit must be of a purely civil nature, and may not be a criminal prosecution; Lofft 1; 19 How. St. Tr. 1154; 7 Md. 416; a penal action; 1 Keen 329; 2 Blatchf. 39; a suit partaking of this character; 1 Pet. 100; 6 Conn. 36; 14 Ga. 255; or a case involving moral turpitude. See 1 Bligh, N. S. 96; 2 E. L. & Eq. 117; 5 Madd. 229; 11 Beav. 380; 1 Sim. 404; 24 Miss. 17.

Workmen pledged to secrecy and employed in a factory in which the business is conducted in private, to secure secrecy as to the method of manufacture, will not be compelled, in a suit against their employer, to disclose such secrets; 49 Fed. Rep. 17.

A corporation not a party to a suit will not be compelled to open its records which it is claimed will disclose something of importance to the litigation; 35 Fed. Rep. 15; nor is an adverse examination of a defendant before trial allowable for the purpose of discovering a cause of action; 3 Misc. Rep. 514; 67 Hun 398.

An infant party to an action cannot be compelled to make discovery of documents; [1892] 2 Q. B. 178.

The court has power to allow a party to an action to take photographs of documents in the possession of the other party; [1893] 2 Q. B. 191.

It seems to be settled that a bill will lie against a corporation and its officers to compel a discovery from the officers, to aid a plaintiff or a defendant in maintaining or defending a suit brought against or by the corporation alone; 19 Blatchf. 69; 1 Ch. D. 71; 144 Mass. 347.

In the sense in which the word is used with respect to equity suits generally, there was, until a comparatively recent period, a failure to recognize the distinction between the two functions of an answer in chancery, viz.: discovery and defence. These two were in the civil law entirely separated, while in chancery they were indiscriminately commingled. The distinction is very clearly put in Langdell's Equity Pleadings, 2d ed. § 68, where the author attributes to Wigram (Disc., 2d ed. § 17) and Hare (Disc. 223) the simultaneous notice of what he terms "the unnatural union." The distinction is important because, when it is borne in mind, the "rule for determining what discovery the defendant must give in his answer becomes simple and uniform. He must answer categorically every material allegation and charge in the bill, unless he has some objection which would be good in the mouth of a witness." In a note to his second edition, Professor Langdell characterizes this rule as too narrow, and sets forth cases in which a defendant may object to answer as to matters which as a witness he could not. Among these are the cases of a defendant against whom no case is made and no relief prayed; one joined because he has a conflicting claim against another defendant, which must be set up by cross-bill; or where a defendant may refuse to answer parts of the bill relating wholly to other defendants. With respect to particular cases the rule must be deduced from the decisions most nearly applicable, and the cases will be found to be collected and examined with discrimination in the work cited. See also Ad. Eq. b. 1, ch. 1.

Courts of equity which have once obtained jurisdiction for purposes of discovery will dispose of a cause finally, if proper for the consideration of equity, though the remedy at law is fully adequate; 1 Story, Eq. Jur. 64 *k*; 1 Munf. 98; 1 A. K. Marsh. 463, 468; 15 Me. 82; 2 Johns. Ch. 424; 1 Dessaus. 208; 2 Ov. 71; 96 Ala. 469. Consult Adams; Story; Bispham; Pomeroy; Beach, Eq. Jur.; Greenleaf; Phillips, Evidence; Wigram; Hare, Discovery; Joy, Confessions; Langdell, Equity Pleading.

DISCREDIT. To deprive one of credit or confidence.

In general, a party may discredit a witness called by the opposite party, who testifies against him, by proving that his character is such as not to entitle him to credit or confidence, or any other fact which

shows he is not entitled to belief. It is clearly settled, also, that the party voluntarily calling a witness cannot afterwards impeach his character for truth and veracity; 1 Mood. & R. 414; 3 B. & C. 746; 70 Miss. 742; 32 Tex. Cr. R. 519. See 5 Ind. App. 243; 42 Ill. App. 178; 52 Kan. 531. If a party call a witness who turns out unfavorable, he may call another to prove the same point; Tayl. Ev. 1247; 2 Campb. 556; 2 Stark. 334; 1 Nev. & M. 34; 4 B. & A. 193; 50 Mo. App. 18; 1 Phill. Ev. 229. The rule that a party cannot discredit his own witness is not violated by proving facts contrary to the testimony of such witness; 111 N. C. 314.

Where the evidence of a witness is a surprise to the party calling him, the trial judge, in the exercise of discretion, may permit him to be cross-examined by such party to show that his previous statements and conduct were at variance with his testimony; 150 Pa. 611; 54 Minn. 434. Proof of contradictory statements by one's own witness, voluntarily called and not a party, is in general not admissible, although the party calling him may have been surprised by them; but he may show that the facts were not as stated, although these may tend incidentally to discredit the witness; 151 U. S. 303.

DISCREPANCY. A difference between one thing and another, between one writing and another; a variance.

A material discrepancy exists when there is such a difference between a thing alleged and a thing offered in evidence as to show they are not substantially the same: as, when the plaintiff in his declaration for a malicious arrest averred that "the plaintiff, in that action, did not prosecute his said suit, but therein made default," and the record was that he obtained a rule to discontinue.

An immaterial discrepancy is one which does not materially affect the cause: as, where a declaration stated that a deed bore date in a certain year of our Lord, and the deed was simply dated "March 30, 1701." 2 Salk. 658; 19 Johns. 49; 5 Taunt. 707; 2 B. & Ald. 301; 8 Miss. 428; 2 McLean 69; 21 Pick. 486.

DISCRETION. That part of the judicial function which decides questions arising in the trial of a cause, according to the particular circumstances of each case, and as to which the judgment of the court is uncontrolled by fixed rules of law.

The power exercised by courts to determine questions to which no strict rule of law is applicable but which, from their nature, and the circumstances of the case, are controlled by the personal judgment of the court.

Whether or not a particular question is one of discretion is in almost every case a matter of settled law, and the individual court or judge has no power to place it within or without that category. It is only when a question arises which, according to precedent, is treated as such that the judicial discretion is invoked and its exercise cannot be reviewed.

The discretion of a judge is said by Lord Camden to be the law of tyrants: it is always unknown, it is different in different men; it is casual, and depends upon constitution, temper, and passion. In the best, it is oftentimes caprice; in the worst, it is every vice, folly, and passion to which human nature is liable. *Optima lex quæ minimum relinquit arbitrio judicis; optimus judex qui minimum sibi.* Bacon, Aph.; 1 Pow. Mortg. 247 *a*; 2 Bell, Suppl. to Ves. 391; Toullier, liv. 3, n. 338; 1 Lilly, Abr. 447. But the prevailing opinion is that discretion must not be arbitrary, fanciful, and capricious; it must be legal and regular, governed by rule, not by humor; 4 Burr. 25; 18 Wend. 99.

There is a species of discretion which is authorized by express law and without which justice cannot be administered: for example, if an old offender, a man of much intelligence and cunning, whose talents render him dangerous to the community, induces a young man of weak intellect to commit a larceny in company with himself, they are both liable to be punished for the offence. The law foreseeing such a case, has provided that the punishment should be proportioned so as to do justice, and it has left such apportionment to the discretion of the judge. It is evident that without such discretion justice could not be administered; for one of these parties assuredly deserves a much more severe punishment than the other.

And many matters relating to the trial such as the order of giving evidence, granting of new trials, etc., are properly left mainly or entirely to the discretion of the judge; 18 Wend. 79, 99; 34 Barb. 291; 38 S. C. 399; 92 Mich. 621; 136 N. Y. 655; 2 C. C. App. 380; 111 N. C. 145.

Decisions upon matters within the absolute discretion of a court are not reviewable in courts of appeal; 157 Mass. 579; 159 *id.* 200; 111 N. C. 509; 102 U. S. 120; 3 C. C. App. 663; but the discretion in granting or refusing a writ of mandamus must be exercised under legal rules, and is reviewable in an appellate court; 78 N. Y. 56. Such a writ will not be granted to regulate the exercise of a discretion on the part of an official; 15 Fla. 317; 52 Ala. 87.

A testator may leave it to his executor to construe the provisions of his will, and to decide doubtful questions concerning his intentions; 15 Fed. Rep. 696; and the donor of a power may leave its execution to the discretion of the donee; 4 D. J. & S. 614.

In Criminal Law. The ability to know and distinguish between good and evil,—between what is lawful and what is unlawful.

The age at which children are said to have discretion is not very accurately ascertained. Under seven years, it seems that no circumstances of mischievous discretion can be admitted to overthrow the strong presumption of innocence which is raised by an age so tender; 1 Hale, Pl. Cr. 27, 28; 4 Bla. Com. 23. Between the ages of seven and fourteen the infant is, *prima facie*, destitute of criminal design; but this presumption diminishes as the age increases, and even during this interval of youth may be repelled by positive evidence of vicious intention; for tenderness of years will not excuse a maturity in crime, the maxim in these cases being *malitia supplet ætatem*. At fourteen, children are said to have acquired legal discretion; 1 Hale, Pl. Cr. 25. See 88 Pa. 35; DOLI CAPAX; AGE.

DISCRETIONARY TRUSTS. Those which cannot be duly administered without the application of a certain degree of prudence and judgment: as, when a fund is given to trustees to be distributed in certain charities to be selected by the trustees.

DISCRIMINATION. This word is now generally applied in law to a breach of the statutory or common-law duty of a carrier to treat all customers alike. It is applied to inequality in both rates of fare and rates of freight, and may also be practised by inequality in the facilities afforded to different consignors. In regard to freight rates, discrimination means the charging shippers unequal sums for carrying the same quantity of goods equal distances; 95 N. C. 434. The fact that the higher charge is not unreasonable will not affect the case; 31 Fed. Rep. 57. The mere allowance of a rebate will not prove discrimination; for others may obtain the same advantage; but to contract to deny others the benefit of a rebate is discrimination; 22 Mo. App. 224; 38 N. J. L. 505; 32 A. & E. R. R. Cas. 413; 56 Ill. 513; 118 Ill. 250.

Mere inequality in charges is not discrimination; it is such only when the shippers stand on the same footing in all respects. The reasonableness of unequal rates may be proved by the difference in the character of the goods, or the part of the line over which they are shipped, having due regard to the expense of carriage; 67 Ill. 11; 12 Gray 393; 74 Pa. 181; 9 Lea 684; 58 Tex. 98.

It is held in England that it is not an unlawful discrimination for a carrier to convey a large quantity of merchandise at a less rate than that charged for smaller quantities; for transportation in large and small quantities does not involve the same amount of trouble and expense; 4 Nev. & M. 7; 4 C. B. N. S. 366; but a contrary view prevails in the United States; 12 Fed. Rep. 309; 31 Fed. Rep. 652; 43 Ohio St. 379; 1 Interst. Com. Rep. 107; and in any case it is not lawful to charge a less rate to all the inhabitants of one town, irrespective of their individual shipments, than to those of another, though the aggregate of freight shipped by the former is greater than that shipped by the latter; 4 Eng. R. R. & Canal Traffic Cases 291.

The rule requiring equal charges for equal distances does not require that the rates for a specified distance should be increased for every greater distance by the corresponding multiple of the specified distance; 111 E. C. L. 248; 1 Interst. Com. Rep. 480; 74 Pa. 190.

Under the Interstate Commerce Act.— This question of discrimination arises in the United States most frequently under the provisions of the Interstate Commerce Act of 1887, Feb. 24; U. S. Rev. Stat. 1 Supp. 529, which provides: (§ 2) That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination; (§ 3) That it shall be unlawful for any such common carrier to give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or description of traffic, or subject such to any undue or unreasonable prejudice or disadvantage; and (§ 4) That it shall be unlawful for any such common carrier to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance, within the same line in the same direction, the shorter being included in the longer distance.

The fact that one railroad is long and circuitous, and therefore obliged to charge a less rate per mile to a competitive point than its shorter rivals, will not establish dissimilar conditions, nor does the fact that there is possible water competition; 1 Interst. Com. Rep. 160; but differences in grade compelling the use of shorter trains, is to be considered in deciding the question of discriminations; 4 Nev. & M. 192. So, it would seem that an increase in the speed of trains will justify an increase in the rate of freight charged; 4 Eng. R. R. & Canal Traffic Cases 291; as may the fact that cars are of a peculiar construction, and only fit for hauling a certain class of freight, so that they must be returned empty; but not the fact that cars are of an improved construction, so that more valuable freight is transported in them; 1 Interst. Com. Rep. 132. On the other hand, it is not discrimination for a carrier to refuse to transport cattle in cars of a special construction furnished by the shipper, when it supplies cars for the same purpose, which it can use more conveniently and profitably by reason of their being likewise so adapted for other freight when not used for carrying cattle; 6 Ry. & Corp. L. J. 364.

DISCUSSION. In Civil Law. A proceeding on the part of a surety by which the property of the principal debtor is made liable before resort can be had to the sureties: this is called the *benefit of discussion.* This is the law in Louisiana. See Domat, 3, 4, 1–4; Burge, Suretyship 329, 343, 348; 5 Toullier 544; 7 *id.* 93.

In Scotch Law. The ranking of the proper order in which heirs are liable to satisfy the debts of the deceased. Bell.

DISENTAILING ASSURANCE. A deed executed under stat. 3 & 4 Will. 4, c. 74, whereby the tenant in tail is enabled to alienate the land for an estate in fee-simple or any less estate, and thus destroy the entail. The deed must be duly enrolled in the court of chancery within six months of its execution; 1 Steph. Com. 250, 575.

DISFRANCHISEMENT. The act of depriving a member of a corporation of his right as such, by expulsion.

It differs from amotion (*q. v.*), which is applicable to the removal of an officer from office, leaving him his rights as a member; Willc. Corp. n. 708; Ang. & A. Corp. 237; 10 H. L. Cas. 404; 44 Mo. 570; 2 Daly 329.

The power of disfranchisement extends only to societies not owning property or organized for gain; unless the power be given by the charter; 50 Pa. 107; Green's Brice, *Ultra Vires* 45; 41 L. T. N. S. 490; 80 Ill. 134; 8 Hun 216; Ang. & A. Corp. § 410. It extends to the expulsion of members who have proved guilty of the more heinous crimes, as to which there must first be a conviction by a jury; 2 Binn. 448; 52 Pa. 125. It is said that the power exists where members do not observe certain duties to the corporation, especially where the breach tends directly or indirectly to the forfeiture of the corporate rights, and franchises, and the destruction of the corporation; Green's Brice, *Ultra Vires* 45; 45 Ill. 112; 61 Ga. 86; 62 Ia. 26. A member is entitled to notice of the charges against him, and to an opportunity to be heard; 20 Pa. 435; 50 *id.* 107; 54 Barb. 532; 40 N. J. L. 295; 24 How. Pr. 216; 44 Mo. 570; 111 Mass. 185. See EXPULSION.

Except in cases authorized by constitutional provisions, a citizen entitled to vote cannot be disfranchised, or deprived of his right by any action of the public authorities, and a law having such effect is void; Cooley, Const. Lim. 776; as an act creating a new county and leaving part of its territory unorganized so that the voters of that portion could not participate in the election; 15 Mich. 471; 20 N. Y. 477.

The present use of the word in England is the depriving an individual of his right of voting, or a constituency of their right of returning a member to parliament; May's Parl. Pr.

DISGRACE. Ignominy; shame; dishonor. No witness is required to disgrace himself. 13 How. St. Tr. 17, 334; 16 *id.* 161. See CRIMINATE.

DISGUISE.

A person lying in ambush is not in disguise within the meaning of a statute declaring a county liable in damages to the next of kin of any one murdered by persons in disguise; 46 Ala. 118, 142.

DISHERISON. Disinheritance; depriving one of an inheritance. Obsolete. See DISINHERISON.

DISHERITOR. One who disinherits, or puts another out of his freehold. Obsolete.

DISHONOR. A term applied to the non-fulfilment of commercial engagements. To dishonor a bill of exchange, or a promissory note, is to refuse or neglect to pay it at maturity.

The holder is bound to give notice to the parties to such instruments of its dishonor; and his laches will discharge the indorsers. See NOTICE OF DISHONOR.

DISINHERISON. In Civil Law. The act of depriving a forced heir of the inheritance which the law gives him.

In Louisiana, forced heirs may be deprived of their legitime, or legal portion, and of the seisin granted them by law, for just cause. The disinherison must be made in proper form, by name and expressly, and for a just cause; otherwise it is null. See FORCED HEIRS; LEGITIME.

DISINHERITANCE. The act by which a person deprives his heir of an inheritance, who, without such act, would inherit.

By the common law, any one may give his estate to a stranger, and thereby disinherit his heir apparent. Cooper, Justin. 495; 7 East 106.

An heir cannot be disinherited by mere words of exclusion, but the entire property of the testator must be given to some one else by express words or by necessary implication; 93 Ky. 498; 105 N. Y. 185; s. c. 5 Am. Prob. Rep. 510; 132 N. Y. 338; 112 Pa. 532; and where a will provides that a gift therein is to be the entire share of an heir, he is not excluded from a share of property not disposed of by the will; 84 Va. 880; even though the will shows that the testator believed he was disposing of all his property; *id.* A testamentary writing which revokes all other wills, and excludes a son from any share of the estate, for reasons given, but does not dispose of the property, does not affect the rights of such son; 85 Va. 459.

In a case of doubt the law leans to a distribution as nearly conforming to the rules of inheritance as possible.

DISINTERESTED WITNESS. One who has no interest in the cause or matter in issue, and who is lawfully competent to testify.

In North Carolina and Tennessee, wills to pass lands must be attested by disinterested witnesses. The word "disinterested" is also applied to arbitrators and magistrates; 48 Ill. 31; 50 Me. 334. See INTEREST.

DISJUNCTIVE ALLEGATIONS. In Pleading. Allegations which charge a party disjunctively, so as to leave it uncertain what is relied on as the accusation against him.

An indictment, information, or complaint which charges the defendant with one or other of two offences, in the disjunctive, as that he murdered *or* caused to be murdered, forged *or* caused to be forged, wrote and published *or* caused to be written and published, is bad for uncertainty; 1 Salk. 342, 371; 2 Stra. 900; 5 B. & C. 251; 1 C. & K. 243; 1 Y. & J. 22. An indictment which averred that S. made a forcible entry into two closes of meadow *or* pasture was held to be bad; 2 Rolle, Abr. 81. A complaint which alleges an unlawful sale of "spirituous *or* intoxicating liquor" is bad for uncertainty; 2 Gray 501. So is an information which alleges that N. sold beer *or* ale without an excise license; 6 Dowl. & R. 143. And the same rule applies if the defendant is charged in two different characters in the disjunctive: as, *quod A existens servus sive deputatus*, took, etc.; 2 Rolle, Abr. 263.

DISJUNCTIVE TERM. One which is placed between two contraries, by the affirming of one of which the other is taken away: it is usually expressed by the word *or*. See 3 Ves. 450; 1 P. Wms. 433; 2 Cox, Ch. 213; 2 Atk. 643; 2 Ves. Sen. 67; Cro. Eliz. 525; 1 Bingh. 500; Ayliffe, Pand. 56.

In the civil law, when a legacy is given to Caius *or* Titius, the word *or* is considered *and*, and both Caius and Titius are entitled to the legacy in equal parts. 6 Toullier, n. 704. See COPULATIVE TERM; CONSTRUCTION.

DISME. Dime, which see.

DISMISS. To remove. To send out of court. Formerly used in chancery of the removal of a cause out of court without any farther hearing. The term is now used in courts of law also.

It signifies a final ending of a suit, not a final judgment on the controversy, but an end of that proceeding; 56 N. H. 417; 24 Ga. 33; 1 Ohio St. 170. It is well settled that the judgment of a court dismissing a suit for want of jurisdiction does not conclude the plaintiff's right of action; 109 U. S. 429.

After a decree, whether final or interlocutory, has been made by which the rights of a party defendant have been adjudicated, or such proceedings have been taken as entitle the defendant to a decree, the complainant will not be allowed to dismiss his bill without the consent of the defendant; 109 U. S. 713.

The effect of dismissals under the codes of some of the United States, has been much discussed. Thus in New York, "a final judgment dismissing the complaint, either before or after a trial, rendered in an action hereafter commenced," does not prevent a new action for the same cause of action, unless it expressly declares that it is rendered upon the merits.

DISORDERLY HOUSE. In Criminal Law. A house the inmates of which behave so badly as to become a nuisance to the neighborhood. It has a wide meaning, and includes bawdy houses, common gaming houses, and places of a like character; 1 Bish. Cr. L. § 1106; 2 Cra. 675; 120 Mass. 356. In order to constitute it such it is not necessary that there be acts violative of the peace of the neighborhood, or boisterous disturbance and open acts of lewdness; 71 Md. 275; 96 Ala. 1; but a single act of lewdness of a man and woman in a house, does not constitute the offence of keeping a house of prostitution; 75 Mich. 127.

The keeper of such house may be indicted for keeping a public nuisance; Hardr. 344; 1 Wheel. Cr. Cas. 290; 1 S. & R. 342; Bacon, Abr. *Nuisances*, A; 4 Sharsw. Bla. Com. 167, 168, note; 83 N. Y. 587; 52 Ala. 377. The husband must be joined with the wife in an indictment to suppress a disorderly house; 1 Show. 146.

DISORDERLY PERSONS. A class of offenders described in the statutes which punish them. See 4 Bla. Com. 169.

DISPARAGEMENT. In Old English Law. An injury by union or comparison with some person or thing of inferior rank or excellence.

Marriage without *disparagement* was marriage to one of suitable rank and character. 2 Bla. Com. 70; Co. Litt. 82 *b*. The guardian in chivalry had the right of disposing of his infant ward in matrimony; and provided he tendered a marriage without *disparagement* or inequality, if the infant refused, he was obliged to pay a *valor maritagii* to the guardian.

Disparagare, to connect in an unequal marriage. Spelman, Gloss. *Disparagatio*, disparagement. Used in Magna Charta (9 Hen. III.), c. 6. *Disparagation*, disparagement. Kelham. *Disparage*, to marry unequally. Used of a marriage proposed by a guardian between those of unequal rank and injurious to the ward.

DISPAUPER. In English Law. To deprive a person of the privilege of suing *in forma pauperis*.

When a person has been admitted to sue *in forma pauperis*, and before the suit is ended it appears that the party has become the owner of a sufficient estate real, or personal, or has been guilty of some wrong, he may be *dispaupered*.

DISPENSATION. A relaxation of law for the benefit or advantage of an individual. In the United States, no power exists, except in the legislature, to dispense with law: and then it is not so much a dispensation as a change of the law.

DISPLACE. Used in shipping articles, and, when applied to an officer, meaning properly to disrate, not to discharge. 103 Mass. 68.

DISPONE. In Scotch Law. A technical word essential to the conveyance of heritable property, and for which no equivalent is accepted however clear may be the meaning of the party. Paterson, Comp.

DISPOSE. To alienate or direct the ownership of property, as, disposition by will. 42 N. Y. 79; see 40 N. H. 219; 101 U. S. 380. Used also of the determination of suits; 13 Wall. 664. Called a word of large extent; Freem. 177.

DISPOSSESSION. Ouster; a wrong that carries with it the amotion of possession. An act whereby the wrong-doer gets the actual occupation of the land or hereditament. It includes abatement, intrusion, disseisin, discontinuance, deforcement. 3 Bla. Com. 167.

DISPUTATIO FORI (Lat.). Argument in court. Du Cange.

DISPUTE. A fact is properly said to be in dispute when it is alleged by one party and denied by the other, and by both with some show of reason. 19 Pa. 494.

DISQUALIFY. To incapacitate, to disable, to divest or deprive of qualifications. 57 Cal. 606.

DISSECTION. The act of cutting into pieces an animal or vegetable for the purpose of ascertaining the structure and uses of its parts; anatomy; the act of separating into constituent parts for the purpose of critical examination. Webster.

DISSEISEE. One who is wrongfully put out of possession of his lands; one who is disseised.

DISSEISIN. A privation of seisin. A usurpation of the right of seisin and possession, and an exercise of such powers and privileges of ownership as to keep out or displace him to whom these rightfully belong. 2 Washb. R. P. 283; Mitch. R. P. 259.

It takes the seisin or estate from one man and places it in another. It is an ouster of the rightful owner from the seisin or estate in the land, and the commencement of a new estate in the wrong-doer. It may be by abatement, intrusion, discontinuance, or deforcement, as well as by disseisin properly so called. Every dispossession is not a disseisin. A disseisin, properly so called, requires an ouster of the freehold. A disseisin at election is not a disseisin in fact; 2 Pres. Abstr. T. 279; but by admission only of the injured party, for the purpose of trying his right in a real action; Co. Litt. 277; 2 Me. 242; 4 N. H. 371; 5 Cow. 371; 5 Pet. 402; 6 Pick. 172.

Disseisin may be effected either in corporeal inheritances, or incorporeal. Disseisin of things corporeal, as of houses, lands, etc., must be by entry and actual dispossession of the freehold: as if a man enters, by force or fraud, into the house of another, and turns, or, at least, keeps, him or his servants out of possession. Disseisin of incorporeal hereditaments cannot be an actual dispossession; for the subject itself is neither capable of actual bodily possession or dispossession; 3 Bla. Com. 169, 170. See 6 Pick. 172; 6 Johns. 197; 2 Watts 23; 1 Vt. 155; 10 Pet. 414; 1 Dana 279; 11 Me. 408.

In the early law every disseisin was a breach of the peace; if perpetrated with violence it was a serious breach. The disseisor was amerced never less than the amount of the damage; if it were by force of arms he was sent to prison and fined. Besides he gave the sheriff an ox,—"the disseisin ox,"—or five shillings. If he disseised one who has already recovered possession from him by the assize, this was a still graver offence, for which he was imprisoned by a statute. The offender was a redisseisor; 2 Poll. & Maitl. Hist. of Eng. Law 45.

DISSEISOR. One who puts another out of the possession of his lands wrongfully.

DISSENT. A disagreement to something which has been done. It is express or implied.

The law presumes that every person to whom a conveyance has been made has given his assent to it, because it is supposed to be for his benefit, To rebut the presumption, his dissent must be expressed. See 4 Mas. 206; 11 Wheat. 78; 1 Binn. 502; 12 Mass. 456; 3 Johns. Ch. 261; 35 Neb. 361; 91 Tenn. 147; 114 N. Y. 307; ASSENT.

In Ecclesiastical Law. A refusal to conform to the rites and ceremonies of the established church. 2 Burn, Eccl. Law 165, 220.

DISSENTER. One who refuses to conform to the rites and ceremonies of the established churches; a non-conformist (*q. v.*). 2 Burn, Eccl. Law 165–220.

DISSOLUTION. In Contracts. The dissolution of a contract is the annulling its effects between the contracting parties.

The dissolution of a partnership is the putting an end to the partnership. Its dissolution does not affect contracts made between the partners and others; so that they are entitled to all their rights, and are liable on their obligations, as if the partnership had not been dissolved. See PARTNERSHIP.

Of Corporations. Dissolution of corporations takes place by act of legislature (but in America only by consent of the corporation, or where the power to dissolve has been reserved by the legislature); by the loss of all the members, or an integral part of them; by a surrender of the charter; by the expiration of the period for which it was chartered; by proceedings for the winding up of the company under the law; or by a forfeiture of the franchises, for abuse of its powers. The loss of members will not work a dissolution, so long as enough members remain to fill vacancies; 5 Ind. 77; 155 Mass. 183; nor does a failure to elect officers; 13 Pa. 133; 20 Conn. 447; 19 D. C. 575; 3 Watts 46. So of an eleemosynary corporation; 14 How. 268; nor does the resignation of all the officers of a corporation work a dissolution; 18 Ia. 469; but it is said that a municipal or charitable corporation may be dissolved by the loss of all of its members, although this mode of dissolution cannot take place in the case of business corporations which have a transferrable joint stock, because the corporate shares, being personal property, must always belong to some person, and such person must of necessity be a member of the corporation; 5 Thomp. Corp. § 6652; 24 Pick. 29. And even where all the shares of stock pass into the hands of less than the prescribed number of stockholders, there is no dissolution, even though they may have passed into the hands of *two* members; 14 Pick. 63; or of a *single* person; 42 Ga. 148; and such person could carry on the corporate business; *id.*

Ordinarily, a corporation may by a majority vote surrender its franchises; 44 Pa. 435; 7 C. E. Green 404; 7 Gray 393; but such a surrender must be accepted by the state; 9 R. I. 590; excepting where the stockholders are liable for the debts; 7 Cold. 420. A corporation is not dissolved or its franchises forfeited by its insolvency and assignment of its assets for the benefit of its creditors, where the state brings no proceedings to have the charter forfeited, and there is no surrender thereof by act of the shareholders; 86 Tenn. 614; 11 Colo. 97; 35 Fed. Rep. 433.

A non-user of corporate powers does not of itself work a dissolution, even though it be for twenty years; 21 N. J. Eq. 463; but see 37 Vt. 324, where there had been no corporate acts performed for 23 years and it was held there was a dissolution. The question is one of fact and intent; 5 Thomp. Corp. § 6659. The fact that a corporation has ceased to do business and has made an assignment of all its property for the payment of its debts and for several years held no annual meetings or elected directors, does not work a dissolution to the extent of preventing its maintaining an action for a debt due it; *id.* § 6660. The sale of the property and franchises of a corporation in

foreclosure proceedings does not, *ipso fac o*, work a dissolution. It will pass the franchise of the company to operate or enjoy the particular property foreclosed, but not its primary franchise to be a corporation; 5 Thomp. Corp. § 6662. (But that the corporation is extinguished by such a sale, see 37 Mo. 131.) The insolvency of a corporation or the appointment of a receiver therefor does not work a dissolution; 24 Pick. 49.

By the statutory consolidation of two corporations, it would seem that both are dissolved, strictly speaking, unless the statute provides for the consolidation of one of the companies into the other. Provision is always made by such statutes that the indebtedness of either of the companies shall become the indebtedness of the consolidated company. See 5 Thomp. Corp. § 6671.

The forfeiture of a charter by misuser or nonuser is complete only upon a final adjudication thereof in a competent court, upon proper proceedings at the suit of the government which created the corporation, and in the courts of such government; Moraw. Priv. Corp. 959, 1015; the existence of the charter cannot be attacked collaterally, or by an individual; 7 Pick. 344; 4 G. & J. 1. But when the legislature has reserved the right to revoke a charter for abuse of its privileges or failure to perform a condition, it may enact the repeal at the proper time; 23 Pick. 334; 26 Pa. 287; and such repealing act will be held constitutional unless the company can show by plain and satisfactory evidence that the privileges granted under the charter were not misused or abused; *id.* The courts will not presume that the power of repeal has been improperly exercised; 5 Thomp. Corp. § 6579. Where the legislature reserves the unqualified right of repeal upon the happening of a certain condition, it is exclusively within its power to determine whether the condition has happened, and a previous judicial determination of that fact is not necessary; *id.*; 26 Pa. 287; 23 Pick. 334; 33 Minn. 377. And so where there is a right of repeal in the legislature in case the corporation misuses its franchises; 26 Pa. 287. Such misuse or abuse of corporate privileges consists in any positive act in violation of the charter and in derogation of public right wilfully done or caused to be done by those appointed to manage the general concerns of the corporation; *id.* Where a franchise is granted with a provision that if not exercised in a specified time it shall be void, upon the expiration of the time without the performance of the condition, the charter falls without any action on the part of the state to declare its forfeiture; 110 Pa. 391; 46 N. J. Eq. 118; 81 N. Y. 69. But other cases hold that the charter is not forfeited until action by the state either legislative or judicial; 79 Mo. 632; 16 Wall. 203; 73 Ill. 541. The former view is strongly maintained by Judge Thompson; see 5 Thomp. Corp. § 6586. If the charter or the statute under which it is granted names a definite period for the life of the corporation, the corporation is dissolved, *ipso facto*, upon the expiration of that period without any action either on the part of the state or of the members of the corporation; 76 Cal. 190; 5 Mo. App. 337. "The incapacity to revive or resuscitate the powers of a corporation may arise from three causes: 1. The absence of the necessary officers who are required to be present when the deficiency is supplied, or their incapacity or neglect to do some act which is requisite to the validity of the appointment; 2. The want of the necessary corporators who are required to unite in the appointment; 3. The want of the proper persons from whom the appointment is to be made." 5 Thomp. Corp. § 6658.

Upon a dissolution, the assets of all kinds are a trust fund for the payment of debts, and afterwards for distribution among the stockholders; 2 Kent 307; 13 Blatch. 134; 39 N. H. 435. The title of the land of an eleemosynary corporation reverts on its dissolution, to the original owner without any act on his part; 129 Ill. 403. Actions at law against a private corporation abate upon its dissolution; 71 Tex. 90; *contra*, 30 W. Va. 43; 11 Colo. 97. Dissolution puts an end to all existing contracts. It works a breach of the contract; Green's Brice, *Ultra Vires* 803. See 12 Am. Dec. 239; 44 La. Ann. 462; Boone, Corporations § 197; 9 Lawy. Rep. Ann. 33, note; *id.* 273.

Since the dissolution of a corporation, either by its own limitation or by the decree of a court of competent jurisdiction, puts an end to its legal existence, it can thereafter neither prosecute nor defend an action. Accordingly, in the absence of statutory reservations (which, however, generally exist), upon the dissolution of a corporation all actions pending against it abate; 8 Pet. 281; 21 Wall. 609; 68 Ill. 348; 31 Me. 57; 123 Mass. 32; 58 N. Y. 562; 71 Tex. 90; and if the suit has been commenced by attachment, the dissolution will destroy the attachment lien; 56 Conn. 468; 8 W. & S. 207; unless ripened into a judgment at the time of the dissolution, and this, whether the attachment is original or is sued out in aid of a pending action; 5 Thomp. Corp. § 6724.

Under the statutes providing for the keeping alive of actions which would otherwise abate on the dissolution of a corporation, it is not quite settled whether the same principles apply as those which apply to the survival of actions on the death of a natural person; but the weight of authority is in favor of the affirmative; 16 N. Y. Supp. 692; 81 Wis. 207.

In Practice. The act of rendering a legal proceeding null, or changing its character; as where an attachment is dissolved so far as it is a lien on property by entering bail or security to the action; or as injunctions are dissolved by the court.

DISSUADE. **In Criminal Law.** To turn from any action by advice or solicitation. Worc. Dict.

To dissuade a witness from giving evidence against a person indicted is an indictable offence at common law; Hawk. Pl. Cr. b. 1, c. 21, s. 15. The mere attempt to stifle evidence is also criminal although the persuasion should not succeed, on the general principle that an incitement to commit a crime is in itself criminal; 1 Russ. Cr. 44; 2 East 5, 21; 6 *id.* 454; 2 Stra. 904; 2 Leach 925.

DISTANCE. The rule is that the distance between given points should be measured in a straight line; 5 E. & B. 92; 6 *id.* 350; 8 L. R. Exch. 32. But in a rule of court as to service the distance has been taken by the usual road; 7 Cow. 419.

DISTILLERY. A place or building where alcoholic liquors are distilled or manufactured. See Pet. C. C. 180; Act July 13, 1866, 14 Stat. L. 117; 45 N. Y. 499; 54 *id.* 35.

DISTRACTED PERSON. A term used in the statutes of Illinois, Rev. Laws, 1833, p. 332, and New Hampshire, Dig. Laws, 1830, p. 339, to express a state of insanity.

DISTRACTIO. In Civil Law. The sale of a pledge by a debtor. The appropriation of the property of a ward by a guardian. Calvinus, Lex.

DISTRAHERE. To withdraw; to sell. *Distrahere controversias*, to diminish and settle quarrels; *distrahere matrimoniam*, to dissolve marriage; to divorce. Calvinus, Lex.

DISTRAIN. To take as a pledge property of another, and keep the same until he performs his obligation or until the property is replevied by the sheriff. It was used to secure an appearance in court, payment of rent, performance of services, etc. 3 Bla. Com. 231; Fitzh. N. B. 32 (B) (C), 223; 3 Daly 455. See DISTRESS.

DISTRESS (Fr. *distraindre*, to draw away from; Lat. *districtio*). The taking of a personal chattel out of the possession of a wrong-doer into the custody of the party injured, to procure satisfaction for the wrong done. 3 Bla. Com. 6; 44 Barb. 488. It is generally resorted to for the purpose of enforcing the payment of rent, taxes, or other duties, as well as to exact compensation for such damages as result from the trespasses of cattle.

This remedy is of great antiquity, and is said by Spelman to have prevailed among the Gothic nations of Europe from the breaking up of the Roman Empire. But in a recent work the opinion is expressed that distress before judicial proceedings had been taken is not very old. 1 Poll. & Maitl. Hist. Engl. Law 334. Distress was not a means whereby the distrainor could satisfy the debt due him; *ibid.* After distress the lord might not sell the goods; they were not in his possession, but were *in custodia legis*, and he must be ready to give them up if the tenant tendered arrears or offered gage and pledge that he would contest the claim in a court of law. The lord could not take what he liked best among the chattels that he found; 2 *id.* 574. The English statutes since the days of Magna Charta have, from time to time, extended and modified its features to meet the exigencies of the times. Our state legislatures have generally, and with some alterations, adopted the English provisions, recognizing the old remedy as a salutary and necessary one, equally conducive to the security of the landlord and to the welfare of society. As a means of collecting rent, however, it is becoming unpopular in the United States, as giving an undue advantage to landlords over other creditors in the collection of debts. See 2 Dall. 68; 2 Halst. 29; 1 Harr. & J. 3; 1 M'Cord 299; 1 Blackf. 469; 1 Bibb 607; 2 Leigh 870; 3 Dana 209.

In the New England states the law of attachment on *mesne process* has superseded the law of distress; 3 Pick. 105, 360; 4 Dane, Abr. 126. The state of New York has expressly abolished it by statute. The courts of North Carolina hold it to be inconsistent with the spirit of her laws and government, and declare that the common process of distress does not exist in that state; 2 McCord 39; Cam. & N. 22; to the same effect are the laws of Missouri; 3 Mo. 472. In Ohio, Tennessee, and Alabama there are no statutory provisions on the subject, except in the former state to secure to the landlord a share of the crops in preference to an execution creditor, and one in the latter, confining the remedy to the city of Mobile; 6 Ala. 239. Mississippi has abolished it by statute; but property cannot be taken in execution on the premises unless a year's rent, if it be due, is first tendered to the landlord, who has also a lien on the growing crop; 50 Miss. 556; to the same effect are the statutes of Wisconsin; Wis. Laws, 1866, p. 77. In Colorado a landlord cannot distrain unless in pursuance of an express agreement; 11 Colo. 393.

To authorize a distress there must be a fixed rent in money, produce or services; it may be by parol and if not certain it must be capable of being reduced to a certainty; Co. Litt. 96 *a*; 9 Wend. 322; 3 Pa. 31; 1 Bay 315; and hence it will not lie on an agreement to pay no rent, but make repairs of uncertain value; Add. Pa. 347; a distress for a rent of a certain quantity of grain, may name the value in case of tender of arrears or sale of the property; 13 S. & R. 52. See 3 W. & S. 531.

A distress can only be taken for rent in arrear, and not, therefore, until the day after it is due; unless by the terms of the lease it is made payable in advance; 4 Cow. 516; 3 Munf. 277; 138 Ill. 483. But no previous demand is necessary, except where the conditions of the lease require it; 83 Ga. 402. Nor will the right be extinguished either by an unsatisfied judgment for the rent or by taking a promissory note therefor, unless such note has been accepted in absolute payment of the rent; 5 Hill 651; 3 Pa. 490.

It may be taken for any kind of rent, the detention of which beyond the day of payment is injurious to him who is entitled to receive it.

At common law, the distrainer must have possessed a reversionary interest in the premises out of which the distress issued, unless he had expressly reserved a power to distrain when he parted with the reversion; 2 Cow. 652; 1 Term 441; Co. Litt. 143 *b*. But the English statute of 4 Geo. II. c. 28, substantially abolished all distinctions between rents, and gave the remedy in all cases where rent is reserved upon a lease. The effect of the statute was to separate the right of distress from the reversion to which it had before been incident, and to place every species of rent upon the same footing as if the power of distress had been expressly reserved in each case.

A distress may be made by each one of several joint tenants for the whole rent or they may all join together; 4 Bingh. 562; 2 Ball & B. 465; by tenants in common, each for his separate share; 1 McCl. & Y. 107; Cro. Jac. 611; unless the rent be entire, as of a house, in which case they must all join;

Co. Litt. 197 *a*; 5 Term 246; a husband as tenant by the curtesy for rent due to his wife, although due to her as executrix or administratrix; 2 Saund. 195; 1 Ld. Raym. 369; a widow after dower has been admeasured for her third of the rent; Co. Litt. 32 *a*; an heir at law, or devisee, for that which becomes due to them respectively, after the death of the ancestor, in respect to their reversionary estate; 5 Cow. 501; 1 Saund. 287; see 34 Ill. App. 373; and guardians, trustees, or agents who make leases in their own names, as well as the assignee of the reversion which is subject to a lease; 2 Hill 475; 5 C. & P. 379. Payment of rent is sufficient attornment to enable the party to whom the payment is made to make a distress; 28 Ill. App. 643.

Generally all goods found upon the premises, whether of tenant, under-tenant, or stranger, may be distrained for rent in arrear; Woodf. Landl. & T. 435; 13 Wend. 256; 1 Rawle 435; 7 H. & J. 129; 4 Rand. 334; 1 Bail. 497; 91 Pa. 349; Com. Dig. *Distress* (B 1). Thus, a gentleman's chariot in a coach-house of a livery-stable keeper was distrainable by the landlord of the livery-stable keeper; 3 Burr. 1498; cattle put on the tenant's land by consent of the owners of the beasts, are distrainable by the landlord immediately after for rent in arrear; 3 Bla. Com. 8; and furniture leased to a tenant, and used by him on the demised premises, is subject to the landlord's right of distress for rent; 134 Pa. 177. And the necessity of this rule is justified by the consideration that the rights of the landlord would be liable to be defeated by a great variety of frauds and collusions, if his remedy should be restricted to such goods only as he could prove to be the property of the tenant.

Goods of a person who has some interest in the land jointly with the distrainor, as those of a joint tenant, although found upon the land, cannot be distrained; nor goods of executors and administrators, or of the assignee of an insolvent regularly discharged according to law, in Pennsylvania, for more than one year's rent. Nor can the goods of a former tenant, rightfully on the land, be distrained for another's rent, as emblements, or growing crops of a tenant at will quitting on notice, even after they are reaped, if they remain on the land for the purpose of husbandry; Willes 131; or in the hands of a vendee they cannot be distrained although the purchaser allow them to remain uncut after they have come to maturity; 2 Ball & B. 362; 5 J. B. Moo. 97. If a tenant seek to remove from the premises any portion of the crops before the rent is due, he is subject to distraint immediately; 84 Ga. 479.

As a distress is only of the property of the tenant, things wherein he can have no absolute property, as cats, dogs, rabbits, and animals *ferœ naturæ*, cannot be distrained; yet deer, which are of a wild nature, kept in a private enclosure for sale or profit, may be distrained for rent; 3 Bla. Com. 7. There can be no distress of such things as cannot be restored to the owner in the same plight as when taken, as milk, fruit, and the like; 3 Bla. Com. 9; or things affixed or annexed to the freehold, as furnaces, windows, doors, and the like; Co. Litt. 47 *b*; or essentially part of the freehold although for a time removed therefrom, as a millstone removed to be picked; or an anvil fixed in a smith's shop; 6 Price 3; 1 Q. B. 895; 3 *id.* 961.

Goods are also privileged in cases where the proprietor is either compelled from *necessity* to place his goods upon the land, or where he does so for *commercial* purposes; 17 S. & R. 139; 4 Halst. 110; 1 Bay 102, 170; 2 M'Cord 39; 3 Ball & B. 75; 6 J. B. Moo. 243; 2 C. & P. 353. In the first case, the goods are exempt because the owner has no option: as goods of a traveller in an inn; 7 Hen. VII. M. 1, p. 1; 2 Keny. 439; Barnes 472; 1 W. Bla. 483; 3 Burr. 1408. In the other, the interests of the community require that commerce should be encouraged; and adventurers will not engage in speculations if the property embarked is to be made liable for the payment of debts they never contracted. Hence goods landed at a wharf, or deposited in a warehouse on storage; 17 S. & R. 138; 21 Me. 47; 23 Wend. 462; goods of a third person consigned to an agent to be sold on commission (and if the landlord knows that the goods are so owned and has them sold under distress, he is liable to the owner in trespass: 155 Pa. 582); a horse standing in a smith's shop to be shod, or in a common inn, or cloth at a tailor's house to be made into a coat, or corn sent to a mill to be ground; 3 Bla. Com. 8; Woodf. Landl. & T. 440; cannot be distrained; neither can goods of a boarder, for rent due by the keeper of a boarding-house; 5 Whart. 9; unless used by the tenant with the boarder's consent and without that of the landlord; 1 Hill, N. Y. 565.

At common law, goods delivered to a common carrier, or other person, to be conveyed for hire, or goods on the premises of an auctioneer, for the purpose of sale are privileged; 1 Cr. & M. 380.

Goods taken in execution cannot be distrained. The law in some states gives the landlord the right to claim payment out of the proceeds of an execution for rent not exceeding one year, and he is entitled to payment up to the day of seizure, though it be in the middle of a quarter; 5 Binn. 505; but he is not entitled to the day of sale; 5 Binn. 505. See 18 Johns. 1. The usual practice is to give notice to the sheriff that there is a certain sum due to the landlord as arrears of rent,—which notice ought to be given to the sheriff, or person who takes the goods in execution upon the premises; for the sheriff is not bound to find out whether rent is due, nor is he liable to an action unless there has been a demand of rent before the removal; Com. Dig. *Rent* (D 8); 11 Johns. 185. This notice can be given by the immediate landlord only. A ground-landlord is not entitled to his rent out of the goods of the under-tenant taken in execution; 2 Stra. 787. And where there

are two executions, the landlord is not entitled to a year's rent on each. See 2 Stra. 1024. Goods distrained and replevied may be distrained by another landlord for subsequent rent; 2 Dall. 68. Where a tenant makes an assignment in the usual form, for the benefit of creditors, the assigned property is no longer his in his own right, and it cannot be seized under a distress warrant for rent; 26 S. C. 333; 36 *id.* 75.

By statute in some states tools of a man's trade, some designated household furniture, school-books, and the like, are exempted from distress, execution, or sale. In Pennsylvania, property to the value of three hundred dollars, exclusive of all wearing apparel of the defendant and his family, and all Bibles and school-books in use in the family, are exempted from distress for rent. Also sewing-machines in private families.

There are also goods conditionally privileged, as beasts of the plough, which are exempt if there be a sufficient distress besides on the land whence the rent issues; Co. Litt. 47 *a*; implements of trade, as a loom in actual use, where there is a sufficient distress besides; 4 Term 565; other things in actual use, as a horse whereon a person is riding, an axe in the hands of a person cutting wood, and the like; Co. Litt. 47 *a*.

At common law a distress could not be made after the expiration of the lease. This evil was corrected by statute in Pennsylvania in 1772. Similar legislative enactments exist in most of the other states. In Philadelphia, the landlord may, under certain circumstances, apportion his rent, and distrain before it becomes due.

A distress may be made either upon or off the land. It generally follows the rent, and is, consequently, confined to the land out of which it issues; Woodf. Landl. & T. 456. If two pieces of land, therefore, are let by two separate demises, although both be contained in one lease, a joint distress cannot be made for them; for this would be to make the rent of one issue out of the other; Rep. *t.* Hardw. 245; 2 Stra. 1040. But where lands lying in different counties are let together by one demise at one entire rent, and it does not appear that the lands are separate from each other, one distress may be made for the whole rent; 1 Ld. Raym. 55; 12 Mod. 76. And where rent is charged upon land which is afterwards held by several tenants, the grantee or landlord may distrain for the whole upon the land of any of them; because the whole rent is deemed to issue out of every part of the land; Rolle, Abr. 671. If there be a house on the land, the distress may be made in the house; if the outer door or window be open, a distress may be taken out of it; Rolle, Abr. 671. If an outer door be open, an inner door may be broken for the purpose of taking a distress, but not otherwise; Cas. *t.* Hard. 168. In levying a distress for rent entrance was obtained into the courtyard through a gate, and being there, the bailiff broke open the main door of the warehouse and distrained therein; the court held the distress illegal, for the reason that the door that was broken was the outer door; 68 Law T. 742. A distress was held lawful where a party climbed over the wall surrounding the yard of a house and entered the house by an open window; [1894] 1 Q. B. 119. Barges on a river, attached to the leased premises (a wharf) by ropes, cannot be distrained; 6 Bingh. 150.

By an act of 1772 in Pennsylvania copied from the act of 11 Geo. II. c. 19, where a tenant fraudulently removes his goods from the premises to prevent a distress, the landlord may distrain on them within 30 days after removal, but not on goods previously sold *bona fide* and for a valuable consideration to one not privy to the fraud. To bring a case within the act, the removal must take place *after* the rent becomes due, and must be *secret*, not made in open day; for such removal cannot be said to be clandestine within the meaning of the act; 12 S. & R. 217; 7 Bingh. 423; 1 Mood. & M. 535. This English statute has been re-enacted in many of the states, but the period during which the goods may be followed varies in different states. In Louisiana the landlord may follow goods removed from his premises for fifteen days after removal, provided they continue to be the property of the tenant; La. Civ. Code 2675; Tayl. Landl. & T. § 538. It has been made a question whether goods are protected that were fraudulently removed on the night before the rent had become due; 4 Campb. 135. The goods of a stranger cannot be pursued; they can be distrained only while they are on the premises; 1 Dall. 440.

A distress for rent may be made either by the person to whom it is due, or, which is the preferable mode, by a constable or bailiff, or other officer properly authorized by him. If made by a constable or bailiff, he must be properly authorized to make it; for which purpose the landlord should give him a written authority, usually called a warrant of distress; but a subsequent assent and recognition given by the party for whose use the distress has been made is sufficient; Hamm. N. P. 382.

Being thus provided with the requisite authority to make a distress, he seizes the tenant's goods, or some of them in the name of the whole, and declares that he takes them as a distress for the sum expressed in the warrant to be due by the tenant to the landlord, and that he takes them by virtue of the said warrant; which warrant he ought, if required, to show; 1 Leon. 50. When making the distress, it ought to be made for the whole rent; but if goods cannot be found at the time sufficient to satisfy the whole, or the party mistake the value of the thing distrained, he may make a second distress; Bradb. Distr. 129, 130. It must be taken in the daytime after sunrise and before sunset; except for damage feasant, which may be in the night; Co. Litt. 142 *a*.

As soon as a distress is made an inventory of the goods should be made, and a copy of it delivered to the tenant, together

with a notice of taking such distress, with the cause of taking it, and an opportunity thus afforded the owner to replevy or redeem the goods. This notice of taking a distress is not required by the statute to be in writing; and, therefore, parol or verbal notice may be given either to the tenant on the premises, or to the owner of the goods distrained; 12 Mod. 76. And although notice is directed by the act to specify the cause of taking, it is not material whether it accurately state the period of the rent's becoming due; Dougl. 279; or even whether the true cause of taking the goods be expressed therein; 7 Term 654. If the notice be not personally given, it should be left in writing at the tenant's house, or, according to the directions of the act, at the mansion-house, or other most notorious place on the premises charged with the rent distrained for.

The distrainor may leave or impound the distress on the premises for the five days mentioned in the act, but becomes a trespasser after that time; 2 Dall. 69. As in many cases it is desirable, for the sake of the tenant, that the goods should not be sold as soon as the law permits, it is usual for him to sign an agreement or consent to their remaining on the premises for a longer time, in the custody of the distrainor, or of a person by him appointed for that purpose. While in his possession, the distrainor cannot use or work cattle distrained, unless it be for the owner's benefit, as to milk a cow, or the like; 5 Dane, Abr. 34. Goods distrained for rent may be replevied by a claimant thereof before sale; 32 W. N. C. (Pa.) 62.

Before the goods are sold, they must be appraised by two reputable freeholders, who shall take an oath or affirmation, to be administered by the sheriff, undersheriff, or coroner, in the words mentioned in the act. The next requisite is to give six days' public notice of the time and place of sale of the things distrained; see 153 Pa. 376; after which, if they have not been replevied, they may be sold by the proper officer, who may apply the proceeds to the payment and satisfaction of the rent, and the expenses of the distress, appraisement, and sale; Woodf. Landl. & T. 1322. The overplus, if any, is to be paid to the tenant. A distrainor has always been held strictly accountable for any irregularity he might commit, although accidental, as well as for the taking of anything more than was reasonably required to satisfy the demand; Bradb. Dist.; Gilbert, Rent.

See Law of Distress for Rent by R. T. Hunter, London.

DISTRESS INFINITE. In English Practice. A process commanding the sheriff to distrain a person from time to time, and continually afterwards, by taking his goods by way of pledge to enforce the performance of something due from the party distrained upon. In this case no distress can be immoderate, because, whatever its value may be, it cannot be sold, but is to be immediately restored on satisfaction being made; 3 Bla. Com. 231. It was the means anciently resorted to to compel an appearance. See ATTACHMENT; ARREST.

DISTRIBUTEES. The persons who are entitled under the statute of distribution to the personal estate of one who has died intestate. 9 Ired. 279.

DISTRIBUTION. See DESCENT AND DISTRIBUTION.

DISTRICT. A certain portion of the country, separated from the rest for some special purpose.

The United States are divided into judicial districts, in each of which is established a district court; they are also divided into election districts, collection districts, etc.

It may be construed to mean territory; 97 Pa. 305; and in the revenue laws the words "district" and "port" are often used in the same sense; 3 Mas. 155.

DISTRICT ATTORNEYS OF THE UNITED STATES. Officers appointed in each judicial district, whose duty it is to prosecute, in such district, all delinquents, for crimes and offences cognizable under the authority of the United States, and all civil actions in which the United States shall be concerned, except in the supreme court, in the district in which the court shall be holden. Rev. Stat. § 767.

The district attorney must appear upon the record for the United States as plaintiffs, in order that the United States should be recognized as such on the record; 7 Blatch. 424; 3 Ben. 132; 4 Blatch. 418.

The officer who represents the state in criminal proceedings within a particular county is also, in some of the states, called district attorney.

As a prosecuting attorney he is a *quasi* judicial officer and stands indifferent between the accused and any private interest; 51 Mich. 422.

DISTRICT COURTS. See UNITED STATES COURTS and the articles on the various states.

DISTRICT OF COLUMBIA. A portion of the country, originally ten miles square, which was ceded to the United States by the states of Virginia and Maryland, over which the national government has exclusive jurisdiction.

Under the constitution, congress is authorized to "exercise exclusive jurisdiction in all cases whatsoever, over such district, not exceeding ten miles square, as may, by cession of particular states and the acceptance of congress, become the seat of government of the United States." In pursuance of this authority, the states of Maryland and Virginia ceded to the United States a small territory on the banks of the Potomac, and congress, by the act of July 16, 1790, accepted the same, for the permanent seat of the government of the United States.

By the act of July 11, 1846, congress retroceded the county of Alexandria, part of the District of Columbia, to the state of Virginia.

The seat of government was removed from Philadelphia to the district in December, 1800. As it exists at present, it constitutes but one county, called the county of Washington.

By act of Congress of Feb. 21, 1871, a territorial government was created for the district; 16 Stat.

L. 419; which was not a mere municipality in its restricted sense, but was held to be placed upon the same footing with that of the states or territories within the limits of the act; 7 D. C. 165. This government was, however, abolished by act of June 20, 1874, U. S. Rev. Stat. 1 Supp. 22; and a temporary government by commissioners was thereby created, which existed until by act of June 11, 1878, *id.* 173, provision was made for the continuance of the District "as a municipal corporation" and its control by the federal government through these commissioners, two of whom are appointed by the President and confirmed by the Senate, and the other is an engineer officer of the army to be detailed for that service by the President. It is a municipal corporation having a right to sue and be sued, and is subject to the ordinary rules that govern the law of procedure between private persons. The sovereign power is lodged in the government of the United States, and not in the corporation of the District; 132 U. S. 1. Congress is its local legislature; 116 *id.* 404; and exercises over it full and entire jurisdiction both of a political and municipal nature; 147 *id.* 282, 300; and it may legislate with respect to people and property therein as may the legislature of a state over any of its subordinate municipalities; 97 *id.* 687, 690.

The District of Columbia and the territorial districts of the United States are not states within the meaning of the constitution and of the Judiciary Act, so as to enable a citizen thereof to sue a citizen of one of the states in the federal courts; 2 Cra. 445; 1 Wheat. 91; R. M. T. Charlt. 374. Kent says: "However extraordinary it might seem to be, that the courts of the United States, which were open to aliens, and to the citizens of every state, should be closed upon the inhabitants of those districts (territories and the District of Columbia), on the construction that they were not citizens of a state, yet as the court observed, this was a subject for legislative, and not for judicial consideration." 1 Com. 349. It might be suggested as a consideration not here adverted to, that the theory on which this right of suing in federal courts is based is possible prejudice to the rights of a citizen of another state or an alien in the state court. In the District of Columbia and territories this would not apply, as their courts are created by the federal government.

For the judiciary of the district, see UNITED STATES COURTS.

DISTRICTIO. A distraint, or distress (*q. v.*). Cowel.

DISTRINGAS. A writ directed to the sheriff, commanding him to distrain a person of his goods and chattels to enforce a compliance with what is required of him.

It is used to compel an appearance where the party cannot be found, and in equity may be availed of to compel the appearance of a corporation aggregate. 4 Bouvier, Inst. n. 4191; Comyns, Dig. *Process* (D 7); Chitty, Pr.; Sellon, Pr.

A form of execution in the actions of detinue and assize of nuisance. Brooke, Abr. pl. 26; 1 Rawle 44.

DISTRINGAS JURATORES (Lat. that you distrain jurors). A writ commanding the sheriff to have the bodies of the jurors, or to *distrain* them by their lands and goods, that they may appear upon the day appointed. 3 Bla. Com. 354. It issues at the same time with the *venire*, though in theory afterwards, founded on the supposed neglect of the juror to attend. 3 Steph. Com. 590.

DISTRINGAS NUPER VICE COMITEM (Lat. that you distrain the late sheriff). A writ to distrain the goods of a sheriff who is out of office, to compel him to bring in the body of a defendant, or to sell goods attached under a *fi. fa.*, which he ought to have done while in office, but has failed to do. 1 Tidd, Pr. 313.

DISTURBANCE. A wrong done to an incorporeal hereditament by hindering or disquieting the owner in the enjoyment of it. 3 Bla. Com. 235; 1 S. & R. 298; 41 Me. 104. The remedy for a disturbance is an action on the case, or, in some instances in equity, by an injunction.

DISTURBANCE OF COMMON. Any act done by which the right of another to his common is incommoded or hindered. The remedy is by distress (where beasts are put on his common) or by an action on the case, provided the damages are large enough to admit of his laying an action with a *per quod*. Cro. Jac. 195; Co. Litt. 122; 3 Bla. Com. 237; 1 Saund. 546; 4 Term 71.

DISTURBANCE OF FRANCHISE. Any acts done whereby the owner of a franchise has his property damnified or the profits arising thence diminished. The remedy for such disturbance is a special action on the case; Cro. Eliz. 558; 2 Saund. 113 *b*; 3 Sharsw. Bla. Com. 236; 28 N. H. 438.

Equity will grant an injunction against disturbance of a franchise in certain cases; 6 Paige 554; 12 Pet. 91; 8 G. & J. 479.

DISTURBANCE OF PATRONAGE. The hindrance or obstruction of the patron to present his clerk to a benefice. 3 Bla. Com. 242. The principal remedy was a writ of right of advowson; and there were also writs of *darrein presentment* and of *quare impedit*. Co. 2d Inst. 355; Fitzh. N. B. 31.

DISTURBANCE OF PUBLIC WORSHIP. The interference with the good order of religious assemblies has been described as disturbance, and in some of the United States, statutes have been passed to meet the offence; 1 Bish. Crim. L. 542; 28 Ind. 364; 34 N. Y. 141; 1 Ala. Sel. Cas. 61; 7 Humph. 11; 1 W. & S. 548; 90 Ga. 459; 51 Mo. App. 293; 83 Ala. 68; 67 Miss. 358.

It is not necessary to constitute the offence that the congregation shall be actually engaged in acts of religious worship at the time of the disturbance, but it is sufficient if they are assembled for the purpose of worship; 78 N. C. 448; 68 Ind. 264.

To support a conviction for disturbing a congregation assembled for public worship, the evidence must show a wilful disturbance; 19 S. W. Rep. (Tex.) 605; 1 Gra. 476; 5 Tex. App. 470; 53 Ala. 398; 68 Ind. 264; 82 N. C. 576.

A Christmas festival is not a religious assembly; 4 Lea 199; nor is a church business meeting; 11 Tex. App. 318. A Sunday school is not divine service; 73 Pa. 39.

DISTURBANCE OF TENURE. Breaking the connection which subsists between lord and tenant. 3 Bla. Com. 242; 2 Steph. Com. 513.

DISTURBANCE OF WAYS. This happens where a person who hath a right of way over another's ground by grant or prescription is obstructed by enclosures or other obstacles, or by ploughing across it, by which means he cannot enjoy his right of way, or at least in so commodious a manner

as he might have done; 3 Bla. Com. 242; 5 Gray 409; 7 Md. 352; 23 Pa. 348; 29 *id.* 22.

DITCH. The words "ditch" and "drain" have no technical or exact meaning. They both may mean a hollow place in the ground, natural or artificial, where water is collected or passes off. 5 Gray 64.

DITTAY. In Scotch Law. A technical term in civil law, signifying the matter of charge or ground of indictment against a person accused of crime. *Taking up dittay* is obtaining informations and presentments of crime in order to trial. Skene, *de verb. sig.;* Bell, Dict.

DIVERSION. A turning aside or altering the natural course of a thing. The term is chiefly applied to the unauthorized changing the course of a water-course to the prejudice of a lower proprietor. Rap. & Lawr. L. Dict. See 17 Conn. 299; 6 Price 1.

One who has a natural gas well on his place may explode nitroglycerine therein for the purpose of increasing the flow, though it has the effect of drawing the gas from the land of another; 131 Ind. 599. The owner of land through which flows a stream of water, may recover damages from one who diverts the water, for any actual injury suffered therefrom in the injoyment of his land; 145 Pa. 438; 84 Wis. 438; 66 Hun 632. The fact that one diverts water maliciously is of no importance in determining whether a legal right of plaintiff has been violated; 134 N. Y. 385. See WATER-COURSE; GAS; OIL.

DIVERSITY OF PERSON. The plea of a prisoner in bar of execution that he is not the person convicted. 4 Steph. Com. 363; Moz. & W. Law Dict.

DIVERSO INTUITU. In a different view or point of view; with a different view, design, or purpose; by a different course or process. 1 W. Bla. 89; 9 East 311; 1 Pet. 500; Gall. 318; 4 Kent, Com. 211 (b).

DIVEST. See DEVEST.

DIVIDEND. A portion of the principal or profits divided among several owners of a thing. 13 Allen 400; 12 N. Y. 325; 8 R. I. 310; 1 Dev. & B. Eq. 545; 22 Wall. 38.

The term is usually applied to the division of the profits arising out of the business of a corporation or to the division among the creditors of the effects of an insolvent estate.

As confined to corporations it is "that portion of the profits and surplus funds of the corporation which has been actually set apart by a valid resolution of the board of directors, or by the shareholders at a corporate meeting, for distribution among the shareholders according to their respective interests, in such a sense as to become segregated from the property of the corporation, and to become the property of the shareholders distributively." 2 Thomp. Corp. § 2126.

In the commonest use of the term dividends are a sum which a corporation sets apart from its profits to be divided among its members. 31 Mich. 76; which, for the purpose of declaring a dividend, consist of the excess of its cash and other property on hand over its liabilities; 79 Ia. 678.

Dividends cannot usually be paid out of the capital but only from the profits. The former is a trust fund for the stockholders; 2 Thomp. Corp. § 2152; which each of them is entitled to have preserved intact; 25 Mo. App. 439; but this principle does not apply when the capital from its nature is liable to waste and depreciation, as in case of companies to work a mine or a patent; 41 Ch. Div. 1.

Where dividends are *required* to be declared out of *profits merely* of a railroad company, the rule for ascertaining what the profits are is to exclude from consideration all debts other than what are commonly understood by the term funded debts, but to treat as deductions debts incurred and due for engines, rails, and the like, which should and would have been paid at the time if the funds had been in hand and are necessary deductions from the property; 29 Beav. 272; and as to what are net earnings in the sense of surplus profits and therefore susceptible of definition, see 99 U. S. 420; 99 Am. Dec. 762, note; 90 Cal. 131.

In England it was held that dividends must be payable in money; L. R. 14 Eq. 517; and it has been said there that the whole of the profits of a corporation must be divided periodically; per Giffard, L. J., in L. R. 4 Ch. 494; but this is perhaps too broadly stated; Green's Brice, *Ultra Vires* 201. Neither of the above rules obtains in America: here stock and scrip dividends are very common; 102 Mass. 542; 115 *id.* 461; 52 N. H. 72; 51 Barb. 378; 8 R. I. 427; 6 Gill 363; Green's Brice, *Ultra Vires* 200; Moraw. Priv. Corp. 448; and in the absence of statutory restriction are lawful; 93 N. Y. 162; 115 Mass. 471; 5 Fed. Rep. 737; 74 Pa. 83; and bonds may be issued to the stockholders of a railroad corporation in place of cash as the dividends representing earnings appropriated to the construction account, and these dividends having been duly earned may be declared for four years at once instead of each year; 47 Hun 550.

The declaration of dividends is within the implied scope of the authority of the directors, and unless controlled by the action of the corporation itself they have authority, at their sole discretion, to declare dividends and to fix the time and place of payment within the limits of reason and good faith with the stockholders; 45 Barb. 510; 6 La. Ann. 745; 99 U. S. 420; 99 Mass. 101; 40 N. J. Eq. 114; 90 Cal. 131; 93 N. Y. 162; and as to time and place; 29 N. J. L. 82. See 77 Me. 445; 119 U. S. 296. And generally courts will not interfere in behalf of a common stockholder to compel the declaration of a dividend except in case of fraud or abuse of discretion; 51 Barb. 378; 33 Conn. 446; 29 Ala. 503; 4 Abb. Pr. 107; 83 Mich. 63; 31 A. & E. Corp. Cas. 349; nor will equity restrain the declaration of a dividend

where the propriety of declaring one is fairly within the discretion of the directors; 41 Ch. Div. 1. Dividends may be applied by the corporation to debts due by the stockholder where the right of set-off would exist with respect to other creditors; 3 Sto. 411; but this right exists only where the dividend has been declared and therefore a stockholder cannot refuse to pay interest due to the corporation in anticipation that a dividend will be declared; 1 Clarke, Ch. 351. It has been held that unpaid dividends are assets of the corporation available for creditors in case of its insolvency; 44 Ala. 305; but this view is disapproved and declared unsound upon good reasons; 2 Thomp. Corp. § 2134. Dividends improperly declared may be recalled; *id.* § 2135; and even if paid, it has been held that they may be reclaimed; 17 B. Mon. 412; but this decision is doubted; 2 Thomp. Corp. § 2135; although approved in a case which did not require the court to go so far but only to hold that the dividend, not having been paid, was not collectible; 25 Mo. App. 439. There can be no discrimination among stockholders of the same class in respect to dividends, but if one stockholder is discriminated against he cannot recover his share ratably from the others, until at least he has established his right as a creditor of the company and pursued his remedy against it; 83 N. Y. 40.

A stockholder cannot recover the profits made by a corporation until a dividend has been declared; 99 Mass. 101; 57 N. Y. 196; 31 Mich. 78; 83 Pa. 269; 57 Me. 143; 112 N. Y. 1; but after a dividend has been declared, and a *demand made therefor* by a stockholder, he may sue in assumpsit for the amount due him; Chase, Dec. 167; 57 N. Y. 196; 49 Pa. 270; and a stockholder has been allowed to follow the amount of his dividend into the hands of the receiver of the company; 14 Hun 8; 42 Conn. 17; and the resolution declaring the dividend is an admission of indebtedness in legal money; 24 N. Y. 548; and it is no defence to show that the earnings were received in other property; *id.* Mandamus will not lie to compel the payment of dividends declared by a private corporation; 41 Mich. 166.

Dividends must be so declared as to give each stockholder his proportional share of profits; 45 Barb. 510; 57 N. Y. 196; 13 Ill. 516; L. R. 3 Ch. 262; 3 Brewst. 366; and if one person is excepted, he may sue for his dividends, for the reason that such exception is void; 21 S. W. Rep. (Mo.) 508. They can properly be declared only out of profits actually earned; and when improperly declared and paid, they may be recovered back; 71 N. Y. 9; 15 How. 304.

When the fact that a dividend has been voted by the directors is not made public or communicated to the stockholders, and no fund is set apart for payment, the vote may be rescinded; 158 Mass. 84.

It has been said that cash dividends are to be regarded as income, and stock dividends as capital; 115 Mass. 461; 102 *id.* 542; L. R. 5 Eq. 238; 1 McClel. 527; other cases hold that all dividends from earnings or profits are income and go to the life tenant; 18 Barb. 646; 30 *id.* 638; 4 C. E. Green 117. See 52 N. H. 72; also 24 Am. Rep. 169, n.; same note in substance in 18 Alb. L. J. 264. It is now uniformly held that cash dividends, extra dividends, or bonuses declared from earnings of a corporation are income; A. & E. Encyc.; 15 Sim. 473; [1887] L. R. 12 App. Cas. 385; 10 Lea 595; 83 Pa. 264; 99 Mass. 101; 104 N. Y. 618.

Dividends on the stock of a corporation whose only property consists of land, which dividends are paid from the proceeds of sales of the land, or from interest on the deferred payments on sales, are all income; 78 Hun 121. As between a life tenant and remainderman, a dividend representing profits is to be considered as income, though permanent improvements to an equal amount had previously been made and it is just sufficient to pay for a voted increase in the capital stock, which the stockholders might subscribe to; 152 Mass. 58. See 1 McLean 527.

In 28 Pa. 368, where accumulated profits were divided among the stockholders proportionally, in the form of full paid stock, the stock was considered to be income; in 83 Pa. 264 (s. c. 24 Am. Rep. 164), the capital stock was increased and the option to subscribe at par given to the stockholders; the original stock immediately fell in value by about the market value of the option; a trustee of shares sold his option on a part of his shares, and used the proceeds to subscribe for other shares; these latter were considered to be capital. The court based its estimate on the market value of the stock at the time of the transaction. In 64 Pa. 256, under peculiar circumstances the proceeds of the sale of a right to subscribe for additional stock were considered income. Extra dividends and bonuses declared from earnings are considered income; 15 Sim. 473; 31 Beav. 280; 2 Edw. Ch. 231; 6 Allen 174. And this is the case though the profits were earned before the purchase of the stock; 31 Beav. 280. The enhanced price for which stocks sell by reason of profits earned but not divided belongs to the corpus of the estate; 32 L. J. Ch. 627. See 36 Cent. Law J. 452; Thompson, Corporations, tit. Dividend; STOCK.

In another sense, according to some old authorities, dividend signifies one part of an indenture.

DIVINE SERVICE. The name of a feudal tenure, by which the tenants were obliged to do some special divine services in certain, as to sing so many masses, etc. 2 Bla. Com. 102; Mozl. & W. Dict.

In its modern use the term does not include Sunday schools; 73 Pa. 39.

DIVISA. In Old English. A device, award, or decree; also a devise; bounds or limits of division of a parish or farm. Also a court held on the boundary, in order to settle disputes of the tenants. Wharton.

DIVISIBLE. That which is susceptible of being divided.

A contract cannot, in general, be divided in such a manner that an action may be brought, or a right accrue, on a part of it; 2 Pa. 454. But some contracts are susceptible of division: as, when a reversioner sells a part of the reversion to one man and a part to another, each shall have an action for his share of the rent which may accrue on a contract to pay a particular rent to the reversioner; 3 Whart. 404. See APPORTIONMENT. But when it is to do several things at several times, an action will lie upon every default; 15 Pick. 409. See 1 Me. 316; 6 Mass. 344.

DIVISION. In English Law. A particular and ascertained part of a county. In Lincolnshire division means what riding does in Yorkshire.

DIVISION OF OPINION. Disagreement among those called upon to decide a matter.

When, in a company or society, the parties having a right to vote are so divided that there is not a plurality of the whole in favor of any particular proposition, or when the voters are equally divided, it is said there is division of opinion. The term is especially applied to a disagreement among the judges of a court such that no decision can be rendered upon the matter referred to them.

When the judges of a court are divided into three classes, each holding a different opinion, that class which has the greatest number shall give the judgment: for example, on a *habeas corpus*, when a court is composed of four judges, and one is for remanding the prisoner, another is for discharging him on his own recognizance, and the two others are for discharging him absolutely, the judgment will be that he be discharged; Rudyard's Case; Bacon, Abr. *Habeas Corpus* (B 10), *Court*, 5. See UNITED STATES COURTS. On the trial of an action at law, when the judges of the circuit court of the United States are opposed in opinion on a material question of law, the opinion of the presiding judge prevails; U. S. Rev. Stat. § 650; but in any such case the judgment rendered conformably thereto might, without regard to its amount, be reviewed on a writ of error, upon a certificate stating such question; 100 U. S. 158. The power of the supreme court to review a case on a division of opinion in a circuit court, under U. S. Rev. Stat. §§ 651 and 697, is taken away by the act of March 3, 1891, creating the circuit courts of appeals, which impliedly repeals said sections; 163 U. S. 132; U. S. *v.* Hewecker, Oct. 26, 1896. See 151 U. S. 577.

DIVISUM IMPERIUM. A divided jurisdiction. Applied *e. g.* to the jurisdiction of courts of common law and equity over the same subject. 1 Kent 366; 4 Steph. Com. 9.

DIVORCE. The dissolution or partial suspension, by law, of the marriage relation.

The dissolution is termed divorce from the bond of matrimony, or, in the Latin form of the expression, *a vinculo matrimonii*; the suspension, divorce from bed and board, *a mensa et thoro*. The former divorce puts an end to the marriage; the latter leaves it in full force. The term divorce is sometimes also applied to a sentence of nullity, which establishes that a supposed or pretended marriage either never existed at all, or at least was voidable at the election of one or both of the parties.

The more correct modern usage, however, confines the signification of divorce to the *dissolution* of a *valid* marriage. What has been known as a divorce *a mensa et thoro* may more properly be termed a legal separation. So also a sentence or decree which renders a marriage void *ab initio*, and bastardizes the issue, should be distinguished from one which is entirely prospective in its operation; and for that purpose the former may be termed a sentence of nullity. The present article will accordingly be confined to divorce in the strict acceptation of the term. For the other branches of the subject, see SEPARATION A MENSA ET THORO; NULLITY OF MARRIAGE.

Marriage, being a legal relation, and not (as sometimes supposed) a mere contract, can only be dissolved by legal authority.

The relation originates in the consent of the parties, but, once entered into, it must continue until the death of either husband or wife, unless sooner put an end to by the sovereign power. The Supreme Court of the United States, in 125 U. S. 210, say that whilst marriage is often termed by text writers and in decisions of courts a civil contract, it is something more. When the contract to marry is executed by the marriage, a relation between the parties is created which cannot change. Other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties, but not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities. The supreme court then approves the views laid down in 51 Me. 483, where it is said that when the contracting parties have entered into the marriage state, they have not so much entered into a contract as into a new relation, the rights, duties, and obligations of which rest not upon their agreement, but upon the general law of the state, statutory or common; they are of law, not of contract. It was of contract that the relation should be established, but being established, the power of the parties as to its extent or duration is at an end. Their rights under it are determined by the will of the sovereign as evidenced by the law. They can neither be modified nor changed by any agreement of the parties. It is a relation for life and the parties cannot terminate it at any shorter period by virtue of any contract they may make. "Marriage has been said to be something more than a mere contract, religious or civil; to be an institution"; L. R. 1 P. & D. 130. In England, until late years, no authority existed in any of the judicial courts to grant a divorce in the strict sense of the term. The subject of marriage and divorce generally belonged exclusively to the various ecclesiastical courts; and they were in the constant habit of granting what were termed divorces *a mensa et thoro*, for various causes, and of pronouncing sentences of nullity; but they had no power to dissolve a marriage, valid

and binding in its origin, for causes arising subsequent to its solemnization. For that purpose recourse must be had to parliament; 2 Burn, Eccl. Law 202; Macq. Parl. Pr. 470. But by the statute of 20 & 21 Vict. (1857) c. 85, entitled "An act to amend the law relating to divorce and matrimonial causes in England," a new court was created, to be called "The Court for Divorce and Matrimonial Causes," upon which was conferred exclusively all jurisdiction over matrimonial matters then vested in the various ecclesiastical courts, and also the jurisdiction theretofore exercised by parliament in granting divorces. At present divorce causes are heard, in the first instance, in the "Probate and Divorce Division of the High Court of Justice," whence an appeal lies to the "Court of Appeal."

In this country the usage has been various. Formerly it was common for the various state legislatures, like the English parliament, to grant divorces by special act. Latterly, however, this practice is now much less common. In many states, also, it has been expressly prohibited by recent state constitutions; 1 Bish. Mar. & D. § 1471; Lloyd, Div. 12, 13. Such a statute is constitutional and it does not offend against the constitutional provision which forbids laws impairing the obligation of contracts, even though there was no valid ground for divorce and the wife was not notified; 125 U. S. 190, where the husband was a resident of the territory. See also 90 Wis. 272. Generally, at the present time, the jurisdiction to grant divorces is conferred by statute upon courts of equity, or courts possessing equity powers, to be exercised in accordance with the general principles of equity practice, subject to such modifications as the statute may direct. The practice of the English ecclesiastical courts, which is also the foundation of the practice of the new court for divorce and matrimonial causes in England, has never been adopted to any considerable extent in this country; but it is said that in some jurisdictions the principles and practice of the ecclesiastical courts are followed so far as they are applicable to our altered conditions and in accord with the spirit of our laws: 2 Bish. Mar. & Div. 460. See 35 Vt. 365; 33 Md. 401.

Numerous and difficult questions are constantly arising in regard to the validity in one state of divorces granted by the courts or legislature of another state. The subject is fully and ably treated in 2 Bish. Mar. Div. and Sep. § 128. The learned author there states the following propositions, which he elaborates with great care:—*first*, the tribunals of a country have no jurisdiction over a cause of divorce, wherever the offence may have occurred, if neither of the parties has an actual *bona fide* domicil within its territory; *secondly*, to entitle the court to take jurisdiction, it is sufficient for one of the parties to be domiciled in the country; both need not be, neither need the citation, when the domiciled party is plaintiff, be served personally on the defendant, if such personal service cannot be made, but there should be reasonable constructive notice, at least; *thirdly*, the place where the offence was committed, whether in the country in which the suit is brought or a foreign country, is immaterial; *fourthly*, the domicil of the parties at the time of the offence committed is of no consequence, the jurisdiction depending on their domicil when the proceeding is instituted and the judgment is rendered; *fifthly*, it is immaterial to this question of jurisdiction in what country or under what system of divorce laws the marriage was celebrated; *sixthly*, without a citation within the reach of process, or an appearance, the jurisdiction extends only to the status and what depends directly thereon, and not to collateral rights.

It should be observed, however, that the fourth proposition is not sustained by authority in Pennsylvania and New Hampshire, it being held in those states that the tribunal of the country alone where the parties were domiciled when the *delictum* occurred have jurisdiction to grant a divorce; 7 Watts 349; 8 W. & S. 251; 6 Pa. 449; 34 N. H. 518, and cases there cited; 35 *id.* 474; 64 *id.* 523. And for the law of Louisiana, see 9 La. Ann. 317. In Pennsylvania, the rule has been changed by statute of 26th April, 1850, § 6. See 30 Pa. 412.

The doctrine of the first proposition is said not to have been thoroughly established in England; 2 Bish. Mar. D. & Sep. § 43; but it is fully established in America; 13 Bush 318; 56 Ind. 263; 25 Minn. 29; 13 Hun 414; 1 Utah 112; 43 La. Ann. 1140; 1 Tex. Civ. App. 315; 120 N. Y. 485; 135 Mass. 83; 102 N. C. 491; 80 Pa. 501. But see *contra*, 30 Pa. 412; 135 *id.* 522. Mr. Bishop maintains the second proposition as fully supported on principle and authority; see especially 4 R. I. 87; 57 Miss. 200; 28 Ala. 12; 35 Ia. 238; 9 Wall. 108; 95 U. S. 714; 19 D. C. 431; but see 76 N. Y. 78; Story, Confl. Laws, Redf. ed.; 3 Am. L. Reg. N. S. 193. As to the third proposition, which is said by the same author to be universal, see 29 Ala. 719; 8 N. H. 21; 57 Barb. 305; 13 Johns. 192. The fifth proposition is universally recognized; see 7 Watts 349; 14 Pick. 181; 28 Ala. 12; 31 Ga. 223. See, however, 2 Cl. & F. 568.

When both husband and wife are domiciled in the state where the divorce is granted, the decree of divorce is without doubt valid everywhere; 39 N. H. 38; 9 Me. 140; 14 Mass. 227; 56 Md. 128; 72 N. Y. 237; 3 Wis. 664; 110 U. S. 701; 111 *id.* 524; 104 Ill. 35. See L. R. 6 P. D. 35.

It is contended by an able writer that, by force of the constitution, whenever a state court has jurisdiction over a cause in divorce, its sentence has the same effect in every other state which it has there; 2 Bish. Mar. Div. & Sep. §§ 153–158, 185. See Whart. Confl. of L. § 237.

If the court making the decree had jurisdiction, it will be held conclusive in other states: 99 Cal. 374; 40 Hun 611; 80 Ky. 353; 98 Mass. 158; and jurisdiction will be presumed; 155 Ill. 158; unless want of it appears upon the record; 30 Ill. App.

159; 80 N. Y. 1; 27 Minn. 265; or it may be shown as against the record; 52 Mich. 117; 154 Mass. 290. One party must be domiciled in the state; 125 Ind. 163; 78 Me. 187; 25 Minn. 29; 25 Mich. 247; 37 Ohio St. 317. See 3 Hagg. Eccl. 639.

There is much difference of opinion as to the extra-territorial effect of constructive service by publication as between states. If both parties are domiciled within the state the decree is of force in other states; 11 Allen 196; 115 Mass. 438; 72 N. Y. 217; but if only one, the decree determines his or her status; 95 U. S. 714, 734; 24 Wis. 372; 154 Mass. 290.

The view cited from Bishop concerning the extra-territorial operation of the decree under the constitution is held in 9 Me. 140; 110 Mo. 233; 29 Pac. Rep. (Kan.) 1071; 91 Ala. 591; the contrary view is taken in 86 Mich. 333; 56 Wis. 195; 42 N. J. Eq. 152; 50 Ohio St. 726; 12 Pa. Co. Ct. 334; [1893] Prob. 89. In New York it was held in an action for divorce by the wife, where the husband removed to Minnesota and there secured a divorce, the summons and complaint therein having been personally delivered to the plaintiff, but she not appearing at the trial, that the decree of the Minnesota court did not affect the status of the plaintiff in the state of New York; 130 N. Y. 193; and to the same effect are 101 *id.* 23; 76 *id.* 78. Referring to this line of decisions, Pryor, J., said: "To this conclusion I am compelled; but I am not forbidden to say that my reason revolts against it;" 2 Misc. 549; and the New York court of appeals held, that after a defendant had gone into another state and filed an answer, he was bound by the effect given to it by the statutes of that state; 108 N. Y. 415.

In England the courts have jurisdiction in case the parties are domiciled there at the commencement of the proceedings, and this is not affected by the residence of the parties, their allegiance, their domicil at the time of the marriage, the place of the marriage, or the place of the offence; Dicey, Confl. Laws 269; and where the respondent has submitted to the jurisdiction of the court; *id.* 276. See DOMICIL.

In several states divorces are by statute inoperative when a person goes out of the state and obtains elsewhere a divorce for a cause not valid in the state from which he goes. And in Massachusetts the courts have held invalid decrees, for causes not cognizable in that state, granted in another state, for a divorce when the party went there to procure it; 122 Mass. 156; or to annul a marriage; 157 *id.* 42; but where it was not shown that the party went to the other state for that purpose and the wife had executed a release to the husband, she was not permitted to impeach the decree; 129 Mass. 1; and so where an appearance was entered in the other state; 55 Cal. 384; or where there has been obtained a *bona fide* domicil elsewhere; 76 Me. 535.

The supreme court of the United States has no jurisdiction to re-examine the judgment of a state court, recognizing as valid the decree of a foreign court annulling a marriage; 107 U. S. 319. See 16 Am. L. Reg. 65, 193; also Whart. Confl. Laws.

It was never the practice of the English parliament to grant a divorce for any other cause than adultery; and it was the general rule to grant it for simple adultery only when committed by the wife, and upon the application of the husband. To entitle the wife, other circumstances must ordinarily concur, simple adultery committed by the husband not being sufficient; Macq. Parl. Pr. 473. The English statute of 20 & 21 Vict. c. 85, before referred to, prescribes substantially the same rule,—it being provided, § 27, that the husband may apply to have his marriage dissolved "on the ground that his wife has, since the celebration thereof, been guilty of adultery," and the wife, "on the ground that, since the celebration thereof, her husband has been guilty of incestuous bigamy, or of bigamy with adultery, or of rape, or of sodomy, or bestiality, or of adultery coupled with such cruelty as without adultery would have entitled her to a divorce *a mensa et thoro*, or of adultery coupled with desertion, without reasonable excuse, for two years or upwards."

In this country the question depends upon the statutes of the several states, the provisions of which are far from uniform. In some of the states, also, the matter is left wholly or in part to the discretion of the court. See Bish. Mar. D. & Sep; 16 Or. 163. For more specific information, recourse must be had to the statutes of the several states.

Some of the more important grounds for divorce are: *desertion;* for a statutory period; 89 Ga. 471; 44 Ill. App. 357; 65 Vt. 623; (see DESERTION;) *abandonment;* 45 La. Ann. 664; *adultery;* 37 Ill. App. 219; 48 N. J. Eq. 532; *cruelty;* 91 Mich. 279; 84 Ia. 221; 61 Conn. 233; 69 Law T. 152; 76 Ga. 319; 83 Va. 806; *habitual drunkenness;* 22 Or. 329; 45 La. Ann. 1364; *conviction of crime*, in most states: *incurable insanity*, in some states; *failure to support;* and *impotence, relationship, incapacity* to enter into the contract, *fraud, duress*, etc.

Cruelty usually means the infliction, or threatened infliction, of bodily harm, by personal violence, actual or threatened, or by words or conduct causing mental suffering, and thereby injuring, or tending to injure, the health. In some states falsely charging the wife with adultery is sufficient. In a few states bodily injury is not necessary; Tiffany, Dom. Rel. 174. Charges by a husband of beating and bruising by his wife, with expressions of a wish that he were dead and suggestions of poisoning him, are "such inhuman treatment as to endanger life;" 10 Ia. 133. So any course of conduct which would have the effect of impairing health would be legal cruelty; 53 Ia. 511; 84 Ia. 221. See CRUELTY.

Where the wife resides in the same house, but wilfully occupies separate apartments from the husband and refuses to

recognize him or to eat or sleep with him for a long period, she was held to have deserted her husband; 89 Ga. 471; but a mere refusal to have sexual intercourse with the husband is not desertion; 138 Ill. 436; 39 Minn. 248. The confinement of the wife in the lunatic asylum is not an abandonment of the husband; 22 S. W. Rep. (Ky.) 215. When a wife is deserted she need not hunt for her husband or go to the place whither he has fled; 44 Ill. App. 357. Where by statute both parties have to be residents of the state, it means an actual and not a theoretical residence, and the rule that the domicil of the wife follows that of the husband does not apply; 61 Hun 625.

Some of the principal defences in suits for divorce are: *Connivance*, or the corrupt consent of a party to the conduct of the other party, whereof he afterwards complains. This bars the right of divorce, because no injury was received; for what a man has consented to he cannot say was an injury; 2 Bish. Mar. & D. § 204. See 116 Ind. 84; 77 Hun 595. And this may be passive as well as active; 3 Hagg. Eccl. 87. See 136 Mass. 310. *Collusion*, which is an agreement between husband and wife for one of them to commit, or appear to commit, a breach of matrimonial duty, for the purpose of enabling the other to obtain the legal remedy of divorce, as for a real injury. Where the act has not been done, collusion is a real or attempted fraud upon the court; where it has, it is also a species of connivance; in either case it is a bar to any claim for divorce; 2 Bish, Mar. & D. § 251. See 86 Mich. 600. *Condonation*, or the conditional forgiveness or remission by the husband or wife of a matrimonial offence which the other has committed. While the condition remains unbroken, condonation, on whatever motive it proceeded, is an absolute bar to the remedy for the particular injury condoned; 2 Bish. Mar. & D. § 268; 86 Ala. 322; 60 Law J. Prob. 73; 109 N. C. 139; 49 Ill. App. 573. For the nature of the condition, and other matters, see CONDONATION. *Recrimination*, which is a defence arising from the complainant's being in like guilt with the one of whom he complains. It is incompetent for one of the parties to a marriage to come into court and complain of the other's violation of matrimonial duties, if the party complaining is guilty likewise; 2 Colo. App. 8. When the defendant sets up such violation in answer to the plaintiff's suit, this is called, in the matrimonial law, recrimination; 2 Bish. Mar. & D. § 340.

The foregoing defences, though available in all divorce causes, are more frequently applicable where a divorce is sought on the ground of adultery.

The consequences of divorce are such as flow from the sentence by operation of law, or flow from either the sentence or the proceeding by reason of their being directly ordered by the court and set down of record. In regard to the former, they are chiefly such as result immediately and necessarily from the definition and nature of a divorce. Being a dissolution of the marriage relation, the parties have no longer any of the rights, nor are subject to any of the duties, pertaining to that relation. They are henceforth single persons to all intents and purposes. It is true that the statutes of some of the states contain provisions disabling the guilty party from marrying again; but these are in the nature of penal regulations, collateral to the divorce, and which leave the latter in full force.

In regard to rights of property as between husband and wife, a sentence of divorce leaves them as it finds them. Consequently, all transfers of property which were actually executed, either in law or fact, continue undisturbed; for example, the personal estate of the wife, reduced to possession by the husband, remains his after the divorce the same as before. On the termination of a tenancy by the entirety, created by a conveyance to husband and wife, by an absolute divorce, they afterward hold the land as tenants in common without survivorship; 128 N. Y. 263. See 92 Tenn. 697. But it puts an end to all rights depending upon the marriage and not actually vested; as, dower in a wife, all rights of the husband in the real estate of the wife, and his right to reduce to possession her choses in action; 27 Miss. 630; 57 Mo. 200; 6 Ind. 229; 6 W. & S. 85, 88; 4 Harr. Del. 440; 8 Conn. 541; 2 Md. 429; 8 Mass. 99; 10 Paige, Ch. 420, 424; 5 Blackf. 309; 5 Dana 254; 102 N. C. 491; 45 N. J. Eq. 466; 125 U. S. 216; 111 *id.* 525; 20 Ohio St. 454. In respect to dower, however, it should be observed that a contrary doctrine has been settled in New York, it being there held that immediately upon the marriage being solemnized the wife's right to dower becomes perfect, provided only she survives her husband; 4 N. Y. 95; 6 Duer, N. Y. 102, 152. See 55 Pa. 375; 62 *id.* 308; 39 Cal. 157; 48 Tex. 269; DOWER.

Of those consequences which result from the direction or order of the court, the most important are: *Alimony*, or the allowance which a husband, by order of court, pays to his wife, living separate from him, for her maintenance. The allowance may be for her use either during the pendency of a suit, —in which case it is called alimony *pendente lite*,—or after its termination, called permanent alimony. As will be seen from the foregoing definition, alimony, especially permanent alimony, pertains rather to a separation from bed and board than to a divorce from the bond of matrimony. Indeed, it is generally allowed in the latter case only in pursuance of statutory provisions. See ALIMONY. It is provided by statute in several of our states that, in case of divorce, the court may order the husband to restore to the wife, when she is the innocent party, and sometimes even when she is not, a part or the whole of the property which he received by the marriage. In some cases, also, the court is authorized to divide the property between the parties, this being a substitute for the allowance of alimony. For further particulars, recourse must be had to the statutes in question.

The custody of children. In this country, the tribunal hearing a divorce cause is generally authorized by statute to direct, during its pendency and afterwards, with which of the parties, or with what other person, the children shall remain, and to make provision out of the husband's estate for their maintenance. There are few positive rules upon the subject, the matter being left to the discretion of the court, to be exercised according to the circumstances of each case. The general principle is to consult the welfare of the child, rather than any supposed rights of the parents, and as between the parents to prefer the innocent to the guilty. In the absence of a controlling necessity or very strong propriety, arising from the circumstances of the case, the father's claim is to be preferred ; see Reeve, Dom. Rel. 453 ; Lloyd, Div. 241 ; 40 N. H. 272 ; 16 Pick. 203 ; 24 Barb. 521 ; 27 *id.* 9 ; 2 Q. B. D. 75 ; 2 U. C. Q. B. 370 ; 55 Ala. 428 ; 56 Miss. 418 ; 12 R. I. 462 ; [1891] Prob. 124 ; and 2 Bish. Mar. & Div. § 1185, where the subject is fully treated ; the general rule, however, being that the welfare of the child will be consulted rather than the rights of either parent ; 12 R. I. 462 ; 68 Ill. 17 ; 32 N. J. Eq. 738 ; 44 Ala. 670. If the child is of an age to require especially a mother's care, her right of custody is preferred ; *id.* ; 55 *id.* 428 ; 14 Cal. 512 ; but it is for the trial court to say upon all the evidence whether she is more worthy of their custody than the father ; 92 Cal. 653. In some cases a child will be placed in the custody of a third person ; 47 How. Pr. 172 ; 2 Russ. 1 ; 21 Tex. 67 ; 80 Ind. 547 ; 39 Wis. 167. See CUSTODY.

A bigamous marriage being void *ab initio*, the second wife cannot maintain an action for judicial separation ; 5 Misc. Rep. 193.

By the civil law, the child of parents divorced is to be brought up by the innocent party at the expense of the guilty party. Ridley's View, pt. 1, c. 3, § 9, citing 8th Collation.

DO UT DES. I give that you may give. See CONSIDERATION.

DO UT FACIAS. I give that you may do. See CONSIDERATION.

DOCK. The enclosed space occupied by prisoners in a criminal court.

The space between two wharves. See 17 How. 434. The owner of a dock is liable to a person who, by his invitation, and in the exercise of due care, places a vessel in the dock, for injury to the vessel caused by a defect thereon which the owner negligently allows to exist ; 127 Mass. 236.

DOCKAGE. The sum charged for the use of a dock. In the case of a dry dock, it has been held in the nature of rent. 1 Newb. 69. See WHARFAGE.

DOCKMASTERS. Officers appointed to direct the mooring of ships, so as to prevent the obstruction of dock entrances.

DOCK WARRANT. A negotiable instrument, in use in England, given by the dock owners to the owner of goods imported and warehoused in the docks, as a recognition of his title to the goods, upon the production of the bills of lading, etc. Pulling on the Customs of London.

DOCKET. A formal record of judicial proceedings ; a brief writing. A small piece of paper or parchment having the effect of a larger. Blount. An abstract. Cowel.

To docket is said to be by Blackstone to abstract and enter into a book ; 3 Bla. Com. 397. The essential idea of a modern docket, then, is an entry in brief in a proper book of all the important acts done in court in the conduct of each case from its commencement to its conclusion. See Colby, Pr. 154.

In common use, it is the name given to the book containing these abstracts. The name of trial-docket is given to the book containing the cases which are liable to be tried at a specified term of court. The docket should contain the names of the parties and a minute of every proceeding in the case. It is kept by the clerk or prothonotary of the court. The docket entries form the record until the technical record is made up in proper form ; 38 Conn. 449 ; 2 Allen 443 ; 49 Me. 337 ; 105 Mass. 90 ; and this is true of the entries in the docket of a justice of the peace ; 18 Pick. 464 ; 21 Vt. 535. A sheriff's docket is not a record ; 9 S. & R. 91 ; 1 Bradf. 343.

DOCTOR. Means commonly a practitioner of medicine, of whatever system or school. 4 E. D. Smith 1.

DOCTORS COMMONS. An institution near St. Paul's Cathedral in London, where the ecclesiastical and admiralty courts were held until the year 1857. 3 Steph. Com. 306, n.

In 1768 a royal charter was obtained by virtue of which the members of the society and their successors were incorporated under the name and title of "The College of Doctors of Laws exercent in the Ecclesiastical and Admiralty Courts." The college consists of a president (the dean of the arches for the time-being) and of those doctors of laws who, having regularly taken that degree in either of the universities of Oxford and Cambridge, and having been admitted advocates in pursuance of the rescript of the archbishop of Canterbury, shall have been elected fellows of the college in the manner prescribed by the charter.

DOCUMENT OF TITLE. By the Factors' Act 56, Vict. c. 39, § 4, it is stated to mean any bill of lading, India warrant, dock warrant, warehouse-keeper's certificate warrant, or order for the delivery of goods, or any other document used in the ordinary course of business, as proof of the possession or control of goods, or authorizing, or purporting to authorize, either by endorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented. Benj. Sales 788.

DOCUMENTS. The deeds, agreements, title-papers, letters, receipts, and other written instruments used to prove a fact. See 12 R. I. 99.

If a document is lost, secondary evidence of its contents may be given, after laying a proper foundation therefor, by proving its former existence, and its due execution, and satisfactorily accounting for the failure to produce it. The burden of proving all these facts rests on the party who seeks to introduce secondary evidence of the document claimed to have been lost ; 101 N. Y. 427 ; 102 Pa. 338 ; 74 Me. 127 ; 66 Tex. 13 ; 20 Vt. 455. See 77 Pa. 507.

In Civil Law. Evidence delivered in the forms established by law, of whatever nature such evidence may be. The term is, however, applied principally to the testimony of witnesses. Savigny, Dr. Rom. § 165. See EVIDENCE.

DOE, JOHN. The name of the fictitious plaintiff in the action of ejectment. 3 Steph. Com. 618.

DOG. A domestic animal.

In almost all languages this word is used as a term or name of contumely or reproach. See 3 Bulstr. 225; 2 Mod. 260; 1 Leon. 148; and the title *Action on the Case for Defamation* in the Digests.

A dog is said *at common law* to have no intrinsic value, and he cannot, therefore, be the subject of larceny; 4 Bla. Com. 236; 8 S. & R. 571; 81 N. C. 527; Bell, Cr. Cas. 36. (But it is otherwise in England, by statute, and in Pennsylvania, by a statute passed in 1878, dogs are made personal property, subject to larceny, upon being duly registered. In Texas they may become the subject of theft; 30 Tex. App. 333; while they are held to be property within the meaning of Amend. V. of the Constitution; 8 Utah 245.) But the owner has such property in him that he may maintain trespass for an injury to his dog, or trover for a conversion; 1 Metc. Mass. 555; 10 Ired. 259; "for a man may have property in some things which are of so base nature that no felony can be committed of them: as, of a bloodhound or mastiff;" 12 Hen. VIII. 3; 18 *id.* 2; 7 Co. 18 *a*; 2 Bla. Com. 397; Fitzh. N. B. 86; Brooke, Abr. *Trespass*, pl. 407; Hob. 283; Cro. Eliz. 125; Cro. Jac. 463; 2 W. Bla. 1117.

Dogs, if dangerous animals, may lawfully be killed when their ferocity is known to their owner, or in self-defence; 10 Johns. 365; 13 *id.* 312; 35 Neb. 638; and when bitten by a rabid animal a dog may be lawfully killed by any one; 13 Johns. 312; 60 Ill. 211; but one is not justified in killing a dog without notice to the owner, merely because it barks around his house at night; 93 Mich. 420.

When a dog, in consequence of his vicious habits, becomes a common nuisance, the owner may be indicted. And when he commits an injury, if the owner had a knowledge of his mischievous propensity he is liable to an action on the case; Bull. N. P. 77; 1 B. & Ald. 620; 4 Campb. 198; 4 Cow. 351; 6 S. & R. 36; 1 Ill. 492; 17 Wend. 496; 23 *id.* 354; 4 Dev. & B. 146; 10 Cush. 509; 64 Hun 633; 161 Pa. 93; 41 La. Ann. 1029; 49 N. J. L. 163; 27 Ill. App. 531. See 1 Ky. L. Rep. 90; 159 Mass. 497; ANIMAL.

A man has a right to keep a dog to guard his premises, but not to put him at the entrance of his house; because a person coming there on lawful business may be injured by him; and this, though there may be another entrance to the house; 4 C. & P. 297; 6 *id.* 1. See also 155 Pa. 225. But if a dog is chained, and a visitor so incautiously go near him that he is bitten, he has no right of action against the owner; 3 Bla. Com. 154.

A tax on dogs is constitutional, and so is a provision that in case of refusal to pay the tax, the dog may be killed; 100 Mass. 136; 82 N. C. 175; *contra*, 8 Ohio Cir. Ct. R. 12; 8 Utah 245. A proceeding of the most stringent character for the destruction of dogs kept contrary to municipal regulations is constitutional; 69 Miss. 34. See EXPEDITATION.

DOGMA. **In Civil Law** The word is used in the first chapter, first section, of the second Novel, and signifies an ordinance of the senate. See, also, Dig. 27. 1. 6.

DOLE. A part or portion. *Dole-meadow*, that which is shared by several. Spelman, Gloss.; Cowel.

DOLI CAPAX. Capable of mischief; having knowledge of right and wrong. 4 Bla. Com. 22, 23; 1 Hale, Pl. Cr. 26, 27.

DOLI INCAPAX (Lat.). Incapable of distinguishing good from evil. A child under seven is absolutely presumed to be *doli incapax;* between seven and fourteen is, *prima facie, incapax doli*, but may be shown to be *capax doli*. 4 Bla. Com. 23; Broom, Max. 310; 2 Pick. 280; 14 Ohio 222; 2 Park. Cr. R. 174. See DISCRETION; AGE.

DOLLAR (Germ. *Thaler*). The money unit of the United States.

It was established under the confederation by resolution of congress, July 6, 1785. This was originally represented by a silver piece only; the coinage of which was authorized by the act of congress of Aug. 8, 1786. The same act also established a decimal system of coinage and accounts. But the coinage was not effected until after the passage of the act of April 2, 1792, establishing a mint, 1 U. S. Stat. L. 246; and the first coinage of dollars commenced in 1794. The law last cited provided for the coinage of "dollars or units, each to be of the value of a Spanish milled dollar, as the same was then current, and to contain three hundred and seventy-one grains and four-sixteenth parts of a grain of pure silver, or four hundred and sixteen grains of standard silver."

The Spanish dollar known to our legislation was the dollar coined in Spanish America, North and South, which was abundant in our currency, in contradistinction to the dollar coined in Spain, which was rarely seen in the United States. The intrinsic value of the two coins was the same; but, as a general (not invariable) distinction the American coinage bore *pillars*, and the Spanish an escutcheon or shield: all kinds bore the royal effigy.

The *milled dollar*, so called, is in contradistinction to the irregular, misshapen coinage nicknamed *cob*, which a century ago was executed in the Spanish-American provinces,—chiefly Mexican. By the use of a milling machine the pieces were figured on the edge, and assumed a true circular form. The pillar dollar and the milled dollar were in effect the same in value, and, in general terms, the same coin; though there are pillar dollars ("cobs") which are not milled, and there are milled dollars (of Spain proper) which have no pillars.

The weight and fineness of the Spanish milled and pillar dollars is eight and one-half pieces to a Castilian mark, or four hundred and seventeen and fifteen-seventeenths grains Troy. The limitation of four hundred and fifteen grains in our law of 1806. April 10, 2 U. S. Stat. L. 374, was to meet the loss by wear. The legal fineness of these dollars was ten dineros, twenty granos, equal to nine hundred and two and seven-ninths thousandths: the actual fineness was somewhat variable, and always below. The Spanish dollar and all other foreign coins are ruled out by the act of congress of Feb. 21, 1857, 13 U. S. Stat. 1856-57, 163, they being no longer a legal tender. But the statements herein given are useful for the sake of comparison: moreover, many contracts still in existence provide for payment (of ground-rents, for example) in Spanish milled or pillar dollars. The following terms, or their equivalent, are frequently used in agreements made about the close of the last and the beginning of the present century:

"silver milled dollars, each dollar weighing seventeen pennyweights and six grains at least." This was equal to four hundred and fourteen grains. The standard fineness of United States silver coin from 1792 to 1836 was fourteen hundred and eighty-five parts fine silver in sixteen hundred and sixty-four. Consequently, a piece of coin of four hundred and fourteen grains should contain three hundred and sixty-nine and forty-six hundredths grains pure silver.

By the act of Jan. 18, 1837, § 8, 5 U. S. Stat. 137, the standard weight and fineness of the dollar of the United States was fixed as follows: "of one thousand parts by weight, nine hundred shall be of pure metal, and one hundred of alloy," the alloy to consist of copper; and it was further provided that the weight of the silver dollar should be four hundred and twelve and one-half grains (412 1-2).

The weight of the silver dollar has not been changed by subsequent legislation; but the proportionate weight of the lower denomination of silver coins has been diminished by the act of Feb. 21, 1853, 11 U. S. Stat. L. 160. By this act the half-dollar (and the lower coins in proportion) is reduced in weight fourteen and one-quarter grains below the previous coinage: so that the silver *dollar* which was embraced in this act weighs twenty-eight and one-half grains more than *two* half-dollars. The silver dollar then, consequently, ceased to be current in the United States; but it continued to be coined to supply the demands of the West India trade and a local demand for cabinets, etc.

But the act of Feb. 28, 1878, 20 U. S. Stat. L. c. 20, restored the standard silver dollar of the act of Jan. 18, 1837, as a legal tender for all debts except where otherwise stipulated in the contract, and required the monthly purchase of not less than two million and not more than four million dollars worth of silver bullion and the coinage of the same into standard silver dollars, but this latter clause was repealed by act of July 14, 1890. The act of Feb. 12, 1873, introduced the *trade-dollar*, of the weight of four hundred and twenty grains Troy, intended chiefly, if not wholly, to supplant the Mexican dollar in trade with China and the East. It has found its way, however, all over the United States, and, as it has been declared by a joint resolution of congress of July 22, 1876, 19 Stat. L. p. 215, not to be a legal tender, has led to great inconvenience. See 10 Am. L. Reg. N. S. 87; 1 W. N. C. Pa. 223. The coinage of the *trade-dollar* was terminated and its redemption and recoinage in standard dollars was directed by the act of March 3, 1887, 24 Stat. L. 643. See also U. S. R. S. 1 Supp. 563, 774.

By the act of November 1, 1893, it is declared to be the policy of the United States to continue the use of both gold and silver as standard money, and to coin both gold and silver into money of equal intrinsic and exchangeable value, such equality to be secured through international agreement, or by such safeguards of legislation as will insure the maintenance of the parity in value of the coins of the two metals, and the equal power of every dollar at all times in the markets and in the payment of debts. It is further declared that the efforts of the Government should be steadily directed to the establishment of such a safe system of bimetallism as will maintain at all times the equal power of every dollar coined or issued by the United States, in the markets and in the payment of debts.

By the act of March 3, 1849, a *gold* dollar was authorized to be coined at the mint of the United States and the several branches thereof, conformably in all respects to the standard of gold coins now established by law, except that on the reverse of the piece the figure of the eagle shall be omitted. It is of the weight of 25.8 grains, and of the fineness of nine hundred thousandths. This dollar was made the unit of value by act of congress Feb. 12, 1873, and it was further provided that such dollar, when worn by natural abrasion, and so reduced in weight after twenty years of circulation (as evidenced by date on the face of such coin), will be redeemed by the United States Treasury or its offices, subject to such regulations as the Secretary of the Treasury may prescribe for the protection of the Government against fraudulent abrasions and other practices; U. S. Rev. Stat. §§ 3505, 3511.

A charge of one-fifth per centum was formerly made for converting gold bullion into coin, but by act of Jan. 14, 1875, this law was repealed.

The one dollar and the three dollar gold pieces are no longer coined. See 26 Stat. L. 485.

When the word dollars is used in a bequest or in any instrument for the payment of money, the amount is payable in whatever the United States declares to be legal tender, whether coin or paper money, but not in real or personal property in which money has been invested; 18 N. J. Eq. 136; 35 *id.* 396; 27 Ind. 426; 33 Texas 351; 8 Dana 190; 1 W. N. C. Pa. 223; 24 Ark. 100.

DOLO. The Spanish form of *dolus*.

DOLUS (Lat.). In Civil Law. A fraudulent address or trick used to deceive some one; a fraud. Dig. 4. 3. 1. Any subtle contrivance by words or acts with a design to circumvent. 2 Kent 560; Code 2. 21.

Dolus differs from *culpa* in this, that the latter proceeds from an error of the understanding, while to constitute the former there must be a will or intention to do wrong. Wolffius, Inst. § 17. See CULPA.

It seems doubtful, however, whether the general use of the word *dolus* in the civil law is not rather that of very great negligence, than of fraud, as used in the common law. A distinction was also made between *dolus* and *fraus*, the essence of the former being the intention to deceive, while that of the latter was actual damage resulting from the deceit.

Such acts or omissions as operate as a deception upon the other party, or violate the just confidence reposed by him, whether there be a deceitful intent (*malus animus*) or not. Pothier, *Traité de Dépôt*, nn. 23, 27; Story, Bailm. § 20 *a*; Webb's Poll. Torts 13; 2 Kent 506, n.

DOLUS MALUS (Lat.). Fraud. Deceit with an evil intention. Distinguished from *dolus bonus*, justifiable or allowable deceit. Calvinus, Lex.; Broom, Max. 349; 1 Kaufmann, Mackeld. Civ. Law 165. Misconduct. *Magna negligentia culpa est, magna culpa dolus est* (great negligence is a fault, a great fault is fraud). 2 Kent 560, n.

DOM PROC. (*Domus Procerum.*) The house of lords. Wharton, Lex.

DOMAIN. Dominion; territory governed. Possession; estate. Land about the mansion-house of a lord. The right to dispose at our pleasure of what belongs to us.

A distinction has been made between property and domain. The former is said to be that quality which is conceived to be in the thing itself, considered as belonging to such or such person, exclusively of all others. By the latter is understood that right which the owner has of disposing of the thing. Hence domain and property are said to be correlative terms; the one is the active right to dispose of, the other a passive quality which follows the thing and places it at the disposition of the owner. 3 Toullier, n. 83. But this distinction is too subtle for practical use. Puffendorff, *Droit de la Nat.* l. 4. c. 4, 106 § 2. See 1 Bla. Com. 105; *Clef des Lois Rom.*; Domat; 1 Hill, Abr. 24; 2 *id.* 237; EMINENT DOMAIN.

DOMBOC (spelled, also, often, *dombec.* Sax.). The name of codes of laws among the Saxons. Of these King Alfred's was the most famous. 1 Bla. Com. 46; 4 *id.* 411.

The *domboc* of king Alfred is not to be confounded with the domesday-book of William the Conqueror.

DOME (Sax.). Doom; sentence; judgment. An oath. The homager's oath in the black book of Hereford. Blount.

DOMESDAY, DOMESDAY-BOOK (Sax.). An ancient record made in the time of William the Conqueror, and now remaining in the English exchequer, consisting of two volumes of unequal size, containing mi-

nute and accurate surveys of the lands in England. It was printed by the English Government, in 1783. 2 Bla. Com. 49, 50. The work was begun by five justices in each county in 1081 and finished in 1086.

The great inquest survey, or "Description of all England," which we call Domesday Book, is one of the most precious documents that any nation possesses. For variety of information, for excellence of plan, for the breadth of land, and for the space it covers it is probably unrivalled. It is at once a terrier, a rent roll, an assessment register, as well as a book of settlements and a legal record. 1 Social England 236.

A variety of ingenious accounts are given of the origin of this term by the old writers. The commoner opinion seems to be that it was so called from the fulness and completeness of the survey making it a day of judgment for the value, extent, and qualities of every piece of land. See Spelman, Gloss.; Blount; *Termes de la Ley*.

It was practically a careful census taken and recorded in the exchequer of the kingdom of England.

DOMESMEN (Sax.). An inferior kind of judges. Men appointed to doom (judge) in matters in controversy. Cowel. Suitors in a court of a manor in ancient demesne, who are judges there. Blount; Whishaw; *Termes de la Ley*. See JURY.

DOMESTICS. Those who reside in the same house with the master they serve. The term does not extend to workmen or laborers employed out-of-doors. 5 Binn. 167; 6 La. Ann. 276; 43 Tex. 456; Merlin, *Répert.* The act of congress of April 30, 1790, s. 25, used the word domestic in this sense. This term does not extend to a servant whose employment is out of doors and not in the house; 41 Tex. 556.

Formerly this word was used to designate those who resided in the house of another, however exalted their station, who performed services for him. Voltaire, in writing to the French queen, in 1748, says, "Deign to consider, madam, that I am one of the domestics of the king, and consequently yours, my companions, the gentlemen of the king," etc.; but librarians, secretaries, and persons in such honorable employments would not probably be considered domestics, although they might reside in the houses of their respective employers.

Pothier, to point out the distinction between a domestic and a servant, gives the following example:—A literary man who lives and lodges with you, solely to be your companion, that you may profit by his conversation and learning, is your domestic; for all who live in the same house and eat at the same table with the owner of the house are his domestics; but they are not *servants*. On the contrary, your valet-de-chambre, to whom you pay wages, and who sleeps out of your house, is not, properly speaking, your domestic, but your servant. Pothier, Proc. Cr. sect. 2, art. 5, § 5; Pothier, Obl. 710, 828; 9 Toullier, n. 314; H. de Pansey, *Des Justices de Paix*, c. 30, n. 1.

DOMESTIC ATTACHMENT. See ATTACHMENT.

DOMESTIC MANUFACTURES. This term in a state statute is used, generally, of manufactures within its jurisdiction. 64 Pa. 100.

DOMICIL. That place where a man has his true, fixed, and permanent home and principal establishment, and to which whenever he is absent he has the intention of returning. 10 Mass. 188; 11 La. 175; 5 Metc. 187; 4 Barb. 505; Wall. Jr. 217; 9 Ired. 99; 1 Tex. 673; 13 Me. 255; 27 Miss. 704; 1 Bosw. 673; 74 Ill. 312.

The domicil of a person is that place or country in which his habitation is fixed, without any present intention of removing therefrom; [1892] 3 Ch. 180.

Dicey defines domicil as, in general, the place or country which is in fact his permanent home, but is in some cases the place or country which, whether it be in fact his home or not, is determined to be his home by a rule of law; Dicey, Dom. 42; and again as "that place or country either (1) in which he in fact resides with the intention of residence (*animus manendi*); or (2) in which, having so resided, he continues actually to reside, though no longer retaining the intention of residence (*animus manendi*); or (3) with regard to which, having so resided there, he retains the intention of residence (*animus manendi*), though he, in fact, no longer resides there;" *id.* 44. The same definition substantially is given in Dicey, Confl. Laws (Moore's ed.) 727. It is there said not to include cases of domicil created by operation of law.

Other definitions are quoted in the same words with modification:

Domicil is "a habitation fixed in some place with the intention of remaining there alway." Vattel, *Droit des Gens*, liv. i, c. xix, s. 218, *Du Domicile*.

"The place where a person has established the principal seat of his residence and of his business." Pothier, *Introd. Gen. Cout. d'Orleans*, ch. 1, s. 1, art. 8.

"That place is to be regarded as a man's domicil which he has freely chosen for his permanent abode [and thus for the centre at once of his legal relations and his business]." Savigny, s. 353.

"That place is properly the domicil of a person in which his habitation is fixed, without any present intention of removing therefrom." Story, Confl. Laws § 43.

"A residence at a particular place, accompanied with [positive or presumptive proof of] an intention to remain there for an unlimited time." Phillimore, Int. Law 49.

"That place is properly the domicil of a person in which he has voluntarily fixed the habitation of himself and his family, not for a mere special and temporary purpose, but with a present intention of making it his permanent home, unless and until something (which is unexpected or uncertain) shall occur to induce him to adopt some other permanent home." 28 L. J. Ch. 361, 366, per Kindersley, V. C.

It has been said that there is no precise definition of the word; 25 L. J. Ch. 750; but Dicey (Domicil, App. and in his Confl. Laws 731) dissents from this statement. In the latter work the learned writer says that "the attempts which have been made to define domicil, and of the criticisms upon such attempts, lead to results which may be summed up as follows:—

"First. Domicil, being a complex term, must, from the nature of things, be capable of definition. In other words, it is a term which has a meaning, and that meaning

can be explained by analyzing it into its elements.

"Secondly. All the best definitions agree in making the elements of domicil 'residence' and '*animus manendi*.'

"Thirdly. Several of these definitions—such, for example, as Story's, Phillimore's, or Vice-Chancellor Kindersley's—have succeeded in giving an explanation of the meaning of domicil, which, even if not expressed in the most precise language, is substantially accurate.

"Fourthly. The reason why English courts have been inclined to hold that no definition of domicil is satisfactory is, that they have found it impossible to reconcile any definition with three sets of judicial decisions or dicta (an officer in the service of the East India Company; an Englishman acquiring a domicil in another country; and a person residing in another country for his health). When, however, these sets are examined, it is found that two of them consist of cases embodying views of domicil now admitted to be erroneous, whilst the third set can be reconciled with all the best definitions of domicil." Dicey, Confl. Laws 735.

A person must have a domicil for purposes of taxation; 1 Metc. 242; 132 Mass. 89; 42 Wis. 476; 49 Me. 367; for jurisdiction; 65 N. H. 248; for succession; 52 Me. 165; 76 Ala. 433; 53 N. Y. 556; for administration; 85 Pa. 466; for pauper settlement; 23 Pick. 177; for loyal character; 93 U. S. 605; for homestead exemption; 20 Tex. 24; for attachment; 54 Miss. 308; 72 N. C. 1. A person can, however, have but one domicil at a time; 93 U. S. 605; 98 Mass. 158; 30 La. Ann. 502; 23 Pick. 170; but Cockburn (Nationality) says that it is quite possible for a person to have two domicils. See Morse, Citizenship 100. And a person may have both a civil and a commercial domicil; Dicey, Confl. Laws 740.

Domicil may be either national or domestic. In deciding the question of national domicil, the point to be determined will be in which of two or more distinct nationalities a man has his domicil. In deciding the matter of domestic domicil, the question is in which subdivision of the nation does the person have his domicil. Thus, whether a person is domiciled in England or France would be a question of national domicil, whether in Norfolk or Suffolk county, a question of domestic domicil. The distinction is to be kept in mind, since the rules for determining the two domicils, though frequently, are not necessarily, the same; see 2 Kent 449; Story, Confl. Laws § 39; Westl. Priv. Int. Law 15; Wheat. Int. Law 123; Jac. Dom. 77.

The Romanists and civilians seem to attach about equal importance to the place of business and of residence as fixing the place of domicil; Pothier, Introd. *Gen. Cout. d'Orleans*, c. 1, art. 1, § 8; Denizart; Story, Confl. Laws § 42. This may go far towards reconciling the discrepancies of the common law and civil law as to what law is to govern in regard to contracts. But at common law the main question in deciding where a person has a domicil is to decide where he has his home and where he exercises his political rights.

Legal residence, inhabitancy, and domicil are generally used as synonymous; 1 Bradf. Surr. 70; 1 Harr. Del. 383; 1 Spenc. 328; 2 Rich. 489; 10 N. H. 452; 3 Wash. C. C. 555; 15 M. & W. 433; 4 Barb. 505; 7 Gray 299; 49 Ia. 447; but much depends on the connection and purpose; 1 Wend. 43; 5 Pick. 231; 17 *id.* 231; 15 Me. 58; as "residence" has a more restricted meaning than "domicil;" 59 Mo. 238; 4 Humph. 346; 132 Mass. 89. So also in insolvency statutes; 130 Mass. 231; those relating to administration and distribution; 31 West Va. 790; testamentary matters; 20 N. Y. Sup. 417; eligibility for public office; 3 N. Y. Sup. 367; attachment statutes; 12 C. C. R. Pa. 255; and matters of jurisdiction; 120 N. Y. 485; 54 Ia. 289; 29 Fed. Rep. 494. The term citizenship ordinarily conveys a distinct idea from that of domicil; 45 Ia. 99; but it is often construed in the sense of domicil; 129 U. S. 315; 56 Fed. Rep. 556.

Two things must concur to establish domicil,—the fact of residence and the intention of remaining. These two must exist or must have existed in combination; 8 Ala. N. S. 159; 4 Barb. 504; 6 How. 163; Story, Confl. Laws § 44; 17 Pick. 231; 27 Miss. 704; 15 N. H. 137; 58 Conn. 268. There must have been an actual residence; 11 La. 175; 5 Metc. Mass. 587; 20 Johns. 208; 12 La. 190; 1 Binn. 349. The character of the residence is of no importance; 8 Me. 203; 1 Spears, Eq. 3; 5 E. L. & Eq. 52; 33 La. Ann. 1304; and if it has once existed, mere temporary absence will not destroy it, however long continued; 7 Cl. & F. 842; 43 Me. 426; 3 Bradf. Surr. 267; 29 Ala. N. S. 703; 4 Tex. 187; 3 Me. 455; 10 Pick. 79; 3 N. H. 123; 3 Wash. C. C. 555; 91 Ga. 30; 59 Mo. 238; 32 La. Ann. 606; 103 Mass. 576; as in the case of a soldier in the army; 36 Me. 428; 4 Barb. 522. And the law favors the presumption of a continuance of domicil; 5 Ves. 750; 5 Pick. 370; 1 Wall. Jr. 217; 1 Bosw. 673; 21 Pa. 106; 113 N. C. 537. The original domicil continues till it is fairly changed for another; 5 Madd. 232, 370; 10 Pick. 77; 8 Ala. N. S. 169; 2 Swan 232; 1 Tex. 673; 1 Woodb. & M. 8; 15 Me. 58; 3 Wall. Jr. 11; 10 N. H. 156; and revives on an intention to return; 1 Curt. Eccl. 856; 19 Wend. 11; 8 Cra. 278; 3 C. Rob. 12; 3 Wheat. 14; 8 Ala. N. S. 159; 3 Rawle 312; 1 Gall. 275; 4 Mas. 308; 8 Wend. 134. This principle of revival, however, is said not to apply where both domicils are domestic; 5 Madd. 379; Am. Lead. Cas. 714.

Mere taking up residence is not sufficient, unless there be an intention to abandon a former domicil; 7 Jac. Dom. 125; 1 Spear 1; 6 M. & W. 511; 21 Me. 357; 10 Mass. 488; 1 Curt. Eccl. 856; 4 Cal. 175; 2 Ohio 232; 5 Sandf. 44; 156 Pa. 617; 77 Mo. 678; nor is it even *prima facie* evidence of domicil when the nature of the residence either is inconsistent with, or rebuts the presumption of the existence of an *animus*

manendi; Dicey, Dom. Rule 19; 34 L. J. Ch. 212. Nor is intention of constituting domicil alone, unless accompanied by some acts in furtherance of such intention; 5 Pick. 370; 1 Bosw. 673; 5 Md. 186; 126 Mass. 161; 75 Pa. 201; 129 U. S. 328. A subsequent intent may be grafted on a temporary residence; 2 C. Rob. 322. Removal to a place with an intention of remaining there for an indefinite period and as a place of fixed present domicil, constitutes domicil, though there be a floating intention to return; 2 B. & P. 228; 3 Hagg. Eccl. 374. Both inhabitancy and intention are to a great extent matters of fact, and may be gathered from slight indications; 1 Sneed 63; 30 Pac. Rep. (N. M.) 936; 126 Mass. 219. A statute as to acquiring a residence will be strictly construed, and where a person spends part of his time in one state and the other part at his home in another, and where he has no business in the former but appears to be gaining a residence for the purpose of divorce only, he is not a *bona fide* resident; 43 Ill. App. 370. The place where a person lives is presumed to be the place of domicil until facts establish the contrary; 2 B. & P. 228, n.; 2 Kent 532; 113 N. Y. 582. A decedent is presumed to have been domiciled at the place where he died; 27 Ct. Cls. 529. See 5 Ves. Jr. 750; but where he was a non-resident of the state for many years and until within two months prior to his death, the presumption is that he was a non-resident at the time of his death; 156 Pa. 617.

Proof of domicil does not depend upon any particular fact but upon whether all the facts and circumstances taken together tend to establish the fact; 23 Pick. 170; 85 Pa. 466. Engaging in business and voting in a particular place are evidence of domicil there; Myr. Prob. Cal. 237; voting in a place is evidence, though not conclusive; 74 Ill. 312; 74 Me. 154; also payment of taxes; 25 Atl. Rep. (N. H.) 553; 61 Mich. 575; the execution of one's will in accordance with the laws of a particular place; 53 N. Y. 556; attending a particular church; 62 Vt. 386. But the ownership of real estate in a place not coupled with residence therein is of no value; 156 Pa. 617; 1 Tex. 673. Declaring an intent to become a citizen is not sufficient to prove an intention to adopt a domicil in the place where the declaration is made; 13 C. C. R. Pa. 177. Declarations made at the time of change of residence are evidence of a permanent change of domicil, but a person cannot, by his own declarations, make out a case for himself; 1 Flipp. 536; 157 Mass. 542; 65 N. H. 248; but see as to the latter, L. R. 2 P. & M. 435. Declarations of the party are admissible to prove domicil; 6 Misc. Rep. 620; 10 Biss. 128; but acts are said to be more important than words; 50 N. J. Eq. 137.

Domicil is said to be of three kinds,—domicil of origin, or by birth, domicil by choice, and domicil by operation of law. The place of birth is the *domicil by birth* if at that time it is the domicil of the parents; 2 Hagg. Eccl. 405; 5 Tex. 211. See 10 Rich. 38. If the parents are on a journey, the actual domicil of the parents will generally be the place of domicil; 5 Ves. 750; Westl. Priv. Int. Law 17. Children of ambassadors; 14 Beav. 441; 31 L. J. 24, 391; and consuls; L. R. 1 Sc. App. 441; 4 P. D. 1; and children born on seas, take the domicil of their parents; Story, Confl. Laws § 48.

The domicil of an illegitimate child is that of the mother; 23 L. J. Ch. 724; 35 Me. 411; 8 Cush. 75; but it has been thought better to "regard the father who acknowledges his illegitimate children, or who is adjudged to be such by the law, as imparting his domicil to such children;" Whart. Confl. L. 37; L. R. 1 Sc. App. 441; see Westl. Priv. Int. Law 272; where it is said that the place of birth of a child whose parents are unknown, is its domicil; if that is unknown, the place where it is found. The domicil of a legitimate child is that of its father; L. R. 1 P. & D. 611; 2 Hagg. Eccl. 405; 31 N. J. Eq. 194; 1 Binn. 349; 5 Ves. 786; see 45 Mo. App. 415. Westlake (Int. Law) maintains that a posthumous child takes its mother's domicil; but see Whart. Confl. Laws § 35. The domicil by birth of a minor continues to be his domicil till changed; 1 Binn. 349; 3 Zabr. 394; 8 Blackf. 34. See 49 Fed. Rep. 257. It changes with that of the father; 92 Ala. 551; 112 U. S. 452; 67 N. Y. 367.

A student does not change his domicil by residence at college; 7 Mass. 1; 5 Metc. Mass. 587; 71 Pa. 302; 35 Ia. 246; 76 Me. 158; 17 N. H. 235; and a prisoner removed from his domicil for temporary imprisonment does not acquire a new domicil; 74 Ga. 761; 85 Ala. 439; 74 Me. 237; or a convict for a long term; 74 Me. 237; or a fugitive from justice though intending never to return; 130 Mass. 231; but see 85 Ala. 439. A change of residence for purposes of health does not generally establish a new domicil; 27 Tex. 734; 38 Miss. 646. Absence in the service of the government does not necessarily affect the domicil; 89 N. C. 115; 17 Fla. 389; 22 N. Y. Supp. 137; depending, of course, on the intention of the party; 3 Ore. 229, 568; 128 Mass. 219. A diplomatic representative residing abroad does not change his domicil; 12 Pa. 365; or a consul; 4 How. Miss. 360; or one in the military or naval service; 36 Me. 428; 128 Mass. 219; nor a sailor absent on duty; 100 Mass. 167.

The domicil of origin always remains in abeyance, as it were, to be resorted to the moment the domicil of choice is given up. If one leaves a domicil of choice, with the intention of acquiring a new one, his domicil of origin attaches the moment he leaves the former, and persists until he acquires the latter; L. R. 1 Sc. App. 441; 75 Fed. Rep. 321; Dicey, Dom. 92. This, however, can only be true of national, as distinguished from local domicil; when a local domicil of choice is acquired, it certainly persists until a new one is adopted.

Domicil by choice is that domicil which a person of capacity of his free will selects to be such. Residence by constraint, which

is involuntary, by banishment, arrest, or imprisonment, will not work a change of domicil; Story, Confl. Laws § 47; 3 Ves. 198, 202; 11 Conn. 234; 5 Tex. 211; 1 Milw. 191; 1 Curt. Eccl. 856; 1 Sw. & Tr. 253; 41 Ill. 495; 74 Me. 236.

Domicil is conferred in many cases by *operation of law*, either expressly or consequentially.

The domicil of the husband is that of the wife; 29 Ala. N. S. 719; 7 Bush 135; 26 Tex. 665; 77 Ga. 84; 69 Ill. 277; 105 Mass. 116; 43 N. J. L. 495; 7 H. L. C. 390; L. R. 4 P. D. 1; 138 U. S. 694. A woman on marriage takes the domicil of her husband, and a husband, if entitled to a divorce, may obtain it though the wife be actually resident in a foreign state; 2 Cl. & F. 488; 1 Dow. 117; 2 Curt. Eccl. 351; 35 N. E. Rep. (Ind.) 713; 45 La. Ann. 457; 44 Ala. 437; 122 Mass. 162; 56 Wis. 195. See, also, 15 Johns. 121; 1 Dev. & B. Eq. 588; 2 Strobh. Eq. 174. But, where it is necessary for her to do so, the wife may acquire a separate domicil, which may be in the same jurisdiction; 9 Wall. 108; 39 Wisc. 659; 57 Mo. 204; 129 Ill. 386; 21 How. 582; *contra*, 2 Cl. & F. 488; Dicey, Dom. 104. She may rest on her husband's domicil for the purpose of obtaining a divorce; 15 N. H. 159; 1 Johns. Ch. 389; 5 Yerg. 203; 6 Humphr. 148; 8 W. & S. 251. See 54 Ark. 172; 30 Am. L. Rev. 604, 612; DIVORCE.

A wife divorced *a mensa et thoro* may acquire a separate domicil so as to sue her husband in the United States courts; 21 How. 582; so where the wife is deserted; 5 Cal. 280; 2 E. L. & Eq. 52; 2 Kent 573.

The domicil of a widow remains that of her deceased husband until she makes a change; Story, Confl. Laws § 46; 18 Pa. 17.

Prisoners, exiles, and refugees do not thereby change their domicil; see L. R. 1 Sc. App. 148; 11 Conn. 234; 21 Vt. 563; 85 Ala. 439. It may be otherwise in case of a life sentence; Whart. Confl. Law § 54.

Commercial domicil. There may be a commercial domicil acquired by maintenance of a commercial establishment in a country, in relation to transactions connected with such establishments; 1 Kent 82; 144 U. S. 47; 52 Fed. Rep. 203. See Dicey, Dom. 341; 2 Wheat. 76.

This is such a residence in a country for purposes of trade as makes a person's trade or business contribute to or form part of the resources of such country. The question is whether he is or is not residing in such country with the purpose of continuing to trade there; Dicey, Confl. Laws 737. The intention of remaining in the commercial domicil is the intention to continue to reside and trade there for the present; *id.* 738. Commercial domicil is not forfeited by temporary absence at the domicil of origin; 144 U. S. 63; but if a person go into a foreign country and engage in trade there, he is, by the law of nations, to be considered a merchant of that country, and subject for all civil purposes, whether that country be hostile or neutral; 3 B. & P. 113; 3 C. Rob. 12; 1 Hagg. 103, 104; 1 Pet. C. C. 159; 2 Cra. 64; and this whether the effect be to render him hostile or neutral in respect to his *bona fide* trade; 1 Kent 75; 3 B. & P. 113; 1 C. Rob. 249.

Corporations. If the term domicil can apply to corporations, they have their domicil wherever they are created; L. R. 1 Ex. 428; 5 H. L. 416; 40 Mo. 580. See 147 Ill. 234; but a permanent foreign agency of an insurance company may create an independent domicil in the place of the agency, for the purpose of enforcing legal obligation; 53 N. Y. 339. See 1 Black 256. If a railroad performs its functions within a state under a charter granted by the legislature, the fact that earlier charters were granted in other states does not render the corporation any the less a resident of the state granting the latest charter; 91 Tenn. 395; an insurance company organized under the laws of one state, but which appoints an agent in another state on whom service of process can be made, does not change the domicil of the corporation; 138 N. Y. 209. See also 107 U. S. 581; 138 N. Y. 209; 158 Mass. 461.

Change of domicil. Any person, *sui juris*, may make any *bona fide* change of domicil at any time; 5 Madd. 379; 5 Pick. 370; 35 E. L. & Eq. 532. And the object of the change does not affect the right, if it be a genuine change with real intention of permanent residence; 3 Wash. C. C. 546; 5 Mas. 70; 1 Paine 594; 3 Sumn. 251; 85 Ala. 439. Domicil is not lost by going to another state to seek a home, but continues until the home is obtained; 12 Pa. Co. Ct. R. 255. Legitimate children follow the domicil of the father, if the change be made *bona fide;* 2 Salk. 528; 2 Bro. Ch. 500; 16 Mass. 52; Ware 464; 27 Mo. 280; L. R. 1 P. & D. 611; 67 N. Y. 379; 45 Ia. 49; 49 Fed. Rep. 257; 23 L. J. Ch. 724; 67 Ala. 304; 23 Ind. 43; illegitimate children, that of the mother; 37 L. J. Ch. 724; Dicey, Dom. 97; 35 Me. 411; 8 Cush. 75; but there are limitations to the power to change a minor child's domicil in the case of alien parents; 10 Ves. 52; 5 East 221; 8 Paige, Ch. 47; 2 Kent 226; and of the mother, if a widow; Burge 38; 30 Ala. N. S. 613; see 2 Bradf. Surr. 214; 45 Mo. App. 415; however, if she acquires a new domicil by remarriage, the child's domicil does not change; 40 N. Y. Sup. Ct. 347; 2 Bradf. Surr. 414; 8 Cush. 528; 11 Humphr. 536. See [1893] 3 Ch. 490; 112 U. S. 452; 35 Ala. 521. If a father abandons his children, who are cared for and live with their grandmother for several years, and he subsequently removes them against her will, the residence of the children is not changed; 92 Cal. 195; 49 Fed. Rep. 257.

The guardian is said to have the same power over his ward that a parent has over his child; 5 Pick. 20; 33 Tex. 512; 8 Ohio 227; 1 Binn. 349, n.; 2 Kent 237. But see *contra*, 8 Blackf. 345. The point is not settled in England; Dicey, Dom. 133. See 3 Mer. 67; 9 W. N. C. Pa. 564. "It has been generally held that a guardian can change the ward's domicil from one county to an-

other in the same state; 42 Vt. 350; L. R. 5 Q. B. 325. It is doubtful, to say the least, whether the guardian can remove the ward's domicil out of the state in which he was appointed; L. R. 12 Eq. 617; 52 Ala. 430. A guardian appointed in a state where the ward is temporarily residing cannot change the ward's domicil from one state to another;" 112 U. S. 452. But see 87 Tenn. 644. The mere appointment of a guardian will not prevent the ward from changing his domicil where he has sufficient mental capacity to do so; 17 R. I. 480; 149 Mass. 57. It may be considered questionable whether the guardian can change the national domicil of his ward; 2 Kent 226; Story, Confl. Laws § 506.

The domicil of a lunatic may be changed by the direction or with the assent of his guardian; 5 Pick. 20; 42 Vt. 350; *contra*, 53 Me. 442. See L. R. 1 P. & M. 611; 3 Ves. Jr. 198; 9 W. R. 764.

The husband may not change his domicil after committing an offence which entitles the wife to a divorce, so as to deprive her of her remedy; 14 Pick. 181; 2 Tex. 261. And it is said the wife may not in the like case acquire a new domicil; 10 N. H. 61; 9 Me. 140; 17 Conn. 284; 5 Yerg. 203; 2 Mass. 153; 2 Litt. 337; 2 Blackf. 407. Until a new domicil is gained, the old one remains; 93 U. S. 605; 55 Me. 117. See DIVORCE.

The law of the place of domicil governs as to all acts of the parties, when not controlled by the *lex loci contractus* or *lex rei sitæ*. Personal property of the woman follows the law of the domicil upon marriage. It passes to the husband, if at all, in such cases as a legal assignment by operation of the law of domicil, but one which is recognized extra-territorially; 2 Rose 97; 20 Johns. 267; Story, Confl. Laws § 423.

The state and condition of the person according to the law of his domicil will generally, though not universally, be regarded in other countries as to acts done, rights acquired, or contracts made in the place of his native domicil; but as to acts, rights, and contracts done, acquired, or made out of his native domicil, the *lex loci* will generally govern in respect to his capacity and condition; 2 Kent 234. See LEX LOCI.

The disposition of, succession to, or distribution of the personal property of a decedent, wherever situated, is to be made in accordance with the law of his actual domicil at the time of his death; 8 Sim. 310; 3 Stor. 755; 11 Miss. 617; 1 Spear, Eq. 3; 4 Bradf. Surr. 127; 15 N. H. 137. See 143 Ill. 25.

The principle applies equally to cases of voluntary transfer, of intestacy, and of testaments; 5 B. & C. 451; 3 Stor. 755; 3 Hagg. 273; 3 Curt. Eccl. 468; 9 Pet. 503; 2 Harr. & J. 191; 6 Pick. 286; 9 N. H. 137; 8 Paige, Ch. 519; 1 Mas. 381; 6 T. B. Monr. 52; 29 Ala. N. S. 72; 6 Vt. 374. Stocks are considered as personal property in this respect; 1 Cr. & J. 151; Bligh, N. S. 15; 1 Jarm. Wills 3.

Movable articles are generally taxable at the place where they are actually situated, 141 U. S. 18, and domicil is the test of liability to personal taxes; 80 Ia. 470; 158 Mass. 461.

Wills are to be governed by the law of the domicil as to the capacity of parties; 1 Jarm. Wills 3; and as to their validity and effect in relation to the transfer of personal property; 4 Blackf. 53; 2 Ill. 373; 2 Bail. 436; 5 Pet. 519; 2 B. Monr. 582; 3 Curt. Eccl. 468; 11 N. H. 88; 1 M'Cord 354; 5 Gill & J. 483; 53 N. Y. 556; 35 Ala. 521; 52 Me. 165; 75 Pa. 201; but by the *lex rei sitæ* as to the transfer of real property; 1 Blackf. 372; 6 T. B. Monr. 527; 22 Me. 303; 8 Ohio 239; 7 Cra. 115; 31 Mo. 166; 27 Tex. 38; 14 Ves. 541; 75 Pa. 201. See LEX REI SITÆ.

The forms and solemnities of the place of domicil must be observed; 8 Sim. 279; 4 M. & C. 76; 2 H. & J. 191; 1 Binn. 336; 4 Johns. Ch. 460; 1 Mas. 381; 12 Wheat. 169; 9 Pet. 483; 52 Me. 165; 35 Ala. 521; 15 La. Ann. 137, 154.

The local law is to determine the character of property; 6 Paige, Ch. 630; Story, Confl. Laws § 447; Erskine, Inst. b, 3, tit. 9, § 4. And it is held that a state may regulate the succession to personal as well as real property within its limits, without regard to the *lex domicilii*; 6 Humphr. 116.

The interpretation of a will of movables is to be according to the law of the place of the last domicil of the testator: 3 Cl. & F. 544, 570; L. R. 3 H. L. 55; 68 Pa. 151; 4 Bligh 502; 3 Sim. 298; 2 Bro. Ch. 38; 9 Pet. 483. But so far as its validity is concerned, it does not matter that after the will was made in one domicil the testator went to another, where he died: Whart. Confl. Laws § 592; Beach, Wills 158, 10 Mo. 543; Story, Confl. Laws § 479 *g*. See 53 N. Y. 556. In England, by statute, a will does not become invalid nor is its construction altered by reason of the testator's change of domicil after making it; Dicey, Dom. 308. It has been said that the rules as to construction of wills apply whether they be of real or personal property, unless in case of real property it may be clearly gathered from the terms of the will that the testator had in view the *lex rei sitæ*; Story, Confl. Laws § 479 *h*; 2 Bligh 60; 4 M. & C. 76. But see, *contra*, Whart. Confl. Laws § 597. See CONFLICT OF LAWS; LEX REI SITÆ; WILL.

Distribution of the personal property of an intestate is governed exclusively by the law of his actual domicil at the time of his death; 5 B. & C. 438; 4 Bush 51; 14 How. 400; 14 Mart. La. 99; 2 H. & J. 193; 4 Johns. Ch. 460; 1 Mas. 418; 15 N. H. 137; 35 La. Ann. 19. This includes the ascertainment of the person who is to take; Story, Confl. Laws § 481; 2 Ves. 35; 2 Hagg. 455; 2 Keen 293. The *descent* of real estate depends upon the law of the place of the real estate; 7 Cra. 115; 52 Ala. 85; 8 L. R. Ch. 842; 32 Ind. 99; 111 N. Y. 624; 9 Wheat. 565; 14 Ves. 541; 70 Ala. 626; 38 N. J. Eq. 516; 101 Ill. 26. The question whether debts are to be paid by the administrator from the personalty or realty is to be decided by the law of his domicil; Story, Confl. Laws § 528; 9 Mod. 66; 2 Keen 293.

Insolvents and bankrupts. An assign-

ment of property for the benefit of creditors valid by the law of the domicil is generally recognized as valid everywhere; Bish. Insolv. Debt. 385; 4 Johns. Ch. 471; 2 Rose 97; 1 Cr. M. & R. 296; 52 Conn. 330; 137 Mass. 366; 142 *id.* 53; 40 Barb. 465; 104 Pa. 381; 41 N. J. Eq. 402; in the absence of positive statute to the contrary; 6 Pick. 283; 14 Mart. La. 93, 100; 6 Binn. 353; but not to the injury of citizens of the foreign state in which property is situated; 5 East 131; 17 Mart. La. 596; 6 Binn. 360; 5 Cra. 289; 12 Wheat. 213; 4 Bush 149; 48 N. H. 125; 1 H. & M'H. 236; 35 Barb. 663. But a compulsory assignment by force of statute is not of extra-territorial operation; 20 Johns. 229; 6 Binn. 353; 6 Pick. 286; 27 Mich. 159. Distribution of the effects of insolvent or bankrupt debtors is to be made according to the law of the domicil, subject to the same qualifications; Story, Confl. Laws § 323, 423 *a*. See, generally, 13 Am. L. Rev. 261; 7 Wash. L. Rep. 487; 11 Cent. L. J. 421; 23 Alb. L. J. 86; Whart. Confl. Laws; Morse, Citizenship; Tiffany; Schouler, Domestic Relations; CONFLICT OF LAWS; BANKRUPT; INSOLVENCY.

DOMINANT. That to which a servitude or easement is due, or for the benefit of which it exists. Distinguished from *servient*, that from which it is due.

DOMINICUM (Lat. domain; demain; demesne). A lordship. That of which one has the lordship or ownership. That which remains under the lord's immediate charge and control.

In this sense it is equivalent to the Saxon *bord-lands*. Spelman, Gloss.; Blount. In regard to lands for which the lord received services and homage merely, the *dominicum* was in the tenant.

Property: domain; anything pertaining to a lord. Cowel.

In Ecclesiastical Law. A church, or any other building consecrated to God. Du Cange.

DOMINION. Ownership or right to property. 2 Bla. Com. 1. "The holder has dominion of the bill." 8 East 579.

Sovereignty or lordship, as the dominion of the seas. Black, L. Dict. See DOMINIUM.

DOMINIUM (Lat.). Perfect and complete property or ownership in a thing.

Plenum in re dominium,—plena in re potestas. This right is composed of three principal elements, viz.: the right to use, the right to enjoy, and the right to dispose of the thing, to the exclusion of every other person. To use a thing, *jus utendi tantum*, consists in employing it for the purposes for which it is fit, without destroying it, and which employment can therefore be repeated; to enjoy a thing, *jus fruendi tantum*, consists in receiving the fruits which it yields, whether natural or civil, *quidquid ex re nascitur*; to dispose of a thing, *jus abutendi*, is to destroy it, or to transfer it to another. Thus, he who has the use of a horse may ride him, or put him in the plow to cultivate his own soil; but he has no right to hire the horse to another and receive the civil fruits which he may produce in that way.

On the other hand, he who has the enjoyment of a thing is entitled to receive all the profits or revenues which may be derived from it, either from natural or civil fruits.

And, lastly, he who has the right of disposing of a thing, *jus abutendi*, may sell it, or give it away, etc., subject, however, to the rights of the usuary or usufructuary, as the case may be.

These three elements, *usus*, *fructus*, *abusus*, when united in the same person, constitute the *dominium*; but they may be, and frequently are, separated: so that the right of disposing of a thing may belong to *Primus*, and the rights of using and enjoying to *Secundus*, or the right of enjoying alone may belong to *Secundus*, and the right of using to *Tertius*. In that case, *Primus* is always the owner of the thing, but he is the naked owner, inasmuch as for a certain time he is actually deprived of all the principal advantages that can be derived from it. *Secundus*, if he has the use and enjoyment, *jus utendi et fruendi simul*, is called the usufructuary, *ususfructuarius*; if he has the enjoyment only, *jus fruendi tantum*, he is the *fructuarius*; and *Tertius*, who has the right of use, *jus utendi tantum*, is called the usuary, —*usuarius* But this dismemberment of the elements of the *dominium* is essentially temporary; if no shorter period has been fixed for its duration, it terminates with the life of the usuary, fructuary, or usufructuary; for which reason the rights of use and usufruct are called personal servitudes. Besides the separation of the elements of the *dominium* among different persons, there may also be a *jus in re*, or dismemberment, so far as real estates are concerned, in favor of other estates. Thus, a right of way over my land may exist in favor of your house; this right is so completely attached to the house that it can never be separated from it, except by its entire extinction. This class of *jura in re* is called predial or real servitudes. To constitute this servitude, there must be two estates belonging to different owners; these estates are viewed in some measure as juridical persons, capable of acquiring rights and incurring obligations. The estate in favor of which the servitude exists is the creditor-estate; and the estate by which the servitude is due, the debtor-estate. 2 Mariadé. See EMINENT DOMAIN.

DOMINIUM DIRECTUM (Lat.). Legal ownership. Ownership as distinguished from enjoyment.

DOMINIUM DIRECTUM ET UTILE (Lat.). Full ownership and possession united in one person.

DOMINIUM UTILE (Lat.). The beneficial ownership. The use of the property.

DOMINUS (Lat.). The lord or master; the owner. Ainsworth, Lat. Lex. The owner or proprietor of a thing, as distinguished from him who uses it merely. Calvinus, Lex. A master or principal, as distinguished from an agent or attorney. Story, Ag. § 3; Ferriere, Dict.

In Civil Law. A husband. A family. Vicat, Voc. Jur.

DOMINUS LITIS (Lat.). The master of suit. The client, as distinguished from an attorney.

And yet it is said, although he who has appointed an attorney is properly called *dominus litis*, the attorney himself, when the cause has been tried, becomes the *dominus litis*. Vicat.

DOMINUS NAVIS. In Civil Law. The absolute owner of a ship. Wharton.

DOMITÆ (Lat.). Tame; subdued; not wild.

Applied to domestic animals, in which a man may have an absolute property. 2 Bla. Com. 391.

DONATARIUS (L. Lat.). One to whom something is given. A donee.

DONATIO (Lat.). A gift. A transfer of the title to property to one who receives

it without paying for it. Vicat. The act by which the owner of a thing voluntarily transfers the title and possession of the same from himself to another person, without any consideration. See 56 Ind. 476; 65 Ga. 499.

A donation is never perfected until it has been accepted; for an acceptance is requisite to make the donation complete. See ASSENT; Ayl. Pand. tit. 9; *Clef des Lois Rom.*; 2 Kent 438; 2 E. D. Sm. 305; 28 Ala. N. S. 641. In old English law and in the modern law, in several phrases, the word retains the extended sense it has in the civil law.

Its literal translation, gift, has acquired in real property law a more limited meaning, being applied to the conveyance of estates tail. 2 Bla. Com. 316; Littleton § 59; West, Symb. § 254; 4 Cruise, Dig. 51. There are several kinds of *donatio:* as, *donatio simplex et pura* (simple and pure gift without compulsion or consideration); *donatio absoluta et larga* (an absolute gift); *donatio conditionalis* (a conditional gift); *donatio stricta et coarctura* (a restricted gift, as, an estate tail).

DONATIO INTER VIVOS (Lat. a gift between living persons). A contract which takes place by the mutual consent of the giver, who divests himself of the thing given in order to transmit the title of it to the donee, gratuitously, and the donee who accepts and acquires the legal title to it. It operates, if at all, in the donor's lifetime, immediately and irrevocably; it is a gift executed; no further act of parties, no contingency of death or otherwise, is needed to give it effect; 3 Del. Ch. 62. "Gifts *inter vivos* have no reference to the future and go into immediate and absolute effect"; 2 Kent, Com. Lacy's ed. 439. Such a gift takes place when the giver is not in any immediate apprehension of death, which distinguishes it from a *donatio mortis causa* (*q. v.*).

This division of gifts is taken from the Roman law as are also the rules by which they are governed; 2 Kent, Com. 439. A *donatio inter vivos*, as distinguished from a *donatio mortis causa*, does not require actual delivery, and it is sufficient, to complete such a gift, that the conduct of the parties should show that the ownership of the chattel has been changed; 79 Ga. 119. It is true, however, that under such a gift a person "may take a benefit to accrue *at a future day*—it may be at the donor's death; but this can be only through the instrumentality of a trust created either in a third person or in the donor. The effect is to divest at once the former property of the donor in the thing so given. Such a gift is no less immediate than in the ordinary case;" 3 Del. Ch. 62. See GIFT.

DONATIO MORTIS CAUSA (Lat. a gift in prospect of death). A gift made by a person in sickness, or other immediate peril, who, apprehending his dissolution near, delivers, or causes to be delivered, to another, the possession of any personal goods, to keep as his own in case of donor's decease. 2 Bla. Com. 514; 51 Pa. 345.

The civil law defines it to be a gift under apprehension of death: as, when anything is given upon condition that if the donor die the donee shall possess it absolutely, or return it if the donor should survive or should repent of having made the gift, or if the donee should die before the donor. 1 Miles 109.

It differs from a legacy, inasmuch as it does not require proof in the court of probate; 2 Stra. 777; see 1 Bligh, N. S. 531; and no assent is required from the executor to perfect the donee's title; 2 Ves. 120; 1 S. & S. 245. It differs from a gift *inter vivos* because it is ambulatory and revocable during the donor's life, because it may be made to the wife of the donor, and because it is liable for his debts, and it requires actual delivery; 79 Ga. 11. See also as to these distinctions Brett, L. Cas. Mod. Eq. 33.

To constitute a good *donatio mortis causa: first*, the thing given must be personal property; 3 Binn. 370; a bond; 3 Binn. 370; 2 Ves. Sen. 431; 3 Madd. 184; bank notes; 23 Pa. 59; 2 Bro. Ch. 612; 32 Barb. 250; 3 P. Wms. 356; certificates of stock; 55 Barb. 251; a policy of life insurance; 1 B. &. S. 109; 51 Pa. 345; and a check offered for payment during the life of the donor; 4 Bro. Ch. 286; will be so considered; but a check not so presented, which had not passed into the hands of a *bona fide* holder, is revoked by the death of the decedent; L. R. 6 Eq. 198; 27 La. Ann. 465; s.c. 21 Am. Rep. 567; 13 L. R. Eq. 489; 31 Ohio St. 457; 30 Hun 632; 59 Cal. 665; *aliter*, as to a check given abroad; L. R. 5 Ch. Div. 730. See 154 Pa. 183. A check to a wife expressing that it was to enable her to buy mourning, was held under peculiar circumstances a valid *donatio mortis causa;* 1 P. Wms. 441. A note not negotiable, or if negotiable, not indorsed, but delivered, passes by such a donation; 1 Dan. Neg. Inst. § 24; Tiedm. Com. Pap. 252; 13 Gray 418; but in 5 Gill & J. 54, this is limited to bank notes and notes payable to bearer. A certificate of deposit which is delivered to a person for the use of a third party, though not indorsed, is a valid gift; 11 Colo. 183; 36 Ill. App. 525; *contra*, 109 Mo. 90; see 64 Cal. 346. The delivery of a savings-bank book passes the money in bank; 63 Me. 364; 124 Mass. 472; 129 *id.* 425; 36 Conn. 88; 8 R. I. 536; *contra*, 3 Ir. Eq. 668; 121 Pa. 177; see 89 Va. 1. A banker's deposit note is a good subject of gift; 44 Ch. Div. 76; but where the bank book is already in the hands of the donee, a statement by the donor that his wife may have it is not sufficient; 81 Me. 231. See 36 Cent. Law J. 354; 31 Am. Law Reg. 681; 34 *id.* 85, for discussions and annotations on this subject. A mortgage is a good gift; Barn. Ch. Cas. 90; 5 Madd. 351; 1 Bligh, N. S. 497; a policy of insurance; 1 Best & Sm. 109; 33 Beav. 619; a receipt for money; 4 De G. & Sm. 517; bonds; 3 Atk. 214; 1 Bligh, N. S. 497; bank notes; 2 Eden 125; Sel. Ch. Cas. 14; 3 P. Wms. 356; 2 Bro. C. C. 612.

A promissory note of the sick man made in his last illness is not a valid donation; 5 B. & C. 501; 14 Pick. 204; 3 Barb. Ch. 76; 21 Vt. 238; 77 Pa. 328. See 33 N. H. 520; 18 Conn. 410; 11 Md. 424; 4 Cush. 87; 41 Ill. App. 659. See 6 Harv. L. Rev. 36. In England, bills delivered on a deathbed but

without consideration, are valid donations; 27 Beav. 303; but a gift of the donor's own cheque, if not payable until after his death, is not valid; 15 Ch. D. 651; 27 Ch. D. 631. See also 5 Ch. D. 730; 4 D. M. & G. 249. As to a gift of money, see 50 N. J. Eq. 537.

Second, the gift must be made by the donor in peril of death, and to take effect only in case the giver dies; Bisph. Eq. 70; 3 Binn. 370; 1 Bligh, N. S. 530; 43 Vt. 513; 49 N. Y. 17; 3 Misc. Rep. 277; a gift made in apprehension of death from a surgical operation is valid; 125 N. Y. 572. There is quite a conflict of authority as to whether a gift by a soldier about to join the army is a valid *donatio causa mortis*, with the weight of authority against sustaining them. They have been upheld, it may possibly be considered, in 42 Ill. 39; but this case is explained in Travis on Sales as a gift *inter vivos* on condition; a case cited as upholding them, 34 Ind. 547, is overruled if it does so hold; 38 *id.* 451, which holds them invalid, as do also 51 Pa. 345; 23 W. Va. 415; 47 Barb. 370; 5 Rob. N. Y. 216 (Barbour, J., dissenting). See 4 Cold. 288.

Such a gift is only good when made in relation to the death of the person by illness affecting him at the time; 2 Ves. Jr. 121; but if it appear that the donation was made when the donor was ill and only a few days or weeks before his death, it will be presumed that it was made in the last illness and in contemplation of death; 1 Wms. Ex. 845; 3 Story 755; 31 Me. 422.

When a gift was made in contemplation of death, but the donor so far recovered as to be able to attend to his business, and then died of the same disease, *held* not a good *donatio;* 17 Me. 287. That the donor lived fourteen days; 2 Whart. 17; three days; 3 Binn. 366; 85 Me. 227; six hours; 23 Pa. 63; after making the gift, does not invalidate it. There seems to be no rule limiting the time within which the gift must be made before death; 49 N. Y. 17.

Third, there must be an actual delivery of the subject to or for the donee, in cases where such delivery can be made; 2 Ves. 120; 2 Gill & J. 268; 4 Gratt. 472; 31 Me. 422; 14 Barb. 243; 7 E. L. & Eq. 134; 75 Pa. 115, 147; 49 N. Y. 17; 41 N. H. 147; 75 Cal. 548; 149 Mass. 12; L. R. 6 Eq. 474; 63 N. H. 552; 77 Mo. 166; 94 N. C. 274. The delivery must be as complete as the nature of the property will admit of; 56 Me. 324; 114 Mass. 30. In this last case taking the key of a trunk, putting goods into the trunk and returning the key to its place at the request of the owner, who expressed a desire, in his last illness, to make the trunk and its contents a *donatio mortis causa*, was held not to be a sufficient delivery. The gift of the keys of a box deposited in a vault of a bank containing bonds, etc., is a sufficient constructive delivery of the contents of the box; 89 Va. 1; 2 Ves. Sen. 431; Prec. Ch. 300; [1891] W. N. 201; where donor delivered the keys of a trunk to donee, and said the trunk and its contents were donee's, it was valid; 158 Mass. 592; but see 85 Me. 227. An intention to give is sufficiently manifested from the fact that a person *in extremis* hands a package of bonds to another saying, "These bonds are for you;" 73 Cal. 61. Delivery can be made to a third person for the use of a donee; 3 Binn. 370; 2 Bradf. Surr. 340; 5 Bush 591; but not if the third party is the agent of the giver; 2 Coll. 356. The acceptance is presumed, unless the contrary appear; 94 Mich. 11.

To make such a gift valid there must be a renunciation by the donor and an acquisition by the donee, of all interest and title to the property intended to be given; 18 N. Y. Sup. 852.

To constitute such a gift, the subject of the gift must be delivered either to the donee or to some person for his use and benefit, and the donor must part with all dominion over the property, and the title must vest in the donee, subject to the right of the donor at any time to revoke the gift; 75 Cal. 548.

It is an unsettled question whether such kind of gift appearing in writing, without delivery of the subject, can be supported; 2 Ves. 120; 3 Ired. Ch. 268; but Lord Hardwicke expressed the opinion that it could be; 2 Ves. Sen. 440; 1 *id.* 314; *contra*, 1 Wms. Ex. 855. And see 12 Tex. 327. By the Roman and civil law, a gift *mortis causa* might be made in writing; Dig. lib. 39, t. 6, l. 28; 2 Ves. Sen. 440; 1 *id.* 314.

Upon the recovery of the donor and his consequent ability to comply with the statute, the dispensation from its requirements ceases and the gift *causa mortis*, though valid when made, becomes of no further force. No expression to this effect is necessary; 3 Del. Ch. 63; 89 Va. 1.

The essentials are also thus stated: 1. It must be in view of donor's death. 2. With express or implied intention that it shall only take effect by reason of existing disorder. 3. Delivery by the donor to the donee or some one on his behalf; Brett, L. Cas. Mod. Eq. 33; but this is not so satisfactory as the well-settled enumeration above given.

A *donatio mortis causa* does not require the executor's assent; 2 Ves. Jr. 120; is revocable by the donor during his life; 2 Bradf. Surr. 339; 27 Me. 196; 3 Woodb. & M. 519; 34 N. H. 439; 99 Cal. 311; by recovery; 3 Macn. & G. 664; Wms. Ex. 651; or resumption of possession; 7 Taunt. 233; 2 Ves. Sen. 433; but not by a subsequent will; Prec. Chanc. 300; *contra*, 31 Ill. App. 28; but may be satisfied by a subsequent legacy; 1 Ves. Sen. 314. And see 1 Ired. Ch. 130. It may be of any amount of property; 24 Vt. 591. It is liable for the testator's debts; 1 Phill. Ch. 406; 109 Mo. 90; 63 N. H. 552; 107 U. S. 602; a gift providing for the payment of certain bills and a division of the remaining property is valid; 70 Hun 565.

A gift *causa mortis* is none the less valid because it embraces the entire personal estate of the donor, and the testimony of one credible witness is sufficient to establish such a gift; 89 Va. 1; 24 Vt. 591; but see 18 Pa. 326; 13 Allen 43; and a gift accom-

panied by the condition that part thereof is to be applied to the payment of the donor's debts is good; 18 N. Y. Sup. 852.

For a thorough discussion of this subject and examination of authorities, see 3 Del. Ch. 51. See also 1 Am. L. Reg. 1; note to Ward *v.* Turner, Wh. & T. L. C. Eq.; 36 Cent. Law J. 354; 32 *id.* 27.

DONATIO PROPTER NUPTIAS (Lat. gift on account of marriage). **In Roman Law.** A gift made by the husband as a security for the marriage portion, The effect of the act of making such a gift was different according to the relation of the parties at the time. Vicat, Voc. Jur. Called, also, a mutual gift.

The name was originally applied to a gift made before marriage, and was then called a *donatio ante nuptias;* but in process of time it was allowed to be made after marriage as well, and was then called a *donatio propter nuptias.*

DONATION. See DONATIO.

DONATIVE. See ADVOWSON.

DONEE. He to whom a gift is made or a bequest given; one who is invested with a power of appointment: he is sometimes called an appointee. 4 Kent 316; 4 Cruise, Dig. 51.

DONIS, STATUTE DE. See DE DONIS, THE STATUTE.

DONOR. He who makes a gift. One who gives lands in tail. *Termes de la Ley.*

DONUM (Lat.). A gift.

The difference between *donum* and *munus* is said to be that *donum* is more general, while *munus* is specific. *Munus* is *said* to mean *donum* with a cause for the giving (though not a legal consideration), as on account of marriage, etc. *Donum* is said to be that which is given from no necessity of law or duty, but from free will, "from the absence of which, if they are not given, no blame arises; but if they are given, praise is due." Vicat, Voc. Jur.; Calvinus, Lex.

DOOM. Judgment.

DOOR. The place of usual entrance into a house, or into a room in the house.

To authorize the breach of an outer door in order to serve process, the process must be of a criminal nature; and even then a demand of admittance must first have been refused; 5 Co. 94; 1 N. H. 346; 10 Johns. 263; 1 Root, 83, 134; 21 Pick. 156; 120 Mass. 190; 106 Ill. 621; 14 B. Monr. 395. The outer door may also be broken open for the purpose of executing a writ of *habere facias;* 5 Co. 93; Bac. Abr. *Sheriff* (N 3).

An outer door cannot, in general, be broken for the purpose of serving civil process; 13 Mass. 520; 51 Ill. 357; 19 Vt. 151; 1 M. & W. 336; 4 Hill 437; but after the defendant has been arrested, and he takes refuge in his own house, the officer may justify breaking an outer door to take him: Fost. 320; 1 Rolle 138; Cro. Jac. 555; 10 Wend. 300. When once an officer is in the house, he may break open an inner door to make an arrest; Kirb. 386; 17 Johns. 127; 13 M. & W. 52; 2 Harr. 494. See 1 Toullier, n. 214, p. 88; L. R. 2 Q. B. 593; or break the outer door to get out; 7 A. & E. 826.

DORMANT. Sleeping; silent; not known; not acting. He whose name and transactions as a partner are professedly concealed from the world; 2 H. & G. 159; 5 Cow. 534; 4 Mass. 424; 47 N. Y. 15; Coll. Partn. § 4. The term is applied, also, to titles, rights, judgments, and executions. As to the latter, see 11 Johns. 110; 2 Hill 364.

DOS (Lat.). **In Roman Law.** That which is received by or promised to the husband from the wife, or any one else by her influence, for sustaining the burdens of matrimony. There are three classes of *dos. Dos profectitia* is that which is given by the father or any male relative from his property or by his act; *dos adventitia* is that which is given by any other person or from the property of the wife herself; *dos receptitia* is where there is a stipulation connected with the gift relating to the death of the wife. Vicat; Calvinus, Lex.; Du Cange; 1 Washb. R. P. 147.

In English Law. The portion bestowed upon a wife at her marriage by her husband. 1 Reeve, Hist. Eng. Law 100; 1 Washb. R. P. 147: 1 Cruise, Dig. 152.

Dower generally. The portion which a widow has in the estate of her husband after his death. Park, Dower.

This use of the word in the English law, though, as Spelman shows, not strictly correct, has still the authority of Tacitus (*de Mor. Germ.* 18) for its use. And if the general meaning of marriage portion is given to it, it is strictly as applicable to a gift from the husband to the wife as to one from the wife to the husband. It occurs often, in the phrase *dos de dote peti non debet* (dower should not be sought of dower). 1 Washb. R. P. 209.

DOS RATIONABILIS (Lat.). A reasonable marriage portion. A reasonable part of her husband's estate, to which every widow is entitled, of lands of which her husband may have endowed her on the day of marriage. Co. Litt. 336. Dower, at common law. 2 Bla. Com. 134.

DOT (a French word adopted in Louisiana). The fortune, portion, or dowry which a woman brings to her husband by the marriage. 6 Mart. La. N. S. 460.

DOTAGE. That feebleness of the mental faculties which proceeds from old age. A diminution or decay of that intellectual power which was once possessed. 1 Bland, Ch. 389. See DEMENTIA.

DOTAL PROPERTY. By the civil law in Louisiana, by this term is understood that property which the wife brings to the husband to assist him in bearing the expenses of the marriage establishment. Extradotal property, otherwise called paraphernal property, is that which forms no part of the dowry. La. Civ. Code, art. 2335.

The effect of marriage under the civil law as found in the digest was that the wife brought her *dos* and the husband his antidos into the marriage. In all other property belonging to them they each retained the rights of owners in their separate ca-

pacities uncontrolled by their relation of husband and wife; Ballinger, Community Property § 2. See COMMUNITY.

DOTATION. In French Law. The act by which the founder of a hospital, or other charity, endows it with property to fulfil its destination.

DOTE. In Spanish Law. The property and effects which a woman brings to her husband for the purpose of aiding him with the rents and revenues thereof to support the expenses of the marriage. Las Partidas, 4. 11. 1. "*Dos*," says Cujas, "*est pecunia marito, nuptiarum causa, data vel promissa.*" The dower of the wife is inalienable, except in certain specified cases, for which see Escriche, Dic. Raz. *Dote.*

As an English verb it has been defined to be delirious, silly or insane. 7 Ind. 441.

DOTE ASSIGNANDA. In English Law. A writ which lay in favor of a widow, when it was found by office that the king's tenant was seized of tenements in fee or fee-tail at the time of his death, and that he held of the king in chief. Such widows were called king's widows.

DOTE UNDE NIHIL HABET. A writ which lies for a widow to whom no dower has been assigned. 3 Bla. Com. 182. By 23 and 24 Vict. c. 126, an ordinary action commenced by writ of summons has taken its place; but it remains in force in the United States, and under the designation of dower *unde nihil habet*, is the form in common use for the recovery of dower at law; 1 Washb. R. P. 290; 4 Kent 63; Stearns, Real Act. 302.

DOUBLE AVAIL OF MARRIAGE. See DUPLEX VALOR MARITAGII.

DOUBLE COMPLAINT. See DUPLEX QUERELA.

DOUBLE COSTS. See COSTS.

DOUBLE OR TREBLE DAMAGES. See MEASURE OF DAMAGES.

DOUBLE EAGLE. A gold coin of the United States, of the value of twenty dollars or units.

It is so called because it is twice the value of the eagle, and, consequently, weighs five hundred and sixteen grains of standard fineness, namely, nine hundred thousandths fine. It is a legal tender for twenty dollars to any amount. Act of March 3, 1849, 6 Stat. L. 397. U. S. Rev. Stat. §§ 3511, 3514. The double eagle is in value the largest coin issued in the United States. The first issue was made in 1849. See act of Feb. 12, 1873, 17 Stat. L. p. 426; EAGLE.

DOUBLE INSURANCE. Where divers insurances are made upon the same interest in the same subject against the same risks in favor of the same assured, in proportions exceeding the value. 1 Phill. Ins. §§ 359, 366.

A like excess in one policy is over-insurance. If the valuation of the whole interest in one policy is double that in another, and half of the value is insured in each policy according to the valuation in that policy, it is not a double insurance; its being so or not depends on the aggregate of the proportions, one-quarter, one-half, etc., insured by each policy, not upon the aggregate of the amounts.

Where the insurance is on the interests of different persons, though on the same goods, it is not double insurance; 9 S. & R. 107; nor is it where carrier and shipper each insure; 26 Fed. Rep. 492.

In England, each underwriter is liable for the whole amount insured by him until the assured is fully indemnified, and either on paying over his proportion *pro rata* is entitled to contribution from the other; but no one can be liable over the rate at which the subject is rated in his policy.

In the United States, the policies generally provide that the prior underwriters shall be liable until the assured is fully indemnified, and underwriters for the excess are exonerated; but the excess is to be ascertained by the aggregate of the proportions, as a quarter, half, etc., to make up the integer; 1 Phill. Ins. § 361; 1 W. Bla. 416; 1 Burr. 489; 15 B. Monr. 433, 452; 18 Ill. 553. This clause does not apply to double insurance by simultaneous policies; 1 Phill. Ins. § 362; 5 S. & R. 475.

In case of double insurance, the assured may sue upon all the policies and is entitled to judgment upon all, *but he is entitled to but one satisfaction*; therefore, if during the pendency of suits on several policies concerning the same risk and interest, the loss is paid in full by one company, the actions against the others must fail, and the insurer paying the loss has a remedy against the other insurers for a proportionate share of the loss. If there be any doubt as to whether the policies cover the same property or interest, evidence is admissible to show the fact; Wood, Fire Ins. 621; 18 Pick. 145; 16 Wend. 385; 39 Barb. 302; 45 Ill. 85; 18 *id.* 553; 49 Pa. 14; 54 *id.* 277; May, Ins. § 13.

The question of double insurance does not generally arise in life insurance, as there is no fixed value to the life, and the person in each case is to pay a fixed sum without regard to other insurance. But where the insurable interest has an ascertainable value the question may arise, as where two policies are taken out in different offices, by a creditor, on the life of a debtor, and for the same debt. Then only the value of the interest can be recovered and the amount recovered on the first policy is to be deducted from the amount payable on the second; May, Ins. § 440. See INSURANCE.

DOUBLE PLEA. The alleging, for one single purpose, two or more distinct grounds of defence, when one of them would be as effectual in law as both or all. See DUPLICITY.

By the statute 4 Anne, c. 16, in England, and by similar statutes in most if not all of the states of the United States, any defendant in any action or suit, and any plaintiff in replevin in any court of record, may plead as many several matters as may be necessary for a defence with leave of court. This statute allows double pleading; but each plea must be single, as at common law; Lawes, Pl. 131; 1 Chit. Pl. 512; Andr. Steph. Pl. 320; and the statute does not extend to the subsequent pleadings; Com. Dig. *Pleader* (E 2); Story, Pl. § 72; Gould, Pl. c. 8; *Doctrina Plac.* 222. And in criminal cases a defendant cannot plead a special plea in addition to the general issue; 7 Cox, Cr. Cas. 85.

DOUBLE POSSIBILITY. A possi-

bility upon a possibility. 2 Bla. Com. 170. See CONTINGENT REMAINDER.

DOUBLE RENT. In English Law. Rent payable by a tenant who continues in possession after the time for which he has given notice to quit, until the time of his quitting possession. Stat. 11 Geo. II. c. 19; Fawcett, L. & T. 304; Moz. & W. Dict. The provisions of these statutes have been re-enacted in New York, and some other states, though they are not generally adopted in this country.

DOUBLE USE. A term used in patent law to indicate that a later device is merely a new application of an older device, not involving the exercise of the inventive faculty.

In construing letters patent for new applications of old devices, if the new use be so nearly analogous to the former one that it would occur to a person of ordinary mechanical skill, it is only a case of double use; but if the relations between them are remote, and especially if the use of the old device produce a new result, it *may* involve an exercise of the inventive faculty—much depending upon the nature of the changes required to adapt the device to its new use; 155 U. S. 597. See PATENT.

DOUBLE VOUCHER. A voucher which occurs when the person first vouched to warranty comes in and vouches over a third person. See a precedent, 2 Bla. Com. App. V. p. xvii.; VOUCHER.

The necessity for double voucher arises when the tenant in tail is not the tenant in the writ, but is tenant by warranty; that is, where he is vouched, and comes in and confesses the warranty. Generally speaking, to accomplish this result a previous conveyance is necessary, by the tenant in tail, to a third person, in order to make such third person tenant to a writ of entry. Pres. Conv. 125, 126.

DOUBLE WASTE. When a tenant bound to repair suffers a house to be wasted, and then unlawfully fells timber to repair it, he is said to commit double waste. Co. Litt. 53. See WASTE.

DOUBT. The uncertainty which exists in relation to a fact, a proposition, or other thing; an equipoise of the mind arising from an equality of contrary reasons. Ayliffe, Pand. 121.

The most embarrassing position of a judge is that of being in doubt; and it is frequently the lot of the wisest and most enlightened to be in this condition: those who have little or no experience usually find no difficulty in deciding the most problematical questions.

Some rules, not always infallible, have been adopted in doubtful cases, in order to arrive at the truth. 1. In civil cases, the doubt ought to operate against him who, having it in his power to prove facts to remove the doubt, has neglected to do so. In cases of fraud, when there is a doubt, the presumption of innocence ought usually to remove it. 2. In criminal cases, whenever a reasonable doubt exists as to the guilt of the accused, that doubt ought to operate in his favor. In such cases, particularly when the liberty, honor, or life of an individual is at stake, the evidence to convict ought to be clear and devoid of all reasonable doubt.

The term reasonable doubt is often used, but not easily defined. "It is not mere possible doubt; because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in such a condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. The burden of proof is upon the prosecutor. All the presumptions of law independent of evidence are in favor of innocence; and every person is presumed to be innocent until he is proved guilty. If upon such proof there is reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal. For it is not sufficient to establish a probability, though a strong one arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary; but the evidence must establish the truth of the fact to a reasonable and moral certainty,—a certainty that convinces and directs the understanding and satisfies the reason and judgment of those who are bound to act conscientiously upon it. This is proof beyond reasonable doubt; because if the law, which mostly depends upon considerations of a moral nature, should go further than this and require absolute certainty, it would exclude circumstantial evidence altogether." Per Shaw, C. J., in 5 Cush. 320; 1 Gray 534; 2 Dev. & B. L. 311; 1 Houst. Cr. Rep. 316. In approving the opinion of Shaw, C. J., the court, in 59 Cal. 395, says: "There can be no 'reasonable doubt' of a fact after it has been clearly established by satisfactory proof." No man should be deprived of life under the form of law unless the jury can say upon their conscience that the evidence is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged; 160 U. S. 469. It must be an actual, substantial doubt, arising from the evidence or want of evidence in the case; 32 Neb. 782.

If the evidence produced in a criminal action be of such a convincing character that the jurors would unhesitatingly be governed by it in the weighty and important matters of life, they may be said to have no *reasonable doubt* respecting the guilt or innocence of the accused, notwithstanding the uncertainty which attends all human evidence. Therefore, a charge to the jury that if after an impartial comparison and consideration of all the evidence, they can truthfully say that they have an abiding conviction of the defendant's guilt, such as they would be willing to act upon in the more weighty and important matters relating to their own affairs, they have no reasonable doubt, is not erroneous; 120 U. S. 431.

Proof 'beyond a reasonable doubt' is not beyond all possible or imaginary doubt, but such proof as precludes every reasonable hypothesis except that which it tends to support. It is proof 'to a moral certainty,' as distinguished from an absolute certainty. As applied to a judicial trial for crime, the two phrases are synonymous and equivalent; and each signifies such proof as satisfies the judgment and consciences of the jury, as reasonable men, and applying their reason to the evidence before them, that the crime charged has been committed by the defendant, and so satisfies them as to leave no other reasonable conclusion possible; 118 Mass. 24.

See Best, Pres. § 195; Will. Cir. Ev. 325; 33 How. St. Tr. 506; Burn. Cr. Law of Scotl. 522; 1 Greenl. Ev. § 1; D'Aguesseau, *Œuvres*, xiii. 242; 103 U. S. 312; 26 N. J. L. 615; 76 Me. 125; 109 N. Y. 510; 122 Ill. 251; 2 Green, Cr. Cas. 434; 10 Am. L. Rev. 642; 14 Cent. L. J. 446; 47 Ala. 78; PRESUMPTION OF INNOCENCE.

DOVE. A bird; a species of pigeon.

Doves are considered as *feræ naturæ*, and not the subject of larceny unless they are in the owner's custody; as, for example, in a dove-house, or when in the nest before they can fly; 9 Pick. 15.

It has been held that larceny may be committed of pigeons which, though they have access to the open air, are tame and unreclaimed and return to their house or box; 2 Den. Cr. Cas. 361. See 2 *id.* 362, note; 4 C. & P. 131.

DOWAGER. A widow endowed; one who has a jointure.

In England, this is a title or addition

given to the widow of a prince, duke, earl, or other nobleman, to distinguish her from the wife of the heir, who has the right to bear the title; 1 Bla. Com. 224.

DOWER (from Fr. *douer*, to endow). The provision which the law makes for a widow out of the lands or tenements of her husband, for her support and the nurture of her children. Co. Litt. 30 *a*; 2 Bla. Com. 130; 4 Kent 35; Washb. R. P. 146.

There were five species of dower in England:—

Dower by custom, where a widow became entitled to a specified portion of her husband's lands in consequence of some local or particular custom.

Dower ad ostium ecclesiæ, where a man of full age, on coming to the church-door to be married, endowed his wife of a certain portion of his lands.

Dower ex assensu patris, which differed from dower *ad ostium ecclesiæ* only in being made out of the lands of the husband's father and with his consent.

Dower de la plus belle, where the widow, on suing the guardian in chivalry for dower, was required by him to endow herself of the fairest portion of any lands she might hold as guardian in socage, and thus release from dower the lands of her husband held in chivalry. This was abolished along with the military tenures, of which it was a consequence; 2 Bla. Com. 132, n.

Dower by common law, where the widow was entitled during her life to a third part of all the lands and tenements of which her husband was seised in law or in fact of an inheritable estate, at any time during the coverture, and which any issue she might have had might by possibility have inherited.

Since the passage of the Dower Act in England, 3 & 4 Will. IV. c. 105, all these species of dower, except that by custom and by the common law, have ceased to exist; 2 Sharsw. Bla. Com. 135, n. Dower in the United States, although regulated by statutes differing from each other in many respects, conforms substantially to that at the common law; 1 Washb. R. P. 149; see Schoul. Hus. & W. 455.

Where a statute provided that no estate in dower be allotted to the wife on the death of her husband, it took away a wife's inchoate right of dower in lands previously alienated by her husband without joining her in the deed; 47 Fed. Rep. 854; the inchoate right of the wife is not such a vested right or interest as cannot be taken away by legislative action; 4 C. C. A. 290.

Of what estates the wife is dowable. Her right to dower is always determined by the laws of the place where the property is situate; 1 Miss. 281; 4 Ia. 381; 3 Strobh. 562.

She is entitled to one-third of all lands, tenements, or hereditaments, corporeal and incorporeal, of which her husband may have been seized during the coverture, in fee or in tail; 2 Bla. Com. 131; 23 Vt. 611.

She was not dowable of a term for years, however long; Park, Dow. 47; 1 Md. Ch. Dec. 36.

The inheritance must be an entire one, and one of which the husband may have corporeal seisin or the right of immediate corporeal seisin; Plowd. 506; 1 Sm. & M.107.

Dower does not attach in an estate held in joint tenancy; but the widow of the survivor has dower; Co. Litt. § 45; 15 Pet. 21. But where the principle of survivorship is abolished, this disability does not exist; 9 Dana 185; 2 Strobh. 67.

An estate in common is subject to dower; 3 Paige, Ch. 653; 3 Edw. Ch. 500; 6 Gray 314; 87 Tenn. 17; 88 Va. 529; 1 Md. 172. But the dower in land owned by the husband in common with others is divested by partition thereof in a suit to which the husband is a party, though the wife is not joined; 36 S. C. 404. See 2 Can. L. T. 15.

In the case of an exchange of lands, the widow may claim dower in either, but not in both; Co. Litt. 31 *b*; if the interests are unequal, then in both; 7 Barb. 633; 32 Me. 412; 1 N. H. 65.

She is entitled to dower in mines belonging to her husband, if opened by him in his lifetime on his own or another's land; 1 Taunt. 402; 1 Cow. 460; 73 Ill. 405; 45 Me. 493. See 92 Mich. 186, where she was held to be entitled whether the mines were opened before or after her husband's death; 49 Fed. Rep. 549; 3 C. C. A. 312. See also 16 L. R. A. 247.

She had right of dower in various species of incorporeal hereditaments: as, rights of fishing, and rents; Co. Litt. 32 *a*; 2 Bla. Com. 132; 1 Bland, Ch. 227; but the rents should be estates of inheritance; 2 Cruise, Dig. 291.

In most of the states she is dowable of wild lands; 2 Dougl. Mich. 141; 10 Ga. 321; 2 Rob. Va. 507; 3 Dana 121; 8 Ohio 418; 24 Ark. 124; 17 N. J. Eq. 32; 68 N. C. 236; *contra*, 15 Mass. 157; 14 Me. 409; 2 N. H. 56.

She has no right of dower in a pre-emption claim; 16 Mo. 478; 2 Ill. 314.

At law there was nothing to prevent her from having dower in lands which her husband held as trustee. But, as she would take it subject to the trust, courts of equity were in the habit of restraining her from claiming her dower in lands which she would be compelled to hold entirely to another's use, till it was finally established, and it remains the same both in England and the United States, that she is not entitled to dower in anything her husband may hold as a mere trustee; 2 Ohio St. 415; 5 B. Monr. 152; Park, Dow. 105.

At common law she was not dowable of the estate of a *cestui que trust;* 2 Sch. & L. 387; 4 Kent 43; Hempst. 251. See 139 Pa. 461. But by the Dower Act this restriction was removed in England; 3 & 4 Will. IV. c. 105; 1 Spence, Eq. Jur. 501. The common-law rule that a widow could only have dower in the legal estates of the husband has been either expressly or impliedly changed by statute in the majority of states, and she now has a right of dower in his equitable estates as well, but only in those of which he died seised; 17 Fed. Rep. 333; 78 Ill. 604; and if the husband has aliened

an equitable estate, although his wife may not have consented, the dower is defeated; 68 Ill. 341; 3 Gill 304. In Delaware a widow is not dowable out of an equitable estate of her deceased husband, except in intestate lands; 3 Del. Ch. 407, but in the United States the law upon this subject is not uniform; 12 Pet. 201; 19 Me. 141; 2 S. & R. 554; 7 Ala. 447; 1 Hen. & M. 92. In some, dower in equitable estates is given by statutes; while in others the severe common-law rule has not been strictly followed by the courts; 1 Md. Ch. Dec. 452; 5 Paige, Ch. 318; 6 Dana 471; 8 Humphr. 537; 1 Jones, N. C. 430; 3 Gill 304.

A mortgagee's wife, although her husband has the technical seisin, had no dowable interest till the estate becomes irredeemable; 4 Dane, Abr. 671; 13 Ark. 44; 4 Kent 42; 49 Me. 53; 2 Ves. Jr. 631; 33 Gratt. 83.

A widow was not dowable of an equity of redemption under the common law; 17 Fed. Rep. 331; L. R. 6 Ch. D. 218; 105 Ill. 342; 53 Md. 607; 45 Miss. 243; 42 N. H. 296; 13 R. I. 105; 6 Mack. 536; nor did the English courts admit the doctrine until the statute of 1833; Ld. Ch. Redesdale in 2 S. & L. 388; but, as was said by Chancellor Bates in 3 Del. Ch. 407, the American courts, being free to carry the equitable view of mortgaged estates to its logical results, have uniformly allowed dower in an equity of redemption; Jones, Mort. 666; 15 Pet. 38; 34 Me. 50; 4 Gray 46; 5 Johns. Ch. 452; 2 Blackf. 262; 1 Rand. 344: 1 Conn. 559; 29 N. H. 564; 1 Stockt. Ch. 361; but after the surplus proceeds of sale have been applied by the sheriff to a judgment against the husband, it is too late to assert the widow's claim to equitable dower; 4 Del. Ch. 599. See on this subject 11 Can. L. T. 281.

In reference to her husband's contracts for the purchase of lands, the rule seems to be, in those states where dower is allowed in equitable estates, that her right attaches to her husband's interest in the contract, if at his death he was in a condition to enforce specific performance; 5 Paige, Ch. 318; 5 Blackf. 406; 1 Hen. & M. 92; 1 B. Monr. 93; 2 Ill. 314; 2 Ohio St. 512; 7 Gray 533; 19 Ill. 545; 1 Jones, N. C. 430. If his interest has been assigned before his death, or forfeited, or taken on execution, her dower-right is defeated; 29 Pa. 71; 6 Rich. Eq. 72; 4 J. J. Marsh. 451; 16 Ala. 522; 16 B. Monr. 114; 1 Hen. & M. 91.

She is entitled to dower in lands actually purchased by her husband and upon which the vendor retains a lien for the unpaid purchase-money, subject to that lien; 12 B. Monr. 261; 8 Blackf. 120; 2 Bland, Ch. 242; 1 Humphr. 403; see 51 Ill. 302; 40 Ala. 538; 44 Ga. 319; 119 Mass. 519; 53 Me. 138; or upon which her husband has given a mortgage to secure the purchase-money, subject to that mortgage; 10 Rich. Eq. 285. See 4 L. R. A. 606.

She is not entitled to dower in partnership lands purchased by partnership funds and for partnership purposes, until the partnership debts have been paid; 4 Metc. 537; 4 Miss. 372; 10 Leigh 406; 5 Fla. 350; 20 Mo. 174; 88 Va. 529; 28 Ark. 259; 65 Mo. 148; 30 N. J. Eq. 417. See 92 Ky. 190; 95 Mich. 426. She has been denied dower in land purchased by several for the purposes of sale and speculation; 3 Edw. Ch. 428; it has been treated as personalty so far as was necessary to settle the partnership affairs, the right of dower being subject to the debts of the firm; 115 Mo. 222; 71 Ia. 63; 12 Leigh 405.

Sometimes she is allowed dower out of money, the proceeds of real estate sold by order of court, or by the wrongful act of an agent or trustee; 14 Pick. 345; 11 Ala. N. S. 33; 3 Sandf. Ch. 434; 12 B. Monr. 172; 7 Humphr. 72.

Her claim for dower has been held not subject to mechanics' liens; 7 Metc. 157; 8 Ill. 511; 8 Blackf. 252; 1 B. Monr. 257.

The principle of equitable contribution applies equally to dower, as to other incumbrances; 3 Del. Ch. 260.

She is not entitled to dower in an estate *pur auter vie;* 5 Cow. 388; or in a vested remainder; 5 N. H. 240, 469; 2 Leigh 29; 5 Paige, Ch. 161; or in reversion of the husband, where he dies before the termination of the life estate; 139 Ill. 433.

In some states she has dower only in what the husband died seised of; 6 McLean 442; 1 Root 53; 2 N. C. 253; 4 Kent 41.

The wife's dower will be protected against the voluntary conveyance of the husband made pending a marriage engagement, under the same circumstances in which the husband is relieved against an antenuptial settlement by the wife; 3 Del. Ch. 99; S. C. 17 Am. Law Reg. N. S. 319. This case is considered by Washburn and Bishop as the leading case and approved by each of them; 3 Washb. R. P. 359; 2 Bish. M. W. § 343, note 2, quoting the greater portion of the opinion of Bates, Ch.

Requisites of. Three things are usually said to be requisite to the consummation of a title to dower, viz.: marriage, seisin of the husband, and his death: 4 Kent 36; 1 Washb. R. P. 169; 61 Ala. 481; 4 N. Y. 99.

The marriage must be a legal one; though, if voidable and not void, she will have her dower unless it is dissolved in his lifetime; 14 Miss. 308; Co. Litt. 33 *a*; 1 Cruise, Dig. 164; 9 Mo. 501; 28 Ark. 21.

The husband must have been seised in the premises of an estate of inheritance at some time during the coverture. It may not be an actual seisin: a seisin in law with the right of immediate corporeal seisin is sufficient; 7 Mass. 253; 39 Me. 25; 1 Paige, Ch. 635; 2 S. & R. 554; 1 Cruise, Dig. 166; 45 N. J. Eq. 27; 88 N. C. 312; 9 Ohio St. 371. Possession by a widow of the mansion house of her husband, and her unassigned right of dower, do not prevent the heir from being seised thereof so that his widow may acquire dower therein; 111 Mo. 273. It is not necessary that the seisin of the husband should be a rightful one. The widow of a disseisor may have dower against all who have not the rightful seisin; Park, Dow. 37; Scribn. Dow. 702; 4 Dane, Abr. 668. See 125 Mass. 122.

So, although the estate is a defeasible one, provided it is one of inheritance, she may claim her dower until it is defeated; Co. Litt. 241; 3 Halst. 241; 10 Co. 95.

The seisin is not required to remain in the husband any particular length of time. It is sufficient if he is seised but an instant to his own benefit and use; 11 Rich. Eq. 417; 37 Me. 508; 2 Bla. Com. 132; 48 How. Pr. 382; but a mere instantaneous seisin for some other purpose than proprietorship will not give the wife dower; 14 Me, 290; 4 Miss. 369; 1 Johns. Cas. 95; 27 Ala. N. S. 578; 15 Vt. 39; 2 G. & J. 318; 6 Metc. 475.

Where he purchases land and gives a mortgage at the same time to secure the purchase-money, such incumbrance takes precedence of his wife's dower; 15 Johns. 458; 12 S. & R. 18; 4 Mass. 566; 5 N. H. 479; 7 Halst. 52; 1 Bay 312; 37 Me. 11.

The death of the husband. 1 Cruise, Dig. 168. What was known as civil death in England did not give the wife right of dower; 2 Crabb, R. P. 130; 7 B. Monr. 51; 6 Johns. Ch. 129. Imprisonment for life is declared civil death in some of the states.

How dower may be prevented or defeated. At common law, *alienage* on the part of the husband or wife prevented dower from attaching; 2 Bla. Com. 131; 16 Wend. 617; 2 Mo. 32. This disability is partially done away with in England, 7 & 8 Vict. c. 66, and is almost wholly abolished in the United States. See ALIEN.

It is well established that the wife's dower is defeated whenever the seisin of her husband is defeated by a paramount title; Co. Litt. 240 *b*; 4 Kent 48.

The foreclosure of a mortgage given by the husband before marriage, or by the wife and husband after marriage, will defeat her right of dower; 15 Johns. 458; 12 S. & R. 18; 1 Ind. 527; 19 Miss. 164; 2 Rob. Va. 384; 8 Blackf. 174; 4 Harr. Del. 111; 140 Ill. 470; 51 N. J. Eq. 135. And in Pennsylvania, whether the wife joined or not. Like force would be given to a vendor's lien or mortgage for the purchase-money, or to a judgment lien outstanding at the time of marriage.

Her right to dower in the estate which she has joined with her husband in mortgaging is good against every one but the mortgagee; 3 Miss. 692; 18 Ohio St. 567; 14 Pick. 93; 29 N. H. 564; 37 Me. 509. The same is true in regard to an estate mortgaged by her husband before coverture; 14 Pick. 98. In neither case would the husband have the right to cut off her claim for dower by a release to the mortgagee, or an assignment of his equity of redemption; 5 Johns. Ch. 452, 482; 14 Pick. 98; 8 Humphr. 713; 1 Rand. 344; 34 Me. 50; 2 Halst. 392. As to a purchase and mortgage for the purchase-money before marriage, in which the husband releases the equity of redemption after marriage, see 6 Cow. 316.

An agreement on the part of the husband to convey before dower attaches, if enforced, will extinguish her claim; 2 Ind. 197; 3 Md. Ch. 359.

Dower will not be defeated by the determination of the estate by natural limitation; as, if the tenant in fee die without heirs, or the tenant in tail; 8 Co. 34; 4 Kent 49; 12 B. Monr. 73. Whether it will be defeated by a conditional limitation by way of executory devise or shifting use, is not yet fully settled; Co. Litt. 241 *a*, Butler's note 170; Sugd. Pow. 333; 3 B. & P. 652; 2 Atk. 47; 1 Leon. 167. But it seems that the weight of American authority is in favor of sustaining dower out of such estates; 9 Pa. 190; 4 Desaus. 617. See 1 Washb. R. P. 216.

Dower will be defeated by operation of a collateral limitation: as, in the case of an estate to a man and his heirs so long as a tree shall stand, and the tree dies; 3 Prest. Abstr. 373; 4 Kent 49.

In some states it will be defeated by a sale on execution for the debts of the husband; 5 Gill 94; 8 Pa. 120; 1 Humphr. 1; 11 Mo. 204: 3 Dev. 3; but see 73 Ia. 657. In Missouri it is defeated by a sale in partition; 22 Mo. 202. See 22 Wend. 498; 2 Edw. Ch. 577. See 25 Alb. L. J. 387.

It is defeated by a sale for the payment of taxes; 8 Ohio St. 430.

It is also defeated by exercise of the right of eminent domain during the life of the husband. Nor has the widow the right of compensation for such taking. The same is true of land dedicated by her husband to public use; 3 Ohio St. 24; 9 N. Y. 110.

How dower may be barred. A divorce from the bonds of matrimony was at common law a bar to dower; 2 Bla. Com. 130; 4 Barb. 192; 84 Ala. 368; 28 Atl. Rep. (N. J.) 719; but the woman's right to dower, or something equivalent to it, is reserved by statutes in most of the states, if she be the innocent party; 6 Duer, N. Y. 102. A judgment of divorce in another state, for cause other than adultery, which has the effect to deprive the wife of dower in the state where rendered, will not have such effect in New York; the United States constitution makes a judgment in another state conclusive as to the fact of divorce, but gives no extra-territorial effect on land of the husband; 133 N. Y. 540. See 15 L. R. A. 542.

By the common law neither adultery alone nor with elopement was a bar to dower; 2 Scrib. Dow. 531; but by the statute of Westminster 2d, a wife who eloped and lived in adultery forfeited her dower-right. This provision has been re-enacted in several of the states and recognized as common law in others; 9 Mo. 555; 2 Brock. 256; 3 N. H. 41; 13 Ired. 361; 4 Dane, Abr. 676; 1 Bailey 312; *contra*, 24 Wend. 193; 64 N. Y. 47; 2 Allen 45; 69 Me. 527; 6 R. I. 543. Dower is not barred even if the wife commit adultery, if she be abandoned by her husband and he be profligate and intemperate and an adulterer; 1 Houst. Del. 224; nor if she be deserted by her husband will her subsequent seduction and adultery operate as a bar; 62 Pa. 308; 126 *id.* 341; 6 U. C. C. P. 310; 27 Ind. 122. For the analysis of decisions and reference to state statutes on this subject, see 2 Scrib. Dow. 531.

In North Carolina, a widow who had been

convicted as accessory before the fact to her husband's murder, and was imprisoned under sentence therefor, was held entitled to dower in his lands; 100 N. C. 240.

The widow of a convicted traitor could not recover dower; 2 Bla. Com. 130; but this principle is not recognized in this country; Wms. R. P. 103, n.

Nor does she in this country, as at common law, forfeit her dower by conveying in fee the estate assigned to her; 4 Kent 82; Wms. R. P. 121, 125, n.; 1 B. Monr. 88.

The most common mode formerly of barring dower was by jointure; Scrib. Dow. 389; 14 Gratt. 518; 8 Mo. 22; 14 Ohio St. 610; 77 Wis. 557. Marriage is a sufficient consideration to support an ante-nuptial contract for release of dower; 121 Pa. 302; 141 Ill. 22. Now it is usually done by joining with her husband in conveying the estate. Formerly this was done by levying a fine, or suffering a recovery; 4 Kent 51; 2 Bla. Com. 137; now it is by deed executed in concurrence with her husband and acknowledged in the form required by statute; Wms. R. P. 189; 114 Ill. 104; Mitch. R. P. 156; which is the mode prevailing in the United States. The husband must usually join in the act; 5 B. Monr. 352; 19 Pa. 361; 6 Cush. 196; 14 Me. 432.

Words of grant will be sufficient although no reference is made in the deed to dower *eo nomine;* 12 How. 256; 16 Ohio 236.

In most of the states her deed must be acknowledged, and that, too, in the form pointed out by statute; 6 Ohio St. 510; 2 Binn. 341; 1 Bail. 421; 1 Blackf. 379; which must appear in the certificate; 13 Barb. 50.

She should be of age at the time; 2 J. J. Marsh. 359; 6 Leigh 9; 1 Barb. 399; 8 Miss. 437; 10 Ohio St. 127.

She cannot release her dower by parol; see 5 T. B. Monr. 57; 3 Zabr. 62. A parol sale of lands in which the husband delivers possession does not exclude dower; 3 Sneed 316. But it has been held that she may bar her claim for dower by her own acts operating by way of estoppel; 1 Rand. 344; 2 Ohio St. 511; 4 Paige, Ch. 94; 12 S. & R. 18; 1 Ind. 354; 5 Gill 94. See 22 Ala. N. S. 104; 1 Rich. Eq. 222; 112 Mo. 1.

A release of dower by a wife direct to her husband will not enable him by his sole deed to convey the land free of dower right, for, if the release is at all effectual, the husband becomes vested with a fee simple and the dower-right immediately reattaches by operation of law; 63 Hun 633; 22 Or. 303; but where the wife has power to release her dower by an attorney in fact, she may constitute her husband attorney for the purpose; 133 N. Y. 505.

A release of dower has been presumed after a long lapse of time; 4 N. H. 321; 3 Yeates 507.

At common law there was no limitation to the claim for dower; 4 Kent 70. As to the statutes in the different states, see *id.* note; 1 Washb. R. P. 217. Adverse possession for seven years with claim and color of title and payment of taxes will bar a claim of dower; 125 Ill. 647; 111 Mo. 275; but see 83 Ia. 481.

The right to dower does not depend on the existence of the family relation at the death of the husband and is not barred by desertion; 126 Pa. 341.

Upon the doctrine of *dos de dote,* see 1 Washb. R. P. 209.

In some states the wife may elect to take half of the husband's estate in lieu of dower under certain contingencies; 28 Mo. 293; or she may accept a devise in lieu of dower; 66 Hun 311; 146 Ill. 312; 37 S. C. 529; 56 Ark. 532.

It seems that a contract to marry on condition that the wife should receive no portion of the husband's lands may be valid; 9 Rich. Eq. 434.

As to how dower may be barred, see 32 Cent. Law J. 166.

How and by whom dower may be assigned. Her right to have dower set out to her accrues immediately upon the death of her husband; but until it is assigned she has no right to any specific part of the estate; 2 Bla. Com. 139. She was allowed by Magna Charta to occupy the principal mansion of her husband for forty days after his death, if it were on dowable lands. This right is variously recognized in the states; 2 Mo. 163; 16 Ala. N. S. 148; 7 T. B. Monr. 337; 5 Conn. 462. In Missouri and several other states, she may remain in possession of and enjoy the principal mansion-house and messuages thereto belonging until dower has been assigned; 5 T. B. Monr. 561; 4 Blackf. 331. This makes her tenant in common with the heir to the extent of her right of dower; and an assignment only works a severance of the tenancy; 4 Kent 62; 2 Mo. 163.

There were two modes of assigning dower; one by "common right," where the assignment was by legal process; the other "against common right," which rested upon the widow's assent and agreement.

Dower of "common right" must be assigned by metes and bounds, where this is possible, unless the parties agree to a different form; 2 Penning. 521; 1 Rolle, Abr. 683; Style 276; Perkins 407.

If assigned "against common right," it must be by indenture to which she is a party; Co. Litt. 34 *b*; 1 Pick. 189, 314.

Where assigned of common right, it must be unconditional and absolute; Co. Litt. 34 *b*, n. 217; 1 Rolle, Abr. 682; and for her life; 1 Bright, Husb. & W. 379.

Where it is assigned not by legal process, it must be by the tenant of the freehold; Co. Litt. 35 *a*. It may be done by an infant; 2 Bla. Com. 136; 1 Pick. 314; 2 Ind. 336; or by the guardian of the heir; 2 Bla. Com. 136; 37 Me. 509. Dower may be assigned in partition; 73 Ia. 657.

As between the widow and heir, she takes her dower according to the value of the property at the time of the assignment; 5 S. & R. 290; 4 Miss. 360; 15 Me. 371; 2 Harr. Del. 336; 13 Ill. 483; 9 Mo. 237.

As between the widow and the husband's alienee, she takes her dower according to

the value at the time of the alienation ; 6 Johns. Ch. 258 ; 4 Leigh 498. This was the ancient and well-established rule ; 2 Johns. 484 ; 9 Mass. 218 ; 3 Mas. 347. But in this country the rule in respect to the alienee seems now to be that if the land had been enhanced in value by his labor and improvements, the widow shall not share in these ; Scrib. Dow. 612 ; 5 S. & R. 289 ; 9 Mass. 218 ; 3 Mas. 347 ; 4 Leigh 498 ; 2 Blackf. 223 ; 10 Ohio St. 498 ; 9 Ala. N. S. 901 ; 10 Md. 746 ; 13 Ill. 483 ; 89 *id.* 40 ; 85 Ky. 539 ; 96 Mo. 226 ; 7 Mackey 268 ; 52 Ia. 563 ; 69 Me. 200 ; 42 Miss. 747 ; if it has been enhanced by extraneous circumstances, such as the rise and improvement of property in the neighborhood, she is to have the full benefit of this ; 5 Blackf. 406 ; 3 Mas. 375 ; 6 McLean 422 ; 5 Call 433 ; 1 Md. Ch. Dec. 452 ; Wms. R. P. 191, n.

There seems to be no remedy for her now in either country where the land has deteriorated in value by the waste and mismanagement of the alienee or by extraneous circumstances ; 10 Mo. 746 ; 5 S. & R. 290 ; 3 Mas. 368 ; 5 Blackf. 406 ; 1 Md. Ch. Dec. 452 ; see 11 R. I. 378 ; but she must be content to take her dower in the property as it was at the time of her husband's death, when her right first became consummate ; 1 Washb. R. P. 239. See 18 L. R. A. 425. Where the widow dies without asserting her claim, neither her personal representatives, nor those of her assignee of such dower right, can maintain an action to have dower admeasured or for a gross sum in lieu thereof ; 59 Hun 538 ; 49 N. J. Eq. 66.

Dower may also be recovered in equity, the jurisdiction of which, as Chancellor Kent says, "has been thoroughly examined, clearly asserted, and definitively established ;" 4 Kent 71 ; and nearly half a century later this language is repeated as correctly expressing the result of the authorities ; Bisph. Eq. § 495. The jurisdiction was asserted in the United States at an early period ; 1 Leigh 449 ; 5 Monr. 284 ; 4 J. J. Marsh. 64 ; 5 Johns. Ch. 482 ; 4 Paige 98 ; and although in New Jersey in the time of Kent the equitable jurisdiction was denied ; 4 Kent 72 ; 2 Halst. 392 ; it was afterwards asserted and sustained ; 1 Gr. Ch. 349. The jurisdiction is concurrent with that of courts of law, which must settle the legal title when that is in controversy, " but if that be admitted or settled, full and effectual relief can be granted to the widow in equity both as to the assignment of dower and the damages ;" 4 Kent 71 ; and in many respects the remedy in equity possesses great advantages over that at law ; Bisph. Eq. § 496. As to the remedies afforded both by law and equity for the enforcement of dower, see 1 Washb. R. P. 236 ; 4 W. R. 459.

Nature of the estate in dower. Until the death of her husband, the wife's right of dower is not an interest in real estate of which value can be predicated ; 9 N. Y. 110. And although on the death of her husband this right becomes consummate, it remains a chose in action until assignment ; 4 Kent 61 ; 1 Barb. 500 ; 32 Me. 424 ; 5 J. J. Marsh. 12 ; 10 Mo. 746 ; 26 Md. 289 ; 12 R. I. 357.

During coverture a wife has such an interest in her husband's lands which have been conveyed by him without her joining in the deed, as will make a release by her a valuable consideration ; 4 Ind. App. 23. See 37 S. C. 285.

Until assignment, she has no estate which she can convey or which can be taken on execution for her debts ; 2 Keen 527 ; 4 Paige, Ch. 448 ; 9 Miss. 489 ; 1 Dev. & B. 437 ; 14 Mass. 378 ; 13 Ill. 483 ; 48 Ia. 611 ; 63 N. C. 271 ; *contra*, 10 Ala. N. S. 900.

But where she does sell or assign this right of action, equity will protect the rights of the assignee and sustain an action in the widow's name for his benefit ; 4 Rich. 516 ; 10 Ala. N. S. 900 ; 7 Ired. Eq. 152 ; 109 N. C. 674. She may mortgage her undivided dower interest, which is valid in equity ; 58 N. W. Rep. (Ia.) 897.

She can release her claim to one who is in possession of the lands, or to whom she stands in privity of estate ; 11 Ill. 384 ; 17 Johns. 167 ; 32 Me. 424 ; 32 Ala. N. S. 404 ; 112 Mo. 1 ; 8 L. R. Q. B. D. 31 ; 12 R. I. 537.

But as soon as the premises have been set out and assigned to her, and she has entered upon them, the freehold vests in her by virtue of her husband's seisin ; Co. Litt. 259 *a* ; 4 Mass. 384 ; 6 N. Y. 394 ; 4 Dev. & B. 442. Her estate is a continuation of her husband's by appointment of the law ; 1 Pick. 189 ; 4 Me. 67 ; 99 N. C. 290. As to the nature of the estate, see 6 Cent. L. J. 63, 143, 163. As to dower generally, see Scribner, Dower ; Dembitz, Land Titles ; Tudor ; Washburn ; Cruise ; Tiedman, Real Property ; DIVORCE ; ELECTION OF RIGHTS.

DOWRESS. A woman entitled to dower. See DOWER.

DOWRY. Formerly applied to mean that which a woman brings to her husband in marriage : this is now called a portion. This word is sometimes confounded with dower. See Co. Litt. 31 ; La. Civ. Code ; Dig. 23. 3. 76 ; Code 5. 12. 20 ; 6 Rob. (La.) 111 ; 10 *id.* 74 ; 6 La. Ann. 786 ; 22 Mo. 254.

DRAFT. An order for the payment of money, drawn by one person on another. 1 Story 30. It is said to be a *nomen generalissimum*, and to include all such orders ; *ibid.*, per Story, J. It is frequently used in corporations where one agent draws on another ; in such case it may be treated either as an accepted bill or a promissory note ; 1 Dan. Neg. Inst. 350 ; Tiedman, Com. Pap. § 128. Drafts come within a statutory provision respecting " bills and notes for the direct payment of money ;" 50 Mo. 491. They are frequently given for mere convenience in keeping accounts, and providing concurrent vouchers, and it is not necessary to present such a draft to the drawee or to give notice of non-payment before suing the corporation ; 1 Dan. Neg. Inst. 350 ; 10 Cal. 369 ; 40 Ind. 361 ; 28 Barb. 391 ; 1 Cush. 256. A draft by directors of an assurance company on its cashier was said to contain

all that is essential to constitute a promissory note; 9 C. B. 574. Drafts are frequently used between municipal officers, and are not usually negotiable instruments; 1 Dan. Neg. Inst. 352. But it has been held that municipal warrants or orders for the payment of debts, if authorized and drawn in negotiable language, may be sued on by the transferee; *id.* 353; 4 Hill, N. Y. 265. They must be presented for payment before suit; 26 Vt. 346; 19 Me. 193; *contra*, 2 Greene (Ia.) 469.

Draft, in a commercial sense, is an allowance to the merchant where the duty is ascertained by weight, to insure good weight to him; it is a small allowance in weighable goods, made by the king to the importer; it is to compensate for any loss that may occur from the handling of the scales, in the weighing, so that, when weighed the second time, the article will hold out good weight. 5 Blatchf. 192.

Also the rough copy of a legal document before engrossing.

DRAGOMAN. An interpreter employed in the east, and particularly at the Turkish court.

DRAIN. To conduct water from one place to another, for the purpose of drying the former.

The right of draining water through another man's land. This is an easement or servitude acquired by grant or prescription. See 3 Kent 436; 7 M. & G. 354.

In 5 Gray 63, it was said that the word drain has no technical or exact meaning, and in 58 Cal. 639, Myrick, J., quotes definitions from Webster's Dictionary thus: "1. To draw off by degrees; to cause to flow gradually out or off; hence, to cause the exhaustion of. 2. To exhaust off liquid contents by draining them off; to make gradually dry or empty, to deprive of moisture; hence, to exhaust. 3. To cause to pass through some porous mass or substance for the purpose of clarifying; to filter. And Drainage (Engin.), the system of drains and their operation, by which water is removed from towns, railway beds, and other works." Then he adds: "The definition of the word 'drain' given in Worcester's Dictionary is somewhat different from Webster's, in that the idea expressed in the third definition as above is entirely omitted; thus showing that lexicographers differ." In the same case, McKee, J., said: "The storage of debris and the promotion of the drainage of a district of country are things essentially different. The one has no necessary connection with the other. To drain land is to rid it of its superfluous moisture. This is generally done by deepening, straightening, or embanking the natural water-courses which run through it, and by supplementing them when necessary by artificial ditches and canals; but it is not within the art of the drainer to promote drainage by building reservoirs for the storage of debris from 'mining and other operations,' unless the word is to be wrenched from its geological or ordinary signification and meaning, and changed so as to mean water, at any mining or other locality where water may have accumulated." See WATER-COURSE.

DRAM. A liquid containing alcohol; something that can intoxicate. 32 Tex. 228. See 101 Ill. 134.

DRAW. To drag (on a hurdle) to the place of execution. Anciently no hurdle was allowed, but the criminal was actually dragged along the road to the place of execution. A part of the ancient punishment of traitors was the being thus drawn. 4 Bla. Com. 92, 377.

DRAWBACK. An allowance made by the government to merchants on the re-exportation of certain imported goods liable to duties, which in some cases consists of the whole, in others of a part, of the duties which had been paid upon the importation. Goods can thus be sold in a foreign market at their natural cost in the home market. For the various acts of congress which regulate drawbacks, see U. S. Rev. Stat. tit. 34, c. 9.

DRAWEE. A person to whom a bill of exchange is addressed, and who is requested to pay the amount of money therein mentioned. See BILL OF EXCHANGE.

DRAWER. The party who makes a bill of exchange.

DRAWING. Every person who applies for a patent for an invention is required to furnish a drawing or drawings illustrative of that invention: provided from the nature of the case the invention can be so illustrated. Drawings are also required on application for a patent for a design. See PATENT.

DRAWLATCHES. Thieves; robbers. Cowel.

DRAYAGE. In a case arising under a statute providing that certain tolls should be charged on coal landed on wharves and thence shipped or "warehoused without drayage," it appeared that the coal, after being taken out of the vessel and put on the wharf, was taken away on tram-cars, of which the railway was supported by pillars resting on the wharf, and by this process was put in the warehouse without any actual hauling on drays. The court held that this amounted to drayage and said: "The difference between the two rates was evidently intended to cover the wear and tear of wharves by the passing of loaded means of conveyance. It makes no difference, as far as the question before us is concerned, whether the conveyance was by wagons, drays, or cars; or whether on a tramway resting on pillars ten feet high, on timbers six inches above the wharf, or on rails resting immediately on the wharf;" 54 Cal. 241.

DREDGE. Formerly applied to a net or drag for taking oysters; now a machine for cleansing canals and rivers. To dredge

is to gather or take with a dredge, to remove sand, mud, and filth from the beds of rivers, harbors, and canals, with a dredging machine. 15 Can. L. T. 268.

DREIT DREIT. Droit droit. Double right. A union of the right of possession and the right of property. 2 Bla. Com. 199.

DRIFTWAY. A road or way over which cattle are driven. 1 Taunt. 279; Selw. N. P. 1037; Woolr. Ways 1. The term is in use in Rhode Island. 2 Hilliard, Abr. Prop. 33.

DRINK. In the case of spirits a "drink" was held to be not more than a quart. 67 Ill. 482.

DRIP. The right of drip is an easement by which the water which falls on one house is allowed to fall upon the land of another.

Unless the owner has acquired the right by grant or prescription, he has no right so to construct his house as to let the water drip over his neighbor's land; 1 Rolle, Abr. 107. See 3 Kent 436; Dig. 43. 23. 4. 6; 11 Ad. & E. 40.

DRIVER. One employed in conducting a coach, carriage, wagon, or other vehicle with horses, mules, or other animals.

Frequent accidents occur in consequence of the neglect or want of skill of drivers of public stage coaches, for which the employers are responsible.

The law requires that a driver should possess reasonable skill and be of good habits for the journey; if, therefore, he is not acquainted with the road he undertakes to drive; 3 Bing. 314, 321; drives with reins so loose that he cannot govern his horse; 2 Esp. 533; does not give notice of any serious danger on the road; 1 Campb. 67; takes the wrong side of the road; 4 Esp. 273; incautiously comes in collision with another carriage; 1 Stark. 423; 1 Campb. 167; or does not exercise a sound and reasonable discretion in travelling on the road to avoid dangers and difficulties, and any accident happens by which any passenger is injured, both the driver and his employers will be responsible; 11 Mass. 57; 6 Term 659; 1 East 106; 4 B. & Ald. 590; 2 McLean 157.

It has been held that the conductor of a street railway is not a driver; 47 N. Y. 124; and one who drove a wagon loaded with calves and drawn by horses was held not to be "driving or conducting" cattle; L. R. 1 Q. B. 259. The New York Court of Appeals refuses to say "whether one who drives a horse to harness comes under this statute, which does not name a driver but does name a rider." See COMMON CARRIERS OF PASSENGERS.

DROF-LAND (*Drift-land*). A yearly payment made by some to their landlords for driving their cattle through the manor to fairs and markets. Cowel.

DROIT (Fr.). **In French Law.** Law. The whole body of law, written and unwritten.

A right. No law exists without a duty. Toullier, n. 96; Pothier, *Droit*.

In English Law. Right. Co. Litt. 158.

A person was said to have *droit droit, plurimum juris*, and *plurimum possessionis*, when he had the freehold, the fee, and the property in him. Crabb, Hist. Eng. Law 406.

DROIT D'ACCESSION. In French Law. That property which is acquired by making a new species out of the material of another. *Modus acquirandi quo quis ex aliena materia suo nomine novam speciem faciens bona fide ejus speciei dominium consequitur.* It is a rule of the civil law that if the thing can be reduced to the former matter it belongs to the owner of the matter, *e. g.* a statue made of gold; but if it cannot so be reduced it belongs to the person who made it, *e. g.* a statue made of marble. This subject is treated of in the *Code Civil de Napoléon*, art. 565, 577; Merlin, *Répert. Accession;* Malleville's Discussion, art. 565. See ACCESSION.

DROITS OF ADMIRALTY. Rights claimed by the government over the property of an enemy. In England, it has been usual in maritime wars for the government to seize and condemn, as droits of admiralty, the property of an enemy found in her ports at the breaking out of hostilities. 1 C. Rob. 196; 13 Ves. 71; 1 Edw. 60; 3 Bos. & P. 191. The power to exercise such a right has not been delegated to, nor has it ever been claimed by, the United States government; Benedict, Adm.; § 33; 6 Wheat. 264; 8 Cra. 110.

DROIT D'AUBAINE. A rule by which all the property of a deceased foreigner, whether movable or immovable, was confiscated to the use of the state, to the exclusion of his heirs, whether claiming *ab intestato* or under a will of the deceased. Finally abolished in 1819. Boyd's Wheat. Int. Laws § 82.

The word *aubaine* signifies *hospes loci, peregrinus advena*, a stranger. It is derived, according to some, from *alibi*, elsewhere, *natus*, born, from which the word *albinus* is said to be formed. Others, as Cujas, derive the word directly from *advena*, by which word aubains or strangers are designated in the capitularies of Charlemagne. See Du Cange; Trévoux, Dict.

DROITS CIVILS. In French Law.

Private rights, the exercise of which is independent of the status (*qualité*) of citizen. Foreigners enjoy them, and the extent of that enjoyment is determined by the principle of reciprocity. Conversely, foreigners, although not resident in France, may be sued on contracts made by them in France, and (unless possessed of sufficient real property in France) are obliged to give security; 12 C. B. 801; Brown, Law Dict.

DROIT-CLOSE. The name of an ancient writ directed to the lord of ancient demesne, and which lies for those tenants in ancient demesne who hold their lands and tenements by charter in fee-simple, in fee-tail, for life, or in dower. Fitzh. N. B. 23.

DROITURAL. What belongs of right; relating to right: as, real actions are either droitural or possessory,—*droitural* when the plaintiff seeks to recover the property. Finch, Law 257. See WRIT OF RIGHT.

DROP LETTER. A letter addressed for delivery and mailed in the same district in which it is posted.

DROVE-ROAD. A road for driving cattle. A right of way for carriages does not involve necessarily a right to drive cattle, or an easement of drove-road.

DRUGGIST. One who deals in medicinal substances, vegetable, animal, or mineral, uncompounded. 28 La. Ann. 765. In a Kentucky case on an indictment for selling liquor without license, the defendant sold dry goods on one side of his shop and drugs on the other. As a merchant he needed a license, but as a druggist he could sell in any quantity less than a quart without. The charge of the court was that if he was an unlicensed merchant and sold less than a quart he was guilty, unless he was "a druggist in good faith, and his business was compounding and selling drugs." This was reversed for error as confining the business of a retail druggist or apothecary to one who actually compounds his medicines. For the definition of apothecary under United States statutes, see APOTHECARY.

In America the term druggist is used synonymously with apothecary, although, strictly speaking, a druggist is one who deals in medicinal substances, vegetable, animal, or mineral, before being compounded, while composition and combination are really the business of the apothecary. The term is here used in its double sense, and throughout this article is to be read as if druggist *or* apothecary. In England an apothecary is a sub-physician, or privileged practitioner. He is the ordinary medical man, or family medical attendant, in that country. Under the revived Pharmacy Acts of 32 and 33 Vict. c. 117, any one selling or compounding poisons, or unlawfully using the name of chemist or druggist, or compounding medicines otherwise than according to the formulæ of the British Pharmacopœia, is liable to a penalty of £5; Oke's Mag. Syn. 584.

Druggists are subject to the general rule of law that persons who hold themselves out to the world as possessing skill and qualification for a particular trade or profession are bound to reasonable skill and diligence in the performance of their duties. Accordingly the law implies an undertaking on the part of apothecaries and surgeons that they shall use a reasonable degree of care and skill in the treatment of their patients; Chit. Contr. 553; 66 Ia. 708; 34 La. Ann. 913; 43 Hun 265. This rule is probably more strict in the United States than in England; Webb's Poll. Torts 26, note. One who practises as a druggist, whether under a license or not, holds himself out as competent to do this, but not to prescribe as a physician; and for any lack of capacity or for negligence, he is answerable in damages to the person injured, the same principles of law applying to him as to a medical practitioner; Bish. Non-Contr. L. § 716.

The utmost care is required of those who prepare medicines or sell drugs, as the least carelessness may prove injurious to health or fatal in its results. Hence druggists are held responsible for injuries resulting from a want of usual care and skill. The highest degree of skill is not to be expected nor can it reasonably be required of all; 39 Me. 156. Perhaps a higher degree of skill than is the usual rule was required in 13 B. Monr. 219; in that case it was held that any mistake made by the druggist, if the result of ignorance or carelessness, renders him liable to the injured party; 7 N. Y. 397. Where one, whether an apothecary or not, negligently gave a customer poison and the customer swallowed it and was injured, he who negligently gave the poison was guilty of a tort, and liable for the injury to the customer unless the latter was also guilty of negligence which contributed to the injury; 61 Ia. 64. If a druggist negligently sells a deadly poison as a harmless medicine to A, who administers it to B and B takes it as a medicine and dies in a few hours by reason thereof, a right of action against the druggist survives to B's administrator; 106 Mass. 143. The sale of an article in itself harmless, which becomes dangerous only by being used in combination with some other article, without any knowledge on the part of the vendor that it was to be used in such combination, does not render him liable to an action by one who purchased the article from the original vendee and is injured while using it in a dangerous combination, although by mistake the article sold was different from that which was intended to be sold; 11 Allen 514.

A druggist who sells to one person for the use of another a hair wash made by himself and represented not to be injurious, is liable to the person for whom it was purchased when used as directed, for injuries arising from such use, the intended use by the third person being known to the vendor; L. R. 5 Ex. 1. The maker of a proprietary medicine recommended for the cure of a certain disease, the bottle having on it directions for use, who sells the medicine, so put up, to a druggist, is liable to one who buys it from the druggist and is injured by its use according to the directions on the bottle; 83 Ga. 457.

Where a druggist selling a poisonous medicine, fully and clearly warned the person of its nature and gave him accurate directions as to the quantity which he could safely take, and the person was injured or killed by taking an overdose in disregard of the directions, the druggist is not liable for negligence simply because he failed to put a label marked "Poison" on the package as directed by statute. The customer disregarding the warning and direction of the vendor was guilty of negligence; 92 N. Y. 490.

A druggist who delivers one medicine when another is asked for is responsible for the consequences, on the ground of negligence only. If the error occurred without fault on the part of himself or his servant, the case is like one of inscrutable accident, and the druggist is not liable though injurious consequences follow.

An unlicensed druggist who conducts a drug store cannot escape the penalty of the law for the unlawful sale of intoxicating liquors by showing that the sales were made for medicinal purposes by his clerk,

who was a licensed pharmacist ; 67 Ia. 641. A druggist is not liable if he compounds carefully another's prescription ; 61 Ga. 505. But if he sell one medicine for another and an injury result therefrom, it is no defence for him to show that the case was negligently treated ; 47 Mich. 576. An apothecary, if guilty of criminal negligence, and fatal results follow, may be convicted of manslaughter ; 1 Lew. Cr. Cas. 169.

DRUGS. Substances used in the composition of medicines or in dyeing and in chemical operations. Webst. Dict.

"Drugs and Medicines," when used in insurance policies, include saltpetre ; 79 N. C. 279 ; s.c. 28 Am. Rep. 322. It is a question of fact whether benzine is a drug ; 53 Vt. 418 ; s.c. 38 Am. Rep. 687.

Where a druggist was charged with selling peppermint lozenges on Sunday, it appeared that the statute permitted the selling of "drugs and medicines" on that day. They were held *prima facie* within the statute ; 33 U. C. Q. B. 543. So a mixture of rosewater and prussic acid to be used as a lotion is within the same terms ; L. R. 4 Q. B. 296.

DRUMMER. A travelling salesman. One who solicits custom ; 34 Ark. 553 ; s.c. 36 Am. Rep. 34. "Commercial agents who are travelling for wholesale merchants and supplying the retail trade with goods, or rather, taking orders for goods to be shipped to the retail merchant ;" 4 Lea 93.

DRUNKENNESS. In Medical Jurisprudence. The condition of a man whose mind is affected by the immediate use of intoxicating drinks.

This condition presents various degrees of intensity, ranging from a simple exhilaration to a state of utter unconsciousness and insensibility. In the popular phrase, the term drunkenness is applied only to those degrees of it in which the mind is manifestly disturbed in its operations. In the earlier stages it frequently happens that the mind is not only not disturbed, but acts with extraordinary clearness, promptitude, and vigor. In the latter the thoughts obviously succeed one another without much relevance or coherence, the perceptive faculties are active, but the impressions are misconceived, as if they passed through a distorting medium, and the reflective powers cease to act with any degree of efficiency. Some of the intermediate stages may be easily recognized ; but it is not always possible to fix upon the exact moment when they succeed one another. In some persons peculiarly constituted, a fit of intoxication presents few if any of these successive stages, and the mind rapidly loses its self-control, and for the time is actually frenzied, as if in a maniacal paroxysm, though the amount of the drink may be comparatively small. The same phenomenon is observed sometimes in persons who have had some injury of the head, who are deprived of their reason by the slightest indulgence.

The habitual abuse of intoxicating drinks is usually followed by a pathological condition of the brain, which is manifested by a degree of intellectual obtuseness, and some insensibility to moral distinctions once readily discerned. The mind is more exposed to the force of foreign influences, and more readily induced to regard things in the light to which others have directed them. In others it produces a permanent mental derangement, which, if the person continue to indulge, is easily mistaken by common observers for the immediate effects of hard drinking. These two results—the mediate and the immediate effects of drinking—may coexist ; but it is no less necessary to distinguish them from each other, because their legal consequences may be very different. Moved by the latter, a person goes into the street and abuses or assaults his neighbors ; moved by the former, the same person makes his will, and cuts off with a shilling those who have the strongest claims upon his bounty. In a judicial investigation, one class of witnesses will attribute all his extravagances to drink, while another will see nothing in them but the effect of insanity. The medical jurist should not be misled by either party, but be able to refer each particular act to its proper source.

Drunkenness may be the result of dipsomania. Rather suddenly, and perhaps without much preliminary indulgence, a person manifests an insatiable thirst for strong drink, which no considerations of propriety or prudence can induce him to control. He generally retires to some secluded place, and there, during a period of a few days or weeks, he swallows enormous quantities of liquor, until his stomach refuses to bear any more. Vomiting succeeds, followed by sickness, depression, and disgust for all intoxicating drinks. This affection is often periodical, the paroxysms recurring at periods varying from three months to several years. Sometimes the indulgence is more continuous and limited, sufficient, however, to derange the mind, without producing sickness, and equally beyond control. Dipsomania may result from moral causes, such as anxiety, disappointment, grief, sense of responsibility ; or physical, consisting chiefly of some anomalous condition of the stomach. Esquirol, Mal. Men. ii. 73 ; Marc, *de la Folie*, ii. 605 ; Ray, Med. Jur. 497 ; Macnish, Anatomy of Drunkenness, chap. 14.

The common law shows but little disposition to afford relief, either in civil or criminal cases, from the immediate effects of drunkenness. It has never considered mere drunkenness alone as a sufficient reason for invalidating any act ; thus it has been held that drunkenness in the maker of a negotiable note is no defence against an innocent holder ; 91 Pa. 17 ; the contract of a drunken man being not void but voidable only ; 8 Am. Rep. 246, n. See also 1 Ames, Cas. on Bills and Notes 558 ; 61 Mich. 384 ; see 15 Johns. 503 ; 42 Ind. 565 ; 72 Ill. 108. If a person when sober agree to sign a contract, he cannot avail himself of intoxication at the time of signature as a defence ; 63 Hun 629. When carried so far as to deprive the party of all consciousness, a strong presumption of fraud is raised ; and on that ground courts may interfere ; 1 Ves. 19 ; 18 *id.* 12. Drunkenness in such a degree as to render the testator unconscious of what he is about, or less capable of resisting the influence of others, avoids a will ; Shelf. Lun. 274, 304 ; 3 D. R. Pa. 554. In actions for torts, drunkenness is not regarded as a reason for mitigating damages ; Co. Litt. 247*a* ; Webb, Poll. Torts 59, n. See 68 Ga. 612. Courts of equity, too, have declined to interfere in favor of parties pleading intoxication in the performance of some civil act ; but they have not gone the length of enforcing agreements against such parties ; 1 Story, Eq. § 232 ; 57 N. W. Rep. (Minn.) 478 ; 18 Ves. Jr. 12 ; 1 Ves. 19.

In England drunkenness has never been admitted in extenuation for any offences committed under its immediate influence ; 3 Witth. & Beck. Med. Jur. 508. "A drunkard who is *voluntarius dæmon*," says Coke, "hath no privilege thereby ; whatever ill or hurt he doth, his drunkenness doth aggravate it." Lawyers have occasionally shown a disposition to distinguish between the guilt of one who commits an offence unconsciously, though in conse-

quence of vicious indulgence, and that of another who is actuated by malice aforethought and acts deliberately and coolly. In Pennsylvania, as early as 1794, it was remarked by the courts on one occasion that, as drunkenness clouds the understanding and excites passion, it may be evidence of passion only, and of want of malice and design; Add. Pa. 257. See 83 Pa. 144. In 1819, Justice Holroyd decided that the fact of drunkenness might be taken into consideration in determining the question whether the act was premeditated or done only with sudden heat and impulse; Rex *v.* Grundley, 1 Russ. Cr. 8. This particular decision, however, was, a few years afterwards, pronounced to be not correct law; 7 C. & P. 145. Again, it was held that drunkenness, by rendering the party more excitable under provocation, might be taken into consideration in determining the sufficiency of the provocation; 7 C. & P. 817. More recently (1849), in Rex *v.* Monkhouse, 4 Cox, Cr. Cas. 55, it was declared that there might exist a state of drunkenness which takes away the power of forming any specific intention. See, also, 16 Jur. 750.

In this country, courts have gone still further in regarding drunkenness as incompatible with some of the elements of crime. It has been held, where murder was defined to be wilful, deliberate, malicious, and premeditated killing, that the existence of these attributes is not compatible with drunkenness; 13 Ala. N. S. 413; 4 Humphr. 136; 11 *id.* 154; 1 Spear 384; Tayl. Med. Jur. 739; and when a man's intoxication is so great as to render him unable to form a wilful, deliberate, and premeditated design to kill, or of judging of his acts and their legitimate consequences, then it reduces what would otherwise be murder in the first degree to murder in the second degree; Wright, Ohio 45; 29 Cal. 678; 1 Leigh 612; 2 Park. C. R. 233; 21 Miss. 446; 40 Conn. 136; 24 Am. L. Reg. 507; 26 S. W. Rep. (Tex.) 396; 33 Ala. 419; 41 Conn. 584; 66 Ill. 118; 75 Pa. 403. See 82 Wis. 23; 22 Or. 591; 95 Cal. 425. But where one who intends to kill another becomes voluntarily intoxicated for the purpose of carrying out the intention, the intoxication will have no effect upon the act; 28 Fla. 113; 96 Ala. 81. See 36 Pac. Rep. (Cal.) 770; 118 Mo. 7; and if one person gets another drunk and persuades him to commit a crime, he is legally responsible; 91 Ga. 740.

Intoxication does not excuse crime, but may show an absence of malice; 10 Ky. L. Rep. 656; 88 Ala. 100; and the burden of proof is on the defendant to show intoxication to such an extent as to render him incapable of malice; 46 La. Ann. 27.

If one commits robbery while so drunk as not to know what he was doing, he will not be deemed to have taken the property with a felonious intent; 92 Ky. 522.

It has been already stated that strong drink sometimes, in consequence of injury to the head, or some peculiar constitutional susceptibility, produces a paroxysm of frenzy immediately, under the influence of which the person commits a criminal act. Cases of this kind have been too seldom tried to make it quite certain how they would be regarded in law. It is probable, however, that the plea of insanity would be deprived of its validity by the fact that, sane or insane, the party was confessedly drunk. In a case where injury of the head had been followed by occasional paroxysms of insanity, in one of which the prisoner killed his wife, it appeared that he had just been drinking, and that intoxication had sometimes brought on the paroxysms, though they were not always preceded by drinking. The court ruled that if the mental disturbance were produced by intoxication it was not a valid defence; and accordingly the prisoner was convicted and executed. Trial of M'Donough, Ray, Med. Jur. 514. The principle is that if a person voluntarily deprives himself of reason, he can claim no exemption from the ordinary consequences of crime; 3 Par. & Fonbl. Med. J. 39; and the courts hold that voluntary intoxication is no justification or excuse for crime; 51 Kan. 651; 49 Cal. 485; 13 Ala. 413; 55 Ga. 31; 68 *id.* 612; 50 Vt. 483; 4 Tex. App. 76. Milder views have been advocated by writers of note, and have appeared in judicial decisions. Mr. Alison, referring to the class of cases just mentioned, calls it inhuman to visit them with the extreme punishment otherwise suitable. Prin. of Crim. Law of Scotland 654. See, also, 23 Am. Jur. 290. When a defendant sets up the defence of *delirium tremens*, and there is evidence to support the plea, the court in charging the jury is bound to set forth the law applicable to such a defence; 12 Rep. 701. This disease is a species of insanity, and one who labors under it is not responsible for his acts; 1 Wh. & Stillé, Med. Jur. § 202. While drunkenness is no excuse for crime, *mania a potu* is; 100 N. C. 457. See 43 Cal. 344; 64 Ind. 435; 50 Barb. 266. Where dipsomania affects the intellect and not merely the will it may be a defence; 3 Witth. & Beck. Med. Jur. 506. See 86 N. Y. 559; 105 Cal. 486. Where a person, in regard to a particular act, though knowing right from wrong, has lost his power to discriminate, in consequence of mental disease, he will be exempt from crime; 3 Witth. & Beck. 507. See 115 N. C. 807. Dipsomania would hardly be considered, in the present state of judicial opinion, a valid defence in a capital case, though there have been decisions which have allowed it, holding the question whether there is such a disease, and whether the act was committed under its influence, to be questions of fact for the jury; 49 N. H. 399; 40 Conn. 136; 1 Bish. Cr. Law § 409.

The law does recognize two kinds of inculpable drunkenness, viz.: that which is produced by the "unskilfulness of the physician," and that which is produced by the "contrivance of enemies." Russ. Cr. 8. To these there may perhaps also be added that above described, where the party drinks no more liquor than he has habitually used

without being intoxicated, but which exerts an unusually potent effect on the brain, in consequence of certain pathological conditions. See 5 Gray 86; 11 Cush. 479; 1 Benn. & H. Lead. Cr. Cas. 113.

DRY EXCHANGE. A term invented for disguising and covering usury,—in which something was pretended to pass on both sides, when in truth nothing passed on one side; whence it was called *dry*. Stat. 3 Hen. VII. c. 5; Wolffius, Ins. Nat. § 657.

DRY RENT. Rent-seck; a rent reserved without a clause of distress.

DRY TRUST. A passive trust; one which requires no action on the part of the trustee beyond turning over the money or property to the *cestui que trust*. Black, L. Dict. See TRUST.

DUBITANTE. Doubting. Affixed in law reports to a judge's name, to signify that he doubts the correctness of a decision.

DUCAT. The name of a foreign coin.

The ducat, or sequin, was originally a gold coin of the middle ages, apparently a descendant from the bezant of the Greek-Roman Empire. For many centuries it constituted the principal international currency, being intended, or supposed, to be made of pure gold, though subsequently settled at a basis a little below. It is now nearly obsolete in every part of the world. Its average value is about $2.26 of our money. It is said they appeared earliest in Venice, and that they bore the following motto: *Sit tibi, Christe, datus, quem tu regis, iste Ducatus*, —whence the name ducat.

The silver ducat was formerly a coin of Naples, weighing three hundred and forty-eight grains, eight hundred and forty-two thousandths fine; consequent value, in our money, about eighty-one cents; but it now exists only as a money of account.

DUCES TECUM LICET LANGUIDUS. A writ directing the sheriff to bring a person whom he returned as so sick that he could not be brought without endangering his life. Blount; Cowel. The writ is now obsolete. See SUBPŒNA DUCES TECUM.

DUCKING-STOOL. A stool or chair in which common scolds were formerly tied and plunged into water. The ducking-stool is mentioned in the Domesday Book; it was extensively in use throughout Great Britain from the fifteenth till the beginning of the eighteenth century. Cent. Dict. See CASTIGATORY.

DUE. Just and proper, as due care, due rights. 8 N. J. Eq. 701; 10 Allen 18, 532. A due presentment and demand of payment must be made. See 4 Rawle 307; 3 Leigh 389; 3 Cra. 300.

What ought to be paid; what may be demanded.

It differs from *owing* in this, that sometimes what is owing is not due: a note payable thirty days after date is owing immediately after it is delivered to the payee, but it is not due until the thirty days have elapsed. But see 7 N. Y. 476; 10 N. J. L. 340; 6 Pet. 36.

The word "due," unlike "arrears," has more than one signification, and expresses two distinct ideas. At times it signifies a simple indebtedness without reference to the time of payment; at others it shows that the day of payment has passed; 31 Fed. Rep. 125; 5 N. J. L. 345.

Bills of exchange and promissory notes are not due until the end of the three days of grace, unless the last of these days happen to fall on a Sunday or other holiday, when it becomes due on the Saturday or day before, and not on the Monday or day following. Story, P. Notes, § 440; 14 Me. 264; 25 Barb. 326; 24 N. Y. 283; 17 Wis. 181; 19 Pick. 381; 31 Mich. 215; unless changed by statute.

DUE-BILL. An acknowledgment of a debt in writing is so called. This instrument differs from a promissory note in many particulars: it is not payable to order, nor is it assignable by mere indorsement. Byles, Bills *11, n. (t.). See I. O. U.; PROMISSORY NOTES.

Where the terms of a due-bill are unambiguous, an erroneous interpretation thereof by the maker is no defence to an action on such due-bill; 33 Ill. App. 58. In an action on a due-bill, the defendant can show, under a plea of want of consideration, that the indebtedness for which it had been given had been paid before the bill was made; 34 Ill. App. 571. The maker of a written acknowledgment of a sum due is not estopped by it as to any one who may purchase the supposed debt; 42 Minn. 498.

DUE CARE. Reasonable care adapted to the circumstances of the case. 10 Allen 532; 54 Md. 656.

DUE COURSE OF LAW. This phrase is synonymous with "due process of law," or "the law of the land," and means law in its regular course of administration through courts of justice. 19 Kan. 542.

DUE PROCESS OF LAW. Law in its regular course of administration through courts of justice. 3 Story, Const. 264, 661; Miller, Const. 664; 18 How. 272; 13 N. Y. 378.

Any legal proceeding enforced by public authority, whether sanctioned by age or custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice. 110 U. S. 516.

This term is considered by Coke as equivalent to the phrase "law of the land" (used in Magna Charta, c. 29), and is said by him to denote "indictment or presentment of good and lawful men." Co. 2d Inst. 50. Amendment V. of the constitution of the United States provides: "No person shall . . . be deprived of life, liberty, or property, without due process of law." Amendment XV. prohibits a state from depriving a person of life, liberty, or property, without due process of law. A similar provision exists in all the state constitutions; the phrases "due course of law" and "the law of the land" are sometimes used; but all three of these phrases have the same meaning; 96 U. S. 97; Cooley, Const. Lim. 437, where the provisions in the various state constitutions are set forth. Miller, J., says, in Davidson *v.* New Orleans, 96 U. S. 103, that a general definition of the phrases which would cover every case

would be most desirable, but that, apart from the risk of failure to make the definition perspicuous and comprehensive, there is a wisdom in ascertaining the extent and application of the phrase by the judicial process of exclusion and inclusion as the cases arise. In that case, however, he says also, that it must be confessed that the constitutional meaning or value of the phrase remains without that satisfactory precision of definition which judicial decisions have given to nearly all the other guaranties of personal rights found in the constitutions of the several states and of the United States. As contributory to the discussion, he proceeds, for the court, to lay down the following proposition: "That whenever by the laws of a state, or by state authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole state or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections." In the case just cited it is remarked that during nearly a century while this provision was in the constitution of the United States, as a restraint upon the authority of the federal government, and during that time the powers of that government were watched with jealousy, this special limitation on its powers was seldom invoked; but after it became, as part of the Fourteenth Amendment, a limitation upon the powers of the states, in a very few years, the docket of the supreme court was crowded with cases in which it was invoked. See 140 U. S. 316; 133 *id.* 660; 154 *id.* 421. The full significance of the clause "law of the land" is said by Ruffin, C. J., to be that statutes which would deprive a citizen of the rights of person or property without a regular trial according to the course and usage of the common law would not be the law of the land; 4 Dev. 15. Mr. Webster's explanation of the meaning of these phrases in the Dartmouth College Case (4 Wheat. 518) is: "By the law of the land is more clearly intended the general law, a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not, therefore, to be considered the law of the land."

The privileges and immunities of citizens of the United States, protected by the Fourteenth Amendment, are privileges and immunities arising out of the nature and essential character of the federal government, and granted or secured by the constitution; and due process of law and the equal protection of the laws are secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government; 152 U. S. 382; 148 *id.* 662; 110 *id.* 535.

In 4 Wheat. 235, Johnson, J., says: "As to the words from Magna Charta incorporated in the constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this, —that they were intended to secure the individual from the arbitrary exercise of the power of government, unrestrained by the established principles of private rights and distributive justice."

"Due process of law undoubtedly means, in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights;" 12 N. Y. 209. Law in its regular course of administration through courts of justice is due process; and when secured by the law of the state, the constitutional requirement is satisfied; 139 U. S. 462. The phrase as used in the constitution does not "mean a statute passed for the purpose of working the wrong. That construction would render the restriction absolutely nugatory, and turn this part of the constitution into mere nonsense. The people would be made to say to the two houses: 'You shall be vested with the legislative power of the state, but no one shall be disfranchised or deprived of any of the rights or privileges of a citizen, unless you pass a statute for that purpose. In other words, you shall not do the wrong unless you choose to do it;'" per Bronson, J., in 4 Hill, N. Y. 140. "The meaning of these words is that no man shall be deprived of his property without being heard in his own defence;" Tucker, J., in 1 Hen. & M. 531. See, also, 6 W. & S. 171.

Judge Cooley (Const. Lim. 441) says: "Due process of law in each particular case means, such an exercise of the powers of the government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs."

Taking property under the taxing power is taking it by due process of law; 22 Cal. 363; 102 U. S. 586. In this connection, it is said in 2 McCord 56: "We think that any legal process which was originally founded in necessity, has been consecrated by time, and approved and acquiesced in by universal consent, . . . is embraced in the alternative 'law of the land.'" In 50 Miss. 479, it is said that these constitutional provisions do not mean the general body of the law as it was at the time the constitution took effect; but they refer to certain fundamental rights which that system of jurisprudence of which ours is derivative has always recognized; if any of these are disregarded in the proceedings by which a person is condemned to the loss of property,

etc., then the deprivation has not been by due process of law. And it has been held that the state cannot deprive a person of his property without due process of law through the medium of a constitutional convention any more than it can through an act of the legislature; 69 Mo. 627. Exaction of tolls under a state statute for the use of an improved waterway, is not a deprivation of property within the federal constitution; 123 U. S. 288.

The subject was exhaustively considered in Murray's Lessees *v.* Hoboken, etc., Co., 18 How. 272, where it was held that a collector of customs, from whom a balance of accounts has been found to be due by accounting officers of the treasury of the United States, designated for that purpose by law, could be deprived of his liberty or property, in order to enforce the payment of that balance, without the exercise of the judicial power of the United States. The proceedings in that case were by way of a distress-warrant issued by the solicitor of the treasury to the marshal of the district, under which the marshal was authorized to collect the amount due by a sale of the collector's personal property. The court considered that the power exercised was executive, and not judicial; and that the writ and proceedings under it were due process of law within the meaning of that phrase as derived from our ancestors and found in the constitution.

In 95 U. S. 37, it was held that the phrase due process of law does not necessarily mean judicial proceedings, and that summary proceedings for the collection of taxes, which were not arbitrary or unequal, were not within the prohibition of this provision. So, also, in 5 Nev. 281. This provision does not imply that all trials in state courts affecting the property of persons must be by jury; it is enough if they were had according to the settled course of judicial proceedings; 92 U. S. 90; 5 Nev. 281; 2 Tex. 250. The question is independent of the question whether the proceeding was by motion or action if it be sanctioned by state law and affords an opportunity to be heard; 160 U. S. 389; and it does not imply a hearing according to established practice in the courts, but by appropriate judicial proceedings; 66 N. W. Rep. (Neb.) 624. As to the right of foreigners to enter our country, the decisions of executive or administrative officers acting within powers expressly conferred by congress are due process of law; 142 U. S. 651.

A statute which provides that real-estate owners shall be liable for damages arising out of the illegal use of their property by a tenant is valid; 18 Am. Law Reg. N. S. 124. A commitment for contempt of court is not obnoxious to this constitutional provision; 23 Minn. 411; 134 U. S. 31; nor is a commitment for failure to pay a tax, not resorted to until other means of collection have failed, and then only upon a showing of property possessed, not accessible to levy, but enabling the owner to pay if he chooses; 13 U. S. 660. A statute providing for assessment on property owners, for street improvements, is not invalid as taking property without due process of law; 4 N. Y. 419; 128 U. S. 578. A provision in the constitution and laws of Missouri by which a litigant, in certain courts of St. Louis, has a right of appeal to the St. Louis court of appeals, but not to the supreme court of the state, is not repugnant to the XIV. amendment. A state may establish one system of law in one portion of its territory and another in another, provided it does not deprive any person of his rights without due process of law; 101 U. S. 22. A review by an appellate court of the final judgment in a criminal case is not a necessary element of due process of law; 153 U. S. 684. A provision in a Wisconsin statute giving jurisdiction to courts to try prosecutions upon informations for all crimes is not repugnant to that amendment; such trial is by due process of law; 30 Wis. 129. The entry of judgment on a bond when the bond is forfeited is not obnoxious to this constitutional provision; 2 Tex. 250. The mere entry of a judgment for money, which is void for want of proper service, does not deprive the defendant of liberty or property; 137 U. S. 15. A law which provides that in case of refusal to pay certain taxes, the treasurer shall levy the same by distress and sale of the goods of the person refusing or of any goods in his possession, and that no claim of property by any other person shall prevent a sale, but giving the owner of the goods a remedy against the person taxed, is constitutional; 5 Mich. 251, where the subject is fully treated. It has been held in California (49 Cal. 402), that a statute which directs the commissioner of immigration to visit vessels arriving from a foreign state, and to ascertain whether there are any lewd women on board, and if such be found, to prevent them from landing unless bonds be given to the state, is not repugnant to the XIV. amendment. An act to allow animals running at large to be taken by any person and publicly sold by a public officer, is constitutional; 39 Mich. 41. An act which makes a garnishee liable to pay a judgment against the defendant, in case the garnishee neglects to render a sworn account, does not deprive him of his property without due process of law; 12 R. I. 127. Taxation authorized for the purposes of meeting railroad aid bonds is not in violation of the constitutional provision against depriving a person of his property without due process of law. This clause has reference not to the object and purposes of a statute, but to the modes in which rights are ascertained; per Emmons, J., in 1 Flipp. 120. Legislation is not open to the charge of depriving one of his rights without due process of law, if it be general in its operation upon the subject to which it relates and is enforceable by usual methods adapted to the nature of the case; 129 U. S. 114.

Whenever a tax or other burden is imposed upon property for public use, whether for the whole state or a limited part thereof,

and the law provides a mode for confirming or contesting the charge, with such notice and proceedings as are appropriate, the judgment rendered in such proceedings cannot be said to deprive the owner of his property without due process of law; 4 Fed. Rep. 366. The tax here was for the reclamation of swamp lands. See 140 U. S. 316; 128 *id.* 578; 154 *id.* 421.

A person imprisoned under a valid law, although there was error in the proceeding resulting in the commitment, is not imprisoned without due process of law; 5 Fed. Rep. 899, per Deady, J. An error in a charge to a jury in a criminal case is not a denial of due process of law; 139 U. S. 651. To compel an attorney to render services gratuitously to defend a person accused of crime, is not the taking of his time and labor, which is his property, without compensation and without process of law; 5 Wash. St. 329.

A statute which authorized the president of the police commissioners of St. Louis, upon satisfactory information that there are any prohibited gaming tables in that city, to issue his warrant for their seizure and to destroy the same publicly, is void; 10 Cent. L. J. 29. The sale of land to satisfy void street assessments which the legislature has unconstitutionally attempted to validate, would be taking property without due process of law; 53 Cal. 44. The commitment to the workhouse of an alleged pauper, upon an *ex parte* hearing, by two overseers, without opportunity to the pauper to be heard, is repugnant to the XIV. amendment, and void; 65 Me. 120, reversing earlier cases in Maine decided before that amendment was passed. A judgment upon a suit *in personam* in Oregon, where there was no service of notice upon the defendant within the jurisdiction, and no appearance on his part, is void, and a sale of defendant's land thereunder passes no title; 95 U. S. 714. See 137 *id.* 15. No judgment of a court is due process of law if rendered without jurisdiction in the court, or without notice to the party; 154 U. S. 34; but when parties have been regularly heard in the course of judicial proceedings, an erroneous decision does not deprive the unsuccessful party of his property without due process of law; 159 *id.* 103.

A statute providing that the use of an easement shall not be evidence of a right thereto, is unconstitutional so far as it applies to rights acquired by user or prescription prior to the enactment; 12 R. I. 522. The legislature may make a tax deed *prima facie* evidence of title in the purchaser, but cannot make it conclusive evidence of his title to the land; 148 U. S. 172. An act which fixes absolute liability on a corporation to make compensation for injuries done to property in the prosecution of its lawful business, without fault on its part, when under the general law, no one else is liable under such circumstances, is void. A person has the right to be present before the tribunal which passes judgment upon the question of life, etc., to be heard by testimony, and to controvert every material fact which bears upon the question involved; if any question of fact or liability be conclusively presumed against him, this is not due process of law; 58 Ala. 594. An affirmance by an appellate court of a judgment of death for murder, although in the absence of the accused and his counsel and without notice to either, does not deprive the defendant of his right to life without due process of law; 143 U. S. 442, 452.

The punishment of death by electricity does not deprive a criminal of due process of law; 142 U. S. 155.

Persons invested with the elective franchise can be deprived of it only by due process of law; 6 Coldw. 233.

An act authorizing monument-makers to place a lien on a tombstone and sell it for non-payment, without providing for any tribunal to adjust the rights of parties, is unconstitutional, and a sale under it is without due process of law; 4 N. Y. Sup. 445.

The provisions of a bill which dispense with personal service in proceedings when it is practicable and has been usual under the general law, the defendants being residents of the county and state, and amenable to process, are void; 50 Miss. 468. A law imposing an assessment for a local improvement without notice to, and a hearing or an opportunity to be heard on the part of, the owner of property assessed, is unconstitutional. It is not enough that he may have notice and a hearing; the law must require notice and give a right to a hearing; 74 N. Y. 183; 96 Ga. 680; 41 N. E. Rep. (Ind.) 326; 23 S. E. Rep. (Va.) 909. A statute providing for the taking of private property for a railroad and for the assessment of damages by commissioners, need not, under the Delaware constitution, provide for notice to the owner of the time and place of meeting of the commissioners, nor need it secure to the owner a hearing; the United States Constitution and amendments impose no restraint upon the states in the exercise of the right of eminent domain, and the words, "due course of law," in the state constitution do not apply thereto; 5 Del. Ch. 524; in which case the authorities are collected and the construction of these words exhaustively considered by Saulsbury, Ch.

See works on constitutional law; 27 Am. Law Reg. 611, 700; 28 *id.* 129; 5 Am. R. R. & Corp. Rep. 575; 31 Am. St. Rep. 104; 7 Cent. L. J. 255; 8 *id.* 398; 18 *id.* 302; 20 *id.* 470; 28 *id.* 266; 48 Am. Dec. 269; 12 Fed. Rep. 583; 13 *id.* 783; 3 L. R. A. 194; 4 *id.* 724; 21 *id.* 789.

DUELLING. The fighting of two persons, one against the other, at an appointed time and place, upon a precedent quarrel. It differs from an affray in this, that the latter occurs on a sudden quarrel, while the former is always the result of design.

When one of the parties is killed, the survivor is guilty of murder; 1 Russ. Cr. 443; 1 Yerg. 228. Fighting a duel, even where there is no fatal result, is of itself a misdemeanor. See 2 Com. Dig. 252; Clark, Cr.

L. 340; Co. 3d Inst. 157; Const. 167; 2 Ala. 506; 20 Johns. 457; 1 McMull. 126. For cases of mutual combat upon a sudden quarrel, see 1 Russ. Cr. 495; 2 Bish. Cr. Law § 311. Under the constitutions of some of the states, as Alabama, California, Kentucky, Pennsylvania, Virginia, and Wisconsin, any one being directly or indirectly engaged in a duel is forever disqualified from holding public office. See 10 Bush 725; 20 Johns. 457; 4 Metc. (Ky.) 1; 2 McCord 334; 28 Gratt. 130; CHALLENGE.

DUELLUM. Trial by battle. Judicial combat. Spelman, Gloss. See WAGER OF BATTLE.

DUKE. The title given to those who are in the highest rank of nobility in England.

DUM BENE SE GESSERIT (Lat. while he shall conduct himself well). These words signify that a judge or other officer shall hold his office during good behavior, and not at the pleasure of the crown nor for a certain limited time.

DUM FUIT IN PRISONA (L. Lat.). **In English Law.** A writ which lay for a man who had aliened lands under duress by imprisonment, to restore to him his proper estates. Co. 2d Inst. 482. Abolished by stat. 3 & 4 Will. IV. c. 27.

DUM FUIT INFRA ÆTATEM (Lat.). The name of a writ which lay when an infant had made a feoffment in fee of his lands or for life, or a gift in tail. Abolished by stat. 3 & 4 Will. IV. c. 27.

It could be sued out by him after he came of full age, and not before; but in the meantime he could enter, and his entry remitted him to his ancestor's rights; Fitzh. N. B. 192; Co. Litt. 247, 337.

DUM NON FUIT COMPOS MENTIS (Lat.). The name of a writ which the heirs of a person who was *non compos mentis*, and who aliened his lands, might have sued out to restore him to his rights. Abolished by 3 & 4 Will. IV. c. 27.

DUM SOLA (Lat. while single or unmarried). A phrase to denote that something has been done, or may be done, while a woman is or was unmarried. Thus, when a judgment is rendered against a woman *dum sola*, and afterward she marries, the *scire facias* to revive the judgment must be against both husband and wife.

DUMB. Unable to speak; mute. See DEAF AND DUMB.

A dog is a dumb animal; 5 Tex. App. 475.

DUMB-BIDDING. In sales at auction, when the amount which the owner of the thing sold is willing to take for the article is written, and placed by the owner under a candlestick, or other thing, and it is agreed that no bidding shall avail unless equal to that, this is called dumb-bidding. Babington, Auct. 44.

DUN. One who duns or urges for payment; a troublesome creditor. A demand for payment, whether oral or written. Stand. Dict.

DUNGEON. A cell under ground; a place in a prison built under ground, dark, or but indifferently lighted. In the prisons of the United States there are few or no dungeons.

DUNNAGE. Pieces of wood placed against the sides and bottom of the hold of a vessel, to preserve the cargo from the effect of leakage, according to its nature and quality. Abbott, Shipp. 227.

There is considerable analogy between dunnage and ballast. The latter is used for trimming the ship and bringing it down to a draft of water proper and safe for sailing. Dunnage is placed under the cargo to keep it from being wetted by water getting into the hold, or between the different parcels to keep them from bruising and injuring each other; 13 Wall. 674.

DUODECIMA MANUS (Lat.). Twelve hands. The oaths of twelve men, including himself, by whom the defendant was allowed to make his law. 3 Bla. Com. 343.

DUPLEX QUERELA (Lat.). **In Ecclesiastical Law.** A complaint in the nature of an appeal from the ordinary to his next immediate superior for delaying or refusing to do justice in some ecclesiastical cause. 3 Bla. Com. 247; Cowel; Jacobs.

DUPLEX VALOR MARITAGII (Lat. double the value of a marriage). Guardians in chivalry had the privilege of proposing a marriage for their infant wards, provided it were done without disparagement, and if the wards married without the guardian's consent they were liable to forfeit double the value of marriage. Co. Litt. 82 *b*; 2 Sharsw. Bla. Com. 70.

DUPLICATE (Lat. *duplex*, double). The double of anything. A document which is essentially the same as some other instrument. 7 Mann. & G. 93; 40 N. Y. 345.

A duplicate writing has but one effect. Each duplicate is complete evidence of the intention of the parties. When a duplicate is destroyed, for example, in the case of a will, it is presumed both are intended to be destroyed; but this presumption possesses greater or less force, owing to circumstances. When only one of the duplicates is in the possession of the testator, the destruction of that is a strong presumption of any intent to revoke both; but if he possessed both, and destroys but one, it is weaker; when he alters one, and afterwards destroys it, retaining the other entire, it has been held that the intention was to revoke both; 1 P. Wms. 346; 13 Ves. 310. But that seems to be doubted; 3 Hagg. Eccl. 548. See 81 Pa. 389; 49 E. C. L. 94; 103 *id.* 29; 54 Ind. 29.

In English Law. The certificate of discharge given to an insolvent debtor who takes the benefit of the act for the relief of insolvent debtors.

DUPLICATIO (Lat. a doubling). The

defendant's second answer; that is, the answer to the plaintiff's replication.

DUPLICATUM JUS (Lat. a twofold or double right). Words which signify the same as *dreit dreit*, or *droit droit*, and which are applied to a writ of right, patent, and such other writs of right as are of the same nature, and do as it were flow from it as the writ of right. Booth, Real Act. 87.

DUPLICITY. In Pleading. (Lat. *duplex*, twofold; double.) The union of more than one cause of action in one count in a writ, or more than one defence in one plea, or more than a single breach in a replication. 1 W. & M. 381.

The union of several facts constituting together but one cause of action, or one defence, or one breach, does not constitute duplicity; 1 W. & M. 381; 10 Vt. 353; 3 H. & M'H. 455; 2 Blackf. 85; 4 Zabr. 333; 16 Ill. 133; 1 Dev. 397; 1 McCord 464; 10 Me. 83; 14 Pick. 156; 33 Miss. 474; 4 Ind. 109; 2 Tex. Civ. App. 115; 101 N. C. 749; 86 Wis. 142; 77 Md. 121; 87 Ky. 578. Though the joinder of two or more distinct offences in one count of an indictment is faulty, yet where the acts imputed are component parts of the same offence the pleading is not objectionable for duplicity; 54 N. J. L. 416; nor is it where one of the two offences charged is insufficiently set out; 39 Minn. 476. It must be of causes on which the party relies, and not merely matter introduced in explanation; 28 Conn. 134; 14 Mass. 157. In trespass it is not duplicity to plead to part and justify or confess as to the residue; 17 Pick. 236. If only one defence be valid, the objection of duplicity is not sustained; 2 Blackf. 385; 14 Pick. 156.

It may exist in any part of the pleadings; the declaration; 23 N. H. 415; 2 Harring. Del. 162; pleas; 4 McLean 267; 2 Miss. 160; replication; 5 Blackf. 451; 4 Ill. 74; 6 Mo. 460; or subsequent pleadings; 24 N. H. 120; 4 McLean 388; 1 Wash. C. C. 446; 8 Pick. 72; and was at common law a fatal defect; 20 Mo. 229; 23 N. H. 415; to be reached on demurrer only; 18 Vt. 363; 10 Gratt. 255; 13 Ark. 721; 1 Cush. 137; 5 Gill 94; 5 Blackf. 451; 97 Ala. 270; 35 Pac. Rep. (Cal.) 1022. The rules against duplicity did not extend to dilatory pleas so as to prevent the use of the various classes in their proper order; Co. Litt. 304 *a*; Steph. Pl. App. n. 56.

Owing to the statutory changes in the forms of pleading, duplicity seems to be no longer a defect in many of the states of the United States, either in declarations; 8 Ark. 378; pleas; 1 Cush. 137; 7 J. J. Marsh. 335; or replications; 8 Ind. 96; though in some cases it is allowed only in the discretion of the court, for the furtherance of justice; 32 Mo. 185.

It is too late after verdict to object to duplicity in an information for a misdemeanor; 106 Mo. 395.

DUPLY. In Scotch Law. The defendant's answer to the plaintiff's replication. The same as *duplicatio*. Maclaurin, Forms of Pr. 127.

DURANTE ABSENTIA. See ADMINISTRATION.

DURANTE BENE PLACITO (Lat.). During good pleasure. The ancient tenure of English judges was *durante bene placito*. 1 Bla. Com. 267, 342.

DURANTE MINORE ÆTATE (Lat.). During the minority. An infant can enter into no contracts during his minority, except those for his benefit. If he should be appointed an executor, administration of the estate will be granted, *durante minore ætate*, to another person. 2 Bouvier, Inst. n. 1555.

DURANTE VIDUITATE (Lat.). During widowhood.

DURATION. Extent, limit or time. 7 Cal. 102.

DURBAR. In India, a court, audience, or levee. Wilson's Gloss. Ind.; Moz. & W. Dict.

DURESS. Personal restraint, or fear of personal injury or imprisonment. 2 Metc. Ky. 445.

Duress of imprisonment exists where a man actually loses his liberty. If a man be illegally deprived of his liberty until he sign and seal a bond, or the like, he may allege this duress and avoid the bond; 2 Bay 211; 9 Johns. 201; 10 Pet. 137; 45 Mich. 569; 95 Ill. 583; 41 N. H. 414; 74 Me. 218; 94 N. Y. 268. But if a man be legally imprisoned, and, either to procure his discharge, or on any other fair account, seal a bond or a deed, this is not by duress of imprisonment, and he is not at liberty to avoid it; Co. 2d Inst. 482; 3 Cai. 168; 6 Mass. 511; 1 H. & M. 350; 17 Me. 338; 18 How. 307; 2 Wash. C. C. 180; 61 Conn. 50. Where the proceedings at law are a mere pretext, the instrument may be avoided; Aleyn 92; 1 Bla. Com. 136.

Duress per minas, which is either for fear of loss of life, or else for fear of mayhem or loss of limb, must be upon a sufficient reason; 1 Bla. Com. 131. In this case, a man may avoid his own act. Lord Coke enumerates four instances in which a man may avoid his own act by reason of menaces:—for fear of *loss of life; of member; of mayhem; of imprisonment;* Co. 2d Inst. 483; 2 Rolle, Abr. 124; Bac. Abr. *Duress*, *Murder*, A; 2 Ld. Raym. 1578; Savigny, Dr. Rom. § 114; 91 Pa. 114.

Where plaintiff executes a note in consideration that defendant will not prosecute his son for perjury and under a threat that otherwise the son will be prosecuted, the threats constitute duress; 154 Mass. 460.

It has been held that restraint of goods under circumstances of hardship will avoid a contract; 2 Bay 211; 9 Johns. 201; 10 Pet. 137; 57 Ill. 289; 114 Mass. 364; 68 Pa. 49; 68 N. C. 134; 95 U. S. 210; 11 Exch. 878. But see 2 Metc. (Ky.) 445; 2 Gall. 337; 8 Ct. Cl. 461; 50 Ala. 437.

The duress to avoid a deed is that which

compels the grantor to do what he would not do voluntarily; 80 Me. 472; 45 Mich. 569; 90 Pa. 161. If a contract is made under duress and subsequently ratified, it becomes valid; 24 Fla. 390.

The violence or threats must be such as are calculated to operate on a person of ordinary firmness and inspire a just fear of great injury to person, reputation, or fortune. See 4 Wash. C. C. 402; 39 Me. 559; 169 *id.* 376; 18 Colo. 82; 26 Ark. 280; 36 La. Ann. 471. The age, sex, state of health, temper, and disposition of the party, and other circumstances calculated to give greater or less effect to the violence of threats, must be taken into consideration; 32 Am. Rep. 180, n.; 1 Ky. Law Rep. 137; 16 Wall. 432; 23 Am. L. Reg. o. s. 206.

Violence or threats will amount to duress not only where they are exercised on the contracting party, but when the wife, the husband, or children of the party are the object of them; 26 N. Y. 12; 131 Mass. 51; 3 Washb. R. P. 276.

If the violence used be only a legal constraint, or the threats only of doing that which the party using them had a right to do, they shall not invalidate the contract. A just and legal imprisonment, or threats of any measure authorized by law and the circumstances of the case, are of this description. See Norris, Peake's Ev. 440, and the cases cited; also, 6 Mass. 506, for the general rule at common law; 84 Me. 103; *contra*, 106 Mass. 291; 155 *id.* 233; 36 N. Y. 365; 47 N. J. L. 265; 79 N. C. 603; 50 Conn. 348.

But the mere forms of law to cover coercive proceedings for an unjust and illegal cause, if used or threatened in order to procure the assent to a contract, will invalidate it; and arrest without cause of action, or a demand of bail in an unreasonable sum, or threat of such proceeding, by this rule invalidates a contract made under their pressure.

Where a person has been refused payment of the balance due after completing his contract, unless he repair, labor free, certain damages done to the work by a stranger, he cannot recover the cost of such extra labor as he was not under duress; 133 N. Y. 372.

All the above cases relate to cases where there may be some other motive besides the violence or threats for making the contract. When, however, there is no other cause for making the contract, any threats, even of slight injury, will invalidate it.

Excessive charges paid to railroad companies refusing to carry or deliver goods, unless these payments were made voluntarily, have been recovered on the ground of duress; 27 L. J. Ch. 137; 32 *id.* 225; 30 L. J. Exch. 361; 28 *id.* 169. Where the carrier refuses to transport stock until a special contract is signed limiting its liability, it does not bind the shipper; 48 Kan. 210.

The burden of proving duress is on the party alleging it; 37 Neb. 666.

See, generally, 2 Watts 167; 1 Bail. 84; 6 Mass. 511; 6 N. H. 508; 2 Gall. 337; 148 U. S. 541.

DURHAM. See COUNTY PALATINE.

DURSLEY. In Old English Law. Blows without wounding or bloodshed; dry blows. Blount.

DUTIES. In its most enlarged sense, this word is nearly equivalent to taxes embracing all impositions or charges levied on persons or things; in its more restrained sense, it is often used as equivalent to *customs*, or *imposts*. Story, Const. § 949.

DUTY. A human action which is exactly conformable to the laws which require us to obey them.

That which is right or due from one to another. A moral obligation or responsibility.

It differs from a legal obligation, because a duty cannot always be enforced by the law: it is our duty, for example, to be temperate in eating, but we are under no legal obligation to be so; we ought to love our neighbors, but no law obliges us to love them.

DWELLING-HOUSE. A building inhabited by man. A house usually occupied by the person there residing, and his family. The apartment, building, or cluster of buildings in which a man with his family resides. 2 Bish. Cr. Law § 104.

The importance of an exact signification for this word is often felt in criminal cases; and yet it is very difficult to frame an exact definition which will apply to all cases. It is said to be equivalent to mansion-house; 3 S. & R. 199; 4 Strobh. 372; 7 Mann. & G. 122. See 14 M. & W. 181; 4 C. B. 105; 4 Call 109.

Judge Cooley, in 50 Mich. 219, says that in the law of burglary the dwelling-house is deemed to include whatever is within the curtilage, even though not inclosed with the dwelling, if used with it for domestic purposes; 2 Mich. 250; 16 *id.* 142.

It must be a permanent structure; 1 Hale, Pl. Cr. 557; 1 Russ. Cr. 798; must be inhabited at the time; 2 Leach 1018, n.; 33 Me. 30; 26 Ala. N. S. 145; 10 Cush. 479; 18 Johns. 115; 4 Call 109; 62 Miss. 782. It is sufficient if a part of the structure only be used for an abode; Russ. & R. 185; 11 Metc. 295; 9 Tex. 42; 2 B. & P. 508; 27 Ala. N. S. 31; 68 N. C. 207. How far a building may be separate is a difficult question. See Russ. & R. 495; 10 Pick. 293; 4 C. B. 105; 1 Dev. 253; 3 Humphr. 379; 1 N. & McC. 583; 5 Leigh 751; 6 Mich. 142; 24 N. J. L. 377; 33 How. Pr. 378; 98 Mich. 26; 45 N. H. 37; 20 N. Y. 52; 18 Q. B. 783; 22 Ir. L. T. Rep. 30; 89 Mo. 430; 38 Ohio St. 506; 68 N. C. 207.

A suite of rooms in a college of the University of Cambridge is a dwelling-house; L. R. 4 C. P. 539. In a rather curious case the question what is a dwelling-house divided the court. Six separate tenants occupied a house of ten rooms, each having exclusive possession of his part of the premises and the owner did not reside there. The outer and street door had no lock or bolt and was always kept open. The entry, stairway, and an ashpit and other conveniences were used in common. Two of the judges held that each of the six tenants occupied a "dwelling-house," and two held otherwise; L. R. 6 C. P. 327.

DWELLING-PLACE. See RESIDENCE; DOMICIL.

DYING DECLARATIONS. See DECLARATIONS.

DYING WITHOUT ISSUE. Not having issue living at the death of the decedent. 5 Paige, Ch. 514; 34 Me. 176; 13 N. J. Eq. 105. In England this is the signification, by statutes 7 Will. IV.; 1 Vict. c. 26, § 29. But the old English rule, that the words, when applied to real estate, import an indefinite failure of issue, has been generally adhered to in this country; 20 N. J. L. 6; 32 Barb. 328; 32 Md. 101. See 2 Washb. R. P. 362; 4 Kent 273.

DYNASTY. A succession of kings in the same line or family.

DYSNOMY. Bad legislation; the enactment of bad laws.

DYSPEPSIA. The group of symptoms resulting from alterations in the process of digestion due either to functional or organic diseases of the stomach.

Dyspepsia is not, in general, considered as a disease which tends to shorten life, so as to make a life uninsurable, unless the complaint has become organic dyspepsia, or was of such a degree at the time of the insurance as by its excess to tend to shorten life; 4 Taunt. 763.

DYVOUR. In Scotch Law. A bankrupt.

DYVOUR'S HABIT. In Scotch Law. A habit which debtors who are set free on a *cessio bonorum* are obliged to wear, unless in the summons and process of *cessio* it be libelled, sustained, and proved that the bankruptcy proceeded from misfortune. And bankrupts are condemned to submit to the habit, even where no suspicion of fraud lies against them, if they have been dealers in an illicit trade. Erskine, Pract. Scot. 4, 3, 13.

E.

E CONVERSO (Lat.). On the other hand; on the contrary. Equivalent to *e contra*.

EAGLE. A gold coin of the United States of the value of ten dollars.

It weighs two hundred and fifty-eight grains of standard fineness; that is to say, of one thousand parts by weight, nine hundred shall be of pure metal and one hundred of alloy, the alloy consisting of silver and copper. As the proportion of silver and copper in the gold coins of the United States is not fixed by law further than to prescribe that the silver therein shall not exceed fifty in every thousand parts, the proportion was made the subject of a special instruction by Mr. Snowden, former director of the mint, as follows:—

"As it is highly important to secure uniformity in our gold coinage, all deposits of native gold, or gold not previously refined, should be assayed for silver, without exception, and refined to from nine hundred and ninety to nine hundred and ninety-three, say averaging nine hundred and ninety-one as near as may be. When any of the deposits prove to be nine hundred and ninety, or finer, they should be reserved to be mixed with the refined gold. The gold coin of the mint and its branches will then be nearly thus: gold, nine hundred; silver, eight; copper, ninety-two; and thus a greater uniformity of color will be attained than was heretofore accomplished."

The instructions on this point were prescribed by the director in September, 1853. Mint Pamphlet, "Instructions relative to the Business of the Mint," 14.

The act of February 12, 1873, Rev. Stat. § 3514, fixes the proportion of silver at in no case more than one-tenth of the whole alloy.

For all sums whatever the eagle is a legal tender for ten dollars. U. S. Rev. Stat. § 3585.

EALDERMAN (Sax.). A Saxon title of honor. It was a mark of honor very widely applicable, the ealdermen being of various ranks. It is the same as alderman, which see.

EAR-MARK. A mark put upon a thing for the purpose of distinction. Money in a bag tied and labelled is said to have an ear-mark. 3 Maule & S. 575.

Also used in equity in respect of property or a fund in the hands of a third party, which is capable of identification as belonging to the claimant out of possession.

The doctrine that money has no ear-mark is no longer law. Property entrusted to a person in a fiduciary capacity may be followed as long as it may be traced, and where a person holding money as trustee or in a fiduciary character mixed it with his own and draws out of the mixed fund for his own purposes, the court presumes that his own drawings are to come out of his own money; 13 Ch. D. 696. And see note to this case citing leading English cases in Brett's Leading Cases in Modern Equity 179; TRUST.

EAR-WITNESS. One who attests to things he has heard himself.

EARL. In English Law. A title of nobility next below a marquis and above a viscount.

Earls were anciently called *comites*, because they were wont *comitari regem*, to wait upon the king for counsel and advice. They were also called *shiremen*, because each earl had the civil government of a shire. After the Norman conquest they were called *counts*, whence the shires obtained the names of counties. They have now nothing to do with the government of counties, their duties having devolved on the sheriff, the earl's deputy, or *vicecomes*. 1 Bla. Com. 398.

EARL MARSHAL. An officer who formerly was of great repute in England. He held the court of chivalry alone as a court of honor, and in connection with the lord high constable as a court having crim-

inal jurisdiction. 3 Bla. Com. 68; 4 *id.* 268. The duties of the office now are restricted to the settlement of matters of form merely. It would appear, from similarity of duties and from the derivation of the title, to be a relic of the ancient office of alderman of all England. See ALDERMAN.

EARL'S PENNY. A corruption for Arles penny. See ARLES; EARNEST.

EARLDOM. The dignity or jurisdiction of an earl. The dignity only remains now, as the jurisdiction has been given over to the sheriff; 1 Bla. Com. 339.

EARNEST. The payment of a sum of money or delivery of a thing or token, upon the making of a contract for the sale of goods, to bind the bargain, the delivery and acceptance of which marks the final and conclusive assent of both parties to the contract.

It has been defined to be the payment of a part of the price of goods sold, or the delivery of part of such goods, for the purpose of binding the contract. 108 Mass. 54.

It has been stated in a general way that the effect of earnest is to bind the goods sold; and, upon their being paid for without default, the buyer is entitled to them; but, notwithstanding the earnest, the money must be paid upon taking away the goods, because no other time for payment is appointed; earnest only binds the bargain, and gives the buyer a right to demand, but a demand without payment of the money is void; after earnest given, the vendor cannot sell the goods to another without a default in the vendee, and therefore if the latter does not come and pay, and take the goods, the vendor ought to go and request him, and then, if he does not come, pay for the goods, and take them away in convenient time, the agreement is dissolved, and the vendor is at liberty to sell them to any other person; 2 Bla. Com. 447; 2 Kent, Com. 495; 2 H. Bla. 316; Ayl. Pan. 450; 3 Campb. 426; 1 Bailey 537.

There is great difference of opinion as to the exact definition of this word. It had a signification at common law sufficiently well understood to warrant its use in the statute of frauds of 29 Car. II. § xvii. which makes parol sales of goods, etc., void unless there is a delivery, or the buyer "give something in earnest to bind the bargain, or in part payment."

The Roman law included two kinds of earnest, one being a contract prior to that of sale and independent of it, which was practically the payment of a sum of money for what we should now call an option to purchase, to be forfeited by the purchaser if he did not buy, while, if the other party was unwilling to sell, he must return the earnest and pay an equal amount as a forfeit. The other kind of earnest was that afterwards found in the common law and might be a *thing*, usually a ring, which either party, generally the buyer, gave to the other as a token. It is important in reading the civil law on this topic to bear in mind these two classes. Benj. Sales § 195. Justinian changed the law on this subject by providing that either party might rescind the sale by forfeiting the amount of the earnest money; Inst. l. 3. 23. 1. At least the text appears to be susceptible of no other meaning, but Pothier maintains that, after earnest, neither party could avoid the obligation; in this he is not followed by the later civilians. The same controversy has arisen upon a similar provision of the French code. The conclusion above stated is that of Benjamin, who cites the authorities; Sales § 198–200.

In Scotland the word arles is used for earnest, and is usually applied to a small sum given to a servant on hiring, as earnest that the wage will be paid.

The word earnest "has been supposed to flow from a Phœnician source, through the ἀρραβὼν of the Greeks, the *arra* or *arrha* of the Latin, and the *arrhes* of the French. . . . The general rule appears to have been that expressed in the Institutes III. 23: '*Is qui recusat adimplere contractum, sequidem est emptor, perdit quod dedit: si vero venditor, duplum restituere compellitur, licet super arris nihil expressum est.*' Furthermore, the *earnest* did not lose that character, because the same thing might also avail as part payment: '*Datur autem arrha vel simpliciter* (says Vinnius, on Inst. III. 24) *ut sit argumentum duntaxat et probatio emptionis contractæ: veluti si annulus detur; vel ut simul postea cedat in partum pretii, data certa pecunia.*' From the Roman law the principles relating to the *earnest* appear to have passed to the earlier jurisprudence of England: '*Item cum arrarum nomine* (says Bracton ii. 27) *aliquid datum fuerit ante traditionem, si emptorem emptionis pœnituerit, et a contractu resilire voluerit, perdat quod dedit: si autem venditorem, quod arrarum nomine receperit, emptori restituat duplicatum.*' Though the liability of the vendor to return to the purchaser twice the amount of the deposit has long since departed from our law, the passage in question seems an authority for the proposition that the *earnest* is lost by the party who fails to perform the contract. That earnest and part payment are two distinct things is apparent from the 17th section of the statute of frauds, where they are treated as separate acts, each of which is sufficient to give validity to a parol contract." Fry, L. J., in 53 L. J. Ch. 1055, 1061.

Kent says it is *only one mode* of binding the bargain, and giving the buyer a right to the goods on payment; 2 Com. 495; it is a token or pledge passing between the parties by way of evidence or ratification of the sale. . . . It is mentioned in the statute of frauds, and in the French code, as an efficient act; but it has fallen into very general disuse in modern times, and seems rather to be suited to the manners of simple and unlettered ages, before the introduction of writing, than to the more precise and accurate habits of dealing at the present day. It has been omitted in the New York Revised Statutes; *id.* (14th ed.) 495, n. (*b*). That it has fallen into disuse is true both as to the giving of earnest in its ancient, strict, and technical sense, and to its having fallen into disuse has been attributed the tendency to treat earnest and part payment as meaning the same thing, though the language of the statute of frauds implies that the former is something to

bind the bargain while no part payment can be made until the contract has been closed; Benj. Sales § 189.

One very recent definition is: "Specifically, in law, a part of the price of goods or service bargained for, which is paid at the time of the bargain to evidence the fact that the negotiation has ended in an actual contract. Hence it is said to bind the bargain." Cent Dict. And another is: "Something given by a buyer to a seller by way of token or pledge to bind the bargain; a part or portion of goods delivered into the possession of the buyer at the time of the sale as a pledge or security for the complete fulfilment of the contract; a handsel." Encyc. Dict. And the latter authority illustrates the function of earnest as *evidence* of the conclusion of the contract by the Scotch law which holds a party who resiles, to fulfil the contract as well as to forfeit the earnest paid.

It is sometimes said that the question whether the earnest shall count as part of the price or wage depends on the intention of the parties, which, in the absence of direct evidence, will be inferred from the proportion which it bears to the whole sum. Int. Cyc. "If a shilling be given in the purchase of a ship or of a box of diamonds, it is presumed to be given merely in evidence of the bargain, or, in the common way of speaking, is dead earnest; but if the sum be more considerable it is reckoned up in the price." Ersk. Inst. b. iii. tit. iii. § 5.

Another writer considers "that the original view of earnest in England was, that it was a payment of a small portion of the price or wage, in token of the conclusion of the contract; and as this view seems to have been adhered to, the sum, however small, would probably then be counted as a part payment." Sto. Sales 216.

It has been a mooted question whether at common law either earnest or delivery was necessary to perfect a sale of chattels; in a case where it was objected that because there was neither, there could not be a recovery for the breach of a parol contract of sale, it was said: Earnest paid is not necessary to complete a parol contract of sale; when made, it only prevents the vendor, under any circumstances, from rescinding the contract without the assent of the vendee; and this by common law, and not by any statute; 3 Ired. 236.

It has been much discussed whether the giving of earnest has any effect to pass the title to the property sold; and in earlier cases of the sale of specific chattels it was so held; Shep. Touchst. 224; Buller, J., in 5 Term 409; 7 East 558; Noy, Max. 87–9; 2 Bla. Com. 447–9; but see the analysis of these authorities; Benj. Sales §§ 355–6. It is said by this learned writer on the subject, that there is no case in which this has been held when a completed bargain, if in writing, would not have altered the property; *id.* § 357; and it is concluded that the true legal effect of earnest is simply to afford conclusive evidence of a bargain actually completed with the mutual intention that it should be binding on both; and whether the property has passed in such cases is to be tested, not by the fact that earnest was given, but by the true nature of the contract concluded by the giving of earnest; *id.* Hence with respect to the remedy of the seller, if the buyer refuse to take the property sold, the law of earnest, properly speaking, is not concerned; but it is to be treated as in the case of contracts otherwise legally evidenced. See 2 Kent, Com. Lacey's ed. 496, note 51; SALES.

To constitute earnest to bind the bargain something must be paid or given. An instance is reported where, the buyer having drawn a shilling across the palm of the seller and returned it to his own pocket, according to a custom alleged to exist in the north of England, it was held that the statute was not satisfied; 7 Taunt. 597. This has been said to be the only reported case; Benj. Sales § 191; but it has been held in the United States that money left in the hands of a third person as a forfeiture is not sufficient; 108 Mass. 54; much less a deposit of a check; 60 Mo. App. 635; 30 Ind. 103. The three cases last cited are usually referred to in connection with the subject of earnest. In the Massachusetts case, the question was as to the recovery of money deposited as a forfeiture, which it was argued was earnest to bind the bargain in case of a refusal to take the goods, and the court said that earnest, as used in the statute of frauds, was part payment. On the strength of this case a text-writer on the law of that state adopts the statement as a definition of earnest; Usher, Sales Per. Prop. § 113. So an authoritative writer on the statute of frauds uses the terms, earnest and part payment, as interchangeable, and discusses the question of when earnest must be paid mainly upon New York cases, although in that state the exception is confined to part payment, the "giving something in earnest" being omitted; Reed, Stat. Fr. § 226. While, therefore, the clear and philosophical definitions of the nature and effect of earnest cited from Benjamin on Sales unquestionably commend themselves as better satisfying the apparent purpose of the statute to designate two distinct acts, it must be admitted that they are constantly referred to by American courts and writers as alternative expressions of the same thing. Consequently the cases cited in text-books as laying down rules as to earnest are usually found, on examination, to be in fact cases of part payment, and they must be so read. This use of the words, interchangeably, makes unavoidable a reference to the cases just referred to, especially since the word earnest, in addition to what has been indicated as its real signification, has, in this country, certainly, an acquired meaning too general to be disregarded.

In part payment something having value must pass from the buyer to the seller; 16 M. & W. 302; 12 Barb. 570; 30 *id.* 265; 49 *id.* 348; an unaccepted tender to the vendor on a call for part payment by him will not

suffice to bind him, as when a remittance by mail of a check was returned to the sender; 41 Vt. 676; nor the promissory note of the buyer; 10 Barb. 573; 26 Wis. 511; 68 Ind. 278; even if there were an express agreement that the note should be received as part payment, which in this instance there was not; *id.*; in this case it was held that the note was not only ineffectual as part payment, but that it could not be regarded as earnest, sufficient to bind the bargain. After referring to the Massachusetts decision, *supra*, that, as used in the statute of frauds, earnest was regarded as part payment of the price, the court said: "But, conceding that it may be something distinct from payment, it is quite clear that it must have some value. The note has no value whatever, because it had no consideration to support it, and its payment could not, therefore, have been enforced. To say that such a note has value, is but grasping at a shadow, and losing sight of the substance. The contract for the sale of the hogs not being valid, the note given in consideration of the agreement therefor was based upon no valid consideration;" *id.*; 32 N. Y. 519; 12 Barb. 570. But see 13 M. & W. 58; Byles, Bills *386; Chitty, Cont. 11th. Am. ed. 865. But when the contract was partly performed by compliance with a condition, and a note was tendered for the price, it was considered that the statute was satisfied; 16 Barb. 277. A note of a third person accepted as payment is sufficient; 10 Barb. 573; or a check if paid is a payment relating back to the time when given; 17 Hun 135; a stipulation that borrowed money owing from the seller to the buyer shall be treated as part payment will avail; 33 Barb. 543; but not an agreement to credit an account due from the seller and send goods for the balance; 43 N. E. Rep. (Ind.) 575; or a promise to pay a part of the purchase money to a creditor of the vendor or credit it in the account against him; 5 Hill 204; but if such debt be actually paid it is good; 21 U. C. Q. B. 340; or if accepting the promise the creditor discharge the vendor; 10 Wis. 425; but the payment must be made at the time of the agreement; 34 *id.* 83; and if there was no entry in the account stating that the credit was given on account of the transactions in suit it was insufficient; 44 Barb. 96. A mere agreement that the price shall go in settlement of an existing account is not sufficient without more; 30 Barb. 265; 16 M. & W. 302; 36 Ala. 675; 16 L. J. Ex. 120; nor is an agreement to sell one article and take another in part payment; 1 Hilt. 366. Part payment may be by the actual delivery of anything of value, as a chattel; 37 Vt. 108; but a delivery of goods must be sufficient within the statute of frauds if they were in litigation; 64 Barb. 275.

With respect to the time at which part payment must be made, it is in some states required to be at the time of making the contract; 63 N. W. Rep. (Wis.) 1057. It was so held in New York; 20 Wend. 63; though in a later case the question was raised and not determined; 53 N. Y. 119; the same day is sufficient; 30 Barb. 265; and so was a payment asked and received on the following day, the contract being held to be then made for the first time; 39 N. Y. 281. See 57 *id.* 375. And when a check is given and paid upon presentation it is a payment at the time; 84 N. Y. 549; so also a check upon a deposit in bank; 70 Fed. Rep. 190. In some cases it has been held that payment is not so restricted; 7 U. C. C. P. 133; 12 Metc. 435; 13 Me. 424; 48 N. H. 189. It is to be observed that this question of time arises with more frequency under the New York statute which does not provide for earnest *eo nomine*, but only for part payment "*at the time*," as does also the Wisconsin statute.

See Benjamin; Blackburn; Story, Sales; Browne; Reed, Statute of Frauds; FRAUDS, STATUTE OF; PAYMENT; SALES.

EARNINGS. The word has been used to denote a larger class of credits than would be included in the term wages. 102 Mass. 235; 115 *id.* 165. See 131 *id.* 534. It also means the gains of the debtor derived from his services or labor without the aid of capital; 20 Wis. 330.

Surplus earnings, is an amount owned by a company, over and above the capital and actual liabilities. 76 N. Y. 74.

Net earnings, generally speaking, are the excess of the gross earnings over the expenditures defrayed in producing them, aside from, and exclusive of, the expenditure of capital laid out in constructing and equipping the works themselves. 99 U. S. 420. See DIVIDENDS.

EARTH. Clay, gravel, loam and the like, in distinction from the firm rock. The term also includes hard-pan, which is a hard stratum of earth. 75 N. Y. 76.

EASEMENT. A right in the owner of one parcel of land, by reason of such ownership, to use the land of another for a special purpose not inconsistent with a general property in the owner. 2 Washb. R. P. 25; 60 Vt. 702.

A privilege which the owner of one adjacent tenement hath of another, existing in respect of their several tenements, by which that owner against whose tenement the privilege exists is obliged to suffer or not to do something on or in regard to his own land for the advantage of him in whose land the privilege exists. *Termes de la Ley, Easements; Servitude;* 1 S. & R. 298; 3 B. & C. 339; 2 M'Cord 451; 3 Pick. 408; 74 Ill. 183; 47 Md. 301; 50 Vt. 361; 71 Tex. 690; 73 Wis. 178.

Although the terms are sometimes used as if convertible, properly speaking *easement* refers to the right enjoyed by one and *servitude* the burden imposed upon the other.

An interest in land created by grant or agreement, express or implied, which confers a right upon the owner thereof to some profit, benefit, dominion, or lawful use out of or over the estate of another. 113 N. Y. 81.

In the civil law, the land against which the privilege exists is called the servient tenement; its proprietor, the servient owner; he in whose favor it exists, the dominant owner; his land, the dominant tenement. And, as these rights are not personal and do not change with the persons who may own the respective estates, it is very common to personify the estates as themselves owning or enjoying the easements; 4 Sandf. Ch. 72; 3 Paige, Ch. 254; 16 Pick. 522.

Easements are of two kinds—appurtenant or appendant, and in gross. The former run with the land, and pass by a deed of conveyance; but the latter are personal, are not assignable, and will not pass by a deed of conveyance; Washb. Easem. 12; 61 Pa. 38; Ld. Raym. 407; 110 Ill. 268. See 14 L. R. A. 333, n., as to the right to assign or transmit easements in gross. A way is never presumed to be in gross when it can be construed to be appurtenant to the land; 82 Va. 462.

Easements are also classified as continuous and discontinuous, the precise distinction between them being thus stated: "Continuous are those of which the enjoyment is, or may be, continual, without the necessity of any actual interference by man. Discontinuous are those, the enjoyment of which can be had only by the interference of man, as rights of way, or a right to draw water." 21 N. Y. 505. Of the former the right to light and air would be an example, of the latter, the right to use a pump; Chase's Bla. Com. 232, note, which see as to Easements generally.

Easements have these essential qualities. There must be two tenements owned by distinct proprietors: the dominant, to which the privilege is attached; the servient, upon which it is imposed. Tudor, Lead. Cas. 108; 17 Mass. 443; 29 Ohio St. 642.

Easements, strictly considered, exist only in favor of, and are imposed only on, corporeal property; 2 Washb. R. P. 25. They confer no right to any profits arising from the servient tenement; 4 Pick. 145; 30 E. L. & Eq. 189; 70 N. Y. 419. They are incorporeal. Like other incorporeal hereditaments they have been held not to pass without a grant; 3 Kent, Com. 434; 2 Mart. 214. By the common law, they may be temporary; by the civil law, the cause must be perpetual. They impose no duty on the servient owner, except not to change his tenement to the prejudice or destruction of the privilege; Gale, Easem. 3d ed. 1; Washb. Easem. 5.

Easements are as various as the exigencies of domestic convenience or the purposes to which buildings and lands may be applied.

The following attach to land as incidents or appurtenances, viz.: the right—

Of pasture on other land; of fishing in other waters; of taking game on other land; of way over other land; of taking wood, minerals, or other produce of the soil from other land; of receiving air, light, or heat from or over other land; of receiving or discharging water over, or having support to buildings from, other land; 3 E. B. & E. 655; of a right to take ice on a pond; 93 Mich. 450; of going on other land to clear a mill-stream, or repair its banks, or draw water from a spring there, or to do some other act not involving ownership; of carrying on an offensive trade; 2 Bingh. N. C. 134; 5 Metc. 8; of burying in a church, or a particular vault; 8 Hou. L. Cas. 362; 11 Q. B. 666; 29 Gratt. 347; 123 Mass. 155, 562; 71 N. Y. 194; 134 *id.* 435. Projection of a cornice on a house over an adjoining lot, apparent and continuous for over 20 years, raises a conclusive presumption of right to maintain it; 153 Pa. 294.

The right to maintain a building or other permanent structure upon the land of another cannot be acquired by custom; 148 Mass. 309.

Where the owner of a tract of land fronting upon a public highway sells a portion thereof which is entirely surrounded by the land of the grantor and of strangers with no outlet, except over the lands of the grantor, the grantee is entitled to a right of way over the grantor's land, unless the situation of the land or the object for which it is used and conveyed shows that no grant of such right was intended; 40 Kan. 203. See 65 Vt. 333.

Some of these are affirmative or positive, —*i.e.*, authorizing the commission of acts on the lands of another actually injurious to it; as, a right of way,—or negative, being only consequentially injurious; as, forbidding the owner from building to the obstruction of light to the dominant tenement. Tudor, Lead. Cas. 107; 2 Washb. R. P. 26.

All easements must originate in a grant or agreement, express or implied, of the owner of the servient tenement; 113 N. Y. 81. The evidence of their existence, by the common law, may be by proof of the agreement itself, or by prescription, requiring an uninterrupted enjoyment immemorially, or for upwards of twenty years, to the extent of the easement claimed, from which a grant is implied. A negative easement does not admit of possession; and, by the civil law, it cannot be acquired by prescription, and can only be proved by grant. Use, therefore, is not essential to its existence; Gale, Easem. 23, 81, 128; 2 Bla. Com. 263; Bell, Law Dict. *Servitudes.* An easement can only be created by a conveyance under seal or by long user, from which such conveyance is presumed; 97 N. C. 271; see 100 N. C. 161; or by necessity; 46 N. Y. 379; 117 Ill. 643; and the burden is on one claiming that it was by virtue of a license, to prove that fact; 68 Hun 269. As to the creation of easements by deed, see 8 L. R. A. 617, n.; and by implication; 13 *id.* 126.

In case of a division of an estate consisting of two or more heritages, the question whether an easement or convenience, which may have been used in favor of one in or over the other by the common owner of both, shall become attached to the one or charged upon the other in the hands of separate owners, by a grant of one or both of those parts, or upon a partition thereof, must depend. where there are no words limiting or defining what is intended to be

embraced in the deed or partition, upon whether the easement is necessary for the reasonable enjoyment of the part of the heritage claimed as an appurtenance.

Where it is not necessary, it requires descriptive words of grant or reservation in the deed to create it; Washb. Easem. 95; 36 Am. Rep. 415. The common-law rule requiring the word "heirs" in the creation of an estate of inheritance by deed is inapplicable in creating a permanent easement; 62 Conn. 195; 93 Mich. 599. See 157 Mass. 489. The use of the word appurtenances is not sufficient to create an easement where none existed before; 66 Miss. 136.

An easement in land held in common cannot be acquired by one of the tenants in common in favor of land held by him in severalty, as a right of flowage over common property by a tenant owning a dam; 15 N. H. 412; or a right of way over the common land by the tenant to a lot in the rear owned by him; 65 Ga. 468.

Easements are extinguished: by release; by merger, when the two tenements in respect of which they exist are united under the same title and to the same person; 68 N. Y. 62; by necessity, or abandonment, as by a license to the servient owner to do some act inconsistent with its existence; 53 N. Y. 622; by cessation of enjoyment, when acquired by prescription,—the non-user being evidence of a release where the abandonment has continued at least as long as the user from which the right arose. In some cases a shorter time will suffice; 2 Washb. R. P. 56, 82, 453. See 3 Kent 550; Cruise, Dig. tit. 31. c. 1. 9. 17; Gale, Easem.; 68 Me. 334; 26 Pa. 438; 73 *id.* 179; 69 Tex. 449; 120 Ill. 200. An easement acquired by grant cannot be lost by mere non-user, though it may be by non-user coupled with an intention of abandonment; 110 N. Y. 595; 134 *id.* 450.

Prescription does not run against the exercise of a servitude in favor of one who resisted and prevented its exercise; 40 La. Ann. 425. Mere non-user must be accompanied by adverse use of the servient estate; 18 L. R. A. 535, with note on the effect of non-user generally. One cannot acquire a prescriptive right over his own lands or the lands of another which he occupies as tenant; 116 Mo. 379.

An easement in favor of land held in common will be extinguished by a partition, if nothing is said about it; 1 Barb. 593. As to the loss or extinguishment of easements, see 1 L. R. A. 214, n.

The remedy at common law for interference with a right of easement is an action of trespass, or where it is for consequential damages and for an act not done on plaintiff's own land, of case; 8 Blackf. 317; 14 Allen 40. Where the act complained of is done in one county, but the injurious consequences thereof are felt in another, the action may be brought in the latter; 9 Pick. 59; 5 Fost. 525. Redress may also, as a general proposition, be obtained through a court of equity, for the infringement of an easement and an injunction will be granted to prevent the same; Washb. Easem. 747.

See Washburn, Easements; BACKWATER; AIR; ANCIENT LIGHTS; COMMON; DAM; HIGHWAY; PARTY-WALL; PROFIT A PRENDRE; SERVITUDE; STREET; SUPPORT; WAY.

EASTERLY. When this word is used alone it will be construed to mean due east; but this is a rule of necessity, growing out of the indefiniteness of the term and has no application where other words are used for the purpose of qualifying its meaning. Where such is the case it means precisely what the qualifying word makes it mean; 32 Cal. 227.

EASTER TERM. **In English Law.** Formerly one of the four movable terms of the courts, but afterwards a fixed term, beginning on the 15th of April and ending on the 8th of May in every year, though sometimes prolonged so late as the 13th of May, under stat. 11 Geo. IV. and 1 Will. IV. c. 70. See TERM.

EAT INDE SINE DIE. Words used on an acquittal, or when a prisoner is to be discharged, *that he may go without day;* that is that he be dismissed. Dane, Abr. Index.

EAVES-DROPPERS. **In Criminal Law.** Such persons as wait under walls or windows or the eaves of a house, to listen to discourses and thereupon to frame mischievous tales.

The common-law punishment for this offence is fine and finding sureties for good behavior; 4 Bla. Com. 167; 1 Rus. Cr. 302; 2 Ov. Tenn. 108. See 4 Clark Pa. 5; 1 Bish. Cr. L. § 112; 3 Head 299; 8 Haz. Pa. Reg. 305.

EBB AND FLOW. An expression used formerly in this country to denote the limits of admiralty jurisdiction. This jurisdiction is discussed in 3 Mas. 127; 2 Story 176; 2 Gall. 398; 4 Wall. 562; 8 *id.* 15. In the last case, the jurisdiction was extended not merely to the high seas and the ebb and flow of the tide, but to all the navigable waters of the United States, including the great lakes and rivers. See Curt. Jurisd. of Courts of U. S.

EBEREMURDER. See ABEREMURDER.

ECCHYMOSIS. **In Medical Jurisprudence.** Blackness. An extravasation of blood by rupture of capillary vessels, and hence it follows contusion; but it may exist, as in cases of scurvy and other morbid conditions, without the latter. Ryan Med. Jur. 172. Ecchymoses produced by blows upon a body but a few hours dead cannot be distinguished from those produced during life. 1 Witth. & Beck. Med. Jur. 485; 2 Beck, Med. Jur. 22.

ECCLESIA (Lat.). An assembly. A Christian assembly; a church. A place of religious worship. Spelman, Gloss.

In the civil law this word retains its classical meaning of an assembly of whatever character. Du Cange; Calvinus, Lex.; Vicat. Voc. Jur.; Acts

xix. 39. Ordinarily in the New Testament the word denotes a Christian assembly, and is rendered into English by the word *church*. It occurs twice in the gospels, Matt. xvi. 18, xviii. 17, but frequently in the other parts of the New Testament, beginning with Acts ii. 47. *Ecclesia* there never denotes the building, however, as its English equivalent *church* does. In the law, generally, the word is used to denote a place of religious worship, and sometimes a parsonage. Spelman, Gloss. See CHURCH.

ECCLESIASTIC. A clergyman; one destined to the divine ministry: as, a bishop, a priest, a deacon.

ECCLESIASTICAL COMMISSIONERS. **In English Law.** A body appointed to consider the state of the revenues, and the more equal distribution of episcopal duties, in the several dioceses. They were first appointed as royal commissioners in 1835; were incorporated in 1836, and now comprise the bishops and chief justices, and other persons of distinction. 2 Steph. Com. 748.

ECCLESIASTICAL CORPORATIONS. Such corporations as are composed of persons who take a lively interest in the advancement of religion, and who are associated and incorporated for that purpose. Ang. & A. Corp. § 36.

Corporations whose members are spiritual persons are distinguished from *lay* corporations; 1 Bla. Com. 470.

They are generally called *religious corporations* in the United States. 2 Kent 274; Ang. & A. Corp. § 37.

ECCLESIASTICAL COURTS (called, also, *Courts Christian*). **In English Ecclesiastical Law.** The generic name for certain courts in England having cognizance mainly of spiritual matters.

The jurisdiction which they formerly exercised in testamentary and matrimonial causes has been taken away. Stat. 20 & 21 Vict. c. 77, § 3, c. 85, § 2; 21 & 22 Vict. c. 95. See 3 Bla. Com. 67.

They consist of the archdeacon's court, the consistory courts, the court of arches, the court of peculiars, the prerogative courts of the two archbishops, the faculty court, and, on appeal, the privy council.

ECCLESIASTICAL LAW. The law of the church.

The existence in England of a separate order of ecclesiastical courts, and a separate system of law by them administered, may be traced back to the time of William the Conqueror, who separated the civil and the ecclesiastical jurisdictions, and forbade tribunals of either class from assuming cognizance of cases pertaining to the other. The elements of the English ecclesiastical law are the canon law, the civil law, the common law of England, and the statutes of the realm. The jurisdiction of the ecclesiastical tribunals extended to matters concerning the order of clergy and their discipline, and also to such affairs of the laity as "concern the health of the soul;" and under this latter theory it grasped also cases of marriage and divorce, and testamentary causes. But in more recent times, 1830–1858, these latter subjects have been taken from these courts, and they are now substantially confined to administering the judicial authority and discipline incident to a national ecclesiastical establishment. See, also, CANON LAW.

ECHOUEMENT. **In French Marine Law.** Stranding. Black, L. Dict.

ECLAMPSIA PARTURIENTIUM. **In Medical Jurisprudence.** Puerperal convulsions. Convulsive movements, loss of consciousness, and coma occurring during pregnancy, parturition or the puerperium. The attack closely resembles the convulsions of epilepsy. The disease is often fatal, causing the death of the patient in about one-fourth of all the cases, and fœtal death in about one-half. Mental defects may result from eclampsia, and are occasionally permanent. American Text-book of Obstetrics.

The word eclampsia is of Greek origin *Significat splendorem, fulgorem, effulgentiam, et emicationem quales ex oculis aliquando prodeunt. Metaphorice sumitur de emicatione flammæ vitalis in pubertate et ætatis vigore.* Castelli, Lex. Medic.

An ordinary person, it is said, would scarcely observe it, and it requires the practised and skilled eye of a physician to discover that the patient is acting in total unconsciousness of the nature and effect of her acts. There can be but little doubt that many of the tragical cases of infanticide proceed from this cause. The criminal judge and lawyer cannot inquire with too much care into the symptoms of this disease, in order to discover the guilt of the mother, where it exists, and to ascertain her innocence, where it does not. See two well-reported cases of this kind in the Boston Medical Journal, vol. 27, no. 10, p. 161.

ECUADOR. A republic of South America, founded in 1830. It has a president elected for four years by the people. It has a congress consisting of a senate with two members elected by each province for four years and a chamber of deputies elected by the people for two years. It has one supreme court, six superior courts, alcaldes in each canton, who have jurisdiction of criminal cases, and two civil justices in each parish. It has also consular courts in Guayaquil and Quito.

EDICT (Lat. *edictum*). A law ordained by the sovereign, by which he forbids or commands something: it extends either to the whole country or only to some particular provinces.

Edicts are somewhat similar to public proclamations. Their difference consists in this,—that the former have authority and form of law in themselves, whereas the latter are, at most, declarations of a law before enacted.

Among the Romans this word sometimes signified a citation to appear before a judge. The edicts of the emperors, also called *constitutiones principium*, were new laws which they made of their own motion, either to decide cases which they had foreseen, or to abolish or change some ancient laws. They were different from rescripts or decrees, which were answers given in deciding questions brought before them. These edicts contributed to the formation of the Georgian, Hermogenian, Theodosian, and Justinian codes. See Dig. 1. 4. 1. 1; Inst. 1. 2. 7; Code 1. 1; Nov. 139.

EDICTAL CITATION. **In Scotch Law.** A citation against a "foreigner" who is not in Scotland, but who has a landed estate there, or against a native of Scotland who is not in Scotland.

EDICTS OF JUSTINIAN. Thirteen constitutions or laws of this prince, found in most editions of the *Corpus Juris Civilis* after the Novels. Being confined to matters of police in the provinces of the empire, they are of little use.

EDICTUM PERPETUUM (Lat.). The title of a compilation of all the edicts. The collection is in fifty books, and was made by Salvius Julianus, a jurist acting by command of the emperor Adrian. Parts of this collection are cited in the Digest.

EDITUS. In old English Law. Put forth or promulgated when speaking of the passage of a statute; and brought forth or born, when speaking of the birth of a child. Black, L. Dict.

EDUCATE. Includes proper moral, as well as intellectual and physical instruction. 6 Heisk. 395. See 39 Cal. 80; 10 Pick. 507; 105 Mass. 420; 29 N. J. Eq. 36.

EDUCATION. The result of educating in knowledge, skill, or discipline of character, acquired; also the act or process of training by a prescribed or customary course of study or discipline. Webster. See 7 H. L. Cas. 713. See SCHOOLS.

It may be directed particularly to either the mental, moral, or physical powers and faculties, but in its broadest and best sense it refers to them all; 145 Mass. 146.

Legal Education. This subject has been for several years receiving earnest and extended attention in England and the United States. It has been elaborately treated at various times by committees of the American Bar Association, in which a report was made in 1879 by Carleton Hunt, chairman, and subsequent reports in 1881, 1890, 1891, and 1892. See the annual reports of those years. In 1893 the association formed a section of legal education, which has held yearly conferences on the subject. The great value of its work is largely due to Hon. George M. Sharp, Hon. Simeon E. Baldwin and Professor Henry W. Rogers. Its work in 1894 was published by the United States in the reports of the Commissioner of Education.

The subject has also been much discussed by various State Bar Associations, as will appear by reference to their published reports. See Pennsylvania State Bar Association, 1895 and 1896; Georgia, 1894, 1895; Virginia, 1895.

An interesting address by Lord Russell of Killowen, Lord Chief Justice of England, was delivered before the Benchers of Lincoln's Inn, October, 1895. See also a paper by Austen G. Fox on the work of the New York State Board of Examiners; Am. Bar Assn. Report, 1896, and 10 Harv. L. Rev. 199. The following is a partial list of books and papers on the subject:

Legal Education, by Gerald B. Finch, London, 1885; 1 Jurid. Soc. Papers 385; Hoffman's Course of Legal Studies; Warren's Introd. to Law Studies; Jones, Legal Educ. in France; Parliamentary Reports on Inns of Court, 1855, and on Legal Educ., 1846; Sir R. Palmer's Address before the Legal Educ. Association, 1871; Reports of Incorporated Law Society, 1893, 1894, 1895, 1896; Bar Examinations in Canada, 18 Legal News (Can.) 275; 3 Amer. Lawy. 55, 283, 288; 33 Am. Law Reg. 689; N. Y. State Bar Association Report, 1894; 7 Harv. Law Rev. 203; Sir F. Pollock's Advice to Students, 95 Law Times 552; Existing Questions, by Austin Abbott, 26 Chi. Leg. News 72; Methods of Study, by J. N. Field, 48 Alb. L. J. 264; 34 *id.* 84; 24 Am. L. Rev. 211, 1027; Address by Lawrence Maxwell, Jr., 30 Weekly L. Bull. 41; 48 Alb. L. J. 81–88; 47 *id.* 496; 28 Can. L. J. 605; 9 Scot. L. Rev. 122; 9 Harv. L. Rev. 169; Case System, 27 Am. L. Reg. 416; 23 Am. L. Rev. 1; 25 *id.* 234; 22 *id.* 756; In Germany, 8 Am. L. Rec. 200; In Japan, 5 G. B. 17, 18; Inns of Court, 1 *id.* 68. See numerous other references in Jones's Index of Legal Periodicals.

EFFECT. The operation of a law, of an agreement, or an act, is called its effect. 4 Ind. 342.

By the laws of the United States, a patent cannot be granted for an effect only, but it may be for a new mode or application of machinery to produce effects; 1 Gall. 478. See 4 Mas. 1; 1 Pet. C. C. 394; 1 Robinson, Pat. §§ 147, 148.

EFFECTS. Property, or worldly substance. As thus used, it denotes property in a more extensive sense than goods. 2 Bla. Com. 284. See 7 Fed. Rep. 361. Indeed the word may be used to embrace every kind of property, real and personal, including things in action; as, a ship at sea; 1 Hill, S. C. 155; a bond; 3 Minn. 389; 16 East 222.

In a will, "effects" may carry the whole personal estate; 5 Madd. 72; 15 Ves. 507; but not real estate; unless the word "real" be added; 2 Pow. Dev. 167; 15 M. & W. 450; 3 Cranch 206; Schouler, Wills § 509. When preceded or followed in a will by words of narrower import, if the bequest is not residuary, it will be confined to species of property of the same kind (*ejusdem generis*) with those previously described; 13 Ves. 39; Rop. Leg. 210. See 2 Sharsw. Bla. Com. 384, n. Generally speaking the word "effects" in a will, is equivalent to "property" or "worldly substance"; but the interpretation may be restricted to articles *ejusdem generis* with those previously enumerated or specified; 1 Ves. Jr. 143; 15 Ves. 500.

When "the effects" passes realty, and when personalty, in a will, see 1 Jarm. Wills 585, 590; Beach, Wills 457, 470; 14 How. 400, 420; 1 Cowp. 307; L. R. 8 Ch. Div. 561; WILL.

EFFIGY. The figure or representation of a person.

To make the effigy of a person with an intent to make him the object of ridicule, is libel (*q. v.*). Hawk. Pl. Cr. b. 1, c. 73, s. 2; 14 East 227; 2 Chitty, Cr. Law 866.

In France an execution by effigy or in effigy is adopted in the case of a criminal who has fled from justice. By the public exposure or exhibition of a picture or representation of him on a scaffold, on which his name and the decree condemning him are written, he is deemed to undergo the punishment to which he has been sentenced. Since the adoption of the Code Civil, the practice has been to affix the names, qualities, or addition, and the residence, of the condemned person, together with an extract

from the sentence of condemnation, to a post set upright in the ground, instead of exhibiting a portrait of him on the scaffold. Répert. *de Villargues*; Biret, Vocab.

EFFRACTION. A breach made by the use of force.

EFFRACTOR. One who breaks through; one who commits a burglary.

EGO. I, myself. This term is used in forming genealogical tables, to represent the person who is the object of inquiry.

EGYPT. This is nominally a province of the Ottoman Empire in the northern part of Africa, whose affairs are administered by the khedive under the supervision of England, which intervened in 1882. It has a legislative council composed of thirty members. Since the British intervention new native tribunals have been established. Litigation between foreigners and natives is carried on by mixed tribunals. Eight of the judges in the Native Court of Appeals are Europeans. The country is divided into districts to which judges from the tribunals are delegated, and from which there is no appeal. See MIXED TRIBUNALS.

EIGHT HOUR LAWS. Statutes making eight hours a day's labor for workmen, laborers, and mechanics.

Eight hours shall constitute a day's work for all laborers, workmen, and mechanics who may be employed by or on behalf of the United States. R. S. § 3738. This act is not a contract between the government and its laborers that eight hours shall constitute a day's work. It neither prevents the government from making agreements with them, by which their labor may be more or less than eight hours a day, nor does it prescribe the amount of compensation for that or any other number of hours' labor; 94 U. S. 400.

On May 24, 1888, a law was passed directing that eight hours should constitute a day's work for letter-carriers in the United States, and for time worked in excess of that number of hours they should be paid extra (25 Stat. L. 157). Under this statute the supreme court held that a letter-carrier was entitled to eight hours' work each day, and that over time on one day could not be set off against a deficiency on another; 148 U. S. 134. See FACTORY ACT.

EIGNE. A corruption of the French word *ainé*. Eldest or first-born.

It is frequently used in our old law-books; *bastard eigne* signifies an elder bastard when spoken of two children, one of whom was born before the marriage of his parents and the other after: the latter is called *mulier puisne*. Littleton, sect. 399.

EIK. In Scotch Law. An addition; as *eik* to a reversion, *eik* to a confirmation. Bell, Dict.

EINETIUS. In English Law. The oldest; the first-born. Spelman, Gloss.

EIRE, or EYRE. In English Law. A journey. See EYRE.

EISNE. The senior; the oldest son. Spelled, also, *eigne*, *einsne*, *aisne*, *eign*. *Termes de la Ley*; 1 Kelham.

EISNETIA, EINETIA (Lat.). The share of the oldest son. The portion acquired by primogeniture. *Termes de la Ley*; Co. Litt. 166 *b*; Cowel.

EITHER. May be used in the sense of each. 59 Ill. 87.

EJECTION. Turning out of possession. 3 Bla. Com. 199.

The term is in general use with reference to the removal of an obnoxious person from the conveyance of a common carrier.

It must be conceded that the carrier, as an incident to its public employment, not only has the power, but is bound to take all reasonable and proper means to insure the safety and provide for the comfort and convenience of its passengers, and it follows that it has the right, in the exercise of this authority and duty, to repress and prohibit all disorderly conduct in its vehicles, and to expel or exclude therefrom any person whose conduct or condition is such as to render acts of impropriety, rudeness, indecency, or disturbance either inevitable or reasonably probable; Ray, Pas. Carriers 165.

A person who steps upon a car after he has once been put off is a trespasser, regardless of his right to be on the car in the first instance; 40 Ill. App. 421. In ejecting a passenger from a car no more force than is necessary should be used; 35 Neb. 74.

An action on the case in tort is proper against a carrier for wrongfully ejecting from its train a passenger who has paid his fare, though no force is used; 36 W. Va. 318.

As to ejection of passengers for refusal to pay fare, see 12 Lawy. Rep. Ann. 823; PASSENGERS; COMMON CARRIERS OF PASSENGERS; TICKET.

EJECTIONE CUSTODIÆ (Lat.). A writ of which lay for a guardian to recover the land or person of his ward, or both, where he had been deprived of the possession of them. Fitzh. N. B. 139, L.; Co. Litt. 199.

EJECTIONE FIRMÆ (Lat. ejectment from a farm). This writ lay where lands or tenements were let for a term of years, and afterwards the lessor, reversioner, remainderman, or a stranger ejected or ousted the lessee of his term. The plaintiff, if he prevailed, recovered the term with damages. Hence Blackstone calls this *a mixed* action, somewhat between real and personal; for therein are two things recovered, as well restitution of the "term of years," as damages for the ouster or wrong. This writ is the original foundation of the action of ejectment. 3 Sharsw. Bla. Com. 199; Fitzh. N. B. 220, F, G; Gibson, Eject. 3; Stearn, Real Act. 53, 400.

EJECTMENT (Lat. *e*, out of, *jacere*, to throw, cast; *ejicere*, to cast out, to eject).

In Practice. A form of action by which possessory titles to corporeal hereditaments may be tried and possession obtained.

A form of action which lies to regain the possession of real property, with damages for the unlawful detention.

In its origin, during the reign of Edw. III., this action was an action of trespass which lay for a tenant for years, to recover damages against a person who had ousted him of his possession without right. To the judgment for damages the courts soon added a judgment for possession, upon which the plaintiff became entitled to a writ of possession. The action of *de ejectione firmæ* (*q. v.*), was framed to meet the case of the termor, and just at the close of the middle ages it was held that under it he could recover his term. As to its history see 2 Poll. & Maitl. 105. As the disadvantages of real actions as a means of recovering land for the benefit of the real owner from the possession of one who held them without title became a serious obstacle to their use, this form of action was taken advantage of by Ch. J. Rolle to accomplish the same result.

In the original action, the plaintiff had been obliged to prove a *lease* from the person shown to have *title*, an *entry* under the *lease*, and an *ouster* by some third person. The modified action as sanctioned by Rolle was brought by a fictitious person as lessee against another fictitious person (the casual ejector) alleged to have committed the ouster. Service was made upon the tenant in possession, with a notice annexed from the casual ejector to appear and defend. If the tenant failed to do this, judgment was given by default and the claimant put in possession. If he did appear, he was allowed to defend only by entering into the *consent rule*, by which he confessed the fictitious *lease*, *entry*, and *ouster* to have been made, leaving only the *title* in question. The tenant by a subsequent statute was obliged, under heavy penalties, to give notice to his lessor of the pendency of the action.

The action has been superseded in England under the Common Law Procedure Act (1852, §§ 170–220) by a writ, in a prescribed form, addressed, on the claimant's part, to the person or persons in possession, by name, and generally "to all persons entitled to defend the possession" of the premises therein described; commanding such of them as deny the claimant's title to appear in court and defend the possession of the property. Not only the person to whom the writ is directed, but any other person (on filing an affidavit that he or his tenant is in possession, and obtaining the leave of the court or a judge), is allowed to appear and defend.

Ejectment has been materially modified in many of the states of the United States, though still retaining the name; but is retained in its original form in others, and in the United States courts for those states in which it existed when the circuit courts were organized. In some of the United States it has never been in use. See 3 Bla. Com. 198.

The action lies for the recovery of corporeal hereditaments only; 7 Watts 318; 5 Denio 389; including a room in a house; 1 Harris. N. J. 202; upon which there may have been an entry and of which the sheriff can deliver possession to the plaintiff; 9 Johns. 298; 15 Conn. 137; and not for incorporeal hereditaments; 2 Yeates 331; 3 Green, N. J. 191; 17 Or. 510; or, rights of dower; 17 Johns. 167; 10 S. & R. 326; or a right of way; 1 N. Chipm. 204; 40 Mich. 232; or a rent reserved; 5 Denio 477. See 20 Miss. 373. One is liable in ejectment for the projection of his roof over another's land; 60 Vt. 723.

The recording of a tax-deed of wild and unoccupied lands is such an assertion of title by the grantee as to authorize ejectment by the original owner; 80 Wis. 337.

It may be brought upon a right to an estate in fee-simple, fee-tail, for life, or for years, if only there be a right of entry and possession in the plaintiff; 5 Ohio 28; 10 Mo. 229; 10 Gill & J. 443; 1 Wash. C. C. 207; 1 Blackf. 133; 1 D. & B. 586; 3 Dana 289; 3 Ga. 105; 4 Gratt. 129; 15 Ala. 412; 17 Ill. 288; 2 Dutch. 376; 4 Cal. 278; 32 Pa. 376; 4 Col. 38; 112 N. Y. 364; but the title must be a legal one; 2 Wash. C. C. 33; 3 Barb. 554; 3 H. & J. 155; 4 Vt. 105; 4 Conn. 95; 3 Litt. 32; 13 Miss. 499; 4 Gratt. 129; 98 U. S. 425; 56 Ala. 414; 98 *id.* 543; 72 Tex. 330; 73 Cal. 415; 101 N. C. 550; 128 U. S. 374 (but in Pennsylvania a valid equitable title will sustain ejectment, on the ground, as has been said, that there is no court of chancery in that state; 8 S. & R. 484; 87 Pa. 286); which existed at the commencement of the suit; 5 H. & J. 155; 4 Vt. 105; 5 W. & S. 427; 23 Miss. 100; 13 Ill. 251; 25 Miss. 177; 20 Barb. 559; 72 Tex. 330; 83 Ala. 220; 11 Mo. 481; (but he cannot recover if the title is terminated pending the action; 86 Ala. 318); at the date of the demise; 3 A. K. Marsh. 131; 2 D. & B. 97; 3 McLean 302; 11 Ill. 547; 12 Ga. 166; 21 How. 481; and at the time of trial; 12 B. Monr. 32; 20 Vt. 83; 9 Gill 269; 24 Fla. 378; and it must be against the person having actual possession; 1 D. & B. 5; 3 Hawks 479; 4 Dana 67; 17 Vt. 674; 9 Humphr. 137; 4 McLean 255; 8 Barb. 244; 86 Pa. 33. A railroad company which has condemned lands for railroad purposes has a sufficient title to sustain an action; 152 Pa. 488.

Plaintiff in ejectment may recover as against a mere trespasser, on proof of his former possession only, without regard to his title; 83 Ala. 220; 38 Fed. Rep. 789; 77 Ga. 262; 87 Ky. 559; 71 Tex. 132.

The real plaintiff must recover on the strength of his own title, and cannot rely on the weakness of the defendant's; 1 East 246; 2 S. & R. 65; 6 Vt. 631; 4 Halst. 149; 2 Ov. 185; 3 Humphr. 614; 2 H. & J. 112; 1 Blackf. 341; 19 Miss. 249; 6 Ired. 159; 1 Cal. 295; 27 Ala. N. S. 586; 16 Fla. 189; 36 W. Va. 489; 110 N. Y. 380; 24 Neb. 559; 115 Mo. 653; and must show an injury which amounts in law to an ouster or dispossession; 1 Vt. 244; 5 Munf. 346; 4 N. Y. 61; 15 Pa. 483; an entry under a contract which the defendant has not fulfilled being equivalent; 5 Wend. 24; 7 S. & R. 297; 7 J. J. Marsh. 318; 3 B. Monr. 173; 3 Green, N. J. 371; 16 Ohio 485; 14 Ill. 91; 79 Cal. 55.

It may be maintained by one joint tenant or tenants in common against another who has dispossessed him; 2 Ohio 110; 7 Cra. 456; 3 Conn. 191; 17 Miss. 111; Spenc. 394; 4 N. Y. 61; 24 Mo. 541; 50 Vt. 11; 70 Tex. 139; 122 Pa. 613. Co-tenants need not join as against a mere disseisor; 5 Day 207; 3 Blackf. 82; 6 B. Monr. 457; 10 Ired. 146; but mere tenants in common may; 4 Cra. 165; 4 Bibb 241; 11 Ired. 211; not in Missouri. In Indiana it may be maintained by the wife against the husband to recover her separate real estate; 118 Ind. 521.

A court of law will not uphold or enforce an equitable title to land as a defence to an action of ejectment; 128 U. S. 374; 97 Mo. 263; 31 Fed. Rep. 393; *contra*, 61 Pa. 186; but see 111 N. C. 542; 90 Ga. 210; 74 Cal. 154. Where a defendant has entered a disclaimer of title and possession, he cannot defend his possession as agent of his wife without first showing a title in her; 121 Pa. 520.

Where a defendant in ejectment repudiates a tenancy and claims a title in fee, he dispenses with the necessity of notice to quit; 126 Ill. 228; 75 Cal. 342.

Plaintiff in ejectment in proving title need not go further back than the common source of title, where the defendant claims under the same person; 29 S. C. 372; 85 Ky. 503; 30 W. Va. 505; 37 *id.* 130; 78 Ga. 245; 17 Wash. L. Rep. 373; 92 Mich. 580.

The plea of not guilty raises the general issue; 3 Pa. 365; 29 Ala. N. S. 542.

The judgment is that the plaintiff recover his term and damages; Pet. C. C. 452; 18 Vt. 600; 12 Barb. 481; 16 How. 275; or damages merely where the term expires during suit; 18 Johns. 295.

Where the fictitious form is abolished, however, the possession of the land generally is recovered, and the recovery may be of part of what the demandant claims; 1 N. Chipm. 41; 6 Ohio 391; 1 H. & M'H. 158; 2 Barb. 330; 1 Ind. 242; 10 Ired. 237; 9 B. Monr. 240; 26 Mo. 591; 4 Sneed 566; 84 Va. 891.

The damages are, regularly, nominal merely; and in such case an action of trespass for mesne profits lies to recover the actual damages; 3 Johns. 481; 3 H. & J. 84; 13 Ired. 439; 25 Miss. 445; 101 N. C. 3; 110 Mo. 419; 65 Vt. 485. See TRESPASS FOR MESNE PROFITS.

In some states, however, full damages may be assessed by the jury in the original action; 18 Vt. 600; 12 Barb. 481; 59 Ga. 55; 55 Miss. 390; 78 N. C. 361; and the verdict is conclusive as to the damages; 100 Cal. 142,

Consult Adams; Archbold; Cole; Gilbert; Remington; Newell; Tyler, Ejectment; LIMITATIONS.

EJECTUM. That which is thrown up by the sea. 1 Pet. Adm. App. 43. See JETSAM.

EJERCITORIA. In Spanish Law. The action which lies against the owner of a vessel for debts contracted by the master, or contracts entered into by him, for the purpose of repairing, rigging, and victualling the same.

EJIDOS. In Spanish Law. Lands used in common by the inhabitants of the place for a pasture, wood, threshing-ground, etc. 15 Cal. 554.

EJUSDEM GENERIS (Lat.). Of the same kind.

In the construction of laws, wills, and other instruments, when certain things are enumerated, and then a phrase is used which might be construed to include other things, it is generally confined to things *ejusdem generis:* as, where an act (9 Anne, c. 20) provided that a writ of *quo warranto* might issue against persons who should usurp "the offices of mayors, bailiffs, port-reeves, and *other offices*, within the cities, towns, corporate boroughs, and *places*, within Great Britain," etc., it was held that "other offices" meant offices *ejusdem generis*, and that the word "places" signified places of the same kind; that is, that the offices must be *corporate offices*, and the places must be *corporate places*. 5 Term 375; Bac. Abr. *Information* (D); 8 Dowl. & R. 393.

So, in the construction of wills, when certain articles are enumerated, the term *goods* is to be restricted to those *ejusdem generis*. Bacon, Abr. *Legacies*, B; 3 Rand. 191; 2 Atk. 113; 3 *id.* 61.

ELDER BRETHREN. A distinguished body of men, elected as masters of Trinity House, an institution incorporated in the reign of Henry VIII., charged with numerous important duties relating to the marine, such as the superintendence of lighthouses. Mozl. & W. Dict.; 2 Steph. Com. 502. The full title of the corporation is Elder Brethren of the Holy and Undivided Trinity. It consists of a master, deputy master, a certain number of acting elder brethren, and of honorary elder brethren, with an unlimited number of younger brethren, the master and honorary elder brethren being chosen on account of eminent social position, and are elected by the court of elder brethren. The deputy master and elder brethren are chosen from such of the younger brethren as have been commanders in the navy four years previously, or have served as master in the merchant service on foreign voyages for at least four years. The younger brethren are chosen from officers of the navy or the merchant shipping service who possess certain qualifications. Their action is subject to an appeal to the Board of Trade. Two of the elder brethren assist the court of admiralty at the hearing of every suit for collision, and occasionally in suits for salvage. Their duty is to guide the court by advice only; though influential, their opinion is not legally binding on the judges.

ELDEST. He or she who has the greatest age.

The eldest son of a man is his first-born, the *primo-genitus;* L. R. 2 App. Cas. 698; L. R. 12 Ch. Div. 171.

The laws of primogeniture are not in force in the United States; the eldest child of a family cannot, therefore, claim any right in consequence of being the eldest.

ELECTED. In its ordinary signification this word carries with it the idea of a vote, generally popular, sometimes more restricted, and cannot be held the synonym of any other mode of filling a position. 5 Nev. 121; 25 Md. 214.

ELECTION. Choice; selection. The selection of one person from a specified class to discharge certain duties in a state, corporation, or society.

The word, in its ordinary signification, carries the idea of a vote, and cannot be held the synonym of any other mode of filling a position; 5 Nev. 111. See 23 Mich. 341; APPOINTMENT. Election has often been construed to mean the act of casting and receiving the ballots,—the actual time of voting, not the date of the certificate of election; 54 Ala. 205.

Both houses of congress, and parliamentary bodies in general, claim to be the sole judges of the election of their own members. This right seems to be derived from the declaration of rights, delivered by the commons to the king in 1604. Brown, Law Dict.

In the United States this power is vested in congress and the state legislatures by the federal and state constitutions, and chancellor Kent considers that "there is no other body known to the constitution to which such power might safely be trusted. It is requisite to preserve a pure and genuine representation, and to control the evils of irregular, corrupt, and tumultuous elections; and as each house acts in these cases in a judicial character, its decisions, like the decisions of any other court of justice, ought to be regulated by known principles of law,

and strictly adhered to for the sake of uniformity and certainty;" 1 Com. 235. On the other hand, experience of the temptation to defeated members, which makes contests, in reliance (unfortunately too often well-founded) upon the irresponsibility of party majorities, leads Mr. Justice Miller to remark that: "This provision . . . seems, from the experience of the past, to have been one of those principles adopted from the English house of commons which has not worked well with our institutions, and which the house of commons itself has been obliged to abandon. Contested elections are now, by the law of England, tried before the judiciary, and the judgment of the court is conclusive upon the subject. It is conceded on all hands that justice is in this way more nearly administered with accuracy than it was under the former system. Both in that country and in this, under the former method, the result of a contested election has been very generally forecast by a knowledge of the relations of the parties contesting to the political majority or minority of the house in which the contest is carried on. As this is a constitutional provision, however, there exists no power in the legislature, without an amendment of that instrument, to refer these contested cases to the judiciary. The increasing number of contested election cases arising out of frauds supposed to be perpetrated at the elections themselves, the investigation of which is always difficult, and the uncertainty of a fair and impartial decision . . . render it doubtful whether the entire provision on this subject is of any value." Miller, Const. 193.

Much may be said in support of the views of each of these learned commentators, and there is a possible middle ground practicable under existing constitutional conditions, which might be suggested. That would be to provide for a judicial determination of the contest in the first instance, reserving to the legislative body the final decision only on exception or appeal under such limitations as would preserve and emphasize the judicial character of the proceeding. This would, on the one hand, preserve the absolute independence of the legislature as one of three co-ordinate branches of the government,—a basic principle, it may be remarked, of American and not of English governmental policy,—and at the same time add to the difficulty and probably lessen the frequency of partisan decisions, contrived in the comparative secrecy of committee rooms and consummated by the mere brute force of a majority.

Election of Public Officers. The right to vote is not a natural one but is derived from constitutions and statutes. Each state determines for itself the qualifications of its voters, and the United States adopts the state law upon the subject as the rule in federal elections in accordance with Section 2, Article 1 of the Constitution of the United States, which provides that "the house of representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications required for electors of the most numerous branch of the state legislature."

The power of the state governments, however, to prescribe the qualifications of electors is limited by the Fifteenth Amendment of the Constitution which provides "that the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state, on account of race, color, or previous condition of servitude." This provision renders void all provisions of a state constitution or a state law which come in conflict with it or with any act of congress passed to enforce it; McCrary, Elections 2; 110 U. S. 663. In the territories the right to vote is regulated by congress.

The right to vote, if once given by a state constitution, cannot be impaired or taken away by legislation. But the legislature can regulate the right to vote in a reasonable way by prescribing questions to be propounded to voters to test their qualifications; 9 Wis. 279; or by requiring them to swear to support the Constitution of the United States, or by requiring registration. But regulations must not in any way impair the right to vote, and hence it has been held that an act prohibiting from voting those who, having been drafted into the military service and duly notified, had failed to report for duty, was void; 59 Pa. 109. An act requiring the voter to declare under oath that he is not guilty of any crime and has not voluntarily borne arms against the United States has also been held void; 24 Ark. 161. But see 3 W. Va. 551. The right to vote can, however, be limited to male citizens or extended to females, but only upon the same terms and conditions as are applied to males; 11 Blatch. 200; 53 Mo. 58; 15 Kan. 26; 2 Utah 136.

The qualifications of voters in the different states are usually citizenship, residence for a given period, age (21 years), sometimes payment of taxes, ownership of land, and education, and mental capacity. See CITIZEN; RESIDENCE; NATURALIZATION; DOMICIL.

The disqualification of voters is imposed as a punishment for crime, usually an infamous one.

Elections must be held at the time and place required by law. Legislative or constitutional provisions on this question are mandatory; 41 Pa. 403; 30 Conn. 591; 44 N. H. 643; see 110 N. C. 232; and votes cast by soldiers in the field, outside of the state, under a statute permitting it, are not valid, when the constitution requires a citizen to vote at his place of residence. In the absence of any constitutional provision a statute providing that soldiers in service may vote is valid; 15 Iowa 304.

If polls are moved to a place not authorized, the election becomes void; 68 Pa. 333; if the polls are not kept open as required by law, the election will be set aside, if enough votes were thereby excluded to change or render doubtful the result; 31 Cal. 82; 68 Pa. 333; but see 4 Wash. St. 661; but it is doubtful whether a few minutes' delay in opening the polls will avoid an election; McCrary, Elect. 85; 5 Eng. El. Cas. 387; 4 *id.* 378. Closing polls too soon; 74 Ill. 76; or during the dinner hour will not vitiate the election; 19 Ohio St. 25. But the casting of enough votes after the proper hour for closing to change the result will; 4 Pa. L. J. 341. See 3 Cong. El. Cas. 564.

Generally speaking, notice is essential to the validity of an election; McCrary, Elect. 87; and all qualified voters who absent themselves from an election duly called are presumed to assent to the expressed will of the majority of those voting, even though only a minority of those entitled to vote really do vote: 68 Md. 146; but formalities or even the absence of notice may be dispensed with, where there has been an

actual election by the people; 10 Ia. 212. See 6 Wash. 427; 99 Cal. 554; but it would seem that, if by a default of notice, enough voters were deprived of a chance to vote, to change the result, the election would be void; McCrary, Elect. 88. The fact that an order providing for an election of the board of education was passed by less than a quorum of the board, does not affect the validity of the election, where it is held at the time provided by statute and there is no statute provision requiring the order to be made; 147 Ill. 514. In California, in a much considered case, it was held that voters must take notice of general elections prescribed by law, and in such cases provisions of the laws as to notice are merely directory; but that in elections to fill vacancies, the requirements as to notice must be fully complied with; 11 Cal. 49. In this case it was further held that, without statutory regulations, no election can be held. See also 12 Cal. 409; 132 Mass. 289; 69 Ind. 218; 20 Kan. 584; 41 N. J. L. 296; 91 N. Y. 616. An election to fill a vacancy cannot be held where such vacancy did not occur long enough before the election to enable due notice to be given; 17 Ind. 554; 12 Cal. 409. A failure to give more than three days' notice may not be fatal to the election, if there was full knowledge thereof and a full vote; 17 R. I. 591.

Slight irregularities in the manner of conducting elections, if not fraudulent, will not avoid an election; Paine, Elect. 502. For instance, the presence of one of the candidates in the room where the election was held, and the fact that he intermeddled with the ballots, was held not to vitiate the poll, there not appearing to have been any actual fraud; Bright. Elect. Cas. 268. Irregularities which do not tend to affect results, will not defeat the will of the majority; 20 Pa. 493. Where a special election was not called by legal authority, the fact that the people voted for the several candidates, will not render the election valid; 91 Mich. 283.

A majority of voters is necessary to pass a constitutional amendment, by a popular vote, but it will be presumed that the number of those who voted is the number of the qualified voters; 22 Alb. L. J. 147; see as to the latter point, 48 Ill. 263; 16 Wall. 644; 68 Md. 146. But there may be a constitutional or statutory method prescribed for ascertaining a majority, in which case the presumption stated does not apply. Thus, in Delaware, a majority to determine whether a constitutional convention shall be called is to be ascertained by the highest vote cast at any one of the last three preceding elections; Const. 1831.

As to whether, when the person receiving the highest number of votes is ineligible, the person receiving the next highest number of votes is thereby elected: In England it is held that the second highest is elected only when it is affirmatively shown that the voters for the candidate highest in votes had such actual knowledge of his ineligibility that they must be taken to have thrown away their votes wilfully; L. R. 3 Q. B. 629; so in 50 N. Y. 451. But in other cases this distinction has not been regarded, and it has been held that the election is void; 13 Cal. 145; 56 Pa. 270; 47 Miss. 266; 38 Me. 597; 53 Mo. 97; 23 Mich. 341. The better opinion is stated by Cooley (Const. Lim.) and Dillon (Mun. Corp.) to be in accordance with this view. This rule was followed in Rhode Island in the presidential election of 1876; 16 Am. L. Reg. 15, with a note by Judge Mitchell. It was therein also held that the ineligibility at the time of election cannot be removed by a subsequent resignation of the office which constituted the ineligibility.

The legislative precedents as to the effect of ineligibility are not uniform. See 56 Pa. 270; 47 Miss. 266; 50 N. Y. 451.

An act providing for the registration of voters, either local or general in its operation, is within the legislative power and constitutional; 93 Ky. 156.

The election laws of the United States of 1870 and 1871, for supervising the election of representatives, now repealed, were constitutional; 100 U. S. 371.

A wager upon the result of an election, being contrary to public policy, is void; 4 Johns. 426; 37 Cal. 670; 4 Kan. 94. All contracts tending to corrupt elections are also void; 13 Am. L. Reg. N. S. 607; 22 Vt. 546. In Pennsylvania and other states one betting on the result of an election is disfranchised as a voter thereat.

Election Officers. Canvassing officers and return judges are ministerial officers only; they exercise no judicial or discretionary function; Cooley, Const. Lim. 783; 44 Mo. 223; 22 Barb. 72; 126 Mass. 282. It is said they may judge whether the returns are in due form; 25 Ill. 328. The acts of such officer, within the scope of his authority, are presumed to be correct; 1 Bartl. 138. In some states, canvassing officers have the power to revise the returns, hear testimony, and reject illegal votes; it is so in Texas, Alabama, Louisiana, and Florida; McCrary, Elect. 67. Where election officers have adopted and enforced an erroneous view as to the qualifications of voters, whereby legal voters are not permitted to vote, an election may be set aside, especially if it appear that such votes would have changed or rendered doubtful the result of the election; Bright. Elect. Cas. 455; McCrary, Elect. 68. A canvassing board which has counted a vote and declared the result, is *functus officio*. It cannot make a recount; 45 Mo. 350; 33 N. Y. 603; 21 Ohio St. 216.

It is a general rule that the errors of a returning officer shall not prejudice the rights of innocent voters; Cl. & H. 329; (see 135 Ill. 591; 147 *id.* 514); as where it was the duty of the officer to return the votes sealed and he returned them unsealed, it was held that in the absence of any suspicion of fraud the return was good. Also where a state prescribed a certain form of certificate to be executed by the election officer, it is sufficient if the certificate is sub-

stantially in that form, and if an election officer insert by accident the wrong name in his return of the persons voted for, the mistake may be corrected; Cl. & H. Elect. Cas. 229, 369.

But it has also been held that where a statute requires the election officer to place on each ballot the number corresponding with the number of the voter, the failure so to number will deprive the voter of his rights; 62 Mo. 422; 53 Mo. 350. All regulations intended to secure the purity of elections are of vital importance and must be enforced to the letter; 1 Kan. 273, 279; 9 Kan. 569. Regulations which affect the time and place of the election and the legal qualifications of the voters are usually matters of substance, while those relating to the recording and return of the votes received and the mode and manner of conducting the details of the election are directory.

A statute requiring an official act, for public purposes, to be done by a given day, is directory only; 6 Wend. 486. A representative in the legislature cannot be deprived of his seat by the failure of mere election officers to make the return required by law to the secretary of state; see opinion of the judges in Maine; Me. Laws, 1880, p. 225, where many election questions are considered fully. Mere irregularity on the part of election officers, or their omission to observe some merely directory provision of the law, will not vitiate the poll; 85 Ky. 597; nor is an election invalid because the election officers *de facto* were disqualified; 37 Minn. 439; 69 Tex. 55; so also irregularities which do not tend to affect results are not allowed to defeat the will of the majority, which must be respected, even when irregularly expressed; 19 Barb. 540; 20 Pa. 493; 11 Kan. 269; 29 Ill. 454; 20 Mo. 107; 11 Mich. 362; 26 Tex. 5; 31 Cal. 173; 34 Cal. 635; Bright. Elect. Cas. 448, 449, 450.

By the laws of some states separate boxes are kept at the voting polls for the reception of ballots for different officers, and the question has arisen whether a ballot dropped into the wrong box can be counted. There is some conflict of authority on this point, but it has been held by the supreme court of Michigan that a voter cannot be deprived of his vote by the mistake or fraud of an officer in depositing it in the wrong box, if the intention of a voter can be ascertained with reasonable certainty; and for the same reason a ballot should not be rejected because put in the wrong box by the honest mistake of the voter himself; 11 Mich. 362; Cl. & H. Elect. Cas. 679; 1 Bart. 5; McCrary on Elections, sec. 195.

An election officer who wilfully and corruptly refuses to any qualified citizen the right to vote or to register is liable in damages to the person injured; Ashby *v.* White, Sm. L. Cas.; 2 Ld. Raym. 958; 98 Ill. 60. In England and in most of the American states proof of a malicious or a corrupt purpose on the part of the officer is necessary; 11 S. & R. 35; 44 N. H. 383; 5 Blackf. 138; 1 Bush 135; but in Massachusetts it is not necessary to show malice, and this rule has been followed in Ohio and Wisconsin. But even in Massachusetts the officer is not liable if he acted under a mistake into which he was led by the conduct of the plaintiff; 5 Metc. 162; 2 Mass. 236; 11 Mass. 350; 11 Ohio 372; 20 Wis. 544. See 11 Johns. 114; 18 N. H. 91; 17 Ind. 536.

Exemplary damages may be recovered if the refusal was wilful, corrupt, and fraudulent; 33 Md. 135.

The jurisdiction to hear and determine election cases, though by common law in courts having ordinary common-law jurisdiction, is generally regulated by special statutes in most of the states.

Where a court can reach a conclusion as to the actual legal vote cast at a precinct, on a contest of an election, it can give effect to it notwithstanding the election officers may have been guilty of misconduct; 15 So. Rep. (La.) 89.

Ballots. Voting by ballots is by a ticket or ball and secrecy is an essential part of this manner of voting; 9 S. C. 94; 27 N. Y. 45; 4 Vt. 535; 26 Minn. 107; L. R. 10 C. P. 753; therefore a statute which provides for numbering ballots is repugnant to a constitutional provision that elections shall be by ballot; 38 Ind. 89; *contra*, 86 Tex. 133; 69 Hun 596. Ballots are frequently deposited which do not clearly indicate the voter's intention; for instance, by misspelling the name of a candidate, etc. The rule in such cases is thus stated in Cooley, Const. Lim. 611:—"We think evidence of such facts as may be called the circumstances surrounding the election,—such as, who were the candidates brought forward by the nominating conventions; whether other persons of the same name resided in the district from which the officer was to be chosen; and if so, whether they were eligible or had been named for the office; if the ballot was printed imperfectly, how it came to be so printed, and the like,—is admissible for the purpose of showing that an imperfect ballot was intended for a particular candidate, unless the name is so different that to thus apply it would be to contradict the ballot itself, or unless the ballot is so defective that it fails to show any intention whatever, in which case it is inadmissible." See on this point, 4 Wis. 430; 8 Cow. 102; 27 N. Y. 64. The case in 1 Dougl. Mich. 65, which is *contra*, was overruled in 16 Mich. 283, and the rule above laid down by Judge Cooley approved and followed. Thus votes for "E. M. Braxton," "Elliot Braxton," and "Braxton" have been counted for Elliot M. Braxton in the 42d Congress. See McCrary, Elect. 296. Ballots cast for "D. M. Carpenter," "M. D. Carpenter," "M. I. Carpenter," and "Carpenter" were counted for Mathew H. Carpenter; 4 Wis. 430. Ballots for "Judge Ferguson" were counted for Fenner Ferguson; 1 Bartl. 267. Ballots cast for "E. Clark" and "Clark" were counted for E. E. Clark; those cast for "W. E. Robso," "Robertson," "Robers," and "Robin—" were counted for W. E. Robinson. Where the only candidates for an office were Caleb Gumm and Joel D. Hubbard, votes

for "J. D. Huba," "J. D. Hubba," "J. D. Hub," and also one for "Huber," and one for "D. Huber," are properly counted for Hubbard; 97 Mo. 311. See opinion of judges of supreme court of Maine, printed in Maine Laws, 1880, App. p. 225.

A ballot containing the names of two candidates for the same office is bad as to both, but is not thereby vitiated as to other names of candidates on the same ballot; 4 Wis. 420; S. C. Bright. Elect. Cas. 258; 29 Neb. 341; where a ballot contains the names of three persons for the same office, and there is only one vacancy to be filled, it should be rejected; 67 Hun 160.

Where there are statutory provisions as to the marking of ballots, the paper on which they are printed, etc., a ballot not complying with the law should not be received; the direction is mandatory; 3 S. & R. 29; 130 Ind. 561; but see 15 Ill. 492, where the law required white paper without any marks, and blue-tinted paper, ruled, was used, and the ballot declared legal; and where the law required the marking of the ballots with ink, if otherwise regular and marked with a pencil, they were counted; 34 Neb. 116. In 46 Cal. 398, the court held, in this connection, that as to those things over which the voter has control, provisions as to the appearance of ballots are mandatory; and as to those things that are not under his control, such provisions are directory. Ballots on which a printed name is erased and another name written in its place are valid; 22 N. Y. 309; 17 Oreg. 189; but see 44 La. Ann. 796.

Where a law provides that the voter may insert in the blank space provided therefor any name not already on the ballot, it was held that such insertion might be made by the use of a "sticker" as well as by writing the name of the candidate; 146 Pa. 529.

The fact that some of the ballots cast at an election were marked, and thereby rendered void by the election law, does not invalidate the ballots that were regular; 69 Hun 596.

Australian Ballot. This system, the leading features of which have now been adopted in many of the states, is the first important gift to civilization from the continent of Australasia. It originated in South Australia soon after the beginning of the present century as the result of the efforts of Mr. Francis S. Dutton, and thence passed from state to state in Australasia, then to the mother country in Europe, afterward to Canada, and eastward to continental countries, and finally westward again to the United States within the last few years. It has been said that a somewhat similar system had been in vogue in England in Maryport for many years before the modern system was introduced in Australasia. But the Australasian system seems to have been purely indigenous, and was developed without any copying or even knowledge of the system at Maryport.

The cardinal features of the system, as everywhere adopted, are an arrangement for polling by which compulsory secrecy of voting is secured and an official ballot printed and distributed by government authority containing the names of all candidates. The details of the system include methods by which candidates may be nominated, prescribing the number of persons necessary to nominate a candidate, forms in which the various party nominations and information for the voters shall be printed on the ballots, arrangements for small closets or rooms into which the voter can retire and mark his ballot in secret, regulations for allowing him to take into the closet with him when he so desires a person to assist him in marking his ballot, and regulations for the numbering and counting of the ballots. See Wigmore, Australian Ballot System.

The system now generally in vogue in the United States is in most cases not the Australian ballot pure and simple. One feature of that system is the enumeration of candidates for a particular office alphabetically and without designation of party name or emblem. This was adopted in Massachusetts. But in most states the plan, better adapted for the American states, is to use an official ballot, but, when many officers are voted for on a single ballot, to have the column of each party indicated by name or sign or both, and permit the voter to vote a "straight" ticket by a single mark for all officers voted for. This, in various forms, may be termed the American modification of the Australian ballot.

The novel features of this system of voting have given rise to much litigation, and a considerable body of law has already accumulated, which involves not so much new principles as the application of old ones to new conditions. It is, nevertheless, desirable to consider these decisions separately from those under the old system, as thereby a clearer impression is received, both of the system and the method of its enforcement, which is necessarily committed very largely to the courts, and, like cases of railroad receiverships, devolves upon the courts the exercise of functions often to some extent administrative as well as judicial.

It may be said without reserve that the courts have, as a rule, been true to the fundamental doctrines of the law of elections: to give effect to the intention of the voter, where it can be done without defeating the purpose of the legislation,—to enforce party rules with respect to nominations and test the integrity and fairness of those made by petition,—to disregard mere technical irregularities and hold valid elections carried on in good faith rather than to permit them to be defeated by the carelessness, ignorance, or fraud of officials,—to enforce rigidly the safeguards against bribery and intimidation, and the provisions to secure the secrecy of the ballot which lie at the foundation of the system.

For an extended discussion of the Australian ballot laws of England and some of the American states, see Bowers *v.* Smith, 111 Mo. 45, in which it is held that the system

should be construed in subordination to the constitution and laws of the state wherein it is adopted.

Such laws have been held constitutional; *id.;* 146 Pa. 529; 99 Mich. 538; 54 N. J. L. 446; 108 Mo. 153; 159 Mass. 487; 164 *id.* 486; 41 N. E. Rep. (Mass.) 681; 42 Pac. Rep. (Wyo.) 1049; 21 S. E. Rep. (Va.) 483. The objections taken will be found to include general ones and also features of particular statutes. The statute forbidding the counting of a ballot not officially stamped and marked with the initials of a judge of election is in conflict with the constitutional provision that all persons duly qualified are entitled to vote and that all elections shall be by ballot; 12 Wash. St. 377. In Illinois the new ballot law is held to have repealed all other laws respecting voting on municipal affairs and ballots; 147 Ill. 204; but it is held to apply only to the election of officers and not to special elections to determine other matters, in Wisconsin; 62 N. W. Rep. (Wis.) 933; and Pennsylvania; 3 Pa. Dist. Rep. 395.

Questions as to the regularity of nomination papers under the Australian ballot system are usually settled by the courts either under express statutory provisions or under their general jurisdiction when applicable. A number of such questions decided in reference to the then pending election are reported in 5 Dist. Rep. Pa. 660–665, 677–681.

Where conflicting nominations have each certain claims to superiority, if technical rules only are applied, the court will give weight to the fact that one candidate carried the district by a decisive majority. The desire of the court in such cases is to reach what is substantial; *id.* 660. If, under the rules of the party, the county committee has power to fill vacancies and did not act, but only certain members of it residing within the representative district, such action is a clear violation of the party rules and the nomination by such irregular body is void; *id.* 660. Where congressional conferees from one county of a congressional district were appointed in violation of the party rules, the conference in which they took part was not a regular body, and the nomination made by it was void; *id.* 661. Nominations attended by fraud and the exercise of arbitrary power will not be upheld by the courts. A minority of delegates cannot nominate, and a faction may not arbitrarily select their meeting-place in defiance of a clear majority of the Ward Executive Committee; *id.* 661. Where persons who are not delegates are permitted upon the floor of a convention and the evidence justifies the conclusion that their presence was not harmless, the nomination is invalid; *id.* 662. A nomination paper which attempts to name presidential electors, representatives at large in congress, and other state officers, as well as candidates for separate congressional, senatorial, and representative districts, by a single paper is bad; *id.* 665. A court will not, however, in the exercise of its equitable powers, enjoin the printing of a certain column on the official ballot on a mere allegation that the nomination papers are defective, false, and fraudulent. Proof of such allegation must be made before the court will find it so as a fact; *id.* 667. Where an adequate remedy exists and a sufficient opportunity has been given to present to the court objections to a nomination paper, the court will not intervene by injunction in relief of a complainant who has failed to avail himself of such a remedy; *id.* 681.

Whenever an official ballot is provided for by statute the secretary of state will not decide which of two rival conventions of the same organization is the regular one, but all such nominations should be certified and left to the voters for their decision; 43 Neb. 651; 18 Colo. 26; 88 Mich. 164. See also 39 N. Y. Supp. 119; 5 Misc. Rep. 369; 6 *id.* 245; nominations by a bolting convention are invalid; 5 Pa. Dist. Rep. 194; in case of a tie vote in a nominating convention neither the candidates nor the election officers can determine the result by lot; 61 N. W. Rep. (Mich.) 346.

The offence of falsely making or signing a nomination certificate must be charged in the words of the statute, being unknown at common law, and the want of criminal intent is no defence, and the voter must sign in person, or be present, and request it to be done; 40 N. E. Rep. (Mass.) 862.

As to defects in statement of names of candidates in nomination papers, see L. R. 1 C. P. Div. 596; L. R. 15 Q. B. Div. 273; 12 *id.* 257; they are not invalidated by ordinary abbreviations of names; 10 N. S. Wales L. R. 59.

Provisions as to filling vacancies are not always mandatory, and after a fair election, an irregularity will not be permitted to invalidate it; 40 Pac. Rep. (Mont.) 80.

For the form of ballots prescribed in a number of states, see 10 Lawy. Rep. Ann. 150. For inserting names under the Australian ballot law in the official ballot, not legally entitled to insertion, see 35 Cent. Law J. 305.

Courts will not interfere with the discretion of the officer charged with the preparation of the official ballot, as to details; 63 N. W. Rep. (Neb.) 23.

Prohibiting the printing of the name of a candidate in more than one column is constitutional; 64 N. W. Rep. (Mich.) 496; 62 *id.* 564; but where the act provides that names shall be grouped by parties, a candidate named by more than one party is entitled to have his name appear in the column of each; 33 S. W. Rep. (Mo.) 447; *contra*, 42 Pac. Rep. (Wyo.) 750.

A construction which makes the error of a single official disfranchise large bodies of voters must be avoided if the language is susceptible of any other; 111 Mo. 45; and where, by the negligence of the officer, the name of a candidate and of the office is omitted from the ballot, the voter may write them, and his vote will be valid; 39 N. E. Rep. (N. Y.) 641.

The provision requiring the voter to make a cross with a stamp *opposite* each name voted for is mandatory; 38 Pac. Rep. (Cal.)

447; 36 N. E. Rep. (Ind.) 204; 29 Atl. Rep. (Me.) 930; 130 Ind. 561; but in other states the courts are disposed to be more liberal and permit marking outside of the square if to the right of the name; 17 R. I. 812; 13 Pa. Co. Ct. 41; *id.* 205; 41 Pac. Rep. (Cal.) 454; *id* (Nev.) 762; 64 N. W. Rep. (S. D.) 180, 186; 41 N. E. Rep. (Ill.) 1002; 34 S. W. Rep. (Ky.) 6 (in which cases the subject of marks is fully considered). A provision for marking with ink is directory only, and pencil will answer; 34 Neb. 116; a blanket paster is not legal in Pennsylvania, but a single sticker may be used; 30 Atl. Rep. 955. As to what distinguishing marks on ballots will vitiate them see 41 N. E. Rep. (Ill.) 1002; *id.* (Ind.) 796; 91 Cal. 526; 129 N. Y. 395; 31 S. W. Rep. (Tex.) 547; and where by mistake "spoiled ballots" were counted the result was not thereby ascertained and the returns of the county clerk were *prima facie* evidence which should be considered by the court; 60 N. W. Rep. (Neb.) 1034; voters are not confined to the names on the official ballot but may write other names thereon; 40 N. E. Rep. (Ill.) 290; signing a ballot invalidates it; 41 N. E. Rep. (Ill.) 1002. The failure of a voter to retire to the booth to mark the ballot does not make the marking illegal if not wilful; 31 S. W. Rep. (Mo.) 97. In Michigan the supreme court have with much detail considered this subject and enumerate seven methods of marking which are defective by reason of their being in effect distinguishing marks; 61 N. W. Rep. (Mich.) 648.

The provision that an officer or person designated by law *may assist* a voter physically or educationally unable to vote should be liberally construed; 21 S. E. Rep. (W. Va.) 483; the voter is the sole judge of his disability; 12 Pa. Co. Ct. 227; *contra*, under the same statute, 2 Pa. Dist. Rep. 1; the disability must be one contemplated by the statute and not drunkenness or ignorance; *id.*; nor that he left his glasses at home; 60 N. W. Rep. (Minn.) 676; a ballot is good if the voter asks assistance though he can read; 42 N. E. Rep. (Ind.) 474; where the voter is required to make oath, this is mandatory, and failure to take it invalidates the vote; 99 Mich. 538; but if no form of oath is prescribed any sufficient form of words will suffice; 60 N. W. Rep. (Minn.) 676; if the statute does not restrict the voter's choice of an assistant the election officers cannot do so; 12 Pa. Co. Ct. 227; but when the statute designates a particular officer, it is mandatory; 21 S. E. Rep. (W. Va.) 483; and irregularities in the services of the voter's assistant, as having one where two were required, or if the assistant had received money from a candidate, will not invalidate the vote; 31 S. W. Rep. (Tex.) 547; if the assistant prepares a ballot contrary to the direction of the voter, if fraudulently done, it will avoid the vote, but if it does not appear whether it was fraud of the assistant or mistake of the voter it will not be rejected; *id.*

When an interpreter was permitted by law but not asked for, the presence of one inside the railing, conversing with voters, was held to vitiate the election; 66 N. W. Rep. (Mich.) 388.

Irregularities in taking the ballot must be gross to defeat the election; L. R. 10 C. P. 751; L. R. 16 Q. B. Div. 739; 7 Can. S. C. 247. When the statute declares a certain irregularity fatal courts will give effect to it, otherwise they will ignore such innocent irregularities as are free from fraud and have not interfered with a fair expression of the voter's will; 111 Mo. 45.

Irregularities which have been held harmless, are where two voting places in a precinct by law entitled to one; 17 Kan. 347; 111 Mo. 45; where ballots were received by officers near a house appointed whose owner refused to permit its use; 58 Cal. 198; errors or irregularities in printing; 17 Colo. 338; 31 Pac. Rep. (Or.) 830; ballots improperly prepared by the officers are not marked "ballots" and may be counted; 42 N. E. Rep. (N. Y.) 536.

When candidates and voters have participated in an election and *acquiesced* in the result failure to give notice may be disregarded; 84 Mich 420; and other irregularities may be so far acquiesced in by the defeated candidate that he will be disqualified to complain; L. R. 1 Q. B. 433; 17 Colo. 338.

Contested Elections. At common law the right to an office was tried by a writ of *quo warranto;* in modern practice, an information in the nature of *quo warranto* is usual, in the absence of a statute; McCrary, Elect. 196. See 3 Bla. Com. 263; 2 Jurist N. S. 114. An act for trying contested elections without a jury is not unconstitutional; 43 Pa. 389. As to whether the declarations not under oath of illegal voters is evidence as to the votes cast by them, is doubtful, see 23 Wis. 319; 1 Bartl. 19, 230; 9 Kan. 569; 27 N. Y. 45. The ordinary rules of evidence apply to election cases; McCrary, Elect. 231; Paine, Elect. 824. A legal voter may refuse to testify for whom he voted, but he may waive this privilege; 2 Pars. 580. It is competent for witnesses to testify that they were under age at the time of voting, and that their votes were cast for the candidate receiving the largest number; 133 Ind. 11.

In all contested elections, the tribunal will look beyond the certificate of the returning board; 20 Wend. 12. See 56 Mo. 107.

In purging the poll of illegal votes, unless it be shown for whom the illegal votes were cast, they will be deducted from the total vote; 2 Brewst. 128.

Where the laws have been entirely disregarded by the election officers and the returns are utterly unworthy of credit, the entire poll will be thrown out, but legal votes, having been properly proved, may be counted; Bright. Elect. Cas. 493. "Nothing short of the impossibility of determining for whom the majority of votes were given ought to vacate an election;" Cl. & H. 504.

Where another than the person returned as elected is found to have received the

highest number of legal votes given, he is entitled to the office; 86 Ky. 596.

See BALLOT; ELECTORAL COMMISSION; ELIGIBILITY; MAJORITY; VOTER.

ELECTIONS IN CORPORATIONS. —The power of election by corporations may apply either to corporate officers generally, or to the selection of new members to fill vacancies in those corporations, whose nature and composition require them to consist of members and not of holders of capital stock, as eleemosynary corporations. The election of members of a corporation of the former class is, in general, regulated by the charter, or other constituent law of the corporation, or by its by-laws, and their provisions must be strictly followed. In the absence of express regulations it is a general principle that the power of election of new members, or when the number is limited, of supplying vacancies, is an inherent power necessarily implied in every corporation aggregate. It is said to result from the principle of self-preservation; 2 Kent 293; 1 Rolle, Abr. 513; 8 East 272.

If the right and power of election is not adequately prescribed by the charter, a corporation has power to make by-laws consistent with the charter, and not contrary to law, regulating the time and manner of elections and the qualifications of electors, and manner of proving the same; 3 Term 189; 3 S. & R. 29; 131 Pa. 614; and if there be no by-law, established usage will be resorted to; 20 Pa. 484. In many states there are general statutes on this subject, and in such case they must be strictly followed; 1 Thomp. Corp. § 745.

Unless under express provision as to special meetings, or filling vacancies, elections of officers are held at regular meetings of the corporation. The *time* is nearly, if not always, regulated by statute, charter, or by-laws, and such cases as are found on the subject are not as to any general principle; 1 Thomp. Corp. § 701; the date cannot be changed by directors so as, by postponement of an annual election, to lengthen their terms; 23 Md. 482; a business meeting of a benevolent corporation may be held on Sunday; 65 Barb. 357; and a charter provision requiring the choice of directors at an annual meeting was held to be directory and not exclusive; 20 N. H. 58.

The *place* of meeting for elections is also usually regulated by the law of the corporation itself, and if there be none, it should unquestionably be done at its usual and principal place of business, or where it exercises its corporate functions. This is for corporate purposes its domicil, (*q. v.*) and the term residence is also applied to corporations, as the place where its business is done; 15 Ill. 436; 82 *id.* 493; while it is a citizen only of the state by which it was created; *id.* In the latter state only may constituent acts be done; 13 Pet. 519, 588; 11 Wall. 459, 476; 14 N. J. Eq. 380. See also 36 Vt. 750; 35 Mo. 13. Accordingly it has been held that votes and similar acts outside of the state creating it are void: 27 Me. 509; even under a provision authorizing the calling of a first meeting at such a time or place as they think proper; *id.*; but the appointment in one state of a secretary, by the directors of a manufacturing corporation of another state, has been held valid; 6 Conn. 428; and a corporation created by a concurrent legislation of two states may hold meetings for elections in either; 31 Ohio St. 317. In some states, as Minnesota, the Dakotas, and Colorado, the holding of such meetings is permitted outside of the state; and in the latter state it is held that the fact that the annual meeting was held outside of the state cannot be raised in a collateral proceeding; 5 Colo. 282. Under an authority to call special meetings on notice of time and place, they may be called by the president at a place other than the regular place of business; 5 Sawy. 403; and at such a meeting an election may be held if otherwise legal. Where no place is named in the charter, the directors may designate it, and officers elected at such meeting will be such *de facto;* 45 Pa. 59.

Meetings for the election of officers following the law of the corporation must be *called by* the person or persons designated for that purpose; 10 Conn. 200; 25 W. Va. 36; though it has been held that it need not always be by formal action or with strictness of procedure if it is done by their direction; 3 N. J. Eq. 68; 8 Allen 217; *contra;* 25 W. Va. 36; 34 N. H. 148; 12 Metc. 105; they must be duly *assembled;* 14 La. Ann. 799; whether of stockholders; 9 La. 397; or directors; 12 N. H. 205, 549; 47 Ia. 11; upon due *notice;* 5 Burr. 2681; in accordance with charter or by-laws; 13 Allen 90; 7 Conn. 214; 14 Vt. 300; 12 Bush 62; and when there is no provision as to method, personal notice is proper; 7 Conn. 214; or according to general statute law, if there be such; 19 Wend. 37; but, though it is safer and better practice to give notice, in case of stated meetings for regular elections, notice is not required, but the members are charged with notice of them; 36 Me. 78; 4 B. & C. 441; 36 N. H. 252; 11 Wend. 604; while of *special* meetings there must always be notice; 2 H. L. Cas. 789; 22 N. Y. 128; 6 S. & R. 469; and the failure to notify a single member will avoid the proceedings, 5 Burr. 2681; 4 B. & C. 441; 4 A. & E. 538; 22 N. Y. 128; 1 Thomp. Corp. § 708; unless notice is waived by *attendance,* as, if all are present, each of them waives the want or irregularity of notice; 7 Ind. 547; 11 Wend. 604. Such waiver will not operate as against a positive direction of the charter; 1 Dill. Mun. Corp. § 264; and when there is no provision as to notice it must be personal; 8 Conn. 191; 8 Metc. 301; 40 Cal. 77; 31 N. J. L. 107.

As to what constitutes a *quorum* at elections, see MEETINGS; QUORUM.

As to all the details of the *conduct* of elections, the provisions of state statutes, charters, or by-laws, must be strictly pursued and will generally be found to cover the subject. Where a statute provided for three *inspectors,* it was held that two could act; 16 Abb. Pr. N. S. 8. The method of

appointment prescribed must be strictly followed; 11 Wend. 604; though in certain emergencies the corporators may appoint; 2 Abb. Pr. N. S. 361; and a candidate has been held not disqualified; 7 Cow. 402; but this is so contrary to well settled and judicious legal principles that it cannot be considered desirable. An election otherwise valid will not be avoided because inspectors were not sworn; 19 Wend. 635; or the oath taken not subscribed by them; 2 Abb. Pr. N. S. 361. In the absence of a statute to the contrary, their duties are ministerial, and they cannot act upon the challenge of a vote except to follow the transfer books; 19 Wend. 37; 4 Cow. 382; or put the challenged party on oath; *id.* note; or pass judicially upon proxies regular on their face; 44 N. J. L. 529; because not acknowledged or witnessed; 36 How. Pr. 477; but this would be otherwise if, as is often the case, the charter requires witnesses. They may not reject votes once received; 10 Abb. Pr. N. S. 331; nor go beyond the ballot to ascertain the intention of the voter; 15 *id.* 14. *Ballots* in which only the initials of a candidate were inserted have been held sufficient when it was determined by a verdict who was intended thereby; 5 Denio 409. If the statutes provide that only a certain number are to be chosen, ballots containing more names will not be counted; 27 Mo. 365; 38 N. Y. St. 217; 8 Wend. 396; 2 Burr. 1020; votes for ineligible candidates were formerly held to be "thrown away;" 2 Burr. 1021 note; but it has been held in a later case that such votes will not give the election to a minority candidate unless the voters knew of the ineligibility; 44 N. J. L. 529.

There is no common-law right to vote by *proxy*, except in England in case of peers; 1 Bla. Com. 168; 131 Pa. 623; and in public or municipal corporations, voting can only be done in person; 2 Kent 294; in private corporations, the right of voting by proxy is usually conferred by charter and the weight of authority is that, if not so conferred, it may be done by by-law; *id.* 295; 5 Day 329; 131 Pa. 614; 69 Ill. 195; Moraw. Corp. § 486; Cook, Stockh. § 610; *contra;* 18 Hun 427; 14 N. J. L. 222. See 3 Grant, Pa. 209; 103 Pa. 134; 1 Paige 598; 2 Pa. Co. Ct. 280; 1 Thomp. Corp. § 737; 4 L. R. A. 421; 3 Dessaus. 557. A proxy may be revoked, even if given for a valuable consideration, if about to be used fraudulently; 6 Paige 337; and voting by proxy in fraud or violation of the charter may be restrained by injunction; 6 Gill & J. 94. A *certificate* of election is not essential; 11 Wend. 604; but it is, when valid on its face, *prima facie* evidence of election; 10 Abb. Pr. 321; but a court on *quo warranto*, may go behind it; 20 Wend. 12.

It is probable that at common law each stockholder is entitled to but one vote without respect to the number of shares held. In public and municipal corporations undoubtedly each member has but one vote, and it is said in connection with the statement of this principle: "This rule has been applied to stockholders in a private corporation, and it has been held that such a shareholder has but one vote, although he be the owner of many shares of the capital stock;" Cook, Stock & Stockholders § 608. But this writer, after adverting to the almost universal practice of providing by constitution, statute, or charter for a vote to each share of stock adds, "at the present day it is probable that no court, even in the absence of such provision, would uphold a rule which disregards, in the matter of voting, the number of shares which the shareholder holds in the corporation;" *id.* And after a reference to the same common-law rule it is said: "But there are good reasons for holding that this rule has no application to ordinary joint stock business corporations of the present day;" Moraw. Corp. § 476. Where the charter did not regulate the voting, but declared that the by-laws may make provision for the conduct of elections, it was held that a corporation might enact a by-law giving to stockholders a vote for each share of stock, and that one providing that they should have one vote for each share up to ten and fixing the proportion which the shares should bear to the votes above that number, "is a reasonable regulation; it is uniform in its operation; it conflicts with no law, and it is binding on all the shareholders;" 131 Pa. 614.

In some states *cumulative* voting is authorized bystatutory or constitutional provision; and such provision in a state constitution is self-executing; 104 Pa. 150. See, generally, works on corporations; Thompson, Corporations, Ch. XV.; 18 L. R. A. 582; MEETINGS; PROXY; QUORUM.

ELECTION OF RIGHTS OR REMEDIES.—The obligation imposed upon a party to choose between two inconsistent or alternative rights or claims, in cases where there is clear intention of the person from whom he derives one that he should not enjoy both. 2 Sto. Eq. Jur. § 1075.

Etymologically, election denotes choice, selection *out of* the number of those choosing. Thus, the election of a governor would be the choice of some individual from the body of the electors to perform the duties of governor. In common use, however, it has come to denote such a selection made by a distinctly defined body—as a board of aldermen, a corporation, or state—conducted in such a manner that each individual of the body choosing shall have an equal voice in the choice, but without regard to the question whether the person to be chosen is a member of the body or not. The word occurs in law frequently in such a sense, especially in governmental law and the law of corporations.

But the term has also acquired a more technical signification, in which it is oftener used as a legal term, which is substantially the choice of one of two rights or things, to each one of which the party choosing has equal right, but both of which he cannot have. This option occurs in fewer instances at law than in equity, and is in the former branch, in general, a question of practice.

At Law. In contracts, when a debtor is obliged in an alternative obligation to do one of two things, as to pay one hundred dollars or deliver one hundred bushels of wheat, he has the choice to do one or the other until the time of payment; he has not the choice, however, to pay a part in

each. Pothier, Obl. part 2, c. 3, art. 6, no. 247; 11 Johns. 59. Or, if a man sell or agree to deliver one of two articles, as a horse or an ox, he has the election till the time of delivery,—it being a rule that, "in case an election be given of two several things, always he which is the first agent, and which ought to do the first act, shall have the election;" Co. Litt. 145 *a*; 7 Johns. 465; 2 Bibb 171. On the failure of the person who has the right to make his election in proper time, the right passes to the opposite party; Co. Litt. 145 *a*; Pothier, Obl. no. 247; 1 Des. Ch. 460; Hopk. Ch. 337; 40 Ohio St. 539; 56 Vt. 538; 66 How. Pr. 306; 21 Fed. Rep. 383.

When one party renounces a contract the other party may elect to rescind at once, except so far as to sue upon it and recover for the breach, and he may immediately bring an action, without waiting for the time of performance to arrive or elapse; (in such case he cannot treat the contract as subsisting for any other purpose); 2 E. & B. 678; L. R. 7 Exch. 114; L. R. 16 Q. B. 460; 158 Pa. 107; 111 U. S. 264; 11 Fed. Rep. 372; *contra*, as to a contract for the sale of land, 114 Mass. 530. See the cases collected, Ans. Cont. (8th ed., 355) n. 1. It is a maxim of law that, an election once made and pleaded, the party is concluded: *electio semel facta et placitum testatum non patitur regressum;* Co. Litt. 146; 11 Johns. 241.

In many cases of voidable contracts there is a right of election to affirm or disavow them, after the termination of the disability, the existence of which makes this contract voidable. So all contracts of an infant, except for necessaries, may be avoided by him within a reasonable time after he comes of age, but they are voidable only, and he must elect not to be bound by them; 48 N. H. 251; 18 Neb. 54. See 102 U. S. 300. And bringing suit is an election to rescind; 50 N. H. 235; 13 Daly, N. Y. 227. See INFANT.

Whenever, by law or contract, a party has laid before him a variety of steps, the taking of one of which excludes another, or the rest, he must choose between them. After his choice is made, and by words or acts expressed in a manner suited to the particular case, he cannot reverse it; he is said to have elected the one step, and waived the other; Bish. Cont. § 808.

Other cases in law arise: as in case of a person holding land by two inconsistent titles; 1 Jenk. Cent. Cas. 27; dower in a piece of land and that piece for which it was exchanged; 3 Leon 271. See Sugd. Pow. 498.

In Equity. A choice which a party is compelled to make between the acceptance of a benefit under a written instrument, and the retention of some property already his own, which is attempted to be disposed of, in favor of a third party, by virtue of the same paper. The doctrine of election presupposes a plurality of gifts or rights, with an intention, express or implied, of the party who has a right to control one or both, that one should be a substitute for the other; 1 Swanst. 394, note (*b*); 3 Woodd. Lect. 491; 2 Rop. Leg. 480; Snell, Pr. Eq. 237.

The doctrine of election rests upon the principle that he who seeks equity must do it, and means, as the term is ordinarily used, that where two inconsistent or alternative rights or claims are presented to the choice of a party, by a person who manifests the clear intention that he should not enjoy both, then he must accept or reject one or the other; and so, in other words, that one cannot take a benefit under an instrument and then repudiate it; 133 U. S. 695.

Where an express and positive election is required, there is no claim, either at law or in equity, to but one of the objects between which election is to be made; but in many cases there is apparent, from the whole of an instrument, the intention that the party to be benefited shall be benefited on certain conditions. In such cases, equity will require the party to elect; Bisph. Eq. sec. 295.

The question whether an election is required occurs most frequently in case of devises; "because deeds being generally matters of contract, the contract is not to be interpreted otherwise than as the consideration which is expressed requires;" L. R. 8 Ch. 578; but it extends to deeds; 1 Swanst. 400; 2 Story, Eq. Jur. § 1075, n.; and it has been held to apply to "voluntary deeds, to cases of contracts for valuable consideration resting in articles, to contracts for value completely executed by conveyance and assigments;" per Selborne, Ld. Ch., L. R. 8 Ch. 578, where the authorities are collected. The doctrine also applies to powers of appointment; 2 Ves. Jr. 367; L. R. 9 Eq. 519; 22 Ch. D. 555; 27 *id.* 696; 34 *id.* 160.

In the case, not strictly of election, but often so treated, of two distinct gifts of a testator's own property, one onerous and the other not, it is the general rule that the donee may take one and reject the other, unless it appear that it was the testator's intention that the option should not exist; 22 Ch. D. 573, 577; and where a gift is made by a deed of which the consideration is partly invalid by reason of the disability of the parties, the parts of the deed are read together and the burden is treated as the consideration for the benefit; Brett, L. Cas. Mod. Eq. 263. When a married woman made a valid appointment by will to her husband under a power, and also bequeathed personal property (not her separate estate) to another person to which the power did not extend, the husband was not put to his election, but took both under the power and *jure mariti*, as to the property ineffectually bequeathed; 9 Ves. 369.

There must be a clear intention by the testator to give that which is not his property; 1 Sim. 105; 18 Ves. 41; 1 Ed. Ch. 532; L. R. 7 Eq. 291. And if the testator has some interest in the thing disposed, the presumption that he intended to dispose only of his interest must be overruled in order to make a case of election; 6 Dow. 149, 179: 1 Ves. 515.

The intention of the testator to put the devisee to his election must appear from the will itself; but surrounding circumstances may be shown by parol; 41 Ark. 64; 30 Beav. 14. The time in which election may be exercised must be reasonable; 30 Beav. 235; 77 Va. 198; 19 Ves. 663; 34 Ala. 558; 30 Ia. 465; 4 McLean 99.

The doctrine applies to every species of property or interest, whether the donor does or does not know of his right to dispose of it; Wats. Comp. Eq. (2d. ed.) 177; cases of transactions involving property of the wife; 23 Beav. 457; 30 Gratt. 83; satisfaction of dower; Ambl. 466, 682; 8 Paige, Ch. 325; 2 Sch. & L. 452; 14 Sim. 253; 1 Drur. & W. 107. The doctrine does not apply to creditors; 12 Ves. 354; 1 Pow. Dev. 437.

As to the right or duty of election by persons under disability, there is much apparent confusion in the cases both as to theory and practice. Story states the rule generally that married women, infants, and lunatics are not bound by election; 2 Eq. Jur. § 1097. The statement would seem too broad even before the great changes made in all matters affecting the property rights and powers of married women by the trend of recent legislation, and before the changes characterized by a careful commentator as a "brand new invention of equity not fifty years old, and made exclusively for the benefit of married women under the old law—a breed which is rapidly becoming extinct;" Brett, L. Cas. Mod. Eq. 257. This writer considers the old and true doctrine of election to apply only to the acceptance of gifts under an instrument made by another, while the new doctrine involves the confirmation or repudiation of voidable instruments made by the person electing, who, in the cases referred to, is always a married woman. The rule, so far as there is one, has been stated thus:—Parties competent to make an election must usually be *sui juris*, but election may sometimes be made by a court of equity on behalf of infants and married women; Bisph. Eq. § 304; but this is really no rule and probably none can be exactly defined; the cases must be resorted to, and a large measure of judicial discretion has been exercised in dealing with them as they arose. In some it is held that a married woman may be permitted to elect; 4 Kay & J. 409; 59 Wis. 483; 65 Pa. 451; in others that she cannot; 3 Myl. & Cr. 171; Lord Cairns in L. R. 7 H. L. 67; 9 Ch. D. 363; but it may be referred to a master to inquire what is best for her; 2 Ves. 60; L. R. 7 H. L. 67 (but in this case there were also infants). It was held that she must elect by Lord Hatherly in 2 J. & H. 344 (which Brett says "led to the new departure)"; followed by Kay, L. J., in 28 Ch. D. 124; *contra;* by Sir George Jessel in 18 Ch. D. 531; followed by Chitty, L. J., in 27 Ch. D. 606. The decisions of Lord Hatherly and Sir George Jessel were referred to without disapproval by Lord Selborne, one in L. R. 8 Ch. 578, and the other in 8 App. Cas. 420. Finally in 31 Ch. D. 275, (reversing 28 Ch. Div. 124,) it was held that the wife would not be compelled to elect, but was entitled to retain both funds, on the ground that the settled fund had a restraint on anticipation. This case reviews the conflicting decisions and considers that they leave the question to be determined on principle. It is treated as deciding that but for the fact on which the case was put it was one for election; Snell, Pr. Eq. 247; and it assumed without discussion that election applied to married women, and thereby as Brett considers "sealed the triumph of the new election"; Lead. Cas. Mod. Eq. 257.

With regard to infants, the practice has varied very much, and the cases are collected in 1 Swanst. 413, note (*c*). The infant has been permitted to elect after coming of age in some cases; cas. *t.* Talbot 176; *id.* 130; 2 Ves. Sr. 12; 3 Bro. P. C. 173; in others an inquiry has been directed; 2 Sch. & Lef. 266; and this may be considered the usual practice; 1 Bro. P. C. 300; 2 Eq. 481; though the court has elected for them without reference; 26 L. J. N. S. Ch. 148; 2 Bland, Ch. 606; and the same practice is adopted when the persons to elect are unborn; Brett, L. Cas. Mod. Eq. 260. See, generally, on this subject, Serrell, Equit. Doct. Elect. 184.

Persons not under disabilities are bound to elect; 79 N. Y. 478. Positive acts of acceptance or renunciation are not indispensable, but the question is to be determined from the circumstances of each case as it arises; 21 Beav. 447; 13 Price 782; 1 M'Clel. 541; 15 Pa. 430. And the election need not be made till all the circumstances are known; 1 Bro. Ch. 186, 445; 2 V. & B. 222; 1 M'Cl. & Y. 569. See, generally, 2 Story, Eq. Jur. § 1075; 1 Swanst. 402, note; 2 Rop. Leg. 480–578; Bisph. Eq. 295.

A widow has a right, regulated by statute in the several states, to declare her election between the provisions in her favor under the will of her husband and her right of dower. When bound to elect she is entitled to full information and ascertainment of the values of the two interests, and she may file a bill in equity to obtain them; 2 Scribn. Dow. 497, and cases cited at large in note 1. The right must be exercised by the widow herself, being purely personal; 6 Gray 307; 6 Ired. L. 274; and the rule is not subject to exception even if she is insane; 7 Ired. L. 72; 5 Md. 503. After the widow's death within forty days without election, her representatives could not make a renunciation of the will; 3 Har. & McH. 95; 37 Ohio St. 460; 71 Ind. 455; 90 Pa. 384. For the statutory provisions on the subject see 2 Scribn. Dow. 505, notes.

There must be an intention to elect and knowledge of her rights so as to constitute a deliberate choice; 43 Pa. 474; 2 Gr. Ch. 504; and an election made under a mistake does not conclude her; 1 Bro. C. C. 445; 12 Ves. Jr. 136; 4 Dessaus. 274; but if she is acquainted with the material facts the election will bind her even though she do not understand her legal rights; 21 Pa. 407. But see 6 Humph. 220; 11 Ohio St. 386. Nor is she concluded by an election procured by

fraud; 10 Yerg. 94; 2 Dana 13. In some cases an election is implied, but so much difficulty is found to exist with respect to what constitutes an implied election that it will generally remain to be determined by the circumstances of each case. See 1 Lead. Cas. in Eq. 537, 570, and cases cited; 5 Call 481; 2 Hen. & Mun. 381; 12 Pick. 146; 43 Pa. 474; 6 Ohio St. 480; 14 Gratt. 518. In many states, if deprived of the provision given in lieu of dower, the widow is entitled to demand her dower; 2 Scribn. Dow. 525; 2 Harris, N. J. 459; if the deprivation be substantial though not total; 32 Me. 132; or if a previous application for dower has been refused; 1 Metc. 66; or the statutory period for demand has passed before she was advised of the failure of her provision; 32 Me. 132; or she had previously elected to take under the will; 20 Wend. 564, affg. 7 Paige 221. In taking a testamentary provision in lieu of dower the widow becomes a purchaser for a valuable consideration; 1 Lead. Cas. in Eq. 511, 570; 2 Scribn. Dow. 527, and cases cited in note; 4 Del. Ch. 289.

In cases not covered by statute a widow may be required to elect upon general equitable principles. In the case last cited, she being also a legatee of one-third of the estate "according to law," was held to be put to her election, not under the statute but under the general doctrine of equity which is thus stated by Bates, Ch.: This doctrine precludes a party taking a benefit by deed or will from asserting any title or claim clearly inconsistent with the provisions of the instrument under which he takes—putting him to his election between the two. In its application to dower it is nowhere better stated than by our court of appeals in 3 Harring. 474. "In regard to dower it seems from all the cases to be an established rule that a court of equity will not compel the widow to make her election, unless it be shown by the express words of the testator, that the devise or bequest was given in lieu or satisfaction of dower; or unless it appears that such was the testator's intention, by clear and manifest implication arising from the fact that the dower is plainly inconsistent with the devise or bequest, and so repugnant to the will as to defeat its provisions. If both claims can stand consistently together, the widow is entitled to both, although the claim under the will may be much greater in value than her dower." 2 S. & L. 451; 3 Ves. Jr. 249; 1 Drew. 411 (17 E. L. & Eq. 352); Dru. & War. 107; 3 Kay & J. 257; 2 John. Ch. 451.

Of Remedies. A choice between two or more means of redress for an injury or the punishment of a crime allowed by law.

The selection of one of several forms of action allowed by law.

The choice of remedies is a matter demanding practical judgment of what will, upon the whole, best secure the end to be attained. Thus, a remedy may be furnished by law or equity, and at law, in a variety of actions resembling each other in some particulars. Actually, however, the choice is greatly narrowed by statutory regulations in modern law, in most cases. See 1 Chit. Pl. 207–214.

A person may often choose whether he will sue in tort or contract. If his goods are taken from him by fraud he may sue for the price in assumpsit, or bring an action of replevin or trover; 1 Paige, N. Y. 192; 99 Mass. 255; 7 Blackf. (Ind.) 501; 29 Ala. 332; 25 Mich. 386; 25 Ark. 100; 43 Cal. 380; 30 Vt. 277; 57 Me. 441. And when two actions are pending at law or in equity between the same persons and for the same subject-matter, the plaintiff is usually compelled to elect which one he will maintain; 32 N. J. Eq. 67; 29 Minn. 252; 35 Ala. 297. But an election is not usually compelled between domestic and foreign suits; 7 Blatchf. (C. C.) 159; 13 Wis. 94; and a foreclosure of a mortgage and a suit on the bond as well as actions to enforce admiralty liens and at the same time recover on the debt are also exceptions; 53 Ill. 171; 5 Cal. 48; 10 Wall. 204.

It may be laid down as a general rule that when a statute prescribes a new remedy the plaintiff has his election either to adopt such remedy or proceed at common law. Such statutory remedy is cumulative, unless the statute expressly or by necessary implication takes away the common-law remedy; 1 S. & R. 32; 5 Johns. 175; 16 *id.* 220; 1 Call 243; 2 Me. 404; 6 H. & J. 383; 4 Halst. 384; 3 Chit. Pr. 130; 15 Hun 556; 74 N. Y. 437; 61 Ind. 290; 47 Ia. 602.

The commencement and trial of an action on a contract is not such an election of remedies as would estop plaintiff from suing on the notes; 39 Mich. 267; 90 *id.* 476.

Where a plaintiff has separate and concurrent remedies against a number of parties, he loses no rights by suing some and afterwards discontinuing his action; 82 Wis. 120. See 141 N. Y. 437. An unsatisfied judgment on a note will not bar an action on notes taken as collateral security; 59 Fed. Rep. 917.

By joining his wife in a suit for her legacy, a husband exercises his election to treat it as joint property; 4 Del. Ch. 117.

After a suit in replevin has been discontinued before judgment without obtaining any benefit, because plaintiff has paid the value of the goods to satisfy his replevin bond, this suit does not constitute such an election of remedy as to stop him from claiming payment of the purchase price out of the assets of the purchaser's estate; 82 Md. 50.

In Criminal Law. The choice or determination by a prosecuting officer, upon which of several charges, or counts, in an indictment he will proceed to trial.

No objection can be raised, either on demurrer or in arrest of judgment, though the defendant or defendants be charged in different counts of an indictment with different offences of the same kind. Indeed, on the face of the record, every count purports to be for a separate offence, and in misdemeanors it is the daily practice to receive evidence of several libels, several assaults, several acts of fraud, and the like, upon the same indictment. In cases of felony, the courts, in the exercise of a sound discretion, are accustomed to quash indictments containing several distinct charges, when it appears, before the defendant has pleaded and the jury are charged, that the inquiry is to include several crimes. When this circumstance is discovered during the progress of the trial, the prosecutor is usually called upon to select one felony, and to confine himself to that, unless the offences, though in law distinct, seem to constitute in fact but parts of one continuous transaction. Thus, if a prisoner is charged with receiving several articles, knowing them to have

been stolen, and it is proved that they were received at separate times, the prosecutor may be put to his election; but if it is possible that all the goods may have been received at one time, he cannot be compelled to abandon any part of his accusation; 1 Mood. 146; 2 Mood. & R. 524. In another case, the defendant was charged in a single count with uttering twenty-two forged receipts, which were severally set out and purported to be signed by different persons, with intent to defraud the king. His counsel contended that the prosecutor ought to elect upon which of these receipts he would proceed, as amidst such a variety it would be almost impossible for the prisoner to conduct his defence. As, however, the indictment alleged that they were all uttered at one and the same time, and the proof corresponded with this allegation, the court refused to interfere; and all the judges subsequently held that a proper discretion had been exercised: 2 Leach 877; 2 East, Pl. Cr. 934. See 11 Cl. & F. 155; Dearsl. 427; 12 Cush. 612; 12 S. & R. 69; 2 H. & J. 426; 12 Wend. 426; 118 Mass. 443; 29 Mich. 61; 75 Mo. 355.

The state need not elect on which count of an indictment it will proceed to trial, where the several counts relate to the same transaction; 109 Mo. 654.

The artificial distinction between felonies and misdemeanors is, in most jurisdictions, obsolete, and in most states several distinct offences to which a similar punishment is attached may be joined. It usually rests with the court whether it will compel a prosecuting officer to elect which count to proceed on; 51 Me. 363; 104 Mass. 552; 89 Ill. 571; 66 Mo. 632; Whart. Crim. Pl. & Pr. § 293. The election should be made before opening the case of the defence; Bish. Cr. Proc. § 462; 65 Ga. 449; 107 Mass. 219.

ELECTION DISTRICT. A subdivision of territory, whether of state, county, or city, the boundaries of which are fixed by law, for convenience in local or general elections. 41 Pa. 403; 2 Pa. L. J. R. 82.

ELECTOR. One who has the right to make choice of public officers; one who has a right to vote. See 10 Minn. 107. See PRESIDENTIAL ELECTORS.

One who exercises the right of election in equity. The term is sometimes used in this sense. Brett, L. Cas. Mod. Eq. 257.

In the German Empire the name was given to those great princes who had the right to elect the emperor or king. The office of elector in some instances became hereditary and was connected with territorial possessions as, elector of Saxony.

ELECTORAL COLLEGE. A name given to the presidential electors, when met to vote for president and vice-president of the United States, by analogy to the college of cardinals, which elects the pope, or the body which formerly selected the German emperor. It is, according to the more general usage, applied to the electors chosen by a single state, but is also used to designate those chosen throughout the United States.

This term has no strict legal or technical meaning, and being unknown to the constitution and laws of the United States, its use is purely colloquial. Accordingly the term is not clearly defined, and it is employed by approved writers in both the senses stated, though more frequently when reference is made to the entire body of electors the plural is employed, as, "the expectations of the public . . . (have) been so completely frustrated as in the practical operation of the system, so far as relates to the independence of the electors in the electoral colleges;" 2 Sto. Const. § 1463; " . . . would be chosen as electors, and would, after mature deliberation in their respective colleges," etc.; 1 Hare, Am. Const. L. 219; "the electoral colleges have sunk so low"; *id.* 221. So in speaking of the electors the phrase "state colleges" is used by Stevens; Sources of the Constitution of the U. S. 153, note. Following this view is a very recent definition:— A name informally given to the electors of a single state when met to vote for president and vice-president of the United States, and sometimes to the whole body of electors. Cent. Dict.

On the other hand, the other use is well sustained by authority, and we find this equally recent definition: The body of electors chosen by the people of the United States to elect their president. Encyc. Dict. This is supported by Webster and Worcester as well as some authorities on constitutional law. "The presidential electors chosen as therein directed, constitute what is commonly called the 'electoral college';" Black, Const. L. 86; and again, "by an electoral college appointed or elected in the several states"; *id.* "In case the electoral college fails to choose a vice-president, the power devolves on the senate to make the selection from the two candidates having the highest number of votes." 1 Calhoun's, Works 175. See PRESIDENTIAL ELECTORS.

ELECTORAL COMMISSION. A commission created by an act of congress of January 29, 1877, to decide certain questions arising out of the presidential election of November, 1876, in which Hayes and Wheeler had been candidates of the republican party and Tilden and Hendricks of the democratic party. The election was very close, and depended on the electoral votes of South Carolina, Florida, and Louisiana. It was feared that there would be much trouble at the final counting of the votes by the president of the senate according to the plan laid down in the Constitution. The republicans had a majority in the senate and the democrats had a majority in the house of representatives. A resolution was adopted by congress for the appointment of a committee of seven members by the speaker to act in conjunction with a similar committee that might be appointed by the senate to prepare a report and plan for the creation of a tribunal to count the electoral votes whose authority no one could question and whose decision all could accept as final. The joint committee thus appointed reported a bill providing for a commission of fifteen members, to be composed of five members from each house appointed *viva voce*, with four associate justices of the supreme court, which latter would select another of the justices of the supreme court, the entire commission to be presided over by the associate justice longest in commission. This body has since been known as the Electoral Commission.

Justices Clifford, Miller, Field, and Strong were named in the act as members, and they chose as the fifth justice Justice Bradley. The other members were Senators Bayard, Edmunds, Frelinghuysen, Morton, and Thurman, and Representatives Abbott, Garfield, Hoar, Hunton, and Payne.

The commission began its sessions February 1, and completed its work March 2, 1877. Various questions came before it in regard to the electoral vote of South Carolina, Florida, and Louisiana, as to which of two state returns was valid, and as to the eligibility of certain of the presidential electors. The most important decision of the commission and the one which has caused most comment and criticism was to the effect that the regular returns from a state must be accepted, and that the commission had no power to go behind these returns; or, as the commission itself expressed it, "that it is not competent under the Constitution and the law as it existed at the date of the passage of said act, to go into evidence *aliunde* the papers opened by the president of the senate in the presence of the two houses, to prove that other persons than those regularly certified to by the governor of the state of Florida in and according to the determination and declaration of their appointment by the Board of State Canvassers of said state prior to the time required for the performance of their duties, had been appointed electors, or by counter-proof to show that they had not, and that all proceedings of the courts or acts of the legislature or of the executive of Florida subsequent to the casting of the votes of the electors on the prescribed day are inadmissible for any such purpose." Curtis, Constitutional History of the United States, vol. 2, 419.

The result of the controversy over the election of 1876 was the passage, after long and earnest consideration, of the Act of Congress of Feb. 3, 1887, to regulate the counting of the electoral votes for president and vice-president. U. S. Rev. St. 1 Supp. 525. See PRESIDENTIAL ELECTORS; PRESIDENT OF THE UNITED STATES.

ELECTRIC LIGHT. Light produced by electricity. It is furnished either by municipalities or by corporations formed for the purpose of manufacturing it for hire.

The Nature of Electric Light Companies. Such companies, although not public corporations in the sense that the term is applied to municipal corporations; Croswell Elec. § 20; and being unable without statutory authority to claim an exemption of property from the ordinary mechanic's lien; 48 Kan. 182; (see FIXTURES), are held to exercise a public use and are of a public character similar to telegraph and telephone companies; 150 Mass. 592; 153 *id.* 129; 160 Pa. 511; 42 Fed. Rep. 723; 130 Ind. 149; but when poles are set for this purpose by a company for furnishing light commercially as well as for lighting streets, the abutting owner of land on a street used by such companies may demand compensation for such use, as it is held to create an additional servitude; 13 Pa. Co. Ct. Rep. 369; 51 N. Y. Sup. Ct. 280; 32 Hun 96; *contra;* when controlled by the municipality; 65 How. Pr. 407. But this subject can scarcely be considered as finally and definitely settled on principle; see Crosw. Elect. § 126. In New York they are held to be manufacturing companies with reference to taxation; 129 N. Y. 543 (reversing 15 N. Y. 718); *contra;* 145 Pa. 105, 131; but by paying a state tax they are exempt from local taxation; 8 Pa. Co. Ct. Rep. 626.

Implied Powers of the Municipality. The right of a municipality to light the streets is generally conceded as a part of the police power and while usually enumerated in the charters, its omission would not deprive the city of such right, whether by electricity or other means; 130 Ind. 149; 33 S. C. 1; 53 Kan, 477; 37 Fed. Rep. 832; 146 U. S. 258; and the right of the municipality, not only to own, operate, and control an electric light plant, but to raise money for such purpose by taxation has been upheld by the courts; 130 Ind. 149; 33 S. C. 1; 53 Kan. 477; 29 Am. & Eng. Corp. Cas. 243; and to issue bonds for that purpose; 121 Ind. 212; 49 Hun 550; but the town must follow strictly the provisions of the statute authorizing such issue, and keep within the limits of such statute or the issue is void; 111 Mo. 365. The contrary view of such implied powers was taken in 153 Mass. 129, where the court decided that the existing statute giving towns the right to maintain street lamps and to raise money by taxation for such purpose did not carry with it the right to maintain the more costly electric light plant, and that to authorize such a purchase an express statute must be passed, thus settling a question raised but not decided in 150 Mass. 592. An act was accordingly passed in that state granting this power to the municipality and limiting and defining the conditions under which it should be exercised; act 1891, c. 370; 1893, c. 454; 1892, c. 259. The states of Connecticut, Iowa, Michigan, Mississippi, Nebraska, Ohio, and Pennsylvania have also conferred this right by statute.

Commercial Lighting by the Municipality. Where the right of maintaining an electric light plant has been conferred upon towns by statute, it has been usually held to apply as well to private property as to public streets, lanes, highways, etc; 42 Fed. Rep. 723; 130 Ind. 149; but where public lighting by electricity has been only implied from existing statutes the implication will not extend to a commercial use by the municipality; 33 S. C. 1; 121 Ind. 212. This right has been created by statute in Massachusetts, Michigan, Nebraska, New York, Pennsylvania, and Tennessee, and the courts have declared the constitutionality of these acts; 150 Mass. 592; 160 Pa. 511.

As to Rights and Privileges. A municipality may grant a franchise to an electric light company to use its streets without making such right an exclusive one; 28 N. E. Rep. (Ind.) 94; 48 N. W. Rep. (Ia.) 1005; but it must have legislative authority to grant such franchise; 5 Ohio Cir. Ct. Rep. 340; 33 Fed. Rep. 659; and in Iowa it must be submitted to a vote of qualified electors; 48 N. W. Rep. (Ia.) 1005; 57

id. 689. It may confer the right on one company to use poles erected by another company; 95 Mich. 551; and may fix the compensation to the latter for their use; 10 Ohio Cir. Ct. Rep. 531; but unless the limit of such use is fixed and the manner of stringing the wires prescribed such a permission is unreasonable and void; 53 N. W. Rep. (Mich.) 452; and a company will be enjoined from use of another's poles without permission from the city, the court, or the other company; 23 Wkly. Law. Bul. 137. In Louisiana a grant to an electric light company included the right to remove poles erected under a preceding contract with a gas company; 40 La. Ann. 474. A contract with a gas company to light the streets with gas was held not to deprive the city of the power to contract with another company to furnish electric lights for the same purpose; 30 W. Va. 435; 28 Fed. Rep. 529. The right of the city to grant franchises for electric lighting carries with it the right to purchase or operate a plant even if there be an existing organized corporation and the city violates no contract by so doing; 42 Fed. Rep. 723. As a rule, however, the statutes provide for the purchase of an existing plant by the municipality and for arbitration in case of disagreement as to the price. In Massachusetts an existing company is not compelled to sell its property to the town; 161 Mass. 432.

Conflicting Electrical Companies. Where a telegraph and an electric light company had each obtained a franchise for the use of the same street, it was held that the company which first obtained the franchise was entitled to priority, and the other company must so adjust its wires as to prevent danger from juxtaposition or interference with the business of the first company; 46 Mo. App. 120; and that where the street was already occupied by the telegraph company the electric light company would be enjoined from placing its wires so near as to interfere with the transmission of messages; *id.* The distance at which a wire will affect the wires of the telegraph company need not be stated in the bill; 76 Fed. Rep. 178; but where the electric light company had already strung its wires the telegraph company could not compel their removal; 46 Mo. App. 120. In the case of a telephone and an electric light company, both having valid franchises, the telephone company was refused an injunction against the latter company on the ground that they had first occupied the streets, but on streets not occupied by either company, the electric light company was enjoined from using the same side of the street for lights and from stringing wires within such a distance as to injure the service of the telephone company; 27 Neb. 284; 12 Ont. 571; 27 S. W. Rep. (Tex.) 902. If two electric light companies have the use of the same street, the first to occupy them has the prior right, and the second company will be restrained from stringing its wires so near as to interfere with the business of the first company or cause danger to the public; 65 Vt. 337; 94 Ala. 372. In the latter case the decision was based rather on the ground that such juxtaposition of the wires was dangerous to public safety, than on any business consideration.

As to the liability for negligence as applied to electrical companies regarding both the employes of such companies and the general public, see POLES; WIRES.

See generally EMINENT DOMAIN; HIGHWAYS; IMPAIRING OBLIGATION OF CONTRACTS; INTERSTATE COMMERCE; MASTER & SERVANT; MEASURE OF DAMAGES; NEGLIGENCE; PARALLEL LINES; RAILWAYS; RATES; STREETS; TELEGRAPH; TELEPHONE.

ELECTRICITY. A natural force utilzed mainly for the production of heat, light, and power.

A powerful physical agent which makes its existence manifest by attractions and repulsions, by producing light and heat, commotions, and chemical decompositions, and other phenomena. Encyc. Dict.

The great increase in the use of this force and its application to the purposes of every-day life not only for power to be used for transportation and manufacturing, but also for lighting and heating, have naturally brought it constantly before the courts. As a result there is a large and constantly increasing body of law on the subject which will be found under the several titles which deal directly with electrical appliances. As to trolleys see RAILROAD; and with respect to telegraph, telephone, electric light, poles, and wires, see those titles.

ELECTROCUTION. A method of punishment of death inflicted by causing to pass through the body of the convicted person a current of electricity of sufficient force and continuance to cause death. See 1 Witth. & Beck. Med. Jur. 663.

It is in use in New York under the act of 1888, and in Ohio was adopted by Act of April 9, 1896, to go into effect on July 1 of that year.

Punishment by death is not cruel within the meaning of the Constitution of the United States, which prohibits the infliction of unusual and cruel punishments; and while the infliction of the death penalty by a new agency is unusual, the adoption of such an agency which is not a certainly prolonged or extreme procedure is not violative of this constitutional provision; 119 N. Y. 569.

This act of New York is not repugant to the Constitution of the United States when applied to a convict who committed the crime for which he was convicted after the act took effect, 136 U. S. 436. See 119 *id.* 584; CRIMES.

ELEEMOSYNARIUS (Lat.). An almoner. There was formerly a lord almoner to the kings of England, whose duties are described in Fleta, lib. 2, cap. 23. A chief officer who received the eleemosynary rents and gifts, and in due method distributed them to pious and charitable uses. Cowel.

ELEEMOSYNARY CORPORATIONS. Such private corporations as are instituted for purposes of charity, their object being the distribution of the bounty of the founder of them to such persons as he directed. Of this kind are hospitals for the relief of the impotent, indigent, sick, and deaf or dumb; Ang. & A. Corp. § 39; 1 Kyd, Corp. 26; 4 Conn. 272; 3 Bland 407; 1 Ld. Raym. 5; 2 Term 346. The nature of eleemosynary corporations is discussed in the Dartmouth College case. They are in no sense ecclesiastical corporations as understood in the classification of Blackstone; as Marshall, C. J., said that if the act created a civil institution to be employed in the administration of the government, it would be a public corporation, but it was in fact a private eleemosynary institution created for purposes unconnected with government, —and none the less so because for public education; 4 Wheat. 681. See, also, 8 *id.* 464; 1 Bla. Com. 471.

A recent writer says: "In the English law corporations are divided into *ecclesiastical* and *lay;* and lay corporations are again divided into eleemosynary and civil. It is doubtful how far clear conceptions of the law are promoted by keeping in mind these divisions. They seem, for us at least, to have an historical, rather than a practical, value. In a country where the church is totally disassociated from the state, there is little room for a division of corporations into ecclesiastical and lay; and while charitable corporations have many features which distinguish them from other private corporations, as will hereafter appear, it is very seldom that the word 'civil' is used in our American books of reports in order to distinguish corporations other than charitable."

ELEGIT (Lat. *eligere*, to choose). A writ of execution directed to the sheriff, commanding him to make delivery of a moiety of the party's land and all his goods, beasts of the plough only excepted.

The sheriff, on the receipt of the writ, holds an inquest to ascertain the value of the lands and goods he has seized, and then they are delivered to the plaintiff, who retains them until the whole debt and damages have been paid and satisfied. During that term he is called tenant by elegit; Co. Litt. 289. See Pow. Mort.; Wats. Sheriff 206; 1 C. B. N. S. 568.

The name was given because the plaintiff has his choice to accept either this writ or a *fi. fa.*

By statute, in England, the sheriff is now to deliver the whole estate instead of the half. See 3 Bla. Com. 418, n. The writ is still in use in the United States, to some extent, and with somewhat different modifications in the various states adopting it; 4 Kent 431, 436; 10 Gratt. 580; 1 Hill, Abr. 555; 3 Ala. 560.

ELEMENTS. A term popularly applied to fire, air, earth and water, anciently supposed to be the four simple bodies of which the world was composed. Encyc. Dict. Often applied in a particular sense to wind and water, as "the fury of the elements." Cent. Dict. It has been said that "damages by the elements," and "damages by the act of God," are convertible expressions; 35 Cal. 416.

ELEVATED RAILWAYS. See RAILWAYS.

ELEVATOR. A building containing one or more mechanical elevators, especially a warehouse for the storage of grain; a hoisting apparatus; a lift; a car or cage for lifting and lowering passengers or freight in a hoistway. Cent. Dict.

A passenger elevator is not a device dangerous, to life, *per se*; 90 Wis. 497.

A landlord who runs an elevator for the use of his tenants and their visitors thereby becomes a common carrier; 41 Minn. 207; and is charged with the highest degree of care which human foresight can suggest, both as to the machinery and the conduct of his servants; 54 Fed. Rep. 637; 80 Cal. 595. A carrier of passengers by elevator is not an insurer, but is required to exercise the highest degree of care; 62 Fed. Rep. 139; 114 N. Y. 312; 159 Mass. 26. In constructing an elevator the utmost care must be exercised; 41 Minn. 209; competent workmen must be employed and suitable material used; 20 Col. 292. In case of a casualty, it is not enough to show that the elevator is one of a kind in ordinary use; 50 Mo. 390; 136 Ill. 170. But the absence of safety appliances is said not to be conclusive evidence of negligence; 142 Mass. 83. An elevator is not supposed to be a place of danger, to be approached with great caution; but when the door is opened a passenger may enter it without stopping to make a special examination; 114 N. Y. 318. One who habitually rides on a freight elevator, in contravention of a posted notice, does so at his own risk; 156 Mass. 511. See as to injury to passengers, 25 L. R. A. 33, as to freight *id.* 34.

The business of elevating grain is a business charged with a public interest, and those who carry it on occupy a relation to the community analogous to that of a common carrier, and may be controlled by public legislation for the common good; Munn. *v.* Illinois, 94 U. S. 113; 143 U. S. 517.

For liability of owners of buildings for accidents at elevator shafts, see 9 Lawy. Rep. Ann. 640, n. See, generally, Webb, Elevators; L. R. 12 Q. B. Div. 30.

ELIGIBILITY. The constitution of the United States provides that no person holding any office under the United States shall be a member of either house. The acceptance by a member of congress of a commission as a volunteer in the army vacates his seat; Cl. & H. 122, 395, 637. But by a decision of the second comptroller of the treasury, of Feb. 24, 1894, it was held that there was no incompatibility of office between that of a member of the house of representatives and the military office held by an officer of the United States army on the retired list, and that he was entitled to pay for both offices. A centennial commissioner holds an office of trust or profit under the United States, and is thereby ineligible as a presidential elector; 16 Am. L. Reg. N. S. 15; S. C. 11 R. I. 638. A state cannot by statute provide that certain state offi-

cers are ineligible to a federal office; 1 Bartl. 167, 619.

Duelling has been made in some states a disqualification for office; see DUELLING. In Kentucky, it was held that the doing of any of the prohibited acts was a disqualification for office without a previous conviction; 14 Am. L. Reg. N. S. 22; but this opinion has been questioned in a note to that case. See McCrary, Elect. 189.

An alien cannot, even in the absence of any provision forbidding it, *hold* an office; 14 Wis. 497; 54 N. W. Rep. (Ia.) 525. See Cooley, Const. Lim. 748, n.; but he may be *elected* to an office; 28 Wis. 96; 50 *id.* 103. And members elect of congress, who were ineligible on account of participation in the rebellion, have been admitted to a seat, their disqualification having been subsequently removed; McCrary, Elect. 193.

As to the effect of the ineligibility of the candidate having the highest number of votes, see ELECTION.

ELIGIBLE. This term relates to the capacity of holding as well as that of being elected to, an office; 15 Ind. 327. See 15 Cal. 117; 3 Nev. 566; 14 Wis. 497.

ELISORS. **In Practice.** Two persons appointed by the court to return a jury, when the sheriff and the coroner have been challenged as incompetent; in this case the elisors return the writ of venire directed to them, with a panel of the jurors' names, and their return is final, no challenge being allowed to their array. 3 Bla. Com. 355; 1 Cow. 32; 3 *id.* 296. See CHALLENGE.

ELL. A measure of length.

In old English the word signifies *arm*, which sense it still retains in the word *elbow*. Nature has no standard of measure. The cubit, the ell, the span, palm, hand, finger (being taken from the individual who uses them), are variable measures. So of the foot, pace, mile, or *mille passuum*. See Report on Weights and Measures, by the secretary of state of the United States, Feb. 22, 1821.

ELOGIUM (Lat.). **In Civil Law.** A will or testament.

ELOIGNE. **In Practice.** (Fr. *éloigner*, to remove to a distance; to remove afar off.) A return to a writ of replevin, when the chattels have been removed out of the way of the sheriff.

ELONGATA. **In Practice.** The return made by the sheriff to a writ of replevin, when the goods have been removed to places unknown to him. See, for the form of this return, Wats. Sheriff, Appx. c. 18, s. 3, p. 454; 3 Bla. Com. 148.

On this return the plaintiff is entitled to a capias in withernam. See WITHERNAM; Wats. Sheriff 300, 301. The word *éloigné* is sometimes used as synonymous with *elongata*.

ELONGATUS. The sheriff's return to a writ *de homine replegiando*, *q. v.*

ELOPEMENT. The departure of a married woman from her husband and dwelling with an adulterer. Cowel; Blount; Tomlin.

To constitute elopement the wife must not only leave the husband, but go beyond his actual control. For if she abandon the husband, and go and live in adultery in a house belonging to him, it is said not to be an elopement; 3 N. H. 42; 1 Rolle, Abr. 680.

While the wife resides with her husband and cohabits with him, however exceptionable her conduct may be, yet he is bound to provide her with necessaries and to pay for them; but when she elopes, the husband is no longer liable for her support, and is not bound to pay debts of her contracting, when the separation is notorious; and whoever gives her credit does so, under these circumstances, at his peril; 3 Pick. 289; 6 Term 603; 11 Johns. 281; Bull. N. P. 135. It has been said that the word has no legal sense; 2 W. Bla. 1080; but it is frequently used, as is here shown, with a precisely defined meaning. An action may be maintained by the husband, against a third person, for enticing away his wife, where nothing in the nature of criminal conversation is alleged. See Schoul. Hus. & W. 64; ENTICE.

ELSEWHERE. In another place.

Where one devises all his land in A, B, and C, three distinct towns, and *elsewhere*, and had lands of much greater value than those in A, B, and C, in another county, the lands in the other county were decreed to pass by the word "elsewhere"; and by Lord Chancellor King, assisted by Raymond, C. J., and other judges, the word "elsewhere" was adjudged to be the same as if the testator had said he devised all his lands in the three towns particularly mentioned, or in any other place whatever. 3 P. Wms. 56. See, also, Chanc. Prec. 202; 1 Vern. 4, n.; Cowp. 360, 808; 5 Bro. P. C. 496; 1 East 456.

As to the effect of the word "elsewhere" in the case of lands not purchased at the time of making the will, see 3 Atk. 254; 2 Ventr. 351. As to the construction of the words "or elsewhere" in shipping articles, see 2 Gall. 477.

ELUVIONES. Spring-tides.

EMANCIPATION. An act by which a person who was once in the power or under the control of another is rendered free.

This is of importance mainly in relation to the emancipation of minors from the parental control. See 3 Term 355; 8 *id.* 479; 11 Vt. 258, 477; 2 Ind. App. 264; 37 W. Va. 242. See Cooper, Justin. 441, 480; 2 Dall. 57, 58; Ferrière, *Dict. de Jurisp. Emancipation;* MANUMISSION.

An infant husband is entitled to his own wages, so far as necessary for the support of himself and family, even though he married without his father's consent; 157 Mass. 73. Where children contract for, collect, and use their own earnings, emancipation is to be inferred; 29 Wkly. Law Bul. 389; and so when they become of age, no other facts being shown; 28 Atl. Rep. (Vt.) 633.

EMANCIPATION PROCLAMATION. See BONDAGE.

EMBARGO. A proclamation or order of state, usually issued in time of war or threatened hostilities, prohibiting the de-

parture of ships or goods from some or all the ports of such state, until further order. 2 Wheat. 148.

A *civil* embargo is the act of a state detaining the ships of its own citizens in port, which amounts to an interdiction of commerce, accompanied, as it usually is, by a closing of its ports to foreign vessels. Such an embargo is enumerated under the head of reprisals. A *hostile* embargo is a seizure, as before mentioned, of foreign vessels and property which may be in the ports of the wronged state. This may also be a prelude to war. Snow, Int. Law 78.

The detention of ships by an embargo is such an injury to the owner as to entitle him to recover on a policy of insurance against "arrests or detainments." And whether the embargo be legally or illegally laid, the injury to the owner is the same, and the insurer is equally liable for the loss occasioned by it. Marsh. Ins. b. 1, c. 12, s. 5; 1 Kent 60; 1 Bell, Dict. 517.

An embargo detaining a vessel at the port of departure, or in the course of the voyage, does not of itself work a dissolution of a charter-party, or of the contract with the seamen. It is only a temporary restraint imposed by authority for legitimate political purposes, which suspends for a time the performance of such contracts, and leaves the rights of parties untouched; 1 Bell, Dict. 517; 8 Term 259; 5 Johns. 308; 7 Mass. 325; 3 B. & P. 405; 4 East 546; Twiss' Law of Nations, part ii. s. 12.

EMBASSAGE or EMBASSY. The message or commission given by a sovereign or state to a minister called an "ambassador," empowered to treat or communicate with another sovereign or state; also the establishment of an embassador. Black, L. Dict.

EMBEZZLEMENT. In Criminal Law. The fraudulent appropriation to one's own use of the money or goods entrusted to one's care by another. 40 N. Y. Super. Ct. 41.

The fraudulent appropriation of property by a person to whom it has been intrusted or to whose hands it has lawfully come; it is distinguished from larceny in the fact that the original taking of the property was lawful or with the consent of the owner, while in larceny the felonious attempt must have existed at the time of the taking. 160 U. S. 268.

The principles of the common law not being found adequate to protect general owners against the fraudulent conversion of property by persons standing in certain fiduciary relations to those who were the subject of their peculations, certain statutes have been enacted, as well in England as in this country, creating new criminal offences and annexing to them their proper punishments. The general object of these statutes doubtless was to define and embrace, as criminal offences punishable by law, certain cases where, although the moral guilt was quite as great as in larceny, yet the technical objection arising from the fact of a possession lawfully acquired by the party screened him from punishment. 2 Metc. Mass. 345; 9 *id.* 142. See 34 La. Ann. 1153.

In order to constitute embezzlement, it must distinctly appear that the party acted with felonious intent, and made an intentionally wrong disposal, indicating a design to cheat and deceive the owner. A mere failure to pay over money intrusted to such party as agent for investment is not sufficient, if this intent is not plainly apparent; 62 Mich. 276. The money appropriated need not have been intrusted to the accused by the owner; it is sufficient if it were intrusted to the employer of the accused and appropriated by the latter; 27 S. W. Rep. (Ky.) 811; and that the money was taken without any attempt at concealment is no defence to the charge of embezzlement; 38 Pac. Rep. (Cal.) 42.

Embezzlement being a statutory offence, reference must be had to the statutes of the jurisdiction for the classes of persons and property affected by them. It has been held that there may be embezzlement of bank bills; 63 Mass. 284; municipal or city bonds; 91 N. Y. 5; 66 Wis. 343; grain; 38 Ia. 321; an animal; 72 Ala. 272; commercial securities; 24 Ia, 102; [1891] 1 Q. B. 112; and of a mortgage; 5 Allen 502; and by public officers, placed in a fiduciary relation as such; 10 Gray 173; 10 Mich. 54. See 11 Allen 439; 31 Cal. 108; 15 Wend. 581; 86 Pa. 416; 22 Minn. 67; 6 How. Pr. 59; 81 Ia. 587; 111 Mo. 413. Where one withdraws from the money drawer of a cash register money that he had deposited a moment before without registering the sale of the article for which it had been received, he is guilty of embezzlement; 155 Mass. 523. Where an attorney collects money for his client, he acts as agent and attorney, and in either case, if he appropriate the money collected to his own use with the intention of depriving the owner of the same, he is guilty of embezzlement; 74 Mich. 478. In a prosecution for the embezzlement of money held by defendant as bailee, it is immaterial that it was deposited in a bank for a time, so that the money actually converted was not the identical bills delivered to the bailee; 160 Mass. 319.

A taking is requisite to constitute a larceny, and embezzlement is in substance and essentially a larceny, aggravated rather than palliated by the violation of a trust or contract, instead of being, like larceny, a trespass. The administration of the common law has been not a little embarrassed in discriminating between the two offences. But they are so far distinct in their character that, under an indictment charging merely a larceny, evidence of embezzlement is not sufficient to authorize a conviction; and in cases of embezzlement the proper mode is to allege sufficient matter in the indictment to apprise the defendant that the charge is for embezzlement. And it is often no less difficult to distinguish this crime from a mere breach of trust. Although the statutes declare that a party shall be deemed to have committed the crime of simple lar-

ceny, yet it is a larceny of a peculiar character, and must be set forth in its distinctive character; 8 Metc. 247; 9 *id.* 138; 9 Cush. 284; 82 Ill. 425; 26 Ohio St. 265. See 81 Ill. 599; 13 Ark. 168; Bish. Cr. L. § 328.

When money is embezzled, the owner has a right to settle as for an implied contract, and such settlement is no bar to a criminal prosecution; 66 N. Y. 526; 111 Mo. 473.

A partner is not guilty of embezzlement in appropriating the funds of the firm to his own use; 53 N. W. Rep. (Ia.) 1086. See 3 Tex. App. 522; 12 Cox, C. C. 96.

When an embezzlement of a part of the cargo takes place on board of a ship, either from the fault, fraud, connivance, or negligence of any of the crew, they are bound to contribute to the reparation of the loss, in proportion to their wages. So too the embezzlement of property saved is a bar to salvage. When the embezzlement is fixed on any individual, he is solely responsible; when it is made by the crew, or some of the crew, but the particular offender is unknown, and, from the circumstances of the case, strong presumptions of guilt apply to the whole crew, all must contribute. The presumption of innocence is always in favor of the crew; and the guilt of the parties must be established beyond all reasonable doubt before they can be required to contribute; 1 Mas. 104; 4 B. & P. 347; 3 Johns. 17; Dane, Abr. Index; Wesk. Ins. 194; 3 Kent 151; See Pars. Sh. & Adm.

Stringent provisions are made by several acts of congress against the embezzlement of arms, munitions, and habiliments of war, property stored in public storehouses, letters, precious metals, and coins from the mint.

EMBLEMENTS (Fr. *embler*, or *emblaver*, to sow with corn. The profits of the land sown). The right of a tenant to take and carry away, after his tenancy has ended, such annual products of the land as have resulted from his own care and labor. The term is also applied to the crops themselves. Co. Litt. 55 *b*; 4 H. & J. 139; 3 B. & Ald. 118; 64 Pa. 134.

It is a privilege allowed to tenants for life, at will, or from year to year, because of the uncertainty of their estates and to encourage husbandry. If, however, the tenancy is for years, and its duration depends upon no contingency, a tenant who sows a crop must know whether his term will continue long enough for him to reap it, and is not permitted to re-enter and cut it after his term has ended; 4 Bingh. 202; 10 Johns. 361; 5 Halst. 128; 48 Mo. App. 430. Whenever a tenancy, other than at sufferance, is from the first of uncertain duration and is unexpectedly terminated without fault of the tenant, he is entitled to emblements; 86 Ala. 508.

This privilege extends to cases where a lease has been unexpectedly terminated by *the act of God or the law;* that is, by some unforeseen event which happens without the tenant's agency; as, if a lease is made to husband and wife so long as they continue in that relation, and they are afterwards divorced by a legal sentence, the husband will be entitled to emblements; Oland's case, 5 Co. 116 *b*; or where the lessee of a tenant for life has growing crops unharvested at the time of the latter's death, he is entitled to them; 56 Conn. 374. A similar result will follow if the landlord, having the power, terminates the tenancy by notice to quit; Cro. Eliz. 460; but not where, under the terms of the lease, the landlord re-enters, and takes possession because the tenant fails to pay rent; 69 Hun 588. See other cases of uncertain duration, 9 Johns. 112; 8 Viner, Abr. 364; 3 Pa. 496. But it is otherwise if the tenancy is determined by an act of the tenant which works a forfeiture; as if, being a woman, she has a lease for a term of years provided she remains so long single, and she terminates it by marrying; for this is her own act; 2 B. & Ald. 470; 1 Price 53; 8 Wend. 584. A landlord who re-enters for a forfeiture takes the emblements; 7 Bingh. 154. Where a tenant wrongfully retains possession of land after his term has expired, crops planted by him so long as they remain unsevered, belong to the landlord; 45 Mo. App. 505. See LANDLORD AND TENANT.

All such crops as in the ordinary course of things return the labor and expense bestowed upon them within the current year become the subject of emblements,—consisting of grain, peas, beans, hemp, flax, and annual roots, such as parsnips, carrots, turnips, and potatoes, as well as the artificial grasses, which are usually renewed like other crops. But such things as are of spontaneous growth, as roots and trees not annual, and the fruit on such trees, although ripe, and grass growing, even if ready to cut, or a second crop of clover, although the first crop taken before the end of the term did not repay the expense of cultivation, do not fall within the description of emblements; Cro. Car. 515; Cro. Eliz. 463; 10 Johns. 361; Co. Litt. 55 *b*; Tayl. Landl. & T. § 534; Woodf. Landl. & T. 750.

But although a tenant for years may not be entitled to emblements *as such*, yet by the custom of the country, in particular districts, he may be allowed to enter and reap a crop which he has sown, after his lease has expired; Dougl. 201; 16 East 71; 7 Bingh. 465. The parties to a lease may, of course, regulate all such matters by an express stipulation; but in the absence of such stipulation it is to be understood that every demise is open to explanation by the general usage of the country where the land lies, in respect to all matters about which the lease is silent; and every person is supposed to be cognizant of this custom and to contract in reference to it; 2 Pet. 138; 5 Binn. 285. The rights of tenants, therefore, with regard to the *away-going crop*, will differ in different sections of the country; thus, in Pennsylvania and New Jersey a tenant is held to be entitled to the grain sown in the autumn before the expiration of his lease, and coming to maturity in the following summer; Mitch. R. P. 24; 54 Pa. 142; 2 South. 460; 13 Conn. 59; 24 N. J. L. 89; while in Delaware the same custom is said to prevail with respect to wheat, but not as to oats; 1 Harr. Del.

522; and trespass will lie against one who interferes with the land to the injury of the outgoing tenant; 6 Houst. 584.

Of a similar nature would be the tenant's right to remove the manure made upon the farm during the last year of the tenancy. Good husbandry requires that it should either be used by the tenant on the farm, or left by him for the use of his successor; and such is the general rule on the subject in England as well as in this country; 15 Wend. 169; 2 Hill, N. Y. 142; 2 N. Chipm. 115; 1 Pick. 371. A different rule has been laid down in North Carolina; 2 Ired. 326; but it is clearly at variance with the whole current of American authorities upon this point. See MANURE. Straw, however, is incidental to the crop to which it belongs, and may be removed in all cases where the crop may be; 22 Barb. 568; 1 W. & S. 509.

There are sometimes, also, mutual privileges, in the nature of emblements, which are founded on the common usage of the neighborhood where there is no express agreement to the contrary, applicable to both outgoing and incoming tenants. Thus, the outgoing tenant may by custom be entitled to the privilege of retaining possession of the land on which his away-going crops are sown, with the use of the barns and stables for housing and carrying them away; while the incoming tenant has the privilege of entering during the continuance of the old tenancy for the purposes of ploughing and manuring the land. But, independently of any custom, every tenant who is entitled to emblements has a right of ingress, egress, and regress to cut and carry them away, and the same privilege will belong to his vendee,—neither of them, however, having any exclusive right of possession. See 46 Barb. 278; Tayl. Landl. & T. § 543; Woodf. Landl. & T. 754. LANDLORD AND TENANT; WAY-GOING CROP.

EMBRACEOR. In Criminal Law. He who, when a matter is on trial between party and party, comes to the bar with one of the parties, and, having received some reward so to do, speaks in the case or privily labors the jury, or stands there to survey or overlook them, thereby to put them in fear and doubt of the matter. But persons learned in the law may speak in a cause for their clients. Co. Litt. 369; *Termes de la Ley*.

EMBRACERY. In Criminal Law. An attempt to corrupt or influence a jury, or any way incline them to be more favorable to one side than to the other, by money, promises, threats, or persuasions, whether the juror on whom such attempt is made give any verdict or not, or whether the verdict be true or false. Hawk. Pl. Cr. 256; Bacon, Abr. *Juries*, M 3; Co. Litt. 157 *b*, 369 *a*; Noy 102; 11 Mod. 111, 118; 5 Cow. 503; 2 Bish. Cr. L. § 389; 2 Nev. 268; 5 Day 260. 8 Vt. 57; 20 *id.* 9.

Such an attempt is a misdemeanor at common law; Cl. Cr. L. 326.

EMENDA (Lat.). Amends. That which is given in reparation or satisfaction for a trespass committed; or, among the Saxons, a compensation for a crime. Spelman, Gloss.

EMENDALS. In English Law. This ancient word is said to be used in the accounts of the inner temple, where so much in emendals at the foot of an account signifies so much in bank, in stock, for the supply of emergencies. Cunningham, Law Dict. But Spelman says it is what is contributed for the reparation of losses. Cowel.

EMENDATIO PANIS ET CEREVISIÆ. The power of supervising and correcting the weights and measures of bread and ale. Cowel.

EMIGRANT. One who quits his country for any lawful reason, with a design to settle elsewhere, and who takes his family and property, if he has any, with him. Vattel, b. 1, c. 19, § 224. See 2 Cra. 302.

EMIGRATION. The act of removing from one place to another.

It is sometimes used in the same sense as expatriation; but there is some difference in the signification. Expatriation is the act of abandoning one's country; while emigration is, perhaps not strictly, applied to the act of removing from one part of the country to another. See 2 Kent 34, 44; EXPATRIATION.

EMINENCE. A title of honor given to cardinals.

EMINENT DOMAIN. The superior right of property subsisting in a sovereignty, by which private property may in certain cases be taken or its use controlled for the public benefit, without regard to the wishes of the owner.

The power to take private property for public use. 6 How. 536.

The right of every government to appropriate otherwise than by taxation and its police authority (which are distinct powers), private property for public use. Dill. Mun. Corp. § 584.

Different theories are advanced as to the precise nature of the power, and it has been defined to be the right retained by the people or government over the estate of individuals, to reclaim the same for public use,—a kind of reserved right or estate remaining in the sovereign as paramount to the individual title. This conception of the right was at one time very generally accepted. The result of this view is to consider the right, theoretically at least, as so much of the original proprietorship retained by the sovereign power in granting lands or franchises to individuals or corporations, wherever the common-law theory of original proprietorship prevails. An argument by analogy in support of this view is derived from the able examination and explanation of the origin of the *jus publicum* in 7 Cush. 90. See, also, remarks of Daniell, J.; 6 How. 533. Perhaps no better statement of this doctrine is to be found than this: "The highest and most exact idea of property remaining in the government, or in the aggregate body of the people in their sovereign capacity, giving a right to resume the possession of the property in the manner directed by the constitution and the laws of the state whenever the public good requires it." 3 Paige, Ch. 73; or, "The true theory and principle of the matter is, that the legislature resume dominion over the property, and having resumed it, instead of using it by their agents, to effect the intended public good, and to avoid entanglement in the common business of life,

they revest it in other individuals or corporations to be used by them in such manner as to effect, directly or indirectly, or incidentally, as the case may be, the public good intended." 34 Conn. 78; see also 3 Yerg. 41; 8 Barb. 486; 113 N. Y. 275; 23 Mo. 597.

But this theory of resumption of original proprietorship is disapproved by the most authoritative writers, and with reason; the weight of authority and of argument are both against it. In this country the right is exercised by two governments, each sovereign, operating on the same property; the federal power can, upon no hypothesis, be based upon original grant in the older states, nor perhaps the state power, in the new states; a new sovereignty by acquiring territorial rights succeeds to this right over property, of which the original grant was from the prior one; property may be appropriated a second time after the power has been already exercised and, upon the theory under consideration, necessarily exhausted; personal property is subject to the right, although the doctrine of reserved right cannot apply to it, while the reversion of the state will supply no argument, as it applies equally to personal property in which the state never had any title; and any paramount or reserved right could be granted, but this right never can; 118 Ill. 427; 36 Conn. 196. All these considerations are inconsistent with the theory suggested and seem to leave no alternative but to recognize the right as an attribute of sovereignty and in no sense an interest or estate. See Lewis, Em. Dom. § 3; Rand. Em. Dom. § 3; 32 Ia. 66; 2 Dev. & B. L. 451; 18 Wend. 9, 57; 2 Redf. Railw. 229.

This right is distinguished from public domain, which is property owned absolutely by the state in the same manner as an individual holds his property; 37 Am. Jur. 121; 2 Kent, Com. 339; 3 Yerg. 339; 6 How. 510; termed by Cooley "the ordinary domain of the state"; Const. Lim. 642.

The right of eminent domain is not to be confounded with cases in which there exists a sovereign right to take or destroy private property without making compensation. The familiar case of taxation is readily distinguished. An owner is not entitled to compensation for damage or loss to property taken or destroyed during war. As to the distinction between the war power and eminent domain see 13 Am. L. Reg. 265, 337, 401; Mills, Em. Dom. § 3. So property may be taken under a controlling necessity, or to prevent the spread of a fire; 12 Co. 63; 23 N. J. L. 605; 50 Tex. 614; 7 Metc. 462; 13 Minn. 38; 18 Wend. 126; or, under the police power, to abate a nuisance (*q. v.*); 7 Cush. 53 (in which Shaw, C. J., draws the distinction between the police power and eminent domain); 126 Mass. 438; or by restraining the owner of land from making a noxious use of it; 105 Ill. 388; or by removing sand, etc., from beaches; 11 Metc. 55; compelling railroads to erect cattle guards; 27 Vt. 140; or holding them responsible for damages by fire (*q.v.*) from locomotives; 41 Ia. 297; compelling riparian owners to keep up a levee; 2 Mart. La. N. S. 455; or changing the course of a river; 47 Cal. 536; or as a forfeiture for violation of law; 3 R. I. 64; 3 Mich. 330; 26 Pa. 287; 12 La. Ann. 432.

History and nature of the power. The phrase "eminent domain" appears to have originated with Grotius, who carefully describes its nature; Lewis, Em. Dom. § 3, n.; Mills, Em. Dom. § 5; 1 Thayer, Cas. Const. L. 945. The power is a universal one and as old as political society, and the American constitutions do not change its scope or nature but simply embody it, as described by Grotius, in positive, fundamental law.

The language of Grotius is: "We have elsewhere said, that the property of subjects is under the eminent domain of the state; so that the state, or he who acts for it, may use, and even alienate and destroy such property; not only in case of extreme necessity, in which even private persons have a right over the property of others; but for ends of public utility, to which ends those who founded civil society must be supposed to have intended that private ends should give way. But it is to be added, that when this is done, the state is bound to make good the loss to those who lose their property; and to this public purpose, among others, he who has suffered the loss must, if need be, contribute." Grotius, *Bel. et Pac.* lib. iii. c. 20. In the last clause quoted there seems to be an expression thus early of the doctrine which commonly forms a part of later legislation in the exercise of the right of eminent domain of the assessment of benefits on the person whose property is taken.

The term used by Grotius has been objected to by other writers, as, for example Bynkershoek, who prefers the terms *imperium eminens* rather than *dominium eminens*, considering the former as more accurately expressing the idea of *supreme* power. At the same time that he advocates the use of a terminology to give more emphatic expression to the sovereign nature and character of the power, this writer discusses the question whether it may be exercised only for necessity as he conceives Puffendorf to urge, or also on the ground of convenience or, to use the exact phrase of Grotius, utility. Bynkershoek considers either ground sufficient, but he also lays down the principle of requiring compensation not merely for a taking, but for "every loss which private persons bear for the common necessity or utility," thus anticipating the doctrine not recognized by writers of his time, but accepted by modern constitution makers, under the name of consequential damages for injury to, as well the direct loss occasioned by, the taking private property. *Quest. Jur. Pub.* lib. ii. c. 15. Puffendorf also criticises the term employed by Grotius. He divides the term control (*potestas*) into *dominium* as used in respect to what is one's own, and *imperium*, with respect to what belongs to others. Accordingly he would consider that *imperium eminens* is more accurate than *dominium eminens*: *De Jure Naturæ et Gentium*, lib. i. c. l. s. 19. So Heinneccius says: "We confess that this use of the word is not quite apt, for the conception of *dominium* and that of *imperium* are different things; it is the latter and not the former which belongs to rulers," but he adds, that as there is no doubt about the absolute right, it is useless to condemn the word when once it has been accepted; *Elem. Jur. Nat. et Gent.* lib. ii. c. 8, s. 168.

All these writers agree that the power is exercised as an attribute of sovereignty, and in this conclusion there is a general concurrence. Vattel says: "In political society everything must give way to the common good; and if even the person of the citizens is subject to this rule, their property cannot be excepted. The state cannot live, or continue to administer public affairs in the most advantageous manner, if it have not the power, on occasion, to dispose of every kind of property under its control. It should be presumed that when the nation takes possession of a country, property in specific things is given up to individuals only upon this reservation." So it was said by the U. S. Supreme Court: "The power to take private property for public use, generally termed the right of eminent domain, belongs to every independent government. It is an incident of sovereignty, and as said in Boom Co. *v.* Patterson, 98 U. S., requires no constitutional recognition;" Field, J., 109 U. S. 513, 518.

Blackstone rests the doctrine upon necessity, and considers the recognized right to compensation as evidence of the great regard of the law for private property; while the good of the individual must yield to that of the community, the legislature alone may interpose to compel the individual to acquiesce, but such interposition is not arbitrary but only upon full indemnification and equivalent for the injury thereby sustained. The nature of the transaction he states thus: "All that the legislature does, is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power which the legislature indulges with caution, and which nothing but the legislature can perform." 1 Sharsw. Bla. Com. 139, n. 19.

This statement by Blackstone of English law is to be borne in mind hereafter in considering the nature and origin of the right to compensation. Here we have the right defined with the same limitation which, as will be seen, is sometimes claimed to rest solely on express provisions of written constitutions. And the force of this statement is strengthened not weakened, by the observation of Buller, J., that there were many cases in which an injury is suffered by individuals for which there is no right of action, as in a case of the destruction of private property in time of war for the public defence; *id.*; 4 Term 794; 3 Wils. 461; 6 Taunt. 29.

Notwithstanding this recognition of the nature of the power the subject of eminent domain as understood in the United States is practically eliminated from English law and the title itself is usually not to be found in digests or text books of that country. "That there is no eminent domain in English jurisprudence," says a recent writer on the subject, "is because the power is included, and the obligation to compensate lost, in the absolutism of parliament." "The only technical term approximating to eminent domain, is compulsory power, as used in acts enabling municipal and other corporations to take property for their use. The multiplication of such acts led to the enactment of several general laws, notably the Lands Clauses Consolidation Act (*q. v.*), which is a complete code. This act or one of the others of a similar class, as the Railway Clauses Consolidation Act, is incorporated by reference in the various special acts;" Rand. Em. Dom. § 7.

It follows of necessity that English decisions do not apply to the vast number of constitutional questions constantly arising in this country, though the adherence of English legislation to the same great principle of compensation necessarily results in producing a body of law in England covering most of the questions which are adjudicated in our own country respecting the construction and application of statutes under which the power is exercised.

The right of compensation. Though not included in the definitions of the power as usually given, the necessity for compensation is recognized by the most authoritative writers as an incident to the right, an original element of its existence, and not a superimposed limitation.

Accordingly eminent domain is said with more precision to be the right of the nation or the state, or of those to whom the power has been lawfully delegated, to condemn private property to public use, and to appropriate the ownership and possession of such property for such use, upon paying to the owner a due compensation, to be ascertained according to law; Black, Const. L. 350.

Nearly if not all of the American constitutions provide for compensation. Professor Thayer states that "now (1895) only three constitutions, New Hampshire, North Carolina, and Virginia are without a clause expressly requiring compensation." The provisions of the several constitutions are given in Randolph, Em. Dom. 401 to 416, and Lewis, Em. Dom. §§ 14 to 52 (the latter including the prior as well as the last state constitutions). With respect to compensation, Kent says: "This principle, in American constitutional jurisprudence, is founded in natural equity, and is laid down by jurists as an acknowledged principle of universal law;" 2 Com. 339.

It would seem to be the most satisfactory conclusion both upon reason and authority that neither the right of the state to take nor the right of the individual to compensation required a constitutional assertion. The right to take private property for public use does not depend on constitutional provisions, but is an attribute of sovereignty; 2 Harr. N. J. 129; 2 Dev. & Bat. 451; it (the right) exists, and the only limitation upon its exercise is that imposed by the state or federal constitution; 5 Del. Ch. 524.

So also the *right to compensation* is an incident to the exercise of the power, inseparably connected with it; 17 N. J. L. 129; "this is an affirmance of a great doctrine established by the common law for the protection of private property;" 2 Story, Const. § 1790; "the obligation attaches to the exercise of the power, though it is not provided for by the state constitution, or that of the United States had not enjoined it;" Bald. C. C. 220. "If by the assertion that this right existed at common law independent of the declaration of rights, is meant that compensation in such case is required by a plain dictate of natural justice, it must be conceded. The bill of rights declares a great principle; the particular law prescribes a practical rule by which the remedy for the violation of right is to be sought and afforded;" Shaw, C. J., in 12 Cush. 475. In New Hampshire, although the constitution did not contain an express provision requiring compensation, "yet it has been construed by the courts, in view of the spirit and tenor of the whole instrument, as prohibiting such taking without compensation; and it is understood to be the settled law of the state, that the legislature cannot constitutionally authorize such taking without compensation;" 51 N. H. 504. It is a condition precedent to its exercise under a statute that it make reasonable provision for compensation to the owner of the property taken; 159 U. S. 380; 2 Johns. Ch. 162.

There are *dicta* which countenance the opinion that compensation is not of the essence of eminent domain, that the usual constitutional clause is restrictive, not declaratory, so that, were it omitted, the state could properly take property without paying for it; Rand. Em. Dom. § 226, citing 98 U. S. 403; 109 *id.* 513; 21 Conn. 313; 5 Del. Ch. 524; 17 Wend. 649; 54 N. H. 590, 647. In one of these cases the language used is "the provision found in the federal and state constitutions for just compensation for property taken is no part of the power itself, but merely a limitation upon the use of it, a condition upon which it may be exercised;" 109 U. S. 513.

One of the leading text writers on the subject takes this view; Lewis, Em. Dom. § 10; and argues it with great earnestness, treating it as the same question discussed by Sedgwick and Cooley and referred to *supra* under the title Constitutional (*q. v.*), whether there are limitations of legislative power other than those contained in the constitutions, federal and state. The real question involved in the relation of compensation to eminent domain is a different one. It is not whether the sovereign powers of government exercised by American state legislatures are subject to undefined limitations not embodied in the written constitution, but what is the sovereign power which we term eminent domain, as recognized and exercised by governments long before written constitutions were known. It is true that some courts in discussing this subject have fallen into the same confusion of ideas, but the distinction none the less exists and should be borne in mind. Is it the right to take private property arbitrarily, or only to take it on making compensation? Lewis thinks "the question has lost most of its practical interest from the fact that all states

except one (North Carolina), now have an express limitation in their organic law touching the exercise of this power." It is submitted, however, that the precise definition and true limitation of so autocratic a governmental power can never become a matter of indifference. So long as one state constitution is silent on the subject of compensation it remains a practical question in American constitutional law and the existence of a reserved power to amend or abolish any existing constitution, coupled with the prevalent tendency to attack and impair the right to private property, must necessarily keep it such, independently of the theoretical interest in maintaining correct definitions of the inherent rights of sovereignty.

Suggestions in the line of the cases cited by Randolph and the views expressed by Lewis, led to practical results in but few cases:—In South Carolina land was taken for roads without compensation; 2 Bay 38; 3 Hill 100; but in New York, taking wild land without compensation was held unconstitutional; 19 Barb. 118. In New Jersey and Pennsylvania, the subject rested on a statutory rather than a constitutional basis, because the grants by the proprietors included an extra allowance for roads; 42 N. J. L. 619; 30 Pa. 362; and this was held compensation; 100 Pa. 362. See 132 *id.* 636. Under the New Jersey constitution, land might be taken for highways without compensation until otherwise directed by the legislature. In Louisiana land on the Mississippi River can be taken without compensation for the construction of a public levee under the old French law, and this applies to the land of a citizen of another state, provided he receive the same measure of right as citizens of Louisiana in regard to their property similarly situated; 160 U. S. 452.

In Thayer's Cases on Constitutional Law the editor discusses this subject in a very interesting note and reaches the somewhat metaphysical conclusion that the right to compensation is not a component part of the right to take, though it arises at the same time and the latter cannot exist without it, the two being compared to shadow and substance.

He argues that the right of the state springs from the necessity of government, while the obligation to reimburse stands upon the natural rights of the individual. "These two, therefore, have not the same origin; they do not come, for instance, from any implied contract between the state and the individual, that the former shall have the property, if it will make compensation; the right is no mere right of pre-emption, and it has no condition of compensation annexed to it, either precedent or subsequent. But there is a right to take, and attached to it, as an incident, an obligation to make compensation; this latter, morally speaking, follows the other, indeed, like a shadow, but it is yet distinct from it, and flows from another source." From this he argues that for the taking the citizen cannot complain; if recompense is not made, the duty of the sovereign is violated and the individual "has an eternal claim against the state, which can never be blotted out except only by satisfaction; but this claim is for compensation, and not for his former property," and, "in the absence of constitutional provisions," the loss "must be regarded as *damnum absque injuria*." 1 Cas. Const. L. 953, note.

The distinction between this theory and the doctrine that the right to compensation is an inherent attribute rather than a subsequent limitation of the original right would seem to be rather ingenious than practical. The citations in the same note from the civilians show clearly that, in their view, compensation was essential, and even in the states whose organic law was, at the time of the decision, either silent or contained merely a general declaration as to private rights the necessity of compensation has been recognized; Rand. Em. Dom. § 227, citing 3 N. H. 524; 35 *id.* 134; 1 Md. Ch. 248; Baldw. C. C. 205; 17 N. J. L. 129; 70 N. C. 550; 111 *id.* 278; 13 Ark. 198; see also Monongahela Navigation Case, 148 U. S. 312; 12 Cush. 475. The mistaken idea that the fifth amendment of the constitution of the United States, applied to the states, seems to have contributed to this opinion in some cases; 2 Johns. Ch. 162; 1 N. J. Eq. 694. "The true doctrine is, in the writer's opinion," says the author last cited, "that which requires the payment of compensation whether it be expressly enjoined or not. The modern concept of a constitutional state as realized in the United States has no room for spoliation of the individual." The same view is supported by Mills, Em. Dom. § 1.

Whatever view may be taken of the general doctrine of the law on this subject the necessity of compensation is firmly imbedded in American constitutional law.

It may be considered settled that the exercise of the right is not justifiable, where the statute fails to provide compensation; and the courts will, in general, substantially declare such an act unconstitutional; 2 Kent 339, n.; *dicta* in 4 Term 794; 1 Rice 383; 3 Leigh 337; 44 N. H. 143; 47 Me. 345; 18 Tex. 585; 21 Ohio St. 667; 26 Ill. 436; 89 Ga. 205; 44 La. Ann. 173; 116 Mo. 114; 148 U. S. 312; 133 *id.* 553. See *contra*, 3 Hill, S. C. 100; 54 Fed. Rep. 559. This compensation must be in money; 2 Mass. 125; 2 Dall. 304; 44 Cal. 51; 66 Ill. 329; 39 N. J. L. 665.

In constitutional construction the words "just," "ample," "full," "adequate," "due," etc., prefixed to the word "compensation," has been said to lend no appreciable additional weight; Rand. Em. Dom. § 223; but much stress has often been put upon it by courts. The word "just" in the fifth amendment excludes the taking into account as an element in the compensation any supposed benefit that the owner may receive in common with all from the public uses to which his private property is appropriated and leaves it to stand as a declaration that no private property shall be appropriated to public uses unless a full and exact equivalent for it be returned to the owner; 148 U. S. 326. The word "just" is not used as an antithesis of unjust, but "evidently to intensify the meaning of the word compensation;" 8 Nev. 165; it means recompense "all circumstances considered;" 5 Blackf. 384, "to save the owner from suffering in his property or estate . . . as far as compensation in money can go;" 60 Me. 290; "making the owner good by an equivalent in money;" 27 Wis. 478.

The federal power. All lands held by private owners everywhere within the geographical limits of the United States are subject to the authority of the general government to take them for such objects as are germane to the execution of the powers granted to it; 135 U. S. 641.

The right of eminent domain is one of the powers of the federal government essential to its independent existence and perpetuity. Among the purposes for which it is exercised are the acquisition of lands for forts, armories, arsenals, navy yards, light-houses, custom-houses, post-offices, court-houses, and other public uses. The right may be exercised within the states without application to them for permission to exercise it; 91 U. S. 367; the fact that the power has not been exercised adversely does not disprove its existence, nor does the fact that in some instances the states have condemned lands for the use of the general government; *id.* It is a right belonging to a sovereignty to take private property for its own public uses but not for those of another; hence the power of the United States must be complete in itself, it can neither be enlarged nor diminished, nor can

the manner of its exercise be regulated by the state whose consent is not a condition precedent to its enjoyment; *id.*

This right exists in the District of Columbia, the territories, and lands within the United States acquired through cession; 4 Cra. C. C. 75; 147 U. S. 282.

The power of eminent domain in the general government as exercised for local purposes in the District of Columbia is the same as that exercised by a state within its own territory; 147 U. S. 282; there and in the territories it exists in all cases in which a similar power could be exercised by the states; 101 U. S. 129. It is among the powers derived by the territorial governments immediately from the United States; 2 Mich. 427; 26 Pac. Rep. (Ariz.) 376; 1 Chand. Wis. 71.

Within the states the United States has the right of eminent domain for federal purposes; 91 U. S. 367; 135 *id.* 641. This power has been exercised to condemn land for military posts; 7 How. 185; fortification; 18 Cal. 229; navigation work; 59 Fed. Rep. 9; light-house and coast survey purposes; 10 Cal. 229; 54 N. H. 590; 160 U. S. 499; the construction of interstate railroads; 127 U. S. 1; water supply; 14 Md. 444; postoffice; 91 U. S. 367; 106 Mass. 356; a national cemetery at Gettysburg; 160 U. S. 668. The weight of authority is in favor of the exercise of the right by the United States directly when property is required for federal purposes and not through the right of eminent domain of the state; 14 Md. 444; 96 N. Y. 227; though the latter method is upheld in some cases; 1 Barb. 24; 103 Mass. 356; 54 N. H. 590; but it is held that the United States may delegate to a tribunal created under the laws of the state the power to fix and determine the amount of compensation to be paid by the federal government for private property taken by it in the exercise of the right of eminent domain; 109 U. S. 513. The United States circuit court has jurisdiction to entertain proceedings instituted by the United States to appropriate land for a postoffice; 91 U. S. 367. In this case there was no act of congress relating to the subject except the appropriation of money, and a direction to the secretary of the treasury to purchase a site, and the jurisdiction was objected to. The supreme court held that the proceedings were a suit at law and cognizable under the general provisions of the judiciary act. As to the federal right, see 14 Am. & Eng. R. R. Cas. 30; 15 Am. L. Reg. 193; 91 U. S. 367. The state cannot condemn for the United States and bind the latter as to compensation; 23 Mich. 471, in which the whole subject of the exercise of this right by state and federal governments was considered by Cooley, J. Proceedings may be in the United States courts, or in state courts, in the name of the United States, and state practice should be followed; 96 N. Y. 227; 48 Wis. 385; 109 U. S. 513; or may by act of congress be made to follow some state statute; 82 Pa. 382.

Public uses of the federal government have been held to be public uses of the state; 14 Md. 444.

Proceedings under state laws for condemnation of lands, involving the ascertainment by judicial proceedings of the value of property to be paid as compensation, may be removed to the United States court; 124 U. S. 197; 75 Fed. Rep. 34; if they take the form of a proceeding before the courts; 98 U. S. 403; the preliminary proceedings are in the nature of an inquest and not a "suit," but when transferred into the state court by appeal it becomes one; *id.*; 115 *id.* 1, 18. As to removal of such proceedings, see 25 Am. L. Reg. 183.

An interesting question referred to but not decided by the supreme court is whether a state can exercise this right as to lands of the United States not held for actual public uses, without the consent of congress or of an officer having power of disposal of public lands. It has been decided in the affirmative; 6 Porter, Ala. 472; and it was also held that an abandoned military reservation is part of the public lands and that the state may use them to construct public roads or bridges, by the right of eminent domain; 6 McLean 517; but a municipal corporation has no right to open streets through property of the United States, adjacent to the city, although the ground had been laid out in lots and streets by the government; 7 How. 185. In the latter case it was said that such power would exist as to land "purchased by the United States as a mere proprietor, and not reserved or appropriated to any special purpose;" but in a later case this and other like expressions were characterized as *dicta*, and it was said that the view could hardly be reconciled with special railroad and general legislation of congress, and that "when that question shall be brought into judgment here, it will require and receive the careful consideration of the court;" 117 U. S. 151.

Exercise of the power through agents. The right of eminent domain is also an attribute or part of the sovereignty of the states, and is by them exercised for a great and constantly increasing variety of purposes, some of which are for governmental uses either of the state at large or of local municipal bodies, or by private persons or corporations authorized to exercise some function of such public character, technically known as a public use. When this is conferred upon private persons or corporations the right is termed by some writers the delegated power of eminent domain; 4 Thomp. Corp. ch. cxxii.; and such person or corporation is the agent of the state for its exercise. Strictly speaking it is not accurate to say that the state delegates a right of sovereignty, of which it cannot divest itself, hence it is more exact to speak of it as exercising the power through an agent. While corporations are usually selected for such agency, it may be and sometimes is conferred upon *individuals*; 5 Ohio 485; 50 N. H. 591; 4 Wend. 667; 79 Cal. 159; and where incorporation and a franchise were granted to an individual "and associates"

it was held that he need not associate any one with him; 8 Me. 365. It has also been held that an individual as purchaser of a railroad and franchises at the foreclosure sale acquired the right to condemn lands; 93 U. S. 217; 39 La. Ann. 417. In one case it is said that a statute neither did nor *could* confer this right "upon private persons, but only corporations organized for public purposes can be clothed with such privileges;" 80 Pa. 59; but this expression, so far as it concerns the power of the legislature, was *obiter;* and a case often cited with this only decides that under a general act, then under construction, the power could not be exercised by individuals, because there was no provision of law for its exercise by individuals; 10 Ohio St. 372.

The exercise of the power by such agencies is governed in the main by the same principles and limitations as when it is directly exerted by the federal or state government, and the exceptions to this rule readily disclose themselves in the consideration of the natural divisions of the subject. When its exercise by a private corporation is authorized it has been termed not a *franchise* but a means to the enjoyment of corporate franchises; 10 Ohio St. 372; but the contrary view was expressed by Bradley, J., in 127 U. S. 1, and it is remarked by a recent writer that "a power conferred upon certain corporations, which is not possessed by the citizens generally, and which is in derogation of their rights, so nearly resembles a franchise as to justify its treatment" under that title; 4 Thomp. Corp. § 5587. The use of the term franchise is not defined, by those who most use it, with sufficient precision to be conclusive against either view. It is as much a franchise, if one at all, if exercised by an individual as a corporation, though the writer quoted seems to overlook the possibility of this. It is, however, a grant of power or privilege from the sovereign to the citizen or subject, to do what would but for the grant be unlawful, and it undoubtedly does come within the usually accepted definition of the word franchise (*q. v.*). As is true with respect to franchises generally, the grant of the power is *never presumed* unless the intent to part with it is clearly expressed; *id.* § 5598; Lewis, Em. Dom. § 249; 93 Pa. 150; 74 Ga. 570; 42 Mo. 225; 41 N. J. Eq. 43; and its exercise by the state may determine a preceding contract made by the state without impairing the obligation of such contract, the right itself being always reserved by implication, if not expressly; 84 Va. 271.

It is no objection to a grant of the power to a corporation that the latter is seeking to effect its own *private gain;* 4 Thomp. Corp. § 5589; for that is said to be merely compensation for the risk assumed for the benefit of the public; 17 N. H. 47. When unrestrained by constitutional provision, the discretion of the legislature in selecting agents through whom the power is to be exercised is absolute. In a state whose constitution prohibits its exercise by *foreign corporations* they cannot of course act unless domesticated in the state; 52 Fed. Rep. 627; but otherwise they may do so; 39 N. Y. 171; 143 N. Y. 411; 33 Pa. 175; 145 Mass. 450; 57 Ia. 560; 81 Mo. 126; 69 Hun 615; but a constitutional incapacity cannot be avoided by acting through a domestic corporation; 27 Neb. 699 (see 22 Neb. 628; 59 Ia. 563); though by consolidating with a domestic corporation it may exercise the power; 47 Mich. 456; 36 Minn. 85; as thereby the consolidated company becomes a corporation of the state; 33 Neb. 171.

How the question of public use is determined. It is well settled that the power exists only in cases where the public exigency demands its exercise. See remarks of Woodbury, J., and cases cited by him in 6 How. 545. But the practice of all the states and of the federal government, since this decision, in condemning land for purposes of public convenience but not necessity, has been so frequent that the legislative control over the necessity and the particular location is almost universally conceded. Mills, Em. Dom. § 11. In a proceeding to condemn land, the term "necessary" does not mean that it is indispensable or imperative, but only that it is convenient and useful; and if an improvement is useful, and a convenience and benefit to the public sufficient to warrant the expense in making it, then it is necessary; 91 Mich. 149; but it is no ground for a right to take land that its resources could be utilized at a much less expense than the land already owned; 64 Cal. 123. In 4 Thomp. Corp. § 5593, in concluding a discussion of the various theories as to what uses are public uses, the author says: "But it is a sound conclusion that the use must be a public use in the sense that it is open to such members of the public as may choose to use it upon the performance of reasonable or proper conditions; or in the sense of satisfying a great public want or exigency. On the other hand, where the public use is not compulsory, but is optional with the private corporation seeking the condemnation, it is not a public use." In U. S. *v.* Gettysburg Electric Railway Co., 160 U. S. 668, it was said: "The constitution provides that private property shall not be taken for public uses without just compensation. These words are a limitation, the same in effect as 'You shall not exercise this power except for public use.'"

The legislature cannot so determine that the use is public as to make its determination conclusive on the courts, and the existence of a public use in any class of cases is a question for the courts; Mills, Em. Dom. § 10; 44 Vt. 648; 59 Wis. 364; 21 W. Va. 534; 42 Ohio St. 202; 37 Md. 537; 51 Cal. 269; 34 Ala. 311.

The Missouri constitution provides, as do those of Colorado, Mississippi, and Washington, that it shall be a judicial question whether the use contemplated is public, and that question will be determined without the aid of a jury; 91 Mo. 54.

The presumption is in favor of the public

character of a use declared so by the legislature ; 79 Pa. 257 ; 21 W. Va. 534 ; and unless it is clear that it is not possible for the use to be public, the courts cannot interfere ; Mills, Em. Dom. § 10.

In an early case it was said that in general the question whether a particular structure, as a bridge, or a lock, canal, or road, is for the public use, is a question for the legislature, and it may be presumed to have been decided by them ; 12 Cush. 475 ; citing 4 Pick. 403 ; but in a later case when this position was broadly urged, it was held to be obviously untenable, and that, where the power was exercised, it necessarily involved an inquiry into the rightful authority of the legislature under the organic law, and that the legislature had no power to determine finally upon the extent of its authority over private rights, 16 Gray 417. In this case what is probably the true doctrine was stated, that it is the duty of the courts to make all reasonable presumptions in favor of the validity of the legislative act. But this is simply the application to *this* particular subject of the general presumption of the constitutionality of legislative acts.

This right of the courts to determine the question of public use was maintained in 103 N. Y. 375 ; but if the court determine the matter in question to be a public use, their power is exhausted and the extent to which property shall be taken for it is wholly in the legislative discretion ; 147 U. S. 282. Whether the necessity exists for taking the property is a legislative question ; 37 N. E. Rep. (Mass.) 437.

The grant of the right is a determination on the part of the legislature that the object is necessary ; 31 N. J. Eq. 475 ; and of this it is the judge ; 80 Ky. 259 ; 98 N. Y. 109 ; 25 Mo. 540 ; and parties cannot be heard on the question of necessity ; 127 Mass. 408. If it is a public use there is no restraint on legislative discretion and the judicial function is gone ; Mills, Em. Dom. § 11. If the use is certainly public courts will not interfere ; only when there is an attempt to evade the law and procure condemnation for private uses will courts declare it void ; Mills, Em. Dom. § 11 ; 17 W. Va. 812. The fact that a railroad has located its line across certain land, is *prima facie* proof that it is necessary for it to take that land for the use of its road ; 130 Ill. 151. Whether the land is reasonably required is a question of fact to be determined by the court or jury, and the burden of proof is on the plaintiff ; 92 Cal. 528.

It has been held that when under the constitution a federal question arises, the supreme court will determine the law without reference to state decisions ; 16 How. 432. See 16 Wall. 678 ; 53 N. Y. 128. But in determining what is a taking of property, the federal courts will accept the definition of the word property by the state court, where it is clearly settled ; 13 Wall. 166 ; 147 U. S. 248 ; 94 *id.* 324 ; 10 Wall. 497 ; even following reversals by the latter ; 2 Black 599 ; 6 Pet. 291 ; 16 Wall. 678.

What is a public use. Property taken for public use need not be taken by the public as a body into its direct possession, but for public usefulness, utility, or advantage, or purposes productive of general benefit or great advantage to the community ; 33 Conn. 532. It is not necessary that the entire community, or any considerable portion of it, should participate in an improvement to constitute a public use ; 16 Gray 417 ; 58 Mo. 175 ; it may be limited to the inhabitants of a small locality ; but the benefit must be in common, not to particular persons or estates ; 18 Cal. 229. See Mills, Em. Dom. § 12. If a considerable number will be benefited the use is public ; 75 Me. 91 ; 97 Ind. 79 ; as a school available for use by a portion of the community taxed to pay for the property taken ; 33 Vt. 271.

The legislature determines the number of people to be benefited to make the use public ; 2 Stew. & P. 199 ; but the incidental benefit of additional facilities for business, etc., will not make use public ; 97 N. Y. 42.

It has been judicially decided that the following are public uses :—an almshouse ; 7 N. Y. 314 ; a public bath ; 101 N. Y. 132 ; a schoolhouse ; 117 Mass. 384 ; 33 Vt. 271 ; 7 R. I. 545 ; 48 Mo. 243 ; 68 Pa. 170 ; a market ; 28 Hun 515 ; 49 Mich. 249 ; telegraph and telephone lines ; 103 Ill. 401 ; 53 N. J. L. 341 ; 43 *id.* 381 ; 136 Mass. 75 ; 53 Ala. 211 ; 92 Cal. 528 ; water-works for a town ; 4 Gray 500 ; 126 Mass. 416 ; 67 Col. 659 ; water supply for a town ; 27 Ala. 104 ; 139 Mass. 183 ; 55 N. J. L. 235 ; the improvement of the navigation of a river ; 12 Cush. 475 ; and the creation of a wholly artificial system of navigation by canals ; *id.* ; 3 Cra. C. C. 599 ; 20 Johns. 733 ; 41 Ind. 364 ; 39 N. Y. 171 ; the drainage of marshes ; 2 Pet. 245 ; 119 Mass. 583 ; 98 Ind. 587 ; sewers ; 11 Gray 345 ; wharves ; 83 Ky. 628 ; 110 N. Y. 569 ; 135 *id.* 253 ; ferries ; 8 Me. 365 ; 1 N. & McC. 387 ; irrigation ; 22 Ore. 389 ; 69 Cal. 255 ; 164 U. S. 112, 160 ; turnpikes ; 35 N. H. 134 ; 27 Conn. 641 ; bridges ; 5 Ohio 485 ; 91 Pa. 216 ; 3 Ga. 31 ; 36 N. H. 404 ; Wright, Ohio 364 ; the criterion being, whether the public may use by right, or only by permission, and not to whom the tolls are paid ; 1 Duv. Ky. 372 ; cemeteries ; 46 Vt. 218 ; 103 Mass. 106 ; 20 Conn. 466 ; even if the price of the lots therein differ ; 53 *id.* 551 ; but not if used exclusively for members of a private corporation ; 66 N. Y. 569 ; a restaurant at a summer resort ; 91 N. Y. 552 ; parks ; 127 Mass. 408 ; 45 N. Y. 234 ; 99 *id.* 569 ; 75 Me. 91 ; 55 Wis. 328 ; 61 Ill. 115 ; 117 U. S. 379 ; 147 *id.* 282 ; even if paid for by a county, though beneficial only or mainly to a neighboring city ; 58 Mo. 175 ; the erection of a memorial hall or monumental statues, arches, and the like, the publication of town histories, decorations on public buildings, parks designed to provide for fresh air or recreation, educate the public taste, or inspire patriotism ; 153 Mass. 255. A highway is a public use ; 11 Ind. 420 ; 103 Mass. 120 ; but it must connect with another highway ; 108 N. Y. 375 ; 64 Wis. 538 ; 84 Pa. 90 ; though at one end only ; 56 Wis. 429 ; 39 Conn. 231 ; 24 N. Y. 559. It may, however, terminate on private property ; 39 N. J. L. 226 ; 87 Ill. 189 ; 43 Conn. 437 ; or at a river ; 53 N. H. 530 ; 125 Ind. 562 ; or at a church ; 63 Pa. 471. So the improvement of a harbor is a public use, (but not the extension of harbor lines to prevent the placing of buildings on either side of a bridge) ; 60 Conn. 278 ; and

the reclamation of flat land ; 1 Thayer, Cas. Const. L. 1025, n. citing cases. Gas works ; 63 Barb. 437 ; 123 Pa. 374 ; 2 R. I. 15 ; a state military encampment ; 54 N. J. L. 268 ; a public urinal ; 130 Mass. 170, are public uses.

Other instrumentalities of commerce held to be public uses are, pipe lines for the transportation of oil or natural gas ; 5 W. Va. 332 ; dams for booms used in logging ; 3 Dill. 465 ; 56 Me. 443 ; 57 N. H. 110 ; see also 98 U. S. 403 ; 28 Minn. 534 ; 65 Pa. 242 ; a flume for the transportation of lumber ; 16 Ore. 67. As to the condemnation of land to facilitate mining operations there is a conflict of decisions. In some of the states the courts have refused to permit it ; 51 Cal. 269 ; 73 *id.* 482 ; 84 Pa. 90 ; 18 Fed. Rep. 753 ; while in others they have considered it justifiable on the ground of public utility ; 59 Ga. 419 ; 15 Nev. 147 ; and the owner of a mine may have land condemned for a railroad for the transportation of the products of his mine to the nearest thoroughfare by rail or water, provided such a railway shall be free to all who wish to use it ; 32 Pa. 169 ; 47 N. J. L. 518 ; 37 Md. 537 ; 41 Fed. Rep. 294 ; and this latter provision will be implied from the statute authorizing the condemnation ; 63 Ia. 28 ; but it has been held that a mine-owner cannot condemn land solely for the transportation of his own products ; 56 Pa. 413 ; 70 *id.* 210 ; 118 Ill. 427 ; 40 Ohio St. 504 ; or to take water to the mines ; 63 Cal. 73.

The right to condemn land for mill sites has been frequently granted ; 8 Blackf. 266 ; 3 Yerg. 41 ; 12 Pick. 467 ; 12 Cush. 475 ; 12 Metc. 182 ; 44 Vt. 648 ; 1 N. J. Eq. 694 ; 33 Conn. 532. In the last case it was urged that it was against public policy to allow such great agencies as streams capable of propelling machinery to go to waste, and that to utilize such power, even for the erection of private mills, promotes the wealth of the state and is of incidental benefit to the people. But although courts have recognized this right to a certain extent, 15 Wall. 500, it has been with reluctance and it will not now probably be sustained ; Mills, Em. Dom. § 15 ; it has been doubted ; 12 Wis. 213 ; and by some denied ; 40 Me. 317 ; 3 Barb. 42 ; 34 Ala. 311 ; 35 Mich. 333, in which, after reviewing the authorities, Judge Cooley holds the question not one of necessity but of comparative cost. A general statute, delegating to individuals the power to condemn land and locate mills, was held unconstitutional ; 42 Ga. 500.

A railroad is a public use ; 135 U. S. 641 ; 20 Fla. 579 ; 9 N. Y. 588 ; 2 Harring. 514 ; 3 Paige 45 ; 2 Mich. 427 ; 43 N. Y. 137 ; 143 *id.* 67 ; even where used for freight only ; 47 N. J. L. 43 ; so also are all appurtenances essential to the reasonable, convenient, and proper construction, maintenance, and operation of the road, such as yard-room ; 46 N. Y. 137 ; 34 Vt. 484 ; and terminals ; 66 Me. 26 ; turnouts, engine-houses, depots, shops, turntables ; 17 Ill. 123 ; 4 Ohio St. 308 ; and repair shops, stock-yards ; 139 U. S. 128 ; 49 Mo. 165 ; paint-shop, lumber, and timber sheds ; 18 Ill. 324 ; wharves ; 77 N. Y. 248 ; a place of deposit for waste earth ; 8 Phila. 145 ; but not shops for manufacturing new rolling stock ; 46 N. Y. 546 ; 6 How. 507 ; 34 Vt. 484 ; or tenement houses for employes ; *id.* ; 43 N. Y. 137 ; 23 N. J. L. 510 ; as to an ordinary warehouse, it was doubted ; 4 Coldw. 419 ; 59 Pa. 23 ; but a building for handling freight was not a mere warehouse ; 77 N. Y. 248 ; so land for a track to an elevator could be taken ; 47 N. Y. 150 ; but not for a railroad constructed solely to convey passengers to see the Niagara River and whirlpool for revenue to a private person ; 108 N. Y. 375. See Lewis, Em. Dom. § 170 ; Rand. Em. Dom. § 45.

It is not a public use to provide for fencing a large tract of land subject to floods which carried off the fences ; 12 Bush 312 ; or to acquire swamp land and build docks, warehouses, factories, etc. ; 96 N. Y. 42 ; or to settle private controversies concerning title by transferring the land of one to another ; 2 Dall. 304 ; 1 S. & R. 54. The latter cases arose under legislation to settle titles and adjust controversies in Pennsylvania under the Connecticut grant.

It is settled that the legislature cannot authorize the taking of property for a private use, but the decisions conflict as to the case of private ways, or roads laid out under statutes existing in many states. By many courts they are held unconstitutional as being a private use ; 4 Hill 140 ; 25 Ia. 540 ; 82 *id.* 358 ; 43 Ind. 455 ; 27 Mo. 373 ; 40 Ill. 175 ; but in others such roads are held to be a public use, and the word private is construed as a word of classification and not technical or describing the use ; 32 Cal. 241 ; 83 *id.* 507 ; 4 Harring. 580 ; 11 Vt. 600 ; 34 Ala. 311 ; 4 Ohio St. 494 ; 108 Mass. 202 ; 84 Pa. 90 ; 77 *id.* 39 ; 22 N. J. L. 356.

The latest case in the United States Supreme Court thus expresses the general principle :—" The taking by a state of the private property of one person without the owner's consent for the private use of another is not due process of law and is a violation of the Fourteenth Article of Amendment of the Constitution of the United States." An act authorizing a board of transportation to require a railroad corporation to grant to private persons a location on the right of way of a railroad for the purpose of erecting a third elevator is invalid ; 164 U. S. 403. The prohibition is against taking without due process of law. So at the same term the court say :—" There is no specific prohibition of the Federal Constitution which acts upon the states with regard to their taking private property for any but a public use ; " 164 U. S. 112.

What is a public use, for which private property may be taken by due process of law, depends upon the particular facts and circumstances connected with the particular subject-matter ; *id.* 112. See notes on this subject in which the cases are collected : 91 Am. Dec. 585 ; 3 Am. St. Rep. 503.

What may be taken. Every kind of property may be taken under this power. It " is attribute of sovereignty, and whatever exists in any form, whether tangible

or intangible, may be subjected to the exercise of its power, and may be seized and appropriated to public uses when necessity demands it." Lewis, Em. Dom. § 262; 87 Ill. 317, 324; 39 Ala. 307; 36 Conn. 196; 41 Ind. 364; 111 Mass. 125. The general rule to be gathered from all the authorities, considered together, is, that a legislative grant of power to condemn property, expressed in general terms, confers on the grantee power to take all kinds of property except property already devoted to public use and necessary for the exercise of such use; 27 Cent. L. J. 207; it makes no difference whether corporeal property, as land, or incorporeal, as a franchise, is to be affected; 14 Wend. 51; 1 Baldw. C. C. 205; 160 U. S. 168; see 1 Rice 383; 11 N. H. 19; 17 Conn. 454; 11 Pet. 420; 8 N. H. 398; 3 Hill, S. C. 109; 8 Dana 289; 5 W. & S. 171; 2 Miss. 21; 130 N. Y. 249; 154 Mass. 579; 68 Miss. 806; 92 Cal. 528. The power has been held to exist, to build a railroad over basins maintained by a water power company for public purposes, and its franchise is not thereby destroyed; 23 Pick. 360; to take for a public road the property, easement, and franchise of a bridge company; 6 How. 507; to build a railroad over the land of a gas company not then in use but likely to become necessary; 63 N. Y. 326; over the lands and right of way of a canal company; 11 Leigh 42; 14 Ill. 314; over lands of a state asylum for deaf and dumb; 3 Ind. 421; over a turnpike which would not be materially injured; 21 Vt. 290; but not over lands, not necessary for the railway, owned and used by the state for an institution for the blind; 43 Ill. 303. In a proceeding by a railroad company to condemn for terminal warehouses the land of a steamboat company, the test whether the defendant held its land for such use as to exempt it from condemnation was said to be not what the defendant "does or may choose to do, but what under the law it must do, and whether a public trust is impressed upon it. It does not so hold its property impressed with a trust for the public use unless its charter puts that character upon it and so that it cannot be shaken off;" 99 N. Y. 12. Any property belonging to a railway not in actual use or necessary to the proper exercise of the franchise thereof may be taken for the purpose of another railroad under a general power; 17 W. Va. 812; 112 Ill. 589; 63 Barb. 151; 138 Mass. 277; 146 Pa. 297; but not where the loss of the property to be taken is necessary to the exercise of the franchise of its owner; 81 Ill. 523; 3 Ore. 164. The same general principles are applied to cases where a municipal corporation attempts to condemn railroad property; if the property is not necessary to the new use and the latter is destructive of the old one it is not permitted to be taken; 23 A. & E. R. R. Cas. 36; s. c. 103 Ind. 486; 56 N. W. Rep. (S. D.) 1077; otherwise, if it will leave the franchise unimpaired; 39 N. J. L. 28. A market house has been condemned for a railway terminal station, reached by an elevated railroad, and its approaches; 142 Pa. 580; but one corporation cannot take the franchise of another which is in use unless expressly authorized by the legislature, and then only by regular condemnation, and cannot take it at all, if this will materially affect its use; 53 Fed. Rep. 687. So a street may be taken; 2 L. R. A. 59; 12 N. J. L. 133; a bridge; 39 Am. & Eng. Corp. Cas. 36; or land in custody of the law; 14 Am. L. Rev. 131.

Where the power in a charter to condemn lands is limited so as to exclude land or property of any other corporation existing under the law of the state, this restriction was not confined to lands of corporations existing at the passage of the act, but applies to those thereafter incorporated; and another corporation which acquired lands after the first corporation had filed a survey thereof according to the requirements of the laws, but before any petition for the appointment of commissioners had been presented, could claim exemption from condemnation under the limitations; 32 Atl. Rep. (N. J.) 74.

See review of cases on this general subject, of the taking of a franchise; 27 Cent. L. J. 207, 231; and as to corporate property; 14 Am. & Eng. R. R. Cas. 41.

Claims of citizens against a foreign power may be taken by the national government for the purpose of adjusting its relations with such power; 2 Ct. of Cl. 224; and a claim for damages to land by reason of an unlawful entry may be taken and adjusted in a proceeding to take the land itself; 24 Barb. 658.

It has been held that money cannot be taken; Field, J., 12 Cal. 76; *contra*, 151 Mass. 364; only as to money taken by the state in time of war; 4 Const. 419; 13 How. 115; 44 Mo. 484; and without any such limitation; Sharswood, J., in 65 Pa. 152, who says that "the public necessity which gives rise to it prevents its being restrained by any limitations as to either subject or occasion." "Such," the opinion continues, "would be the case of a pressing and immediate necessity, as in the event of invasion by a public enemy, or some great public calamity, as famine or pestilence, contribution could be levied on banks, corporations, or individuals."

Buildings on land condemned are parts of the realty and pass with the land, and the owner must be paid for them in full, and being so paid cannot recover from the company damages for the removal of them; 23 Neb. 465; 28 Kan. 816; nor can the owner remove them; 99 Pa. 640. See, generally, as to structures, 3 Am. R. R. & Corp. Cas. 181.

An act for the extinguishment of irredeemable ground rents was held not to be an exercise of the right of eminent domain and therefore unconstitutional; 67 Pa. 479. Generally a city may not condemn property beyond its territorial limits; 13 Peters 519; 36 N. H. 404; or a corporation in a different state from that of its incorporation; 58 Fed. Rep. 133; but there are exceptions to the

rule as in case of a city which may condemn property beyond its borders where the necessity exists, as for a park ; 44 Mich. 602 ; 58 Mo. 175 ; a sewer ; 36 Mich. 474 ; 140 Ill. 216 ; or waterworks ; 31 Pac. Rep. (Col.) 238 ; 54 N. J. L. 62 ; but in such case the property must be sufficiently near to the municipality to be serviceable for the purpose for which it is condemned ; 99 N. Y. 569.

Indirect or consequential damages. The principle that a right of compensation exists wherever private property is *taken* for public use does not extend to the case of one whose property is indirectly *damaged* by the lawful use of property already belonging to the public. For example, it was held that an adjoining or abutting owner was not entitled to compensation for damages resulting from the change of a grade of a street ; 4 Term 794 ; 158 Mass. 564 ; 82 Me. 1 ; 136 N.Y. 528. Callender *v.* Marsh, 1 Pick. 418, was the leading American case, and gave rise to a statute to remedy the wrong suggested by it. In Pennsylvania the doctrine of these cases was followed in a case in which Gibson, C. J., expressed regret that such injustice was remediless ; 18 Pa. 187 (a case referred to by the same court as of a class intended to be remedied by the constitution of 1874 ; 150 Pa. 589). These and the other authorities were reviewed by the United States Supreme Court, and the same conclusion reached as being " well settled both in England and in this country ; " 20 How. 135. Of the law at this period, it was said that the limitation of the term " taking " to an actual physical appropriation or divesting of title was " far too narrow to answer the purpose of justice ; " Sedg. Const. L. (2d ed.) 456. See 1 Thayer, Cas. Const. L. 1053, 1055 ; 2 Am. R. & Corp. Cas. 435. The law on this specific subject of change of grades became firmly settled, except as changed by constitutional or statutory enactments, but on the general subject of what constitutes a " taking " of property, it has since undergone very great changes, and the narrow rule of physical appropriation has ceased to afford a criterion of decision. An illustration of the tendency to treat this question liberally, rather than technically, is a decision that it is a " taking " of property to prohibit an owner of land on a boulevard from building, beyond a certain limit, on the front part of the lot ; 22 S. W. Rep. (Mo.) 861 ; 97 Pa. 242 ; 118 *id.* 593. See also 73 Mich. 522 ; 18 L. R. A. 166. The older cases rested upon a narrow, the later ones upon a liberal, meaning of the word " property " in the constitutions. Of the latter, Eaton *v.* Boston, etc., Railroad, 51 N. H. 504, is the leading case on the subject of the right to compensation where property is injured and not physically taken. Plaintiff's land was overflowed during a freshet as the result of the construction of the defendant's railroad. Damages for the land actually taken for the railroad had been paid as the result of condemnation proceedings. It was held that the right to use the land undisturbed really constituted the property in it, rather than the physical possession of the land itself, and that even if the land itself were the " property," a physical interference with it which abridged the right to use it was in fact a taking of the owner's property to that extent. The opinion of Smith, J., in this case is said to have contributed more than any other towards the change in the law extending the effect of the word *taking ;* Lewis, Em. Dom. § 58. See also 54 N. H. 545 ; 77 Wis. 288 ; 28 Minn. 534 ; 14 Ch. Div. 58 ; 99 U. S. 635 ; Earl, J., dissenting in 90 N. Y. 122. It is now quite settled that the flowing of lands, against the owner's consent and without compensation, is a taking ; 51 N. H. 504 ; 30 Mich. 321. See also 41 Ill. 502 ; 25 Wis. 223 ; 13 Wall. 166. In the latter case, Miller, J., after referring to the decisions that there is no remedy for a consequential injury from the improvements of roads, streets, rivers, etc., said : " But we are of opinion that the decisions referred to have gone to the uttermost limit of sound judicial construction in favor of this principle, and, in some cases, beyond it, and that it remains true that where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the constitution, and that this proposition is not in conflict with the weight of judicial authority in this country, and certainly not with sound principle. Beyond this we do not go, and this case calls us to go no further." This was afterwards said by the court to be a case of " physical invasion of the real estate of the private owner, a practical ouster of his possession " ; 98 U. S. 403.

The interference with the rights of abutting owners by building an elevated railroad on a street was held a taking of private property for public use without compensation, to restrain which the plaintiff was entitled to an injunction ; 90 N. Y. 122. This case was decided by four judges against three dissenting, whose views were expressed by Earl, J., in an opinion much referred to, contending that it was a use of the street properly incident to its purpose as a public highway. An effort to secure a re-examination of the doctrine of this case resulted in its affirmance ; 104 N. Y. 268. In a subsequent case the New York court of appeals stated the law of that state to be that, although the abutting owner might have an injunction, and in the same proceeding recover full compensation for the permanent injury, he could not, in an action at law, recover permanent damages measured by the diminution in value of the property, but only such temporary damages as he had sustained at the time of commencing the action ; 135 N. Y. 432 ; 112 *id.* 190. See also 118 *id.* 618 ; 137 *id.* 302.

In a leading case the construction of an ordinary commercial railroad along a street in front of a lot without impairing ingress and egress, but resulting in the usual injuries to the lot from steam, smoke, dust,

smells, interference with light and air, jarring the ground, etc., was held to be an appropriation of the street for what was not a proper street use, for which damages were recoverable, but limited to the injury resulting from the operation of the road in front of the lot, and not including any accruing from operating it on other parts of the street; 39 Minn. 286.

The Maryland court of appeals, in reviewing the decisions on the subject, and particularly the New York cases, mentions as the only other cases holding that opinion, 7 Ohio St. 480; 39 Minn. 286; 66 Miss. 279, and considers that its own decision in 50 Md. 148 and 74 *id.* 363 should be adhered to as being in accord with the decided weight of judicial opinion. The conclusion is thus stated: "The New York doctrine involves this inextricable dilemma, viz., if the grading of a street by a municipal corporation cuts off all access to a person's house, albeit his property is thereby destroyed and rendered valueless, it is not taken in the constitutional sense; but if a railroad company in lawfully constructing its road does precisely the same thing that the city did in grading a street, then the abutter's property is taken, though not physically entered upon at all. The structure is therefore a lawful one. But it does not destroy the street as a street, though it may cause the plaintiff greater inconvenience in gaining access to his lots than he encountered before it was built. But this and other injuries complained of are purely incidental and consequential, though the appellant, under the statutes of Maryland, is not without a remedy therefor; 79 Md. 277: s. c. 29 Atl. Rep. 830.

The question what constitutes a taking, under the older constitutional provisions, was much considered with respect to the use of streets and highways by many other modern appliances, such as gas and water pipes, steam and electric railroads, and poles for telegraph, telephone, and electric light wires. In this class of cases, of which the elevated railroad cases have been used as an illustration, the question has turned on the consideration whether the proposed use was a legitimate incidental use of the street *as such*, and the tendency of the cases is in favor of a very liberal construction of the rights of the public, at least in streets of cities. In some states a distinction is made between city streets and country roads, and the public easement in the latter is much more restricted, and the rights of abutting owners to damages consequently more extended; 62 N. Y. 386; 111 Pa. 35; 167 *id.* 62; 124 Ind. 577.

In a general view of the subject nothing more is practicable than a mere indication or illustration of the tendency of the decisions which must be resorted to and examined for application to a special case. City streets are legitimately used, from necessity, for sewers and drains; 28 Conn. 363; 103 Ind. 372; 29 N. J. Eq. 206; 27 Miss. 357; water pipes; 29 Hun 245; gas pipes, as a practical necessity in cities, are not questioned but indirectly sanctioned; 90 N. Y. 161; 32 Vt. 371; 2 Hun 146. See 13 Allen 146, 160. As to steam railroads, from a great conflict of decisions (difficult if not impossible to reconcile), it would seem to be the best opinion that it is not a legitimate use of the street; see Rand. Em. Dom. § 405; Lewis, Em. Dom. § 111, with notes citing the cases at large; a horse railway is almost universally held to be a proper use of streets; Rand. Em. Dom. § 402; Lewis, Em. Dom. § 124; the only substantial dissent being in New York; 39 N. Y. 404; unless the fee is in the public; 50 *id.* 203. See 14 Ohio St. 523; 27 Wis. 194. With respect to electric railways in cities, now a current subject of litigation, the doctrine of "the right of the public to use the streets by means of street cars," was said to be "now so thoroughly settled as to be no longer open to debate," and it was extended to the poles and wires of the new system; 47 N. J. Eq. 380; and see 85 Mich. 634; 75 Md. 222; 61 Conn. 127; 147 Pa. 579; but not along a country road; 167 *id.* 62. See Rand. Em. Dom. § 403. Electric light poles are usually treated as proper, on the same basis as the older lamp posts; 54 Hun 469; but not telegraph and telephone poles, according to the weight of authority; 49 Fed. Rep. 113; 86 Va. 696; 16 R. I. 668; 148 U. S. 92; though in some cases it is held otherwise, and of these the leading case considered the subject within the principle of Callender *v.* Marsh; the opinion of the court and the dissenting one of two judges present the two views of the question very fully; 136 Mass. 75. See also 88 Mo. 258.

In the cases relating to the use of streets and highways a great diversity of decision is occasioned by the distinctions drawn between the rights of an abutting owner who has the fee and one owning merely an easement of access over a street of which the soil belongs to the public. The question is further complicated by the varied application of the doctrine that an owner whose land was taken for a street or highway is presumed to anticipate the future uses to which it may be put both over and under the surface. The confusion of the decisions is well stated by a writer on the subject: "Laying aside constitutional and statutory declarations of liability for consequential injuries we find the following anticipations imputed to one whose land is affected by a street easement. In every state except Ohio he anticipates that he may be obliged to enter his house by a second-story window when the grade is raised, or by a ladder when the grade is lowered. In New York he does not foresee any improved method of transportation from the horse-car to the electric motor; but in Pennsylvania he anticipates all methods. The Massachusetts man seems to be the only one who has clearly anticipated the telegraph and telephone. Judged by results there is no working rule of general application deducible from a presumed anticipation of future use." Rand. Em. Dom. § 414.

In some states there are constitutional provisions covering this subject, sixteen of them requiring compensation when property is damaged by such proceedings generally, and three others when the delegated power of eminent domain is exercised by corporations. Under these provisions compensation is required for property "damaged" as well as "taken," and the former word is held to include all actual damages resulting from the exercise of the right of eminent domain which diminish the

market value of private property; 25 Neb. 489; 66 Cal. 492; 67 Ga. 386; 106 Ill. 511; 45 Ark. 429; s. c. 136 U. S. 121.

The treatment by the courts of the subject of consequential damages is illustrated by the course of decisions under two constitutions of Illinois, by the supreme court of that state, which is very elaborately reviewed in a judgment of the supreme court of the United States. The constitution of 1848 prohibited the taking or application to public use of property without just compensation; and the rule adopted by the courts was that any physical injury to private property, by the erection, etc., of a public improvement, in or along a public highway, whereby its use was materially interrupted, was to be regarded as a *taking*, within the meaning of the constitution. The constitution of 1870 provided that private property should not be *taken* or *damaged* without just compensation, and upon this it was held that the property owner was protected against any *substantial damage*, though consequential, and that it did not require a trespass or actual physical invasion; 102 Ill. 64, 379; 125 U. S. 161. In the judgment last cited Harlan, J., said: "We concur in that construction" and "we regard that case (102 Ill. 64) as conclusive of this question." This constitution of Illinois was the first in which the word "damaged" was inserted, but in 1894 the supreme court of Colorado enumerated fourteen other states which had then adopted the word; 36 Pac. Rep. (Colo.) 789.

See, generally, as to land injured; 2 Am. R. & C. Cas. 94; 5 *id.* 201; property damaged; 25 Am. L. Rev. 924; taken or damaged; 27 Am. L. Reg. 391; 21 Cent. L. J. 130.

What estate is acquired. Where the constitution contains no restriction, a fee or any less estate may be taken, in the discretion of the legislature; 100 Mass. 544; 89 Ind. 501; 34 Ohio St. 541; 3 Dill. 465; 79 N. Y. 293; 80 Va. 616; Lewis, Em. Dom. § 277; Rand. Em. Dom. § 205; Cooley, Const. Lim. 688; and if a fee is taken under the statute, the land may afterwards be devoted to other uses; *id.*; Rand. Em. Dom. § 209. If the state condemn, a fee is presumed; 50 Pa. 425; 53 *id.* 477; but when a private corporation does so, never; Rand. Em. Dom. § 206; when the act authorized a railroad company to take the fee for a *right* of way it was a qualified estate which would revert; 50 Mo. 496; s. c. 62 *id.* 429; but a railroad may be authorized to take a fee; 2 Dev. & B. 451. The purpose is sometimes said to indicate the estate taken; 127 Mass. 408; 45 N. Y. 234; but this is an unsafe criterion of the interest, and the better opinion is that it merely defines the use. See 31 La. Ann. 430; 32 *id.* 471; 90 Mich. 385; 53 N. J. L. 1. Under a provision that the title should vest, a city took a fee for sewers; 144 Mass. 303; but a turnpike company only an easement; 36 Barb. 136. An absolute power of alienation, the ear-mark of untrammelled and unconditional ownership, has been supported in land held by a municipal corporation for a park; 45 N. Y. 234; 137 *id.* 241; or an almshouse; 7 N. Y. 314; 2 Blatchf. 95; when a street which had been taken for a canal was abandoned, the right of the public and the abutters revived in the street; 88 Ind. 563; and land taken for a canal was afterwards used for a street; 42 Hun 202; 34 Ohio St. 541. It is said that a municipal corporation can condemn the fee-simple title of land for streets, but only so as to acquire the absolute control for that purpose and not a proprietary right to sell or devote it to a private use; 46 Minn. 540. When the fee is taken and the use ceases, the state may authorize a sale for other uses, but when only an easement, the land reverts; Lewis, Em. Dom. 596, citing cases; and so if there is an abandonment; *id.* 597.

See, generally, 3 Am. R. R. & Corp. Cas. 368; 32 Am. L. Reg. 563; 10 Am. & Eng. R. R. Cas. 11; 32 Cent. L. J. 80.

The time when payment must be made varies according to the exact terms of the constitutional provision under which proceedings are taken. In the majority of states where there is no express provision it is held that compensation need not be concurrent in time with the taking, it is sufficient if an adequate and certain remedy is provided by which the owner may compel payment of damages; 18 Wend. 9; 26 *id.* 585; 6 Hill 359; 11 N. Y. 308; 96 *id.* 227; and this means reasonable legal certainty; *id.*; 54 N. Y. 132, 146; 89 *id.* 189; or if there is a definite provision or security for the payment of the compensation; 34 Ala. 461; 31 Ark. 494; 20 Fla. 597; 137 Mass. 71; 54 N. H. 590 (but 50 *id.* 591 seems *contra*); 19 Conn. 142; 5 Ohio St. 109; 17 Pa. 524 (*contra*, as to private roads; 31 *id.* 12); 11 Leigh 42; 57 Vt. 128; 88 N. C. 686; 57 Wis. 364; 25 Fed. Rep. 521. The same rule was formerly followed, in some states in which later constitutions provided for prior payment, or required compensation where none was provided for before, as Maryland; 3 Bland, Ch. 386; 19 Ga. 427; 3 Mich. 496; 52 Ind. 16; other states require that the owner shall receive compensation before entry; 45 Cal. 640 (see 31 *id.* 538, which reviewed the cases, established a different rule, and was overruled); 53 *id.* 208; 37 Tex. 447; 1 Md. Ch. 248; 57 Ill. 307; 120 *id.* 86; but in Maine, while title does not pass, possession may be taken before payment, and a reasonable time—three years being so held—allowed therefor; 34 Me. 247; 75 *id.* 91. It has been held that the state when acting directly may provide that title shall pass when the amount is ascertained, it being presumed that payment will be made by the state; 78 N. Y. 325; but any such declaration in a statute is controlled by the constitution, and it was held in a New York case that payment must be prior to or concurrent with the taking; 21 Wall. 196. In many state constitutions there is a distinction between the direct exercise of the power by the government and the delegated power conferred on private corporations,

Under such a provision it was said that in both cases the sovereign power is coupled with the correlative duty; 52 N. J. L. 132; but municipal corporations must settle first when exercising delegated power; *id.*; 38 *id.* 151; 39 *id.* 291. And it is said by a writer of authority, "the almost invariable, and certainly the just, course being to require payment to precede or accompany the act of appropriation;" 2 Dill. Mun. Corp. 615. Generally, however, when the compensation is to be paid by the state or is a charge upon the funds of a municipality that is held sufficient; 103 Mass. 120; 88 N. C. 686; 1 Pa. 309; 99 N. Y. 569; 40 Ind. 33; 40 Wis. 674; 68 Pa. 168, 170; 2 Am. Ry. & Corp. Cas. (Wis.) 424; but if the available resources are shown to be insufficient an entry may be enjoined; 26 *id.* 46.

The fact that there is a limitation of the amount to be expended does not invalidate the law for taking property; 91 U. S. 367; 160 *id.* 668.

When the title passes. It naturally follows that no title can be acquired under the proceedings until the compensation is paid or so secured as to be treated in law as the equivalent of payment. Accordingly when the title is permitted to vest before payment, it is said to be subject to a claim for compensation in the nature of a vendor's lien enforcible in equity; Lewis, Em. Dom. § 620, and note citing cases. And a sale or mortgage of the property could only be made subject to such prior right of the landowner, which is maintained by some courts on the theory of a lien, and by others on that of title remaining in the owner; *id.* § 621. In Pennsylvania, however, an extreme doctrine prevails; the appropriation is valid and effectual where compensation is paid or secured; 8 W. & S. 459; 66 Pa. 404; 75 *id.* 464; and title passes when the bond is approved by the court under the statute; 85 *id.* 73; and remains vested even if the bond is found to be valueless; 138 *id.* 168; and there is no lien for compensation; 118 *id.* 512. By the *act of location* the corporation acquires a conditional title as against the land-owner, which becomes absolute upon making or securing compensation; 141 *id.* 407; as against third parties there is a valid location after entry made, lines run, map prepared, and a report made to the directors and adopted by them; 159 *id.* 331; but running a line, making a map, and a report to the directors, not acted on, did not confer title to the location to justify an injunction to restrain another company from taking the land for a railway, though the land was owned by the plaintiff company; 141 *id.* 407.

If a land-owner, knowing that a railroad company has entered upon his land, and is engaged in constructing its road without having complied with a statute requiring either payment by agreement or proceedings to condemn, remains inactive and permits it to go on and expend large sums in the work, he cannot maintain either trespass or ejectment, and will be restricted to a suit for damages; 158 U. S. 1.

The actual cash market value, at the time, of property actually taken must be allowed; 117 Mass. 302; 58 Mo. 491; 51 Kan. 408; 110 Ill. 414; 98 U. S. 403. It has been said that the true criterion of market value is the sum which the property would bring if sold at auction, conducted in the fairest possible way; 63 N. H. 557; but this is not the result of the best considered cases. "Market value means the fair value of the property as between one who wants to purchase and one who wants to sell an article; not what could be obtained for it under peculiar circumstances; not its speculative value; not a value obtained from the necessity of another. Nor is it to be limited to that price which the property would bring when forced off at auction under the hammer;" 119 Mass. 126; it is measured by the difference between what it would have sold for before the injury, and what it would have sold for as affected by it; 7 S. & R. 441; 112 Pa. 56; what would be accepted by one desiring but not obliged to sell and paid by one under no necessity of buying; 115 *id.* 325; 49 Ark. 381; it is not to be measured by the interest or necessity of the particular owner; 95 Pa. 426; nor, on the other hand, by those of the appropriator; 110 Pa. 54; 88 Cal. 50; 22 N. J. L. 195; 53 Ga. 178; 59 Ia. 243; when these principles are fairly applied due consideration may be given to auction value; 115 Pa. 325; but its availability for other special purposes to which it is particularly adapted by reason of "its natural advantages, or its artificial improvements, or its intrinsic character," may be considered as an element of value; Lewis, Em. Dom. § 479, and cases cited; as, for railroad approaches to a large city; 116 Me. 114; 58 *id.* 491; or for a bridge site; 17 Ga. 30; 49 Ark. 381; or a mill site; 64 Miss. 404; so also its situation and surroundings for railroad purposes; 52 N. J. L. 391; 34 Kan. 158; 111 Ill. 413; or market-gardening; 110 Ill. 414; or subdivision into village lots; 57 Wis. 332; 91 Ill. 49; 30 Ohio St. 108; 30 Minn. 227; or in case of a pond, for ice or milling, there being no other one near; 5 N. Y. Sup. Ct. 217; or for warehouse purposes; 33 Minn. 210. When the water of a stream running through a farm was taken by a village for its waterworks, the owner was entitled to damages, not only for being deprived of the water for farm purposes, but also for being deprived of the opportunity to sell water rights to prospective purchasers of village lots plotted out for sale in a part of the farm; 67 Vt. 653. So its adaptability for the particular purpose for which the condemnation is bought may be shown, as islands well situated for boom purposes; 98 U. S. 403; or the bed of an old canal desired for a railroad; 27 Hun 116. But mere speculative opinions and considerations will be excluded from consideration; 127 Mass. 358; 9 G. & J. 479; 116 Ill. 163; 107 Pa. 461; 57 Wis. 332; 17 N. J. L. 25; 18 Mo. App. 632.

See, generally, 21 L. R. A. 373; 57 Am. &

Eng. R. R. Cas. 508; 2 Am. R. R. & Corp. Cas. 744.

Assessment of benefits on the remainder of a tract of which part is taken is prohibited by the constitution in some states, either generally, as in Iowa and Ohio, in favor of any corporation, as in Arkansas, Kansas, and South Carolina, or any other than municipal, as in California, North Dakota, and Washington. In the other states there is a diversity of decisions which have been thus classified, as: 1. Not considered. 2. Special benefit is set off against damages to the remainder but not against the value of the part taken. 3. General or special, as in the last class. 4. Special, against both damages to remainder and value of part taken. 5. General and special, as in the last class. Lewis, Em. Dom. § 465.

In the first class the benefit is excluded because compensation is held to be money, and this view appears to be confined to one state; 34 Miss. 227, 241; 62 *id.* 807.

The second rule which obtains has been justly criticised as illogical; Lewis, Em. Dom. § 467; but it rests upon the theory that for the part *taken* compensation in money is required, while for incidental damage the legislature may prescribe the rule of compensation. This was the doctrine laid down in Tennessee which, with several other states, adheres to it; 2 Swan, Tenn. 422; 6 Wis. 636; 59 *id.* 364; 34 Md. 336; 9 Leigh 313; 21 Gratt. 164; 24 W. Va. 662; 11 Neb. 585; 25 *id.* 542.

The third class rests upon the same idea of requiring compensation in money for the part taken, but treating the claim for damage to the remainder as consequential and properly subject to the set-off of all advantages; and in Kentucky, from which comes the leading case, a judgment was reversed for an instruction excluding general benefits; 17 B. Monr. 173; 5 Dana 28; 50 Ga. 612 (but see 17 Ga. 30, in which a different doctrine was applied, which was passed without mention in 30 *id.* 43, which laid down the rule afterwards adhered to); 26 Tex. 588; 33 *id.* 112; 37 *id.* 447; 60 Tex. 215; but see 60 *id.* 76; 31 La. Ann. 430; 36 *id.* 344.

The fourth rule allows special benefits against both the value of the part taken and damage to the remainder, because just compensation is construed to mean recompense for the net resulting injury, and excludes a share of the general advantage, because to allow it would be to distribute it unequally, charging those whose land is taken for that which the rest of the community enjoy without cost; 60 Maine 290; 55 N. H. 413; 4 Cush. 291; 125 Mass. 226, 557; 57 Vt. 240; 32 Conn. 452; 55 N. J. L. 88; 95 Pa. 426; 112 *id.* 56 (which lays down the rule with great clearness not only on this point but in confining the consideration of inconvenience and advantage to the effect of both upon the market value); 4 Jones, N. C. 89; 74 N. C. 220; 70 Mo. 629; 91 *id.* 26; 11 Minn. 515; 28 *id.* 61, 503; 59 Wis. 364; 18 Ore. 283 (but see 6 *id.* 328). See L. R. 2 C. P. 638.

The last class permits all benefits to be set off against all damages of either kind, placing the rule on natural equity, and in a leading case (17 Ga. 30, afterwards apparently overruled as stated *supra*), it is argued that the term compensation comes from the civil law which so construes it. This rule is accepted by many courts which, among other reasons, hold that compensation does not mean money but includes any means of recompense; 46 Cal. 85; 2 Harring. 514; 5 Ohio St. 140; 43 *id.* 228 (before the constitution of 1851); 97 Ind. 79; 130 *id.* 219; 5 Rich. 428; 6 Rich. 47. See 60 Tex. 76. In New York this rule applies to cases where land is taken by the state and municipal corporations; 99 N. Y. 296; 120 *id.* 309; but in the case of private corporations the third rule seems to apply; 68 *id.* 591; 118 *id.* 618; 129 *id.* 576. See 50 *id.* 302. In Illinois the cases prior to 1870 were under the fifth rule; 14 Ill. 190; and since the constitution of that year and a subsequent statute it has been held that benefits were prohibited as against the value of land taken; 77 Ill. 250; that general benefits cannot be set off against either value or damage; 79 *id.* 290; and that special damage may be charged against the damage to the residue; Lewis, Em. Dom. § 470, where the cases are collected and analyzed.

The last rule enumerated seems to be approved by the federal courts; 3 Cra. C. C. 599; 103 U. S. 599; and upon candid consideration it must be admitted that if benefits are to be allowed at all it is the only logical doctrine. This seems also to be the conclusion of the writer whose classification of the decisions is here given, and to whose discussion of the whole subject reference may profitably be made; Lewis, Em. Dom. § 471.

Damage to property injured but not physically taken. A question of great importance which yet remains to be settled arises either under the later constitutional provisions for compensation for injury as well as actual taking, or under the extension of the meaning of the word taking to include consequential damages so called, when the injury to property is so great and permanent as practically to deprive the owner of all use and enjoyment of it.

In such cases the only remedy of the property owner, in the absence of legislation, is a common-law action, and for permanent or continuing injury trespass is totally inadequate, as is evidenced by the fact that to restrain it when continuous is a recognized ground of equitable interference. In many cases it is held that prospective damages cannot be recovered, and the property owner is thus put to the necessity of resorting to repeated actions, but when the trespass is the result of the exercise of a public use authorized by statute this remedy is not only unsatisfactory but illogical. Accordingly it is held in many cases that such damage being of a permanent nature there should be but one recovery for all damages past, present, and future; and it has been held that they may be al-

lowed. An action on the case is the proper remedy in such cases, but the measure of damages applied is not uniform, though when the liberal rule referred to is adopted the payment vests in the defendant a right to maintain its works and operates as a bar to further suits. In some cases such an action has also been held to have the effect of statutory proceedings for the assessment of compensation; 118 Ill. 203; 141 *id.* 35. This subject is, however, involved in great confusion, which should undoubtedly be removed by legislative enactments providing for the acquisition of the right to cause, and the assessment of compensation for, permanent injury to property whenever consequential damages are provided for by constitution or statute, or recognized by the courts. As to this subject, see discussions with copious citations of cases in Lewis, Em. Dom. §§ 624, 625; Rand. Em. Dom. §§ 308–311; 26 Am. L. Reg. 281, 345.

Who are proper and necessary parties. The compensation must be paid to the true owner as on that the title depends; 82 N. Y. 436; 112 Ill. 379; 133 U. S. 553; and if paid to the wrong person, it may be recovered from him by one having an interest; 92 N. Y. 262; 109 Ind. 411; but if title is doubtful, it may be paid into court; 41 Fed. Rep. 70; 73 N. Y. 560; and if afterwards paid out wrongly the person who paid it in is not liable; 146 U. S. 338.

The general principle is that the necessary parties to a proceeding, independent of statutory requirements, are all persons having an interest in the property taken, as proprietors, or such as is recognized by the law of the state as property; Lewis, Em. Dom. § 317. When the ownership is divided, each is entitled to his share, as life-tenant and remainderman; 112 N. C. 759; 86 Mo. 473; dowress after admeasurement; 117 Pa. 174; but not before the dower is assigned; 43 Ill. 401; and only as against the award when it is inchoate; 27 N. J. Eq. 534. The interest of a tenant must be compensated; 4 Whart. 86; if the lease has actual value to him; 144 Ill. 537; sometimes separately; 127 Ill. 144; and sometimes by apportionment of the entire amount; 108 Mass. 535.

When part of land under lease is taken, the lease is not terminated or the tenant discharged; 134 Ill. 37; but both he and the lessor are entitled to compensation for their respective losses; 20 Pick. 159; 11 Ohio 408; 30 Pa. 362; 1 Thayer, Cas. Const. L. 968. See Rand. Em. Dom. § 304; 21 L. R. A. 212, with note on rights of tenants, reversioners, life-tenants, remaindermen, etc., in such cases; 5 Am. R. R. & Corp. Cas. 208, as to grantor and grantee, and 29 Am. St. Rep. 304, as to leased premises. See also 29 Am. L. Rev. 351, as to the abatement of rent when leased premises are appropriated.

As to mortgagees the decisions lack both uniformity and consistency, and this result is largely due to the differing views taken of the position of a mortgagee before the law. As between the parties to the mortgage the award takes the place of the land and the lien attaches to it; 2 Paige 68; 59 Ind. 453; 102 Mo. 560; 123 Ill. 95; as to all rights and interests; 112 N. Y. 610. The damages should be apportioned by the jury between owner, lessee, mortgagee, etc.; 48 Mich. 547. In some cases the remainder of the land must be exhausted before the mortgagee can resort to the fund; 44 N. Y. 192; or to the condemned land; 20 Neb. 281; and the mortgagee, if not a party to the proceedings, may appropriate the fund; 56 Ia. 422; 32 N. J. Eq. 370; but when the land has been sold and bought in by the mortgagee he loses all claim to the fund and new proceedings must be taken to condemn his interest; 35 N. J. Eq. 379. As affecting the title of the appropriator who has been said to take no better title than an innocent purchaser for value; 38 Ia. 463; and must protect himself against the claim of the mortgagee; 57 Wis. 311; the more reasonable opinion would seem to be that the mortgagee is a necessary party; if in possession he certainly is; 36 N. H. 84; 5 Gray 468; or after condition broken; 57 Vt. 248; in other cases to be bound he must have notice; 24 Minn. 25; 29 N. J. Eq. 128; 12 R. I. 144; 55 Vt. 207; 57 Wis. 311; 109 Ind. 411; 40 Mich. 383; 67 Me. 358; L. R. 1 Eq. 145; *contra;* 11 N. H. 293; 13 W. Va. 476; 45 Conn. 303; 126 Mass. 1, 427; 56 Cal. 508; 44 N. Y. 192. See Lewis, Em. Dom. § 324; 18 L. R. A. 113. It was held that the appropriator must see to the discharge of the mortgage and may pay it off or keep the money until it is due; 19 Wend. 659; and he may require or provide for its satisfaction; 131 N. Y. 127. It has even been held that a mortgagee cannot move for consequential damages to mortgaged property when the mortgagor has without fraud settled with the company; 121 Pa. 467.

Judgment liens may be divested by the proceedings, and the creditor need not be made a party; 47 N. Y. 157, 162. This is the leading case and well states the reasons on which this settled principle is based. See also 59 Ind. 446; 7 Phila. 650; Lewis, Em. Dom. § 325; Rand. Em. Dom. §§ 302, 340.

Notice and procedure. It is a general rule that notice of proceedings must be given to the owner of property to be taken; Lewis, Em. Dom. § 363; Rand. Em. Dom. § 333; though a few cases hold contrary to the otherwise uniform course of decisions; 5 Del. Ch. 524; 40 Md. 425, 437; 25 Miss. 479; 35 *id.* 17; 23 Ill. 202. In the Delaware case there was actual notice, though it was held that the act need not require it; in the Mississippi cases the proceeding is considered as *in rem*, which is treated as actual notice, and the Illinois case is in effect though not expressly overruled in 59 *id.* 276 and 78 *id.* 96. These cases have been termed "sporadic decisions," by which the current of authority is not disturbed; Rand. Em. Dom. § 333. See also Lewis, Em. Dom. § 364; where the cases are cited, and, for other cases cited in support of the view that notice need not be required in the act; 21 N. Y. 595; 2 Dana 227; 2 Mich. 441; 5

Ohio St. 140; 3 Paige 75. The questions whether the property shall be taken and what compensation shall be paid need not be tried by a jury; 2 Dev. & Bat. 451; 2 Harring. 514; the constitution does not describe the mode or means by which compensation shall be ascertained; these therefore can only be prescribed by the legislature; 5 Del. Ch. 524; under the constitution of the United States, a jury is not necessary; 46 Fed. Rep. 176; and it cannot be demanded as a matter of right; 100 N. C. 497; 11 N. H. 19; 54 N. J. L. 268.

It was recently held that due process of law is furnished and equal protection of the law given in such proceedings when the course pursued for the assessment and collection of taxes is that customarily provided in the state, for then the party charged has an opportunity to be heard; 164 U. S. 112; and where by state law a burden is imposed upon property for the public use, "whether it be for the whole state or some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections;" *id.*

As to procedure generally, see Rand. Em. Dom. ch. xi.; Lewis, Em. Dom. ch. xvii.-xix.; Mills, Em. Dom. ch. xi.; 3 L. R. A. 83; 14 A. & E. R. R. Cas. 378, 384, 392; and for some cases as to the necessity of notice and a hearing, to constitute due process of law, see 2 L. R. A. (Ind.) 655, note; 3 *id.* (Mont.) 194, note; 11 *id.* 224.

The power need not be exhausted in the first instance; 36 Conn. 196; 87 Ala. 50; and a railroad may subsequently take land for laying additional tracks when necessary; 57 Ark. 359; 4 Montg. Co. Rep. Pa. 102; or a canal company for a new supply of water; 23 Pick. 36; or a company may take more than at present required, having view to future and other needs, and use of part is not an abandonment; 152 Pa. 488.

See, generally, Mills; Lewis; Randolph, Eminent Domain; Cooley, Const. Lim. ch. xv.; Gould, Waters, ch. viii.; Redfield, Railways, Part 3; Wood, Railways, ch. xiv.; Harris, Damages; Thompson, Highways; POLICE POWER; TAXATION; RAILROAD; DUE PROCESS OF LAW.

EMISSION. In Medical Jurisprudence. The act by which any matter whatever is thrown from the body: thus, it is usual to say, emission of urine, emission of semen, etc.

Emission is not necessary in the commission of a rape to complete the offence; 1 Hale, P. C. 628; 4 C. & P. 249; 5 *id.* 297; 6 *id.* 251; 9 *id.* 31; 1 Const. 354; 30 Tex. App. 510; 30 Pac. Rep. (N. M.) 851; 106 Mo. 463; [1891] 2 Q. B. 149. It is, however, essential in sodomy; 12 Co. 36; 94 Mich. 27. But see 1 Va. Cas. 307.

EMIT. To put out; to send forth.

The tenth section of the first article of the constitution contains various prohibitions, among which is the following: "No state shall emit bills of credit." To emit bills of credit is to issue paper intended to circulate through the community for its ordinary purposes, as money, which paper is redeemable at a future day. 4 Pet. 410, 432; 11 *id.* 257; 28 Ark. 369; 1 Scam. 87; Story, Const. § 1358. See BILLS OF CREDIT.

EMMENAGOGUES. In Medical Jurisprudence. The name of a class of medicines which are believed to have the power of favoring the discharge of the menses. These are "*savine* (see *Juniperus Sabina*), *black hellebore, aloes, gamboge, rue, madder, stinking goosefoot* (*chenopodium olidum*), *gin, parsley* (and its active principle, *apiol*), *permanganate of potassium, cantharides, and borax*, and for the most part substances which, in large doses, act as drastic purgatives or stimulating diuretics." They are sometimes used for the criminal purpose of producing abortion (*q. v.*). They always endanger the life of the woman. 1 Beck, Med. Jur. 316; Dunglison, Med. Dict.; Parr, Med. Dict.; 3 Par. & F. Med. Jur. 88; Taylor's Med. Jur. 184.

EMOLUMENT. The profit arising from office or employment; that which is received as a compensation for services, or which is annexed to the possession of office as salary, fees, and perquisites; advantage; gain, public or private. Webster. It imports any perquisite, advantage, profit or gain arising from the possession of an office. 105 Pa. 303. See 113 *id.* 108.

EMPEROR. This word is synonymous with the Latin *imperator:* they are both derived from the verb *imperare*. Literally, it signifies *he who commands.*

EMPHYTEUSIS. In Civil Law. The name of a contract, in the nature of a perpetual lease, by which the owner of an uncultivated piece of land granted it to another, either in perpetuity or for a long time, on condition that he should improve it, by building on, planting, or cultivating it, and should pay for it an annual rent, with a right to the grantee to alienate it, or transmit it by descent to his heirs, and under a condition that the grantor should never reenter as long as the rent should be paid to him by the grantee or his assigns. Inst. 3, 25, 3; 18 Toullier, n. 144.

EMPHYTEUTA. The grantee under a contract of *emphyteusis* or *emphyteosis.* Vicat, Voc. Jur.; Calvinus, Lex.; 1 Hallam, c. ii. p. 1.

EMPLAZAMIENTO. In Spanish Law. The citation given to a person by order of the judge, and ordering him to appear before his tribunal on a given day and hour.

EMPLOYE or EMPLOYEE. From the French. A term of rather broad signification for one who is employed, whether his duties are within or without the walls of the building in which the chief officer usually transacts his business. 3 Ct. Cl.

257, 260. It is not usually applied to higher officers of corporations or to domestic servants, but to clerks, workmen, and laborers, collectively.

Strictly and etymologically, it means "a person employed," but in practice, in the French language, it ordinarily is used to signify a person in some official employment, and as generally used with us, though perhaps not confined to any official employment, it is understood to mean some permanent employment or position. It may be any one who renders service to another; 30 N. J. Eq. 588; and has been extended so far as to embrace attorney and counsel; 58 N. Y. 358. The servant of a contractor for carrying mail is an employe of the department of the post-office; Brock. 280; also one who received five per cent. of the cost for superintending the erection of a warehouse was held an employe; 14 Md. 558. See MASTER AND SERVANT.

EMPLOYED. The act of doing a thing, and the being under contract or orders to do it. 14 Pet. 464, 475; 2 Paine 731, 745.

Where persons were employed "in and about the works," it was held that although their work as miners was at the bottom of a mine, the term covered them as employes until they arrived safely at the top, even although they discharged themselves; 2 C. P. Div. 397.

EMPLOYERS AND WORKMEN ACT. The English statute of 38 and 39 Vict. c. 90, regulating the jurisdiction of certain courts over disputes between masters and employes. See MASTER AND SERVANT.

EMPLOYERS' LIABILITY ACT. The English statute of 43 and 44 Vict. c. 42, regulating the liability of employers in actions for negligence by their workmen and greatly limiting and modifying the common-law doctrine of common employment. The act is said to be "on the face of it an experimental and empirical compromise between conflicting interests." Poll. Torts 127. It was enacted for a limited time only, and has been since renewed from time to time. The effect is to put a "workman," "as against his employer, in approximately the same position as an outsider, as regards the safe and fit condition of the material instruments, fixed or movable, of the master's business," and to hold the latter responsible for the conduct of those in delegated authority under him; *id.*

Similar statutes have been enacted in many of the states. See Reno, Emp. Liab. Acts; MASTER AND SERVANT; FACTORY ACT.

EMPRESTITO. In Spanish Law. A loan. Something lent to the borrower at his request. *Las Partidas*, pt. 3, tit. 18, l. 70.

EMPTIO, EMPTOR (Lat. *emere*, to buy). *Emptio*, a buying. *Emptor*, a buyer. *Emptio et venditio*, buying and selling.

In Roman Law. The name of a contract of sale. Du Cange; Vicat, Voc. Jur.

EN AUTRE DROIT (Fr.). In the right of another.

EN DECLARATION DE SIMULATION. A form of action used in Louisiana. It is one of revendication (*q. v.*), and has for its object to have the contract declared judicially a simulation and a nullity; 5 La. Ann. 1; 20 *id.* 169.

EN DEMEURE (Fr.). In default. Used in Louisiana. 3 Mart. La. N. S. 574.

ENDOWED SCHOOLS ACTS. In English Law. Beginning with the stat. 3 & 4 Vict. c. 77, parliament has passed a series of acts for improving the condition of, and extending the system of education in, the endowed schools. Moz. & W.

EN OWEL MAIN (L. Fr.). In equal hand. The word *owel* occurs also in the phrase *owelty* of partition. See 1 Washb. R. P. 427.

EN VENTRE SA MERE (Fr.). In its mother's womb. For certain purposes, indeed for all beneficial purposes, a child *en ventre sa mère* is to be considered as born; 5 T. R. 49; 1 P. Wms. 329. Its civil rights are equally respected at every period of gestation; it is capable of taking under a will, by descent, or under a marriage settlement, may be appointed executor, may have a guardian assigned to it, may obtain an injunction to stay waste; 3 Johns. Cas. 18; 5 S. & R. 38; Bing. Inf. ch. vii; 1 Ves. 81; 2 Atk. 117; Bacon, Abr. *Infancy* (B); 2 H. Bla. 399; 2 Vern. 710; 4 Ves. Jr. 227. In a recent English case it was held that such a child is to be considered as living so as to vest in the parent on the death of the life tenant a devise made by a testator to A for life, and on her death to the parent of the child, "for her absolute use and benefit in case she has issue living at the death" of A, "but in case she has no issue then living," then over, when the parent was *enceinte* at the time of A's death; [1895] 2 Ch. 497. The right of an unborn infant to take property by descent or otherwise has been said by a learned commentator to be an inchoate right, which will not be completed by a *premature* birth; 1 Sharsw. Bla. Com. 130, n.; but as the word premature is used in the authorities, the rule accurately stated is that it must be born alive or after such period of fœtal existence that it might reasonably be expected to survive; 4 Sm. & M. 99; 5 S. & R. 38; 4 Kent 248; 2 Paige 35. See Tyler, Inf. & Cov. ch. xiv., POSTHUMOUS CHILD; FŒTUS; NEGLIGENCE.

ENABLING POWERS. A term used in equity. When the donor of a power, who is the owner of the estate, confers upon persons not seised of the fee the right of creating interests to take effect out of it, which could not be done by the donee of the power unless by such authority, this is called an *enabling power*.

ENABLING STATUTE. The act of 32 Henry VIII. c. 28, by which tenants in tail, husbands seised in right of their wives,

and others, were empowered to make leases for their lives or for twenty-one years, which they could not do before. 2 Bla. Com. 319; Co. Litt. 44 *a*. The phrase is also applied to any statute enabling persons or corporations to do what before they could not.

ENACT. To establish by law; to perform or effect; to decree. The usual formula in making laws is, *Be it enacted.*

ENAJENACION. In Spanish Law. The act by which one person transfers to another a property, either gratuitously, as in the case of a donation, or by an owner's title, as in the case of a sale or an exchange.

In Mexican Law. This word is used in conveyancing to convey the fee, and not a mere servitude upon the land. 26 Cal. 88.

ENCEINTE (Fr.). Pregnant. See PREGNANCY.

ENCLOSURE. An artificial fence around one's estate. 39 Vt. 34, 326; 36 Wis. 42. See CLOSE.

ENCOMIENDA. A charge or mandate conferring certain important privileges on the four military orders of Spain, to wit, those of Santiago, Calatrava, Alcantara, and Montesa. In the legislation of the Indias, it signified the concession of a certain number of Indians for the purpose of instructing them in the Christian religion and defending their persons and property.

ENCOURAGE. To intimate, to incite to anything, to give courage to, to inspirit, to embolden, to raise confidence, to make confident. 7 Q. B. Div. 258.

ENCROACH. To gain unlawfully upon the lands, property, or authority of another: as if one man presseth upon the grounds of another too far, or if a tenant owe two shillings rent-service and the lord exact three. So, too, the Spencers were said to encroach the king's authority. Blount; Plowd. 94 *a*. Quite a memorable instance of punishment for encroaching (accroaching) royal power took place in 21 Edw. III. 1 Hale, Pl. Cr. 80. Taking fees by clerks of the courts has been held encroaching; 1 Leon. 5.

ENCUMBRANCE. See INCUMBRANCE.

ENDOWMENT. Now generally used of a permanent provision for any public object, as a school or hospital, but more technically, of the assigning dower to a woman, or the severing of a sufficient portion for a vicar towards his perpetual maintenance. 1 Bla. Com. 387; 2 *id.* 135; 3 Steph. Com. 99; 27 Me. 381; 32 N. J. L. 360; 4 Har. & M. 429.

ENDORSE. See INDORSE.

ENEMY. A nation which is at war with another. A citizen or a subject of such a nation. Any of the subjects or citizens of a state in amity with another state who have commenced or have made preparations for commencing hostilities against the latter state, and also the citizens or subjects of a state in amity with another state who are in the service of a state at war with it. See Salk. 635; Bacon, Abr. *Treason*, G; 43 Pa. 491.

By the term enemy is also understood a person who is desirous of doing injury to another. The Latins had two terms to signify these two classes of persons: the first, or the public enemy, they called *hostis*, and the latter, or the private enemy, *inimicus*.

An enemy cannot, as a general rule, enter into any contract which can be enforced in the courts of law; but the rule is not without exceptions: as, for example, when a state permits expressly its own citizens to trade with the enemy; and perhaps a contract for necessaries, or for money to enable the individual to get home, might be enforced; 7 Pet. 586. See also 4 Op. Atty. Gen. 81; 4 Sawy. 457; 24 Ark. 337; 4 Dall. 37.

ENFEOFF. To make a gift of any corporeal hereditaments to another. See FEOFFMENT.

ENFRANCHISE. To make free; to incorporate a man in a society or body politic. Cun. Dict.

ENFRANCHISEMENT. Giving freedom to a person. Admitting a person to the freedom of a city. A denizen of England, or a citizen of London, is said to be enfranchised. So, too, a villein is enfranchised when he obtains his freedom from his lord. *Termes de la Ley;* 11 Co. 91; Jacob, Law Dict.

The word is now used principally either of the manumission of slaves (*q. v.*), of giving to a borough or other constituency a right to return a member or members to parliament, or of the conversion of copyhold into freehold. Moz. & W. L. Dict.

ENFRANCHISEMENT OF COPYHOLD. The change of the tenure by which lands are held from copyhold to freehold, as by a conveyance to the copyholder or by a release of the seignorial rights. 1 Watk. Copy. 362; 1 Steph. Com. 632; 2 *id.* 51.

ENGAGEMENT. In French Law. A contract. The obligations arising from a *quasi* contract.

The terms *obligation* and *engagement* are said to be synonymous; 17 Toullier, n. 1; but the Code seems specially to apply the term engagement to those obligations which the law imposes on a man without the intervention of any contract, either on the part of the obligor or the obligee; art. 1370. An engagement to do or omit to do something amounts to a promise; 21 N. J. L. 369.

Promises or debts of a married woman, not expressly charged on her separate estate, are termed her *general engagements*, not binding it unless made with reference to and upon the credit of it. L. R. 4 C. P. 593; L. R. 2 Eq. 182; 3 DeG. F. & J. 513.

ENGLAND. See UNITED KINGDOM OF GREAT BRITAIN AND IRELAND.

ENGLESHIRE. A law was made by Canute, for the preservation of his Danes,

that, when a man was killed, the hundred or town should be liable to be amerced, unless it could be proved that the person killed was an Englishman. This proof was called *Engleshire*. It consisted, generally, of the testimony of two males on the part of the father of him who had been killed, and two females on the part of his mother. 1 Hale, Pl. Cr. 447 ; 4 Bla. Com. 195 ; Spelman, Gloss.

ENGLISH MARRIAGE. This phrase may refer to the place where the marriage was solemnized, or it may refer to the nationality and domicil of the parties between whom it was solemnized, the place where the union so created was to have been enjoyed. 6 Prob. Div. 51.

ENGROSS (Fr. *gros.*). To copy the rude draught of an instrument in a fair, large hand. To write out, in a large, fair hand, on parchment. The term is applied to statutes, which, after being read and acted on a sufficient number of times, are ordered to be engrossed. Anciently, also, used of the process of making the indenture of a fine. 5 Co. 39 *b*.

In Criminal Law. To buy up such large quantities of an article as to obtain a monopoly of it for the purpose of selling at an unreasonable price. The tendency of modern law is very decidedly to restrict the application of the law against engrossing ; and is very doubtful if it applies at all except to obtaining a monopoly of provisions ; 1 East 143. And now the common-law offence of the total engrossing of any commodity is abolished by stat. 7 & 8 Vict. c. 24. Merely buying for the purpose of selling again is not necessarily engrossing. 14 East 406 ; 15 *id.* 511. See TRUSTS ; COMBINATIONS.

ENGROSSER. One who engrosses or writes on parchment in a large, fair hand.

One who purchases large quantities of any commodity in order to have the command of the market and to sell them again at high prices.

ENGROSSING. The offence committed by an *engrosser*.

ENHANCED. Taken in an unqualified sense, it is equivalent to "increased," and comprehends any increase in value however caused or arising. 32 Fed. Rep. 812.

ENITIA PARS (L. Lat.). The part of the eldest. Co. Litt. 166 ; Bacon, Abr. *Coparceners* (C).

When partition is voluntarily made among coparceners in England, the eldest has the first choice, or *primer election* (*q. v.*) ; and the part which she takes is called *enitia pars*. This right is purely personal, and descends : it is also said that even her assignee shall enjoy it ; but this has been doubted. The word *enitia* is said to be derived from the old French *eisne*, the eldest ; Bac. Abr. *Coparceners* (C) ; Keilw. 1 *a*, 49 *a* ; Cro. Eliz. 18.

ENJOIN. To command ; to require : as, private individuals are not only permitted, but enjoined, by law, to arrest an offender when present at the time a felony is committed or a dangerous wound given, on pain of fine and imprisonment if the wrong-doer escape through their negligence. 1 Hale, Pl. Cr. 587 ; 1 East, Pl. Cr. 298 ; Ry. & M. 93.

To command or order a defendant in equity to do or not to do a particular thing by writ of injunction. See 55 Ch. Div. 418 ; INJUNCTION.

ENLARGE. To extend : as, to enlarge a rule to plead is to extend the time during which a defendant may plead. To enlarge means, also, to set at liberty : as, the prisoner was enlarged on giving bail.

ENLARGING. Extending, or making more comprehensive : as, an enlarging statute, which is one extending the common law. Enlarging an estate is the increasing an estate in land, as where A. has an estate for life with remainder to B. and his heirs, and B. releases his estate to A. 2 Bla. Com. 324. See RELEASE.

ENLISTMENT. The act of making a contract to serve the government in a subordinate capacity, either in the army or navy. The contract so made is also called an enlistment. See, as to the power of infants to enlist, 4 Bing. 487 ; 5 *id.* 423 ; 6 *id.* 255 ; 1 S. & R. 87 ; 11 *id.* 93. A drafted man is said to be "enlisted" as well as a volunteer, but the term does not apply to one entering the army under a commission ; 107 Mass. 282 ; 48 N. H. 280. See 8 Allen 480 ; 2 Sprague 103 ; 40 Conn. 286. The contract of enlistment involves a change in the status of the recruit, which he cannot throw off at will, though he may violate his contract ; 137 U. S. 147. See MILITIA ; MILITARY LAW.

ENORMIA (Lat.). Wrongs. It occurs in the old Latin forms of pleading, where, after a specific allegation of the wrongs done by the defendant, the plaintiff alleges generally that the defendant did *alia enormia* (other wrongs), to the damage, etc. 2 Greenl. Ev. § 278 ; 1 Chit. Pl. 379. See ALIA ENORMIA.

ENQUETE or ENQUEST. In Canon Law. An examination of witnesses in the presence of a judge authorized to sit for this purpose, taken in writing, to be used as evidence in the trial of a cause. The day of hearing must be specified in a notice to the opposite party ; 9 Low. C. 392. It may be opened, in some cases, before the trial ; 10 Low. C. 19.

ENROLL. To register ; to enter on the rolls of chancery, or other courts ; to make a record.

ENROLMENT. In English Law. The registering or entering on the rolls of chancery, king's bench, common pleas, or exchequer, or by the clerk of the peace in the records of the quarter sessions, of any

lawful act: as, a recognizance, a deed of bargain and sale, and the like. Jacob, Law Dict. For the terms "enrolment" and "registration" as used in the United States merchant shipping laws, see R. S. tit. 50; 21 Stat. L. 271; 18 *id.* 30; 3 Wall. 566; VESSEL.

ENS LEGIS. A being of the law. Used of corporations.

ENTAIL. A fee abridged or limited to the issue, or certain classes of issue, instead of descending to all the heirs. 1 Washb. R. P. 66; Cowel; 2 Bla. Com. 112, n.; Wms. R. P. 61.

To restrict the inheritance of lands to a particular class of issue. 1 Washb. R. P. 66; 2 Bla. Com. 113. See FEE-TAIL.

ENTENCION. In Old English Law. The plaintiff's declaration.

ENTER. To go upon lands for the purpose of taking possession; to take possession. In a strict use of terms, entry and taking possession would seem to be distinct parts of the same act; but, practically, entry is now merged in taking possession. 1 Washb. R. P. 10, 32; Stearn, Real Act. 2.

To cause to be put down upon the record. An attorney is said to enter his appearance, or the party himself may enter an appearance. See ENTRY.

ENTERTAINMENT. Something connected with the enjoyment of refreshment rooms, tables, and the like. It is something beyond refreshments; it is the accommodation provided whether that includes musical or other amusements or not. L. R. 10 Q. B. 595. It is synonymous with board; 2 Miles 323; but it may include refreshment, without seating accommodation; 1 Ex. Div. 385.

ENTICE. To solicit, persuade, or procure. 12 Abb. Pr. U. S. 187. The enticing desertions from the army or navy or arsenals of the United States is punishable with fine and imprisonment. R. S. §§ 1553, 1668, 5455, 5525.

A *husband* may recover compensation for enticing his wife away: 36 Pac. Rep. (Colo.) 609; 153 Mass. 148; 26 Vt. 273. It is no defence to show that they had not lived happily together, though it may go in mitigation of damages; 121 Mass. 236; 63 N. W. Rep. (Ia.) 341. Stronger evidence is required where a parent harbors his daughter; it ought to appear that there were improper motives; 5 Johns. 196; Schoul. Husb. & W. § 64; 89 Tenn. 478; 47 Mich. 172. So of a wife's action against her husband's parents for enticing him away from her; 6 Ind. App. 317; and probably of a brother's harboring his sister; 89 Tenn. 479. It has been held that neither at common law nor under statutes giving a *wife* the right to sue has she a right of action for enticing away her husband; 76 Wis. 374; 82 Me. 503; 88 Tenn. 270; but the weight of authority is that the action will lie at common law; 133 Ind. 386; 45 Fed. Rep. 315; 43 Neb. 269; 116 N. Y. 584; 9 H. L. Cas. 577. See 89 Mich. 123, with citations.

A *parent* has a right of action against one who improperly entices his minor child away from him; 71 Ind. 451; 50 Barb. 351; L. R. 2 C. P. 615; in tort or assumpsit; Tiffany, Pers. & Dom. Rel. 284. The action is on the theory of loss of services, and the relation of master and servant, either actual or constructive, must be proven; *id.*; 27 N. J. L. 86.

A *master* has a right of action for knowingly enticing his servant; 2 El. &Bl. 216; 56 N. H. 456; s. c. 22 Am. Rep. 475 and note; 43 Ga. 331; 33 S. C. 238; even though the contract of employment was one which the servant could terminate at will; 70 N. C. 60; L. R. 2 C. P. 615; but not where it had expired by its own limitations; 4 Pick. 425. The doctrine extends to all kinds of employes; 107 Mass. 555; though it has been held to apply, at common law, only to domestic servants and apprentices; 15 S. C. 82.

Where one after notice continues to employ another's servant the latter has a right of action, though at the time he hired him the second master did not know that he was hiring another man's servant; Schoul. Dom. Rel. § 487; but in Lumley *v.* Gye, 2 El. & Bl. 216, which was an action for damages caused by the enticement of Wagner, a celebrated singer, from one theatre to another, the majority of the court thought the action would lie.

Enticement in some states renders one liable to criminal prosecution; 44 Ga. 328; 50 Ala. 160; 89 N. C. 553. See, generally, 26 Fla. 206 and cases cited.

ENTIRE. That which is not divided; that which is whole.

When a contract is entire, it must, in general, be fully performed before the party can claim the compensation which was to have been paid to him: for example, when a man hires to serve another for one year, he will not be entitled to leave him at any time before the end of the year, and claim compensation for the time unless it be done by the consent or default of the party hiring; 6 Vt. 35; 2 Pick. 267; 4 McCord 26, 246; 4 Me. 454; 2 Pa. 454; 15 Johns. 224; 6 H. & J. 38. See 27 Atl. Rep. (Md.) 501. A contract is entire if the consideration be single and entire, notwithstanding the subject of the contract consist of several distinct items; 2 Pars. Cont. 517. See DIVISIBLE.

An *entire day* is an undivided day, from midnight to midnight; 43 Ala. 325; 7 Tex. App. 30, 192. The words "entire use, benefit," etc., in a trust deed for the benefit of a married woman, have been construed as equivalent to "sole and separate use;" 3 Ired. Eq. 414. *Entire tenancy* "is contrary to *several tenancy*, signifying a sole possession in one man, whereas the other signifieth joint or common in more." Cowel.

ENTIRETY. This word denotes the whole in contradistinction to moiety, which denotes the half part. A husband and wife, when jointly seized of land, are seized by entireties *per tout* and not *per my et per tout*, as joint tenants are. Jacob, Law

Dict.; 2 Kent 132. See 156 Pa. 628; PER TOUT ET NON PER MY.

The same words of conveyance that would make two other persons joint tenants will make the husband and wife tenants of the entirety; 38 S. C. 34; 69 Miss. 795; 23 Or. 4; 92 Tenn. 707. Where a wife pays for land and consents that the title may be taken in the name of herself and husband, they hold as tenants in entirety, and a conveyance by the husband passes the rights to the possession of the land during their joint lives, and to the fee in case the husband survive; 67 Hun 229; 159 Mass. 415.

ENTREGA. In Spanish Law. Delivery.

ENTREPOT. A warehouse. A magazine where goods are deposited which are to be again removed.

ENTRY. In Common Law. The act of setting down the particulars of a sale, or other transaction, in a merchant's or tradesman's account-books: such entries are, in general, *prima facie* evidence of the sale and delivery, and of work done; but unless the entry be the original one, it is not evidence. See SHORT ENTRY; SINGLE ENTRY.

In Revenue Law. The submitting to the inspection of officers appointed by law, to collect customs, goods imported into the United States, together with a statement or description of such goods, and the original invoices of the same, for the purpose of estimating the duties to be paid thereon.

The act of March 2, 1799, s. 36, 1 Story, U. S. Laws 606, and the act of March 1, 1823, 3 Story, U. S. Laws 1881, and of March 3, 1863, regulate the manner of making entries of goods. Under the last mentioned act, goods entered by means of any false paper, etc., or their value, shall be forfeited, and the word "entry" in that act means the entire transaction by which the goods become a part of the merchandise of the country; 5 Ben. 25.

The term "entry" in the acts of congress is used in two senses. In many of the acts it refers to the bill of entry,—the paper or declaration which the merchant or importer in the first instance hands to the entry clerk. In other statutes it is used to denote, not a document, but a transaction; a series of acts which are necessary to the end to be accomplished, viz. the entering of the goods; 3 Sawy. 46.

In Criminal Law. The act of entering a dwelling-house, or other building, in order to commit a crime.

In cases of burglary, the least entry with the whole or any part of the body, hand, or foot, or with any instrument or weapon, introduced for the purpose of committing a felony, is sufficient to complete the offence; Co. 3d Inst. 64.

It is an entry if a person descend a chimney but is arrested before he can get low enough to enter any room; it is an entry to open a window entirely, but not to push it up or down when partly opened; putting a finger or a pistol over a threshold is an entry, but not a centre-bit or crowbar, these instruments being intended for breaking, and not for committing a felony. Sir M. Hale suggests a "quære," however, with a "seeming" to the contrary, as to an entry by a bullet fired into a house; 1 Hale, Pl. Cr. 555. It is submitted, says Wilmot (Dig. Law of Burglary 58), that the only possible way in which the discharging a loaded gun or pistol into a dwelling-house from the outside could be held burglary would be by laying the intent to commit felony by killing or wounding, or generally to commit felony; and *quære*, whether the breaking and entry requisite to complete the burglary would be satisfied by such discharge? It is not necessary in all cases to show an actual entry by all the prisoners; there may be a *constructive* entry as well as a constructive breaking. A, B, and C come in the night by consent to break and enter the house of D to commit a felony. A only actually breaks and enters the house; B stands near the door, but does not actually enter; C stands at the lane's end, or orchard-gate, or field-gate, or the like, to watch that no help come to aid the owner, or to give notice to the others if help comes: this is burglary in all, and all are principals; 1 Hale, Pl. Cr. 555. See BURGLARY.

Upon Real Estate. The act of going upon the lands of another, or lands claimed as one's own, with intent to take possession. See 8 Humph. 306.

In general, any person who has a right of possession may assert it by a peaceable entry, without the formality of a legal action, and, being so in possession, may retain it, and plead that it is his soil and freehold; 3 Term 295. A notorious act of ownership of this kind was always equivalent to a feodal investiture by the lord, and is now allowed in all cases where the original entry of a wrong-doer was unlawful. But, in all cases where the first entry was lawful and an apparent right of possession was thereby gained, the owner of the estate cannot thus enter, but is driven to his action at law; 3 Bla. Com. 175. See RE-ENTRY; FORCIBLE ENTRY.

At common law, no person could make a valid sale of land unless he had lawfully entered, and could make livery of seisin,—that is, could make an actual delivery of possession to the purchaser. This provision was early incorporated into the English statutes, to guard against the many evils produced by selling pretended titles to land. A pretended title within the purview of the law is where one person claims land of which another is in possession holding adversely to the claim; 1 Plowd. 88 *a*; Littleton § 347; 9 Wend. 511. And now in most of the states, every grant of land, except as a release, is void as an act of maintenance, if, at the time it is made, the lands are in the actual possession of another person claiming under a title adverse to that of the grantor; 4 Kent 446; 5 Johns. 489; 6 Mass. 418; 87 Hun 50; 20 S. W. Rep. (Ky.) 20; *contra*, 5 N. H. 181; 6 Binn. 420; 2 App. Cas. D. C, 349. See CHAMPERTY.

In a more limited sense, an entry signifies the simply going upon another person's premises for some particular purpose. The right to land is exclusive, and every unwarranted entry thereon without the owner's leave, whether it be enclosed or not, or unless the person entering have an authority given him by law, is a trespass; 12 Johns. 408; 19 *id.* 385; 2 Mass. 127. But the owner's license will sometimes be presumed, and then will continue in force until it is actually revoked by the owner; 10 Johns. 243; Willes 195; Tayl. L. & T. 766.

Authority to enter upon lands is given by law in many cases. See ARREST.

The proprietor of chattels may under some circumstances enter the land of another upon which they are placed, and remove them, provided they are there without his default: as, where his tree has blown down into the adjoining close by the wind, or his fruit has fallen from a branch which overhung it; 20 Vin. Abr. 418; 2 Greenl. Ev. § 627.

A landlord also may enter, to distrain or to demand rent, to see whether waste has been committed, or repairs made, and may go into the house for either purpose, provided the outer door be open; Cro. Eliz. 876; 2 Greenl. Ev. § 627. So, if he is bound to repair, he has a right of entry given him by law for that purpose; Moore 889. Or if trees are excepted out of a demise, the lessee has a right of entering to prune or fell them; 11 Co. 53; Tayl. L. & T. § 767. A tenant becomes a trespasser after the expiration of his term, though his holding is in good faith under color of a reasonable claim of right; and the landlord may forcibly enter thereon and eject him without legal process; 16 R. I. 524; 17 *id.* 731.

Every traveller also has, by law, the privilege of entering a common inn, at all seasonable times, provided the host has sufficient accommodation, which, if he has not, it is for him to declare. Wand. Inns 46.

So any man may throw down a public nuisance; and a private one may be thrown down by the party grieved, and this before any prejudice happens, but only from the probability that it may happen; Webb, Poll. Torts 513; 5 Co. 102. And see 1 Brownl. 212; 12 Mod. 510; W. Jones 221; 1 Stra. 683; 53 Wis. 404. To this end, the abator has authority to enter the close in which it stands. See NUISANCE.

In Practice. The placing on record the various proceedings in an action, in technical language and order. The extreme strictness of the old practice is somewhat relaxed, but the term entry is still used in this connection. "Books of Entries" were formerly much relied on, containing forms or precedents of the proceedings in various actions as they appear on record.

In the law books the words entry and entered are frequently used as synonymous with recorded; 130 N. Y. 504. See 100 Ill. 484; 54 Cal. 519; 74 Ind. 59.

For entry of public lands, see PREEMPTION RIGHT. For the terms entry of judgment, entry of appearance, entry for copyright, see JUDGMENT; APPEARANCE; COPYRIGHT.

ENTRY AD COMMUNEM LEGEM. In English Law. A writ which lay in favor of the reversioner, when the tenant for term of life, tenant for term of another's life, tenant by the curtesy, or tenant in dower had aliened and died. Tomlin, Law Dict. Long obsolete, and abolished in 1833.

ENTRY, WRIT OF. In Old Practice. A real action brought to recover the possession of lands from one who wrongfully withholds possession thereof.

Such writs were said to be in the *Quibus*, where the suit was brought against the party who committed the wrong; in the *Per*, where the tenant against whom the action was brought was either heir or grantee of the original wrong-doer; in the *Per and Cui*, where there had been two descents, two alienations, or descent and an alienation; in the *Post*, where the wrong was removed beyond the degrees mentioned.

The above designations are derived from significant Latin words in the respective forms adapted to the cases given. A descent or alienation on the part of the disseisor constituted a degree (see Co. Litt. 239 *a*); and at common law the writ could be brought only within the degrees (two), the demandant after that being driven to his writ of right. By the statute of Marlbridge (*q. v.*), 52 Hen. III. c. 30 (A. D. 1267), however, a writ of entry, after (*post*) those degrees had been passed in the alienation of the estate, was allowed. Where there had been no descent and the demandant himself had been dispossessed, the writ ran, *Præcipe A quod reddat B sex acras terræ, etc. de quibus idem A, etc.* (command A to restore to B six acres of land, etc., *of which* the said A, etc.); if there had been a descent after the description came, the clause, *in quod idem A non habet ingressum nisi per C qui illud ei demisit* (into which the said A, the tenant, has no entry but *through* C, who demised it to him); where there were two descents, *nisi per D cui C illud demisit* (but by D, to whom C demised it); where it was beyond the degrees, *nisi post disseisinam quam C* (but *after* the disseisin which C, the original disseisor, did, etc.).

The writ was of many varieties, also, according to the character of the title of the claimant and the circumstances of the deprivation of possession. Booth enumerates and discusses twelve of these, of which some are *sur disseisin, sur intrusion, ad communem legem, ad terminum qui preterit, cui in vita, cui ante divortium*, etc. Either of these might, of course, be brought in any of the four degrees, as the circumstances of the case required. The use of writs of entry has been long since abolished in England; but they are still in use in a modified form in some of the United States, as the common means of recovering possession of realty against a wrongful occupant; 2 Pick. 473; 10 *id.* 359; 5 N. H. 450; 68 Me. 21, 71; 85 *id.* 90; 124 Mass. 307, 468; 139 *id.* 244; 157 *id.* 24. See Stearn, Real Act.; Booth, R. A.; Co. Litt. 238 *b*.

To maintain a writ of entry, the demandant who declares on his own seisin, and alleges a disseisin, is required to prove only that he has a right of entry and need not prove an actual wrongful dispossession or an adverse possession by the tenants; 161 Mass. 91.

ENURE. To take or have effect. To serve to the use, benefit, or advantage of a person. The word is often written *inure*. A release to the tenant for life *enures* to him in reversion; that is, it has the same effect for him as for the tenant for life. A

discharge of the principal enures to the benefit of the surety.

ENVOY. In International Law. A diplomatic agent sent by one state to another. Wharton.

A minister of the second rank, on whom his sovereign or government has conferred a degree of dignity and respectability which, without being on a level with an ambassador, immediately follows, and, among ministers, yields the pre-eminence to him alone.

Envoys are either ordinary or extraordinary; by custom the latter is held in greater consideration. Vatt. liv. 4, c. 6, § 72.

EO INSTANTI. At that instant; at the very or same instant; immediately. 1 Bla. Com. 196, 249; 1 Co. 138; Black, L. Dict.

EORLE (Sax.). An earl. Blount; 1 Bla. Com. 398.

EPILEPSY. In Medical Jurisprudence. A disease of the brain, which occurs in paroxysms with uncertain intervals between them.

These paroxysms are characterized by the loss of sensation, and convulsive motions of the muscles. When long continued and violent, this disease is very apt to end in dementia. It gradually destroys the memory and impairs the intellect, and is one of the causes of an unsound mind.

EPIQUEYA. In Spanish Law. The benignant and prudent interpretation of the law according to the circumstances of the time, place, and person. This word is derived from the Greek, and is synonymous with the word equity. See Murillo, nn. 67, 68.

EPISCOPACY. In Ecclesiastical Law. A form of government by diocesan bishops; the office or condition of a bishop.

EPISCOPALIA (L. Lat.). **In Ecclesiastical Law.** Synodals, or payments due the bishop.

EPISCOPUS (L. Lat.). **In Civil Law.** A superintendent; an inspector. Those in each municipality who had the charge and oversight of the bread and other provisions which served the citizens for their daily food were so called. Vicat; Du Cange.

A bishop. These bishops, or *episcopi*, were held to be the successors of the apostles, and have various titles at different times in history and according to their different duties. It was applied generally to those who had authority or were of peculiar sanctity. After the fall of the Roman empire they came to have very considerable judicial powers. Du Cange; Vicat; Calvinus, Lex.

EPISTOLÆ (Lat.). **In Civil Law.** Rescripts; opinions given by the emperors in cases submitted to them for decision.

Answers of the emperors to petitions.

The answers of counsellors (*juris-consulta*), as Ulpian and others, to questions of law proposed to them, were also called *epistolæ*.

Opinions written out. The term originally signified the same as *literæ*. Vicat.

EQUALITY. Likeness in possessing the same rights and being liable to the same duties. See 1 Toullier, nn. 170, 193.

Person are all equal before the law, whatever adventitious advantages some may possess over others. All persons are protected by the law, and obedience to it is required from all.

Judges in court, while exercising their functions, are all upon an equality, it being a rule that *inter pares non est potestas:* a judge cannot, therefore, punish another judge of the same court for using any expression in court, although the words used might have been a contempt in any other person. Bacon, Abr., *Of the Court of Sessions, Of Justices of the Peace.*

In contracts, the law presumes that the parties act upon a perfect equality: when, therefore, one party uses any fraud or deceit to destroy this equality, the party grieved may avoid the contract. In case of a grant to two or more persons jointly, without designating what each takes, they are presumed to take in equal proportions; 4 Day 395; 6 Ired. Eq. 437; 83 Pa. 59.

It is a maxim that when the equity of the parties is equal, the law must prevail; 3 Call 259; and that as between different creditors, equality is equity; 2 Bouvier, Inst., 2d ed. n. 3729; 1 Paige, Ch. 181. See Kames, Eq. 75.

EQUINOX. The name given to two periods of the year when the days and nights are equal; that is, when the space of time between the rising and setting of the sun is one-half of a natural day. The *vernal* equinox occurs about March 21, the *autumnal* about September 23.

EQUITABLE ASSETS. Such assets as are chargeable with the payment of debts or legacies in equity, and which do not fall under the description of legal assets.

Those portions of the property which by the ordinary rules of law are exempt from debts, but which the testator has voluntarily charged as assets, or which, being non-existent at law, have been created in equity. Ad. Eq. 254.

They are so called because they can be reached only by the aid and instrumentality of a court of equity, and because their distribution is governed by a different rule from that which governs the distribution of legal assets. 2 Fonb. Eq. b. 4, pt. 2, c. 2, § 1, and notes; 2 Vern. 763; Willes 523; 3 Woodd. Lect. 486; Story, Eq. Jur. § 552.

The doctrine of equitable assets has been much restricted in the United States generally, and has lost its importance in England since the act of 1870, providing that simple contract and specialty creditors are, in future, payable *pari passu* out of both legal and equitable assets; Bisph. Eq. § 531; 4 Johns. Ch. 651; 5 Pet. 160; 2 Brock. 325; 3 Dana 18; 8 B. Monr. 499; 3 Ired. Eq. 259.

EQUITABLE ASSIGNMENT. An assignment of a *chose in action*, a thing not *in esse*, as a mortgage of personal property to be acquired in the future, and a mere

contingency which, though not good at law, equity will recognize. Bisph. Eq. § 164; 10 H. L. Cas. 209; 19 Wall. 544; 38 Ill. App. 66; 33 N. J. Eq. 614; 91 Pa. 96. In making such an assignment, no particular form of words is necessary; 35 Me. 41; 56 Barb. 362; 33 Vt. 431; 59 N. H. 383; 30 N. J. Eq. 171; but the property must be specifically pointed out; 56 Me. 465; Benj. Sales 62; and there must be an appropriation or separation, and the mere intent to appropriate is not sufficient; 54 Fed. Rep. 577; 37 N. J. Eq. 123. See 14 Wall. 69. A valid assignment may be made of a portion of the contract price of a building contracted to be erected by the assignor, but not yet erected, and such assignment need not be written nor accompanied by any transfer of the contract itself; 50 N. J. Eq. 201. The assignee of a *chose in action* takes it subject to existing equities in favor of third persons, as well as to those between the original parties; 50 N. Y. 67; 3 Lead. Cas. Eq. 372, n.; Beach, Eq. Jur. 342. Equity will not recognize the assignment of certain kinds of property as against the policy of the law, such as, mere litigious rights, pensions, salaries of judges, commissions of officers in the army or navy, claims against the United States, and the like; 1 E. L. & Eq. 153; 67 Pa. 369; L. R. 7 Ch. 109; 8 *id.* 76; 6 Ct. Cl. 123; 4 *id.* 569; 112 U. S. 733. The assignment of secured notes carries with it an equitable assignment of the security; 44 Ill. App. 516. See ASSIGNMENT; EXPECTANCY.

EQUITABLE CONVERSION. See CONVERSION.

EQUITABLE DEFENCE. A defence to an action on grounds which, prior to the passing of the Common Law Procedure Act (17 and 18 Vict. c. 125), would have been cognizable only in a court of equity. Moz. & W. The codes of procedure and the practice in some of the states likewise permit both a legal and equitable defence to the same action.

EQUITABLE ESTATE. A right or interest in land, which, not having the properties of a legal estate, but being merely a right of which courts of equity will take notice, requires the aid of such court to make it available.

These estates consist of uses, trusts, and powers. They possess in some respects the qualities of legal estates in modern law; 1 Pet. 508; 13 Pick. 154; 5 Watts 113; 82 Pa. 86; 1 Johns. Ch. N. Y. 508; 2 Vern. 536; 1 Bro. Ch. Cas. 499; Wms. R. P. 134–136; 1 Spence, Eq. Jur. 501; 1 Washb. R. P. 130, 161.

EQUITABLE MORTGAGE. A lien upon real estate of such a character that it is recognized in equity as a security for the payment of money and is treated as a mortgage. A mortgage of a merely equitable estate or interest is also so called.

Such a mortgage may exist by a deposit with the lender of money of the title-deeds to an estate; Story, Eq. Jur. § 1020; Bisph. Eq. 161; 1 Bro. Ch. C. 269, note; 17 Ves. 230; 2 Myl. & K. 417; 5 Wheat. 277; 2 Dick. 759; 2 Drew 41; 20 Beav. 607. They must have been deposited as a present, *bona fide* security; 1 Washb. R. P. 503; and the mortgagee must show notice to affect a subsequent mortgagee of record; 24 Me. 311; 3 Hare 416; Story, Eq. Jur. § 1020. Such mortgages are recognized in some states; 24 Me. 311; 18 Miss. 418; 16 Ga. 469; 2 Hill, S. C. 166; 2 Sandf. 9; 4 R. I. 512; but under the usual system of the registration of deeds are of infrequent occurrence.

Such a mortgage has been said to exist in favor of the vendor of real estate as security for purchase-money due from the purchaser; in which case a lien is recognized in some jurisdictions; 15 Ves. 339; 1 Bro. Ch. C. 420, 424, n. It is occasionally spoken of as an equitable mortgage; 1 Bland 491; 2 Rob. Va. 447, though it is doubtful if it is to be so considered. It is properly termed vendor's lien, which see. See also LIEN.

EQUITABLE WASTE. See WASTE.

EQUITATURA. In Old English Law. Needful equipments for riding or travelling.

EQUITY. A branch of remedial justice by and through which relief is afforded to suitors in the courts of equity.

In the broad sense in which this term is sometimes used, it signifies natural justice.

In a more limited application, it denotes equal justice between contending parties. This is its moral signification, in reference to the rights of parties having conflicting claims; but applied to courts and their jurisdiction and proceedings, it has a more restrained and limited signification.

One division of courts is into courts of law and courts of equity. And equity, in this relation and application, is a branch of remedial justice by and through which relief is afforded to suitors in the courts of equity.

The difference between the remedial justice of the courts of common law and that of the courts of equity is marked and material. That administered by the courts of law is limited by the principles of the common law (which are to a great extent positive and inflexible), and especially by the nature and character of the process and pleadings, and of the judgments which those courts can render; because the pleadings cannot fully present all the matters in controversy, nor can the judgments be adapted to the special exigencies which may exist in particular cases. It is not uncommon, also, for cases to fail in those courts, from the fact that too few or too many persons have been joined as parties, or because the pleadings have not been framed with sufficient technical precision.

The remedial process of the courts of equity, on the other hand, admits, and, generally, requires, that all persons having an interest shall be made parties, and makes a large allowance for amendments by summoning and discharging parties after the commencement of the suit. The pleadings are usually framed so as to present to the consideration of the court the whole case, with its possible legal rights, and all its equities,—that is, all the grounds upon which the suitor is or is not entitled to relief upon the principles of equity. And its final remedial process may be so varied as to meet the requirements of these equities, in cases where the jurisdiction of the courts of equity exists, by "commanding what is right, and prohibiting what is wrong." In other words, its final process is varied so as to enable the courts to do that equitable justice between the parties which the case demands, either by commanding what is to be done, or prohibiting what is threatened to be done.

The principles upon which, and the modes and forms by and through which, justice is administered in the United States, are derived to a great extent from those which were in existence in England at the time of the settlement of this country; and

it is therefore important to a correct understanding of the nature and character of our own jurisprudence, not only to trace it back to its introduction here on the early settlement of the colonies, but also to trace the English jurisprudence from its earliest inception as the administration of law, founded on principles, down to that period. It is in this way that we are enabled to explain many things in our own practice which would otherwise be entirely obscure. This is particularly true of the principles which regulate the jurisdiction and practice of the courts of equity, and of the principles of equity as they are now applied and administered in the courts of law which at the present day have equitable jurisdiction conferred upon them by statutes passed for that purpose. And for the purpose of a competent understanding of the course of decisions in the courts of equity in England, it is necessary to refer to the origin of the equitable jurisdiction there, and to trace its history, inquiring upon what principles it was originally founded, and how it has been enlarged and sustained.

The study of equity jurisprudence, therefore, comprises an inquiry into the origin and history of the courts of equity; the distinctive principles upon which jurisdiction in equity is founded; the nature, character, and extent of the jurisdiction itself; its peculiar remedies; the rules and maxims which regulate its administration; its remedial process and proceedings and modes of defence; and its rules of evidence and practice.

"The meaning of the word 'equity,' as used in its technical sense in English jurisprudence, comes back to this: that it is simply a term descriptive of a certain field of jurisdiction exercised in the English system, by certain courts, and of which the extent and boundaries are not marked by lines founded upon principle so much as by the features of the original constitution of the English scheme of remedial law, and the accidents of its development." Bisph. Eq. § 11.

ORIGIN AND HISTORY. The courts of equity may be said to have their origin as far back as the Aula or Curia Regis, the great court in which the king administered justice in person, assisted by his counsellors. Of the officers of this court, the chancellor was one of great trust and confidence, next to the king himself; but his duties do not distinctly appear at the present day. On the dissolution of that court, he exercised separate duties.

On the introduction of seals, he had the keeping of the king's seal, which he affixed to charters and deeds; and he had some authority in relation to the king's grants,—perhaps annulling those which were alleged to have been procured by misrepresentation or to have been issued unadvisedly.

As writs came into use, it was made his duty to frame and issue them from his court, which, as early as the reign of Henry II., was known as the chancery. And it is said that he exercised at this period a sort of equitable jurisdiction by which he mitigated the rigor of the common law,—to what extent it is impossible to determine. He is spoken of as one who "annuls unjust laws, and executes the rightful commands of the pious prince, and puts an end to what is injurious to the people or to morals,"—which would form a very ample jurisdiction; but it seems probable that this was according to the authority or direction of the king, given from time to time in relation to particular cases. He was a principal member of the king's council, after the conquest, in which, among other things, all applications for the special exercise of the prerogative in regard to matters of judicial cognizance were discussed and decided upon. In connection with the council, he exercised a separate authority in cases in which the council directed the suitors to proceed in chancery. The court of chancery is said to have sprung from this council. But it may be said that it had its origin in the prerogative of the king, by which he undertook to administer justice, on petitions to himself, without regard to the jurisdiction of the ordinary courts, which he did through orders to his chancellor. The great council, or parliament, also sent matters relating to the king's grants, etc., to the chancery; and it seems that the chancellor, although an ecclesiastic, was the principal actor as regards the judicial business which the select or king's council, as well as the great council, had to advise upon or transact. In the reign of Edward I. the power and authority of the chancellor were extended by the statute of Westminster 2d.

In the time of Edward III. proceedings in chancery were commenced by petition or bill, the adverse party was summoned, the parties were examined, and chancery appears as a distinct court for giving relief in cases which required extraordinary remedies, the king having, "by a writ, referred all such matters as were of *grace* to be dispatched by the chancellor or by the keeper of the privy seal."

It may be considered to have been fully established as a separate and permanent jurisdiction, from the 17th of Richard II.

In the time of Edward IV. the chancery had come to be regarded as one of the four principal courts of the kingdom. From this time its jurisdiction and the progress of its jurisdiction become of more importance to us.

It is the tendency of any system of legal principles, when reduced to a practical application, to fail of effecting such justice between party and party as the special circumstances of a case may require, by reason of the minuteness and inflexibility of its rules and the inability of the judges to adapt its remedies to the necessities of the controversy under consideration. This was the case with the Roman law; and, to remedy this, edicts were issued from time to time, which enabled the consuls and prætors to correct "the scrupulosity and mischievous subtlety of the law;" and from these edicts a code of equitable jurisprudence was compiled.

So the principles and rules of the common law, as they were reduced to practice, became in their application the means of injustice in cases where special equitable circumstances existed, of which the judge could not take cognizance because of the precise nature of its titles and rights, the inflexible character of its principles, and the technicality of its pleadings and practice. And in a manner somewhat analogous to the Roman mode of modification, in order to remedy such hardships, the prerogative of the king or the authority of the great council was exercised in ancient

times to procure a more equitable measure of justice in the particular case, which was accomplished through the court of chancery.

This was followed by the "*invention*" of the writ of subpœna by means of which the chancery assumed, upon a complaint made directly to that court, to require the attendance of the adverse party, to answer to such matters as should be objected against him. Notwithstanding the complaints of the commons, from time to time, that the course of proceeding in chancery "was not according to the course of the common law, but the practice of the holy church," the king sustained the authority of the chancellor, the right to issue the writ was recognized and regulated by statute, and other statutes were passed conferring jurisdiction where it had not been taken before. In this way, without any compilation of a code, a system of equitable jurisprudence was established in the court of chancery, enlarging from time to time; the decisions of the court furnishing an exposition of its principles and of their application. It is said that the jurisdiction was greatly enlarged under the administration of Cardinal Wolsey, in the time of Henry VIII. The courts of equity also began to act *in personam* and to enjoin plaintiffs in common-law courts from prosecuting inequitable suits. A controversy took place between Lord Chancellor Ellesmere and Lord Coke, Chief Justice of the King's Bench, in the time of James I., respecting the right of the chancellor to interfere with any of the proceedings and judgments of the courts of law. The king sustained the chancellor; and from that time the jurisdiction then claimed has been maintained. See 1 Ch. Rep. 1; 2 Lead. Cas. Eq. 504; Bisph. Eq. § 407; 1 Poll. & Maitl. 172; CANCELLARIUS.

It is from the study of these decisions and the commentaries upon them that we are enabled to determine, with a greater or less degree of certainty, the time when and the grounds upon which jurisdiction was granted or was taken in particular classes of cases, and the principles upon which it was administered. And it is occasionally of importance to attend to this; because we shall see that, chancery having once obtained jurisdiction, that jurisdiction continues until expressly taken away, notwithstanding the intervention of such changes in common-law practice and rules as, if they had been made earlier, would have rendered the exercise of jurisdiction in equity incompatible with the principles upon which it is founded.

A brief sketch of some of the principal points in the origin and history of the court of chancery may serve to show that much of its jurisdiction exists independently of any statute, and is founded upon an assumption of a power to do equity, having its first inception in the prerogative of the king, and his commands to do justice in individual cases, extending itself through the action of the chancellor, to the issue of a writ of summons to appear in his court without any special authority for that purpose, and, upon the return of the subpœna, to the reception of a complaint, to a requirement upon the party summoned to make answer to that complaint, and then to a hearing and decree, or judgment, upon the merits of the matters in controversy, according to the rules of equity and good conscience.

It appears as a noticeable fact that the jurisdiction of the chancery proceeded originally from and was sustained by successive kings of England against the repeated remonstrances of the commons, who were for adhering to the common law; though not, perhaps, approving of all its rigors, as equity had been to some extent acknowledged as a rule of decision in the common-law courts.

This opposition of the commons may have been owing in part to the fact that the chancellor was in those days usually an ecclesiastic, and to the existing antipathy among the masses of the people to almost everything Roman.

The master of the rolls, who for a long period was a judicial officer of the court of chancery, second only to the chancellor, was originally a clerk or keeper of the rolls or records, but seems to have acquired his judicial authority from being at times directed by the king to take cognizance of and determine matters submitted to him.

DISTINCTIVE PRINCIPLES. It is quite apparent that some principles other than those of the common law must regulate the exercise of such a jurisdiction. That law could not mitigate its rigor upon its own principles. And as, down to the time of Edward III., and, with few exceptions, to the 21st of Henry VIII., the chancellors were ecclesiastics, much more familiar with the principles of the Roman law than with those of the common law, it was but a matter of course that there should be a larger adoption of the principles of that law; and the study of it is of some importance in this connection. Still, that law cannot be said to be of *authority* even in equity proceedings. The commons were jealous of its introduction. "In the reign of Richard II. the barons protested that they would never suffer the kingdom to be governed by the Roman law, and the judges prohibited it from being any longer cited in the common-law tribunals."

This opposition of the barons and of the common-law judges furnished very sufficient reasons why the chancellors should not profess to adopt that law as the rule of decision. In addition to this, it was not fitted, in many respects, to the state of things existing in England; and so the chancellors were of necessity compelled to act upon equitable principles as expounded by themselves. In later times the common-law judges in that country have resorted to the Roman law for principles of decision to a much greater extent than they have given credit to it.

Since the time of Henry VIII. the chancery bench has been occupied by some of the ablest lawyers which England has pro-

duced, and they have given to the proceedings and practice in equity definite rules and forms, which leave little to the personal discretion of the chancellor in determining what equity and good conscience require. The discretion of the chancellor is a judicial discretion, to be exercised according to the principles and practice of the court. See DISCRETION.

The avowed principle upon which the jurisdiction was at first exercised was the administration of justice according to honesty, equity, and conscience,—which last, it is said, was unknown to the common law as a principle of decision.

In the 15th of Richard II. two petitions, addressed to the king and the lords of parliament, were sent to the chancery to be heard, with the direction, "Let there be done, by the authority of parliament, that which right and reason and good faith and good conscience demand in the case."

These may be said to be the general principles upon which equity is administered at the present day.

The distinctive principles of the courts of equity are shown, also, by the classes of cases in which they exercise jurisdiction and give relief,—allowing it to be sought and administered through process and proceedings of less formality and technicality than are required in proceedings at law. This, however, has its limitations, some of its rules of pleading in defence being quite technical. And it is another peculiar feature that the relief is administered by a decree or process adapted to the exigencies of the particular case.

JURISDICTION. It is difficult to reduce a jurisdiction so extensive and of such diverse component parts to a rigid and precise classification. But an approach to it may be made. The general nature of the jurisdiction has already been indicated. It exists—

First, for the purpose of compelling a *discovery* from the defendant, respecting the truth of the matters alleged against him, by an appeal to his conscience to speak the truth. The discovery is enforced by requiring an answer to the allegations in the plaintiff's complaint, in order that the plaintiff may use the matters disclosed in the answer, as admissions of the defendant, and, thus, evidence is secured for the plaintiff, either in connection with and in aid of other evidence offered by the plaintiff, or to supply the want of other evidence on his part; or it may be to avoid the expense to which the plaintiff must be put in procuring other evidence to sustain his case.

When the plaintiff's complaint, otherwise called a bill, prays for relief in the same suit, the statements of the defendant in his answer are considered by the court in forming a judgment upon the whole case.

To a certain extent, the statements of the defendant in answer to the bill are evidence for himself also.

The discovery which may be required is not only of facts within the knowledge of the defendant, but may, also, be of deeds and other writings in his possession.

The right to discovery is not, however, an unlimited one: as, for instance, the defendant is not bound to make a discovery which would subject him to punishment, nor, ordinarily, to discover the title upon which he relies in his defence; nor is the plaintiff entitled to require the production of all papers which he may desire to look into. The limits of the right deserve careful consideration. The discovery, when had, may be the foundation of equitable relief in the same suit, in which case it may be connected with all the classes of cases in which relief is sought; or it may be for the purpose of being used in some other court, in which case the jurisdiction is designated as an assistant jurisdiction. Since the new statutes on the admission of evidence of parties, bills of discovery have practically fallen into disuse. See DISCOVERY.

Second, where the courts of law do not, or did not, recognize any right, and therefore could give no remedy, but where the courts of equity recognize equitable rights and, of course, give equitable relief. This has been denominated the exclusive jurisdiction. In this class are *trusts*, *charities*, *forfeited and imperfect mortgages*, *penalties* and *forfeitures*, *imperfect consideration*.

Uses and trusts have been supposed to have had their origin in the restrictions laid by parliament upon conveyances in mortmain,—that is, to the church for charitable, or rather for ecclesiastical, purposes.

It may well be that the doctrine of equitable titles and estates, unknown to the common law but which could be enforced in chancery, had its origin in conveyances to individuals for the use of the church in order to avoid the operation of these restrictions,—the conscience of the feofee being bound to permit the church to have the use according to the design and intent of the feoffment.

But conveyances in trust for the use of the church were not by any means the only cases in which it was desirable to convey the legal title to one for the use of another. In many instances, such a conveyance offered a convenient mode of making provision for those who, from any circumstances, were unable to manage property advantageously for themselves, or to whom it was not desirable to give the control of it; and the propriety in all such cases of some protection to the beneficiary is quite apparent. The court of chancery, by recognizing that he had an interest of an equitable character which could be protected and enforced against the holder of the legal title, exercised a jurisdiction to give relief in cases which the courts of common law could not reach, consistently with their principles and modes of procedure.

Mortgages, which were originally estates conveyed upon condition, redeemable if the condition were performed at the day, but absolute on non-performance, the right to redeem being thereby forfeited, owe their origin, in the modern conception of the term, to the court of chancery; which,

acting at first, perhaps, in some cases where the non-performance was by mistake or accident, soon recognized an equitable right of redemption after the day, as a general rule, in order to relieve against the forfeiture. This became known as an equity of redemption,—a designation, in use at the present day, although there has long been a legal right of redemption in such cases.

Relief against penalties and forfeitures also was formerly obtained only through the aid of the court of chancery.

In most of the cases which fall under this head, courts of law now exercise a concurrent jurisdiction.

Third, where the courts of equity administer equitable relief for the infraction of legal rights, in cases in which the courts of law, recognizing the right, give a remedy according to their principles, modes, and forms, but the remedy is deemed by equity inadequate to the requirements of the case. This is sometimes called the concurrent jurisdiction. This class embraces *fraud, mistake, accident, administration, legacies, contribution*, and cases where justice and conscience require the *cancellation, or reformation of instruments, or the rescission, or the specific performance of contracts.*

The courts of law relieve against fraud, mistake, and accident where a remedy can be had according to their modes and forms; but there are many cases in which the legal remedy is inadequate for the purposes of justice.

The modes of investigation and the peculiar remedies of the courts of equity are often of the greatest importance in this class of cases.

Transfers to defeat or delay creditors, and purchases with notice of an outstanding title, come under the head of fraud.

It has been said that there is a less amount of evidence required to prove fraud, in equity, than there is at law; but the soundness of that position may well be doubted.

The court does not relieve in all cases of accident and mistake.

In many cases the circumstances are such as to require the cancellation or reformation of written instruments or the specific performance of contracts, instead of damages for the breach of them.

Fourth, where the court of equity administers a remedy because the relations of the parties are such that there are impediments to a legal remedy. *Partnership* furnishes a marked instance. *Joint-tenancy and marshalling of assets* may be included.

From the nature of a partnership, there are impediments to suits at law between the several partners and the partnership in relation to matters involved in the partnership; and impediments of a somewhat similar character exist in other cases.

Fifth, where the forms of proceeding in the courts of law are not deemed adequate to the due investigation of the particulars and details of the case. This class includes *account, partition, dower, ascertainment of boundaries.*

Sixth, where, from a relation of trust and confidence, or from consanguinity, the parties do not stand on equal ground in their dealings with each other: as, the relations of *parent* and *child, guardian* and *ward, attorney* and *client, principal* and *agent, executor* or *administrator* and *legatees* or *distributees, trustee* and *cestui que trust*, etc.

Seventh, where the court grant relief from considerations of public policy, because of the mischief which would result if the court did not interfere. *Marriage-brokage agreements, contracts in restraint of trade, buying* and *selling public offices, agreements founded on corrupt considerations, usury, gaming*, and *contracts with expectant heirs*, are of this class.

Many cases of this and the preceding class are sometimes considered under the head of *constructive fraud.*

Eighth, where a party from incapacity to take care of his rights is under the special care of the court of equity, as *infants, idiots*, and *lunatics.*

This is a branch of jurisdiction of very ancient date, and of a special character, said to be founded in the prerogative of the king.

In this country the court does not, in general, assume the guardianship, but exercises an extensive jurisdiction over guardians, and may hold a stranger interfering with the property of an infant accountable as if he were guardian.

Ninth, where the court recognizes an obligation on the part of a husband to make provision for the support of his wife, or to make a settlement upon her, out of the property which comes to her by inheritance or otherwise.

This jurisdiction is not founded upon either trust or fraud, but is derived originally from the maxim that he who asks equity should do equity.

Tenth, where the equitable relief appropriate to the case consists in restraining the commission or continuance of some act of the defendant, administered by means of a writ of *injunction.*

Eleventh, the court aids in the procuration or preservation of evidence of the rights of a party, to be used, if necessary, in some subsequent proceeding, the court administering no final relief.

See a full note as to equity jurisdiction in 19 Am. L. Reg. N. S. 563.

PECULIAR REMEDIES, AND THE MANNER OF ADMINISTERING THEM. Under this head are—*specific performance of contracts; re-execution, reformation, rescission*, and *cancellation* of contracts or instruments; restraint by *injunction; bills quia timet; bills of peace;* protection of a party liable at law, but who has no interest, by bill of *interpleader; election* between two inconsistent legal rights; *conversion; priorities; tacking; marshalling of securities; application of purchase-money.*

In recent periods, the principles of the

court of chancery have in many instances been acted on and recognized by the courts of law (as, for instance, in relation to mortgages, contribution, etc.) so far as the rules of the courts of law admitted of their introduction.

In some states the entire jurisdiction has, by statute, been conferred upon the courts of law, who exercise it as a separate and distinct branch of their authority, upon the principles and according to the modes and forms previously adopted in chancery.

In a few, the jurisdictions of the courts of law and of equity have been amalgamated, and an entire system has been substituted, administered more according to the principles and modes and forms of equity than the principles and forms of the common law.

Rules and Maxims. In the administration of the jurisdiction, there are certain rules and maxims which are of special significance.

First, Equity having once had jurisdiction of a subject-matter because there is no remedy at law, or because the remedy is inadequate, *does not lose the jurisdiction* merely because the courts of law afterwards give the same or a similar relief.

Second, Equity follows the law. This is true as a general maxim. Equity follows the law, except in relation to those matters which give a title to equitable relief because the rules of law would operate to sanction fraud or injustice in the particular case.

Third, Between equal equities, the law must prevail. The ground upon which the suitor comes into the court of equity is that he is entitled to relief there. But if his adversary has an equally equitable case, the complainant has no title to relief.

Fourth, Equality is equity: applied to cases of contribution, apportionment of moneys due among those liable or benefited by the payment, abatement of claims on account of deficiency of the means of payment, etc.

Fifth, He who seeks equity must do equity. A party cannot claim the interposition of the court for relief unless he will do what it is equitable should be done by him as a condition precedent to that relief.

Sixth, Equity considers that as done which ought to have been done. A maxim of much more limited application than might at first be supposed from the broad terms in which it is expressed. In favor of parties who would have had a benefit from something contracted to be done, and who have an equitable right to have the case considered as if it had been done, equity applies this maxim. Illustration: when there is an agreement for a sale of land, and the vendor dies, the land may be treated as money, and the proceeds of the sale, when completed, go to the distributees of personal estate, instead of to the heir. If the vendee die before the completion of the purchase, the purchase-money may be treated as land for the benefit of the heir.

Remedial Process, and Defence. A suit in equity is ordinarily instituted by a complaint, or petition, called a bill; and the defendant is served with a writ of summons, requiring him to appear and answer, called a subpœna.

In Pennsylvania the suit is begun by filing and serving a copy of the bill, the subpœna having been dispensed with by a rule of court.

The forms of proceedings in equity are such as to bring the rights of all persons interested before the court; and, as a general rule, all persons interested should be made parties to the bill, either as plaintiffs or defendants.

There may be amendments of the bill; or a supplemental bill,—which is sometimes necessary when the case is beyond the stage for amendment.

In case the suit fails by the death of the party, there is a bill of revivor, and after the cause is disposed of there may be a bill of review.

The defence is made by demurrer, plea, or answer. If the defendant has no interest, he may disclaim. Discovery may be obtained from the plaintiff, and further matter may be introduced, by means of a cross-bill, brought by the defendant against the plaintiff, in order that it may be considered at the same time. Issue is joined by the plaintiff's filing a replication to the defendant's answer; Sto. Eq. Pl. § 878 n. The U. S. Equity rule 66 requires a replication to be filed on or before the next rule day; failing which the bill may be dismissed. In some states, as Delaware, the replication is entered as of course without filing; and special replications are now as a rule not used.

The final process is directed by the decree, which being a special judgment can provide relief according to the nature of the case. This is sometimes by a perpetual injunction.

There may be a bill to execute, or to impeach, a decree.

Evidence and Practice. The rules of evidence, except as to the effect of the answer and the taking of the testimony, are, in general, similar to the rules of evidence in cases at law. But to this there are exceptions.

The answer, if made on oath, is evidence for the defendant, so far as it is responsive to the calls of the bill for discovery, and as such it prevails, unless it is overcome by something more than what is equivalent to the testimony of one witness. If without oath, it is a mere pleading, and the allegations stand over for proof.

If the answer is incomplete or improper, the plaintiff may except to it, and it must, if the exceptions are sustained, be so amended as to be made sufficient and proper.

The case may be heard on the bill and answer, if the plaintiff so elects, and sets the case down for a hearing thereon.

If the plaintiff desires to controvert any of the statements in the answer, he files a replication by which he denies the truth of

the allegations in the answer, and testimony is taken.

The testimony, according to the former practice in chancery, is taken upon interrogatories filed in the clerk's office, and propounded by the examiner, without the presence of the parties. But this practice has been very extensively modified.

If any of the testimony is improper, there is a motion to suppress it.

The case may be referred to a master to state the accounts between the parties, or to make such other report as the case may require; and there may be an examination of the parties in the master's office. Exceptions may be taken to his report.

The hearing of the case is before the equity judge, who may make interlocutory orders or decrees, and who pronounces the final decree or judgment. There may be a rehearing, if sufficient cause is shown.

At the present day, wherever equity forms are used, the proceedings have become very much simplified.

The system of two distinct sets of tribunals administering different rules for the adjudication of causes has now been changed in England. By the Judicature Acts of 1873 and 1876, the courts of law and equity were consolidated into one Supreme Court of Judicature, in which equitable claims and defences are recognized in all proceedings to the same effect as a court of chancery would have recognized them before the passing of the act. Equitable remedies are substantially applied.

In America, the federal courts have equity powers under the constitution, where an adequate remedy at law does not exist; R. S. § 723; 140 U. S. 105; 141 *id.* 656; 138 *id.* 146. The adequate remedy at law, which is the test of the equitable jurisdiction of the courts of the United States, is that which existed when the judiciary act of 1789 was adopted, unless subsequently changed by congress; 121 U. S. 201. The equity jurisdiction conferred on the federal courts is the same that the high court of chancery in England possesses, is subject to neither limitation nor restraint by state legislation, and is uniform throughout the different states of the Union; 150 U. S. 202; 120 *id.* 130; 2 Sumn. 612.

Courts of chancery were constituted in some of the states after 1776: and in Pennsylvania, for a short time, as early as 1723, a court of chancery existed; see Rawle, Eq. in Penna.; and in most of the colonies before the revolution; Bisph. Eq. § 14, n.

At the present time, distinct courts of chancery exist in very few of the states. In the greater number chancery powers are exercised by judges of common-law courts according to the ordinary practice in chancery. In the remaining states, the distinctions between actions at law and suits in equity have been abolished, but certain equitable remedies are still administered under the statutory form of the civil action. See Bisph. Eq. § 15.

It has been claimed that Pennsylvania was the first state to administer equity through common-law forms; but in a recent report to the Texas State Bar Association it is said: "Of one fact there can be no doubt, viz., Texas was the first state in the Union, which was dominated by common-law people and lawyers, to reject the common-law form of pleading and practice when the issue was raised between that system and the civil-law system; and Texas was unquestionably the first state in the American Union controlled by common-law principles to abolish the distinction between law and equity in the enforcement of private rights and redress of private wrongs." Ann. Rep. 1896.

For a very comprehensive reference list of text-books and periodical literature on Equity Jurisprudence, Pleading, and Practice, see the admirable catalogue of the St. Louis Law Library.

EQUITY EVIDENCE. See EQUITY; EVIDENCE.

EQUITY PLEADING. See EQUITY; PLEA.

EQUITY OF REDEMPTION. A right which the mortgagor of an estate has of redeeming it, after it has been forfeited at law by the non-payment at the time appointed of the money secured by the mortgage to be paid, by paying the amount of the debt, interest, and costs.

The phrase of equity of redemption is indiscriminately, though often incorrectly, applied to the right of the mortgagor to regain his estate, both *before* and *after* breach of condition. In North Carolina, by statute, the former is called a *legal right of redemption*, and the latter the *equity of redemption*, thereby keeping a just distinction between these estates; 1 N. C. Rev. Stat. 266; 4 M'Cord 340. The interest is recognized at law for many purposes: as a subsisting estate, although the mortgagor in order to enforce his right is obliged to resort to an equitable proceeding, administered generally in courts of equity, but in some states by courts of law; 11 S. & R. 223; or in some states may pay the debt and have an action at law; 18 Johns. 7, 110; 1 Halst. 466; 2 H. & M'H. 9.

This estate in the mortgagor is one which he may devise or grant; 2 Washb. R. P. 40; and which is governed by the same rules of devolution or descent as any other estate in lands; 10 Conn. 243; 2 S. & S. 323; 2 Hare 35. He may mortgage it; 1 Pick. 485; and it is liable for his debts; 3 Metc. 81; 21 Me. 104; 7 Watts 475; 15 Ohio 467; 1 Cai. Cas. 47; 4 B. Monr. 429; 31 Miss. 253; 20 Ill. 53; 7 Ark. 269; 1 Day 93; 4 M'Cord 336; but see 7 Paige, Ch. 437; 7 Dana 67; 14 Ala. N. S. 476; 23 Miss. 206; 2 Dougl. Mich. 176; 24 Mo. 249; 13 Pet. 294; and in many other cases, if the mortgagor still retains possession, he is held to be the owner; 5 Gray 470, note; 11 N. H. 293; 22 Conn. 587; 13 Ill. 469; 34 Me. 89; 23 Barb. 490.

Any person who is interested in the mortgaged estate, or any part of it, having a legal estate therein, or a legal or equitable lien thereon, provided he comes in as privy in estate with the mortgagor, may exercise the right; including heirs, devisees, executors, administrators, and assignees of the mortgagor; 2 Root 509; 2 Hayw. 22; 14 Vt.

501; 10 Paige, Ch. 49; 9 Mass. 422; 48 Minn. 223; subsequent incumbrancers; 5 Johns. Ch. 35; 1 Dana 23; 8 Cush. 46; 47 Minn. 434; 63 Hun 625; judgment creditors; 2 Litt. 382; 4 Hen. & M. 101; 4 Yerg. 10; 2 Cal. 595; 2 D. & B. Eq. 285; 133 Ind. 670; 45 Ill. 62; 140 *id.* 135; tenants for years; 8 Metc. 517; 7 N. Y. 44; a jointress; 1 Vern. 190; 2 Wh. & T. Lead. Cas. 752; dowress and tenant by curtesy; 14 Pick. 98; 84 Wis. 240; 64 Vt. 616; one having an easement; 23 Pick. 401; one having an interest as a partner; 159 Mass. 356.

A mortgagee for adequate value and in good faith may acquire the equity of redemption; 112 Mo. 315; and a second mortgagee who purchases such equity is entitled to any payments that may have been made on the first mortgage, but which were not credited thereon; 26 Atl. Rep. (N. J.) 839.

Where the necessary amount has been tendered within the statutory period for redemption, it can be followed up by suit to redeem at any time before the right to bring suit is barred; 57 Ark. 198. A court of equity has the discretion governed by the equities of each case, to name terms on which it will let in a party to redeem; 112 Mo. 599.

Where a bill to redeem is filed before the debt is due, it must be dismissed, although the hearing is not had until after the debt is due; 160 Mass. 162. See MORTGAGE.

EQUIVALENT. Of the same value. Sometimes a condition must be literally accomplished in *forma specifica;* but some may be fulfilled by an equivalent, *per æquipolens,* when such appears to be the intention of the parties: as, if I promise to pay you one hundred dollars, and then die, my executor may fulfil my engagement; for it is equivalent to you whether the money be paid to you by me or by him. Rolle, Abr. 451. For its meaning in patent law, see 7 Wall. 327; PATENT.

EQUIVOCAL. Having a double sense. In the construction of contracts, it is a general rule that when an expression may be taken in two senses, that shall be preferred which gives it effect. See CONSTRUCTION; INTERPRETATION.

EQUULEUS (Lat.). A kind of rack for extorting confessions. Encyc. Lond.

ERASURE. The obliteration of a writing. The effect of an erasure is not *per se* to destroy the writing in which it occurs, but is a question for the jury, and will render the writing void or not, under the same circumstances as an interlineation. See 5 Pet. 560; 11 Co. 88; 5 Bingh. 183; 11 Conn. 531; 3 La. 56; 57 Ala. 173; 62 Ind. 401; 39 Mo. 34; 44 N. H. 227; 43 Wis. 221; 69 Me. 429; 119 Mass. 269. See ALTERATION; INTERLINEATION.

ERCISCUNDUS (Lat. *erciscere*). For dividing. *Familiæ erciscundæ actio.* An action for dividing a way, goods, or any matter of inheritance. Vicat, Voc. Jur.; Calvinus, Lex.

ERECTION. This term is generally used of a completed building. 45 N. Y. 153; 119 Mass. 254. The repairing, alteration, and enlarging, or the removal from one spot to another, of a building, is not erection within the meaning of a statute forbidding the erection of wooden buildings; 27 Conn. 332; 2 Rawle 262; 51 Ill. 422. The moving of a building is not an erection of a building; 121 Mass. 229; but the painting of a house has been held to be part of the erection; 51 Ill. 422. See LIEN.

EREGIMUS (Lat. we have erected). A word proper to be used in the creation of a new office by the sovereign. Bac. Abr. *Offices,* E.

EROSION. This consists of the gradual eating away of the soil by the operation of currents or tides. 100 N. Y. 433.

EROTIC MANIA. In Medical Jurisprudence. A name given to a morbid activity of the sexual propensity. It is a disease or morbid affection of the mind, which fills it with a crowd of voluptuous images, and hurries its victim to acts of the grossest licentiousness, in the absence of any lesion of the intellectual powers. See Krafft-Ebing, Psycopathia Sexualis, Chaddock's ed.; MANIA.

ERRANT (Lat. *errare,* to wander). Wandering. Justices in eyre were formerly said to be *errant* (itinerant.) Cowel.

ERRONEOUS. Deviating from the law. 72 Ind. 338.

ERROR. A mistake in judgment or deviation from the truth in matters of fact, and from the law in matters of judgment.

Error of fact will excuse the party acting illegally but honestly, in many cases, will avoid a contract in some instances, and when mutual will furnish equity with a ground for interference; 15 Me. 45; 20 Wend. 174; 5 Conn. 71; 12 Mass. 36. See MISTAKE.

Error in law will not, in general, excuse a man for its violation. A contract made under an error in law is, in general, binding; for, were it not so, error would be urged in almost every case; Bisph. Eq. 187. 2 East 469. See 6 Johns. Ch. 166; 8 Cow. 195; 2 J. & W. 249; 1 Y. & C. 232; 6 B. & C. 671. But a foreign law will for this purpose be considered as a fact; 15 Me. 45; 9 Pick. 112; 2 Pothier, Obl. 369, etc.

ERROR, WRIT OF. See WRIT OF ERROR.

ESCAMBIO. In Old English Law. A writ granting power to an English merchant to draw a bill of exchange on another who is in a foreign country. Reg. Orig. 194. Abolished by Stats. 59 Geo. III. c. 49, and 26 & 27 Vict. c. 125.

ESCAMBIUM. Exchange, which see.

ESCAPE. The deliverance of a person who is lawfully imprisoned, out of prison, before such a person is entitled to such deliverance by law. 5 Mass. 310.

The voluntarily or negligently allowing any person lawfully in confinement to leave the place. 2 Bish. Cr. L. § 917.

Departure of a prisoner from custody before he is discharged by due process of law.

Escape takes place without force; prison-breach, with violence; rescue, through the intervention of third parties.

Actual escapes are those which take place when the prisoner in fact gets out of prison and unlawfully regains his liberty.

Constructive escapes take place when the prisoner obtains more liberty than the law allows, although he still remains in confinement. Bac. Abr. *Escape* (B); Plowd 17; 5 Mass. 310; 2 Mas. 486.

Negligent escape takes place when the prisoner goes at large, unlawfully, either because the building or prison in which he is confined is too weak to hold him, or because the keeper by carelessness lets him go out of prison.

Voluntary escape takes place when the prisoner has given to him voluntarily any liberty not authorized by law. 5 Mass. 320; 2 D. Chip. 11.

When a man is imprisoned in a proper place under the process of a court having jurisdiction in the case, he is lawfully imprisoned, notwithstanding the proceedings may be irregular; 1 Crawf. & D. 203; see 133 Mass. 399; but if the court has not jurisdiction the imprisonment is unlawful, whether the process be regular or otherwise. Bacon, Abr. *Escape in Civil Cases* (A 1); 13 Johns. 378; 8 Cow. 192; 1 Root 233. See 7 Conn. 452.

Letting a prisoner, confined under final process, out of prison for any, even the shortest time, is an escape, although he afterwards return; 2 W. Bla. 1048; 40 N. J. L. 230; 57 How. Pr. 109; 38 Fed. Rep 794; 11 Mass. 160; 40 N. J. L. 417; 85 N. Y 445; and this may be (as in the case of imprisonment under a *ca. sa.*) although an officer may accompany him; 3 Co. 44 *a*; Plowd. 37; Hob. 202; 1 B. & P. 24. Where an insolvent debtor whose discharge has been refused by the court, surrenders himself to the keeper of a prison, who will not receive him because he has no writ or record showing that he is an insolvent debtor and is not in charge of an officer, the surrender is not sufficient to make the keeper liable for the debt in case of the debtor's escape; 140 Pa. 102.

In criminal cases, the prisoner is indictable for a misdemeanor, whether the escape be negligent or voluntary; 2 Hawk. Pl. C. 189; Cro. Car. 209; 7 Conn. 384; 82 N. C. 585; and the officer is also indictable; 32 Ark. 124; 80 N. C. 390; 107 *id.* 857. If the offence of the prisoner was a felony, a voluntary escape is a felony on the part of the officer; 2 Hawk. Pl. C. c. 19, § 25; if negligent, it is a misdemeanor only in any case; 2 Bish. Cr. L. § 925; Cl. Cr. L. 327. See 78 Ind. 166. It is the duty of the officer to rearrest after an escape; 6 Hill 344; 111 Ill. 90; 1 Russ. Cr. 572.

In civil cases, a prisoner may be arrested who escapes from custody on mesne process, and the officer will not be liable if he rearrest him; Cro. Jac. 419; but if the escape be voluntary from imprisonment on mesne process, and in any case if the escape be from final process, the officer is liable in damages to the plaintiff, and is not excused by retaking the prisoner; 2 B. & A. 56; 88 Mass. 260. Nothing but an act of God or the enemies of the country will excuse an escape; 24 Wend. 381; 2 Murph. 386; 1 Brev. 146; 51 Miss. 575. See 5 Ired. 702; 5 W. & S. 455.

Attempts to escape by one accused of crime are presumptive of guilt, and the conduct of a defendant in arrest, either before or after being accused of the crime, may be competent evidence against him, as indicating a guilty mind; 30 La. Ann. Part II. 1266; 58 Ala. 335; 6 Tex. App. 207, 347; 14 Bush 340; 47 Cal. 113; 33 N. H. 216. Where a prisoner being in the corridor of a jail unlocks a door between the corridor and a cell, and thence escapes, he commits prison breach; 53 N. J. L. 488. An unsuccessful attempt at prison breach is indictable; 12 Johns. 339. See Whart. Cr. L. § 1667; 26 Am. L. Reg. 345; FLIGHT.

ESCAPE WARRANT. A warrant addressed to all sheriffs throughout England, to retake an escaped prisoner for debt, and commit him to gaol till the debt is satisfied.

ESCHEAT (Fr. *escheoir*, to happen). An accidental reverting of lands to the original lord.

An obstruction of the course of descent, and a consequent determination of the tenure, by some unforeseen contingency; in which case the land naturally results back, by a kind of reversion, to the original grantor or lord of the fee; 2 Bla. Com. 244.

The estate itself which so reverted was called an escheat. Spelman. The term included also other property which fell to the lord; as. trees which fell down, etc. Cowel.

All escheats under the English laws are declared to be strictly feudal and to import the extinction of tenure. Wr. Ten. 115; 1 W. Bla. 123.

That if the ownership of a property become vacant, the right must necessarily subside into the whole community in which, when society first assumed the elements of order and subordination, it was originally vested, is a principle which lies at the foundation of property; 4 Kent 425; and this seems to be the universal rule of civilized society. Domat, *Droit Pub.* lib. 1, t. 6, s. 3, n. 1. See 10 Viner, Abr. 139; 1 Bro. Civ. Law 250; 5 Binn. 375; 27 Barb. 376; 5 Cal. 373; 47 Md. 103; 86 Pa. 284; Mitch. R. P. 313. It was recognized by Justinian, and by the civil law an officer was appointed, called the escheator, whose duty it was to assert the right of the emperor to the *hæreditas jacens* or *caduca* when the owner left no heirs or legatee to take it. Code 10, 10, 1. By the earlier English usages the estate of the vassal escheated to his lord when there were no representatives in the seventh degree, and this custom was later extended to include male descendants *ad infinitum*; Lib. Feud. I. 1, s. 4.

In case of escheat by failure of heirs, by corruption of blood, or by conviction of certain crimes, the feud fell back into the lord's hands by a termination of the tenure. 1 Washb. R. P. 24. At the present day, in England, escheat can only arise from the failure of heirs. By the Felony Act, 33 and 34 Vict. c. 23, no confession, verdict, inquest, conviction, or judgment of or for any treason or felony, or *felo de se*, shall cause any forfeiture or escheat; 3 Steph. Com. 660; Moz. & W.; Brown. An action of

ejectment, commenced by writ of summons, has taken the place of an ancient *writ of escheat*, against the person in possession on the death of the tenant without heirs.

The early English law is thus well stated: "By the law of England, before the Declaration of Independence, the lands of a man dying intestate and without lawful heirs reverted by escheat to the king as the sovereign lord; but the king's title was not complete without an actual entry upon the land, or judicial proceedings to ascertain the want of heirs and devisees; 8 App. Cas. 767, 772; 2 Bla. Com. 245. The usual form of proceeding for this purpose was by an inquisition or inquest of office before a jury, which was had upon a commission out of the court of chancery, but was really a proceeding at common law; and, if it resulted in favor of the king, then, by virtue of ancient statutes, any one claiming title in the lands might, by leave of that court, file a traverse in the nature of a plea or defense to the king's claim, and not in the nature of an original suit; Lord Somers in 14 How. St. Tr. 1, 83; 6 Ves. 809: 4 Madd. 281; L. R. 2 Eq. 95; 3 Johns. 1; 11 Allen 157, 172. The inquest of office was a proceeding *in rem*; when there was proper office found for the king, that was notice to all persons who had claims to come in and assert them; and, until so traversed, it was conclusive in the king's favor; Bayley, J., in 12 East 96, 103; 16 Vin. Abr. 86, pl. 1;" Hamilton *v.* Brown, 161 U. S. 256.

In this country, however, the state steps in, in the place of the feudal lord, by virtue of its sovereignty, as the original and ultimate proprietor of all the lands within its jurisdiction; 4 Kent 424. See 10 Gill & J. 450; 3 Dane, Abr. 140. And it escheats to the state as part of its common ownership, either by mere operation of law, or upon an inquest of office according to the law of the particular state; 161 U. S. 256; 3 Washb. R. P., 4th ed. 47, 48. It is, perhaps, questionable how far this incident exists at common law in the United States generally. In Maryland the lord proprietor was originally the owner of the land, as the crown was in England. In most of the states the right to an escheat is secured by statute; 4 Kent 424; 1 Washb. R. P. 24, 27; 2 *id.* 443. See DESCENT AND DISTRIBUTION.

In Indiana and Missouri it was held that at common law, if a bastard died intestate, his property escheated; 6 Blackf. 533; 30 Mo. 268; but this is now otherwise by statute in those states and in most of the others. See BASTARD. So at common law there was an escheat if the purchaser or heirs of the decedent were aliens; 7 N. H. 475; Co. Litt. 2 *b*; but it is usually otherwise by the statutes of the several states. See ALIEN.

In Massachusetts unclaimed moneys or dividends of any insolvent bank or insurance company, after 10 years' custody by the clerk of court, are turned over to the state treasurer, and if not claimed within two years thereafter, escheat to the state; acts of Mass. p. 210; and such a provision is constitutional; 1 Caldw. 202.

Hereditaments which, although they may be held in fee-simple, are not strictly subjects of tenure, such as fairs, markets, commons in gross, rents charge, rents seck, and the like, do not escheat, but become extinct upon a failure of heirs of the tenant; Challis, R. P. 30.

The method of proceeding, and subject-matter. To determine the question of escheat a proceeding must be brought in the nature of an inquest of office or office found; 7 Wend. 367; 5 Cal. 373; 28 Ga. 227; 14 Ia. 474; and to give the inquisition the effect of a lien the same must be filed, as the record of it is the only competent evidence by which title by escheat can be established; 21 Mich. 24; 3 Johns. 1; and such action must also be taken to recover escheated lands held in adverse possession; after which an entry must be made to give the state a right of possession; 7 Wend. 367; 6 Leigh 588; 74 Ind. 252; and the facts which support the escheat must be stated; 2 Head 553; 2 Watts 228; a bill of information must be filed and a *scire facias* issued against all alleged to have, hold, claim, or possess such estate; 117 Ill. 123; and the names of all persons in possession of the premises, and all who were known to claim an interest therein, must be set forth and the *scire facias* served on them personally; to all other persons constructive notice is sufficient; *id.* In Texas, no proceedings can be had, except under and according to an act of the legislature; 64 Tex. 133; 161 U. S. 256.

In many of the states, however, the doctrine in force is, that land cannot remain without an owner; it must vest somewhere, and on the death of an intestate without heirs it becomes *eo instanti* the property of the state; 6 Johns. Ch. 360; 2 Har. & J. 112; 5 Neb. 203; 7 N. H. 475; 7 Watts 455; 9 R. I. 26; 24 N. J. L. 566. In the case of Wallahan *v.* Ingersoll, 117 Ill. 123, it was held that on the death of an intestate without heirs, the title to his estate devolves immediately upon the state, but, in order to make that title available, it must be established in the manner prescribed by law by proceedings in the proper court, in the name of the people for the purpose of proving and establishing by judicial determination the title of the state. After a long lapse of time an inquest will be presumed; 27 Va. 291; 26 Ga. 582. A right of action for the recovery of lands is vested in the state at the death of the owner whose property escheats; 107 N. Y. 185. Persons claiming as heirs may come in under the statute and obtain an order for leave to make up an issue at law to have their rights determined; 13 Rich. L. 77. The legislature is under no constitutional obligation to leave the title to such property in abeyance, and a judicial proceeding for ascertaining an escheat on due notice, actual to known and constructive to all possible unknown claimants, is due process of law; and a statute, providing for such proceeding does not impair the obligation of any contract, contained in the grant under which the former owner held whether from the state or a private person; 161 U. S. 256, 275.

Not only do estates in possession escheat, but also those in remainder, if vested; 2 Hill 67; and equitable as well as legal estates; 1 Wall. 5; 5 Ired. Eq. 207; 3 Washb. R. P. 446; 10 Gill & J. 443; 4 Kent 424; (in many states this provision is statutory, but the rule in England is contrary; 1 Eden 177;) also those held in trust, when the trust expires; 88 Pa. 429.

Proceedings to traverse an inquest. An

inquisition is traversable, the traverser being considered as a defendant, and being only required to show failure of title in the state and bare possession in himself; 3 Johns. 1; *contra*, in Pennsylvania, where such traverser is in the position of plaintiff in ejectment and must show a title superior to the commonwealth; proceedings may be brought by any one claiming an interest and including an administratrix in possession; 137 Pa. 138; it is a proceeding at law and not in equity; 19 Ore. 504; and the court of common pleas has jurisdiction over it; 137 Pa. 138; the traverser being allowed to begin and conclude the suit to the jury; 2 Ashm. 163. And if only one of those notified appear, he is entitled to a separate trial of his traverse; 21 S. C. 435; but such traverser has no precedence over others on the dockets of cases; Riley, S. C. 301.

When all the members of a partnership have died intestate and without heirs, the property escheats to the state, but the heirs or kindred of any one of the partners may traverse the inquisition; 57 Pa. 102.

The law favors the presumption of the existence of heirs, and there must be something shown by those claiming by virtue of escheat to rebut that presumption; 2 Watts 228; 41 Tex. 249; but see *contra*, 36 Tex. 283; 4 Md. 138; 90 N. C. 385, overruling as to this point, 1 Hayw. 373. Proceedings for an escheat for want of heirs or devisees, like ordinary provisions for the administration of his estate, presuppose that he is dead; if he is still alive, the court is without jurisdiction and its proceedings are null and void, even in a collateral proceeding; 161 U. S. 256, 267: citing 8 Cr. 9, 23; 154 U. S. 34; 27 Tex. 217; *id.* 491, 497; 67 *id.*

Equity cannot enjoin proceedings to have an escheat declared, where every question presented could be decided on a traverse should such escheat be found; 88 Pa. 284; and an *amicus curiæ* cannot move to quash an inquisition, unless he has an interest himself or represents some one who has; 2 Cal. 284.

Disposition of escheated lands by the state. Where the state takes the title of escheated land, it is entitled to the rights of the last owner; therefore, such lands cannot be taken up by location as vacant land; 11 Tex. 10; or be regarded as ungranted land; but it must be sold pursuant to the statute; 2 Brev. 321; 27 Pa. 36; and a grant of such lands by the state before office found is valid; 7 Watts 456; 24 N. J. L. 566; 27 Barb. 376; as is also a grant of land to escheat *in futuro*; 9 Rich. Eq. 440: but no authority is vested in officers of the land office to issue warrants for the taking up of escheated lands. After seven years from the inquisition they shall be sold at auction; 27 Pa. 36; and the power to order the sale of the property is vested in the district court; 41 Tex. 10. The disposition of funds secured by the sale of such property must be strictly in conformity with the state statute; and the legislature of a state can pass no act diverting the funds to another purpose; 5 Neb. 203; but where the constitution gives to the legislature the power to provide methods to enforce the forfeiture, there can be no proceedings until the legislature acts; 64 Tex. 133.

In selling escheated lands the grantee named in the statute must be a party to the proceedings, or the sale will be void; 2 Swan 46; 1 Caldw. 381.

When land is held by a foreign corporation and a statute has been passed declaring that the land shall be held "indefeasibly as to any right of escheat" in the commonwealth, the penalty of escheat is removed, although the act imposing such penalty is not repealed in terms; 132 Pa. 591; 7 L. R. A. 634.

As to statutory disposition of escheated lands, see the statutes of the several states; DESCENT AND DISTRIBUTION.

See, generally, 12 L. R. A. 529; ALIEN; BASTARD; DISSOLUTION; FOREIGN CORPORATION.

ESCHEATOR. The name of an officer whose duties are generally to ascertain what escheats have taken place, and to prosecute the claim of the sovereign for the purpose of recovering the escheated property. 10 Vin. Abr. 153; Co. Litt. 13 *b*; Toml. L. D. His office was to be retained but one year; and no one person could hold the office more than once in three years.

This office has fallen into desuetude. There was formerly an escheator-general in Pennsylvania, but his duties have been transferred to the auditor-general, and in most of the states the duties of this office devolve upon the attorney-general.

ESCRIBANO. In Spanish Law. The public officer who is lawfully authorized to reduce to writing and verify by his signature all judicial acts and proceedings as well as all acts and contracts entered into between private individuals.

ESCROW. A deed delivered to a stranger, to be by him delivered to the grantee upon the happening of certain conditions, upon which last delivery the transmission of title is complete.

The delivery must be to a stranger; 8 Mass. 230. See 9 Co. 137 *b*; T. Moore 642; 5 Blackf. 18; 23 Wend. 43; 2 Dev. & B. L. 530; 4 Watts 180; 22 Me. 569; for when delivered directly to the grantee it cannot be treated as an escrow; 52 Ark. 493; 114 Ill. 19; 1 Tex. Civ. App. 238; 84 Me. 340; nor to the agent or attorney of the grantee; 85 Me. 242; but see 1 S. D. 497; 84 Ala. 327. The second delivery must be conditioned, and not merely postponed; 8 Metc. 436; 2 B. & C. 82; Shepp. Touch. 58. Care should be taken to express the intent of the first delivery clearly; 10 Wend. 310; 8 Mass. 230; 22 Me. 569; 14 Conn. 271; 3 Green, Ch. 155. An escrow has no effect as a deed till the performance of the condition; 21 Wend. 267; 16 Or. 255; 56 Miss. 383; 10 Neb. 1; and takes effect from the second delivery; 1 Barb. 500. See 3 Metc. 412; 6 Wend. 666; 16 Vt. 563; 30 Me. 110; 10 Pa. 285; 91 Ala. 610. But where the parties announce their intention that the escrow shall, after the

performance of the condition, take effect from the date of the deed, such intention will control; Devl. Deeds 329; 34 Ill. 13.

A deed delivered in escrow cannot be revoked; 77 Cal. 279.

See, generally, 14 Ohio St. 309; 13 Johns. 285; 5 Mas. 60; 6 Humph. 405; 3 Metc. 412; 3 Ill. App. 30, 498; 57 Ala. 459; 90 *id.* 294; 33 Ohio St. 203; 26 N. Y. 483; 28 Am. L. Reg. 697, n.; 91 Cal. 282; 47 Fed. Rep. 276; 10 Lawy. Rep. Ann. 469, n.

ESCUAGE. In Old English Law. Service of the shield. Tenants who hold their land by escuage hold by knight's service. 1 Thomas, Co. Litt. 272; Littleton § 95, 86 *b*. Abolished by Stat. 12 Car. II. c. 24. SCUTAGE.

ESKETORES. Robbers or destroyers of other men's lands and fortunes. Cowel.

ESKIPPAMENTUM. Tackle or furniture; outfit. Certain towns in England were bound to furnish certain ships at their own expense and with double *skippage* or tackle. The modern word outfit would seem to render the passage quite as satisfactorily; though the conjecture of Cowel has the advantage of antiquity.

ESKIPPER, ESKIPPARE. To ship. Kelh. Norm. L. D.; Rast. 409.

ESKIPPESON. Shippage, or passage by sea. Spelled, also, *skippeson*. Cowel.

ESNECY. Eldership. In the English law, this word signifies the right which the eldest coparcener of lands has to choose first one of the parts of the estate after it has been divided.

ESPERA. The period fixed by a competent judge within which a party is to do certain acts, as, *e. g.*, to effect certain payments, present documents, etc.; and more especially the privilege granted by law to debtors, allowing them certain time for the payment of their indebtedness.

ESPLEES. The products which the land or ground yields; as, the hay of the meadows, the herbage of the pasture, corn or other produce of the arable, rents, and services. See 11 S. & R. 275; Dane, Abr. Index; 9 Barb. 293.

ESPOUSALS. A mutual promise between a man and a woman to marry each other at some other time: it differs from a marriage, because then the contract is completed. Wood, Inst. 57. See BETROTHMENT.

ESQUIRE (Lat. *Armiger;* Fr. *Escuier*). A title applied by courtesy to officers of almost every description, to members of the bar, and others. No one is entitled to it by law; and therefore it confers no distinction in law.

In England, it is a title next above that of a gentleman and below that of a knight. Camden reckons up four kinds of esquires particularly regarded by the heralds: the eldest sons of knights, and their eldest sons in perpetual succession; the eldest sons of the younger sons of peers, and their eldest sons in like perpetual succession; esquires created by the king's letters patent, or other investiture, and their eldest sons; esquires by virtue of their office, as justices of the peace, and others who bear any office of trust under the crown. 2 Steph. Com. 615. A miller or a farmer may be an esquire; I. R. 2 Eq. 235.

ESSE. See IN ESSE.

ESSENDI QUIETAM DE THEOLONIA (Lat. of being quit of toll). A writ which lay anciently for the citizens or burgesses of a town which was entitled to exemption from toll, in case toll was demanded of them. Fitzh. N. B. 226, I.

ESSOIN, ESSOIGN. In Old English Law. An excuse for not appearing in court at the return of the process. Presentation of such excuse. Spelman, Gloss.; 1 Sell. Pr. 4; Comyns, Dig. *Exoine*, B 1. *Essoin* is not now allowed at all in personal actions. 2 Term 16; 16 East 7 (*a*); 3 Bla. Com. 278, n.

ESSOIN DAY. Formerly, the first day in the term was essoin day; now practically abolished. Dowl. 448; 3 Bla. Com. 278, n.

ESSOIN ROLL. The roll containing the *essoins* and the day of adjournment. Rosc. R. Act. 162 *et seq.*

ESTABLISH. This word occurs frequently in the constitution of the United States, and it is there used in different meanings. 1. To settle firmly, to fix unalterably: as, to establish justice, which is the avowed object of the constitution. 2. To make or form: as, to establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies,—which evidently does not mean that these laws shall be unalterably established as justice. 3. To found, to create, to regulate: as, Congress shall have power to establish post-roads and post-offices. 4. To found, recognize, confirm, or admit: as, Congress shall make no law respecting an establishment of religion. 5. To create, to ratify, or confirm: as, We, the people, etc., do ordain and establish this constitution. 1 Story, Const. § 454.

For judicial decisions upon the scope and meaning of the word, see 14 N. Y. 356; 28 Barb. 65; 23 Pa. 202; 11 Gray 306; 49 N. H. 230; 18 La. Ann. 49; 10 S. C. 389.

ESTABLISHMENT, ESTABLISSEMENT. An ordinance or statute. Especially used of those ordinances or statutes passed in the reign of Edw. I. Co. 2d Inst. 156; Britt. c. 21. That which is instituted or established for public or private use, as the trading establishments of a government.

Establissement is also used to denote the settlement of dower by the husband upon his wife. Britt. c. 102.

ESTADAL. In Spanish Law. In Spanish America this was a measure of land of sixteen square varas, or yards. 2 White, Rec. 139.

ESTADIA. In Spanish Law. Called, also, *Sobrestadia*. The time for which the

party who has chartered a vessel, or is bound to receive the cargo, has to pay demurrage on account of his delay in the execution of the contract.

ESTATE (Lat. *status*, the condition or circumstances in which the owner stands with reference to his property). The degree, quantity, nature, and extent of interest which a person has in real property.

It signifies the quantity of interest which a person has, from absolute ownership down to naked possession. 9 Cow. 81.

This word has several meanings. 1. In its most extensive sense, it is applied to signify everything of which riches or fortune may consist, and includes personal and real property: hence we say, personal estate, real estate; 8 Ves. 504; 16 Johns. 537; 4 Metc. 178; 3 Cra. 97; 55 Me. 284; 10 Mass. 323; 1 Pet. 585; 4 Harr. (Del.) 177; 32 Miss. 107; 4 McCord 60; 14 N. J. L. 53. 2. In its more limited sense, the word estate is applied to lands. It is so applied in two senses. The first describes or points out the land itself, without ascertaining the extent or nature of the interest therein: as, "my estate at A." 18 Pick. 537. The second, which is the proper and technical meaning of estate, is the degree, quantity, nature, and extent of interest which one has in real property: as, an estate in fee, whether the same be a fee-simple or fee-tail, or, an estate for life or for years, etc. Coke says, Estate signifies such inheritance, freehold, term of years, tenancy by statute merchant, staple, eligit, or the like, as any man hath in lands or tenements, etc. Co. Litt. §§ 345, 650 *a*. See Jones, Land Off. Titles in Penna. 165-170. Estate does not include rights in action; 12 Ired. L. 61; 35 Miss. 25; 18 Pa. 249. But as the word is commonly used in the settlement of estates, it does include the debts as well as the assets of a bankrupt or decedent, all his obligations and resources being regarded as one entirety. See 9 La. 135. Also the status or condition in life of a person; 15 Me. 122. See ESTATES OF THE REALM.

ESTATE AT SUFFERANCE. The interest of a tenant who has come rightfully into possession of lands by permission of the owner and continues to occupy the same after the period for which he is entitled to hold by such permission. 1 Washb. R. P. 392; 2 Bla. Com. 150; Co. Litt. 57 *b*; Sm. L. & T. 217; 25 Cal. 31; 86 Ind. 108; 39 Mo. 177; Mitch. R. P. 174. This estate is of infrequent occurrence, but is recognized as so far an estate that the landlord must enter before he can bring ejectment against the tenant; 3 Term 292; 1 M. & G. 644. If the tenant has personally left the house, the landlord may break in the doors; 1 Bingh. 58; 17 Pick. 263; and the modern rule seems to be that the landlord may use force to regain possession, subject only to indictment if any injury is committed against the public peace; 7 Term 431; 14 M. & W. 437; 1 W. & S. 90; 7 M. & G. 316; 13 Johns. 235; 121 Mass. 309; 59 Me. 568. See 32 Vt. 82; 26 Mo. 116; 68 Ill. 53; L. R. 17 Ch. Div. 174.

ESTATE AT WILL. An estate in lands which the tenant has, by entry made thereon under a demise, to hold during the joint wills of the parties to the same. Co. Litt. 55 *a*; Tud. L. Cas. R. P. 10; 2 Bla. Com. 145; 4 Kent 110. Estates properly at will are of very infrequent occurrence, being generally turned into estates for years or from year to year by decisions of the courts or by statute; 4 Kent 115; Tud. L. Cas. R. P. 14; 4 Rawle 123; 1 Term 159.

ESTATE BY ELEGIT. See ELEGIT.

ESTATE BY STATUTE MERCHANT. See STATUTE MERCHANT.

ESTATE BY THE CURTESY. That estate to which a husband is entitled upon the death of his wife in the lands or tenements of which she was seised in possession, in fee-simple, or in fee-tail during their coverture; provided they have had lawful issue born alive and possibly capable of inheriting her estate. 1 Washb. R. P. 128; 2 Crabb, R. P. § 1074; Co. Litt. 30 *a*; 2 Bla. Com. 126; 1 Greenl. Cruise, Dig. 153; 4 Kent 29, note; 21 Hun 381; 8 Baxt. 361; 3 Lea 710; 6 Mo. App. 416, 549; [1892] 2 Ch. 336. See CURTESY.

Curtesy is abolished or modified in many states. In Pennsylvania, birth of issue is no longer necessary, and in some states actual seisin is not required; 152 Pa. 313; 4 Day 298; 2 Ohio 308; 38 Me. 356; 24 Miss. 261.

ESTATE FOR LIFE. A freehold estate, not of inheritance, but which is held by the tenant for his own life or the life or lives of one or more other persons, or for an indefinite period, which may endure for the life or lives of persons in being, and not beyond the period of a life. 1 Washb. R. P. 88; Co. Litt. 42 *a*; Bract. lib. 4, c. 28, § 207; 4 Den. 414; 7 Pick. 169; Chal. R. P. 89. When the measure of duration is the tenant's own life, it is called simply an estate "for life;" when the measure of duration is the life of another person, it is called an estate "*per* (or *pur*) *autre vie*;" 2 Bla. Com. 120; Co. Litt. 41 *b*; 4 Kent 23, 24.

Estates for life may be created by act of law or by act of the parties: in the former case they are called legal, in the latter conventional. The legal life estates are estates-tail after possibility of issue extinct, estates by dower, estates by curtesy, jointures; Mitch. R. P. 118, 133; 34 Me. 151; 5 Gratt. 499; 1 Cush. 95; 24 Pa. 162; 6 Ind. 489; 3 E. L. & Eq. R. 345; 5 Md. 219; 51 Vt. 37; 12 S. C. 422; 50 Ia. 302; 89 Ill. 246; 31 N. J. Eq. 234. A life estate may be created by implication; 35 S. C. 333.

The chief incidents of life estates are a right to take reasonable estovers, and freedom from injury by a sudden termination or disturbance of the estate; 40 N. H. 532. Under-tenants have the same privileges as the original tenant; and acts of the original tenant which would destroy his own claim to these privileges will not affect them; see 19 Pa. 323.

Their right, however, does not of course, as against the superior lord, extend beyond the life of the original tenant; 2 Bla. Com. 122; 1 Rolle, Abr. 727; Co. Litt. 41 *b*; 1 Greenl. Cruise, Dig. 102.

ESTATE FOR YEARS. An interest in lands by virtue of a contract for the possession of them for a definite and limited period of time. 2 Bla. Com. 140; 2 Crabb, R. P. § 1267; Bac. Abr. *Leases*; Wms. R. P. 195. Such estates are frequently called terms. See TERM. The length of time for

which the estate is to endure is of no importance in ascertaining its character, unless otherwise declared by statute; 15 Mass. 439; 1 N. H. 350; 13 S. & R. 60; 22 Ind. 122; 4 Kent 93.

ESTATE IN COMMON. An estate held in joint possession by two or more persons at the same time by several and distinct titles. 1 Washb. R. P. 415; 2 Bla. Com. 191; 1 Pres. Est. 139. This estate has the single unity of possession, and may be of real or personal property; 76 N. Y. 436; 82 N. C. 75, 82; 92 Ill. 129; 25 Minn. 222; 126 Mass. 480; 30 N. J. Eq. 110; 25 Mich. 53.

Where one dies intestate, the joint ownership of his property by his children is generally that of tenants in common; 94 Mich. 204.

ESTATE IN COPARCENARY. An estate which several persons hold as one heir, whether male or female. In the latter case, it arises at common law, when an estate descends to two or more females; in the former, when an estate descends to all the males in equal degree by particular custom. This estate has the three unities of time, title, and possession; but the interests of the coparceners may be unequal. 1 Washb. R. P. 414; 2 Bla. Com. 188; 4 Kent 366; 4 Mo. App. 360. See COPARCENARY, ESTATES IN.

ESTATE IN DOWER. See DOWER.

ESTATE IN EXPECTANCY. An estate giving a present or vested contingent right of future enjoyment. One in which the right to pernancy of the profits is postponed to some future period. Such are estates in remainder and reversion. 7 Paige 70, 76; 20 Barb. 455.

ESTATE IN FEE-SIMPLE. See FEE-SIMPLE.

ESTATE IN FEE-TAIL. See FEE-TAIL.

ESTATE IN POSSESSION. An estate where the tenant is in actual pernancy or receipt of the rents and other advantages arising therefrom. 2 Crabb, R. P. § 2322; 2 Bla. Com. 163. See 19 Mach. 116; 18 Mo. 486; EXPECTANCY.

ESTATE IN REMAINDER. See REMAINDER.

ESTATE IN REVERSION. See REVERSION.

ESTATE IN SEVERALTY. See SEVERALTY, ESTATE IN.

ESTATE IN VADIO. Pledge. See MORTGAGE.

ESTATE OF FREEHOLD or FRANK-TENEMENT. Any estate of inheritance, or for life, in either a corporeal or incorporeal hereditament, existing in or arising from real property of free tenure. 2 Bla. Com. 104. It thus includes all estates but copyhold and leasehold, the former of which has never been known in this country. Freehold *in deed* is the real possession of land or tenements in fee, fee-tail, or for life. Freehold *in law* is the right to such tenements before entry. The term has also been applied to those offices which a man holds in fee or for life. Mozl. & W. Dict.; 1 Washb. R. P. 71, 637. See 100 Ill. 221; 75 N. C. 12; L. R. 11 Eq. 454; LIBERUM TENEMENTUM.

ESTATE OF INHERITANCE. An estate which may descend to heirs. 1 Washb. R. P. 51; 1 Steph. Com. 218.

All freehold estates are estates of inheritance, except estates for life. Crabb, R. P. § 945.

ESTATE OF JOINT TENANCY. The estate which subsists where several person have any subject of property jointly between them in equal shares by purchase. 1 Washb. R. P. 406; 1 Bla. Com. 180. The right of survivorship is the distinguishing characteristic of this estate. Littleton § 280. In most of the United States the presumption is that all tenants holding jointly hold as tenants in common, unless a clear intention to the contrary be shown; 6 Gray 428; 5 Halst. 42; 20 Ala. N. S. 112; 1 Root 48; 10 Ohio 1; 11 S. & R. 191; 3 Vt. 543; 3 Md. Ch. Dec. 547; 96 Mo. 591; 60 Pa. 511; 35 Ark. 17; 93 N. C. 214. In some states this is by statute.

In some, words that would have created a joint tenancy now create a tenancy in common.

ESTATE PUR AUTRE VIE. An estate for the life of another. It arises most frequently when a tenant for his own life conveys his estate to a third person. He can only convey what he has, and his grantee takes an estate during the life of the grantor. If the tenant died during the life of the grantor (who was called the *cestui que vie*), at common law the balance of the estate went to the first person who took it, termed a general occupant. If the original gift was to the tenant and his heirs, the heir took it as special occupant. By statute in England, if there is no special occupant, the estate goes to the executors as personalty, if not disposed of by will. This rule has been adopted in most of the United States, except a few, where it still descends as personalty; 1 Washb. R. P. 88; 2 Bla. Com. 120.

ESTATE TAIL. See FEE-TAIL.

ESTATE UPON CONDITION. See CONDITION.

ESTATES OF THE REALM. The lords spiritual, the lords temporal, and the commons of Great Britain. 1 Bla. Com. 153; 3 Hallam, ch. 6, pl. 3. Sometimes called the three estates.

ESTER IN JUDGMENT. To appear before a tribunal either as plaintiff or defendant. Kelh. Norm. L. D.

ESTIMATE. A word used to express the mind or judgment of the speaker or writer on the particular subject under consideration. It implies a computation or calculation. 37 Hun 203.

ESTOPPEL. The preclusion of a person from asserting a fact, by previous conduct inconsistent therewith, on his own part or the part of those under whom he claims, or by an adjudication upon his rights which he cannot be allowed to call in question.

A preclusion, in law, which prevents a man from alleging or denying a fact, in consequence of his own previous act, allegation, or denial of a contrary tenor. Steph. Pl. 239.

A plea which neither admits nor denies the facts alleged by the plaintiff, but denies his right to allege them. Gould, Pl. c. 2, § 39.

A special plea in bar, which happens where a man has done some act or executed some deed which precludes him from averring anything to the contrary. 3 Bla. Com. 303.

Where a fact has been admitted or asserted for the purpose of influencing the conduct or deriving a benefit from another so that it cannot be denied without a breach of good faith, the law enforces the rule of good morals as a rule of policy, and precludes the party from repudiating his representations or denying the truth of his admissions; 5 Ohio 199; Rawle, Cov. 407.

This doctrine of law gives rise to a kind of pleading that is neither by way of traverse, nor confession and avoidance, viz.: a pleading that, waiving any question of fact, relies merely on the estoppel, and, after stating the previous act, allegation, or denial of the opposite party, prays judgment if he shall be received or admitted to aver contrary to what he before did or said. This pleading is called a pleading by way of estoppel. Steph. Pl. 240; 126 Mass. 21; 18 Hun 163; 57 Miss. 634; 31 La. Ann. 81, 108; 8 Baxt. 289; 90 Ill. 604; 6 Wash. 244. See 95 Cal. 541.

Formerly the questions of regarding estoppel arose almost entirely in relation to transfers of real property, and the rules in regard to one kind of estoppel were quite fully elaborated. In more modern time the principle has come to be applied to all cases where one by words or conduct wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief or to alter his own previous position; 2 Exch. 653; 1 Zab. 403; 28 Me. 525; 9 N. Y. 121; 40 Me. 348. See, as to the reason and propriety of the doctrine, Co. Litt. 352 *a*; 11 Wend. 117; 1 Dev. & B. L. 464; 12 Vt. 44.

"The correct view of estoppel is that taken in a recent work (Bigelow, Est.), 'Certain admissions,' it is there said, 'are indisputable, and estoppel is the agency of the law by which evidence to controvert their truth is excluded.' In other words, when an act is done, or a statement made by a party the truth or efficacy of which it would be a fraud on his part to controvert or impair, the character of an estoppel will be given to what would otherwise be a mere matter of evidence. The law of estoppel, therefore, is a branch of the law of evidence, it has become a part of the jurisdiction of chancery, simply because in equity alone, or rather by equitable construction alone, has that full effect been given to this species of evidence which is necessary to the due administration of justice." Bisph. Eq. § 280. See Tiedm Eq. Jur. 106.

Where there is an attempt to apply the doctrine of estoppel, one essential in such a case is that the party in whose favor it is invoked must himself act in good faith; 50 Kan. 773.

By Deed. Such as arises from the provisions of a deed. It is a general rule that a party to a deed is estopped to deny any thing stated therein which has operated upon the other party: as, the inducement to accept and act under such deed; 7 Conn. 214; 13 Vt. 158; 3 Mo. 373; 5 Ohio 199; 10 Cush. 163; 107 Mo. 616; and see 135 N. Y. 326; 52 Minn. 67; 36 S. C. 468; 98 N. C. 203; 3 M'Cord 411; 6 Ohio 366; including a deed made with covenant of warranty, which estops even as to a subsequently acquired title; 11 Johns. 91; 24 Pick. 324; 20 Me. 260; 3 Ohio 107; 12 Vt. 39; 145 U. S. 546; 130 *id.* 122; 157 Mass. 57; 89 Tenn. 411. But see 13 Pick. 116; 5 Gray 328; 4 Wend. 300; 11 Ohio 475; 14 Me. 351; 43 *id.* 432; 29 Fla. 223. See 101 U. S. 240; 21 Hun 145; 45 N. Y. Sup. Ct. 528; 61 Ga. 322; 94 Ill. 191; 83 Ia. 565; 94 Ala. 508; 83 Va. 817; 64 N. H. 500.

A corporation accepting conveyance of a water works plant by deed describing certain mortgages thereon, and expressly declaring that the conveyance was made subject thereto, is thereby estopped from questioning the validity of the mortgages; 73 Fed. Rep. 956.

To create an estoppel, the deed must be good and valid in its form and execution; 2 Washb. R. P. 41; 39 Minn. 511; and must convey no title upon which the warranty can operate in case of a covenant; 3 McLean 56; 9 Cow. 271; 2 Pres. Abs. 216.

Estoppels affect only parties and privies in blood, law, or estate; 6 Bing. N. C. 79; 3 Johns. Ch. 103; 24 Pick. 324; 35 N. H. 99; 5 Ohio 190; 2 Dev. 177; 13 N. H. 389; 44 La. Ann. 584; 32 Fla. 264. See 125 Mass. 25; 47 Fed. Rep. 231. Estoppels, it is said, must be reciprocal; Co. Litt. 352 *a*; 17 Or. 204. But see 4 Litt. 272; 15 Mass. 499; 11 Ark. 82; 2 Sm. L. C. 664. And see 2 Washb. R. P. 458.

A grantor is not estopped by recitals in his deed of payment of consideration, from suing for the unpaid purchase money; 110 N. C. 400. A grantee cannot enter and hold under a deed and at the same time repudiate the title thereby conveyed; 75 Md. 376. See 156 Mass. 181; 145 Pa. 628; 112 N. C. 688; 94 Mich. 429; 46 Ill. App. 119; 79 Cal. 23.

By Matter of Record. Such as arises from the adjudication of a competent court. Judgments of courts of record, and decrees and other final determinations of ecclesiastical, maritime, and military courts, work estoppels; 1 Munf. 466; 2 B. & Ald. 362; 16 Blatchf. 324; 69 Me. 445; 75 N. Y. 417; 25 Minn. 72; 101 U. S. 570; 124 Mass. 109, 347; 87 Ill. 367; 139 *id.* 274; 98 U. S. 433; 109 N. C. 406; 12 Colo. 434. See 44 La. Ann. 548; 112 N. C. 759. Admissions in pleadings, either express or implied, cannot afterwards be controverted in a suit between the same parties; Com. Dig. *Estoppel* A 1. It is of the essence of estoppel by judgment that it is certain that the precise fact was determined by the former judgment; 158 U. S. 216. Estoppels by deed and by record are common-law doctrines.

By Matter in Pais. Such as arises from the acts and declarations of a person by which he designedly induces another to alter his position injuriously to himself; 17 Conn. 345, 355; 5 Denio 154; 46 Ohio St. 255; 39 Minn. 419. See 97 N. C. 303; 43 Ill. App. 157; 116 Mo. 333; 3 Tex. Civ. App. 406; 66 Hun 628. Equitable estoppel, or estoppel by

conduct, is said to have its foundation in fraud, considered in its most general sense; Bisph. Eq. § 282. It is said (Bigelow, Estop. 437) that the following elements must be present in order to constitute an estoppel by conduct: 1. There must have been a representation or concealment of material facts. 2. The representation must have been made with knowledge of the facts. 3. The party to whom it was made must have been ignorant of the truth of the matter. 4. It must have been made with the intention that the other party would act upon it. 5. The other party must have been induced to act upon it. See 69 Tex. 287; Tiedm. Eq. Jur. 107. The rule of equitable estoppel is, that where one by his acts, declarations, or silence, where it is his duty to speak, has induced another person, in reliance on such acts or declarations, to enter into a transaction, he shall not, to the prejudice of the person so misled, impeach the transaction; per Bates, Ch., in 3 Del. Ch. 9.

In the leading case on this subject (Pickard *v.* Sears, 6 Ad. & El. 469) a mortgagee of personalty was held to be estopped from asserting his title under the mortgage because he had passively acquiesced in a purchase of the same by the defendant under an execution against the mortgagor. Cases of estoppel by silence are numerous; 10 Wall. 289; 31 Pa. 334; 12 Gray 73, 265; 4 Wall. 572; 158 Mass. 97; but silence does not always amount to fraud; 65 Pa. 241; and there is no estoppel by silence where a party has had no opportunity to speak; 63 Pa. 417. See 94 Mich. 34; 2 Misc. Rep. 397.

The estoppel will be limited to the acts which were based upon the representations out of which the estoppel arose; thus, where a sheriff had a writ against A, but took B into custody, upon B's representations that she was A, but detained her after he was informed that she was not A, B was estopped to recover damages for the false arrest but not for the subsequent detention; 2 C. B. N. S. 495. See 50 Ga. 90; 27 Barb. 595; Bisph. Eq. § 292. The acts alleged as an estoppel must be executed and not merely executory; 83 Va. 397; as when a statement is not accepted and acted upon, it does not constitute an estoppel; 73 Ia. 268; 60 Vt. 261. Where an indorser gave notes in compromise of the claims of the indorsee, the acceptance of partial payments by the latter did not estop him from suing on the original notes upon which, under the agreement, the indorser was to be released from liability upon payment of the compromise notes at maturity; 75 Fed. Rep. 852.

It is said that the contract of a person under disability cannot be made good by estoppel; Bisph. Eq. § 293. See 2 Gray 161; 117 Mass. 241; 52 Pa. 400. It makes no difference that the person, if a married woman, falsely represented herself to be *sole;* 9 Ex. 422; 97 N. C. 106. But estoppel may operate to prevent such a person from enforcing a right. For instance, if a married woman were to induce A to buy property from B, knowing that the title was not in B, but in herself, she would be estopped from asserting her title against A; 3 Bush 702; 8 C. E. Green 477; 30 Ala. 382. The same principle would extend to similar acts on the part of an infant; 3 Hare 503; 9 Ga. 23; but not unless the conduct was intentional and fraudulent; 38 Fed. Rep. 482. An unexecuted contract void as against public policy cannot be validated by invoking the doctrine of estoppel; 71 Mich. 141.

The doctrine that estoppels bind not only parties, but privies of blood, law, and estate, is said to apply equally to this class of estoppels; Bigelow, Estop. 74, 449; but a ward cannot be estopped by an act of his guardian which the other party to the agreement knew to be unauthorized; 145 Ill. 658.

The maxim *vigilantibus non dormientibus leges adjuvant* specially applies to a claim of equitable estoppel, since in such cases the interposition of equity is extraordinary and restrictive of what but for the estoppel would be a clear legal right; 3 Del. Ch. 9.

The doctrine of estoppel is said to be the basis of another equitable doctrine, that of election; Bisph. Eq. § 294. See ELECTION.

This principle has been applied to cases of dedication of land to the public use; 6 Pet. 438; 19 Pick. 405; of the owner's standing by and seeing land improved upon; 50 N. Y. 223; 68 Pa. 164; 24 Mich. 134; 24 Neb. 702; 84 Ala. 570; 85 Tenn. 171; 30 W. Va. 687; 31 S. C. 153; or sold; 7 Watts 168; 11 N. H. 201; 2 Dana 13; 13 Cal. 359; 1 Woodb. & M. 213; 40 Me. 348; 115 Mo. 613; without making claim; 44 La. Ann. 917; 115 Mo. 613; 37 Fed. Rep. 508; 76 Cal. 260; 69 Tex. 33, 287; 41 Minn. 198; 85 Ky. 260.

ESTOVERS (*estouviers*, necessaries; from *estoffer*, to furnish). The right or privilege which a tenant has *to furnish himself* with so much wood from the demised premises as may be sufficient or necessary for his fuel, fences, and other agricultural operations. 2 Bla. Com. 35; Woodf. L. & T. 232; 10 Wend. 639.

Any tenant may claim this right, whether he be a tenant for life, for years, or at will; and that without waiting for any special leave or assignment of the lessor, unless he is restrained by some provision contained in his lease; Shepp. Touchst. 3, n. 1; Chal. R. P. 311. Nor does it appear to be necessary that the wood should all be consumed upon the premises, provided it is taken in good faith for the use of the tenant and his servants, and in reasonable quantities, with the further qualification, also, that no substantial injury be done to the inheritance; 1 Paige, Ch. 573.

Where several tenants are granted the right of estovers from the same estate, it becomes *a common of estovers;* but no one of such tenants can, by underletting his land to two or more persons, apportion this right among them; for in this way he might surcharge the land, and the rights of his cotenants, as well as those of the landlord, would be thereby invaded. In case, therefore, of the division of a farm among several tenants, neither of the under-tenants can have estovers, and the right, consequently,

becomes extinguished; 10 Wend. 650; 4 Co. 36; 8 *id.* 78. There is much learning in the old books relative to the creation, apportionment, suspension, and extinguishment of these rights, very little of which, however, is applicable to the condition of things in this country, except perhaps in the state of New York, where the entanglements produced by grants of the manor-lands have led to some litigation on the subject. Tayl. Landl. & T. § 220. See 4 Washb. R. P. 99; 7 Bing. 640; 7 Pick. 152; 17 *id.* 248; 14 Me. 221; 2 N. H. 130; 7 *id.* 341; 7 Ired. Eq. 197; 6 Yerg. 334; 5 Mas. 13.

The alimony allowed to a wife was called at common law, *estovers*. See DE ESTOVERIIS HABENDIS.

ESTRAY. Cattle whose owner is unknown. Spelman, Gloss.; 29 Ia. 437; 27 Wis. 422; 4 Oreg. 206; 18 Pick. 426; but see 69 Mo. 205; 14 Tex. 431. Any beast, not wild, found within any lordship, and not owned by any man. Cowel; 1 Bla. Com. 297; 2 *id.* 14. These belonged to the lord of the soil. Britt. c. 17.

Statutes directing unlicensed dogs at large to be killed and animals running at large to be seized and upon notice by a justice, etc., sold at auction, are not unconstitutional; 39 Mich. 451; 82 N. C. 175; 69 Mo. 205; 16 Or. 62.

An animal turned on a range by its owner is not an estray, although its immediate whereabouts is unknown to the owner, unless it wanders from the range and becomes lost; 16 Or. 62.

ESTREAT. A true copy or note of some original writing or record, and especially of fines and amercements imposed by a court, *extracted* from the record, and certified to a proper officer or officers authorized and required to collect them. Fitzh. N. B. 57, 76. A forfeited recognizance taken out from among the other records for the purpose of being sent up to the exchequer, that the parties might be sued thereon, was said to be estreated. 4 Bla. Com. 253.

ESTREPEMENT. A common-law writ for the prevention of waste.

The same object being attainable by a motion for an injunction in chancery, the writ became obsolete in England, and was explicitly abolished by 3 & 4 Will. IV. c. 27.

The writ lay at common law to prevent a party in possession from committing waste on an estate the title to which was disputed, after judgment obtained in any real action and before possession was delivered by the sheriff.

But, as waste might be committed in some cases pending the suit, the statute of Gloucester gave another writ of estrepement *pendente placito*, commanding the sheriff firmly to inhibit the tenant "*ne faciat vastum vel strepementum pendente placito dicto indiscusso.*" By virtue of either of these writs, the sheriff may resist those who commit waste or offer to do so; and he might use sufficient force for the purpose; 3 Bla. Com. 225, 226.

The writ is sometimes directed to the sheriff and the party in possession of the lands, in order to make him amenable to the court as for a contempt in case of his disobedience to the injunction of the writ. At common law the process proper to bring the tenant into court is a *venire facias*, and thereon an attachment. Upon the defendant's coming in, the plaintiff declares against him. The defendant usually pleads "that he has done no waste contrary to the prohibition of the writ." The issue on this plea is tried by a jury, and in case they find against the defendant they assess damages which the plaintiff recovers. But, as this verdict convicts the defendant of a contempt, the court proceed against him for that cause as in other cases; Co. 2d Inst. 329; Rast. 317; 1 B. & P. 121; 2 Lilly, Reg. *Estrepement;* 5 Co. 119; Reg. Brev. 76.

In Pennsylvania, by legislative enactment, the remedy by estrepement is extended for the benefit of any owner of lands leased for years or at will, at any time during the continuance or after the expiration of such demise, and due notice given to the tenant to leave the same, agreeably to law; or for any purchaser at sheriff or coroner's sale of lands, etc., after he has been declared the highest bidder by the sheriff or coroner; or for any mortgagee or judgment-creditor, after the lands bound by such judgment or mortgage shall have been condemned by inquisition, or which may be subject to be sold by a writ of *venditioni exponas* or *levari facias*. See 10 Viner, Abr. 497; Woodf. Landl. & T. 447; Arch. Civ. Pl. 17; 7 Com. Dig. 659; 24 Pa. 162; 37 *id.* 260.

ET ADJOURNATUR. And it is adjourned. A phrase used in the old reports, where the argument of a cause was adjourned to another day, or where a second argument was had. 1 Keb. 692, 754; Black, L. Dict.

ET ALIUS (Lat.). And another. The abbreviation *et al.*, sometimes in the plural written *et als.*, is affixed to the name of the first plaintiff or defendant, in entitling a cause, where there are several joined as plaintiffs or defendants.

On an appeal from a judgment in favor of two or more parties, a bond payable to one of the appellees *et al.* will be good; 3 La. Ann. 313; 12 *id.* 282. But where a summons should state the parties to the action, the name of one followed by the words *et al.* is not sufficient; 44 Cal. 630.

ET CÆTERA (Lat.). And others; and other things. See 39 Hun 576; 4 Daly 62.

The addition of the abbreviation etc. to some minor provisions of an agreement for a lease does not introduce such uncertainty as to prevent a decree for specific performance where the material points are clear; Chelmsford, Ld. Ch., in 2 De G. & J. 559; but such an agreement "for letting and taking coals, etc.," was too indefinite a statement of the *subject-matter* of the agreement to admit of such a decree; 1 De G. M. & G. 80; but an agreement "to do all the painting, papering, repairing, decorating, etc., during the term of the lease" was not so uncertain as to prevent a specific performance; 21 L. J. Rep. 185.

Under a bequest of "all her household furniture and effects, plate, linen, china, glass, books, wearing apparel, etc.," it was claimed that the testatrix had disposed of

the general residue of her estate, but she was held by Romilly, M. R., to be intestate "except as to the articles specified in the will and those which are *ejusdem generis;*" 26 Beav. 220; and the same judge held the words good-will, etc., in a contract, to include "such other things as are necessarily connected with and belong to the good-will, . . . for instance, the use of trade-marks," and a covenant not to engage in similar business in Great Britain for a reasonable time to be limited in the conveyance having regard to the nature of such undertakings. "All these things would be included in the words *et cætera;*" 28 L. J. Ch. 212; "all my furniture, etc.," passed only property *ejusdem generis* and not shares of a waterworks company; L. R. 11 Eq. 363; "all my money, cattle, farming implements, etc., the paying" certain sums named to testator's two brothers, was, upon looking at the whole will, sufficient to make the widow universal residuary legatee of real and personal estate, the latter being insufficient to pay debts; Jessel, M. R., L. R. 4 Ch. Div. 800.

The abbreviation etc. was formerly much used in pleading to avoid the inconveniences attendant upon making full and half defence. See DEFENCE. It is not generally to be used in solemn instruments; see 6 S. & R. 427; when used in pleadings to avoid repetition, it usually refers to things unnecessary to be stated; 27 Ark. 564.

Where the sense of the abbreviation may be gathered from the preceding words there is sufficient certainty; but where the abbreviation cannot be understood and affects a vital part of the contract or instrument the uncertainty will be fatal.

See 105 Mass. 21; 11 Hun 70; L. R. 11 Eq. 362.

ET DE HOC PONIT SE SUPER PATRIAM (Lat.). And of this he puts himself upon the country. The Latin form of concluding a traverse. See 3 Bla. Com. 313.

ET HOC PARATUS EST VERIFICARE (Lat.). And this he is prepared to verify. The Latin form of concluding a plea in confession and avoidance; that is, where the defendant has confessed all that the plaintiff has set forth, and has pleaded new matter in avoidance. 1 Salk. 2.

ET HOC PETIT QUOD INQUIRATUR PER PATRIAM (Lat.). And this he prays may be inquired of *by the country.* The conclusion of a plea tendering an issue to the country. 1 Salk. 3.

ET INDE PRODUCIT SECTAM (Lat.). And thereupon he brings suit. The Latin conclusion of a declaration, except against attorneys and other officers of the court. 3 Bla. Com. 295.

ET MODO AD HUNC DIEM (Lat.). And now at this day. The Latin form of the commencement of the record on appearance of the parties.

ET NON (Lat.). And not. These words are sometimes employed in pleading to convey a pointed denial. They have the same effect as "without this," *absque hoc.* 2 Bouvier, Inst., 2d ed. n. 2985, note.

ET SIC AD PATRIAM (Lat.). And so to the country. A phrase used in the year books, to record an issue to the country.

ET UXOR (Lat. and wife). Used to show that the wife of the grantor is a party to the deed. The abbreviation is *et ux.*

ETHICS, LEGAL. That branch of moral science which treats of the duties which a member of the legal profession owes to the public, to the court, to his professional brethren, and to his client.

Perhaps the most comprehensive and satisfactory treatment of the subject is the essay of Judge Sharswood, originally embodied in a series of lectures to the law school of the University of Pennsylvania, in 1854. The recent republication of the fifth edition, forty-two years after the issue of the first, attests the interest of the profession in the work, and from it the following is mainly extracted:

The relation of the profession to the public is so intimate and far-reaching, that it "can hardly be over-estimated." This arises from its influence both on legislation and jurisprudence; the latter of which it controls entirely and "the former almost entirely." Accordingly there is involved the study of the true ends of society and government and the conservation of life, liberty, and property, and as means to these ends it is the office of the Bar to diffuse sound principles among the people, to aid in forming correct public opinion, "to maintain the ancient landmarks, to respect authority, and to guard the integrity of the law as a science."

The responsibilities, legal and moral, of the lawyer, arising from his relations to the court, to his professional brethren, and to his client, are thus treated: "Fidelity to the court, fidelity to the client, fidelity to the claims of truth and honor: these are the matters comprised in the oath of office."

"*Fidelity to the court* requires outward *respect* in words and actions. The oath, as it has been said, undoubtedly looks to nothing like allegiance to the person of the judge; unless in those cases where his person is so inseparable from his office, that an insult to the one is an indignity to the other. In matters collateral to official duty, the judge is on a level with the members of the Bar, as he is with his fellow-citizens; his title to distinction and respect resting on no other foundation than his virtues and qualities as a man." Per Gibson, C. J., in 5 Rawle 204.

"There are occasions, no doubt, when duty to the interests confided to the charge of the advocate demands firm and decided opposition to the views expressed or the course pursued by the court, nay, even manly and open remonstrance; but this duty may be faithfully performed, and yet that outward respect be preserved, which is here inculcated. Counsel should ever remember how necessary it is for the dignified and honorable administration of justice, upon which the dignity and honor of their profession entirely depend, that the courts and the members of the courts should be regarded with respect by the suitors and people; that on all occasions of difficulty or danger to that department of government, they should have the good opinion and confidence of the public on their side."

"Indeed it is highly important that the *temper* of an advocate should be always equal. He should most carefully aim to repress everything like excitability or irritability. When passion is allowed to prevail, the judgment is dethroned. Words are spoken, or things done, which the parties afterwards wish could be unsaid or undone. Equanimity and self-possession are qualities of unspeakable value."

"Another plain duty of counsel is to present everything in the cause to the court *openly* in the course of the public discharge of its duties. It is not often, indeed, that gentlemen of the Bar so far forget themselves as to attempt to exert privately an influence upon the judge, to seek private interviews, or take occasional opportunities of accidental or social meetings to make *ex parte* statements, or to endeavor to impress their views. . . . They know that such conduct is wrong in itself, and has

a tendency to impair confidence in the administration of justice, which ought not only to be pure but unsuspected. A judge will do right to avoid social intercourse with those who obtrude such unwelcome matters upon his moments of relaxation."

"There is one thing, however, of which gentlemen of the Bar are not sufficiently careful,—*to discourage and prohibit their clients* from pursuing a similar course. The position of the judge in relation to a cause, under such circumstances, is very embarrassing, especially, as is often the case, if he hears a good deal about the matter before he discovers the nature of the business and object of the call upon him."

"Counsel should set their faces against all *undue influences* of the sort; they are unfaithful to the court if they allow any improper means of the kind to be resorted to. *Judicem nec de obtinendo jure orari oportet nec de injuria exorari.* It may be in place to remark here that the counsel in a cause ought to avoid all unnecessary communication with the jurors before or during any trial in which he may be concerned. He should enforce the same duty upon his client."

"There is another duty to the court, and that is, *to support* and *maintain it* in its proper province wherever it comes in conflict with the co-ordinate tribunal—the jury."

"It need hardly be added that a practitioner ought to be particularly cautious, in all his dealings with the court, to use no *deceit, imposition,* or *evasion*—to make no statements of facts which he does not know or believe to be true—to distinguish carefully what lies in his own knowledge from what he has merely derived from his instructions—to present no paper-books intentionally garbled. 'Sir Mathew Hale abhorred,' says his biographer, 'those too common faults of misreciting witnesses, quoting precedents or books falsely, or asserting anything confidently; by which ignorant juries and weak judges are too often wrought upon.'"

"The topic of *fidelity to the client* involves the most difficult questions in the consideration of the duty of a lawyer."

"He is legally responsible to his client only for the want of ordinary care and ordinary skill. That constitutes gross negligence. It is extremely difficult to fix upon any rule which shall define what is negligence in a given case. The habits and practice of men are widely different in this regard. It has been laid down that if the ordinary and average degree of diligence and skill could be determined, it would furnish the true rule. Though such be the extent of legal liability, that of moral responsibility is wider. Entire devotion to the interest of the client, warm zeal in the maintenance and defence of his rights, and the exertion of his utmost learning and ability,—these are the higher points which can only satisfy the truly conscientious practitioner."

"But what are the limits of his duty when the legal demands or interests of his client conflict with his own sense of what is just and right? This is a problem by no means of easy solution. That lawyers are as often the ministers of injustice as of justice, is the common accusation in the mouth of gainsayers against the profession. It is said there must be a right and a wrong side to every lawsuit. In the majority of cases it must be apparent to the advocate on which side is the justice of the cause; yet he will maintain, and often with the appearance of warmth and earnestness, that side which he must know to be unjust, and the success of which will be a wrong to the opposite party. Is he not then a participator in the injustice? It may be answered in general: Every case is to be decided, by the tribunal before which it is brought for adjudication, upon the evidence, and upon the principles of law applicable to the facts as they appear upon the evidence."

"Now the lawyer is not merely the agent of the party; he is an officer of the court. The party has a right to have his case decided upon the law and the evidence, and to have every view presented to the minds of the judges which can legitimately bear upon the question. This is the office which the advocate performs. He is not morally responsible for the act of the party in maintaining an unjust cause, nor for the error of the court, if they fall into error, in deciding it in his favor. The court or jury ought certainly to hear and weigh both sides; and the office of the counsel is to assist them by doing that which the client in person, from want of learning, experience, and address, is unable to do in a proper manner. The lawyer who refuses his professional assistance because in his judgment the case is unjust and indefensible, usurps the functions of both judge and jury."

"As an answer to any sweeping objection made to the profession in general, the view thus presented may be quite satisfactory. It by no means follows, however, as a principle of private action for the advocate, that all causes are to be taken by him indiscriminately, and conducted with a view to one single end, success. It is much to be feared, however, that the prevailing tone of professional ethics leads practically to this result. He has an undoubted right to refuse a retainer, and decline to be concerned in any cause, at his discretion. It is a discretion to be wisely and justly exercised. When he has once embarked in a case, he cannot retire from it without the consent of his client or the approbation of the court."

"Lord Brougham, in his justly celebrated defence of the Queen, went to very extravagant lengths upon this subject; no doubt he was led by the excitement of so great an occasion to say what cool reflection and sober reason certainly never can approve. 'An advocate,' said he, 'in the discharge of his duty knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and among them to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on, reckless of consequences: though it should be his unhappy lot to involve his country in confusion.'"

"On the other hand, and as illustrative of the practical difficulty which this question presented to a man with as nice a perception of moral duty as perhaps ever lived, it is said by Bishop Burnet of Sir Matthew Hale: 'If he saw a cause was unjust, he for a great while would not meddle further in it, but to give his advice that it was so; if the parties after that would go on, they were to seek another counsellor, for he would assist none in acts of injustice; if he found the cause doubtful or weak in point of law, he always advised his clients to agree their business. Yet afterwards he abated much of the scrupulosity he had about causes that appeared at first unjust, upon this occasion: there were two causes brought him which, by the ignorance of the party or their attorney, were so ill-represented to him that they seemed to be very bad; but he inquiring more narrowly into them, found they were really very good and just; so after this he slackened much of his former strictness of refusing to meddle in causes upon the ill circumstances that appeared in them at first.'"

"There is a distinction to be made between the case of prosecution and defence for crimes; between appearing for a plaintiff in pursuit of an unjust claim, and for a defendant in resisting what appears to be a just one. Every man, accused of an offence, has a constitutional right to a trial according to law; even if guilty, he ought not to be convicted and undergo punishment unless upon legal evidence; and with all the forms which have been devised for the security of life and liberty. These are the panoply of innocence, when unjustly arraigned; and guilt cannot be deprived of it, without removing it from innocence. He is entitled, therefore, to the benefit of counsel to conduct his defence, to cross-examine the witnesses for the State, to scan, with legal knowledge, the forms of the proceeding against him, to present his defence in an intelligible shape, to suggest all those reasonable doubts which may arise from the evidence as to his guilt, and to see that if he is convicted, it is according to law."

On the subject of contingent fees Judge Sharswood says:

"Regard should be had to the general usage of the profession, especially as to the rates of commission to be charged for the collection of undefended claims. Except in this class of cases, agreements between counsel and client that the compensation of the former shall depend upon final success in the lawsuit—in other words, contingent fees—however common such agreements may be, are of a very dangerous tendency, and to be declined in all ordinary cases. In making his charge, after the business committed to him has been completed, as an attorney may well take into consideration the general ability of his client to pay, so he may also consider the pecuniary benefit which may have been derived from his services. For a poor man, who is

unable to pay at all, there may be a general understanding that the attorney is to be liberally compensated in case of success. What is objected to is an agreement to receive a certain part or proportion of the sum or subject-matter, in the event of a recovery, and nothing otherwise."

He considers that the practice should be discouraged not necessarily on the consideration of unlawfulness but of morality and its effect on the lawyer.

"It is to be observed, then, that such a contract changes entirely the relation of counsel to the cause. It reduces him from his high position of an officer of the court and a minister of justice, to that of a party litigating his own claim. Having now a deep personal interest in the event of the controversy, he will cease to consider himself subject to the ordinary rules of professional conduct. He is tempted to make success, at all hazards and by all means, the sole end of his exertions. He becomes blind to the merits of the case, and would find it difficult to persuade himself no matter what state of facts might be developed in the progress of the proceedings, as to the true character of the transaction, that it was his duty to retire from it."

"He has now an interest, which gives him a right to speak as principal, not merely to advise as to the law, and abide by instructions. It is either unfair to him or unfair to the client. If he thinks the result doubtful, he throws all his time, learning, and skill away upon what, in his estimation, is an uncertain chance. He cannot work with the proper spirit in such a case. If he believes that the result will be success, he secures in this way a higher compensation than he is justly entitled to receive.

"It is an undue encouragement to litigation. Men, who would not think of entering on a lawsuit, if they knew that they must compensate their lawyers whether they win or lose, are ready upon such a contingent agreement to try their chances with any kind of a claim. It makes the law more of a lottery than it is.

"The worst consequence is yet to be told,—its effect upon professional character. It turns lawyers into higglers with their clients. Of course it is not meant that these are always its actual results; but they are its inevitable tendencies, in many instances its practical working. To drive a favorable bargain with the suitor in the first place, the difficulties of the case are magnified and multiplied, and advantage taken of that very confidence which led him to intrust his interests to the protection of the advocate. The parties are necessarily not on an equal footing in making such a bargain. A high sense of honor may prevent counsel from abusing his position and knowledge; but all have not such high and nice sense of honor. If our example goes towards making the practice of agreements for contingent fees general, we assist in placing such temptations in the way of our professional brethren of all degrees—the young, the inexperienced, and the unwary, as well as those whose age and experience have taught them that a lawyer's honor is his brightest jewel, and to be guarded from being sullied, even by the breath of suspicion, with the most sedulous care."

On the same subject Mr. Eli K. Price, in an essay on Limitations and Liens, thus expresses his opinion: "And further permit me to advise and earnestly to admonish you, for the preservation of professional honor and integrity, to avoid the temptation for bargaining for fees or shares of any estate or other claim, contingent upon a successful recovery. The practice directly leads to a disturbance of the peace of society, and to an infidelity to the professional obligation promised to the court, in which is implied an absence of desire or effort of one in the ministry of the temple of justice, to obtain a success that is not just as well as lawful. It is true, as a just equivalent for many cases honorably advocated and incompetently paid by the poor, a compensation may and will be received, the more liberal because of the ability produced by success; but let it be the result of no bargain, exacted as a price before the service is rendered, but rather the grateful return for benefits already conferred. If rigid in your terms, in protection of the right of the profession to a just and honorable compensation, let it rather be in the amount of the required retainer, when it will have its proper influence in the discouragement of litigation." See CHAMPERTY.

In an address of Joseph B. Warner before the American Bar Association on "The Responsibilities of the Lawyer," will be found, probably, the latest discussion of this subject. It is said upon the much-discussed question of how an honorable man can advocate what he knows to be a bad cause, that it is important to look at the profession from the non-professional standpoint, and that the familiar argument that every man has the right to have the law fairly applied to his case is a solution, less satisfactory in theory than in practice, of the problem as it confronts the individual lawyer. This assumes the presentation of a cause by an official spokesman before a competent and impartial tribunal. The theory might fit a mere intermediary in the public function of the administration of justice, but does not answer when, as in modern practice, it concerns the intimate and confidential adviser of the client who is thoroughly identified with the client at the inception and during the preparation for the progress of the trial at every stage. "Such being the lawyer's immersion in his client's cause, it is out of the question to consider him merely as a perfunctory representative. His responsibility for litigation in its inception, its progress, and its results, must be, to some extent at least, commensurate with his identification with the cause. If he wholly adopts the client he must acknowledge the relationship. This leaves the lawyer's responsibility where he chooses to put it. He may limit it by limiting his relations to those external services which are guardedly professional; he may, on the other hand, enter so far into the case as to become as answerable for it as the client is, or even more. This is, I think, the position which the lawyer must accept. He cannot make a case his own, and push it as if he were a party, and yet disclaim responsibility for it on the ground that his connection with it is wholly official. He must openly accept the consequences of whatever he does, and expect no shelter from any theory of the professional relation which does not squarely recognize all the facts."

Nor does Mr. Warner consider that the unavoidable influence of powerful counsel on courts is to be disregarded as a disturbing factor in the cause of justice. While the danger may be slight as to courts, with juries it is by no means so, and "in proportion as the lawyer purposely carries a jury against the facts, or beyond the facts, so far the verdict is his act. To that responsibility he must be held." The shadowy impression of an obligation to undertake any cause is dismissed as untenable and inconsistent with present conditions. The counsel is in a measure responsible for the cause he has chosen to take. It is true he is not required to settle all doubts against his client, and due regard is to be had for the uncertainty of the law and the unquestioned fact that the lawyer must administer it as it is, and not in each case sit in judgment upon its wisdom or policy. The law, therefore, he does not control, but as to facts there is grave responsibility. No special rule can be formulated to distinguish between true and false advocacy, and allowance is to be made for the avowedly partisan attitude of the counsel, but "from a piece of false evidence, or a false statement in argument, every decent lawyer starts back. . . . Certainly nothing could be worse than to give any sanction whatever to a theory which, though never avowed, may sometimes be tacitly assumed, that the practice of the law is a game, or a species of warfare, in which there may be a few rules agreed on, but in the main there is but one thing to consider, and that is victory. As in the strange, unethical ethics of war you may not use poisoned bullets, but may use explosive shells, and may not poison the well in the besieged city, but may destroy the provision train on its way thither, so in a court of law, on this monstrous theory, though you may not actually suborn witnesses, you may take advantage of every piece of falsehood which in any other way can pass in, undetected, in evidence or argument. But if law is a game, it is a game in which the stakes are human happiness and character; if it is war, it is not a war for plunder, but one for principles, which cannot be set up with glory in the end if they have been first defiled and trampled under foot by the victors." The subject is thus fairly summed up: "At last the moralities of the practice of the law must rest on the individual lawyer, and perhaps little more can be said by way of particular rules for professional conduct than that the lawyer is under all the obligations which the highest standard, rightly understood, imposes on any man. From these he neither gets, nor claims, an exemption by reason of any convention which would permit falsehood, nor by reason of working within a system which, to some extent, settles conduct by general rules of law without regard to the moral aspect of particular cases.'

Our system is not devised primarily to discover truth, nor is the lawyer chiefly a searcher after truth. If he were, his methods would seem strange, indeed. Our administration of law is made, or rather has grown, by forces which are virtually the great forces of nature, to meet human needs, to control the elemental passions of men, to regulate the affairs of life. . . . It has the imperfections and the contradictions of all human things. It does not always conform to rules, however unquestionable and right. It touches all of life and takes on both good and evil by the contact. In its critical moments, when it is centred in a trial in court, it is the modern phase of all ancient strife, the visible struggle, old as the world, of all the passions of anger, hate, greed, and avarice, less wild than of old, but still full of their inherited spirit, and now forced into an arena which, excepting war itself, is left as the only battlefield for the irrepressible fighting instincts of the race.

That these contests should not always proceed in irreproachable methods and infallibly end in right results, is not to be wondered at: that the men who engage in them as trained contestants sometimes fight with indefensible tactics must be laid to traits which yet survive in the human animal. The vigorous participation in affairs, with a purpose to do right, is the most wholesome moral tonic that our nature can have. This way lies open in the practice of the law. It cannot be said to be free from perplexities. The practitioner will not find himself in a plain way in which the fool cannot err. But he will find himself in the midst of abundant opportunities for service to mankind, will see before him ideals among the highest which our minds can reach, and will have the encouragement of examples which are not behind the farthest mark that human nature has touched in its approach to justice.

Among numerous works and articles, the following may be referred to:—Virginia State Bar Assoc. Reports, 1894; Butler, Lawyer & Client, 1871; Eaton, Public Relations, etc., of the Legal Profession, 1882; Hearn, Legal Duties & Rights, 1883; Hill, The Bar: Its Ethics, 1881; Hoffman, Legal Studies; Pollock, Essays in Jurispr. & Ethics, 1882; Sedgwick, Relation & Duty of the Lawyer to the State, 1892; Warren, Professional Duties, 1870; F. C. Brewster's Address before the Law Academy, 1861; Woolworth, Duty, etc., of the Profession, Nebraska State Bar Assoc. 1877; Lord Herschell, Rights & Duties of an Advocate, Glasgow Jurid. Soc. 1890; The Responsibilities of the Lawyer, by Joseph B. Warner, Amer. Bar Assoc. 1896.

As to the propriety of contingent fees, see 16 Cent. L. J. 462; 24 Alb. L. J. 24; 27 Fed. Rep. 849; 18 Cent. L. J. 353; and see also generally, Jones, Index of Legal Periodical Literature.

EUNDO MORANDO ET REDEUNDO (Lat.). This Latin phrase signifies going, remaining, and returning. It is employed in cases where a person is privileged from arrest, in order to give him the freedom necessary to the performance of his respective obligations, to signify that he is protected from arrest *eundo, morando et redeundo.*

EUNOMY. Equal laws and a well-adjusted constitution of government.

EUNUCH (Lat. *eunuchus* from the Gr. *ευνουχος*, one who had charge of the sleeping apartments). A man whose organs of generation have been so far removed or disorganized that he is rendered incapable of reproducing his species. Domat, liv. prél. tit. 2, s. 1, n. 10.

EVASION (Lat. *evadere*, to avoid). A subtle device to set aside the truth or escape the punishment of the law: as, if a man should tempt another to strike him first, in order that he might have an opportunity of returning the blow with impunity. He is, nevertheless, punishable, because he becomes himself the aggressor in such a case. Hawk. Pl. Cr. c. 31, §§ 24, 25; Bac. Abr. *Fraud*, A.

EVENT. The consequences of anything, the issue, conclusion, end; that in which an action, operation or series of operations, terminates. 11 Barb. 473.

EVICTION. Deprivation of the possession of lands or tenements.

Originally and technically, the dispossession must be by judgment of law; if otherwise, it was an *ouster*; 2 Wend. 563, note; 7 *id.* 285; but the necessity of legal process was long ago abandoned in England; 4 Term 617; and in this country also it is settled that there need not be legal process; 4 Hill 645; 3 Dev. 200; 54 Miss. 450. The word is difficult to define with technical accuracy; 17 C. B. 30; but it may be fairly stated that any actual entry and dispossession, adversely and lawfully made under paramount title, will be an eviction; Rawle, Cov. § 133.

Total eviction takes place when the possessor is wholly deprived of his rights in the premises. Partial eviction takes place when the possessor is deprived of only a portion of them; as, if a third person comes in and ejects him from the possession of half his land, or establishes a right to some easement over it, by a title which is prior to that under which he holds.

With respect to the demised premises, an eviction consists in taking from a tenant some part of the premises of which he was in possession, not in refusing to put him in possession of something which by the agreement with his landlord he should have enjoyed; 12 Wend. 529. And in order to effect a suspension of rent there must be something equivalent to an expulsion from the premises, and not a mere trespass, or disturbance in the enjoyment of them; 4 Wend. 505; 5 Sandf. 542; T. Jones 148; 1 Yerg. 379; 120 Mass. 284. The entry of a landlord upon demised premises for the purpose of rebuilding does not operate as an eviction, where it was with the tenant's assent and not to his entire seclusion; 151 Pa. 101.

It is not necessary, however, in order to produce the eviction of a tenant, that there should be an actual physical expulsion; for a landlord may do many acts tending to diminish the enjoyment of the premises, short of an expulsion, which will amount to an eviction in law: as, if he erect a nuisance so near the demised premises as to deprive the tenant of the use of them, or if he otherwise intentionally disturb the tenant's enjoyment to such an extent as to injure his business or destroy the comfort of himself and family, it will amount to an eviction; 8 Cow. 727; 2 Ired. 350; Woodf. Landl. &. T. 1096; 52 N. W. Rep. (S. Dak.) 583; 16 N. Y. Sup. 163; 44 Mo. App. 279; 91 Pa. 322; 106 Mass. 201; 49 Vt. 109.

In New York it is said that eviction from the whole premises leased relieves the tenant from the payment of rent; but when the eviction is from a part only, the rent will be apportioned; 46 N. Y. 370. When the landlord's wrongful act interferes more

or less with the beneficial enjoyment of the premises, but leaves them intact, the act is merely a trespass, though the tenant suffer injury by it; *ibid.*

Where the landlord, instead of resorting to the means provided by law, takes upon himself without authority to remove the property of his tenant and turn him out, he will be liable in damages, though it were effected without personal violence in the tenant's absence; 44 La. Ann. 514.

Constructive eviction may arise from any wrongful act of the lessor which deprives the tenant of the full enjoyment of the leased premises: as, by forbidding an under-tenant to pay rent to the tenant; 25 Ill. 587; building a fence in front of the premises to cut off the tenant's access thereto; 9 Allen 421; erecting a permanent structure which renders unfit for use two rooms; 106 Mass. 201; refusal to do an act indispensably necessary to enable the tenant to carry on the business for which the premises were leased: as, when premises were let for a grog-shop, the landlord refused to sign the necessary documents required by statute to enable the tenant to obtain a license; 42 Md. 236; also where lessor tears down an adjoining building, making it evident that lessee's building would fall; 142 N. Y. 263. And when a landlord, who owned another building adjoining that occupied by a tenant, the two being constructed together, tore the former down, rendering the latter unsafe for occupancy, and then procured its condemnation and destruction by the city authorities, these acts constituted an eviction, for which the tenant might recover damages; and the landlord could not avail himself of the action of the city authorities as a defence; 68 N. W. Rep. (Wis.) 406.

But a mere failure of the landlord to make repairs, although such act may cause the place to be untenable, will not amount to an eviction; 23 La. Ann. 59; 35 N. Y. Super. Ct. 412; 72 Pa. 285. See 49 Vt. 109. But the doctrine of constructive eviction amounts only to a right to abandon the premises; it is not a defence against an action for rent when the tenant waives the eviction and remains in possession; 20 N. Y. 281.

The remedy for an eviction depends chiefly upon the covenants in the deed under which the party held. When the grantee suffers a total eviction, if he has a covenant of seisin or for quiet enjoyment, he recovers from the grantor the consideration-money which he paid for the land, with interest, and not the enhanced value of the premises, whether such value has been created by the expenditure of money in improvements thereon, or by any other more general cause; 14 Wend. 38; 2 Mass. 432. And this seems to be the general rule in the United States; 13 Johns. 50; 4 Dall. 441; Cooke 447; 1 Hen. & M. 202; 4 Halst. 139; 2 Bibb 272.

With respect to a lessee, however, who pays no purchase-money, the rule of damages upon an eviction is different; for he recovers nothing, except such expenses as he has been put to in defending his possession; and as to any improvements he may have made upon the premises, he stands upon the same general footing with a purchaser. The rents reserved in a lease, where no other consideration is paid, are regarded as a just equivalent for the use of the demised premises. Upon an eviction the rent ceases, and the lessee is thereby relieved from a burden which must be deemed equal to the benefit he would have derived from the continued enjoyment of the property; 2 Hill 105; 1 App. D. C. 447; 44 Mo. 164; 49 Vt. 109; 59 Pa. 420; 25 Ill. 587. And see 1 Duer, N. Y. 343; Tayl. Landl. & T. § 317; 147 Ill. 634; 3 Ind. App. 54. It is no defence, however, to an action for rent which was due at the time of the eviction; 8 Misc. Rep. 307.

When the eviction is only *partial*, the damages to be recovered under the covenant of seisin are a ratable part of the original price, and they are to bear the same ratio to the whole consideration that the value of the land to which the title has failed bears to the value of the whole tract. The contract is not rescinded, so as to entitle the vendee to the whole consideration-money, but only to the amount of the relative value of the part lost; 5 Johns. 19; 12 *id.* 126; 4 Kent 462. See 6 Bac. Abr. 44; 1 Saund. 204, 322 *a*; 117 Mass. 262; 22 Gratt. 109; 43 N. J. L. 480. 71 Fed. Rep. 226. See MEASURE OF DAMAGES.

EVIDENCE. That which tends to prove or disprove any matter in question, or to influence the belief respecting it. Belief is produced by the consideration of something presented to the mind. The matter thus presented, in whatever shape it may come, and through whatever material organ it is derived, is evidence. Prof. Parker, Lectures on Medical Jurisprudence, in Dartmouth College.

The word evidence, in legal acceptation, includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved. 1 Greenl. Ev. c. I. § 1; Will, Cir. Ev. 1. Testimony is not synonymous with evidence; 17 Ind. 272; the latter is the more comprehensive term; Whart. Cr. L. § 783; and includes all that may be submitted to the jury whether it be the statement of witnesses, or the contents of papers, documents, or records, or the inspection of whatever the jury may be permitted to examine and consider during the trial; Will, Cir. Ev. 2; 48 Ill. App. 230.

The means sanctioned by law of ascertaining in a judicial proceeding the truth respecting a question of fact. Cal. Code Civ. Proc. § 1823. And the law of evidence is declared to be a collection of general rules established by law:

1. For declaring what is to be taken as true without proof.

2. For declaring the presumptions of law, both disputable and conclusive.

3. For the production of legal evidence.

4. For the exclusion of what is not legal.

5. For determining in certain cases the value and effect of evidence. *Id.* § 1825.

"The rules of evidence," says a late discriminating writer, "are the maxims which the sagacity and experience of ages have established, as the best means of discriminating truth from error, and of contracting as far as possible the dangerous power of judicial discretion." Will, Cir. Ev. 2.

That which is legally submitted to a jury, to enable them to decide upon the questions in dispute, or issue, as pointed out by the pleadings, and distinguished from all comment and argument, is termed evidence. 1 Stark. Ev. pt. 1, § 3.

Evidence may be considered with reference to its *instruments*, its *nature*, its *legal character*, its *effect*, its *object*, and the *modes of its introduction*.

The instruments of evidence, in the legal acceptation of the term, are:—

1. *Judicial notice* or *recognition*. There are divers things of which courts take judicial notice, without the introduction of proof by the parties: such as the territorial extent of their jurisdiction, local divisions of their own countries, seats of courts, all public matters directly concerning the general government, the ordinary course of nature, divisions of time, the meanings of words, and, generally, of whatever ought to be generally known in the jurisdiction. If the judge needs information on subjects, he will seek it from such sources as he deems authentic. See 1 Greenl. Ev. c. 2; Steph. Ev. art. 58; Tayl. Ev. 3; JUDICIAL NOTICE.

2. *Public records;* the registers of official transactions made by officers appointed for the purpose; as, the public statutes, the judgments and proceedings of courts, etc.

3. *Judicial writings:* such as inquisitions, depositions, etc.

4. *Public documents* having a semi-official character: as, the statute-books published under the authority of the government, documents printed by the authority of congress, etc.

5. *Private writings:* as, deeds, contracts, wills.

6. *Testimony of witnesses.*

7. *Personal inspection*, by the jury or tribunal whose duty it is to determine the matter in controversy: as, a view of the locality by the jury, to enable them to determine the disputed fact, or the better to understand the testimony, or inspection of any machine or weapon which is produced in the cause.

Real evidence is evidence of the thing or object which is produced in court. When, for instance, the condition or appearance of any thing or object is material to the issue, and the thing or object itself is produced in court for the inspection of the tribunal, with proper testimony as to its identity, and, if necessary, to show that it has existed since the time at which the issue in question arose, this object or thing becomes itself "real evidence" of its condition or appearance at the time in question. 1 Greenl. Ev. § 13 *a*, note. For a full discussion of this species of evidence, see 50 N. J. L. 491.

There are rules prescribing the limits and regulating the use of these different instruments of evidence, appropriate to each class.

In its *nature*, evidence is *direct*, or *presumptive*, or *circumstantial*.

Direct evidence is that means of proof which tends to show the existence of a fact in question, without the intervention of the proof of any other fact.

It is that evidence which, if believed, establishes the truth of a fact in issue, and does not arise from any presumption. Evidence is direct and positive when the very facts in dispute are sworn to by those who have the actual knowledge of them by means of their senses. 1 Phill. Ev. 116; 1 Stark. Ev. 19; Tayl. Ev. 84. In one sense, there is but little direct or positive proof, or such proof as is acquired by means of one's own sense; all other evidence is presumptive; but, in common acceptation, direct and positive evidence is that which is communicated by one who has actual knowledge of the fact.

Presumptive evidence is that which shows the existence of one fact, by proof of the existence of another or others, from which the first may be inferred; because the fact or facts shown have a legitimate tendency to lead the mind to the conclusion that the fact exists which is sought to be proved.

Presumptive evidence has been divided into presumptions of law and presumptions of fact.

Presumptions of law, adopted from motives of public policy, are those which arise in certain cases by force of the rules of law, directing an inference to be drawn from proof of the existence of a particular fact or facts. They may be conclusive or inconclusive.

Conclusive presumptions are those which admit of no averment or proof to the contrary. Thus, the records of a court, except in some proceeding to amend them, are conclusive evidence of the matter there recorded, being presumed to be rightly made up.

Inconclusive or *disputable* presumptions of law are those where a fact is presumed to exist, either from the general experience of mankind, or from policy, or from proof of the existence of certain other facts, until something is offered to show the contrary. Thus, the law presumes a man to be sane until the contrary appears, and to be innocent of the commission of a crime until he is proved to be guilty. So, the existence of a person, or of a particular state of things, being shown, the law presumes the person or state of things to continue until something is offered to conflict with the presumption. See Best, Presumption, ch. ii.

But the presumption of life may be rebutted by another presumption. Where a party has been absent from his place of residence for the term of seven years, without having been heard of, this raises a presumption of his death, until it is encountered by some evidence showing that

he is actually alive, or was so within that period.

Presumptions of fact are not the subject of fixed rules, but are merely natural presumptions, such as appear, from common experience, to arise from the particular circumstances of any case. Some of these are "founded upon a knowledge of the human character, and of the motives, passions, and feelings by which the mind is usually influenced." 1 Stark. Ev. 27.

They may be said to be the conclusions drawn by the mind from the natural connection of the circumstances disclosed in each case, or, in other words, from circumstantial evidence.

Circumstantial evidence is sometimes used as synonymous with presumptive evidence, but not with strict accuracy; for presumptive evidence is not necessarily and in all cases what is usually understood by circumstantial evidence. The latter is that evidence which tends to prove a disputed fact by proof of other facts which have a legitimate tendency, from the laws of nature, the usual connection of things, and the ordinary transactions of business, etc., to lead the mind to a conclusion that the fact exists which is sought to be established. See 1 Stark. Ev. 478; Whart. Ev. 1, 2, 15.

The latest writer on this subject thus states the distinction: the word presumption, *ex vi termini*, imports an inference from facts known, based upon previous experience of the ordinary connection between the two, and, the word itself implies a certain relation between fact and inference. Circumstances, however, generally but not necessarily lead to particular inferences; for the facts may be indisputable, and yet their relation to the principal fact may be only apparent, not real; and even where the connection is real, the deduction may be erroneous. Circumstantial and presumptive evidence differ therefore as genus and species. Will, Cir. Ev. 17.

Presumptive evidence may sometimes be the result, to some extent, of any arbitrary rule—as in the case of the presumption of death after an absence of seven years without being heard of—derived by analogy from certain statutes.

The judge and the jury draw conclusions from circumstantial evidence, and find one fact from the existence of other facts shown to them,—some of the presumptions being so clear and certain that they have become fixed as rules of law, and others having greater or less weight according to the circumstances of the case, leaving the matter of fact inquired about in doubt until the proper tribunal to determine the question draws the conclusion.

In its *legal character*, evidence is *primary* or *secondary*, and *prima facie* or *conclusive*.

Primary evidence is the best evidence, or that proof which most certainly exhibits the true state of facts to which it relates. The law requires this, and rejects secondary or inferior evidence when it is attempted to be substituted for evidence of a higher or superior nature. For example, when a written contract has been entered into, and the object is to prove what it was, it is requisite to produce the original writing, if it is to be attained; and in that case no copy or other inferior evidence will be received.

This is a rule of policy, grounded upon a reasonable suspicion that the substitution of inferior for better evidence arises from sinister motives, and an apprehension that the best evidence, if produced would alter the case to the prejudice of the party. This rule relates not to the measure and quantity of evidence, but to its quality when compared with some other evidence of superior degree.

To this general rule there are several exceptions. 1. As it refers to the *quality* rather than to the *quantity* of evidence, it is evident that the fullest proof that every case admits of is not requisite: if, therefore, there are several eye-witnesses to a fact, it may be sufficiently proved by one only. 2. It is not always requisite, when the matter to be proved has been reduced to writing, that the writing should be produced: as, if the narrative of a fact to be proved has been committed to writing, it may yet be proved by parol evidence. A receipt for the payment of money, for example, will not exclude parol evidence of payment; 4 Esp. 213. And see 3 B. & Ald. 566; 3 Cra. 51; 1 Dak. 372; 78 N. Y. 82; 41 Minn. 169. The evidence of a father and mother, cognizant of their child's birth, is primary evidence of its date or the age of the child, although there is a written record thereof in the family Bible; 49 Kan. 237; 34 S. C. 118. 1 McCord 164; 73 Wis. 248. A stenographer's notes of the testimony of a witness are not the best evidence of such testimony, so as to prevent any other person who was present from testifying in relation thereto; 35 S. C. 537; 17 Misc. Rep. 157. Documentary evidence is not the best evidence of marriage; 72 Mich. 184. Oral admissions of a party against himself as to the contents of a writing are primary evidence; 62 Conn. 542.

Secondary evidence is that species of proof which is admissible when the primary evidence cannot be produced, and which becomes by that event the best evidence that can be adduced. 3 Yeates 530.

But before such evidence can be allowed it must be clearly made to appear that the superior evidence is not to be had; 87 Ga. 727; 91 Mich. 229. The person who possesses it must be applied to, whether he be a stranger or the opposite party: in the case of a stranger, a subpœna and attachment, when proper, must be taken out and served; and in the case of a party, notice to produce such primary evidence must be proved before the secondary evidence will be admitted; 7 S. & R. 116; 3 B. & Ald. 296; 61 Pa. 328; 149 *id.* 25; 72 Mich. 599; 7 Exch. 639; 94 Ala. 602. See 45 Mo. App. 497; 83 Ala. 401; 25 Neb. 57. Secondary evidence of the contents of a written contract is inadmissible in the absence of proper diligence to secure the original; 70 Tex. 745;

84 Ala. 592. After proof of the due execution of the original, the contents should be proved by a counterpart, if there be one, for this is the next best evidence; and it seems that no evidence of a copy is admissible until proof has been given that the counterpart cannot be produced; 6 Term 236. If there be no counterpart, a copy may be proved in evidence by any witness who knows that it is a copy, from having compared it with the original; Bull. N. P. 254; 6 Binn. 234; 8 Mass. 273. If regularly recorded, an office copy may be given in evidence. If there be no copy, the party may produce an abstract, or even give parol evidence of the contents of a deed; 10 Mod. 8; 6 Term 556. A transcribed telegraphic message which is actually delivered is primary evidence, and if lost or destroyed its contents may be proved by parol; 50 Minn. 424. See 118 Ind. 98; 127 Ill. 652. Letterpress copies of writings are secondary evidence; 30 S. W. Rep. (Tex.) 454.

If books or papers necessary as evidence in the courts of one state be in the possession of a person living in another state, secondary evidence without further showing may be given to prove the contents of such papers, and notice to produce them is unnecessary; 20 Wall. 125. See 52 Minn. 174. Where the attesting witness to a deed lives out of the state, secondary evidence of its execution is admissible; 157 Mass. 272.

It has been decided in England that there are no degrees in secondary evidence; and when a party has laid the foundation for such evidence, he may prove the contents of a deed by parol, although it appear that an attested copy is in existence; 6 C. & P. 206; 8 *id.* 389; 7 M. & W. 102. It is urged on the one hand that the rule requiring the best evidence has reference to its nature, not to its strength, and the argument *ab inconvenienti* is invoked against the extension of the rule recognizing degrees. On the other hand it is contended that such an extension is an equitable one and rests on the same principle which forbids the introduction of any secondary evidence while the primary is available. English cases cited in favor of the recognition of degrees are said to be not so much decisions of the point as *dicta*, as they refer to it as a rule existing but not involved in the case; 10 Mod. 8; 2 Atk. 71; 1 Nev. & Per. 8. But in the latter case the rule is doubted, and in 6 C. & P. 359 impliedly denied by Patteson, J., as it is also by Parke, J.; 6 C. & P. 81; *id.* 206. See 8 Dowl. 389; 3 Scott, N. R. 577. The question is not settled in the United States; Greenl. Ev. § 84, note; and the United States Supreme Court, after saying they do not adopt the English rule, observe that the rule of exclusion or admission must be so applied as to promote the ends of justice, and guard against fraud, surprise, and imposition; 20 Wall. 226. See 3 Wash. St. 166; 68 Fed. Rep. 864. The American doctrine seems to be "that if from the nature of the case itself it is manifest that a more satisfactory kind of secondary evidence exists, the party will be required to produce it; but that when the nature of the case does not of itself disclose the existence of such better evidence, the objector must not only prove its existence, but also must prove that it was known to the other party in time to have been produced at the trial;" 1 Gr. Ev. § 84, note; 7 Tex. 315; 2 Cold. 321; 28 Ala. 250; 56 Ga. 258; 75 Ill. 315; 62 Me. 480; 20 Wall. 226; 9 Pet. 663. In an action against a stockholder for an assessment, without deciding whether the law recognizes degrees of secondary evidence, oral testimony of the contents of the notice of the call was admitted, when the existence of a copy did not appear; 53 Minn. 381. In an action for work and labor where the time-book had been burned but there was proof that plaintiff had made a copy of the entries against the defendant, the copy was held best evidence and parol proof was excluded in the absence of proof of the loss of the copy; 98 Mich. 168.

Prima facie evidence is that which appears to be sufficient proof respecting the matter in question, until something appears to controvert it, but which may be contradicted or controlled.

Conclusive evidence is that which establishes the fact: as in the instance of conclusive presumptions.

Evidence may be conclusive for some purposes but not for others.

Admissibility of evidence. In considering the legal character of evidence, we are naturally led to the rules which regulate its competency and admissibility, although it is not precisely accurate to say that evidence is in its legal character competent or incompetent; because what is incompetent for the consideration of the tribunal which is to pronounce the decision is not, strictly speaking, evidence.

But the terms incompetent evidence and inadmissible evidence are often used to designate what is not to be heard as evidence: as, witnesses are spoken of as competent or incompetent.

As the common law excludes certain classes of persons from giving testimony in particular cases, because it deems their exclusion conducive, in general, to the discovery of the truth, so it excludes certain materials and statements from being introduced as testimony in a cause, for a similar reason. Thus, as a general rule, it requires witnesses to speak to facts within their own knowledge, and excludes hearsay evidence.

Hearsay is the evidence, not of what the witness knows himself, but of what he has heard from others.

Such mere recitals or assertions cannot be received in evidence for many reasons, but principally for the following:—first, that the party making such declarations is not on oath; and, secondly, because the party against whom it operates has no opportunity of cross-examination; 1 Phil. Ev. 185. See, for other reasons, 1 Stark. Ev. pt. 1, p. 44; Tayl. Ev. 508. The general rule excluding hearsay evidence does not apply to those declarations to which the

party is privy, or to admissions which he himself has made.

Many facts, from their very nature, either absolutely or usually exclude direct evidence to prove them, being such as are either necessarily or usually imperceptible by the senses, and therefore incapable of the ordinary means of proof. These are questions of pedigree or relationship, character, prescription, custom, boundary, and the like; as also questions which depend upon the exercise of particular skill and judgment. Such facts, some from their nature, and others from their antiquity, do not admit of the ordinary and direct means of proof by living witnesses: and, consequently, resort must be had to the best means of proof which the nature of the case affords. The rule permitting a resort to hearsay evidence, however, in cases of pedigree extends only to the admission of declarations by deceased persons who were related by blood or marriage to the person in question, and not to declarations by servants, friends, or neighbors; 75 Fed. Rep. 217. And "general reputation in the family," which is admissible in matters of pedigree, or to establish the facts of birth, marriage, or death, is confined to declarations of deceased members of the family, and family history and traditions handed down by declarations of deceased members, in either case made *ante litem motam*, and originating with persons presumed to have competent knowledge of the facts stated; and evidence of the opinion or belief of living members of a family as to the death of another member, or of general reputation among a person's living friends and acquaintances as to his death, is not within the rule, and is inadmissible; 35 Atl. Rep. (Vt.) 77. See BOUNDARY; CUSTOM; PEDIGREE; PRESCRIPTION.

Admissions are the declarations which a party by himself, or those who act under his authority, make of the existence of certain facts. But where an admission is made the foundation of a claim, the whole statement must be taken together; 82 Va. 59. See 62 Conn. 542; 85 Ala. 569; ADMISSIONS.

A statement of all the distinctions between what is to be regarded as hearsay and what is to be deemed original evidence would extend this article too far. The general principle is that the mere declaration, oral or written, of a third person, as to a fact, standing alone, is inadmissible.

Res gestæ. But where evidence of an act done by a party is admissible, his declarations made at the time, having a tendency to elucidate or give a character to the act, and which may derive a degree of credit from the act itself, are also admissible, as part of the *res gestæ*; 9 N. H. 271; 93 U. S. 465; 116 Ind. 278; 79 Ga. 631; 112 Mo. 374; 128 Ill. 545; 95 Mich. 412; 82 Tex. 516; 18 Fed. Rep. 156; 148 Pa. 566; 21 How. St. Tr. 514; Steph. Dig. Ev. §§ 2, 7.

So, declarations of third persons, in the presence and hearing of a person, which tend to affect his interest, may be shown in order to introduce his answer or to show an admission by his silence, but this species of evidence must be received with great caution; 1 Greenl. Ev. 236.

Confessions of guilt in criminal cases come within the class of admissions, provided they have been voluntarily made and have not been obtained by the hope of favor or by the fear of punishment. And if made under such inducements as to exclude them, a subsequent declaration to the same effect, made after the inducement has ceased to operate, and having no connection with the hopes or fears which have existed, is admissible as evidence; 17 N. H. 171. Actions as well as verbal declarations may constitute a confession, and the same rule as to admissibility applies to both; 98 N. C. 595. There is, however, a growing unwillingness to rest convictions on confessions unless supported by corroborating circumstances, and in all cases there must be at least proof of the *corpus delicti*, independently of the confession; 1 Whart. Cr. Law, § 683; Cooley, Const. Lim. 385; Tayl. Ev. 744. See ADMISSIONS; CONFESSION; RES GESTÆ.

Dying declarations are an exception to the rule excluding hearsay evidence, and are admitted, under certain limitations in cases of homicide, so far as the circumstances attending the death and its cause are the subject of them. See DECLARATION; DYING DECLARATIONS.

Opinions of persons of skill and experience, called experts, are also admissible in certain cases, when, in order to the better understanding of the evidence or to the solution of the question, a certain skill and experience are required which are not ordinarily possessed by jurors. See EXPERT; OPINION.

In several instances proof of facts is excluded from public policy; as professional communications between lawyer and client, and physician and patient; secrets of state, proceedings of grand juror, and communications between husband and wife. See CONFIDENTIAL COMMUNICATIONS; PRIVILEGED COMMUNICATIONS.

The *effect* of evidence. As a general rule, a judgment rendered by a court of competent jurisdiction directly upon a point in issue is a bar between the same parties; 1 Phill. Ev. 242; and privies in blood, as an heir; 3 Mod. 141; or privies in estate; 1 Ld. Raym. 730; Bull. N. P. 232, stand in the same situation as those they represent: the verdict and judgment may be used for or against them, and is conclusive. See RES JUDICATA; JUDGMENT.

The constitution of the United States, art. 4, s. 1, declares that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof." See 3 Wheat. 234; 17 Mass. 546; 3 Bibb 369; 2 Marsh. 293; 5 Day 563; 159

U. S. 113, 235; 2 Black, Judg. § 857; FOREIGN JUDGMENT.

Foreign laws must be proved as facts in the courts of this country, and mere citations to English statutes and authorities cannot be accepted as showing the English law; 50 Fed. Rep. 73. See FOREIGN LAW. For the force and effect of foreign judgments, see FOREIGN JUDGMENT.

The *object* of evidence is next to be considered. It is to ascertain the truth between the parties. It has been discovered by experience that this is done most certainly by the adoption of the following rules, which are now binding as law:— 1. The evidence must be confined to the point in issue. 2. The substance of the issue must be proved; but only the substance is required to be proved. 3. The affirmative of the issue must be proved.

It is a general rule, both in civil and criminal cases, that *the evidence shall be confined to the point in issue.* Justice and convenience require the observance of this rule, particularly in criminal cases; for when a prisoner is charged with an offence it is of the utmost importance to him that the facts laid before the jury should consist exclusively of the transaction which forms the subject of the indictment, and which alone he has come prepared to answer; 2 Russ. Cr. 694; 1 Phill. Ev. 166.

To this general rule there are several exceptions, and a variety of cases which do not fall within the rule. In general, evidence of collateral facts is not admissible; but when such a fact is material to the issue joined between the parties, it may be given in evidence: as, for example, in order to prove that the acceptor of a bill knew the payee to be a fictitious person, or that the drawer had general authority from him to fill up bills with the name of a fictitious payee, evidence may be given to show that he had accepted similar bills before they could, from their date, have arrived from the place of date; 2 H. Bla. 288.

When special damage sustained by the plaintiff is not stated in the declaration, it is not one of the points in issue, and, therefore, evidence of it cannot be received; yet a damage which is a necessary result of the defendant's breach of contract may be proved notwithstanding it is not in the declaration; 11 Price 19.

In general, evidence of the character of either party to a suit is inadmissible; yet in some cases such evidence may be given. See CHARACTER.

When evidence incidentally applies to another person or thing not included in the transaction in question, and with regard to whom or to which it is inadmissible, yet if it bear upon the point in issue it will be received; 8 Bing. 376. And see 4 B. & P. 92; 9 Conn. 47; 1 Whart. Cr. Law § 649.

The *acts* of others, as in the case of conspirators, may be given in evidence against the prisoner, when referable to the issue; but *confessions* made by one of several conspirators after the offence has been completed, and when the conspirators no longer act in concert, cannot be received. See 3 Pick. 33; 2 Pet. 364; 2 Va. Cas. 269; 1 Rawle 362, 458; 2 Leigh 745; 2 Day 205; 2 B. & Ald. 573, 574; 25 Tex. App. 533; CONFESSION.

In criminal cases, when the offence is a cumulative one, consisting itself in the commission of a number of acts, evidence of those acts is not only admissible, but essential to support the charge. On an indictment against a defendant for a conspiracy to cause himself to be believed a man of large property, for the purpose of defrauding tradesmen after proof of a representation to one tradesman, evidence may thereupon be given of a representation to another tradesman at a different time; 1 Campb. 399; 2 Day 205; 1 Johns. 99.

To prove the guilty knowledge of a prisoner with regard to the transaction in question, evidence of other offences of the same kind committed by the prisoner, though not charged in the indictment, is admissible against him; as, in the case where a prisoner had passed a counterfeit dollar, evidence that he had other counterfeit dollars in his possession is evidence to prove the guilty knowledge; 2 Const. 758, 776; 1 Bail. 300; 2 Leigh 745; 1 Wheel. Cr. Cas. 415; Russ. & R. 132; 5 Rand. 701.

The substance of the issue joined between the parties *must be proved;* 1 Phill. Ev. 190; Tayl. Ev. 233. Under this rule will be considered the *quantity* of evidence required to support particular averments in the declaration or indictment.

And, *first*, of *civil* cases. 1. It is a fatal variance in a contract if it appear that a party who ought to have been joined as plaintiff has been omitted; 1 Saund. 291 *h*, n.; 2 Term 282; and so where a bill for specific performance alleges the execution of a contract in a certain year, and the proof shows that it was made in another; 85 Ala. 286. But it is no variance to omit a person who might have been joined as defendant; because the non-joinder ought to have been pleaded in abatement; 1 Saund. 291 *d*, n. 2. The consideration of the contract must be proved; but it is not necessary for the plaintiff to set out in his declaration, or prove on the trial, the several parts of a contract consisting of distinct and collateral provisions: it is sufficient to state so much of the contract as contains the entire consideration of the act, and the entire act to be done in virtue of such consideration, including the time, manner, and other circumstances of its performance; 6 East 568; 4 B. & Ald. 387.

Second. In *criminal* cases, it may be laid down that it is, in general, sufficient to prove what constitutes the offence. 1. It is enough to prove so much of the indictment as shows that the defendant has committed a substantive crime therein specified; 2 Campb. 585; 1 H. & J. 427. See 78 Ga. 98; 62 Mich. 297. If a man be indicted for robbery, he may be found guilty of larceny and not guilty of the robbery; 2 Hale, Pl. Cr. 302. The offence of which the party is convicted must, however, be of the same

class with that of which he is charged; 1 Leach 14; 2 Stra. 1133.

2. When the intent of the prisoner furnishes one of the ingredients in the offence, and several intents are laid in the indictment, each of which, together with the act done, constitutes an offence, it is sufficient to prove one intent only; 3 Stark. 35.

3. When a person or thing necessary to be mentioned in an indictment is described with circumstances of greater particularity than is requisite, yet those circumstances must be proved; 3 Rog. 77; 3 Day 283; 26 Tex. App. 486. For example, if a party be charged with stealing a *black* horse, the evidence must correspond with the averment, although it was unnecessary to make it; Rosc. Cr. Ev. 77; 4 Ohio 350; 83 Ga. 381; but see 73 Cal. 7, where an indictment charging a murder with a "bludgeon" is supported by proof that death was produced by a blow with a bolt or club; 23 Neb. 33. See 103 N. C. 364; 26 Tex. App. 109.

4. The name of the prosecutor or party injured must be proved as laid; and the rule is the same with reference to the name of a third person introduced into the indictment, as descriptive of some person or thing. See 35 Fed. Rep. 407; 10 Ky. L. Rep. 972; 40 Minn. 55.

The affirmative of the issue must be proved. The general rule with regard to the burden of proving the issue requires that the party who asserts the affirmative should prove it. But this rule ceases to operate the moment the presumption of law is thrown into the other scale. When the issue is on the legitimacy of a child, therefore, it is incumbent on the party asserting the illegitimacy to prove it; 2 Selw. N. P. 709. Or where an answer admits all the averments of the complaint, and sets up a counter-claim as a defence, the affirmative of all the issues raised by the pleadings is on the defendant; 61 Hun 624. See ONUS PROBANDI; PRESUMPTION; 2 Gall. 485; 1 M'Cord 573; 2 So. L. Rev. (N. S.) 126; 44 La. Ann. 1043.

Modes of proof. Records are to be proved by an exemplification, duly authenticated according to law, in all cases where the issue is *nul tiel record.* In other cases, an examined copy, duly proved, will, in general, be evidence; 2 Woods 680. Foreign laws are proved in the mode pointed out under the article FOREIGN LAW. See *supra.*

Private writings are proved by producing the attesting witness; or in case of his death, absence, or other legal inability to testify, as if after attesting the paper he becomes infamous, his handwriting may be proved. When there is no witness to the instrument, it may be proved by the evidence of the handwriting of the party, by a person who has seen him write, or who in a course of correspondence or business relations has become acquainted with his hand. See 3 Wash. C. C. 31; 1 Rawle 223; 4 Am. L. Rev. 625; 49 Minn. 420. As to the question whether the genuineness of a signature may be proved or disproved by comparison, or the signature to documents not a part of the case be proven for the purpose of using them as standards of comparison with the signature to the instrument sued on, see HANDWRITING.

Books of original entry, when duly proved, are *prima facie* evidence of goods sold and delivered, and of work and labor done. See ORIGINAL ENTRY.

A recent decision laid down some general rules in relation to the use of the ballots as evidence in an election contest, which present the law in that regard in a very terse and lucid form. It holds (1) that one who has received a certificate of election to office is not estopped in case of contest from going behind the returns from ballot boxes which were counted without objection by either party, and which formed the basis of the certificate; (2) that in an election contest, the ballots of a certain box, which had been opened before a legislative committee after the election, are admissible when it appears that the opportunity for the ballots to have been tampered with was a mere possibility; and (3) that the fact that a discrepancy exists between the returns of the votes counted from that ballot box and a recount made by the court in an election contest does not indicate that there was any alteration in the ballots after being voted, nor tend to cast suspicion thereon, when the evidence shows that, when the count was concluded by the election officers, there were discrepancies between the tally sheets of the different clerks of the election, which it was attempted to reconcile by guessing at the result, and making changes accordingly; 34 S. W. Rep. (Tex.) 992. See ELECTION.

Proof by witnesses. The testimony of witnesses is called oral evidence, or that which is given *viva voce*, as contradistinguished from that which is written or documentary. It is a general rule that oral evidence shall in no case be received as equivalent to, or as a substitute for, a written instrument, where the latter is required by law; or to give effect to a written instrument which is defective in any particular which by law is essential to its validity; or to contradict, alter, or vary a written instrument, either appointed by law, or by the contract of the parties, to be the appropriate and authentic memorial of the particular facts it recites; for by doing so, oral testimony would be admitted to usurp the place of evidence decidedly superior in degree; 1 S. & R. 27, 464; 3 Marsh. 333; 1 Bibb 271; 11 Mas. 30; 3 Conn. 9; 12 Johns. 77; 1 Maule & S. 21; 45 La. Ann. 580; 67 Hun 315; 142 N. Y. 207; 150 Mass. 496; but this rule does not apply in suits between persons not parties to the writing; 8 Misc. Rep. 314; 50 Ohio St. 528; 77 N. Y. 613; 142 Mass 76; 60 Me. 465; 1 Gr. Ev. § 279.

But parol evidence is admissible to defeat a written instrument, on the ground of fraud, mistake, etc., or to apply it to its proper subject-manner, or, in some instances, as ancillary to such application, to explain the meaning of doubtful terms, or

to rebut presumptions arising extrinsically. In these cases, the parol evidence does not usurp the place, or arrogate the authority of written evidence, but either shows that the instrument ought not to be allowed to operate at all, or is essential in order to give to the instrument its legal effect; 1 Murph. 426; 1 Des. 465; 1 Bay 247; 1 Bibb 271; 11 Mass. 30. See 1 Pet. C. C. 85; 3 S. & R. 340; Pothier, Obl. pl. 4, c. 2; 15 R. I. 41; 1 Okl. 232; 65 Vt. 231; 62 Conn. 459; 6 Harv. L. Rev. 325, 417; 2 Misc. Rep. 219; 148 U. S. 581; 154 Pa. 149. Where the facts do not appear on the face of the judgment, oral evidence is admissible to show how credits thereon come to be allowed, and what they were allowed for; 75 Fed. Rep. 852. And parol evidence has been admitted to establish a contemporaneous oral agreement which induced the execution of the written contract though the effect be to alter or reform the latter; 114 Pa. 170; 116 *id.* 270; so when the contract was a letter "confirming our verbal contract," proof of the latter was permitted although inconsistent with the letter; 120 *id.* 439.

See, generally, the treatises on Evidence, of Gilbert, Phillipps, Starkie, Roscoe, Swift, Bentham, Macnally, Peake, Greenleaf, Wharton, Stephen, Rice; Best on Presumption; Browne, Parol Ev.; Will, Circ. Ev.

EVIDENCE, CIRCUMSTANTIAL. The proof of facts which usually attend other facts sought to be proved; that which is not direct evidence. For example, when a witness testifies that a man was stabbed with a knife, and that a piece of the blade was found in the wound, and it is found to fit exactly with another part of the blade found in the possession of the prisoner, the facts are directly attested, but they only prove circumstances; and hence this is called circumstantial evidence.

Circumstantial evidence is of two kinds, namely, certain and uncertain. It is *certain* when the conclusion in question necessarily follows: as, where a man had received a mortal wound, and it was found that the impression of a bloody *left* hand had been made on the *left* arm of the deceased, it was certain some other person than the deceased must have made such mark; 14 How. St. Tr. 1334. But it is *uncertain* whether the death was caused by suicide or by murder, and whether the mark of the bloody hand was made by the assassin, or by a friendly hand that came too late to the relief of the deceased. It has been contended that, in order to justify the inference of legal guilt from circumstantial evidence, the existence of the inculpatory facts must be absolutely incompatible with the innocence of the accused; Wills, Cir. Ev. 300; Stark. Ev. 160; 1 Crim. L. Mag. 234; 9 Houst. 564; 85 Pa. 127; 19 Ia. 230; 58 Ind. 530; but other writers have held that the distinction between this species of evidence and that which is direct is merely one of logic, and of no practical significance; that all evidence is more or less circumstantial; all statements of witnesses, all conclusions of juries, are the results of inference; or as it was expressed by Gibson, C. J., "the difference being only in degree;" 4 Pa. 269. See 2 Sumn. 27; 4 Pa. 269; Whart. Cr. Ev. § 10; Tayl. Ev. 86. Even in its strictest sense, circumstantial evidence is legal evidence, and when it is satisfactory beyond reasonable doubt, a jury is bound to act upon it as if it were the most direct; 1 Cent. L. J. 219; 1 Greenl. Ev. § 13; 3 Rice, Ev. 544. See CIRCUMSTANCES; EVIDENCE.

EVIDENCE, CONCLUSIVE. That which, while uncontradicted, satisfies the judge and jury; it is also that which cannot be contradicted.

The record of a court of common-law jurisdiction is conclusive as to the facts therein stated; 2 Wash. Va. 64; 2 Hen. & M. 55; 6 Conn. 508. But the judgment and record of a prize-court is not conclusive evidence in the state courts, unless it had jurisdiction of the subject-matter; and whether it had or not, the state courts may decide; 1 Conn. 429. See, as to the conclusiveness of the judgments of foreign courts of admiralty, 3 Cra. 458; 4 *id.* 421, 434; Gilm. 16; 1 Const. 381; 1 Nott & M'C. 537. See EVIDENCE.

EVIDENCE, DIRECT. That which applies immediately to the *factum probandum*, without any intervening process: as, if A testifies he saw B inflict a mortal wound on C, of which he instantly died. 1 Greenl. Ev. § 13. See EVIDENCE.

EVIDENCE, EXTRINSIC. External evidence, or that which is not contained in the body of an agreement, contract, and the like.

It is a general rule that extrinsic evidence cannot be admitted to contradict, explain, vary, or change the terms of a contract or of a will, except in a latent ambiguity, or to rebut a resulting trust; 14 Johns. 1; 1 Day 8. Excepting where evidence is admissible to vary a written contract on the ground that it does not represent the actual contract between the parties. See Wigram, Extrinsic Evidence; 14 L. R. A. 459; EVIDENCE.

EVOCATION. In French Law. The act by which a judge is deprived of the cognizance of a suit over which he had jurisdiction, for the purpose of conferring on other judges the power of deciding it. It is like the process by writ of *certiorari*.

EWAGE. A toll paid for water-passage. Cowel. The same as *aquagium*.

EWBRICE. Adultery; spouse-breach; marriage-breach. Cowel; Tomlin, Law Dict.

EX ÆQUO ET BONO (Lat.). In justice and good dealing. 1 Story, Eq. Jur. § 965.

EX CONTRACTU (Lat.). From contract. A division of actions is made in the common and civil law into those arising *ex contractu* (from contract) and *ex delicto*

(from wrong or tort). 3 Bla Com. 117; 1 Chit. Pl. 2; 1 Mackeldey, Civ. Law § 195.

EX DEBITO JUSTITIÆ (Lat.). As a debt of justice. As a matter of legal right. 3 Bla. Com. 48.

EX DELICTO (Lat.). Actions which arise in consequence of a crime, misdemeanor, or tort are said to arise *ex delicto*: such are actions of case, replevin, trespass, trover. 1 Chit. Pl. 2; See EX CONTRACTU; ACTIONS.

EX DOLO MALO (Lat.). Out of fraud or deceit. When a cause of action arises from fraud or deceit, it cannot be supported; *ex dolo malo non oritur actio*. See MAXIMS.

EX EMPTO. Out of purchase; founded on purchase. A term of the civil law, adopted by Bracton. Inst. 4, 6, 28; Brac. fol. 102; Black, L. Dict.

EX GRATIA (Lat.). Of favor. Of grace. Words used formerly at the beginning of royal grants, to indicate that they were not made in consequence of any claim of legal right.

EX INDUSTRIA (Lat.). Intentionally. From fixed purpose.

EX MALEFICIO (Lat.). On account of misconduct. By virtue of or out of an illegal act. Used in the civil law generally, and sometimes in the common law. Browne, Stat. Frauds 110, n.; Broom, Leg. Max. 351.

EX MERO MOTU (Lat.). Of mere motion. The term is derived from the king's letters patent and charters, where it signifies that he grants them of his own mere motion, without petition. To prevent injustice, the courts will, *ex mero motu*, make rules and orders which the parties would not strictly be entitled to ask for. See EX GRATIA; EX PROPRIO MOTU.

EX MORA (Lat.). From the delay; from the default. All persons are bound to make amends for damages which arise from their own default.

EX MORE (Lat.). According to custom.

EX NECESSITATE LEGIS (Lat.). From the necessity of law.

EX NECESSITATE REI (Lat.). From the necessity of the thing. Many acts may be done *ex necessitate rei* which would not be justifiable without it; and sometimes property is protected *ex necessitate rei* which under other circumstances would not be so, or a way of necessity will be allowed; 126 Mass. 445. Property put upon the land of another from necessity cannot be distrained for rent. See DISTRESS.

EX OFFICIO (Lat.). By virtue of his office.

Many powers are granted and exercised by public officers which are not expressly delegated. A judge, for example, may be *ex officio* a conservator of the peace and a justice of the peace.

EX OFFICIO INFORMATION. In English Law. A criminal information filed by the attorney-general *ex officio* on behalf of the crown, in the court of queen's bench, for offences more immediately affecting the government, and to be distinguished from informations in which the crown is the nominal prosecutor. Moz. & W. L. Dict.; 4 Steph. Com. 372.

EX PARTE (Lat.). Of the one part. Many things may be done *ex parte*, when the opposite party has had notice. An affidavit or deposition is said to be taken *ex parte* when only one of the parties attends to taking the same. An injunction is granted *ex parte* when but one side has had a hearing. "*Ex parte*," in the heading of a reported case, signifies that the name following is that of the party upon whose application the case is heard. The term *ex parte* implies an examination in the presence of one of the parties and the absence of the other. 2 Scam. 62.

EX PARTE MATERNA (Lat.). On the mother's side. The words *ex parte materna* and *ex parte paterna* have a well-known signification in the law. They are found constantly used in the books to denote the line, or blood of the mother or father, and have no such restricted or limited sense, as from the mother or father, exclusively; 24 N. J. L. 433; 2 Bla. Com. 224, and notes.

EX PARTE PATERNA (Lat.). On the father's side. See EX PARTE MATERNA; DESCENT AND DISTRIBUTION.

EX POST FACTO (Lat.). From or by an after act: by subsequent matter. The correlative term is *ab initio*. An estate granted may be made good or avoided by matter *ex post facto*, when an election is given to the party to accept or not to accept; 1 Coke 146. A remainderman or reversioner may confirm *ex post facto* a lease granted by a life-tenant to last beyond his own life.

EX POST FACTO LAW. A statute which would render an act punishable in a manner in which it was not punishable when it was committed. 6 Cra. 138; 1 Kent 408.

A law made to punish acts committed before the existence of such law, which had not been declared crimes by preceding laws. Mass. Declar. of Rights, pt. 1, s. 24; Md. Decl. of Rights, art. 15.

A law passed after the commission of the offence charged, which inflicts a greater punishment than was annexed to the crime at the time of commission, or which alters the situation of the accused to his disadvantage. 3 Wyo. 478.

A law which, in its operation, makes that criminal which was not so at the time the action was performed; or which increases the punishment, or, in short, which, in relation to the offence or its consequences, alters the situation of a party to his disadvantage. 2 Wash. 366; 107 U. S. 228; see 65 Miss. 542; 6 Cra. 87; 43 N. J. L. 203; 29 N. Y. 124; 4 Wall. 325.

Parliament, in virtue of its supreme

power, may pass such laws, being sustained by discretion alone; 1 Bla. Com. 46, 160.

By the constitution of the United States, congress is forbidden to pass *ex post facto* laws. U. S. Const. art. 1, § 9. And by § 10 of the same instrument, as well as by the constitutions of most, if not all, of the states, a similar restriction is imposed upon the state legislatures. Such an act is void as to those cases in which, if given effect, it would be *ex post facto;* but so far only. In cases arising after it, it may have effect; for as a rule for the future, it is not *ex post facto.*

There is a distinction between *ex post facto* laws and *retrospective* or *retroactive* laws: every *ex post facto* law must necessarily be retrospective, but not every retrospective law is an *ex post facto* law; in general, *ex post facto* laws only are prohibited. Retrospective laws are prohibited by the constitutions of the states of New Hampshire and Ohio. See 15 Ohio 207; 27 *id.* 22; 50 *id.* 428; 107 U. S. 221; T. U. P. Charlt. 94.

It is fully settled that the term *ex post facto,* as used in the constitution, is to be taken in a limited sense as referring to criminal or penal statutes alone, and that the policy, the reason, and the humanity of the prohibition against passing *ex post facto* laws do not extend to civil cases, to cases that merely affect the private property of citizens. But the prohibition cannot be evaded by giving a civil form to what is, in substance, criminal; 4 Wall. 277; *id.* 333; 97 U. S. 385; 39 N. Y. 418; 43 Ga. 480; Hare, Am. Const. L. 547. Divorce not being a punishment may be authorized for causes happening previous to the passage of the divorce act; 40 Miss. 349.

The constitution does not prohibit the states from passing retrospective laws generally. Some of the most necessary acts of legislation are, on the contrary, founded upon the principles that private rights must yield to public exigencies; 8 Wheat. 89; 17 How. 463; 8 Pet. 88; 11 *id.* 421; 9 Cra. 374; 1 Gall. 105; 2 Pet. 380, 523, 627; 7 Johns. 488; 6 Binn. 271; 69 Mo. 343; 59 How. Pr. 21; 93 Ill. 483; Cooley, Const. Lim. 265; 36 S. C. 454. See 73 Ia. 707; 74 *id.* 708.

Test oaths of past loyalty to the government have been held void as *ex post facto;* 4 Wall. 333; except as pre-requisites to the exercise of the elective franchise; 47 Mo. 119; 39 N. Y. 418. A law prohibiting the sale of intoxicating liquors is not *ex post facto,* 5 R. I. 185; or a law imposing a retrospective tax; 31 N. J. L. 133; 20 Wall. 323; see 16 Pa. 63; s. c. 17 How. 856; 66 N. C. 361; or a law authorizing a divorce for past offences; 40 Miss. 349; 10 N. H. 380; compare 3 Murph. (N. C.) 327; or a law providing that the punishment of future crimes shall be increased by reason of past offences; 68 Me. 409. Corporations cannot pass *ex post facto* by-laws; 31 Mich. 458.

Laws under the following circumstances are to be considered *ex post facto* laws within the words and intent of the prohibition: 1. Every law that makes an act done before the passing of the law, which was innocent when done, criminal and punishes such action. 2. Every law that aggravates a crime, or makes it greater than it was when committed. 3. Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed; though it would be otherwise of a law mitigating the punishment; 3 Story, Const. 212. 4. Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offence, in order to convict the offender; 3 Dall. 390. This construction, it is said, "has been accepted and followed as correct by the courts ever since;" Cooley, Const. Lim. 325. See 93 Cal. 427; 155 Mass. 163.

This classification has been generally adopted as accurate and complete, but is not entirely so. Thus a law has been decided to be *ex post facto* which was intended to punish a criminal act, prosecution as to which was already barred by a statute of limitations; Moore *v.* State of N. J., 43 N. J. L. 203; s. c. 24 Alb. L. J. 308; but an act which reduces a punishment is not *ex post facto* as to crimes committed prior to its enactment; 140 N. Y. 484; 65 N. C. 311; 12 Allen 421; 20 Tex. App. 335. The statement under the fourth head also requires modification. Convictions under changes in the rules of evidence have been held not unconstitutional; 53 N. Y. 164; 9 Cush. 279; 14 Rich. L. 281; 31 Tex. Cr. R. 597; 84 Ky. 1; 84 Ind. 452; though it seems to be settled that a law requiring a *less* degree of evidence cannot be applied to a previous offence. But changes in the forms, in the manner of passing sentence, or the qualifications of jurors, do not fall within the prohibition; 11 Pick. 28; 2 Wash. St. 552; 3 Wyo. 478; 29 S. C. 355; nor will a provision reducing the number of peremptory challenges on a prosecution for a capital offence, though applied to cases where the offence was committed before the change was made; 31 Fla. 291; 86 Ala. 617; nor an amendment which confers jurisdiction in a criminal cause upon a division of the supreme court less in numbers and different in personnel from the court as organized when the crime was committed; 152 U. S. 377. A change of criminal procedure applied to the trial of crimes committed before it took effect is not *ex post facto,* unless it affects some substantial right to which the accused was entitled when the alleged offence was committed; 33 La. Ann. 1214; 107 U. S. 221. The supreme court of the United States has recently decided that a constitutional provision, requiring all grand and petit jurors to be qualified electors, able to read and write, and enjoining on the legislature to provide by law for listing and drawing persons so qualified, but declaring that, until otherwise provided by law, all crimes should be tried as though no change had been made (Const. Miss. 1890, §§ 264, 283), went into effect immediately on its adoption, so far as the qualifications of jurors were concerned; that one who committed a crime after the adoption of the constitution, but before the legisla-

ture passed a new jury law, could be tried, after the passage of such a law, by a jury selected under its provisions; and that, as the new law did not aggravate the crime previously committed, or inflict a greater punishment, or alter the rules of evidence, its application to the trial of the accused did not make it an *ex post facto* law; 162 U. S. 565.

For a review of the history of the *ex post facto* clause of the constitution in connection with its adoption, and with its subsequent construction by the federal and state courts, see 107 U. S. 221.

See also 134 *id.* 160; Cooley, Const. Lim. ch. ix.; Sto. Const. §§ 1345, 1373; Wade, Retro. L.; Pat. Fed. Restr. ch. vi.; Johnson, Ex Post Facto Laws; Black, Const. Prohibitions; Pomeroy, Const. Law; 6 Myer, Fed. Dec. 258; 25 Am. L. Reg. 681; 4 L. Mag. & Rev., 4th 59; Savigny, Confl. Laws; 22 Am. L. Rev. 523; Myer, Vested Rights; 3 L. R. A. 181; 1 *id.* 632; Fisher, Evolution of Const.; IMPAIRING THE OBLIGATION OF CONTRACTS; RETROSPECTIVE.

EX PROPRIO MOTU (Lat.). Of his own accord.

EX PROPRIO VIGORE (Lat.). By its own force. 2 Kent 457.

EX REL. See EX RELATIONE.

EX RELATIONE (Lat.). At the information of; by the relation. A bill in equity, for example, may in many cases be brought for an injunction to restrain a public nuisance *ex relatione* (by information of) the parties immediately interested in or affected by the nuisance; 18 Ves. 217; 2 Johns. Ch. 382; 6 *id.* 439; 13 How. 518; 12 Pet. 91.

It is frequently abbreviated *ex rel.* See RELATOR.

EX TEMPORE (Lat.). From the time; without premeditation.

EX VI TERMINI (Lat.). By force of the term.

EX VISCERIBUS (Lat. from the bowels). From the vital part, the very essence of the thing. 10 Co. 24 *b*; 2 Metc. Mass. 213. *Ex visceribus verborum* (from the mere words and nothing else); 10 Johns. 494; 1 Story, Eq. § 980.

EX VISITATIONE DEI (Lat.). By or from the visitation of God. In the ancient law, upon a prisoner arraigned for treason or felony standing mute, a jury was impanelled to inquire whether he stood obstinately mute, or was dumb *ex visitatione Dei;* 4 Steph. Com. 391. This phrase is frequently employed in inquisitions by the coroner, where it signifies that the death of the deceased is a natural one.

EXACTION. A wilful wrong done by an officer, or by one who, under color of his office, takes more fee or pay for his services than the law allows.

Between *extortion* and *exaction* there is this difference: that in the former case the officer extorts more than his due, when something is due to him; in the latter, he exacts what is not his due, when there is nothing due to him. Co. Litt. 368.

EXACTOR. In Old English and Civil Law. A collector. *Exactor regis* (collector for the king). A collector of taxes or revenue. Vicat, Voc. Jur.; Spelman, Gloss. The term exaction early came to mean the wrong done by an officer, or one pretending to have authority, in demanding or taking any reward or fee for that matter, cause, or thing which the law allows not. *Termes de la Ley.*

EXAMINATION. In Criminal Law. The investigation by an authorized magistrate of the circumstances which constitute the grounds for an accusation against a person arrested on a criminal charge, with a view to discharging the person so arrested, or to securing his appearance for trial by the proper court, and to preserving the evidence relating to the matter.

Practically, it is accomplished by bringing the person accused, together with witnesses, before a magistrate (generally a justice of the peace), who thereupon takes down in writing the evidence of the witnesses, and any statements which the prisoner may see fit to make. If no cause for detention appears, the party is discharged from arrest. If sufficient cause of suspicion appears to warrant putting him on trial, he is committed, or required to give bail or enter into a recognizance to appear at the proper time for trial. The witnesses are also frequently required to recognize for their appearance; though in ordinary cases only their own recognizance is required. The magistrate signs or certifies the minutes of the evidence which he has taken, and it is delivered to the court before whom the trial is to be had. The object of an examination is to enable the judge and jury to see whether the witnesses are consistent, and to ascertain whether the offence is bailable. 2 Leach 552. And see 4 Sharsw. Bla. Com. 296.

At common law, the prisoner could not be interrogated by the magistrate; but under the statutes 1 & 2 Phil. & M. c. 13, 2 & 3 Phil. & M. c. 10, the provisions of which have been substantially adopted in most of the United States, the magistrate is to examine the prisoner as well as the witnesses. 1 Greenl. Ev. § 224; 4 Bla. Com. 296; Rosc. Cr. Ev. 44; Ry. & M. 432.

The examination should be taken and completed as soon as the nature of the case will admit; Cro. Eliz. 829; 1 Hale, Pl. Cr. 585; 2 *id.* 120. The prisoner must not be put upon oath, but the witnesses must; 1 Phil. Ev. 106; Archb. Cr. Pr. & Pl. 386. The prisoner formerly had no *right* to the assistance of an attorney; but the privilege was granted at the discretion of the magistrate; 2 Dowl. & R. 86; 1 B. & C. 37. Now, however, a prisoner is permitted to have counsel as a matter of course. The magistrate's return and certificate are conclusive evidence, and exclude parol evidence, of what the prisoner said on that occasion with reference to the charge; 2 C. & K. 223; 5 C. & P. 162; 1 Mood. & M. 403. See CONFESSION; RECOGNIZANCE.

In Practice. The interrogation of a witness, in order to ascertain his knowledge as to the facts in dispute between parties.

The *examination in chief* is that made by the party calling the witness; the *cross-examination* is that made by the other party. In the examination in chief the

counsel cannot ask leading questions, except in particular cases. See CROSS-EXAMINATION ; LEADING QUESTIONS.

The examination is to be made in open court, when practicable ; but when, on account of age, sickness, absence from the jurisdiction, or other cause, the witness cannot be so examined, then in civil causes it may be made before authorized commissioners.

The interrogation of a person who is desirous of performing some act, or availing himself of some privilege of the law, in order to ascertain if all the requirements of the law have been complied with, conducted by and before an officer having authority for the purpose.

There are many acts which can be of validity and binding force only upon an examination. Thus, in many states, a married woman must be privately examined as to whether she has given her consent freely and without restraint to a deed which she appears to have executed ; see ACKNOWLEDGMENT ; an insolvent who wishes to take the benefit of the insolvent laws, one who is about to become bound for another in legal proceedings, a bankrupt, etc., must submit to an examination.

EXAMINED COPY. A phrase applied to designate a paper which is a copy of a record, public book, or register, and which has been compared with the original. 1 Campb. 469.

Such examined copy is admitted in evidence, because of the public inconvenience which would arise if such record, public book, or register were removed from place to place, and because any fraud or mistake made in the examined copy would be so easily detected ; 1 Greenl. Ev. § 91 ; 1 Stark. Ev. 189. But in an answer in chancery on which the defendant was indicted for perjury, or where the original must be produced in order to identify the party by proof of handwriting, an examined copy would not be evidence ; 1 Mood. & R. 189. See COPY.

EXAMINERS. Persons appointed to question students of law in order to ascertain their qualifications before they are admitted to practice.

Persons employed by the government of the United States in the Patent Office for the purpose of passing upon applications for letters patent. See SPECIAL EXAMINER.

EXAMINERS IN CHANCERY. Officers who examine, upon oath, witnesses produced on either side upon such interrogatories as the parties to any suit exhibit for that purpose. Cowel.

The examiner is to administer an oath to the party, and then repeat the interrogatories one at a time, writing down the answer himself ; 2 Dan. Ch. Pr. 1062. Anciently, the examiner was one of the judges of the court : hence an examination before the examiner is said to be an examination in court ; 1 Dan. Ch. Pr. 1053.

EXANNUAL ROLL. A roll containing the illeviable fines and desperate debts, which was read yearly to the sheriff (in the ancient way of delivering the sheriff's accounts), to see what might be gotten. Hale, Sheriffs 67 ; Cowel.

EXCAMB. In Scotch Law. To exchange. *Excambion*, exchange. The words are evidently derived from the Latin *excambium*. Bell, Dict. See EXCHANGE.

EXCAMBIATOR. An exchanger of lands ; a broker. Obsolete.

EXCAMBIUM (Lat.). **In English Law.** Exchange ; a recompense. 1 Reeve, Hist. Eng. Law 442.

EXCEPTION (Lat. *excipere : ex*, out of, *capere*, to take).

In Contracts. A clause in a deed by which the lessor excepts something out of that which he before granted by the deed.

The exclusion of something from the effect or operation of the deed or contract which would otherwise be included.

An *exception* differs from a *reservation* (*q. v.*),—the former being always of part of the thing granted, the letter of a thing not *in esse*, but newly created or reserved ; the exception is of the whole of the part excepted ; the reservation may be of a right or interest in the particular part affected by the reservation. See 5 R. I. 419 ; 41 Me. 177 ; 42 *id.* 9 ; 51 *id.* 493 ; 19 Barb. 192 ; 2 B. & C. 197. The two words, however, are often used indiscriminately ; 129 Mass. 231 ; 38 Conn. 541. An exception differs, also, from an explanation, which, by the use of a *videlicet*, *proviso*, etc., is allowed only to explain doubtful clauses precedent, or to separate and distribute generals into particulars ; 3 Pick. 272.

To make a valid exception, these things must concur : *first*, the exception must be by apt words, as, "saving and excepting," etc. ; see 30 Vt. 242 ; 5 R. I. 419 ; 41 Me. 177 ; 102 N. C. 14 ; *second*, it must be of part of the thing previously described, and not of some other thing ; *third*, it must be of part of the thing only, and not of all, the greater part, or the effect of the thing granted ; 11 Md. 339 ; 23 Vt. 395 ; 10 Mo. 426 ; see 146 Pa. 451 ; an exception, therefore, in a lease which extends to the whole thing demised is void ; *fourth*, it must be of such thing as is severable from the demised premises, and not of an inseparable incident ; 33 Pa. 251 ; 37 N. H. 167 ; *fifth*, it must be of such a thing as he that excepts may have, and which properly belongs to him ; *sixth*, it must be of a particular thing out of a general, and not of a particular thing out of a particular thing ; *seventh*, it must be particularly described and set forth ; a lease of a tract of land except one acre would be void, because that acre was not particularly described ; Co. Litt. 47 *a* ; 12 Me. 337 ; Wright, Ohio 711 ; 3 Johns. 375 ; 8 Conn. 369 ; 6 Pick. 499 ; 6 N. H. 421 ; 4 Strobh. 208 ; 2 Tayl. 173 ; see 91 Cal. 74 ; 112 N. C. 58. Exceptions against common right and general rules are construed as strictly as possible ; 1 Bart. Conv. 68 ; 5 Jones, N. C. 63. When a grantor makes a valid exception, the thing excepted remains the property of himself or his heirs ; but if he has no valid title to it, neither he nor his heirs can recover ; 97 N. C. 95.

In Equity Practice. The allegation of a party, in writing, that some pleading or proceeding in a cause is insufficient.

In Civil Law. A plea. Merlin, *Répert.* *Declinatory exceptions* are such dilatory

exceptions as merely decline the jurisdiction of the judge before whom the action is brought. La. Code Proc.

Dilatory exceptions are such as do not tend to defeat the action, but only to retard its progress.

Declinatory exceptions have this effect, as well as the exception of discussion offered by a third possessor or by a surety in an hypothecary action, or the exception taken in order to call in the warrantor. 7 Mart. La. N. S. 282; 1 La. 38, 420.

Peremptory exceptions are those which tend to the dismissal of the action.

Some relate to forms, others arise from the law. Those which relate to forms tend to have the cause dismissed, owing to some nullities in the proceedings. These must be pleaded *in limine litis*. Peremptory exceptions founded on law are those which, without going into the merits of the cause, show that the plaintiff cannot maintain his action, either because it is prescribed, or because the cause of action has been destroyed or extinguished. These may be pleaded at any time previous to definitive judgment; Pothier. Proc. Civ. pt. 1, c. 2, ss. 1, 2, 3. These, in the French law, are called *Fins de non recevoir*.

In Practice. Objections made to the decisions of the court in the course of a trial. See BILL OF EXCEPTION.

EXCEPTION TO BAIL. An objection to the special bail put in by the defendant to an action at law made by the plaintiff on grounds of the insufficiency of the bail. 1 Tidd, Pr. 255.

EXCESS. When a defendant pleaded to an action of assault that the plaintiff trespassed on his land, and he would not depart when ordered, whereupon he *molliter manus imposuit*, gently laid hands on him, the replication of excess was to the effect that the defendant used more force than necessary. Wharton.

EXCESSIVE BAIL. Bail which is *per se* unreasonably great and clearly disproportionate to the offence involved, or which under the peculiar circumstances appearing is shown to be so in the particular case. 44 Cal. 558; 53 *id.* 410.

EXCHANGE. In Commercial Law. A negotiation by which one person transfers to another funds which he has in a certain place, either at a price agreed upon or which is fixed by commercial usage.

This transfer is made by means of an instrument which represents such funds and is well known by the name of a bill of exchange. The price above the par value of the funds so transferred is called the *premium* of exchange, and if under that value the difference is called the *discount*,—either being called the *rate* of exchange.

The par of exchange is the value of the money of one country in that of another, and is either real or nominal. The nominal par is that which has been fixed by law or usage, and, for the sake of uniformity, is not altered, the rate of exchange alone fluctuating. The real par is that based on the weight and fineness of the coins of the two countries, and fluctuates with changes in the coinage. The nominal par of exchange in this country on England, settled in 1799 by act of congress, was four dollars and forty-four cents for the pound sterling; but by successive changes in the coinage this value has been increased, the real mint par at present being a little over four dollars and eighty-seven cents. The *course* of exchange means the quotations for any given time.

The transfer of goods and chattels for other goods and chattels of equal value. This is more commonly called barter. Where a party deposits wheat with a mill company, expecting to receive a proportionate amount of flour, it constitutes an exchange and not a sale; 49 Mo. App. 23. One cannot, as having been defrauded thereby, rescind an exchange of property, without tendering a return of his property to the other, unless it is absolutely worthless; 97 Mich. 581.

The distinction between a sale and exchange of property is rather one of shadow than of substance. In both cases the title to property is absolutely transferred, and the same rules of law are applicable to the transaction, whether the consideration of the contract is money or by way of barter. It can make no essential difference in the rights and obligations of parties that goods and merchandise are transferred and paid for by other goods and merchandise instead of by money, which is but the representative of value or property; 14 Gray 372.

The profit which arises from a maritime loan, when such profit is a percentage on the money lent, considering it in the light of money lent in one place to be returned in another, with a difference in amount in the sum borrowed and that paid, arising from the difference of time and place. The term is commonly used in this sense by French writers. Hall, Mar. Loans 56, n.

The place where merchants, captains of vessels, exchange-agents, and brokers assemble to transact their business. *Code de Comm.* art. 71.

In Conveyancing. A mutual grant of equal intersts in land, the one in consideration of the other. 2 Bla. Com. 323; Littleton 62; Shep. Touchst. 289; Watk. Conv; Digby, R. P. 368. It is said that exchange in the United States does not differ from bargain and sale. 1 Bouvier, Inst. n. 2059.

There are five circumstances necessary to an exchange. That the estates given be equal. That the word *excambium*, or exchange, be used,—which cannot be supplied by any other word, or described by circumlocution. That there be an execution by entry or claim in the life of the parties. That if it be of things which lie in grant, it be by deed. That if the lands lie in several counties, or if the thing lie in grant, though they be in one county, it be by deed indented. In practice this mode of conveyancing is nearly obsolete.

See Cruise, Dig. tit. 32; Com. Dig.; Co. Litt. 51; 1 Washb. R. P. 159; 1 N. H. 65; 3 Harr. & J. 361; 3 Wood, Conv. 243; 79 Ia. 135; 47 Minn. 500; 132 Ind. 202; 30 Ala. 591.

EXCHEQUER (L. Lat. *scaccarium*,

Nor. Fr. *eschequier*). **In English Law.** A department of the government which has the management of the collection of the king's revenue.

The name is said to be derived from the chequered cloth which covered the table on which some of the king's accounts were made up and the amounts indicated by counters.

It consisted of two divisions, one for the receipt of revenue, the other for administering justice. Co. 4th Inst. 103; 3 Bla. Com. 44, 45. See COURT OF EXCHEQUER; COURT OF EXCHEQUER CHAMBER.

EXCHEQUER BILLS Bills of credit issued by authority of parliament.

They constitute the medium of transaction of business between the bank of England and the government. The exchequer bills contain a guarantee from government which secures the holders against loss by fluctuation. Wharton; McCulloch, Comm. Dict.

EXCISE. An inland imposition, paid sometimes upon the consumption of the commodity, and frequently upon the retail sale. 1 Bla. Com. 318; Story, Const. § 950; Cooley, Tax. 4. See 11 Allen 268; INTERNAL REVENUE.

EXCLUSIVE (Lat. *ex*, out, *claudere*, to shut). Not including; debarring from participation. Shut out; not included.

An exclusive right or privilege, as a copyright or patent, is one which may be exercised and enjoyed only by the person authorized, while all others are forbidden to interfere.

EXCOMMUNICATION. In Ecclesiastical Law. An ecclesiastical sentence pronounced by a spiritual judge against a Christian man, by which he is excluded from the body of the church, and disabled to bring any action or sue any person in the common-law courts. Bac. Abr.; Co. Litt. 133, 134; 91 Tenn. 303.

In early times it was the most frequent and the most severe method of executing ecclesiastical censure, although proper to be used, said Justinian (Nov. 123), only upon grave occasions. The effect of it was to remove the excommunicated person not only from the sacred rites, but from the society of men. In a certain sense it interdicted the use of fire and water, like the punishment spoken of by Cæsar (lib. 6, *de Bell. Gall.*) as inflicted by the Druids. Innocent IV. called it the nerve of ecclesiastical discipline. On repentance, the excommunicated person was absolved and received again to communion. These are said to be the powers of binding and loosing,—the keys of the kingdom of heaven. This kind of punishment seems to have been adopted from the Roman usage of interdicting the use of fire and water. Fr. Duaren, *De Sacris Eccles. Ministeriis*, lib. 1, cap. 3. See Ridley, View of the Civil and Ecclesiastical Law 245.

EXCOMMUNICATO CAPIENDO (Lat. for taking an excommunicated person).

In Ecclesiastical Law. A writ issuing out of chancery, founded on a bishop's certificate that the defendant had been excommunicated, returnable to the king's bench. 4 Bla. Com. 415; Bac. Abr. *Excommunication*, E. See Cro. Eliz. 224, 680; Cro. Car. 421; Cro. Jac. 567; 1 Salk. 293.

EXCUSABLE HOMICIDE. In Criminal Law. The killing of a human being, when the party killing is not altogether free from blame, but the necessity which renders it excusable may be said to have been partly induced by his own act. 1 East, Pl. Cr. 220. See HOMICIDE.

EXCUSATIO (Lat.). **In Civil Law.** Excuse. A cause from exemption from a duty, such as absence, insufficient age, etc. Vicat, *Voc. Jur.*, and reference there given.

EXCUSATOR (Lat.). **In English Law.** An excuser.

In Old German Law. A defendant; he who utterly denies the plaintiff's claim. Du Cange.

EXCUSE. A reason alleged for the doing or not doing a thing.

This word presents two ideas, differing essentially from each other. In one case an excuse may be made in order to show that the party accused is not guilty; in another, by showing that though guilty he is less so than he appears to be. Take, for example, the case of a sheriff who has an execution against an individual, and who, in performance of his duty, arrests him: in an action by the defendant against the sheriff, the latter may prove the facts, and this shall be a sufficient excuse for him; this is an excuse of the first kind, or a complete justification; the sheriff was guilty of no offence. But suppose, secondly, that the sheriff has an execution against Paul, and by mistake, and without any malicious design, he arrests Peter instead of Paul: the fact of his having the execution against Paul and the mistake being made will not justify the sheriff, but it will extenuate and excuse his conduct, and this will be an excuse of the second kind.

Persons are sometimes excused for the commission of acts which ordinarily are crimes, either because they had no intention of doing wrong, or because they had no power of judging, and therefore had no criminal will, or, having power of judging, they had no choice, and were compelled by necessity. Among the first class may be placed infants under the age of discretion, lunatics, and married women committing certain offences in the presence of their husbands. Among acts of the second kind may be classed the beating or killing another in self-defence, the destruction of property in order to prevent a more serious calamity, as the tearing down of a house on fire to prevent its spreading to the neighboring property, and the like. See Dalloz, Dict.

EXCUSSIO (Lat.). **In Civil Law.** Exhausting the principal debtor before proceeding against the surety. Discussion is used in the same sense in Scotch law. Vicat, *Excussionis Beneficium*.

EXECUTE. To complete; to make; to perform; to do; to follow out.

The term is frequently used in law; as, to *execute* a deed, which means to make a deed, including especially signing, sealing, and delivery. To execute a contract is to perform the contract. To execute a use is to merge or unite the equitable estate of the *cestui que use* in the legal estate, under the statute of uses. To execute a writ is to do the act commanded in the writ. To execute a criminal is to put him to death according to law, in pursuance of his sentence.

EXECUTED. Done; completed; effectuated; performed; fully disclosed; vested; giving present right of employment. The term is used of a variety of subjects.

EXECUTED CONSIDERATION. See CONSIDERATION.

EXECUTED CONTRACT. One which has been fully performed. The statute of frauds does not apply to such contracts; 130 Ind. 108; 48 Kan. 418; 9 U. S. App. 537; 159 Pa. 121; 100 Ala. 430; 18 Colo. 456; 83 Tex. 158. See CONTRACTS.

EXECUTED ESTATE. An estate whereby a present interest passes to and resides in the tenant, not dependent upon any subsequent circumstance or contingency. They are more commonly called estates in *possession*. 2 Bla. Com. 162.

An estate where there is vested in the grantee a present and immediate right of present or future enjoyment. An estate which confers a present right of present enjoyment.

When the right of enjoyment in possession is to arise at a future period, only the estate is executed; that is, it is merely vested in point of interest: where the right of immediate enjoyment is annexed to the estate, then only is the estate vested in possession. 1 Prest. Est. 62; Fearne, Cont. Rem. 392.

Executed is synonymous with vested. 1 Washb. R. P. 11.

EXECUTED REMAINDER. One giving a present interest, though the enjoyment may be future. Fearne, Cont. Rem. 31; 2 Bla. Com. 168. See REMAINDER.

EXECUTED TRUST. A trust of which the scheme has in the outset been completely declared. Ad. Eq. 151. One in which the devise or trust is *directly and wholly declared* by the testator or settler, *so as to attach* on the lands immediately under the deed or will itself. 1 Greenl. Cruise, Dig. 385; 1 Jac. & W. 570. "A trust in which the estates and interest in the subject-matter of the trust are completely limited and defined by the instrument creating the trust, and require no further instruments to complete them." Bisph. Eq. 31. The instrument creating such a trust must be construed according to the rules of law, although the *intention* may be defeated; *id.* 86. See 1 Hayes, Conv. 85; TRUST; EXECUTORY TRUST.

EXECUTED USE. A use with which the possession and legal title have been united by statute. 1 Steph. Com. 339; 2 Sharsw. Bla. Com. 335, note; 7 Term 342; 12 Ves. Ch. 89; 4 Mod. 380; Comb. 312.

EXECUTED WRIT. A writ the command in which has been obeyed by the person to whom it was directed.

EXECUTION. The accomplishment of a thing; the completion of an act or instrument; the fulfilment of an undertaking. Thus, a contract is executed when the act to be done is performed; a deed is executed when it is signed, sealed, and delivered. See 12 Ired. 221. Where the party is present and directs another to sign for him, no written authority is necessary; 30 N. J. Eq. 193; 6 Neb. 368; 22 Cal. 563; 175 Pa. 393; Reed, St. of Fr. § 1063.

In Criminal Law. Putting a convict to death, agreeably to law, in pursuance of his sentence. This is to be performed by the sheriff or his deputy; (see 4 Bla. Com. 403;) or under the laws of the United States, by the marshal. See CRIMES; ELECTROCUTION; GARROTE; GUILLOTINE; HANGING.

In Practice. Putting the sentence of the law in force. 3 Bla. Com. 412. The act of carrying into effect the final judgment or decree of a court.

The writ which directs and authorizes the officer to carry into effect such judgment.

Final execution is one which authorizes the money due on a judgment to be made out of the property of the defendant.

Execution *quousque* is such as tends to an end, but is not absolutely final: as, for example, a *capias ad satisfaciendum*, by virtue of which the body of the defendant is taken, to the intent that the plaintiff shall be satisfied of his debt, etc., the imprisonment not being absolute, but until he shall satisfy the same. 6 Co. 87.

Execution, in civil actions, is the mode of obtaining the debt or damages or other thing recovered by the judgment; and it is either for the *plaintiff* or *defendant*. For the *plaintiff* upon a judgment in *debt*, the execution is for the debt and damages; or in *assumpsit*, *covenant*, *case*, *replevin*, or *trespass*, for the damages and costs; or in *detinue*, for the goods, or their value, with damages and costs. For the *defendant* upon a judgment in *replevin*, the execution at common law is for a return of the goods, to which damages are superadded by the statutes 7 Hen. VIII. c. 4, § 3, and 21 Hen. VIII. c. 19, § 3; and in other actions upon a judgment of *non pros.*, *non suit*, or verdict, the execution is for the costs only; Tidd, Pr. 993.

After final judgment signed, and even before it is entered of record, the plaintiff may, in general, at any time within a year and a day, and whilst the parties to the judgment continue the same, take out execution; provided there be no writ of error depending or agreement to the contrary, or, where this is allowed, security entered for stay of execution. But after a year and a day from the time of signing judgment the plaintiff cannot regularly take out execution without reviving the judgment by *scire facias*, unless a *fieri facias*, or *capias ad satisfaciendum*, etc., was previously sued out, returned, and filed, or he was hindered from suing it out by a writ of error; and if a writ of error be brought, it is, generally speaking, a *supersedeas* of execution from the time of its allowance; provided bail, when necessary, be put in and perfected, in due time. See Tidd, Pr. 994; 3 Ala. 223.

Writs of execution are judicial writs issuing out of the court where the record is upon which they are grounded. Hence, when the record has been removed to a higher court by writ of error or *certiorari*, or on appeal, either the execution must issue out of that court, or else the record must be returned to the inferior court by a *remittitur* (*q. v.*) for the purpose of taking

out execution in the court below. The former is the practice in England; the latter, in some of the United States.

The object of execution in personal actions is effected in one or more of the three following ways. 1. By the seizure and sale of personal property of the defendant. 2. By the seizure of his real property, and either selling it or detaining it until the issues and profits are sufficient to satisfy the judgment. 3. By seizing his person and holding him in custody until he pays the judgment or is judicially declared insolvent.

These proceedings, though taken at the instance and under the direction of the party for whom judgment is given, are considered the act of the law itself, and are in all cases performed by the authorized minister of the law. The party or his attorney obtains, from the office of the court where the record is, a writ, based upon and reciting the judgment, and directed to the sheriff (or, where he is interested or otherwise disqualified, to the coroner) of the county, commanding him, in the name of the sovereign or of the state, that of the goods and chattels or of the lands and tenements of the defendant in his bailiwick he cause to be *made* or *levied* the sum recovered, or that he seize the person of the defendant, as the case may be, and have the same before the court at the return day of the writ. This writ is delivered by the party to the officer to whom it is directed, who thenceforth becomes responsible for his performance of its mandate, and in case of omission, mistake, or misconduct is liable in damages to the person injured, whether he be the plaintiff, the defendant, or a stranger to the writ.

When property is sold under execution, the proceeds are applied to the satisfaction of the judgment and the costs and charges of the proceedings; and the surplus, if there be any, is paid to the defendant in execution.

Execution against personal property. When the property consists of goods and chattels, in which are included terms for years, the writ used is the *fieri facias* (*q. v.*). If, after levying on the goods, etc., under a *fieri facias*, they remain unsold for want of buyers, etc., a supplemental writ may issue, which is called the *venditioni exponas*. At common law, goods and chattels might also be taken in execution under a *levari facias;* though now perhaps the most frequent use of this writ is in executions against real property.

Where it is sought to reach an equitable interest a bill in equity is sometimes filed in aid of an execution; 73 Fed. Rep. 627.

When the property consisted of *choses in action*, whether debts due the defendant or any other sort of credit or interest belonging to him, it could not be taken in execution at common law; but now, under statutory provisions in many of the states, such property may be reached by a process in the nature of an attachment, called an *attachment execution* or *execution attachment*. See ATTACHMENT; CREDITORS' BILL.

Execution against real estate. Where lands are absolutely liable for the payment of debts, and can be sold in execution, the process is by *fieri facias* and *venditioni exponas*. In Pennsylvania the land cannot be sold in execution unless the sheriff's jury, under the *fieri facias*, find that the profits will not pay the debt in seven years. But, practically, lands are almost never extended. And, in general, under common-law practice, lands are not subject to sale under execution, until after a levy has been made under the *fieri facias*, and they are appraised under an inquisition. They are then liable to be sold under a *venditioni exponas*.

There are in England writs of execution against land which are not in general use here. The extent (*q. v.*), or *extendi facias*, is the usual process for the king's debt. The *levari facias* (*q. v.*) is also used for the king's debt, and for the subject on a *recognizance* or *statute staple* or *merchant* (*q. v.*), and on a judgment in *scire facias*, in which latter case it is also generally employed in this country.

Execution against the person. This is effected by the writ of *capias ad satisfaciendum*, under which the sheriff arrests the defendant and imprisons him till he satisfies the judgment or is discharged by process of law; Freem. Ex. 451. See INSOLVENCY. This execution is not final, the imprisonment not being absolute; whence it has been called an execution *quousque;* 6 Co. 87.

Besides the ordinary judgment for the payment of a sum certain, there are specific judgments, to do some particular thing. To this the execution must correspond: on a judgment for plaintiff in a real action, the writ is a *habere facias seisinam;* in ejectment it is a *habere facias possessionem;* for the defendant in replevin, as has already been mentioned, the writ is *de retorno habendo*.

Still another sort of judgment is that *in rem*, confined to a particular thing: such are judgments upon mechanics' liens and municipal claims, and, in the peculiar practice of Pennsylvania, on *scire facias* upon a mortgage. In such cases the execution is a writ of *levari facias*. A confession of judgment upon warrant of attorney, with a restriction of the lien to a particular tract, is an analogous instance; but in such case there is no peculiar form of execution; though if the plaintiff should, in violation of his agreement, attempt to levy on other land than that to which his judgment is confined, the court on motion would set aside the execution.

An execution issued in direct violation of an express agreement not to do so, except in a certain contingency which has not happened, will be set aside; 127 Pa. 238.

The lien of an execution from the judgment or decree of a court of record relates to its teste, and attaches to all personalty owned by the debtor between the teste and the levy so as to defeat the title of all intermediate purchasers; 85 Tenn. 720; not only in the county in which judgment was

rendered, but everywhere in the state; 86 Tenn. 139. A sale under execution transmits only the debtor's estate, in the same plight and subject to all the equities under which he held it; 97 N. C. 241.

In Connecticut, Massachusetts, and Maine by common law and immemorial usage, under a judgment against a town, the property of any inhabitant may be taken in execution; 121 U. S. 121.

See, generally, Bingham; Freeman; Herman, and a long list of leading cases and annotations on special branches of the title in St. Louis Law Library catalogue, tit. Executions; EXEMPTION; FIERI FACIAS; HOMESTEAD.

EXECUTION PAREE. In French Law. A right founded on an act passed before a notary, by which the creditor may immediately, without citation or summons, seize and cause to be sold the property of his debtor, out of the proceeds of which to receive his payment. It imports a confession of judgment, and is not unlike a warrant of attorney. La. Code of Proc. art. 732; 6 Toullier, n. 208; 7 *id.* 99.

EXECUTIONER. The name given to him who puts criminals to death, according to their sentence; a hangman.

In the United States there are no executioners by profession. It is the duty of the sheriff or marshal to perform this office, or to procure a deputy to do it for him.

EXECUTIVE. That power in the government which causes the laws to be executed and obeyed.

It is usually confided to the hands of the chief magistrate; the president of the United States is invested with this authority under the national government; and the governor of each state has the executive power of the state in his hands.

The officer in whom the executive power is vested.

The constitution of the United States directs that "the executive power shall be vested in a president of the United States of America." Art. 2, s. 1. See Story, Const. b. 3, c. 36.

EXECUTIVE POWER. Authority exercised by that department of government which is charged with the administration or execution of the laws as distinguished from the legislative and judicial functions.

"'Executive power,' which the constitution declares shall be 'vested' in the president, includes power to carry into execution the national laws—and including such other powers, not legislative or judicial in their nature, as might from time to time be delegated to the president by congress—as the prosecution of war when declared—and to take care that the law be faithfully executed." 1 Curtis, Const. Hist. 578.

The separation of the three primary governmental powers as found in the constitution of the United States and of the separate states is the culmination of a revolution which had long been in progress in Europe. As is pointed out by a recent writer all governmental power was formerly united in the monarch of the middle ages. As the result of experience there was a separation of the state from the government, the former being termed the constitution-making power and the latter the instrumentalities by which administration was from time to time set in motion and carried on. Further advances in experience indicated the necessity of the distribution of powers by which there should be a deliberative body for the formulation of the rules and regulations under which the state should exist and its affairs be administered; another which should be the medium by which these rules and regulations forming the body of municipal law should be carried into effect; and a third to which should be committed the functions known in the science of government as judicial. The latter, under the government of the United States, has reached its highest development and exercises an authority in some instances over the other two departments of the government elsewhere unknown, even going so far as to define the limits of their authority and to declare void legislative acts. See CONSTITUTIONAL. This theory of the distribution of the powers of government among three distinct authorities, independent of each other, was first formulated by Montesquieu, *Esprit des Lois*, b. xi. c. vi. The absolute independence of the three branches of government which was advocated by Montesquieu has not been found entirely practicable in practice, and, although the threefold division of powers is the basis of the American constitution, there are many cases in which the duties of one department are to a certain extent devolved upon and shared by another. This is illustrated in the United States and in many of the states by the veto power which vests in the executive a part of the legislative authority, and on the other hand by the requirement of the confirmation by one branch of the legislature of executive appointments. The practical difficulty in the way of an exact division of powers is thus well expressed: "Although the executive, legislative, and supreme judicial powers of the government ought to be forever separate and distinct, it is also true that the science of government is a practical one; therefore, while each should firmly maintain the essential powers belonging to it, it cannot be forgotten that the three co-ordinate parts constitute one brotherhood whose common trust requires a mutual toleration of the occupancy of what seems to be a 'common because of vicinage' bordering on the domains of each;" 70 N. C. 98, 102. In England, there is in parliament a practical union of all the governmental powers, that body having absolute power of selecting the agents through whom, in fact, is exercised the executive power theoretically vested in the crown, and the final judicial authority on appeal remaining in the House of Lords. There is, notwithstanding, a complete recognition of the threefold nature of governmental power which is not lost nor destroyed by the unity of the final depositary of it all.

While the science of government in modern times may be said to accept the general theory of the separation of powers, subject to limitations and exceptions suggested, the application of the theory has not been uniform. Great difficulty has been found in practice in determining the depositary of executive power and whether it should be vested in one man or a board of control, the latter being supposed to insure deliberation and possibly to prevent tyranny, and the other being more conducive to efficient administration. See 2 Sto. Const. §§ 1419–23; Montesq. *Espr. de L.* b. xi. ch. vi.; De Lolme, Const. Eng. b. 2, ch. 2; Federalist No. 70; 1 Kent 271. The necessity for the latter has led to the almost universal adoption of the plan of having a single executive head, and the principal remaining difficulty has been the extent and character of the power to be entrusted to it. This is in part the result of the effort to apply too rigidly the theory of the absolute separation of powers already shown to be impracticable. Another difficulty has been said to arise from the failure to recognize that executive power really comprises two functions, the political or governmental and the administrative. The former concerns the relations of the chief executive authority with the great powers of government, the latter relates to the practical management of the public service. It has been said that the executive authority, as understood in the American states, is mainly a political chief, that in France and to a less extent in England its position as an administrator is more important, while in the federal government in this country it is both, as it is also in Germany; 1 Goodnow, Comp. Adm. L. 51.

The proper treatment of this subject involves the

consideration of the systems of executive administration developed in the principal countries of the world which have adopted the principle of the distribution of powers. Only the briefest summary, however, is here practicable.

The general theory of the distribution of powers in Great Britain is very much like that in the princely governments of Germany. The residuum of governmental powers is in the crown, and the crown may exercise all authority not expressly otherwise delegated, but it rests with parliament to decide ultimately what powers shall be exercised by the crown and how it shall exercise them; herein it differs from the German system. From the comprehensive Norman idea of royalty which combined all the sovereign powers of the Saxon and Dane with those of the feudal theory of monarchy exemplified at the time in France, there developed at first hereditary and despotic power which was gradually limited by the necessity of the concurrent action of parliament for the imposition of taxes and the enactment of laws affecting the ordinary relations of individuals. Later it was considered that a law once enacted could not be changed without the consent of parliament, and finally the latter body assumed the right to initiate as well as approve laws, and the crown lost its original power of veto which has certainly become obsolete, though it has been said to be merely dormant and susceptible of being revived; 2 Todd, Parl. Govt. in Eng. 390. See 1 Stubbs, Const. Hist. of Eng. 338. The result of this development is that parliament has assumed most of the legislative power, though many matters not regulated by it are controlled by the crown which exercises a large ordinance power both independent and supplementary. The crown has lost both the taxing power and the judicial power, but retains in large part its old executive powers, and its action is controlled very largely by a body whose power has gradually developed, viz., the privy council. The crown may do anything which it is not forbidden to do and possesses the administrative as well as the political power. It may create offices as well as fill them, and both remove and direct the incumbents. The crown is, therefore, the chief both of the administrative and political departments of the executive power, its position being modified by the principle that its advisers, without whom it cannot act, must possess the confidence of the majority in the house of commons. The principle of parliamentary responsibility puts the crown in the position of reigning but not governing; but so long as it possesses the confidence of the house of commons it has very extensive executive powers, and in council may declare war and make treaties, which in other countries can be done only with the consent of the legislature. The crown is in theory irresponsible, but when its ministers are in a minority in the house of commons it chooses new ministers who will have the confidence of parliament, or dissolves parliament in the hope that the new body will have confidence in the existing ministers, but the theory is that in all cases the crown and not parliament administers. See Pom. Const. Law § 176; 1 Goodn. Comp. Adm. L. ch. vi.

In France the executive power is vested in a president elected by the legislature. His position is said by a recent writer, probably on account of the monarchical traditions in France, to be more important from the administrative point of view and less from a political point of view than that of the President of the United States, he having no veto power. He has quite an unlimited power of appointment and also a very extensive power of removal, not only of officers appointed by himself, but of local administrative officers; as mayors of communes; Law, Apr. 5, 1884; and he may dissolve local and municipal legislative bodies in the departments and communes; LL. Aug. 10, 1871, and Apr. 5, 1884. In addition to his power of executing laws, he has in many cases authority to supplement the law without any delegation of legislative power by what are known as decrees. This supplemental power is accorded to him under a constitutional provision that he shall watch over and secure the execution of the laws, and the difference between the interpretation put upon this and the similar provision in the United States constitution is accredited to the monarchical traditions of the country, and the resulting idea that the residuary governmental power is vested in the executive and not, as in this country, in congress. The president is also held to a greater responsibility for his action than in the American system. 1 Goodnow, Comp. Adm. L. ch. iv.

In Germany the conception of executive power is much broader than in the United States, and it is more important from the administrative point of view. There are important constitutional limitations on the action of the Prince, or executive head of the subdivisions of the empire; but in the absence of such limitations he is recognized as having the governmental power, being as in France the possessor of the residuum of the governmental power. The limitations upon his action by the constitution are found in the requirement of legislative consent for the validity of legislative acts affecting freedom of person and property and the financial affairs of the government, judicial power administered by courts independent of the control of the executive, and the necessity that each of his official acts must be countersigned by a minister who is responsible for it either to the legislature or to the criminal courts. The administrative powers are very extensive, including that of appointment and removal, and a very wide power of direction, together with the authority to make decrees or ordinances as to all matters not regulated in detail by legislation.

In the imperial government, the Emperor occupies, from the administrative point of view, about the same position as the President of the United States. He has a general power of appointment and of administrative direction, which latter is, however, exercised under the responsibility of the chancellor, who must countersign all acts by which it is exercised; but just what the responsibility of the latter officer is seems to be undefined other than that he may be called upon to defend his policy before the federal council. The Emperor does not have any ordinance power except such as is expressly mentioned in the constitution or delegated by the legislature, and in the exercise of it he often requires the consent of the federal council. He is entirely irresponsible. *id.* ch. v. A leading German commentator regards the governmental form of the empire as a republic; 1 Zorn, *Das Reichsstaatsrecht*, 162.

In the United States, the federal executive power is vested in the president. In all the states the chief executive is the governor. With respect to the power of the latter the differences in the state constitutions make it necessary, for brief statements of the executive officers and their duties, to refer to the titles under the names of the several states, and for more detailed information to the constitutions of the states, while comparative views of the provisions on particular points may be found in Stimson, Am. Stat. Law. Many features are common to most of the states and, making due allowance for differences of detail, the character of the officer is substantially the same. In general, it may be noted that he is commander of the state militia, subject to the paramount federal constitutional control when it is in the actual service of the United States: he has in most cases a pardoning power (except in some states for treason), as to which, however, there is a growing tendency to limit it by requiring the recommendation of a board of pardons, either such in name or effect, usually composed of several executive officers, *virtute officii;* he has usually a veto power which compels the reconsideration of legislation by a two-thirds vote in most cases, but in some, three-fifths, and in others a mere majority; in most of the states he has power to summon the legislature in extra session, and to adjourn its sessions when the two houses disagree as to the time. As a rule, the governor's power of appointment is confined to minor state officials, and he has no power of removal except for cause and after a hearing. He is usually charged with the duty of sending messages to the

legislature containing his views and recommendations upon public questions. The constitutional powers vested in the governor alone are addressed to and regulated by his own uncontrolled discretion; for example, where an officer assuming to act as governor, in his absence, had issued a proclamation convening the legislature in extraordinary session, the governor having returned previous to the time named for the meeting, and issued a second proclamation, revoking the first, it was held that, the power of convening the legislature being discretionary, the call might be recalled before the meeting took place; 3 Neb. 409; s. c. 19 Am. Rep. 634.

Under the United States constitution the governor of a state may call upon the president, when necessary, for aid in the enforcement of the laws.

His limited power of removal makes his power of direction and administration very slight. He is in effect a political rather than an administrative officer, his powers of the former class having increased while those of the latter class have been gradually curtailed. In this respect his relative position is quite the reverse of that of the president. For a discriminating review of this subject, see 1 Goodn. Comp. Adm. L. ch. iii.; and see titles on the several states.

The executive power possessed by the president must be considered historically in order to reach an adequate view, both of its present scope and limitations and its growth since the adoption of the constitution. It is to be observed primarily that in the United States there is the fundamental condition that the executive power, whether of president or governor, is expressly granted, and the residuum of sovereignty is in the legislature, either federal or state as the case may be, and not, as in France and Germany, actually so, or, as in England, theoretically so. This remark is equally true as to its general results, notwithstanding decisions, that the *express* grant of executive power carries with it certain *implied* powers. These were still powers of executing the laws, and not, as in the countries named, of supplementing or adding to them.

Though it is often said that the framers of the United States constitution, in creating the office of president, had in view, as a model, the English king; Pom. Const. Law § 176, a more recent and probably correct view is that the office was rather modelled upon the colonial governor; 1 Goodnow, Comp. Adm. L. 52, and 1 Bryce, Am. Com. 36. An examination of the powers of the executive in each of the three colonies of New York, Massachusetts, and Virginia leads Professor Goodnow to the conclusion that the American constitutional executive power was that which has been called the political or governmental power, and which had usually been exercised by the colonial governor, to which was added the carrying on of foreign relations, which, in the colonial period, were under the control of the mother country, and afterwards of the continental congress. The fact that the constitution, in vesting in the president the executive power, used the term as one whose meaning would be readily understood, undoubtedly leads to the conclusion that the general powers so characterized were such as people of the states were accustomed to have exercised by the governors, first of the colonies and then of the states. But see Stevens, Sources Const. U. S. ch. vi.

The specific powers conferred by the constitution in addition to the general provision vesting the executive power in him, are that he shall be commander-in-chief of the army and navy and the militia of the states when in service; that he may require the opinions of the officers of the executive departments; grant reprieves and pardons, except in cases of impeachment; make treaties with the advice and consent of the senate, two-thirds thereof concurring, and, the senate consenting, appoint ambassadors, judges, and other officers whose appointment is not otherwise provided for by law; give information to congress; convene both houses, or either, and adjourn them, when they disagree with respect to the time of adjournment, to such time as he shall think proper; receive ambassadors and other public ministers; take care that the laws be faithfully executed; and commission all officers; Const. art. ii. §§ 1, 2, 3.

This grant is said to have conferred upon the president the political power of an executive and one administrative power, viz., the power of appointment, beyond which he had no control over the administration; 1 Goodnow, Comp. Adm. L. 63; Pom. Const. L. § 633.

These original powers of the president have been increased by acts of congress conferring specific powers upon him and by decisions that his power is not limited by the express terms of legislative acts but includes certain "rights, duties, and obligations growing out of the constitution itself, our international relations, and all the protection implied by the nature of the government under the constitution;" 135 U. S. 1, 64. Under this implied power it was held that the president could take measures to protect a United States judge or a mail-carrier in the discharge of his duty without an act of congress authorizing him to do so; *id.* 67; or, in the same manner, to place guards upon the public lands to protect the property of the government. As an illustration of the exercise of this power the supreme court cites the executive action which resulted in the release of Koszta from a foreign prison where he was confined in derogation of his rights as a person who had declared his intention to become an American citizen; *id.* 64. He may remove obstructions to interstate commerce and the transportation of the mails; and enforce the full and free exercise of all national powers and the security of all rights under the constitution; *in re* Debs, 158 U. S. 568.

Another increase of the administrative power of the president was due to his power of removal, which was not expressed in the constitution, but it was held by a majority vote in the first congress to be a part of the executive power; 1 Lloyd's Debates 351, 366, 450, 480–600; 2 *id.* 1–12; 5 Marsh. Life of Washington, ch. 3, 196; and this construction of the constitution was judicially approved; Deady 204; and was undoubtedly the recognized practice of the government until the passage of the Tenure of Office Acts of 1867–9; U. S. Rev. Stat. §§

1767 to 1769; which were repealed in 1887. See 2 Sto. Const. §§ 1537–43; Paper of W. A. Dunning on the Impeachment and Trial of President Johnson; 4 Papers Am. Hist. Assoc. 491; 1 Kent 310; Pom. Const. L. §§ 647–657. To the power of removal thus recognized has been attributed the evolution of "the president's power of direction and supervision over the entire national administration" and "the recognition of the possession by the president of the administrative power;" 1 Goodnow, Comp. Adm. L. 66. Whatever theories may be formed of the conception of the office in the minds of the framers of the constitution, and however the result may have been brought about, it cannot be doubted that the executive head of the federal government is now in fact the depositary of the complete executive power, as it is understood to comprehend both political and administrative power. He is authorized to appoint certain officers in the executive departments, the discharge of whose duties is under his direction; 1 Cra. 165; 12 Pet. 524; 5 Cra. C. C. 163. This is considered by the writer last cited to be a great enlargement of the American conception; and this view seems to be well supported by the considerations already suggested. It is true that at the time of the adoption of the constitution the powers conferred upon the president were considered by many to be so great as to endanger the stability of the Union, and it is considered by one of the ablest authorities on constitutional law that no one of the three great departments "has been more shorn of its just powers, or crippled in the exercise of them, than the presidency;" Miller, Const. U. S. 20, 95. But the context shows that this has reference solely to the encroachments on the appointing power by the extra-legal participation of members of congress therein—an evil much mitigated by the extension of the civil service system to the greater number of offices which were formerly not subject to its operation.

The administrative power of the president includes not only the control of the personnel of the public service but also the vast number of powers brought into action in the course of the administration of the government growing out of powers vested in the president by his duty under the constitution to see that the laws are faithfully executed. These duties, aside from this specific enumeration in the constitution as already stated, are those imposed upon the president by act of congress, and may be either of a special or general character, as the promulgation of regulations for the control of particular branches of the public service, such as consular regulations and the civil service rules; but in most cases such executive regulations proceed from the heads of departments and not from the president directly, although they are in law presumed to proceed from him; 13 Peters 498, 513; 16 *id.* 291; 20 Wall. 92, 109; 99 U. S. 10, 19; 101 *id.* 755. Executive acts, as to the manner of doing which there is no provision of law, may be done through the head of the proper department whose acts are the acts of the president in contemplation of law; 137 U. S. 202, 217. The president may act in special cases by directions to his subordinate officers, either directly or through the head of a department, or by his decision on appeal from either of them, though, as a rule, he is not considered to be authorized to entertain such appeals except as to the jurisdiction of the officer appealed from; 15 Op. Atty. Gen. 94, 100, reviewing opinions on this question. In other cases the appeal does not go beyond the head of the department; 4 *id.* 515; 9 *id.* 462; 10 *id.* 526.

Congress may impose on any executive officer any duty which is not repugnant to any right which is secured and protected by the constitution; 1 Cra. 137; 12 Pet. 524. With respect to certain executive functions which spring from the legislation of congress, after the occasion is created by the passage of a law, the authority of the legislature is ended, and the uncontrolled discretion of the executive attaches and is exercised independently of the other departments of the government. In the exercise of such powers the discretion of the subordinate officer, within his sphere, is the discretion of the president. Of this character are the control of the military resources of the government; the pardoning power and the power of appointment, all of which are dormant until legislation has been enacted for creating an army and navy, or defining crimes and punishments and the creation of offices. As to another class of executive powers which depend entirely upon the legislation of congress both for their existence and their scope, the president merely executes the law. Within this class necessarily fall the greater number of executive functions, and they differ from the other classes in that, with respect to them, the president may be deprived of all discretion.

The executive powers which are derived directly from the constitution would still remain if all the legislative acts of congress were repealed. As to these the president is clothed with unrestrained discretion, and his acts in pursuance of them are purely political. He cannot be controlled nor can his powers be enlarged or diminished by legislation, though through the medium of proper laws he may be aided in the performance of the duties thus imposed upon him. For example, an attempt to limit the pardoning power or control its effect has been held unconstitutional, where the supreme court having declared that the power of the president dispensed with the necessity of proof of loyalty in cases authorizing claims for the value of property seized as captured or abandoned during the war; congress subsequently enacted that such proof should be required irrespective of any executive pardon or amnesty. This the court held unconstitutional, saying:—"Now it is clear that the legislature cannot change the effect of such a pardon any more than the executive can change a law. Yet this is attempted

by the provision under consideration. The court is required to receive special pardons as evidence of guilt and to treat them as null and void. It is required to disregard pardons granted by proclamation on condition, though the condition has been fulfilled, and to deny them their legal effect. This certainly impairs the executive authority and directs the court to be instrumental to that end." 13 Wall. 128, 148. But when a claim was made against the government for payment for supplies furnished before the war, it was held that the prohibitory legislation of congress prevented a recovery, because the disability of the claimant to receive a debt from the United States did not arise as a consequence of any offence but out of a state of war, and ended with the close of the war, and not by reason of the pardon, which operated only to relieve him from punishment for his acts and gave him no new rights ; 118 U. S. 62.

As to his express powers the president is equally independent of the courts and can be held for maladministration of them only by impeachment ; 1 Cra. 165 ; 12 Pet. 524 ; 5 Cra. C. C. 163 ; Hempst. 306.

The command of the army and navy is essentially an executive power; 2 Sto. Const. § 1491 ; 2 Kent 282 ; though it did not pass without criticism : 2 Elliot, Deb. 365 ; 3 *id.* 103, 103 ; the power to call out the militia is discretionary and his judgment of the necessity is final ; 12 Wheat. 29 ; and he may delegate the command of it ; Rawle, Const. 193 ; 2 Sto. Const., 5th ed. § 1492, n. 2. See 5 Mass. 548.

The power to require opinions from the heads of departments has been termed a mere redundancy ; Federalist, No. 74 ; but it is said to be not without its use and frequently acted upon ; 2 Sto. Const. § 1493 ; especially in two notable instances, by President Washington, 1793, relative to the condition of affairs between France and Great Britain, and by President Grant in 1873 in reference to the subject of expatriation ; Miller, Const. U. S. 185.

The pardoning power of the president extends to any case in which it might have been exercised under the English law ; 7 Pet. 150 ; 18 How. 307 ; and includes the power to grant a conditional pardon ; *id.;* 4 Wall. 333 ; to relieve against forfeiture of property under a confiscation act ; 6 Wall. 766 ; or release from fines, penalties, and forfeiture which accrue from the offence ; 91 U. S. 474 ; or contempt of court ; 24 La. Ann. 119 ; s. c. 13 Am. Rep. 115 ; it includes amnesty ; 13 Wall. 128 ; and a general amnesty proclamation includes domiciled aliens ; 16 Wall. 14, 148. The power of the president to issue a proclamation of general amnesty has been much drawn into question, and it was denied in a report of the Judiciary Committee of the Senate made Feb. 17, 1869, that he could do it without the authority or assent of congress. It was the subject of legislation, an express power being granted to the president by sec. 13 of the act of June 17, 1862, which was repealed by act of Jan. 19, 1867. It was, however, generally considered that the subject was within the power of the executive, and it was exercised by Presidents Washington, Adams, Madison, Lincoln, and Johnson, and independently of congressional action. See an extended discussion of the subject in 8 Am. Law Reg. N. S. 513, 577. The president may act on pardons immediately, or first refer them to the executive departments ; 14 Op. Att. Gen. 20.

The power to make treaties "embraces all sorts of treaties, for peace or war ; for commerce or territory ; for alliances or succors ; for indemnity for injuries or payment of debt ; for the recognition and enforcement of principles of public law ; and for any other purposes which the policy or interests of independent sovereigns may dictate in their intercourse with each other." 2 Sto. Const. sec. 1508. This power is plenary ; 14 Pet. 540 ; 93 U. S. 188 ; it includes removing the disabilities of aliens to inherit ; 5 Cal. 381 ; or enabling them to purchase and hold lands in the United States ; 2 Wheat. 259.

An important question has frequently arisen as to the effect of this power where legislation was required to give effect to a treaty. "In regard to this, any serious difficulty has been averted by the wisdom and forbearance of the house of representatives ;" Miller, Const. U. S. 168. See also *id.* 181, and authorities cited ; Pom. Const. L. §§ 676–681 ; 1 Kent 286 ; TREATIES.

The power of appointment includes nomination and appointment, and the power to commission is distinct, but when the commission is signed and sealed, the legal right of the officer is vested and delivery of the commission is not essential ; 1 Cra. 137 ; 19 How. 74. The nomination is a recommendation in writing ; 1 Cra. 137 ; 7 Op. Att. Gen. 186 ; and the senate can only affirm or reject ; 3 Op. Att. Gen. 188 ; congress cannot by law designate the person to fill an office ; 13 How. 40. The president cannot make a temporary appointment in a recess, if the senate was in session when or since the vacancy occurred ; 16 Am. L. Reg. 786.

Whether a newly created office, not before filled, is a *vacancy*, within the constitutional power of the president to make temporary appointments, is a question upon which courts and attorneys-general have differed. The most reasonable conclusion and that best supported by authority seems to be that it is not ; Cooley, Const. Law 104, n. 5 ; Ordronaux, Const. Leg. 107 ; and it is said that if the senate is in session when offices are created by law and no appointment is made, no vacancy exists in such sense that the president can appoint during the recess ; *id.;* 2 Sto. Const. § 1559 ; 7 Am. L. Reg. N. S. 786 ; 3 Fed. Rep. 112.

Strictly speaking, an appointment to office is an executive act ; 3 J. J. Marsh. 404 ; 2 Goodn. Comp. Adm. L. 22 ; but in many cases it has been held that it may be exercised by the legislative power, and this in the absence of negative constitutional limitation is held valid ; *id.;* Cooley, Const. Lim. 115, n.; 15 Md. 376 ; 13 Mich. 481 ; 24

id. 44; 6 W. Va. 562; *contra*, 118 Ind. 449; *id.* 426; 7 Ohio St. 546; 29 *id.* 102.

See, generally, as to the president's power of appointment and removal, 2 Sto. Const. §§ 1545–1553; Rawle, Const. 166; Sergeant, Const. ch. 29; Miller, Const. U. S. 156; Pom. Const. L. §§ 642–651.

Among the executive powers of first importance vested in the president is the management of foreign affairs, including the treaty power, to be exercised with the consent of the senate, and the power to appoint and receive foreign ministers, both of which are expressed in the constitution.

A question recently much discussed, is whether the recognition of a foreign revolutionary government is a matter entrusted, under the constitution, to the discretion of the president acting alone, or whether it is vested in congress, or requires the joint action of both of the political departments of the government. It has been contended on the one hand that this power

"rests exclusively with the executive," and that, "a resolution on the subject by the senate or by the house, by both bodies or by one, whether concurrent or joint, is inoperative as legislation, and is important only as advice of great weight voluntarily tendered to the executive regarding the manner in which he shall exercise his constitutional functions."

Such is the view said to have been expressed by Secretary Olney in a public statement, which, although not an official document, was generally accepted as a fit expression of the opinion of those who take the extreme view of the prerogative of the executive on this subject. The occasion of this utterance was a unanimous report of the Committee on Foreign Affairs of the Senate, recommending the passage of a joint resolution, "That the independence of the Republic of Cuba be, and the same is, hereby acknowledged by the United States of America."

The opposite opinion is based upon the idea that, because the constitution vests in congress the power to declare war (which is liable to be a consequence of the recognition of a new government) not only is the action of that body necessary, but it is the proper department of the government to act in such case. At least it is contended that congress has the power to act even if its power is not exclusive.

The argument in favor of the absolute and exclusive control of the subject by congress is substantially this:—The recognition of the independence of a people is from its very nature the creation of obligations arising from international law, and therefore must belong to the law-making power; it is also a supreme act of sovereignty and must be done by that department of the government in which the national sovereignty resides. Under the constitution, congress is invested with almost all the prerogatives of sovereignty, the only one granted to the president being the pardoning power, and even that is denied in cases of impeachment. The power in question is not directly granted to the president; therefore, is not one of his functions unless necessary to the full and proper exercise of some power directly granted to him or inherent in the office. His general inherent function is to *execute the laws*, to which this power of recognition has no relation, unless it be exercised in pursuance of law. The only expressed power from which it is sought to imply this far-reaching authority is that of receiving ambassadors and ministers, and that, it is urged, is simply a ceremonial duty, imposed upon him as the medium through which the government communicates with foreign governments. As the power of receiving ambassadors and ministers can be exercised pursuant to the direction of congress in doubtful cases, the power to determine the existence or independence of a nation is not necessarily involved in the constitutional grant of power to receive ambassadors, etc. If this power is vested in the executive, it is unlimited and involves the authority, so far as this government is concerned, to alter the map of the world, change the relation of this government to other governments, and involve the country in war. That such uncontrolled executive power over foreign relations was intended, cannot be reconciled with the fact that the president cannot declare war, or make a treaty, or appoint an ambassador or consul without the consent of the senate.

The argument from this point of view is very forcibly stated in a speeech by Senator Bacon, Jan. 13, 1897, in the United States senate, made expressly to take issue with the position taken by Secretary Olney, *supra*.

A third view is that, under the constitution and according to precedent,

"the recognition of the independence of a new foreign power is an act of the executive (president alone, or president and senate), and not of the legislative branch of the government, although the executive branch may properly first consult the legislative. While the legislative branch of the government cannot directly exercise the power of recognizing a foreign government, because that is a power executive or judicial in nature (and one which the judiciary, by refusing independently to examine the question, cast entirely upon the executive), nevertheless, if a recognition of such independence is liable to become a *casus belli* with some other foreign power, it is most advisable as well as proper for the executive first to consult the legislative branch as to its wishes and postpone its own action if not assured of legislative approval."

The basis of the argument in favor of legislative participation in such action is mainly the power to declare war and, as particularly urged by Mr. Clay, the power to regulate commerce. The argument in favor of exclusive executive power is found in the general control of foreign relations, as to which the only expressed powers are to "make treaties" and to "receive ambassadors and other ministers." The argument of greater force in favor of executive control is, however, not that the power in question is included in the specific powers named but that it is a part of the general grant of executive power; that all duties in connection with foreign relations, not otherwise specified, are placed upon the executive, and that the two powers enumerated are merely illustrative and not ex-

clusive. This third view is thus stated in a memorandum submitted to the United States senate by Senator Hale in connection with resolutions pending for the recognition of Cuba, and printed as Ex. Doc. No. 56, 2d Sess. 54th Cong.

"It is in the light of this conception of the executive character of foreign negotiations and acts concerning foreign relations that our constitution gave the president power to send and receive ministers and agents to or from any country he sees fit, and when he sees fit, and not to send or receive any, as he may think best. Also, the power to make treaties; that is, to negotiate with or without agents, as he may prefer, when he may prefer, or not at all, if he prefer; to draw up such articles as may suit him; and to ratify the acts of his plenipotentiaries, instructed by him, the only qualification of his power being the advice and consent of the states in the senate to the treaty he makes. These grants confirm the executive character of the proceedings, and indicate an intent to give all the power to the president, which the federal government itself was to possess—the general control of foreign relations."

The extent of executive control of foreign relations was the subject of an extended debate in congress in 1796, upon a resolution calling upon the president for details of the negotiations leading up to the Jay treaty with England, the exact question, however, being the effect of a treaty when negotiated. See TREATY.

With respect to the express power of the executive to make treaties, that is shared with the senate and there is no precedent for the primary act of recognition of a new foreign state, by the joint action of president and senate under the treaty-making power. As to the power to "receive ambassadors and other ministers," though it was much debated as giving the president too much power, the only comments on it in the Federalist are the following:

"This, though it has been a rich theme of declamation, is more a matter of dignity than of authority. It is a circumstance which will be without consequence in the administration of the Government; and it was far more convenient that it should be arranged in this manner, than that there should be necessity for convening the legislature, or one of its branches, upon every arrival of a foreign minister; though it were merely to take the place of a departed predecessor." Federalist, No. 69, p. 326.

"Except some cavils about the power of . . . receiving ambassadors, no objection has been made to this class of authorities; nor could they possibly admit of any. . . . As to the reception of ambassadors, what I have said in a former paper will furnish a sufficient answer." *id.* No. 77, p. 362.

The executive can alone appoint a diplomatic representative to a new government, but to do this there is required congressional action to provide for the payment of his salary, and it might be an inference from the practice of the government that the creation of an office, either directly or by provision for compensation to its incumbent, is a prerequisite to the appointment of a person to exercise any public functions. It has been argued, on the other hand, that such an officer, appointed by the president and senate, and his position as an officer having been established, might serve gratuitously or be paid out of the contingent fund. It would seem, however, that it might be urged with more force that merely from an appointment authorized by the constitution, there would arise an obligation to provide compensation, of the same character as those created in many cases without the direct action of congress, notably under the power to make a treaty (*q. v.*).

In 1798 a discussion arose as to this power, in which was considered the possible clashing between the appointing power of the president and the appropriating financial power of congress. In the course of debate Mr. Otis concluded his remarks with some observations not less pertinent to the present question than to that to which they were addressed: "It was owing to the apparent contradictions arising from a theoretical view of constitutions like ours that they were pronounced to be impracticable by some of the best writers of antiquity. And these abstract questions and extreme cases were not calculated to reconcile the minds of our citizens to our excellent form of government. It is a plain and conclusive reply, by which all such objections are obviated, that the constitution is not predicated upon a presumed abuse of power by any department, but on the more reasonable confidence that each will perform its duty within its own sphere with sincerity, that division of sentiment will yield to reason and explanation, and that extreme cases are not likely to happen."

And Attorney-General Cushing objected to an act in which it was provided that the president "shall" appoint a consul at Port au Prince, that it involved the diplomatic recognition of the Haytien empire, which rested entirely within the discretion of the president. 7 Op. Attys. Gen. 242.

Turning to the *precedents*, the right to recognize a foreign power was first discussed in 1818 with reference to the South American republics. The matter first came up on an appropriation to pay a minister, which was defeated, after a debate, in which Mr. Clay maintained that recognition might be either by the president in receiving or sending a minister, or by congress under the commerce clause; and the relation of the two powers of government to the subject was much considered; Ann. of Cong. (1818), pp. 1468–1608–1655. The subject was at this time much discussed both in congress and between the president and individual members, so much so that Mr. Adams, the secretary of state, in his memoirs, mentions jocular remarks made in the cabinet in that connection about the power of impeachment; 4 Memoirs, J. Q. Adams 204–206. Subsequently the subject was revived in the house and various resolutions were considered, with the result of a request for information from the president, which was responded to by the message of March 8, 1822, in which he said it was his duty to invite the attention of congress to a very important subject, and to communicate the sentiments of the executive on it; that, should congress entertain other sentiments, then there might be such co-operation between the two departments of the government as their respective rights and duties might require. And after stating that in his judgment the time had come to recognize the republics, he said: "Should congress concur in the view herein presented, they will doubtless see the propriety of making the necessary appropriations for carrying it into effect." The house then resolved that it "concur in the opinion expressed by the president in his message of the 8th of March, 1822, that the late American provinces of Spain which have declared their independence and are in the enjoyment of it, ought to be recognized by the United States as independent nations," and directed an appropriation "to enable the President of the United States to give due effect to such recognition." The Hale memorandum concludes a review of this matter with a protest against the conclusion which has been drawn that President Monroe, after all the discussion, had admitted the power of recognition in congress, but concedes that he did acknowledge "the importance of consulting the legislative branch when a step was about to be taken whose expediency might be doubted, and which would necessarily result in a request for appropriations."

In June, 1836, in reporting a resolution declaring that the independence of Texas ought to be recognized, the committee on foreign affairs of the senate made a report in which it was said: "The recognition of Texas as an independent power may be made by the United States in various ways: First, by treaty; second, by the passage of a law regulating com-

mercial intercourse between the two powers; third, by sending a diplomatic agent to Texas with the usual credentials; or, lastly, by the executive receiving and accrediting a diplomatic representative from Texas, which would be a recognition as far as the executive only is competent to make it. . . . The President of the United States, by the constitution, has the charge of their foreign intercourse. Regularly he ought to take the initiative in the acknowledgment of the independence of any new power, but in this case he has not yet done it, for reasons which he, without doubt, deems sufficient. If in any instance the president should be tardy, he may be quickened in the exercise of his power by the expression of the opinion, or by other acts, of one or both branches of congress, as was done in relation to the republics formed out of Spanish America." Quoted in Senate Report, No. 1160, 54th Cong. 2d Sess.

President Jackson, in his message of Dec. 21, 1836, after referring to the resolution, said that there had never been any deliberate inquiry as to where belonged the power of recognizing a new state,—a power in some instances equivalent to a declaration of war, and nowhere expressly given, but only as it is implied from some of the great powers given to congress or in that given to the president to make treaties and receive and appoint ministers. Then he continues: "In the preamble to the resolution of the house of representatives it is distinctly intimated that the expediency of recognizing the independence of Texas should be left to the decision of congress. In this view, on the ground of expediency, I am disposed to concur, and do not, therefore, consider it necessary to express any opinion as to the strict constitutional right of the executive, either apart from or in conjunction with the senate, over the subject. It is to be presumed that on no future occasion will a dispute arise, as none has heretofore occurred, between the executive and the legislature in the exercise of the power of recognition. It will always be considered consistent with the spirit of the constitution and most safe that it should be exercised, when probably leading to war, with a previous understanding with that body by whom war can alone be declared, and by whom all the provisions for sustaining its perils must be furnished. Its submission to congress, which represents in one of its branches the states of this Union, and in the other the people of the United States, where there may be reasonable ground to apprehend so grave a consequence, would certainly afford the fullest satisfaction to our own country and a perfect guaranty to all other nations of the justice and prudence of the measures which might be adopted."

As to this message the Hale memorandum, which, it is to be remembered, is an argument for the absolute and unqualified *power* of the executive (but modified only by what might be termed a moral *duty* to consult congress in extreme cases) remarks:

"President Jackson plainly was of the opinion that, in a doubtful case, when international complications might be involved, the president should not recognize a revolutionary government without the assent of congress. His language is so carefully guarded that no inference can be made with entire confidence as to the proper course if the executive were strongly of the opinion that facts justifying the recognition of independence did not exist."

With respect to other expressions on this subject from the executive department of the government, Secretary Seward wrote to Minister Dayton, April 7, 1864: "The question of recognition of foreign revolutionary or reactionary governments is one exclusively for the executive, and cannot be determined internationally by congressional action." This had reference to the action of the house of representatives, which had unanimously adopted a resolution protesting against the establishment of an empire in Mexico under Maximilian. The senate did not act on it. The French government asked an explanation, and the secretary of state, using the expression quoted, said that a vote of the house or the senate could neither coerce the executive to modify its policy nor deprive it of its freedom of action. In Dec., 1864, the house by a large majority affirmed their right to advise on questions of foreign policy; but, as was remarked by an intelligent foreign writer, this declaration does not appear to have had any influence on the course of the administration. Chambrun, Exec. Pow. in the U. S. 101.

On the other hand, Secretary Clayton, writing to Mr. Mann, a special agent to investigate the Hungarian insurrection, says: "Should the new government prove to be, in your opinion, firm and stable, the president will cheerfully recommend to congress, at their next session, the recognition of Hungary; and you might intimate, if you should see fit, that the president would in that event be gratified to receive a diplomatic agent from Hungary in the United States by or before the next meeting of congress, and that he entertains no doubt whatever that in case her new government should prove to be firm and stable, her independence would be speedily recognized by that enlightened body." In his Digest of International Law, from which the foregoing is quoted, Dr. Wharton concludes his statement of precedents on this subject as follows: "As to this it is to be remarked that while Mr. Webster, who shortly afterwards, on the death of President Taylor, became secretary of state, sustained the sending of Mr. Mann as an agent of inquiry, he was silent as to this paragraph, and suggests, at the utmost, only a probable congressional recognition in case the new government should prove to be firm and stable. In making congress the arbiter, President Taylor followed the precedent of President Jackson, who, on March 3, 1837, signed a resolution of congress for the recognition of the independence of Texas. The recognition, however, by the United States, of the independence of Belgium, of the powers who threw off Napoleon's yoke, and of the South American states who have from time to time declared themselves independent of prior governments, has been primarily by the executive, and such also has been the case in respect to the recognition of the successive revolutionary governments of France.

The courts have frequently had occasion to determine whether the independence of a foreign country should be recognized as existing for the purpose of the pending case, but not to pass upon the question of power as between the executive and legislative departments. In an early case Marshall, C. J., said that before a nation

"could be considered independent by the judiciary of foreign nations, it was necessary that its independence should be recognized by the executive authority of those nations. That as our executive had never recognized the independence of Buenos Ayres, it was not competent to the court to pronounce its independence." 2 Wh. Cr. Cas. 543.

A little later, on certificate of division, the supreme court had before it the direct question of the rights of a revolting colony, or portion of a nation which has declared its independence. The case was the trial for piracy of one of the revolutionary subjects.

Marshall, C. J., speaking for the court, said:

"Those questions which respect the rights of a part of a foreign empire, which asserts and is contending for its independence, and the conduct which must be observed by the courts of the Union towards the subjects of such section of an empire who may be brought before the tribunals of this country, are equally delicate and difficult. . . . Such questions are generally rather political than legal in their character. They belong more properly to those who can declare what the law shall be who can place the nation in such a position with respect to foreign powers as to their own judgment shall appear wise; to whom are entrusted all its foreign relations, than to that tribunal whose power as well as duty is confined to the application of the rule which the legislature may prescribe for it." The certificate of opinion was ". . . The court is further of opinion that when a civil war rages in a foreign nation, a part of which separates itself from the old established government, and erects itself into a distinct government, the courts of the Union must view such newly constituted government as it is viewed by the legislative and executive departments of the government of the United States." 3 Wheat. 610.

In a case involving the question of the right of citizens of the United States to

the use of the seal fisheries at the Falkland Islands belonging to Buenos Ayres, 3 Sumn. 270, 273, Mr. Justice Story said,

"It is very clear that it belongs exclusively to the executive department of our government to recognize from time to time any new governments which may arise in the political revolutions of the world; and until such new governments are so recognized they cannot be admitted by our courts of justice to have or to exercise the common rights and prerogatives of sovereignty."

He adds that "this doctrine was fully recognized by the supreme court" in Gelston *v.* Hoyt; which was one of those cases cited *infra* in which the court had referred to the recognition of independence, by the "government." On appeal from Judge Story's decision the supreme court held that the action, of the executive department of the government, on the question to whom the sovereignty of the islands belonged was binding and conclusive on the courts, and it was enough that in the exercise of his constitutional functions the president had decided that question; 13 Pet. 417, 420. In several cases the court has said that the question of the recognition of belligerency or independence is one for the *government* of the United States; 4 Wheat. 52; 5 *id.* 338; 6 *id.* 193; 3 *id.* 324; 4 Cra. 241, 272; and again congress and the president are referred to as "those departments" having the control of such matters; 11 Wall. 632, 638. On a bill to enforce an agreement the validity of which turned on the question whether at its date Texas was, or was not, independent, Taney, C. J., said that "was a question for that part of our government which is charged with our foreign relations," and it was held that the court could not inquire whether it had not in fact become an independent sovereign state before its recognition as such by the treaty-making power; 14 How. 38, 51.

In the Prize Cases, much later than any of those above cited (relating not to foreign but to domestic relations, and therefore not strictly applicable), this language is used:

"As in the case of an insurrection, the President must, in the absence of congressional action, determine what degree of force the crisis demands, and as in political matters the courts must be governed by the decisions and acts of the political department to which this power is entrusted, the proclamation of blockade by the president is of itself conclusive evidence that a state of war existed which demanded and authorized recourse to such a measure." 2 Black 635.

In this case, the court terms the executive the political department of the government, and in a later case it so designates congress; 1 Wall. 412. More recently in a case in which the president was authorized, by act of congress, to declare that a guano island belonged to the United States, the court said:

"Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but a political, question, the determination of which by the legislative and executive departments of any government conclusively binds the judges as well as all other officers, citizens, and subjects of that government;" 137 U. S. 202.

With reference to the status of the revolutionary party of Chile, the circuit court of appeals said that it was to be regarded by the courts as determined by the executive department of the United States; 56 Fed. Rep. 505; aff'g 48 *id.* 99.

The earliest reference to this subject by a text-writer is by Rawle, who says:

"The power of receiving foreign ambassadors carries with it, among other things, the right of judging in the case of a revolution in a foreign country, whether the new ruler ought to be recognized. The legislature, indeed, possesses a superior power, and may declare its dissent from the executive recognition or refusal, but until their sense is declared, the act of the executive is binding. The judicial power can take no notice of a new government, until one or the other of those two departments has acted on it. Circumstances may render the decision of great importance to the interests and peace of the country. A precipitate acknowledgment of the independence of part of a foreign nation, separating itself from its former head, may provoke the resentment of the latter; a refusal to do so may disgust the former, and prevent the attainment of amity and commerce with them if they succeed. The principle on which the separation takes place must also be taken into consideration, and if they are conformable to those which led to our own independence, and appear likely to be preserved, a strong impulse will arise in favor of recognition. . . . The power of congress on this subject cannot be controlled; they may, if they think proper, acknowledge a small and helpless community, though with a certainty of drawing war upon our country; but greater circumspection is required from the president, who, not having the constitutional power to declare war, ought ever to abstain from a measure likely to produce it." Rawle, Const. 195.

A little later Story wrote:

"The exercise of this prerogative of acknowledging new nations or ministers is, therefore, under such circumstances, an executive function of great delicacy, which requires the utmost caution and deliberation. . . . If such recognition is made, it is conclusive upon the nation, unless indeed, it can be reversed by an act of congress repudiating it. If, on the other hand, such recognition has been refused by the executive, it is said that congress may, notwithstanding, solemnly acknowledge the sovereignty of the nation or party (citing Rawle). These, however, are propositions which have hitherto remained as abstract statements under the constitution, and therefore can be propounded, not as absolutely true, but as still open to discussion if they should ever arise in the course of our foreign diplomacy. The constitution has expressly invested the executive with power to receive ambassadors and other ministers. It has not expressly invested congress with the power either to repudiate or acknowledge them." 2 Sto. Const. § 1566.

In connection with this treatment of the subject is to be considered the judicial utterance of Judge Story, before cited from 3 Sumn. 270. Pomeroy is also cited in Senator Hale's memorandum as an authority in favor of the exclusive executive control, which he does assert strongly with reference to foreign relations, and the treaty-making power in general, but he does not discuss the particular question under consideration; while he enforces with great earnestness the necessity of harmonious action of congress and the executive, and of their cooperation in giving due effect to the powers confided to each; Pom. Const. Law § 675.

Dr. Wharton, in his Digest of International Law, in discussing the subject of the recognition of various revolutionary governments, entitles section vii. of chap. iii., vol. 1, thus: "Such recognition determinable by executive," thus implying the opinion that the right rests with the executive alone. The author states the proposition embodied in his caption more fully thus:

"In political matters the courts follow the department of the government to which those matters may be committed, and will not recognize the existence of a new government until it has been recognized by the executive." Most of the cases, however, which are cited by him under this caption are among the authorities upon the proposition already noted, that it is not a matter for the judicial department of the government, but that the courts will not take cognizance of the existence of a new government until it has been recognized by the *political* department of the government, without discriminating between the executive and legislative branches of the government.

From an examination of all the decisions touching this question by the judicial department, no precise principle can be deduced unless it be that the references to it rest upon an assumption of entire harmony of action between the executive and legislative departments. And the fact that the direct issue arising from the claim of exclusive control by one of those two departments has not heretofore been made, will readily account for the absence of direct judicial authority or authoritative expression of opinion by text-writers. The duties and powers of what the supreme court frequently terms the political departments are so closely interwoven that it is unlikely that such an issue will be sharply drawn. Every approach to it hitherto has resulted, after discussion, in the recognition by congress of the right of the executive to full control of foreign relations and to the initiative in the practical recognition of a new foreign power, and, on the other hand, by a prudent disposition on the part of the executive not to act in a doubtful case or one likely to create a *casus belli* without ascertaining the disposition of congress. This has been simply the application to this particular subject of the principle of mutual recognition of the distribution of powers and interdependence of the executive and congress which, with the prudent reserve of the judiciary in keeping closely within the limits of its own sphere, has enabled the government to avoid the dangers of mere theoretical construction alluded to by Mr. Otis in the quotation made from his remarks upon the subject. The undoubted constitutional powers of both departments bearing upon the question make harmony of action as necessary in dealing with this subject as with most, if not all, of the ordinary details of the government. While the president may undoubtedly recognize a foreign government, as has frequently been done, such action, if it involved war, would still require the action of congress to make it effective, and doubtless the precedents established by Presidents Jackson and Monroe, neither of whom was indifferent to the respect due to his office, will always have very great, if not controlling, weight. Again, the question recently raised of the right of congress by independent action and against the views of the president, to recognize the independence of a new nation, is more likely to be met hereafter, as heretofore, in the spirit of co-operation and full recognition of the executive control of foreign relations than to be asserted, to the extent of making a direct issue, as it would need to be by a majority of two-thirds of each house.

Executive officers, including the president, are required to execute the laws as enacted by the legislature or congress, and can in no case nullify them by refusing to execute them so long as their unconstitutionality or invalidity has not been judicially established, for, until this is done, the constitutionality is presumed, and in the judicial power alone resides the power to decide as to the validity of a statute; Pom. Const. L. secs. 148, 662–668; 2 Dall. 304; 1 Wheat. 304; 6 *id.* 264; 21 How. 506.

The question whether an executive officer has, under any circumstances, the right to question the constitutionality of an act of congress, and to make this decision the basis of acting upon claims to be passed upon by him, was the subject of consideration and extended discussion in the sugar bounty case lately pending before the comptroller of the treasury. It was contended on the one hand that every law must be considered valid until declared otherwise by the supreme court, and that although the comptroller is an independent officer, and not a mere subordinate of the secretary of the treasury or the president, such an exercise of jurisdiction would be a dangerous usurpation by an executive officer of judicial authority, which is confided by the constitution exclusively to the courts. On the other hand, it was urged that the constitution is the supreme law, and that an executive officer is responsible for a wrongful act under an unconstitutional statute. It was replied that his responsibility is political. The claim was disallowed by the comptroller upon the ground that the act was unconstitutional and the case sent to the court of claims under the authority of U. S. Rev. Stat. § 1065. The act in question had been held unconstitutional, but not by the court of last resort; 23 Wash. Law Rep. 33. Subsequently the act was held to be constitutional by the supreme court, but the question of the power of the comptroller was not determined; 163 U. S. 427. This decision of the comptroller and the questions involved have been elaborately discussed by Mr. Black, the writer on constitutional law, who, after an examination of the authorities, reaches the conclusion that the power of an executive officer to judge of the constitutionality of a statute (in advance of a determination by the courts) is confined to cases in which it is necessary for the regulation of his own conduct, and that where the rights of others are involved he must enforce the law; 29 Am. L. Rev. 801. See also 11 Op. Atty. Gen. 214; 114 U. S. 270; 96 *id.* 567; 104 *id.* 728; 135 *id.* 100; 120 *id.* 102.

The same principle is applied in the state governments. In a recent case in Louisiana it was held that the executive officers of the state government have no authority to decline the performance of purely ministerial duties imposed upon them by a statute, on the ground that it is unconstitutional. An executive officer cannot nullify a law

by neglecting or refusing to act under it; 18 So. Rep. (La.) 746.

The so-called war powers of the executive, so much discussed during the late war, do not now present a practical subject for discussion, and may be passed, with this quotation from a judicious writer on the subject:

"During our Civil War, many powers were claimed and exercised by the president under a stringency of circumstances for which no provision had been made in the constitution. Secession being the outgrowth of the doctrine of states governed by compact and not by law, it became necessary, in the complication growing out of the war, whether in the form of military occupancy and blockade, legislative reconstruction, or judicial protection of persons and property in the seceded states, to find by implication, in the executive department, certain war powers not hitherto contemplated and never before invoked. While the general results of their exercise doubtless contributed to the restoration of the Union, and the re-establishment of the government of the United States over all its territory, these powers were so far anomalous in their assumption as to afford no justifiable precedents for the government of the executive, in the ordinary circumstances of our federal administration. A formal discussion of their scope and application has accordingly been omitted, because they present exceptions in the body of our constitutional legislation that are never again likely to be repeated." Ordronaux, Const. Leg. 109. See Whiting, War Powers under the Constitution; Campbell, Collection of Pamphlets on *Habeas Corpus*, Martial Law, etc.

The president is not responsible to the courts, civil or criminal; 4 Blatchf. 451; nor are his acts reviewable by them to the extent of bringing them into conflict with him; 4 Wall. 475; except that they may declare void an order or regulation in excess of his powers; 1 Gall. 137; 9 Am. Law Reg. 524; but with respect to all of his political functions growing out of the foreign relations, the control of military officers, and his relations with congress, it is settled that the courts have no control whatever; 5 Peters 1, 20; 7 How. 1; 4 Wall. 475; 1 Goodn. Comp. Adm. L. 34, 73; Pom. Const. L. § 633. See also 1 Ves. 467; 1 Ves. Jr. 375; 2 *id.* 56.

All the acts of the president by which his political powers are exercised are considered equally political, and are only brought within the scope of judicial examination where the act of some inferior ministerial officer, who is the direct instrument for exercising the executive function, is submitted to the scrutiny of the courts. This usually occurs where the constitutionality of a law is questioned by the judicial examination of the act of some officer who has attempted to carry the law into execution. In such a case there is not a direct judicial examination of the president's acts, or those of his subordinates, but merely the determination of the question whether there is a valid law; *id.* 419; 1 Cranch 137; 4 Wall. 475; Pom. Const. Law § 633.

So, as a necessary incident of the power to perform his executive duties, must be included freedom from any obstruction or impediments; accordingly, the president cannot be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and for this purpose his person must be deemed, in civil cases at least, to possess an official inviolability; 2 Sto. Const. § 1569.

Whether in any case a court may issue a mandamus to the governor of a state is a question on which the decisions are not uniform. In some states it is held that, although conceding the independence of the executive from the control of the judiciary with respect to political duties and powers, as to ministerial duties imposed upon the executive, which might have been committed to another officer, the writ may be resorted to; 7 Jones, L. 545; 5 Ohio St. 528; 39 Cal. 189; 25 Md. 173; 43 *id.* 572; 17 Colo. 156; 36 Ala. 371; 31 Neb. 82; 2 Mont. 242; 38 Kan. 641. But the weight of authority would seem to be in favor of the contrary opinion; 32 Me. 508; 8 R. I. 192; 19 Ill. 229; 100 *id.* 472; 120 Mo. 428; 127 Ind. 588; 25 N. J. L. 331; 8 Ga. 360; 39 Mo. 388; 120 *id.* 428; 1 Ark. 571; 29 Mich. 320; 17 Fla. 67; 22 La. Ann. 1; 19 Minn. 103; 61 Miss. 102.

As to other executive officers, such as secretary of state, treasurer, auditor, and the like, though some conflict exists, the better-considered doctrine, and that supported by the great weight of authority, is properly said to be that courts will apply the general principle of law and issue the writ in the case of purely ministerial acts; High, Ext. Leg. Rem. § 124*a*–126, where the cases are collected.

The same principle is applied to determine how far the courts will interfere in like manner with the heads of executive departments, or bureaus thereof, of the federal government. If the act is purely ministerial the writ will issue; 12 Pet. 524; 16 D. C. 428; but it must be an act not growing out of the inherent powers of the officer; 6 How. 92; 17 *id.* 284; and in no case where the act involves the exercise of discretion will the court interfere; 4 Wall. 522; 9 *id.* 298; 116 U. S. 423; 128 *id.* 40; 137 *id.* 637; 139 *id.* 306; 155 *id.* 303.

See, generally, Desty; Rawle; Story; Miller; Black, Constitution; Sergeant; Sedgwick, Const. Law; Thayer, Cas. Const. L.; Cooley, Const. Lim.; Elliot's Debates; Elmes, Executive Departments; Kent, Com. Lect. XIII.; 4 West. Law Monthly 505; Stubbs, Const. Hist. Eng.; Todd, Parl. Gov. in Eng.; Dunning, The Constitution in Civil War, 3 Pol. Sci. Quar. 454; Von Holst, Hist. U. S.; Whiting, War Powers; Ordronaux, Const. Leg. 99–110; Goodnow, Comp. Adm. Law; Bryce, Am. Com.; Chambrun, Executive Power in the U. S.; Fisher, Evolution of the Const.; Stevens, Sources Const. U. S.; Wilson, Legislative Government; GOVERNMENT; JUDICIAL POWER; LEGISLATIVE POWER; OFFICER; PRESIDENT OF THE UNITED STATES.

EXECUTOR. One to whom another man commits by his last will the execution of that will and testament. 2 Bla. Com. 503.

A person to whom a testator by his will commits the *execution*, or putting in force, of that instrument and its codicils. Fonbl. Rights and Wrongs 307. See LETTERS TESTAMENTARY; HÆRES.

Lord Hardwicke, in 3 Atk. 301, says, "The proper term in the civil law, as to goods, is *hæres testamentarius*; and executor is a barbarous term, unknown to that law." And again, "What we call executor and residuary legatee is, in the civil law, universal heir." *Id.* 300.

The word executor, taken in its broadest sense, has three acceptations. 1. *Executor a lege constitutus.* He is the ordinary of the diocese. 2. *Executor ab episcopo constitutus* or *executor dativus*; and that is he who is called an administrator to an intestate. 3. *Executor a testator constitutus*, or *executor testamentarius*; and that is he who is usually meant when the term executor is used. 1 Wms. Ex. 185.

A general executor is one who is appointed to administer the whole estate, without any limit of time or place, or of the subject-matter.

A rightful executor is one lawfully appointed by the testator, by his will. Deriving his authority from the will, he may do most acts before he obtains letters testamentary; but he must be possessed of them before he can declare in an action brought by him as such; 1 P. Wms. 768; Wms. Ex. 173.

An instituted executor is one who is appointed by the testator without any condition, and who has the first right of acting when there are substituted executors.

A substituted executor is a person appointed executor if another person who has been appointed refuses to act.

An example will show the difference between an instituted and a substituted executor. Suppose a man makes his son his executor, but if he will not act he appoints his brother, and if neither will act, his cousin: here the son is the instituted executor in the first degree, the brother is said to be substituted in the second degree, the cousin in the third degree, and so on. See Swinb. Wills, pt. 4, s. 19, pl. 1.

An executor de son tort is one who, without lawful authority, undertakes to act as executor of a person deceased. See EXECUTOR DE SON TORT.

A special executor is one who is appointed or constituted to administer either a part of the estate, or the whole for a limited time, or only in a particular place.

An executor to the tenor is a person who is not directly appointed by the will an executor, but who is charged with the duties which appertain to one: as, "I appoint A B to discharge all lawful demands against my will;" 3 Phill. Eccl. 116; 1 Eccl. 374; Swinb. Wills 247; Wentw. Ex. pt. 4, s. 4, p. 230; [1892] Prob. 227, 380; 66 Law T. N. S. 382.

Qualification. Generally speaking, all persons who are capable of making wills, and many others besides, may be executors; 2 Bla. Com. 503. The king may be an executor. So may a corporation sole. So may a corporation aggregate; Toller, Exec. 30; Schoul. Ex. & Ad. 32. So may an alien, if he be not an alien enemy residing abroad or unlawfully continuing in the country. See 3 Abb. App. Dec. 86. So may married women and infants; and even infants unborn, or *en ventre sa mère*, may be executors; 1 Dane, Abr. c. 29 *a* 2, § 3; 5 S. & R. 40. But in England an infant cannot act solely as executor until his full age of twenty-one years. Meanwhile, his guardian or some other person acts for him as administrator *cum test. ann.* See 25 Miss. 162; Schoul. Dom. Rel. § 416; ADMINISTRATION. A married woman cannot be executrix without her husband's consent; 56 Me. 300; 34 Ala. 40; 2 Ark. 212. But a man by marrying an executrix becomes executor in her right, and is liable to account as such; 2 Atk. 212; 1 Des. 150.

Persons attainted, outlaws, insolvents, and persons of bad moral character may be qualified as executors, because they act *en autre droit* and it was the choice of the testator to appoint them; 6 Q. B. 57; 12 B. Monr. 191; 7 W. & S. 244; 3 Salk. 162. It is the duty of the court, when a will has been proven, to grant letters testamentary to the person named in it upon application, if he is not disqualified by statute; 16 Or. 147. Poverty or insolvency is no ground for refusing to qualify an executor; but an insolvent executor may be compelled to give security; 2 Halst. Ch. 9; 2 Barb. Ch. 351; 148 Pa. 564. In some states a bond is required from executors, similar to or identical with that required from administrators. The testator may, by express direction, exempt from the obligation of giving a bond with sureties any trustees whom he appoints or directs to be appointed, but not his executor, unless permitted to do so by state statute; because the creditors of the estate must look to the funds in the executor's hands.

Idiots and lunatics cannot be executors; and an executor who becomes *non compos* may be removed; 1 Salk. 36; 2 Robertson 128. In Massachusetts, when any executor shall become insane, or otherwise incapable of discharging his trust, or *evidently unsuitable therefor*, the judge of probate may remove him; 11 Metc. 104. A drunkard may perform the office of executor; 12 B. Monr. 191; 7 W. & S. 244; but in some states, as Massachusetts and Pennsylvania, there are statutes providing for his removal. A court will not reject an executor on the ground that he is lacking in honesty, integrity, and business experience; 61 Conn. 420. As to who may be, see 30 Cent. L. J. 222.

Appointment. Executors can be appointed only by will or codicil; but the word "executor" need not be used. He may be appointed and designated, by committing to his charge those duties which it is the province of an executor to perform; 3 Phill. Eccl. 118; 10 B. Monr. 394; 2 Bradf. Surr. 32; 2 Spears 97; 7 Watts 51; Schoul. Ex. & Ad. 36. Even a direction to keep accounts will, in the absence of any thing to the contrary, constitute the person addressed an executor. A testator may project his power of appointment into the future and exercise it after death through an agent pointed out by name or by his office; 56 Conn. 268.

The appointment of an executor may be absolute, qualified, or conditional. It is *absolute* when he is constituted certainly, immediately, and without any restriction in regard to the testator's effects or limitation in point of time; Toller, Ex. 36. It may be *qualified* as to the time or place wherein, or

the subject-matters whereon, the office is to be exercised; 1 Will. Ex. 204. Thus, a man may be appointed executor, and his term made to begin or end with the marriage of testator's daughter; or his authority may be limited to the state: or to one class of property, as if A be made executor of goods and chattels in possession, and B of *choses* in action: Swinb. Wills, pt. 4, s. 17, pl. 4; Off. Exec. 29; 3 Phill. Eccl. 424. Still, as to creditors, three limited executors all act as one executor, and may be sued as one; Cro. Car. 293. Finally, an executor may be appointed *conditionally*, and the condition may be precedent or subsequent. Such is the case when A is appointed in case B shall resign. Godolphin, Orph. Leg. pt. 2, c. 2, § 1. As to appointment, see 24 L. R. A. 684; 39 Sol. J. 228, 244.

Removal. An executor who fails to keep proper accounts or to render any account for a long period, who retains the trust funds mixed with his own and who makes improper investments, should be dismissed; 155 Pa. 215; but the mere delay of an executor to convert real estate into personalty when the same has increased in value, is not such misconduct as to warrant his removal; 65 Hun 621. He may be removed, however, where he has any conflicting personal interest; 148 Mass. 247.

Assignment. An executor cannot assign his office. In England, if he dies having proved the will, his own executor becomes also the original testator's executor. But if he dies intestate, an administrator *de bonis non* of the first testator succeeds to the executorship. And an adminstrator *de bonis non* succeeds to the executorship in both these events, in the United States generally, wherever a trust is annexed to the office of executor; 4 Munf. 231; 7 Gill 81; 8 Ired. Eq. 52; 17 Me. 204; 1 Barb. Ch. 565; 4 Fla. 144.

Acceptance. The appointee may accept or refuse the office of executor; 3 Phill. Eccl. 577; 4 Pick. 33; 34 Me. 37; 65 N. H. 102. But his acceptance may be implied by acts of authority over the property which evince a purpose of accepting, and by any acts which would make him an executor *de son tort*, which see. So his refusal may be inferred from his keeping aloof from all management of the estate; 5 Johns. Ch. 388; 16 Conn. 291; 2 Murph. Eq. 85; 9 Ala. 181; 62 Pa. 166; 158 *id.* 645. But he cannot be compelled to accept and qualify or renounce in some formal manner; 76 Ia. 163. See Wms. Exrs. 274. If one of two or more appointees accepts, and the other declines or dies, or becomes insane, he becomes sole executor; 6 Watts 373. An administrator *de bonis non* cannot be joined with an executor.

Acts before probate. The will itself is the sole source of an executor's title. Probate is the evidence of that title. See 97 Ala. 375; 10 Pick. 463; 34 N. H. 407. Before probate, an executor may do nearly all the acts which he can do after. He can receive payments, discharge debts, collect and recover assets, sell bank-stock, give or receive notice of dishonor, initiate or maintain proceedings in bankruptcy, sell or give away goods and chattels, and pay legacies. And when he has acted before probate he may be sued before probate; 6 Term 295; 4 Metc. 421. He may commence, but he cannot maintain, suits before probate, except such suits as are founded on his actual possession; 3 C. & P. 123; 7 Ark. 404; 3 Me. 174; 3 N. H. 517; 2 Atk. 285; 5 Exch. Cas. 14. So in some states he cannot sell land without letters testamentary; 7 Cra. 115; 9 Wheat. 565; or transfer a mortgage; 1 Pick. 81; or remain in his own state and sue by attorney elsewhere; 12 Metc. 423; or indorse a note so as to be sued, in some states; 5 Me. 261; 2 N. H. 291. And see 2 Pet. 239; 7 Johns. 45; Byles, Bills 40; Story, Pr. Notes 304; Story, Bills 250; 87 Ga. 448.

Powers of executors. An executor may do, in general, whatever an administrator can. See ADMINISTRATOR. His authority dates from the moment of his testator's death; Com. Dig. *Administration* (B 10); 5 B. & Ald. 745; 2 W. Bla. 692; 10 Ad. & El. 212. When once probate is granted, his acts are good until formally reversed by the court; 3 Term 125; 15 S. & R. 39. In some states he has power over both real and personal estate; 3 Mass. 514; 1 Pick. 157. In the majority, he has power over the real estate only when expressly empowered by the will, or when the personal estate is insufficient; 9 S. & R. 431; 2 Root 438; 25 Wend. 224; 3 M'Cord 371; 9 Ga. 55; 27 N. J. Eq. 445; 57 Ind. 42. The will may direct him to sell lands to pay debts, but the money resulting is usually held to be equitable assets only; 9 B. & C. 489; 3 Brev. 242; 8 B. Monr. 499; 82 Ill. 392; 50 N. J. L. 636; but the title and right of possession to the land remain in the heirs until the sale, and they are the proper parties to maintain ejectment; 68 Miss. 510; but see 112 N. C. 791; and to collect the rents; 168 Pa. 431. In equity, the testator's intention will be regarded as to whether the surplus fund, after a sale of the real estate and payment of debts, shall go to the heir; 1 Wms. Ex. 555, Am. note. An executor's power is that of a mere trustee, who must apply the goods for such purposes as are sanctioned by law; 4 Term 645; 9 Co. 88; Co. 2d Inst. 236; 13 Bush 77; 16 N. Y. Sup. Ct. 12. The personal representative has the legal title to the *choses* in action of the deceased, and may transfer, discharge, or compound them as if he were the absolute owner; 83 Ala. 225; 35 N. J. Eq. 461.

Chattels real go to the executor; but he has no interest in freehold terms or leases, unless by local statute, as in South Carolina. But the wife's chattels real, unless taken into possession by her husband during his lifetime, do not pass to his executors; 1 Wms. Ex. 579, n; 5 Whart. 138; 4 Ala. N. S. 350; 7 How. Miss. 425. The husband's act of possession must effect a complete alteration in the nature of the joint interest of husband and wife in her chattels real, or they will survive to her.

Chattels personal go to the executor; 3

Redf. 450; 35 N. J. Eq. 461; 67 Ind. 596; 18 Conn. 610. Such are emblements; Brooke, Abr. *Emblements;* 4 H. & J. 139; 98 N. C. 383; but see 96 Ala. 536. Heirlooms and fixtures go to the heir; and as to what are fixtures, see FIXTURES, and 1 Wms. Ex. 615; 2 Sm. L. Cas., 9th Am. ed. 1450; Crosw. Ex. & Ad. 352. The widow's separate property and paraphernalia go to her. For elaborate collections of cases on the effect of nuptial contracts about property upon the executor's right, see 1 Wms. Ex. *660, Am. note 2; 2 *id.* 636, note 1; 1 Sm. Lead. Cas. 65. Donations *mortis causa* go to the donee at once, and not to the executor; 1 Nott & M'C. 237; 23 Pa. 59; 16 Gray 403; 56 Me. 327.

Suits. 1. *By.* In general, a right of action founded on a tort or malfeasance dies with the person. But personal actions founded upon any obligation, contract, debt, covenant, or other duty to be performed, survive, and the executor may maintain them; Cowp. 375; 1 Wms. Saund. 216, n. See 76 Ind. 573; 5 B. & Ad. 78. By statutes in England and the United States this common-law right is much extended. An executor may now have trespass, trover, etc., for injuries done to the intestate during his lifetime. Except for slander, for libels, and for injuries inflicted on the person, executors may bring personal actions, and are liable in the same manner as the deceased would have been; 2 Brod. & B. 102; 2 Johns. Cas. 17; 1 Md. 102; 15 Ala. N. S. 253; 5 Blackf. 232; 6 T. B. Monr. 40; 3 Ohio 211; 2 W. N. C. Pa. 154. See 28 Cal. 567; 17 Vt. 176; 98 Mass. 85. Should his death have been caused by the negligence of any one, they may bring an action for the benefit of the family. Executors may also sue for stocks and annuities, as being personal property. A right of action for the breach of a parol contract for the sale of land survives to the executors; 6 S. & R. 208. So they may sue for an insurance policy. And for all these purposes they may take legal proceedings by action, suit, or summons.

The supreme court of New Jersey has lately held that the courts of New Jersey will enforce the Pennsylvania statute giving a right of action to the widow of one who dies of injuries inflicted by the wrongful act of another, that statute not being repugnant to the policy of the former state; but such an action cannot be brought in New Jersey by the personal representative of the deceased, as required by the laws of that state in similar cases; 34 Atl. Rep. (N. J.) 945.

2. *Against.* An action of trespass *quare clausum fregit* survives against the executor; 9 Phila. 240. So also in causes of action wholly occurring after the testator's death, the executor is liable individually; 80 N. C. 219. The actions of trespass and trover do not survive against the executors of deceased defendants. But the action of replevin does. The general rule is that causes of action *ex contractu* survive, while those *ex delicto* do not. "Executors and administrators are the representatives of the personal property of the deceased and not of his wrongs except so far as the tortious act complained of was beneficial to his estate;" 2 Kent 416.

Wife's choses. In general, *choses* in action given to the wife either before or after marriage survive to her, provided her husband have not reduced them to possession before his death. A promissory note given to the wife during coverture comes under this rule in England; 12 M. & W. 355; 7 Q. B. 864; but not so in this country generally; 4 Dana 333; 15 Conn. 587; 17 Me. 301; 17 Pick. 391. Mere intention to reduce *choses* into possession is not a reduction, nor is a mere appropriation of the fund; 5 Ves. 515; 11 S. & R. 377; 5 Whart. 138; 2 Hill, Ch. 644; 4 Ala. N. S. 350; 14 Ohio 100.

Other suits. For actions accruing after the testator's death, the executor may sue either in his own name or as executor. This is true of actions for tort, as trespass or trover, actions on contract and on negotiable paper; 3 Nev. & M. 391; 4 Hill 57; 19 Pick. 432; 4 Jones, N. C. 159. So he may bring replevin in his own name; 6 Fla. 314; and so, in short, wherever the money, when recovered, will be assets, the executor may sue as executor; 20 Wend. 668; 6 Blackf. 120; 1 Pet. 686. See 22 Ark. 535; 56 Pa. 166. An executor cannot recover in ejectment without producing the will; 56 Ga. 527; 87 *id.* 448.

As to federal jurisdiction over the administration of estates, it is held that by virtue of their chancery powers these courts have jurisdiction over such cases when the requisite citizenship and other conditions exist. The jurisdiction does not extend to the appointment of administrators, confirmation of executors, or the probate of wills; nor will it be exercised when the state courts of concurrent jurisdiction have taken possession of the subject-matter of the controversy. The possession of the state court which will exclude the exercise of power by the federal court, and *vice versa*, must be the possession of some thing, corporeal or incorporeal, which has been taken under the dominion of the court. A controversy or inquiry is not such a thing, and the pendency of a suit or proceeding in one court, involving a question, controversy, or inquiry, is no bar to the exercise of jurisdiction in the determination of the same question, etc., in the other; 41 Fed. Rep. 486.

Other powers. An executor may sell terms for years, and may even make a good title against a specific legatee, unless the sale be fraudulent. So he may underlet a term. He may indorse a promissory note or a bill payable to the testator or his order; 10 Miss. 687. The rule that executors have no power to confess judgment is not applicable to offers of judgments to firm creditors, by a firm composed of a surviving member and the executor of a deceased member, conducting the interests of the deceased therein; 61 Hun 557; but they may compromise claims; 15 Pick. 79; 26

Me. 531; 59 Tenn. 311; or submit matters in dispute to arbitration; 70 Vt. 340; 41 Ala. 198; 74 N. Y. 38. Without the sanction of the probate court, he has no power to bind the estate by contract, even for the necessities of infant devisees; 91 Mich. 270.

Co-executors. Co-executors are regarded in law as one individual; and hence, in general, the acts of one are the acts of all; Com. Dig. *Administration* (B 12); 9 Cow. 34; 8 S. C. 244; 83 Tex. 635; 129 N. Y. 190. Hence the assent of one executor to a legacy is sufficient, and the sale or gift of one is the sale or gift of all. So a payment by or to one is a payment by or to all; 8 Blackf. 170; 10 Ired. 263; 74 N. Y. 539; a release by one binds all; 26 Pa. 502. But each is liable only for the assets which have come into his own hands; 11 Johns. 21. So he alone who is guilty of tort or negligence is answerable for it, unless his co-executor has connived at the act or helped him commit it; 74 Cal. 199. An executor is not liable for a *devastavit* of his co-executor; 9 S. C. 460; 74 N. Y. 539. A power to sell land, conferred by will upon several executors, must be executed by all who proved the will; 2 Dev. & B. 262. But if only one executor consents to act, his sale under a power in the will would be good, and such refusal of the others may be *in pais;* Cro. Eliz. 80; 3 Dana 195; 92 Mich. 440. If the will gives no direction to the executors to sell, but leaves the sale to the discretion of the executors, all must join. But see less strict rules in 8 Pa. 417; 2 Sandf. 512; 1 N. Y. 341. Where all the executors must unite to make a valid conveyance, no valid contract to convey can be made by a part of them; 72 Wis. 539. One executor cannot bind his co-executors by a confession of judgment without their consent; 2 Pittsb. Pa. 54. On the death of one or more of several joint executors, their rights and powers survive to the survivor; Bac. Abr. *Executor* (D); Shepp. Touchst. 484. As to acts of co-executor, see 8 Cent. L. J. 63, 82; and as to liability of joint-executors, see 24 *id.* 147.

Duties. The following is a brief summary of an executor's duties:—

First. He must bury the deceased in a manner suitable to the estate; 2 Bla. Com, 503. But no unreasonable expenses will be allowed, nor any unnecessary expenses if there is any danger of the estate proving insolvent; 2 C. & P. 207; 2 W. N. C. Pa. 447; 24 N. Y. Sup. Ct. 296; 28 La. Ann. 149; 59 N. Y. 582.

Second. Within a convenient time after the testator's death, he should collect the goods of the deceased, if he can do so, peaceably; if resisted, he must apply to the law for redress.

Third. He must prove the will, and take out administration. In England, there are two ways of proving a will,—in *common form*, and in *form of law*, or solemn form. In the former, the executor *propounds* the will,—*i. e.* presents it to the registrar, in the absence of all other interested parties. In the latter, all parties interested are summoned to show cause why probate should not be granted

Fourth. Ordinarily, he must make an inventory of personal property at least, and, in some states, of real estate also; 5 N. H. 492; 11 Mass. 190; 58 Me. 499; 14 N. J. Eq. 514; 71 Pa. 75. This duty rests on the executors and not on the adult legatees; 65 Hun 619.

Fifth. He must next collect the goods and chattels, and the claims inventoried, with reasonable diligence. And he is liable for a loss by the insolvency of a debtor, if it results from his gross delay; 6 Watts 46; 15 Ala. N. s. 328.

Sixth. He must give notice of his appointment in the statute form, and should advertise for debts and credits; 2 Ohio St. 156; but the giving or not giving it does not affect the statute of limitations, nor does the failure to publish, affect a creditor who did not present his claim; 94 Cal. 357.

Seventh. The personal effects he must deal with as the will directs, and the surplus must be turned into money and divided as if there were no will. The safest method of sale is a public auction.

Eighth. He must keep the money of the estate safely, but not mixed with his own, or he may be charged interest on it. He is also charged when he has misemployed funds or let them lie idle, provided a want of ordinary prudence is proved against him; 4 Mass. 205; 2 Bland, Ch. 306; 1 Sumn. 14; 2 Rand. 409; 4 Harr. N. J. 109; 3 Des. 241; 33 Pa. 258; 131 N. Y. 409. When a debtor is appointed executor of the creditor's will, equity will presume that the debt has been paid, and will treat it as an asset in the executor's hands; 90 Mich. 247. And generally, interest is to be charged on all money received by an executor and not applied to the use of the estate; 1 Bailey, Eq. 98; 1 Dev. Eq. 369; 6 J. J. Marsh. 94; 82 Pa. 143. See 150 *id.* 301. But an executor cannot be charged with interest on money allowed him for commission; 10 Pa. 408; 2 Jones, N. C. 347; he is not chargeable with compound interest; 24 Pa. 180. Where investments have been made contrary to the requirements of the will, on personal security, they are at the executor's risk, and he must answer personally for any loss; 48 N. J. Eq. 559. See INTEREST; INVESTMENTS.

Ninth. He must be at all times ready to account to the proper authorities, and must actually file an account at the end of the year generally prescribed by statute. The burden of proving items of a discharge in an accounting is upon the accountant; 48 N. J. Eq. 559.

Tenth. He must pay the debts and legacies in the order required by law. Funeral expenses are preferred debts, and so are debts to the United States, under certain limitations respecting insolvency, by act of congress; 2 Kent 418. Otherwise there is no one order of payment universal in the United States. A valid claim against an estate cannot be defeated on the ground that the estate had been settled before the

claim was filed; 85 Ia. 698. See ADMINISTRATION.

Compensation. Commissions are not allowed on a legacy given in trust to an executor; 1 Bradf. Surr. 198, 321. Reasonable expenses are always allowed an executor; 5 Gray 26; 28 Vt. 765; 3 Cal. 287; 4 Abb. N. Cas. 317; 29 Miss. 72. When one of two co-executors has done nothing, he should get no commission; 20 Barb. 91. In England, executors cannot charge for personal trouble or loss of time, and can only be paid for reasonable expenses. An executor cannot pay himself. His compensation must be ordered by the court; 58 Ind. 374. Faithful service by an executor is a condition to the right of commissions. Misappropriation of funds may forfeit the right; 84 Pa. 51.

In England the jurisdiction of probate formerly belonged to the ecclesiastical courts. It was then exercised in the Court of Probate, which held its sittings in Westminster Hall. There was a principal registry of wills, situated in Doctors Commons, and forty *district* registries, scattered throughout England and Wales, each presided over by a district registrar, by whom probate was granted where the application was unopposed. This Court of Probate is now consolidated into the Supreme Court of Judicature, and its jurisdiction is exercised by the Probate, Divorce, and Admiralty Division of that court. Mozl. & W. Dict. In the United States the jurisdiction is vested in surrogates, judges of probate, registers of wills, county courts, etc.

See Schouler; Williams; Croswell, Exrs. and Admrs.; Woerner, Law of Adm.; 3 Field. Lawy. Br. 387–416; 9 Harv. L. Rev. 42; 2 Lawson, Rights & Rem. 889–1008; ADMINISTRATION; ADMINISTRATOR.

EXECUTOR DE SON TORT. One who attempts to act as executor without lawful authority.

If a stranger takes upon him to act as executor without any just authority (as, by intermeddling with the goods of the deceased, and many other transactions), he is called in law an executor of his own wrong, *de son tort;* 2 Bla. Com. 507; 4 M'Cord 286; 12 Conn. 213; 48 Miss. 38; 14 E. L. & Eq. 510; 3 Litt. 163; 3 Pa. 129; 58 Ala. 310; 38 Ga. 264. If a man kill the cattle of the testator, or take his goods to satisfy a debt, or collect money due him, or pay out such money, or carry on his business, or take possession of his house, etc., he becomes an executor *de son tort.* Where a person with whom a will had been left filed it, but took out no letters with the will annexed, or any other legal authority to administer on the estate, he became an executor *de son tort;* 77 Ga. 114.

But a stranger may perform many acts in relation to a testator's estate without becoming liable as executor *de son tort.* Such are locking up his goods for preservation, burying the deceased in a manner suitable to his fortune, paying for the funeral expenses and those of the last sickness, making an inventory of his property to prevent loss or fraud solely, feeding his cattle, milking his cows, repairing his houses, etc. Such acts are held to be offices of kindness and charity; 19 Mo. 196; 28 N. H. 473. Nor does paying the debts of the deceased with one's own money make one an executor *de son tort;* 8 Rich. 29; 59 Conn. 247. Nor does one become executor *de son tort* by obtaining payment of a debt from an executor *de son tort;* 65 L. T. N. S. 709. The fact that a widow has taken possession of community property is not sufficient to authorize suit against her on a note of her deceased husband; 75 Tex. 595. As to what acts will render a person so liable, see Godolphin, Orph. Leg. 91; 1 Wms. Exec. 299; 1 Dane, Abr. 561; Bull. N. P. 48; Com. Dig. *Administration* (C 3); 8 Johns. 426; 15 S. & R. 39; 26 Me. 361; 6 Blackf. 367.

An executor *de son tort* is liable only for such assets as come into his hands, and is not liable for not reducing assets to possession; 2 Rich. Eq. 247; 82 Pa. 193. And it has been held that he is only liable to the rightful administrator; 3 Barb. Ch. 477; 58 Ala. 319. But see 9 Leigh 79; 2 M'Cord 423; 19 Mo. App. 488; which imply that he is also liable to the heir at law. He cannot be sued except for fraud, and he must be sued as executor; 1 Brayt. 116; 11 Ired. 215; 10 S. & R. 144; 5 J. J. Marsh. 170. But in general he is liable to all the trouble of an executorship, with none of its profits. And the law on this head seems to have been borrowed from the civil-law doctrine of *pro hærede gestio.* See Heineccius, Antiq. Syntagma, lib. 2, tit. 17, § 16, p. 468.

An executor *de son tort* is an executor only for the purpose of being sued, and not for the purpose of suing; 11 Ired. 215. He is sued as if rightful executor. But if he defends as such he becomes thereby also an executor *de son tort;* Lawes, Pl. 190, note; 4 B. Monr. 136; 1 M'Cord, Ch. 318; 21 Miss. 688; 2 H. & J. 435. When an executor *de son tort* takes out letters of administration, his acts are legalized, and are to be viewed in the same light as if he had been rightful administrator when the goods came into his hands; 19 Mo. 196; 15 Mass. 325; 4 Harr. Del. 108; 8 Johns. 126. But see, *contra,* 2 N. H. 475. A voluntary sale by an executor *de son tort* confers only the same title on the purchaser that he himself had; 6 Exch. 164; 20 E. L. & Eq. 145; 20 Ala. N. S. 587; 10 Watts 287.

It is held that in regard to land no man can be an executor *de son tort;* 1 Root 183; 7 S. & R. 192; 10 *id.* 144. In Arkansas it is said that there is no such thing as a technical executor *de son tort;* 17 Ark. 122, 129; and so in Missouri; 103 Mo. 339. See, on this subject, 35 Me. 287; 15 N. H. 137; 17 Mo. 91; 23 Miss. 544; 13 Ga. 478; 23 Ala. N. S. 548; 25 *id.* 353; Busb. 399; 12 La. Ann. 245, 344; 1 Rawle 149; Schoul. Exrs. & Admrs. § 184.

EXECUTORY. Performing official duties; contingent; also, personal estate of a deceased; whatever may be executed,—as, an executory sentence or judgment.

EXECUTORY CONSIDERATION. Something which is to be done after the promise is made, for which it is the legal equivalent. See CONSIDERATION.

EXECUTORY CONTRACT. One in which some future act is to be done: as, where an agreement is made to build a house in six months, or to do any act at a future day. See CONTRACT.

An agreement to sell and convey land, which is not a conveyance, operating as a present transfer of legal estate and seisin, is wholly executory, though it contains the words "grant, bargain and sell;" and produces no effect upon the estates and titles of the parties; and creates no lien or charge on the land itself; 32 Pa. 287; 37 *id.* 201; 35 W. Va. 463.

EXECUTORY DEVISE. Such a limitation of a future estate in lands or chattels as the law admits in case of a will, though contrary to the rules of limitation in conveyances at common law.

It is a limitation by will of a future estate or interest in lands or chattels. 38 Pa. 294.

By the executory devise no estate vests at the death of the devisor or testator, but only on the future contingency. It is only an indulgence to the last will and testament which is supposed to be made by one *inops consilii*. When the limitation by devise is such that the future interest falls within the rules of contingent remainders, it is a contingent remainder, and not an executory devise. 4 Kent 257; 3 Term 763.

If a particular estate of freehold be first devised, capable in its own nature of supporting a remainder, followed by a limitation which is not immediately connected with, or does not immediately commence from, the expiration of the particular estate of freehold, the latter limitation cannot take effect as a remainder, but may operate as an executory devise: *e. g.*, if land be devised to A for life, and after his decease to B in fee, B takes a (vested) remainder, because his estate is immediately connected with, and commences on, the limitation of A's estate. If land be limited to A for life, and one year after his decease to B in fee, the limitation to B is not such a one as will be a remainder, but may operate as an executory devise. Fearne, Cont. Rem. 399. If land be limited to A for life, and after his decease to B and his heirs, with a proviso that if B survive A and die, without issue of his body living at his decease; then to C and his heirs, the limitation to B, etc., prevents an immediate connection of the estate limited to C with the life estate of A, and prevents its commencement on the death of A. It must operate, if at all, as an executory devise; Butler's note (c) to Fearne, Cont. Rem. 397. If a chattel interest be bequeathed for life, with remainder over, this latter disposition cannot take effect as a remainder, but may as an executory devise, or more properly bequest; *id.* 407.

An executory devise differs from a remainder in three very material respects:—

First. It needs no particular estate to support it. *Second.* By it a fee-simple or other less estate may be limited on a fee-simple. *Third.* By it a remainder may be limited of a chattel interest after a particular estate for life created in the same.

The first is a case of freehold commencing *in futuro*. A makes a devise of a future estate on a certain contingency, and till the contingency happens does not dispose of the fee-simple, but leaves it to descend to his heirs at law. 1 T. Raym. 82; 1 Salk. 226; 1 Lutw. 798.

The second case is a fee upon a fee. A devises to A and his heirs forever, which is a fee-simple, and then, in case A dies, before he is twenty-one years of age, to B and his heirs. Cro. Jac. 590; 10 Mod. 420.

The third case: a limitation in a term of years after a life estate. A grants a term of one thousand years to B for life, remainder to C. The common law regards the term for years as swallowed up in the grant for life, which, being a freehold, is a greater estate, and the grantee of such a term for life could alien the whole. A similar limitation in a will may take effect, however, as an executory bequest; 2 S. & R. 59; 1 Desaus. 271; 4 *id.* 330.

It is not a mere possibility, but a substantial interest, and in respect to its transmissibility stands on the same footing with a contingent remainder; 81 Va. 268.

In order to prevent perpetuities, the rule has been adopted that executory interests must be so limited that from the time of their limitation they will necessarily vest in right (not necessarily in possession) at a period not exceeding that occupied by the life or lives of a person or persons then living, or *in ventre matris*, and the minority of any person or persons born or *in ventre matris* prior to the decease of such first named person or persons, or at a period not exceeding that occupied by the life or lives of such first named person or persons, and an absolute term of twenty-one years afterwards, or within, or at the expiration of an absolute term of twenty-one years without reference to any life. For example, lands are devised to such unborn son of a *feme covert* as shall first reach the age of twenty-one years. The utmost length of time that can happen before the estate can vest is the life of the mother and the subsequent infancy of her son. Such an executory devise is therefore good. If, however, such limitation had been to the first unborn son who shall attain the age of twenty-five years, the rule against perpetuities would be infringed and the limitations bad; Smith, Ex. Int. 391; 2 Bla. Com. 174.

An executory devise limited after an indefinite failure of issue is bad as leading to a perpetuity; 4 Kent 273; and so of an executory bequest, but the courts are in the latter case much less apt to construe limitations as contemplating a definite failure of issue; 4 Kent 281; 1 P. Wms. 663; Gray, Perpet. 212.

An executory devise is generally indestructible by any alteration in the estate out of or after which it is limited. But if it is limited on an estate tail the tenant in tail can bar it, as well as the entail, by common recovery or by deed enrolled, etc., where such deed is by statute given the force and effect of a common recovery; Butler's note to Fearne, Cont. Rem. 562; Wms. R. P. 319.

EXECUTORY ESTATES. Interests which depend for their enjoyment upon some subsequent event or contingency. Such estate may be an *executory devise*, or an *executory remainder*, which is the same as a contingent remainder, because no present interest passes.

EXECUTORY PROCESS (*Via Executoria*). **In Louisiana.** A process which can be resorted to in two cases, namely: 1. When the right of the creditor arises from an act importing confession of judgment, and which contains a privilege or mortgage in his favor. 2. When the creditor demands the execution of a judgment which has been rendered by a tribunal different from that within whose jurisdic-

tion the execution is sought. Code of Practice, art. 732.

EXECUTORY TRUSTS. A trust is called *executory* when some further act is requisite to be done by the author of the trust to give it its full effect. See Bisph. Eq. 31; Lewin, Tr. 144.

The distinction between executed and executory trusts is well settled; 7 Pa. 177; 1 Desaus. 444; though once doubted in England; 1 Ves. 142; but see 2 Ves. 323. The test is said to be: Has the testator been what is called, and very properly called, his own conveyancer? Has he left it to the court to make out from general expressions what his intention is? or has he so defined that intention that you have nothing to do but to take the limitations he has given to you, and to convert them into legal estates? per Lord St. Leonards, Ld. Ch., in 4 H. L. Cas. 210; see 7 R. I. 383; Bisph. Eq. 86.

In the case of articles made in contemplation of marriage, and which are, therefore, preparatory to a settlement, so in the case of a will directory of a future conveyance to be made or executed by the trustees named therein, it is evident that something remains to be done. The trusts are said to be executory, because they require an ulterior act to raise and perfect them: *i. e.* the actual settlement is to be made or the conveyance to be executed. They are instructions, rather than complete instruments, in themselves.

The court of chancery will, in promotion of the supposed views of the parties or the testator and to support their manifest intention, give to the words a more enlarged and liberal construction than in the case of legal limitations or trusts executed; 1 Fonbl. Eq. b. 1; 1 Sanders, Uses and T. 237; White, Lead. Cas. 18. Where a voluntary trust is executory and not executed, if it could not be enforced at law because it is a defective conveyance, it is not helped in favor of a volunteer in a court of equity; 4 Johns. Ch. 498, 500; 4 Paige, Ch. 305; 1 Dev. Eq. 93. But where the trust, though voluntary, has been executed in part, it will be sustained or enforced in equity; 1 Johns. Ch. 329; 7 Pa. 175, 178; White, Lead. Cas. 176; 6 Ves. 656; 18 *id.* 140; 1 Keen 551; 3 Beav. 238.

EXECUTORY USES. Springing uses which confer a legal title corresponding to an executory devise.

Thus, when a limitation to the use of A in fee is defeasible by a limitation to the use of B to arise at a future period, contingency, or event, these contingent or springing uses differ herein from an executory devise: there must be a person seized to such uses at the time the contingency happens, else they can never be executed by the statute. Therefore, if the estate of the feoffee to such use be destroyed by alienation or otherwise, before the contingency arises, the use is destroyed forever; 1 Co. 134, 138; Cro. Eliz. 439; whereas by an executory devise the freehold itself is transferred to the future devisee. In both cases, a fee may be limited after a fee; 10 Mod. 423.

EXECUTRIX. A woman who has been appointed by will to execute such will or testament. See EXECUTOR.

EXECUTRY. In Scotch Law. The movable estate of a person dying, which goes to his nearest of kin. So called as falling under the distribution of an executor. Bell, Dict.

EXEMPLARY DAMAGES. See MEASURE OF DAMAGES.

EXEMPLIFICATION. A perfect copy of a record or office-book lawfully kept, so far as relates to the matter in question. See, generally, 1 Stark. Ev. 151; 1 Phill. Ev. 307; 7 Cra. 481; 9 *id.* 122; 3 Wheat. 234; 10 *id.* 469; 2 Yeates 532; 1 Hayw. 359; 1 Johns. Cas. 238; 6 Ct. Cls. 230; 92 Ind. 246; 56 Me. 107; 52 Ga. 438. As to the mode of authenticating records of other states, see FOREIGN JUDGMENTS.

EXEMPLUM (Lat.). **In Civil Law.** A copy. A written authorized copy. Used also in the modern sense of example; *ad exemplum constituti singulares non trahi* (exceptional things must not be taken for examples). Calv. Lex. *Exempli gratia*, for the sake of example. Abb. *e. g.*

EXEMPTION. The right given by law to a debtor to retain a portion of his property without its being liable to execution at the suit of a creditor, or to a distress for rent.

In general, the sheriff may seize and sell all the property of a defendant which he can find, except such as is exempted by the common law or by statute. The common law was very niggardly of these exceptions: it allowed only the necessary wearing apparel; and it was once holden that if a defendant had two gowns the sheriff might sell one of them; Comb. 356. But in modern times, with perhaps a prodigal liberality, a considerable amount of property, both real and personal, is exempted from execution by the statutes of the several states; 19 Am. L. Reg. 1; 4 So. L. Rev. N. S. 1; 3 Hughes 609; 82 N. C. 212, 241; 62 Ga. 568; 31 La. Ann. 374; 8 Bax. 33; 69 Mo. 41; 38 Mich. 669; 77 Cal. 194; 99 *id.* 202; 6 Wash. 327; 54 Minn. 366; 157 Pa. 133; and there is now hardly a state or nation which has not by statute made certain exemptions designed as a protection for the family; 18 John. 403; and such statutes are to be liberally construed; 104 Ind. 259; 33 Wis. 510; 61 Ill. 449; 46 Vt. 346; 38 Tex. 199; 40 Conn. 106. Some of the exemptions are the following: household furniture; 33 N. H. 345; 18 Wis. 163; 30 Vt. 224; 15 Cal. 266; 56 Tex. 308; tools of trade; 19 Conn. 513; 44 *id.* 93; 28 La. Ann. 695; 52 Wis. 315; the interest of a legatee in lands, until the court has held it to be a charge on such, although the legacy is given with a view that it shall be such a charge; 63 Hun 624; curtesy initiate; 109 N. C. 202; property held in trust; 33 Neb. 770; the bridge of a public corporation; 33 Neb. 857; blackberries while growing; 49 Minn. 412; trademark, apart from the articles it has served to identify; 20 N. Y. S. 462; a vendor's lien reserved for the purchase price of lands conveyed; 3 Tex. Civ. App. 509; the interest

of a *cestui que trust* under a trust for maintenance and support; 8 C. C. App. 370; the interest of the grantor in property transferred in fraud of creditors; 141 N. Y. 1. State exemption laws are inapplicable to debts due from a citizen to the United States; 9 Fed. Rep. 674. See 106 U. S. 280.

See, generally, DISTRESS; EXECUTION; HOMESTEAD; FAMILY; TOOLS.

EXEMPTS. Persons who are not bound by law, but excused from the performance of duties imposed upon others.

By act of congress Feb. 24, 1864, it was enacted that such persons as were rejected as physically or mentally unfit for the service, all persons actually in the military or naval service of the United States at the time of the draft, and all persons who had served in the military or naval service two years during the then war and been honorably discharged therefrom, and no others, were exempt from enrolment and draft under said act, and act of congress, March 3, 1863.

EXEQUATUR (Lat.). **In French Law.** A Latin word which was, in the ancient practice, placed at the bottom of a judgment emanating from another tribunal, and was a permission and authority to the officer to execute it within the jurisdiction of the judge who put it below the judgment.

We have something of the same kind in our practice. When a warrant for the arrest of a criminal is issued by a justice of the peace of one county, and he flies into another, a justice of the latter county may indorse the warrant, and then the ministerial officer may execute it in such county. This is called *backing* a warrant.

In International Law. An official recognition of a consul or commercial agent, made by the foreign department of the state to which he is accredited, authorizing him to exercise his power. He cannot act without it, and it may be refused or revoked at the pleasure of the same government. 3 Chit. Com. Law 56; 3 M. & S. 290; 5 Pardessus, n. 1445; Twiss, Law of Nations; 1 Halleck, Int. Law 351.

EXERCITOR MARIS (Lat.). **In Civil Law.** One who fits out and equips a vessel, whether he be the absolute or qualified owner, or even a mere agent. Emerigon, Mar. Loans, c. 1, s. 1. We call him *exercitor* to whom all the returns come. Dig. 14. 1. 1. 15; 14. 1. 7; 3 Kent 161; Molloy, de Jur. Mar. 243.

The managing owner, or ship's husband. These are the terms in use in English and American laws, to denote the same as *exercitor maris*. See SHIP'S HUSBAND.

EXERCITORIA ACTIO (Lat.). **In Civil Law.** An action against a managing owner (*exercitor maris*), founded on acts of the master. 3 Kent 161; Vicat, Voc. Jur.

EXFESTUCARE (Lat.). To abdicate; to resign by passing over a staff. Du Cange. To deprive one's self of the possession of lands, honors, or dignities, which was formerly accomplished by the delivery of a staff or rod. Said to be the origin of the custom of *surrender* as practised in England formerly in courts baron. Spelman, Gloss. See also, Vicat, Voc. Jur.; Calvinus, Lex.

EXHÆREDATIO (Lat.). **In Civil Law.** A disinheriting. The act by which a forced heir is deprived of his legitimate or legal portion. In common law, a disherison. Occurring in the phrase, in Latin pleadings, *ad exhæredationem* (to the disherison), in case of abatement.

EXHÆRES (Lat.). **In Civil Law.** One disinherited. Vicat, Voc. Jur.; Du Cange.

EXHIBERE (Lat.). To present a thing corporeally, so that it may be handled. Vicat, Voc. Jur. To appear personally to conduct the defence of an action at law.

EXHIBIT. To produce a thing publicly, so that it may be taken possession of and seized. Dig. 10. 4. 2.

To file of record. Thus, it is the practice in England in personal actions, when an officer or prisoner of the king's bench is defendant, to proceed against such defendant in the court in which he is an officer, by *exhibiting*, that is, *filing*, a bill against him. Steph. Pl. 52, n. (*l*); 2 Sellon, Pr. 74; 2 Conn. 38.

A paper or writing proved on motion or other occasion.

A supplemental paper referred to in the principal instrument, identified in some particular manner, as by capital letter, and generally attached to the principal instrument. 1 Stra. 674; 2 P. Wms. 410; Gresl. Eq. Ev. 98.

A paper referred to in, and filed with the bill, answer, or petition in a suit in equity, or with a deposition. 16 Ga. 68.

In the absence of a positive statutory provision, exhibits properly identified need not be attached to the deposition in connection with which they are offered in evidence; 98 Cal. 490. It has been held that the exhibits filed with a petition form no part thereof, and cannot be considered in determining its sufficiency on demurrer; 113 Mo. 440; and if the exhibit is not the foundation for the cause of action or of the defence, it will not be considered; 129 Ind. 568.

EXHIBITANT. A complainant in articles of the peace. 12 Ad. & E. 599.

EXHIBITION. In Scotch Law. An action for compelling the production of writings. See DISCOVERY.

EXIGENDARY. In English Law. An officer who makes out exigents.

EXIGENT, EXIGI FACIAS. In Practice. A writ issued in the course of proceedings to outlawry, deriving its name and application from the mandatory words found therein, signifying, "that you cause to be exacted or required;" and it is that proceeding in an outlawry which, with the writ of proclamation, issued at the same time, immediately precedes the writ of *capias utlagatum*. 2 Va. Cas. 244.

EXIGENT LIST. A phrase used to indicate a list of cases set down for hearing upon various incidental and ancillary motions and rules.

EXIGENTER. An officer who made out exigents and proclamations. Cowel. The office is now abolished. Holthouse.

EXIGIBLE. Demandable; that which may be exacted.

EXILE. Banishment. A person banished.

EXILIUM (Lat.). **In Old English Law.** Exile. Setting free or wrongly ejecting bond-tenants. *Waste* is called *exilium* when bondmen (*servi*) are set free or driven wrongfully from their tenements. Co. Litt. 536. Destruction; waste. Du Cange. Any species of waste which drove away the inhabitants, into exile, or had a tendency to do so. Bac. Abr. *Waste* (*a*); 1 Reeve, Hist. Eng. Law 386.

EXISTIMATIO (Lat.). The reputation of a Roman citizen. The decision of arbiters. Vicat, Voc. Jur.; 1 Mackeldey, Civ. Law § 123.

EXISTING. The force of this word is not necessarily confined to the present. Thus a law for regulating "all existing railroad corporations" extends to such as are incorporated after as well as before its passage, unless exception is provided in their charters; 63 Ill. 117; 5 Ind. 525; 38 Ia. 215.

EXIT WOUND. The wound made in coming out by a weapon which has passed through the body or any part of it. 2 Beck. Med. Jur. 119.

EXITUS (Lat.). An export duty. Issue, child, or offspring. Rent or profits of land.

In Pleading. The issue or the end, termination or conclusion, of the pleadings; so called because an issue brings the pleadings to a close. 3 Bla. Com. 314.

EXLEX (Lat.). An outlaw. Spelman, Gloss.

EXOINE. In French Law. An act or instrument in writing which contains the reasons why a party in a civil suit, or a person accused, who has been summoned, agreeably to the requisitions of a decree, does not appear. Pothier, *Procéd. Crim.*, s. 3, art. 3. See ESSOIGN.

EXONERATION. The taking off a burden or duty. The main use of the word is in the rule in the distribution of an intestate's estate that the debts which he himself contracted and for which he mortgaged his land as security, shall be paid out of the personal estate in exoneration of the real.

But when the real estate is charged with the payment of a mortgage at the time the intestate buys it, and the purchase is made subject to it, the personal is not in that case to be applied in exoneration of the real estate; 2 Pow. Mortg. 780; 5 Hayw. 57; 3 Johns. Ch. 229; 1 Lead. Cas. in Eq. n. *646; 92 Pa. 491.

But the rule for exonerating the real estate out of the personal does not apply against specific or pecuniary legatees, nor the widow's right to paraphernalia, and, with reason, not against the interest of creditors; 2 Ves. 64; 1 P. Wms. 693; 3 *id.* 367. See 26 Beav. 522; 35 Pa. 54; 21 Conn. 550.

Like the right of contribution between those equally liable for the same debt, the right of exoneration exists between debtors successively liable. A surety who discharges an obligation is entitled to look to the principal for reimbursement, and to invoke the aid of a court of equity for this purpose, and a subsequent surety, who, by the terms of the contract, is responsible only in the case of the default of the principal and a prior surety, may claim exoneration at the hands of either; Bisph. Eq. § 331; 3 Pom. Eq. Jur. § 1416.

As to exoneration of simple contract debts, see 1 Sm. L. Cas., 9th Am. ed. 614.

EXONERETUR (Lat.). **In Practice.** A short note entered on a bail-piece, that the bail is exonerated or discharged in consequence of having fulfilled the condition of his obligation, made by order of the court or of a judge upon a proper cause being shown. See RECOGNIZANCE.

EXPATRIATION. The voluntary act of abandoning one's country and becoming the citizen or subject of another.

The right of a citizen to do this has been much discussed. The question has been settled in the United States by the act of July 27, 1868, which declares the right of expatriation to be the inherent right of all people, disavows the claim made by foreign states that naturalized American citizens are still the subjects of such states, and extends to such naturalized citizens, while in foreign countries, the same protection accorded to native-born citizens. Rev. Stat. §§ 1999, 2000. This declaration comprehends our own citizens as well as those of other countries; 14 Op. Atty. Gen. 295. Since the passage of this act, the United States has entered into treaties with nearly all the nations of Europe by which the contracting powers mutually concede to subjects and citizens the right of expatriation *on conditions and under qualification.* And in case of conflict between the above act of congress and any treaty, it would seem the treaty must be held paramount; Morse, Citizenship § 179. To be legal, the expatriation must be for a purpose which is not unlawful nor in fraud of the duties of the emigrant at home. But a woman who is a citizen of the United States does not expatriate herself merely by marriage with an alien, and in any event actual removal from the country and the acquisition of a domicil elsewhere are conditions precedent to such expatriation; 56 Fed. Rep. 556. There is no implied expatriation, and it will not occur unless in some manner assented to by congress, and the purpose to effect it must be manifested by some unequivocal act on the part of the citizen as to whom the question is raised; *id.*

A citizen may acquire in a foreign country commercial privileges attached to his domicil, and be exempted from the operation

of commercial acts embracing only persons resident in the United States or under its protection. See DOMICIL; NATURALIZATION. See also Miller, Const. U. S. 285, 297; 2 Cra. 120; 2 Kent 36; Grotius, b. 2, c. 5, s. 24; Puffendorff, b. 8, c. 11, ss. 2, 3; Vattel, b. 1, c. 19, ss. 218, 223, 224, 225; Wyckford, tom. i. 117, 119; 3 Dall. 133; 7 Wheat. 342; 1 Pet. C. C. 161; 4 Hall, L. T. 461; Bracken, Law Misc. 409; 9 Mass. 461; 21 Am. L. Reg. 77; 11 *id.* 447; 3 Can. L. T. 463, 511; 22 Law Rep. 641; 25 Law Mag. & Rev. 124; Lawrence's Wheat. Int. L. 891. For the doctrine of the English courts on this subject, see 1 Barton, Conv. 31, note; Vaugh. 227, 281; 7 Co. 16; Dy. 2, 224, 298 *b*, 300 *b*; 2 P. Wms. 124; 1 Hale, Pl. Cr. 68; 1 Wood, Conv. 382; Westl. Priv. Int. Law; Story, Confl. Laws; Cockburn, Nationality.

EXPECTANCY. Contingency as to possession. That which is expected or hoped for. Frequently used to imply an estate in expectancy.

Estates are said to be *in possession* when the person having the estate is in actual enjoyment of that in which his estate subsists, or *in expectancy*, when the enjoyment is postponed, although the estate or interest has a present legal existence.

A bargain in relation to an expectancy is, in general, considered invalid, unless the proof of good faith is strong; 2 Ves. 157; 1 Bro. Ch. 10; Jeremy, Eq. Jur. 397; 32 S. W. Rep. (Ky.) 406.

But it is well settled in equity that a deed which purports to convey property, which is in expectancy or to be subsequently acquired, or which is not the subject of grant at law, though inoperative as a grant or conveyance, will be upheld as an executory agreement, and enforced according to its intent, if supported by a valid consideration, whenever the grantor is in a condition to give it effect; per Strong, J., in 40 Pa. 37, 43; 11 Paige 290; 2 S. & R. 507; 12 R. I. 560, 568; 10 H. L. Cas. 189, 211; 91 Pa. 96; *id.* 296. So it is said that an estate in expectancy, though contingent, is a fair subject of contract, and an agreement by an expectant heir in respect thereto, fairly made upon valuable considerations, will be enforced in equity; 45 Ill. 232; 1 Hoffm. Ch. 382; 5 Jones, Eq. 211; so also the interest which a person may take under the will of another living person; 2 Pa. 335; 9 Beav. 252; but a mere agreement to appropriate the money when received from a legacy will not operate as an assignment of it; 92 Pa. 196. An executory agreement between the husbands of two expectant legatees to divide equally what should be left to either of them has been enforced; 2 P. Wms. 182; 2 Sim. 183. In a few instances the contrary is held; 7 Ohio St. 432; 125 Ind. 139; Cal. Civ. Code 700, 1045; and a conveyance to a wife upon consideration only of natural love and affection was held invalid, in equity, as against creditors at the time of the deed or the death of the ancestor; 87 Tenn. 759; so an agreement by a wife, as a collateral security for an old debt of the husband, will not be enforced; 40 Pa. 37.

The general doctrine is undoubtedly to treat such an assignment as a contract enforcible in equity, but Pomeroy considers it inadequate; 3 Pom. Eq. Jur. § 1287, n. 2; and prefers the theory that it is an actual transfer of the ownership of an equitable property right which ripens into an absolute title; *id.* § 1271.

Such an agreement or assignment will be enforced against creditors of the grantor and attaches to the estate, in equity, at the death of the ancestor; 46 Barb. 84.

Equity will, in general, relieve a party from unequal contracts for the sale or pledge of expectancies, as they are in fraud of the ancestor. See 2 P. Wms. 182; 2 Sim. 183, 192; 5 *id.* 524; 1 Sto. Eq. Jur. § 342. But relief will be granted only on equitable terms; for he who seeks equity must do equity; *id.*; 1 Fonbl. Eq. b. 1, c. 2, § 13, note *p*.

In dealing with such cases, the rule applied by courts of equity is, as laid down in Chesterfield *v.* Janssen, to scrutinize them carefully according to the circumstances of each; 2 Ves. Sr. 125; and, if upon inadequate consideration, or otherwise fraudulent, they will be relieved against and wholly or partially set aside; *id.*; 1 L. Cas. in Eq. 773; 2 Pom. Eq. Jur. § 953, and note, where the cases are collected.

In a leading modern English case the principle is thus stated: "The court will relieve 'expectant heirs' against bargains relating to their reversionary or expectant interest in cases of undervalue, of weakness due to age or poverty, and of the absence of independent advice. But all these circumstances must co-exist in order to entitle them to relief;" L. R. 8 Ch. 484. In that case it was held that the repeal of the usury laws in England has not altered the doctrine by which the court of chancery affords relief against improvident and extravagant bargains. In the opinion Lord Selborne directed attention to the fact that concealment was usually a feature of these cases, but agreed with Lord St. Leonards that it was not an indispensable condition of equitable relief; Sugd. Vend. & Pur., 11th ed. 316; differing, as to this point, with Lord Brougham; 2 Myl. & K. 456. The independent advice of a father seems to rebut the presumption of fraud; 2 App. Cas. 814; but old age or youth increases it; 2 Giff. 157; 4 D. J. & S. 388; or poverty and ignorance; L. R. 10 Ch. 389; 40 Ch. D. 312. In the first of these two cases, Jessel, M. R., thus defined the term "expectant heir": "The phrase is used not in its literal meaning, but as including every one who has either a vested remainder, or a contingent remainder in a family property, including a remainder in a portion, as well as a remainder in an estate, and every one who has the hope of succession to the property of an ancestor, either by reason of his being the heir-apparent or presumptive, or by reason, merely, of the expectation of a devise or bequest on account of the supposed or presumed affection of his ancestor or relation. More than this, the doctrine as to expectant heirs has been extended to all reversioners and remaindermen. So that the

doctrine not only included the class mentioned, who in some popular sense might be called 'expectant heirs,' but also all remaindermen and reversioners."

The principle has been held to include younger sons of peers; 15 Ch. D. 679. As to what is a reversionary interest for this purpose, see 11 Eq. 265, 276; L. R. 2 Ch. 542; and as to what is independent advice, see 10 Eq. 641, in which the borrower, though accompanied by a friend who was a solicitor but did not act as such, or know the terms of the contract, was held not to have independent advice.

Undervaluation is not alone a sufficient ground for setting aside a contract, conveyance, or mortgage of a reversion, otherwise fair; stat. 31 Vict. c. 4; 2 Ch. Cas. 136; 35 Beav. 570; 32 L. J. Ch. 201.

By the civil law, such contracts are held *contra bonos mores*, and they are forbidden in general terms; Code 2, 3, *de pactis* 30; and in the French code it is forbidden to sell the succession of a living person, even with his consent; art. 1600; the same is the rule of the Italian code; art. 1460; and of that of Austria; § 879.

See, generally, 2 Lead. Cas. in Eq., 4th Am. ed. 1530, 1559, 1605; 3 Pom. Eq. Jur. ch. 8, sec. 3; Brett, L. Cas. Mod. Eq., 3d ed, 69, n.; 9 Harv. L. Rev. 476; CATCHING BARGAIN; POST OBIT.

EXPECTANT. Contingent as to enjoyment.

EXPEDITATION. A cutting off the claws or ball of the fore-feet of mastiffs, to prevent their running after deer; a practice for the preservation of the royal forests. Cart. de For. c. 17; Spelman, Gloss.; Cowel. See COURT OF REGARD.

EXPENDITORS. Paymasters. Those who expend or disburse certain taxes. Especially the sworn officer who supervised the repairs of the banks of the canals in Romney Marsh. Cowell.

EXPENSÆ LITIS (Lat.). Expenses of the suit; the costs, which are generally allowed to the successful party.

EXPERTS (Lat. *experti*, instructed, proved by experience). Persons selected by the court or parties in a cause, on account of their knowledge or skill, to examine, estimate, and ascertain things and make a report of their opinions. Merlin, *Répert.* Witnesses who are admitted to testify from a peculiar knowledge of some art or science, a knowledge of which is requisite or of value in settling the point at issue.

Persons professionally acquainted with the science or practice in question. Strickl. Ev. 408. Persons conversant with the subject-matter on questions of science, skill, trade, and others of like kind. Best, Ev. § 346. The qualification of a witness as an expert is largely within the discretion of the trial judge; 61 Fed. Rep. 752; 132 Mass. 218; 63 Pa. 156; 126 *id.* 141; 108 N. Y. 61; 107 Ind. 84. Such a witness may be asked whether the examination made by him was superficial or otherwise; 158 U. S. 271; he need not be engaged in his profession, it is sufficient that he has studied it; 12 Ala. N. S. 648. Experts alone can give an opinion based on facts shown by others, assuming them to be true; 100 N. C. 457.

"It is not sufficient to warrant the introduction of expert testimony that the witness may know more of the subject of inquiry and may better understand and appreciate it than the jury; but to warrant its introduction, the subject of the inquiry must be one relating to some trade, profession, science, or art in which persons instructed therein by study and experience may be supposed to have more skill and knowledge than jurors of average intelligence may generally be presumed to have;" 97 N. Y. 511; and not only may they testify to facts but they may give their opinions on them as experts; 118 N. Y. 429. The practical result of the rule admitting such testimony is far from satisfactory; its principal defect being that such witnesses are usually called because their known theories are understood to support the fact which the party calling them wishes to prove; 40 Cal. 405. "They come," says Lord Campbell, speaking of scientific witnesses, "with a bias on their minds to support the cause in which they are embarked, and hardly any weight should be given to their evidence;" 10 Cl. & F. 154. In another case it was said that it was generally safer to take the judgments of unskilled jurors than the hired and biassed opinions of experts; 97 N. Y. 511; and such testimony is frequently characterized by the courts as of little value; 4 Dill. 488; 3 Bann. & A. 42; 6 Fish. 336; L. R. 6 Ch. Div. 415, n. See 32 Am. L. Reg. 529.

On the other hand, the necessity of such testimony in certain classes of cases, particularly those involving patent law, is thus set forth in 3 Rob. Pat. § 1012:—

"Notwithstanding the strictures passed upon expert testimony by many jurists on each side of the Atlantic, and the truth of the assertions by which these censures have been justified, it is still certain that in most patent cases expert evidence is, and must always be, indispensable. That the expert is consulted before he is summoned as a witness; that when his opinion is unfavorable to the party who consults him he is not produced in court, at least on that side of the case; that when called as a witness his testimony is expected to support, and generally does support, the claims of the litigant on whose behalf he is presented,—are no doubt true; but this is only what occurs in every other trial where counsel have properly prepared their case. The error lies with those who ascribe judicial functions to the patent-expert, and demand of him such freedom from partisanship as the exercise of judicial powers requires. That there are experts in other departments of affairs upon whose opinion the court is forced to rely as the foundation of its own judgments, because incapable of forming an opinion for itself, and that such experts consequently fill the places of judges and should be beyond the influence and control of parties, must be conceded. But such is not the case with patent-experts, whose opinion is received in evidence only in connection with the reasons on which it is based, and is to be accepted or rejected by the jury according to their own view of its fallacy or truth. The patent-expert, considered in his real character, is an explorer, gifted with unusual powers of discernment and apprehension; a chronicler, trained to preserve the recollection of the essential attributes of things; an expositor, fitted to embody those essential attributes

in accurate and intelligible language; a monitor, able to suggest the conclusions which follow from the premises he has described. His relation to the jury is not unlike that which counsel sustain to the court, as guides to a correct decision of the issues severally confided to their judgments,—the one pointing out facts and applying them in support of the claims advanced by his employer, as the other produces his authorities and applies them to the maintenance of his claims of law."

Such assistance, it is properly suggested, it would not be wise in any tribunal to undervalue or reject; 3 Rob. Pat. § 1012.

The fact that the opinions of experts in patent cases are often diametrically opposite does not necessarily discredit their testimony but merely emphasizes the fact that their opinions are to be regarded as *opinions*, merely, and a decision rendered between them; Hall, J., in 4 Fish. 12. A patent expert is in effect an "auxiliary counsel" who argues upon the law and the facts; 28 Fed. Rep. 618. While expert evidence is not conclusive on the jury; 1 Fish 17; and is to be judged by the same standards as ordinary evidence; 27 Fed. Rep. 691; 4 Fish. 401; 1 Sawyer 512; 1 Fish. 393; and to be accorded by the jury such weight as they see fit; 1 Fish. 351; 6 McLean 303; 3 *id.* 432; it is nevertheless of great value in patent cases, 2 Fish. 465; 1 *id.* 133, 193, 461; 1 Bond 254; 5 McLean 44; 3 Story 742; 2 Robb 288; 3 McLean 432.

The value of such testimony depends on the skill, not the number; 4 McLean 70; and is to be measured by their reasons; 3 Blatchf. 184; 4 Fish. 29, 232, 468.

There are two classes of patent experts, as is clearly shown by an able writer, scientific and mechanical, each having a distinct sphere. The scientific expert is one familiarized by his studies and experiments with the principles of a science and qualified to understand, distinguish, and explain the subject-matter and application thereto of such science. His services are invoked to determine the character and scope of an invention with reference to the condition of the art at the date of its production. His testimony is directed to the question whether the alleged invention is the result of an inventive act; whether it embraces or excludes a different invention or is substantially the same in principle, function, or effect with any other. The mechanical expert represents the skilled workman in his art, who by practical training in it could comprehend and apply to it various instruments and methods. His evidence will bear upon the defence of want of novelty, prior patent, inutility of the invention, or ambiguity of the description in the specification of the patent. One person may appear in both capacities. 3 Rob. Pat. § 1013. See Curt. Pat. § 479.

Expert testimony is admissible upon questions for the court as well as upon those for the jury, where it can be properly applied to the subject-matter of the question as the construction of the patent and whether a prior patent covers the same invention; 3 Rob. Pat. § 1014. In dealing with such questions the court is at liberty to admit expert evidence, but cannot be compelled to do so, and it is not error to refuse it; *id.*; 1 Fish. 487; 21 How. 88.

It has been a matter of grave discussion whether an expert is bound to testify on matters of *opinion* without extra compensation, the weight of decisions being that he is not bound to do so; 1 C. & K. 25; Sprague 276; 5 So. L. Rev. 793; 59 Ind. 15; 60 Ark. 508; *contra*, 6 Cent. L. J. 11; 21 D. C. 491; 59 Ind. 1, 15; 6 So. Law Rev. 706. It was recently held that, in the absence of statutory authority, one who testifies for the state in a criminal case as an expert cannot demand extra compensation as such, at least when not compelled to make any preliminary examination or preparation, or to attend and listen to the testimony; 60 Ark. 204. When no demand is made in advance for special compensation, an expert witness can recover only the statutory witness fees; 3 Colo. App. 177.

See, generally, as to who are experts, and the admissibility of their evidence, 1 Greenl. Ev. 440; Tayl. Ev. 1209; 3 Dougl. 157; 2 Mood. & M. 75; 9 Conn. 55; 17 Pick. 497; 12 La. Ann. 183; 28 Am. L. Reg. 529, 593; 1 Am. L. Rev. 45; 5 *id.* 227, 428; 22 Alb. L. J. 365; 77 Cal. 579; 93 Mich. 511; 1 Misc. Rep. 354; 98 Ala. 285; 143 Ill. 571; 160 Mass. 131; Hershell, How to Use Experts; Etting, Exp. Ev. See also OPINION; PATENT; HYPOTHETICAL QUESTION.

EXPILATION. In Civil Law. The crime of abstracting the goods of a succession.

This is said not to be a theft, because the property no longer belongs to the deceased, nor to the heir before he has taken possession. In the common law, the grant of letters testamentary, or letters of administration, relates back to the time of the death of the testator or intestate: so that the property of the estate is vested in the executor or administrator from that period.

EXPIRATION. Cessation; end: as, the expiration of a lease, of a contract or statute.

In general, the expiration of a contract puts an end to all the engagements of the parties, except to those which arise from the non-fulfilment of obligations created during its existence. See PARTNERSHIP; CONTRACT.

The term is specially used to denote the day upon which the risk of an insurance policy terminates. When before the expiration of policies the companies agreed to "hold" the policies for renewal, and after the expiration the agent of the insured told them to continue to hold them until the form could be arranged, the policies were held to be in force; 162 Mass. 358. Temporary insurance from one day "until" a certain other date, includes all of the day of expiration; 4 Dist. Rep. Pa. 382. See INSURANCE.

When a statute is limited as to time, it expires by mere lapse of time, and then it has no force whatever; and, if such a statute repealed or supplied a former statute, the first statute is, *ipso facto*, revived by the expiration of the repealing statute; 6 Whart. 294; 1 Bland, Ch. 664; unless it appear that such was not the intention of the

legislature; 3 East 212; Bacon, Abr. *Statute* (D).

EXPIRY OF THE LEGAL. In Scotch Law. The expiration of the term within which the subject of an adjudication may be redeemed on payment of the debt adjudged for. Bell, Dict.; 3 Jurid. Styles, 3d ed. 1107.

EXPLICATIO (Lat.). In Civil Law. The fourth pleading: equivalent to the surrejoinder of the common law. Calvinus, Lex.

EXPLOSION. A sudden and rapid combustion, causing violent expansion of the air, and accompanied by a report. 22 Ohio St. 348.

There is no difference in ordinary use between "explode" and "burst." The ordinary idea is that the explosion is the cause, while the rupture is the effect; 44 N. Y. 151.

EXPORTATION. In Common Law. The act of sending goods and merchandise from one country to another. 2 M. & G. 155; 3 *id.* 959.

In order to preserve equality among the states in their commercial relations, the constitution provides that "no tax or duty shall be laid on articles exported from any state." Art. 1, s. 9. And, to prevent a pernicious interference with the commerce of the nation, the tenth section of the first article of the constitution contains the following prohibition: "No state shall, without the consent of congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any state on imports or exports shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the congress." See 12 Wheat. 419; IMPORTATION.

EXPOSE. A French word, sometimes applied to a written document containing the reasons or motives for doing a thing. The word occurs in diplomacy.

To cast out to chance, to place abroad, or in a situation unprotected; 5 Mich. 90.

EXPOSITION DE PART. In French Law. The abandonment of a child, unable to take care of itself, either in a public or private place.

If the child thus exposed should be killed in consequence of such exposure, as, if it should be devoured by animals, the person so exposing it would be guilty of murder. Rosc. Cr. Ev. 591.

EXPOSURE OF PERSON. In Criminal Law. Such an intentional exposure, in a public place, of the naked body, as is calculated to shock the feelings of chastity or to corrupt the morals.

This offence is indictable on the ground that every public show and exhibition which outrages decency, shocks humanity, or is contrary to good morals, is punishable at common law. 1 Bish. Cr. Law § 1125; 32 Mo. 560. An indecent exposure, though in a place of public resort, if visible by only one person, is not indictable as a common nuisance. An omnibus is a public place sufficient to support the indictment; Clark, Cr. L. 306, n.; 1 Den. 338; Templ. & M. 23; 2 C. & K. 933; 2 Cox, Cr. Cas. 376; 3 *id.* 183; Dearsl. 207. But see 1 Dev. & B. 208; 68 N. C. 259. An ordinance making it an offence to expose the person indecently without reference to the intent which accompanies the act, is a valid exercise of police power; 93 Mich. 135.

See, generally, 1 Benn. & H. Lead. Cr. Cas. 442; 3 Day 103; 5 *id.* 81; 18 Vt. 574; 1 Mass. 8; 2 S. & R. 91; 5 Barb. 203.

EXPRESS. Stated or declared, as opposed to implied. That which is made known and not left to implication. It is a rule that when a matter or thing is expressed it ceases to be implied by law; *expressum facit cessare tacitum.* Co. Litt. 183.

EXPRESS ABROGATION. A direct repeal in terms by a subsequent law referring to that which is abrogated.

EXPRESS ASSUMPSIT. A direct undertaking. See ASSUMPSIT; ACTION.

EXPRESS COMPANIES. Companies organized to carry small and valuable packages expeditiously in such manner as not to subject them to the danger of loss and damage which to a greater or less degree attends the transportation of heavy or bulky articles of commerce. 10 Fed. Rep. 213.

An express company may be defined to be a common carrier that carries at regular and stated times, over fixed and regular routes, money and other valuable packages, which cannot be conveniently or safely carried as common freight; and also other articles and packages of any description which the shipper desires or the nature of the article requires should have safe and rapid transit and quick delivery, transporting the same in the immediate charge of its own messenger on passenger steamers and express and passenger railway trains, which it does not own or operate, but with the owners of which it contracts for the carriage of its messengers and freights; and within cities and towns or other defined limits, it collects from the consignors and delivers to the consignees at other places of business the goods which it carries. 44 Fed. Rep. 310. Their right to use the facilities afforded by a railroad depends entirely on contract; 117 U. S. 3.

They are common carriers; 44 Ala. 468; 28 Ohio St. 144; 36 Ga. 669; notwithstanding a declaration in their bill of lading that they are not to be so considered; 93 U. S. 174; 15 Minn. 270. See COMMON CARRIERS.

Like all other common carriers they must receive all goods offered for transportation, on being paid or tendered the proper charge; 6 Hun 344; 5 Cush. 69; and if they cannot transport them within a reasonable time, must refuse them or be responsible for loss caused by the delay; 54 N. Y. 500; 76 *id.* 305; 64 Ill. 128. They may also refuse to receive dangerous articles for transportation; 15 Wall. 524; 107 Mass. 568.

An express company insures the safe delivery of the goods received at the destination if on its own route; if not, safe delivery at the end of its own route to the next carrier; and will be relieved only by

the act of God or of the public enemy; 33 N. J. L. 543; 58 Ill. 44; 49 Miss. 480; 49 N. Y. 491; 69 Pa. 394; 101 Mass. 420; 52 Vt. 335.

An express company may by special contract limit its liability for the value of goods lost; 69 Ill. 62; 62 N. Y. 35; 74 *id.* 125; 28 Ohio St. 144; 89 Ind. 475; except for losses due to its own negligence or misconduct; 93 U. S. 174; 93 Ill. 523; 74 Mo. 538; 87 N. Y. 413. A contract between an express company and its messenger exempting it from liability for injury to him by the negligence of the carrier, is valid and may extend so far as to authorize the express company to contract with the carrier against liability to the messenger; but such contract will not enure to the benefit of the carrier having no knowledge of it or not having availed itself of it by contracting with the express company; 44 N. E. Rep. (Ind.) 796.

The express business is an "industrial pursuit" within the meaning of U. S. Rev. Stat. § 1889, and may therefore be carried on in Washington territory by a corporation formed there under a general law, or by a corporation otherwise duly formed or incorporated elsewhere; *id.*; 10 Sawy. 441; 43 Fed. Rep. 467.

By various statutes of New York, an express company organized as a joint-stock company has all the powers of a corporation, except that it has no right to adopt and use a common seal; 3 Abb. N. S. 163.

A statement filed by an express company showing that the business was managed, and its property and effects owned, by five trustees, the names of four of whom, and their respective places of residence, were given; that there was one vacancy, and that "the persons interested as *cestui que trust* are the stockholders of said company, who change from day to day, and of whom it is impossible to make an accurate statement, owing to the frequency of such changes," was a substantial compliance with the requirement of an act requiring that the statement so filed shall show the full name of every member of such company and his proper place of residence; 32 Ind. 19.

See an epitome of the law on this subject at that date by Judge Redfield in 5 Am. Law Reg. N. S. 1; and three articles on express companies as common carriers; *id.* 449, 513, 648. See also as to limiting liability, 27 *id.* 570; discrimination; 1 Am. & Eng. Corp. Cas. 390; and as to carriers by express generally; 20 Am. L. Reg. 602; 5 Myers, Fed. Dec. 647; 3 Am. & Eng. R. R. Cas. 601; 13 *id.* 425; 16 *id.* 93; 23 *id.* 572.

EXPRESS CONSIDERATION. A consideration expressed or stated by the terms of the contract.

EXPRESS CONTRACT. One in which the terms are openly uttered and avowed at the time of making. 2 Bla. Com. 443; 1 Pars. Contr. 4. One made in express words. 2 Kent 450. See CONTRACTS.

EXPRESS COVENANTS. Those stated in words more or less distinctly expressing the intent to covenant; 88 Ga. 675.

EXPRESS TRUST. One declared in express terms. See TRUSTS.

EXPRESS WARRANTY. One expressed by particular words. 2 Bla. Com. 300. The statements in an application for insurance are usually construed to constitute an express warranty. 1 Phil. Ins. 346. See WARRANTY.

EXPROMISSIO (Lat.). **In Civil Law.** The species of novation by which a creditor accepts a new debtor, who becomes bound instead of the old, the latter being released. See NOVATION.

EXPROMISSOR. In Civil Law. The person who alone becomes bound for the debt of another, whether the latter were obligated or not. He differs from a surety, who is bound together with his principal. Dig. 12. 4. 4; 16. 1. 13; 24. 3. 64. 4; 38. 1. 37. 8.

EXPULSION (Lat. *expellere*, to drive out). The act of depriving a member of a body politic or corporate, or of a society, of his right of membership therein, by the vote of such body or society, for some violation of his duties as such, or for some offence which renders him unworthy of longer remaining a member of the same.

By the constitution of the United States, art. 1, s. 5, § 2, each house may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member. In the case of John Smith, a senator from Ohio, who was expelled from the senate in 1807, the committee made a report which embraces the following points:

First. That the senate may expel a member for a high misdemeanor, such as a conspiracy to commit treason. Its authority is not confined to an act done in its presence.

Second. That a previous conviction is not requisite in order to authorize the senate to expel a member from their body for a high offence against the United States.

Third. That although a bill of indictment against a party for treason and misdemeanor has been abandoned, because a previous indictment against the principal party had terminated in an acquittal, owing to the inadmissibility of the evidence upon that indictment, yet the senate may examine the evidence for themselves, and if it be sufficient to satisfy their minds that the party is guilty of a high misdemeanor it is sufficient ground of expulsion.

Fourth. That the fifth and sixth articles of the amendments of the constitution of the United States, containing the general rights and privileges of the citizens as to criminal prosecutions, refer only to prosecutions at law, and do not affect the jurisdiction of the senate as to expulsion.

Fifth. That before a committee of the senate, appointed to report an opinion relative to the honor and privileges of the senate, and the facts respecting the conduct of the member implicated, such member is not entitled to be heard in his defence by counsel, to have compulsory process for witnesses, or to be confronted with his accusers. It is before the senate that the member charged is entitled to be heard.

Sixth. In determining on expulsion, the senate is not bound by the forms of judicial proceedings or the rules of judicial evidence; nor, it seems, is the same degree of proof essential which is required to convict of a crime. The power of expulsion must, in its nature, be discretionary, and its exercise of a more summary character. 1 Hall. Law Journ. 459, 465; 6 Wheat. 204; Cooley, Const. Lim. 162.

Corporations have the right of expulsion in certain cases, as such power is necessary

to the good order and government of corporate bodies; and the cases in which the inherent power may be exercised are classified by Lord Mansfield as follows: 1. When an offence is committed which has no immediate relation to a member's corporate duty, but is of so infamous a nature as to render him unfit for the society of honest men; such as the offences of perjury, forgery, and the like. But before an expulsion is made for a cause of this kind it is necessary that there should be a previous conviction by a jury according to the law of the land. 2. When the offence is against his duty as a corporator, in which case he may be expelled on trial and conviction before the corporation. 3. The third is of a mixed nature, against the member's duty as a corporator, and also indictable by the law of the land; 1 Burr. 517; 75 Pa. 291; 50 *id.* 107; 15 Am. Rep. 27; Field, Corp. 73; 47 Wis. 670; 1 Spelling, Priv. Corp. § 523. See 1 Thomp. Corp. 806–930, where the subject is fully treated; AMOTION; DISFRANCHISEMENT.

EXTENSION. In Common Law. This term is applied among merchants to signify an agreement made between a debtor and his creditors, by which the latter, in order to enable the former, embarrassed in his circumstances, to retrieve his standing, agree to wait for a definite length of time after their several claims become due and payable, before they will demand payment. It is often done by the issue of notes of various maturities.

Among the French, a similar agreement is known by the name of attermoiement. Merlin, *Répert.* mot *Attermoiement.*

EXTENSION OF PATENT (sometimes termed *Renewal of Patent*). **In Patent Law.** An ordinary patent was formerly granted for the term of fourteen years. But the law made provision that when any patentee, without neglect or fault on his part, had failed to obtain a reasonable remuneration for the time, ingenuity, and expense bestowed upon the same and the introduction thereof into use, he might obtain an extension of such patent for the term of seven years longer. A fee of forty dollars was required from the applicant, and a public notice of sixty days was to be given of the application. No extension could be granted after the patent had once expired.

The extension of a patent was intended for the sole benefit of the inventor; and where it was made to appear that he would receive no benefit therefrom, it would not be granted. The assignee, grantee, or licensee of an interest in the original patent retained no right in the extension, unless by reason of some stipulation to that effect. But where any person had a right to use a specific machine under the original patent he still retained that right after the extension. See act of 1836, § 18, and act of 1848, § 1; PATENTS. By act of congress of March 2, 1861, c. 88, § 16, 12 Stat. L. 249, it was provided that patents should be granted for the term of seventeen years, and further extension was forbidden. U. S. Rev. Stat. § 4924, provided for the granting of extensions only on patents issued prior to March 2, 1861.

EXTENT. A writ, issuing from the exchequer, by which the body, goods, and lands of the debtor may all be taken at once to satisfy the judgment.

It is so called because the sheriff is to cause the lands to be appraised at their full extended value before he delivers them to the plaintiff. Fitzh. N. B. 131. The writ originally lay to enforce judgments in case of recognizances or debts acknowledged on statutes merchant or staple; see stat. 13 Edw. I. *de Mercatoribus*; 27 Edw. III. c. 9; and by 33 Hen. VIII. c. 39, was extended to debts due the crown. The term is sometimes used in the various states of the United States to denote writs which give the creditor possession of the debtor's lands for a limited time till the debt be paid. 16 Mass. 186.

Extent in aid is an extent issued at the suit or instance of a crown-debtor against a person indebted to himself. This writ was much abused, owing to some peculiar privileges possessed by crown-debtors, and its use was regulated by stat. 57 Geo. III. c. 117. See 3 Bla. Com. 419.

Extent in chief is an extent issued to take a debtor's lands into the possession of the crown. See 2 & 3 Vict. c. 11; 5 & 6 Vict. c. 86, § 8.

Manorial extent. A survey of a manor made by a jury of tenants, often of unfree men sworn to sit for the particulars of each tenancy, and containing the smallest details as to the nature of the service due.

These manorial extents "were made in the interest of the lords, who were anxious that all due services should be done; but they imply that other and greater services are not due, that the customary tenants, even though they be unfree men, owe these services for their tenements, no less and no more. Statements that the tenants are not bound to do services of a particular kind are not very uncommon;" 1 Poll. & Maitl. 343. "Many admissions against their own (the lords) interests the extent of their manors may contain; they suffer it to be recorded that a 'day's work' ends at noon, that in return for some works they must provide food, even that the work is not worth the food that has to be provided; but they do not admit that for certain causes, and for certain causes only, may they take their tenements into their own hands. As a matter of fact it is seldom of an actual ejectment that the peasant has to complain;" *id.* 359. Many examples of the manorial extents have been preserved in the monastic cartularies and elsewhere. "Among the most accessible are the Bolden Book (printed at the end of the Domesday); the Black Book of Peterborough, the Domesday of St. Paul's, the Worcester Register, the Battle Cartulary, all published by the Camden Society; the Ramsey, Gloucester, and Malmesbury Cartularies or registers published in the Rolls series; the Burton Cartulary of the Salt Society and the Yorkshire Inquisitions of the Yorkshire Record Society;" *id.* 189.

EXTENUATION. That which renders a crime or tort less heinous than it would be without it. It is opposed to aggravation.

In general, extenuating circumstances go in mitigation of punishment in criminal cases, or of damages in those of a civil nature.

EXTERRITORIALITY (Fr.). This term (*exterritorialité*) is used by French jurists to signify the immunity of certain persons, who, although in the state, are not amenable to its laws: foreign sovereigns,

ambassadors, ministers plenipotentiary, and ministers from a foreign power, are of this class. Fœlix, *Droit Intern. Privé*, liv. 2, tit. 2, c. 2, s. 4; Westl. Priv. Int. L. 211. See Davis, Int. L. 59, 150; AMBASSADOR; CONFLICT OF LAWS; PRIVILEGE FROM ARREST.

EXTINGUISHMENT. The destruction of a right or contract. The act by which a contract is made void. The annihilation of a collateral thing or subject in the subject itself out of which it is derived. Prest. Merg. 9. For the distinction between an extinguishment and passing a right, see 2 Sharsw. Bla. Com. 325.

An extinguishment may be by matter of fact and by matter of law. It is by matter of fact either express, as when one receives satisfaction and full payment of a debt and the creditor releases the debtor; 11 Johns. 513; or implied, as when a person hath a yearly rent out of lands and becomes owner, either by descent or purchase, of the estate subject to the payment of the rent, and the latter is extinguished; 3 Stew. 60; but the person must have as high an estate in the land as in the rent, or the rent will not be extinct; Co. Litt. 147 *b*.

There are numerous cases where the claim is extinguished by operation of law: for example where two persons are jointly but not severally liable for a simple contract-debt, a judgment obtained against one is at common law an extinguishment of the claim on the other debtor; 1 Pet. C. C. 301; 2 Johns. 213.

A conveyance of mortgaged land by the mortgagor to the mortgagee extinguishes the mortgage; 114 Ill. 388. Taking a note for the amount due does not deprive a claimant of his right to a lien, but merely suspends its enforcement until the note is payable; 7 Misc. Rep. 79.

See, generally, Co. Litt. 147 *b*; 5 Whart. 541; 3 Conn. 62; 1 Ohio 187; 11 Johns. 513; 1 Halst. 190; 4 N. H. 251; 31 Pa. 475; 154 Mass. 314; 84 Me. 33; 54 Fed. Rep. 568; 37 Neb. 677; 2 Crabb, R. P. § 1487.

EXTINGUISHMENT OF COMMON. Loss of the right to have common. This may happen from various causes; by the owner of the common right becoming owner of the fee; by severance from the land; by release; by approvement; 2 Hill, R. P. 75; 2 Steph. Com. 41; 1 Crabb, R. P. § 341; Co. Litt. 280; 1 Bacon, Abr. 628; Cro. Eliz. 594.

EXTINGUISHMENT OF COPYHOLD. This takes place by a union of the copyhold and freehold estates in the same person; also by an act of the tenant showing an intention not to hold any longer of his lord; Hutt. 81; Cro. Eliz. 21; Wms. R. P. 287; Watk. Copyh.

EXTINGUISHMENT OF A DEBT. Destruction of a debt. This may be by the creditor's accepting a higher security; 1 Salk. 304; 1 Md. 492; 24 Ala. N. S. 439. A judgment recovered extinguishes the original debt; 1 Pick. 118; Hill & D. 392. A trust deed given to secure the payment of a bond is not affected by the rendition of a judgment on the bond, since the original debt is not thereby merged, but only the form of the evidence of the debt charged; 89 Va. 524. A debt evidenced by a note may be extinguished by a surrender of the note; 10 Cush. 169; 29 Pa. 50; 3 Ind. 337. As to the effect of payment in extinguishing a debt, see PAYMENT.

EXTINGUISHMENT OF RENT. A destruction of the rent by a union of the title to the lands and the rent in the same person. *Termes de la Ley;* Cowel; 3 Sharsw. Bla. Com. 325, note.

EXTINGUISHMENT OF WAYS. Destruction of a right of way, effected usually by a purchase of the close over which it lies by the owner of the right of way. 2 Washb. R. P.

EXTORSIVELY. A technical word used in indictments for extortion.

When a person is charged with extorsively taking, the very import of the word shows that he is not acquiring possession of his own; 4 Cox, Cr. Cas. 387. In North Carolina the crime may be charged without using this word; 1 Hayw. 406.

EXTORTION. The unlawful taking by any officer, by color of his office, of any money or thing of value that is not due to him, or more than is due, or before it is due. 4 Bla. Com. 141; 152 Pa. 554; 1 Hawk. Pl. Cr. c. 68, s. 1; 1 Russ. Cr.* 144; 2 Bish. Cr. L. 390; 14 Fed. Rep. 595.

At common law, any oppression by color of right; but technically the taking of money by an officer, by reason of his office, where none at all was due, or when it was not yet due. The obtaining of money by force or fear is not extortion; 61 Hun 571; Whart. Cr. L. 833.

In a large sense the term includes any oppression under color of right; but it is generally and constantly used in the more limited technical sense above given.

The incumbent of an office, which it was attempted to create by an unconstitutional statute, cannot be guilty of extortion, as he is neither a *de jure* nor a *de facto* officer; 31 Atl. Rep. (N. J.) 213.

To constitute extortion, there must be the receipt of money or something of value; the taking a promissory note which is void is not sufficient to make an extortion; 2 Mass. 523; 16 *id.* 93. See Bacon, Abr.; Co. Litt. 168. It is extortion and oppression for an officer to take money for the performance of his duty, even though it be in the exercise of a discretionary power; 2 Burr. 927. See 6 Cow. 661; 1 Cai. 130; 3 Pa. 183; 152 *id.* 554; 1 South. 324; 7 Pick. 279; 4 Cox, Cr. Cas. 387. See 27 Tex. App. 513; 133 N. Y. 649.

EXTRA-DOTAL PROPERTY. In Louisiana this term is used to designate that property which forms no part of the dowry of a woman, and which is also called paraphernal property. La. Civ. Code, art. 2315.

EXTRA-JUDICIUM. Extra-judicial; out of the proper cause. Judgments rendered or acts done by a court which has no jurisdiction of the subject, or where it has no jurisdiction, are said to be *extra-judicial.*

EXTRA QUATUOR MARIA (Lat. beyond four seas). Out of the realm. 1 Bla. Com. 157. See BEYOND SEA.

EXTRA SERVICES. When used with reference to officers it should be construed to embrace all services rendered by such for which no compensation is given by law. 21 Ind. 32.

EXTRA-TERRITORIALITY. That quality of laws which makes them operate beyond the territory of the power enacting them, upon certain persons or certain rights. See Wheat. Int. Law 121; 19 Law M. & R., 4th series 147.

EXTRA VIAM. Out of the way. When, in an action of trespass, the defendant pleads a right of way, the defendant may reply *extra viam*, that the trespass was committed beyond the way, or make a new assignment. 16 East 343, 349.

EXTRACT. A part of a writing. In general, an extract is not evidence, because the *whole* of the writing may explain the part extracted, so as to give it a different sense; but sometimes extracts from public books are evidence, as extracts from the registers of births, marriages, and burials, kept according to law, when the whole of the matter has been extracted which relates to the cause or matter in issue.

EXTRACTOR OF THE COURT OF SESSION. In Scotland. A salaried officer of the High Court of Justice.

EXTRADITION (Lat. *ex*, from, *traditio*, handing over). The surrender by one sovereign state to another, on its demand, of persons charged with the commission of crime within its jurisdiction, that they may be dealt with according to its laws.

The surrender of persons by one sovereign state or political community to another, on its demand, pursuant to treaty stipulations between them.

The surrender of persons by one federal state to another, on its demand, pursuant to their federal constitution and laws.

Without treaty stipulations. Public jurists are not agreed as to whether extradition, independent of treaty stipulations, is a matter of imperative duty or of discretion merely. Some have maintained the doctrine that the obligation to surrender fugitive criminals was perfect, and the duty of fulfilling it, therefore, imperative, especially where the crimes of which they were accused affected the peace and safety of the state; but others regard the obligation as imperfect in its nature, and a refusal to surrender such fugitives as affording no ground of offence. Of the former opinion are Grotius, Heineccius, Burlamaqui, Vattel, Rutherforth, Schmelzing, and Kent; the latter is maintained by Puffendorf, Voet, Martens, Klüber, Leyser, Kluit, Saalfeld, Schmaltz, Mittermeyer, Heffter, and Wheaton.

Except under the provisions of treaties, the delivery by one country to another of fugitives from justice is a matter of comity, not of obligation; 119 U. S. 407.

Foreign extradition belongs solely to the national government; 14 How. 103; 10 S. & R. 125; 119 U. S. 407. A state cannot regulate the surrender of fugitives from justice to foreign countries; 50 N. Y. 321.

Many nations have practised extradition without treaty engagements to that effect, as the result of mutual comity and convenience; others have refused. The United States has always declined to surrender criminals unless bound by treaty to do so; 1 Kent 39, n.; 1 Opin. Attys. Gen. 511; 6 *id.* 85, 431; 50 N. Y. 321; 14 Pet. 540; 12 Vt. 631; 1 Dall. 120. The existence of an extradition treaty does not prohibit the surrender by either country of a person charged with a crime not enumerated in the treaty; 36 Pac. Rep. (Cal.) 669. No state has an absolute right to demand of another the delivery of a fugitive criminal, though it has what is called an *imperfect* right, but a refusal to deliver the criminal is no just cause of war. Per Tilghman, C. J., in 10 S. & R. 125.

Under treaty stipulations. The sovereignty of the United States, as it respects foreign states, being vested by the constitution in the federal government, it appertains to it exclusively to perform the duties of extradition which, by treaties, it may assume; 14 Pet. 540; 119 U. S. 407; and, to enable the executive to discharge such duties, congress passed the act of Aug. 12, 1848, 11 Stat. L. 302. The general government alone has the power to enact laws for the extradition of foreign criminals. It possesses that power under the treaty power in the constitution; 14 Pet. 540; 50 N. Y. 321; 12 Blatch. 391. See 14 How. 103.

Treaties have been made between the United States and many foreign powers for the mutual surrender of persons charged with certain crimes. These treaties may be found in full in the United States Statutes at Large, in 2 Moore on Extradition 1072; Haswell, Treaties & Conventions, U. S. See also 17 Am. L. J. 44.

Austria-Hungary. Murder, assault with intent to commit murder, piracy, arson, robbery, forgery, counterfeiting, and embezzlement of public moneys.

Baden. Same as Austria-Hungary.

Bavaria. Same as Austria-Hungary.

Belgium. Murder, attempt to commit murder, rape, abortion, arson, bigamy, piracy, mutiny, burglary, forgery, counterfeiting, embezzlement of public moneys and also of private moneys, wilful destruction or obstruction of railroads which endangers human life, reception of articles obtained by means of any one of the above crimes.

Bremen. Same as Prussia. See *post.*

Dominican Republic. Murder, attempt to commit murder, rape, forgery, counter-

feiting, arson, robbery, intimidation, forcible entry of an inhabited house, piracy, embezzlement by public officers or by private persons.

Ecuador. Murder, arson, rape, piracy, mutiny, burglary, forgery, counterfeiting, embezzlement of public property.

France. Murder, rape, forgery, arson, embezzlement by public officers or private persons and counterfeiting.

Great Britain. Murder, manslaughter, assault with intent to commit murder, piracy, arson, robbery, forgery, counterfeiting, embezzlement, larceny, receiving money or valuables known to have been embezzled, stolen, or fraudulently obtained, fraud by a bailee, banker, agent, factor, trustee, or director of board of officers of any company made criminal by the laws of both countries, perjury, rape, abduction, child-stealing, kidnapping, house-breaking, shop-breaking, piracy, mutiny, crimes against the laws of both countries for the suppression of slavery, and slave-trading. See 14 Am. L. J. 85; 15 *id.* 224.

Hanover. Murder, assault with intent to commit murder, piracy, arson, robbery, forgery, or utterance of forged papers, counterfeiting and embezzling of public moneys.

Hawaiian Islands. Murder, piracy, arson, robbery, forgery or the utterance of forged papers.

Hayti. Murder, attempt to commit murder, piracy, rape, forgery, counterfeiting, utterance of forged papers, arson, robbery, and embezzlement by public officers or private persons.

Italy. Murder, attempt to commit murder, rape, arson, piracy, mutiny, burglary, the utterance of forged papers and counterfeiting of public, sovereign, or government acts, counterfeiting, embezzlement of public moneys, and embezzlement by private persons. See 11 Law Mag. & Rev., 4th ed. 62.

Japan. Murder, assault with intent to commit murder, counterfeiting, forgery, embezzlement of public funds, robbery, burglary, entering or breaking into offices of government or of banks, trust companies, insurance, or other companies with the intent to commit a felony, perjury, rape, arson, piracy, assault with intent to kill, and manslaughter on the high seas on board a ship bearing the flag of the demanding country, malicious destruction of or attempt to destroy railways, trams, vessels, bridges, dwellings, public edifices, or other buildings when the act endangers human life.

Luxemberg. Murder, attempt to commit murder, rape, attempt to commit rape, abortion, bigamy, arson, piracy, mutiny, burglary, forgery, counterfeiting, embezzling of public moneys, embezzling by private persons, wilful obstruction, or destruction of railroads which endangers human life, reception of articles obtained by means of any of the above crimes. An attempt against the life of the head of a foreign government or against that of any member of his family when such an attempt comprises the act either of murder, assassination, or poisoning shall not be considered a political offence or an act connected with such an offence.

Mecklenberg-Schwerin. Same as Prussia. See *post.*

Mecklenberg-Strelitz. Same as Prussia. See *post.*

Mexico. Murder, assault with intent to commit murder, mutilation, piracy, arson, rape, kidnapping, forgery, counterfeiting, embezzling of public moneys, robbery, burglary, larceny of goods of the value of $25, or more when the same is committed within the frontier states or territories of the contracting parties.

Netherlands. Murder, manslaughter, attempt to commit murder, rape, bigamy, abortion, arson, burglary, mutiny, breaking and entering public offices or the offices of banks, trust companies, insurance companies, and attempt to commit theft therein, robbery, forgery, counterfeiting, embezzling by public officers, embezzling by private persons, intentional destruction of a vessel on the high seas, kidnapping of minors, obtaining money or valuables by false devices, larceny, wilful destruction or obstruction of railroads which endangers human life.

Nicaragua. Murder, piracy, arson, rape, mutiny, burglary, robbery, forgery, counfeiting, embezzling of public money, embezzling by private persons.

North German Confederation. Same as Prussia. See *post.*

Oldenberg. Same as Prussia. See *post.*

Orange Free State. Murder, attempt to commit murder, rape, forgery, arson, robbery, forcible entry of an inhabited house, piracy, embezzling by public officers, or by private persons.

Ottoman Porte. Murder, attempt to commit murder, rape, arson, piracy, mutiny, burglary, forgery, counterfeiting, embezzling of public moneys by private persons.

Peru. Murder, abduction, rape, bigamy, arson, kidnapping, robbery, larceny, burglary, counterfeiting, embezzling of public moneys, or by private persons, fraud, bankruptcy, fraudulent barratry, mutiny, severe injuries intentionally inflicted on railroads, or to telegraph lines, or to persons by means of explosions of mines or steam boilers, piracy.

Prussia. Murder, assault with intent to commit murder, piracy, arson, robbery, forgery, utterance of forged papers, counterfeiting, embezzling of public moneys.

Salvador. Murder, attempt to commit murder, rape, arson, piracy, mutiny, burglary, robbery, forgery, counterfeiting, embezzling of public moneys and by private persons.

Schaumberg-Lippe. Same as Prussia. See *ante.*

Spain. Murder, attempt to commit murder, rape, arson, piracy, mutiny, burglary, breaking and entering offices of government or banks, trust companies or insurance companies with intent to commit felony therein, robbery, forgery or the utterance of forged papers, counterfeit-

ing, embezzling of public funds and by private persons, kidnapping, destruction or loss to a vessel caused intentionally on the high seas by persons on board the said vessel, obtaining by threats or false devices money or valuables, larceny, slave-trading. See 16 Am. L. J. 444.

Sweden and Norway. Murder, attempt to commit murder, rape, piracy, mutiny, arson, robbery, burglary, forgery, counterfeiting, embezzling by public officers.

Switzerland. Murder, attempt to commit murder, rape, forgery, or the emission of forged papers, arson, robbery, piracy, embezzling by public officers or by private persons.

Two Sicilies. Same as Italy. See *ante.*

Venezuela. Murder, attempt to commit murder, rape, forgery, counterfeiting, arson, robbery, intimidation, forcible entry of an inhabited house, piracy, embezzling by public officers or by private persons.

Wurtemberg. Same as Prussia. See *ante.*

Most of the foregoing treaties contain provisions relating to the evidence required to authorize an order of extradition; but as to this, see FUGITIVE FROM JUSTICE.

The United States has made treaties for the mutual surrender of *deserting seamen* with the following foreign states: Austria-Hungary, Belgium, Bolivia, Colombia, Denmark, Dominican Republic, Ecuador, France, German Empire, Greece, Hawaiian Islands, Hayti, Italy, Madagascar, Netherlands, Peru, Portugal, Roumania, Russia, Salvador, Spain, Sweden and Norway, Tonga.

It has also made treaties with numerous Indian tribes as nations or distinct political communities, in many of which the Indians have stipulated to surrender to the federal authorities persons accused of crime against the laws of the United States; and in some tripartite treaties they have stipulated for mutual extradition of criminals to one another. 11 Stat. L. 612, 703.

Between the several states, by art. iv. sec. ii. of the constitution of the United States, it is provided that "a person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having the jurisdiction of the crime."

The act of congress of Feb. 12, 1793, U. S. Rev. Stat. §§ 5278–9 prescribed the mode of procedure in such cases, and imposed a like duty upon the territories northwest or south of the river Ohio. See FUGITIVE FROM JUSTICE.

As to trial for a different offence. If surrendered by a foreign government, an extradited criminal can be tried only for the offence for which he was extradited; 14 Fed. Rep. 130; 26 *id.* 421; 32 *id.* 911; 13 Bush 697; 39 Ohio St. 273; 10 Tex. App. 627; 119 U. S. 407; *contra,* 8 Blatchf. 131; 13 *id.* 295; 6 Crim. L. Mag. 511; 9 Misc. Rep. 600; 81 Hun 336. See 39 Fed. Rep. 204; 28 Am. L. Rev. 568; 32 Am. L. Reg. N. S. 557; Spear, Extrad. 150; 14 Alb. L. J. 91; 28 Cent. L. J. 241; 25 *id.* 267; 19 *id.* 22; 19 L. R. A. 206.

Extradition treaties of the United States do not guarantee a fugitive an asylum in any foreign country. So far as they regulate the right of asylum at all, they limit it; 119 U. S. 436; and the laws of the United States do not recognize any right of asylum, on the part of a fugitive from justice, in any state to which he has fled; 127 U. S. 900.

Under the extradition treaty with England and Rev. Stat. §§ 5272, 5275, a person brought to this country by extradition proceedings can only be tried for the offence with which he is charged in such proceedings; if not tried, or if acquitted after trial, he shall have reasonable time to leave the country before he is arrested for any other crime previously committed; 119 U. S. 407.

As between the states of the Union, fugitives from justice have no right of asylum, in the international sense; and a fugitive who has been returned by interstate rendition may be tried for other offences than that for which his return was demanded, without violating any rights secured by the constitution or laws of the United States; 127 U. S. 700; 148 *id.* 537, aff. 90 Ga. 347; 112 N. C. 896; 135 N. Y. 536; 158 Mass. 149; 116 Mo. 505; 119 *id.* 467; 116 Ind. 51; 89 Ia. 94; 158 Mass. 149; 104 Ala. 4; 60 Wis. 587; 4 Tex. App. 645; 12 Pa. Co. Ct. R. 263; 1 Colo. App. 191; 2 Ohio N. P. 230; 3 Wash. Ty. 131; *contra,* 41 Fed. Rep. 472; 45 *id.* 471; 40 Kan. 338; 56 *id.* 690; 47 Mich. 481. In some states the courts have overruled former decisions, bringing themselves in accord with the United States supreme court; 66 N. W. Rep. (Neb.) 308, rev. 29 Neb. 135; 2 Ohio N. P. 230, rev. 48 Ohio St. 588.

As to trial for other offences, see 19 Cent. L. J. 22; 25 *id.* 267; 28 *id.* 241; 28 Am. L. Rev. 568; 26 Am. L. Reg. 241; 32 *id.* 568; 19 L. R. A. 206.

A prisoner, regularly committed for trial on criminal process of the state which is in itself regular and valid, cannot be discharged because he was brought back from another state on extradition warrants procured by false affidavits; and on that ground alone the federal courts will not release him on *habeas corpus;* 75 Fed. Rep. 821; nor is a fugitive, who has been kidnapped and brought back into the state where his offence was committed, entitled to release on *habeas corpus;* 9 B. & C. 446; 119 U. S. 436; 18 Fed. Rep. 167, aff. 110 Ill. 627; 127 U. S. 700, aff. 34 Fed. Rep. 525; 21 Iowa 467; 18 Pa. 37; 1 Bailey 283; 7 Vt. 118; *contra,* State *v.* Simmons, 39 Kan. 262. A prisoner cannot set up as a ground for discharge that he has been enticed into the state by fraudulent representations; 4 N. Y. Crim. Rep. 576; nor that the extradition proceedings in the other state were irregular; 45 Fed. Rep. 352; 52 Vt. 609.

The constitutional provision for interstate rendition warrants a surrender after conviction; 7 N. Y. Crim. Rep. 406; but after serving his sentence the convict cannot be surrendered under a requisition from

another state until he has had reasonable time to return to the state from which he was extradited; *id.*

Extradition proceedings may be made the basis of a suit for malicious prosecution; 16 Fed. Rep. 93.

As to questions of practice relating to this subject, see FUGITIVE FROM JUSTICE; also, Hurd, Hab. Corp. 592.

See Spear; Moore, Extrad.; Rorer, Inter-State Law; 18 Alb. L. J. 146; 10 Am. L. Rev. 617; 28 *id.* 568; 35 Cent. Law J. 301; paper by H. D. Hyde, Report Am. Bar Assn. for 1880; Hawley, Interst. Extrad.; Hawley, Internat. Extrad.; 35 Am. L. Reg. N. S. 749; St. Louis Law Library catalogue, list of authorities *h. t.*

EXTRA-JUDICIAL. That which does not belong to the judge or his jurisdiction, notwithstanding which he takes cognizance of it. Extra-judicial judgments and acts are absolutely void. See CORAM NON JUDICE; Merlin, *Répert. Excès de Pouvoir.*

EXTRANEUS. In Old English Law. One foreign born; a foreigner. 7 Rep. 16.

In Roman Law. An heir not born in the family of the testator. Those of a foreign state. The same as *alienus.* Vicat, Voc. Jur.; Du Cange.

EXTRAORDINARY. Beyond or out of the common order or rule; not usual, regular, or of a customary kind; not ordinary; remarkable; uncommon; rare. 29 Abb. N. C. 154. 19 Fed. Rep. 103.

EXTRA-TERRITORIALITY. The extra-territorial operation of laws; *i. e.*, their operation upon persons, rights, or statutes existing beyond the limits of the state, but which are still amenable to its laws.

EXTRA-TERRITORIUM. Beyond or outside of the territorial limits of a state. 6 Binn. 353.

EXTRAVAGANTES. In Canon Law. The name given to the constitutions of the popes posterior to the Clementines.

They are thus called, *quasi vagantes extra corpus juris*, to express that they were out of the canonical law, which at first contained only the decrees of Gratian: afterwards the Decretals of Gregory IX., the Sexte of Boniface VIII., the Clementines, and at last the Extravagantes, were added to it. There are the Extravagantes of John XXII., and the common Extravagantes. The first contain twenty epistles, decretals, or constitutions of that pope, divided under fifteen titles, without any subdivision into books. The others are epistles, decretals, or constitutions of the popes who occupied the holy see either before or after John XXII. They are divided into books, like the decretals.

EXTREMIS (Lat.). When a person is sick beyond the hope of recovery, and near death, he is said to be *in extremis.*

A will made in this condition, if made without undue influence, by a person of sound mind, is valid. As to the effect of declarations of persons *in extremis*, see DYING DECLARATIONS; DECLARATIONS.

EY. A watery place; water. Co. Litt. 6.

EYE-WITNESS. One who saw the act or fact to which he testifies. When an eye-witness testifies, and is a man of intelligence and integrity, much reliance must be placed on his testimony; for he has the means of making known the truth.

EYOTT. A small island arising in a river. Fleta, l. 3, c. 2, s. b; Bracton, l. 2, c. 2. See ISLAND.

EYRE. A journey; a court of itinerant justices. In old English law applied to the judges who travelled in circuit to hold courts in the different counties. See JUSTICES IN EYRE.

EYRER. To go about. See EYRE.

F.

F. The sixth letter of the alphabet. A fighter or maker of frays, if he had no ears, and a felon on being admitted to clergy, was to be branded in the cheek with this letter. Cowel; Jacob. Those who had been guilty of falsity were to be so marked. 2 Reeve, Hist. Eng. L. 392.

F. O. B. Free on board. A term frequently inserted, in England, in contracts for the sale of goods to be conveyed by ship, signifying that the buyer will be responsible for the cost of shipment. In London, when goods are so sold, the buyer is considered as the shipper and the goods are shipped at his risk; 5 Moo. P. C. 165; 3 Hurlst. & N. 484; 4 *id.* 822; 29 L. J. C. P. 213; 42 N. E. Rep. (Ill.) 147.

FABRIC LANDS. In English Law. Lands given for the repair, rebuilding, or maintenance of cathedrals or other churches.

It was the custom, says Cowel, for almost every one to give by will more or less to the *fabric* of the cathedral or parish church where he lived. These lands so given were called fabric lands, because given *ad fabricam ecclesiæ reparandam* (for repairing the fabric of the church). Called by the Saxons *timber-lands.* Cowel; Spelman, Gloss.

FABRICARE (Lat.). To make. Used of an unlawful making, as counterfeiting coin; 1 Salk. 342, and also lawful coining.

FABRICATE. To invent; to devise falsely. Invent is sometimes used in a bad sense, but fabricate never in any other. To

fabricate a story implies that it is so contrary to probability as to require the skill of a workman to induce belief in it. Crabbe, Syn.

The word implies fraud or falsehood; a false or fraudulent concoction, knowing it to be wrong. L. R. 10 Q. B. 162.

FABULA. In old European law, a contract or covenant. Also in the laws of the Lombards and Visigoths, a nuptial contract; a will. Burrill.

FACE. The outward appearance or aspect of a thing.

The words of a written paper in their apparent or obvious meaning, as, the face of a note, bill, bond, check, draft, judgment, record, or contract, which titles see. The face of a judgment is the sum for which it was rendered, exclusive of interest. 32 Ia. 265.

FACIAS (Lat. *facere*, to make, to do). That you cause. Occurring in the phrases *scire facias* (that you cause to know), *fieri facias* (that you cause to be made), etc. Used also in the phrases *Do ut facias* (I give that you may do), *Facio ut facias* (I do that you may do), two of the four divisions of considerations made by Blackstone, 2 Com. 444.

FACILITIES. A name formerly given to certain notes of some of the banks in the state of Connecticut, which were made payable in two years after the close of the war of 1812. 14 Mass. 322.

This word has been the subject of much discussion in connection with the English Traffic Act and the act of congress creating the interstate commerce commission. It has been held to include all works necessary for the accommodation of traffic and safety of passengers; 3 Nev. & Mac. 48; designation of the hour and speed of connecting trains; 2 El. & Bl. 530; accommodation for receiving and delivering freight where there was no station before, if within the power of the company, and if demanded by the public convenience; *id.* 306; or even to provide a new station; *id.* 331.

The statutory obligation to afford due and reasonable facilities is not limited by the convenience of the company; 3 Nev. & Mac. 37; or the question of remuneration to the company; 7 *id.* 72, 83; nor is it to be interfered with by disputes between different companies; 3 *id.* 540. It cannot be avoided because the company, by its own act, has rendered the performance of such obligation more difficult; [1891] 1 Q. B. 440. Facilities must be of a more or less public character, and not designed to remedy a mere private grievance; 1 Nev. & Mac. 38, 56, 58, 61.

In a very leading case the word was held to include structural alterations; per Lord Selborne, L. C. (with whom concurred Coleridge, C. J., Brett, L. J., dissenting) in 6 Q. B. D. 506 (reversing 5 Q. B. D. 220, in which the decision was by Cockburn, C. J., and Manisty, L. J., dissenting).

Land owned by a railroad company may be rented for storage of coal without liability for undue preference, storage not being included in the facilities required by the English act; L. R. 5 C. P. 622; s. c. 1 Nev. & Mac. 166.

By the second clause of the third section of the act of congress creating the Inter-State Commerce Commission all railroad companies are required "to afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines.—This (it was held by the Circuit Court for Kentucky, per Mr. Justice Jackson) leaves the carriers where it finds them and imposes no duty upon the railroad companies, either to the public or to other lines, to make new stations, yards or depots, even though such would be convenient for the public or other carriers; 37 Fed. Rep. 567; and when a new railroad makes a physical connection with an old one, at a point other than the regular yard or depot, the old company is not compelled to provide the same or equal facilities at the point of contact which it had originally provided at its regular yards and depots; *id.*; the provision was not enacted for the benefit of carriers but of the commerce transported; *id.* In this case the Inter-State Commerce Commission made an order requiring the connection; 2 Int. Com. Rep. —; but on application to the circuit court to enforce the order the court considered it was not warranted by the act and refused to enforce it.

Under this clause, railroad companies are not required to furnish competing connecting carriers with equal facilities, for the interchange of traffic, when this involves the use of its tracks by such carriers; it may permit such use by one carrier to the exclusion of others; 59 Fed. Rep. 400; nor is the clause violated by receiving and forwarding without prepayment of freight or car mileage, cars of other companies, containing goods coming from one locality and under like circumstances, refusing goods from a different locality; 61 Fed. Rep. 158, affg. 51 *id.* 465.

A state constitution prohibiting discrimination in charges and facilities does not require a company to make provision for joint business with a new line crossing it, similar to those already made with a rival line at another near point; 110 U. S. 667; but railroad companies may be required to furnish facilities at, and prevented from abandoning stations already established; 37 Conn. 153; 42 *id.* 56; 104 U. S. 1; 63 Me. 269; 103 Mass. 254; 19 Neb. 476. The mere failure of a common carrier to provide facilities for the shipment of freight does not constitute a legal ground for the recovery of damages; 61 Ark. 560; 35 S. W. Rep. (Ky.) 626; 2 Mo. App. Rep. 941. See COMMON CARRIER.

The power of the commission to regulate the accessorial facilities is held by the circuit court of appeals to be confined to mere regulation, and cannot be used to invade rights of property by entering the domain of deprivation, construction, and recon-

struction of properties to carry out the proposed regulation ; 74 Fed. Rep. 803.

See, generally, as to the construction of the word in the English Traffic Act, Darlington, Ry. Rates, Ch. III. See INTERSTATE COMMERCE ; RATES.

FACILITY. In Scotch Law. A degree of mental weakness short of idiocy but justifying legal intervention.

In order to support the reduction of the deed of a facile person, there must be evidence of circumvention and of imposition in the transaction, as well as facility in the party and lesion. But where lesion in the deed and facility in the grantor concur, the most slender circumstances of fraud or circumvention are sufficient to set it aside ; Bell, Dict.

FACIO UT DES (Lat. I do that you may give). An expression applied in the civil law to the consideration of that species of contract by which a person agrees to perform anything for a price either specifically mentioned or left to the determination of the law to set a value on it ; as, when a servant hires himself to his master for certain wages or an agreed sum of money ; 2 Bla. Com. 445. See CONSIDERATION.

FACIO UT FACIAS (Lat. I do that you may do). An expression used in the civil law to denote the consideration of that species of contract by which I agree with a man to do his work for him if he will do mine for me ; or if two persons agree to marry together, or to do any other positive acts on both sides ; or it may be to forbear on one side in consideration of something done on the other. 2 Bla. Com. 444. See CONSIDERATION.

FACSIMILE. An exact copy or accurate imitation of an original instrument.

In England, where the construction of a will may be affected by the appearance of the original paper, the court will order the probate to pass in *facsimile* as it may possibly help to show the meaning of the testator ; 1 Wms. Ex., 7th ed. 331, 386, 566, See PROBATE.

FACT (Lat. *factum*). An action ; a thing done. A circumstance.

Fact is much used in modern times in distinction from law. Thus, in every case to be tried there are facts to be shown to exist to which the law is to be applied. If law is, as it is said to be, a rule of action, the fact is the action shown to have been done, and which should have been done in accordance with the rule. Fact, in this sense, means a thing done or existing. It has been a frequent subject of debate whether certain words and phrases imply questions of fact, or of law, or both, or are conclusions of law. A useful collection of decisions will be found in Ram on Facts, 3d Am. ed. 21.

Material facts are those which are essential to the right of action or defence. See 30 Mo. 68 ; 40 N. H. 338.

Immaterial facts are those which are not essential to the right of action or defence. Material facts must be shown to exist ; immaterial facts need not. As to what are questions of law for the court and questions of fact for the jury, see JURY ; LIBEL. Wells, Law and Fact. As to pleading material facts, see Gould, Pl. c. 3, § 28 ; COLLATERAL FACTS.

Facts constituting a cause of action are those facts which the evidence upon the trial will prove, and not the evidence which will be required to prove the existence of such facts. 1 Dak. 403.

FACTA ARMORUM. Feats of arms ; jousts ; tournaments, etc. Cowel.

FACTIO TESTAMENTI (Lat.). **In Civil Law.** The power of making a will, including right and capacity. Also, the power of receiving under a will. Vicat, Voc. Jur.

FACTOR. An agent employed to sell goods or merchandise consigned or delivered to him, by or for his principal, for a compensation, commonly called factorage or commission. Pal. Ag. 13 ; Sto. Ag. § 33 ; Com. Dig. *Merchant*, B ; Malynes, Lex Merc. 81 ; Beawes, Lex Merc. 44 ; 3 Chit. Com. L. 193 ; 2 Kent 622 ; 1 Bell, Comm. 385, § 408 ; 2 B. & Ald. 143.

An agent for the sale of goods in his possession or consigned to him. Lawson, R. & Rem. § 227.

When the agent accompanies the ship, taking a cargo aboard, and it is consigned to him for sale, and he is to purchase a return cargo out of the proceeds, such agent is properly called a factor ; he is, however, usually known by the name of a supercargo (*q. v.*). Beawes, Lex Merc. 44 ; Livermore, Ag. 69 ; 1 Domat, b. 1, t. 16, § 3, art. 2.

A factor differs from a broker in some important particulars : namely, he may buy and sell for his principal in his own name, as well as in the name of his principal ; on the contrary, a broker acting as such should buy and sell in the name of his principal ; 3 Chitty, Com. Law 193, 210, 541 ; 2 B. & Ald. 143 ; 3 Kent 622 ; 23 Wall. 321 ; 11 Mart. La. 331. Again, a factor is intrusted with possession, management, disposal, and control of the goods to be bought and sold, and has a special property and a lien on them ; the broker, on the contrary, has usually no such possession, management, control, or disposal of the goods, nor any such special property or lien ; Paley, Ag. 13 ; 1 Bell, Com. 385. The business of factors in the United States is usually done by commission merchants, who are known by that name, and the term factor is but little used ; 1 Pars. Contr. 78. The term factor, however, is largely used in the Southern States in the cotton business, and in a different sense from commission merchant ; 16 Fed. Rep. 516. He not only sells cotton, but makes advances to the merchant or planter, in cash or goods, to be repaid when the crop comes in. He thus has a lien upon the crop before it is shipped to him. In Alabama the term "commission merchant" as used in the revenue laws is synonymous with "factor" ; 50 Ala. 154.

A domestic factor is one who resides in the same country with his principal.

By the usages of trade, or intention of law, when *domestic* factors are employed in the ordinary business of buying and selling goods, it is presumed that a reciprocal credit among the principal and the agent and third persons has been given. When a purchase has been made by such a factor, he, as well as his principal, is deemed liable for the debt ; and in case of a sale the buyer is responsible both to the factor and principal for the purchase-money ; but this presumption may be rebutted by proof of exclusive credit ; Story, Ag. § 267, 291, 293 ; Paley, Ag. 243, 371 ; 9 B. & C. 78 ; 15 East 62.

A foreign factor is one who resides in a different country from his principal. 1 Term 112 ; 4 Maule & S. 576.

Foreign factors are held personally liable upon all contracts made by them for their employers, whether they describe themselves in the contract as agents or not. In such cases the presumption is that the credit is given exclusively to the factor. But this presumption may be rebutted by proof of a contrary agreement; Story, Ag. § 268; Mech. Ag. 1051; Bull. N. P. 130; 1 B. & P. 398; 9 B. & C. 78.

His duties. He is required to use reasonable skill and ordinary diligence in his vocation; 1 Ventr. 121; 66 Hun 633; 104 Ala. 662. If for any reason not tortious, he delays selling the goods consigned to him, he is not liable for a subsequent loss occurring through an act of God; 44 Ill. App. 527. He is bound to obey his instructions; 3 N. Y. 62; 77 Ga. 64; 5 C. B. 895; but when he has none he may and ought to act according to the general usages of trade; 14 Pet. 479; 7 Taunt. 164; 5 Day 556; 3 Caines 226; 1 Story. 43; to sell for cash when that is usual, or to give credit on sales when that is customary; 51 N. H. 56. He is bound to render a just account to his principal, and to pay him the moneys he may receive for him. The mere fact that one sells products as a factor, does not impose upon him the burden of proving due diligence in the sale; 111 N. C. 458.

His rights. He has the right to sell the goods in his own name; and, when untrammelled by instructions, he may sell them at such times and for such prices as, in the exercise of a just discretion, he may think best for his employer; 3 C. B. 380; 63 N. C. 542; but he must obey instructions if given; 5 Dill. 438; 31 N. Y. 676; but when the instructions are to wait until a certain law has produced its effect on the market, a certain discretion as to time may be exercised; 21 *id.* 386. He may sell on credit when such is the usage of the market; 1 Sto. 43; but if he sell on change he is held to a high degree of diligence to ascertain the solvency of the purchaser; 75 Ill. 464. In the absence of instructions he may give a warranty; 1 Wall, 359; and he may insure the goods of the principal in his own name; 120 Mass. 449. He is, for many purposes, between himself and third persons, to be considered as the owner of the goods. He may, therefore, recover the price of goods sold by him in his own name, and, consequently, he may receive payment and give receipts, and discharge the debtor, unless, indeed, notice has been given by the principal to the debtor not to pay. But the title to goods consigned to a factor to be sold remains in the principal until sold, and may not be sold on execution to pay debts of the factor; 38 W. Va. 158. He has a lien on the goods for advances made by him, and for his commissions; but he is not to be considered as the owner, beyond the extent of his lien; *id.*; 63 N. W. Rep. (Minn.) 720; 23 Wall. 35. He has no right to barter the goods of his principal; 65 Mo. 89; 44 Wis. 265; nor to pledge them for the purpose of raising money for himself, nor to secure a debt he may owe; 13 Mass. 178; 59 Ill. App. 149; 1 M'Cord 1; 1 Mas. 440; 5 Johns. Ch. 429; 73 Pa. 85; L. R. 10 C. P. 354. See 3 Den. 472; 13 E. L. & Eq. 261; FACTOR'S ACTS. But he may pledge them for advances made to his principal, or for the purpose of raising money for him, or in order to reimburse himself to the amount of his own lien; 2 Kent 625; 4 Johns. 103; 7 East 5; Story, Bailm. § 325; Edw. Bailm. 194; 10 Wall. 141. Another exception to the general rule that a factor cannot pledge the goods of his principal is, that he may raise money by pledging the goods for the payment of duties or any other charge or purpose allowed or justified by the usages of the trade; 2 Gall. 13; 6 S. & R. 386; 3 Esp. 182. He has a lien upon the goods of his principal in his possession, to protect himself against unpaid drafts drawn and accepted in the course of the agency; 25 S. W. Rep. (Mo.) 346; and such lien is personal to the factor; 38 W. Va. 158. Where a factor disobeys instructions in selling grain which he has bought for his principal, he thereby loses his lien on money deposited with him as security; 40 Ill. 313; 114 *id.* 96.

It may be laid down as a general rule that when the property remitted by the principal, or acquired for him by his order, is found distinguishable in the hands of the factor, capable of being traced by a clear and connected chain of identity, in no one link of it degenerating from a specific trust into a general debt, the creditors of the factor who has become bankrupt have no right to the specific property; 2 Stra. 1182; 3 Maule & S. 562; even where it is money in the factor's hands; 2 Burr. 1369; 14 N. H. 38; 2 Dall. 60; 2 Pick. 86; 5 *id.* 7; 63 Conn. 198. He may sell them to reimburse advances; 14 Pet. 479; unless restrained by an agreement with his principal, but if he has agreed to hold them for a given time he is bound to do so; 16 Fed. Rep. 516. And where the factor dies insolvent, before remitting to the shipper, the latter is entitled to satisfaction out of the proceeds of the sale or deposit in bank, as against the claim of the bank on an unmatured note; 70 Hun 90. And see 1 B. & P. 539, 648, for the rule as to promissory notes. Stock ordered of a broker on margin contracts belongs not to the broker, but to the customers, and may be redeemed by them from an assignee of the broker for benefit of creditors; 63 Conn. 198.

But the rights of third persons dealing *bona fide* with the factor as a principal, where the name of the principal is sunk entirely, are to be protected; 7 Term 360; 3 Bingh. 139; 6 Maule & S. 14.

See, generally, 58 Am. Dec. 156, note; Lawson, Rights & Rem. § 227–230; 3 Wait, Act. & Def. 289; 2 Sm. L. Cas. 118; 1 Am. L. Cas. 788; 16 Fed. Rep. 516, note; LIEN; AGENT; BROKER.

FACTOR'S ACTS. A name given to legislative enactments in England and the United States designed to mitigate the hardships of the common-law rule governing dealings with factors, and especially with respect to pledges made by them of the goods of the principal. The object of

the English legislation known under this general designation is the protection of persons dealing with those having possession of goods or documents representing the title thereto. The first acts were 4 Geo. IV. c. 84 and 6 Geo. IV. c. 94, and these were confined to persons entrusted with documents of title, not with the goods themselves. This defect was remedied by 5 & 6 Vict. c. 39, of which the Ontario act is merely a copy; R. S. Ont. c. 121. The subject was again dealt with in 40 & 41 Vict. c. 39, under which many of the decisions under the former acts were practically set aside. As to the provisions of the English acts and decisions thereunder, see 5 Can. L. T. 145.

In the United States the rule of the common law that a factor cannot pledge the property of his principal has been largely altered by statute in many of the states, founded generally it is said upon the statutes of 6 Geo. IV. c. 94; 3 Wait, Act. & Def. 300. It is necessary to have reference to the legislation or absence of it in any particular state, to ascertain the law applicable to a particular case and to compare it with the English acts in order to determine the applicability of English decisions. See, as to legislation in this country, 58 Am. Dec. 165, note. See also FACTOR.

FACTORAGE. The wages or allowances paid to a factor for his services; it is more usual to call this commissions.

FACTORIZING PROCESS. A process for attaching effects of the debtor in the hands of a third party. It is substantially the same process known as the *garnishee process*, *trustee process*, process by *foreign attachment*; Drake, Attach. § 451.

FACTORY. A building or group of buildings appropriated to the manufacture of goods, including the machinery necessary to produce the goods, and the engine or other power by which the machinery is propelled; the place where workers are employed in fabricating goods, wares, or utensils. Cent. Dict.

All buildings and premises wherein or within the close or curtilage of which steam, water, or any mechanical power is used to move or work any machinery employed in preparing, manufacturing, or finishing cotton, etc. 7 Vict. c. 15, sect. 73. By subsequent acts, this definition has been extended to various other manufacturing places; Moz. & W. L. Dict. The term includes the fixed machinery when used in a policy of insurance; 8 Ind. 479.

In Scotch Law.—A contract which partakes of a mandate and *locatio ad operandum*, and which is in the English and American law books discussed under the title of Principal and Agent. Bell, Comm. 259.

FACTORY ACTS. Laws enacted for the purpose of regulating the hours of work, and the sanitary condition, and preserving the health and morals, of the employes, and promoting the education of young persons employed at such labor.

The statute of 1802 (42 Geo. III. c. 73) was the first to be passed, and was followed by those of 1833, and others following at brief intervals up to 1883. For a detailed account of the English acts, see International Cyclopedia, *h. t.*

In this country statutes have been passed from time to time in most if not all the states, having in view the same reformatory purpose or kindred ones, as the English Factory Act of 1833 and the others of like character which followed it. The right of the states to pass such acts is sustained under the police power and the principles by which the validity of any such legislation is to be tested is thus stated by the most recent writer on the subject of labor law: "Such statutes are doubtless constitutional in any case where the reason of the regulation is based upon consideration of the public health, safety, and comfort, or the health and morals of the operatives, and is apparent on the face of the statute, but it will not do, under the guise of police regulation, to pass statutes of which the real purpose is different, even though they be in the interest of any particular trade, or otherwise desirable. Such regulations or reformations can only be attained by combination among the workmen themselves to see that they are complied with." Stimson, Lab. L. of U. S. § 45.

The most important subjects covered by this legislation are summarized by the same author: "The preservation of the health of employes in factories by the removal of excessive dust, or for securing pure air, or requiring fans or other special devices to remove noxious dust or vapors peculiar to the trade; statutes requiring guards to be placed about dangerous machinery, belting, elevators, wells, airshafts, etc.; statutes providing for fire-escapes, adequate staircases with rails, rubber treads, etc.; doors opening outwardly, etc.; statutes providing against injury to the operatives by the machinery used, such as laws prohibiting the machinery to be cleaned while in motion, or from being cleaned by any woman or minor; laws requiring mechanical belt-shifters, etc., or connection by bells, tubes, etc., between any room where machinery is used and the engine-room; laws aimed at overcrowding in factories, and at the general comfort of the operatives; and many special laws in railways, mines, and other special occupations, such as the laws requiring warning guards to be placed before bridges upon railroads, requiring the frogs and switches or other appliances of the track to be in good condition and properly protected by timber or otherwise, providing automatic couplings to both freight and passenger trains, and, in building trades, providing for railings upon scaffolds and for suitable scaffolds generally." *Id.*

There are in many of the states restrictions upon the employment of women and children by limiting the number of hours of labor permitted and providing for oversight of their treatment. For details of such legislation in various states, see *id.* § 13. It is held constitutional as to minors without doubt, resting on the theory that the state is *parens patriæ*, and as such entitled to the control of those who are unable to contract for themselves. The effort is made to rest it on the same ground as to women; 120 Mass. 383 (in which state there is an unusual and extensive constitutional power of legislation "for the good and welfare," of the people); but elsewhere the constitutionality of such acts has been lately denied on the ground that it was class legislation; 155 Ill. 98. It is now earnestly contended that under the modern view of women under the law, as equally capable with men of contracting, and often of voting and holding office, any effort to restrict the freedom of women to contract cannot be sustained; Stimson, Lab. L. § 13. But while we may admit the full force of the argument against this class of legislation based upon the changed legal relations of women, it may nevertheless be doubted whether it does not to some extent, at least,

miss the real underlying principle of such legislation. It is intended for the protection of women and the amelioration of their condition, and is more or less a recognition of the different physical constitution of woman and her peculiar and important relation to the community. Such considerations rest upon conditions which are not changed by any increase of her property rights or political privileges, and, so far as they may have been the basis of these restrictive regulations, they exist and operate with undiminished force. They are apparently overlooked by courts and text writers, including the author quoted, but must undoubtedly be reckoned with in any attempt to deal properly either with the validity or the policy of the acts in question. It is at least fairly to be considered whether they are not quite sufficient to bring the subject of the *protection*, not the *restriction*, of women fairly within the scope of the police power as determined by the criterion above quoted, viz.: considerations of public health, safety, and comfort, or the health and morals of the operatives. Every one of these things would remain to be affected by regulations for promoting the welfare of women, even if they were absolutely unshackled by the law as to other classes of rights. The underlying principle or *motif* of such legislation is restraint of the employer rather than of the employé.

FACTORY PRICES. The prices at which goods may be bought at factories, as distinguished from the prices of those bought in the market, after they have passed into the hands of third parties or shopkeepers. 2 Mas. 90.

FACTUM. A deed; a man's own act and deed. A culpable or criminal act; an act not founded in law. A deed; a written instrument under seal: called, also, *charta*. Spelman, Gloss.; 2 Bla. Com. 295.

The difference between *factum* and *charta* originally would seem to have been that *factum* denoted the thing done, and *charta* the evidence thereof; Co. Litt. 9 *b*. When a man denies by his plea that he made a deed on which he is sued, he pleads *non est factum* (it is not his deed).

In wills, *factum* seems to retain an active signification and to denote a making. See 11 How. 358.

A fact. *Factum probandum* (the fact to be proved). 1 Greenl. Ev. § 13.

A portion of land granted to a farmer; otherwise called a hide, *bovata*, etc. Spelm.

In French Law. A memoir which contains concisely set down the fact on which a contest has happened, the means on which a party founds his pretensions, with the refutation of the means of the adverse party. See Vicat, Voc. Jur.

FACULTY. In Canon Law. A license; an authority. For example, the ordinary, having the disposal of all seats in the nave of a church, may grant this power, which when it is delegated is called a faculty, to another.

Faculties are of two kinds: first, when the grant is to a man and his heirs in gross; second, when it is to a person and his heirs as appurtenant to a house which he holds in the parish; 1 Term 429, 432; 12 Co. 106.

In Scotch Law. Ability or power. The term faculty is more properly applied to a power founded on the consent of the party from whom it springs, and not founded on property; Kames, Eq. 504.

FACULTY OF A COLLEGE. The body of instructors or professors whose duties are to attend to the educational business, course of studies, and discipline of the college, as distinguished from the trustees in whom are vested the title to the property and management of the financial concerns of the institution.

FACULTY OF ADVOCATES. See ADVOCATES.

FAESTING-MEN. Approved men who were strong-armed. Subsequently the word seems to have been used in the sense of *rich*, and hence it probably passed into its later and common meaning of pledges or bondsmen, which, by Saxon custom, were bound to answer for each other's good behavior. Cowel; Du Cange.

FAGGOT. A badge, worn in medieval times by persons who had recanted their heretical opinions, designed to show what they considered they had merited but had escaped. Cowel.

FAGGOT VOTE. A term applied to votes manufactured by nominally transferring land to persons otherwise disqualified from voting for members of parliament.

FAIDA. In Saxon Law. Great and open hostility which arose on account of some murder committed. The term was applied only to that deadly enmity in deference to which, among the Germans and other northern nations, if murder was committed, punishment might be demanded from any one of kin to the murderer by any one of the kin of the murdered man. Du Cange; Spelman, Gloss.

FAIL. To leave unperformed; to omit; to neglect, as distinguished from refuse, which latter involves an act of the will, while the former may be an act of inevitable necessity; 9 Wheat. 344.

FAILLITE (Fr.). **In French Law.** Bankruptcy; failure. The condition of a merchant who ceases to pay his debts. 3 Massè, *Droit Comm.* 171; Guyot, *Répert.*

FAILURE. In legal parlance, the neglect of any duty may be a failure, and the commission of any fault a delinquency. When applied to a mercantile concern, it means an inability to meet its debts from insolvency. It is synonymous with insolvency. 1 Rice 126.

FAILURE OF CONSIDERATION. See CONSIDERATION.

FAILURE OF EVIDENCE. A failure to offer proof, either positive or inferential, to establish one or more of the many

facts, the establishment of all of which is indispensable to the finding of the issue for the plaintiff. 7 Gill. & J. 28.

FAILURE OF ISSUE. A want of issue to take an estate limited over by an executory devise.

Failure of issue is definite or indefinite. When the precise time for the failure of issue is fixed by the will, as in the case of a devise to Peter, but, if he dies without issue living *at the time of his death*, then to another, this is a failure of issue *definite*. An *indefinite* failure of issue is a general failure whenever it may happen, without fixing any time, or a certain and definite period, within which it must happen. 4 Kent 275. An executory devise in fee, with remainder over, to take effect on an indefinite failure of issue is void for remoteness, and hence courts are astute to devise some construction which shall restrain the failure of issue to the term of limitation allowed; *id.* 276, n. See 40 Pa. 18; 2 Redf. Wills 276, n.; Beach, Wills 374; DYING WITHOUT ISSUE; EN VENTRE SA MERE; SHELLEY'S CASE, RULE IN.

FAILURE OF JUSTICE. An expression used to denote the deprivation of a right or the loss of reparation for an injury as the result of the lack or inadequacy of a legal remedy. It is also colloquially applied to the miscarriage of justice which occurs when the result of a trial is so palpably wrong as to shock the moral sense of the community.

FAILURE OF RECORD. The neglect to produce the record after having pleaded it. When a defendant pleads a matter and offers to prove it by the record, and the plaintiff pleads *nul tiel record*, a day is given to the defendant to bring in the record; if he fails to do so, he is said to fail *of his record*, and, there being a *failure of record* the plaintiff is entitled to judgment. *Termes de la Ley.* See the form of entering it; 1 Wms. Saund. 92, n. 3.

FAILURE OF TITLE. The entire or partial loss of title suffered by a grantee or one who has contracted to purchase property, resulting from failure or inability of the grantor or vendor to pass a satisfactory title.

FAILURE OF TRUST. The lapse or inability to execute a trust, whether from the legal insufficiency or defective execution of the instrument creating it, the uncertainty of the object, or the lack of a person to take as *cestui que trust*. It is a doctrine of equity that a trust shall not fail for want of a trustee. See TRUST.

FAINT PLEADER. A false, fraudulent, or collusory manner of pleading, to the deception of a third person.

FAIR. A public mart or place of buying or selling. 1 Bla. Com. 274. A greater species of market, recurring at more distant intervals.

Though etymologically signifying a market for buying and selling exhibited articles, it includes a place for the exhibition of agricultural and mechanical products. 48 Ohio St. 509.

A fair is usually attended by a greater concourse of people than a market, for the amusement of whom various exhibitions are gotten up. McCulloch, Comm. Dict.; Wharton, Dict.

A solemn or greater sort of market, granted to any town by privilege, for the more speedy and commodious provision of such things as the subject needeth, or the utterance of such things as we abound in above our own uses and occasions. Cowel; Cunningham, Law Dict. A privileged market.

A fair is a franchise which is obtained by a grant from the crown. 2d Inst. 220; 3 Mod. 123; 1 Ld. Raym. 341; 2 Saund. 172; 1 Rolle, Abr. 106; Tomlin; Cunningham, Law Dict.

In some of the United States fairs are recognized and regulated by statute.

FAIR ABRIDGMENT. See COPYRIGHT.

FAIR CRITICISM. See CRITICISM.

FAIR KNOWLEDGE or SKILL. A reasonable degree of knowledge or measure of skill. 95 Ind. 382.

FAIR-PLAY MEN. A local irregular tribunal which at one time existed in Pennsylvania.

About the year 1769 there was a tract of country in Pennsylvania, situate between Lycoming creek and Pine creek, in which the Proprietaries prohibited the making of surveys, as it was doubtful whether it had or had not been ceded by the Indians. Although settlements were forbidden, yet adventurers settled themselves there. Being without the pale of ordinary authorities, the inhabitants annually elected a tribunal, in rotation, of three of their number, whom they denominated *fair-play men*, who had authority to decide all disputes as to boundaries. Their decisions were final, and enforced by the whole community *en masse*. Their decisions are said to have been just and equitable. 2 Smith, Pa. Laws 195; Sergeant, Land Laws 77.

FAIR PLEADER. The name of a writ given by the statute of Marlebridge, 52 Hen. III. c. 11. See BEAU PLEADER.

FAIR PREPONDERANCE. Of evidence, a preponderance which is apparent upon fair consideration. 29 Minn. 225; 63 Ia. 466; 54 Conn. 274; 86 Pa. 286.

FAIR SALE. A sale conducted with fairness as respects the rights of all parties affected. 24 Minn 419. A sale at a price sufficient to warrant confirmation or approval when it is required. See SALE.

FAIR VALUE. In a contract by a city to purchase a waterworks plant at "fair and equitable value, the amount is to be determined not by capitalization of the earnings nor limited to the cost of reproducing the plant, but allowance should be made for the additional value created by connection with and supply of buildings, although the company did not own the connections. 10 C. C. A. 653; s. c. 62 Fed. Rep. 863.

FAIRLY. Reasonably; justly; equitably. It is not synonymous with "truly," and the latter should not be substituted for it in a commissioner's oath to take testimony fairly. Language may be "truly" yet unfairly reported, and it may be fairly reported, yet not in accordance with strict truth; 17 N. J. Eq. 234; but it may be deemed synonymous with "equitably"; 41 Ala. 40. "Fairly merchantable" conveys the idea of mediocrity in quality, or something just above it; 74 Me. 479.

FAIT. Anything done.

A deed lawfully executed. Comyns, Dig. *Fait.*

Femme de fait. A wife *de facto.*

FAIT JURIDIQUE. In French Law. A judicial fact. One of the factors or elements constitutive of an obligation.

FAITH. A term used in the law only in connection with the adjectives good and bad, as expressing the belief, intent, or purpose with which a transaction has been entered into or completed. See GOOD FAITH.

FAITH AND CREDIT. See FOREIGN JUDGMENTS.

FAITHFUL. As respects temporal affairs, diligently, and without unnecessary delay; but it does not include the idea of impartiality. 16 N. J. L. 72.

FAITOURS. Idle persons; idle livers; vagabonds. *Termes de la Ley;* Cowel; Blount; Cunningham, Law Dict.

FAKIR. A term applied among the Mohammedans to a kind of religious ascetic or beggar, whose claim is that he "is in need of mercy, and poor in the sight of God, rather than in need of worldly assistance." Hughes, Dict. of Islam. Sometimes spelled *Faqueer* or *Fakeer.*

FALCARE (Lat.). To cut or mow down. *Falcare prata,* to cut or mow down grass in meadows *hayed* (laid in for hay), was a customary service for the lord by his inferior tenants. Kennett, Gloss.

Falcator. The tenant performing the service.

Falcatura. A day's mowing. *Falcatura una.* Once mowing the grass.

Falcatio. A mowing.

Falcata. That which was mowed. Kennett, Gloss.; Cowel; Jacobs.

FALCIDIA. In Spanish Law. The fourth portion of an inheritance, which legally belongs to the heir, and for the protection of which he has the right to reduce the legacies to three-fourth parts of the succession, in order to protect his interest.

FALCIDIAN LAW. In Roman Law. A statute or law restricting the right of disposing of property by will, enacted by the people during the reign of Augustus, on the proposition of Falcidius, who was a tribune, in the year of Rome 714.

Its principal provision gave power to fathers of families to bequeath three-fourths of their property, but deprived them of the power to give away the other fourth, which was to descend to the heir. Inst. 2. 22. This fourth was termed the Falcidian portion.

A similar principle exists in Louisiana, and formerly prevailed in England. See LEGITIME.

As to the early history of testamentary law, see Maine, Ancient Law.

In some of the states the statutes authorizing bequests and devises to charitable corporations limit the amount which a testator may give, to a certain fraction of his estate.

FALDA. In Spanish Law. The slope or skirts of a hill. 2 Wall. 673.

FALDÆ CURSUS. In Old English Law. A fold-course or sheep-walk. Spel.; 2 Vent. 139.

FALDAGE. The privilege which anciently several lords reserved to themselves of setting up folds for sheep in any fields within their manors, the better to manure them, and this not only with their own but their tenants' sheep. Called, variously, *secta faldare, fold-course, free-fold, faldagii.* Cunningham, Law Dict.; Cowel; Spelman, Gloss.

FALDATA. In Old English Law. A flock or fold of sheep. Cowel.

FALDFEY. A compensation paid by some customary tenants that they might have liberty to fold their own sheep on their own land. Cunningham, Law Dict.; Cowel.

FALDISDORY. In Ecclesiastical Law. The bishop's seat or throne within the chancel.

FALDSOCA. Liberty or privilege of foldage.

FALDSTOOL. A folding seat similar to a camp stool, made either of wood or metal, sometimes covered with silk or other material. It was used by a bishop when officiating in other than his own cathedral church. Encyc. Dic.

FALDWORTH. A person reckoned old enough to become a member of the decennary, and so subject to the law of frank-pledge. Spel.

FALERÆ. In Old English Law. The tackle and furniture of a cart or wain. Blount.

FALESIA. In Old English Law. A hill or down by the sea-side. Co. Litt. 5 *b*; Domesday.

FALK-LAND. See FOLC-LAND.

FALL. In Scotch Law. To loose. To fall from a right is to loose or forfeit it. 1 Kames, Eq. 228.

FALL OF LAND. In English Law. A quantity of land six ells square.

FALLO. In Spanish Law. The final decree or judgment given in a lawsuit.

FALLOW LAND. Land ploughed, but not sown, and left uncultivated for a time, after successive crops; land left untilled for a year or more.

FALLUM. In Old English Law. An unexplained term for some particular kind of land.

FALSA DEMONSTRATIO. In Civil Law. False designation; erroneous description of a person or a thing in a written instrument. Inst 2, 20, 30.

FALSA DEMONSTRATIO NON NOCET. See MAXIMS; DEMONSTRATIO.

FALSA MONITA. In the Civil Law. Counterfeit money. Cod. 9, 24.

FALSARE. In Old English Law. To counterfeit. Bract. fol. 276 *b*. *Falcarious*, a counterfeiter.

FALSE. Applied to the intentional act of a responsible being, it implies a purpose to deceive. 63 Vt. 201; 18 U. C. C. P. 19.

FALSE ACTION. See FEIGNED ACTION.

FALSE AND PRETENDED PROPHECIES. When made with intent to disturb the public peace they are punishable under 33 Hen. VIII. c. 14, 3 & 4 Edw. VI. c. 15, and 5 Eliz. c. 15. These statutes, although unrepealed, are not likely to be enforced.

FALSE CHARACTER. To personate the master or mistress of a servant or his or her representative and give a false character to the servant, is an offence punishable by fine, by 32 Geo. III. c. 56. See PERSONATE.

FALSE CLAIM. A claim made by a man for more than his due. An instance is given where the prior of Lancaster claimed a tenth part of the venison *in corio* as well as *in carne*, where he was entitled to that *in carne* only. Manw. For. Laws, cap. 25, num. 3.

FALSE IMPRISONMENT. Any unlawful restraint of a man's liberty, whether in a place made use of for imprisonment generally, or in one used only on the particular occasion, or by words and an array of force, without bolts or bars, in any locality whatever. 1 Bish. Cr. Law § 553; Webb's Poll. Torts 259; 8 N. H. 550; 7 Humph. 43; 12 Ark. 43; 7 Q. B. 742; 5 Vt. 588; 3 Blackf. 46; 9 Johns. 117; 1 A. K. Marsh 345; 36 Fed. Rep. 252; 92 Mich. 498; 78 Hun. 238. See 35 W. Va. 588.

The total, or substantially total, restraint of a man's freedom of locomotion, without authority of law, and against his will. Big. Torts 113. Any general restraint is sufficient; there need not be actual contact of the person. Any demonstration of physical violence, which apparently can be avoided only by submission, constitutes imprisonment. Submission, in such case, is not consent; *id.* 114; but the detention must be such as to cause escape in any direction to amount to a breach of the restraint.

Arresting the wrong person under a warrant constitutes false imprisonment; F. Moo. 457; so if there is a misnomer in the warrant, even though the person actually intended was arrested; 4 Wend. 455; and if the officer makes the arrest out of his bailiwick, or detains the person unduly; 4 B. & C. 596; an arrest under a void writ constitutes a false imprisonment; 5 Hill 242. A writ may be void because defective in language, because the court had no jurisdiction of the proceedings, or because the court had no jurisdiction to issue the writ; Big. Torts 122; 34 A. & E. Corp. Cas. 431; 67 N. W. Rep. (Minn.) 989. The clerk of the court who issues a defective writ, or one not authorized by the court, is liable; and so is a judge who orders a writ which he had no right to issue, or where he had no jurisdiction. Both the attorney and his client may be liable if the former ordered the arrest, and even when the arrest has been ordered by a judge, *i. e.* in a case where they participate in making the arrest; Big. Torts 128; or where the writ was issued by the misconduct of the attorney; *id.* 129. If the writ be voidable it must be set aside before an action for false imprisonment will lie, but otherwise if it be void; *id.* 131.

Malice is not an element of false imprisonment; 66 Hun 230; 35 W. Va. 588; except so far as it affects the measure of damages; 35 Neb. 898.

In order to be restored to liberty, the remedy is, by writ of *habeas corpus*. An action of trespass *vi et armis* lies. To punish the wrong done to the public by the false imprisonment of an individual, the offender may be indicted; 4 Bla. Com. 218; 2 Burr. 993. See Bacon, Abr. *Trespass* (D, 3); 9 N. H. 491; 6 Ala. N. S. 778; 2 Harr. Del. 538; 3 Tex. 282; 10 Cush. 375.

One cannot maintain an action for false imprisonment where he is arrested by a proper officer, under a warrant lawful on its face, and issued by proper authority; 97 Ala. 626; 94 Mich. 1. Justification is not available as a defence unless pleaded; 2 Misc. Rep. 127.

FALSE JUDGMENT. The name of a writ which lies when a false judgment has been given in the county court, court baron, or other courts not of record. Fitzh. N. B. 17, 18.

FALSE LATIN. When legal proceedings were conducted in Latin, if a word were significant though not good Latin, yet an indictment, declaration, or fine should not be made void by it; but if the word were not Latin, nor allowed by the law, and it were in a material point, it made the whole vicious. 5 Coke 121; 2 Nels. 830. Wharton.

FALSE LIGHTS AND SIGNALS. Lights and signals falsely and maliciously displayed for the purpose of bringing a vessel into danger. Exhibiting false lights or signals, with intent to bring any ship into danger, is felony, punishable, in England, with penal servitude for life; stat. 24 & 25 Vict. c. 97, § 47; and in the United States by imprisonment. U. S. Rev. Stat. § 5358. See COLLISION.

FALSE NEWS. Spreading false news, whereby discord may grow between the queen of England and her people, or the great men of the realm, or which may produce other mischiefs, still seems to be a misdemeanor under Stat. 3 Edw. I. c. 34 ; Steph. Cr. Dig. § 95.

FALSE OATH. See PERJURY.

FALSE PERSONATION. See PERSONATION.

FALSE PLEA. See SHAM PLEA.

FALSE PRETENCES. In Criminal Law. False representations and statements, made with a fraudulent design to obtain "money, goods, wares, and merchandise," with intent to cheat. 2 Bouvier, Inst. n. 2308.

A representation of some fact or circumstance calculated to mislead, which is not true. 19 Pick. 184.

Such a fraudulent representation of fact by one who knows it not to be true as is adapted to induce the person to whom it is made to part with something of value. It may relate to quality, quantity, the nature or other incident of the article offered for sale, whereby the purchaser buying it, is defrauded ; 126 Ill. 139.

The pretence must relate to past events. Any representation or assurance in relation to a future transaction may be a promise, or covenant, or warranty, but cannot amount to a statutory false pretence ; 19 Pick. 185 ; 3 Term 98 ; but one will be guilty if there are false representations of a past or existing fact, although a promise be also a part of the inducement to the person defrauded to part with his property ; 90 Ga. 437. It must be such as to impose upon a person of ordinary strength of mind ; 3 Hawks 620 ; 4 Pick. 178 ; and this will doubtless be sufficient ; 11 Wend. 557 ; Clark, Cr. L. 278. But, although it may be difficult to restrain false pretences to such as an ordinarily prudent man may avoid, yet it is not every absurd or irrational pretence which will be sufficient. See 14 Ill. 348 ; 17 Me. 211 ; 1 Den. Cr. Cas. 592 ; Russ. & R. 127. It is not necessary that all the pretences should be false, if one of them, *per se*, is sufficient to constitute the offence ; 14 Wend. 547. And although other circumstances may have induced the credit, or the delivery of the property, yet it will be sufficient if the false pretences had such an influence that without them the credit would not have been given or the property delivered ; 11 Wend. 557 ; 14 *id.* 547. The false pretences must have been used before the contract was completed ; 13 Wend. 311. Extra-judicial admissions and statements of the defendant alone as to the falsity of the statement are not sufficient to warrant a conviction, as the falsity is in the nature of a *corpus delicti* which requires other proof ; 40 Pac. Rep. (Cal.) 440.

The question is modified in the different states by the wording of the statutes, which vary from each other somewhat. It may be laid down as the general rule of the interpretation of the words "by any false pretence," which are in the statutes, that wherever a person fraudulently represents as an *existing fact* that which is not an existing fact, and so gets money, etc., that is an offence within the acts. See 1 Den. Cr. Cas. 559 ; 3 C. & K. 98 ; 22 Pa. 253 ; 100 Cal. 352.

There must be an intent to cheat or defraud some person ; Russ. & R. 317 ; 98 N. C. 733 ; 112 Mo. 585. This may be inferred from a false representation ; 13 Wend. 87. The intent is all that is requisite : it is not necessary that the party defrauded should sustain any loss ; 11 Wend. 18 ; 1 C. & M. 516, 537 ; 4 Pick. 177. The offence is not proven where the representations were not relied on ; 98 Cal. 661. See, generally, 2 Bish. Cr. Law § 409 ; 19 Pick. 179 ; 24 Me. 77 ; 7 Cox, Cr. Cas. 131 ; 16 Am. Law Reg. N. S. 321 ; 126 Ill. 139 ; 133 Ind. 297 ; 137 N. Y. 530 ; DECEIT ; FRAUD.

FALSE REPRESENTATION. A representation which is untrue, wilfully made to deceive another to his injury. See DECEIT ; MISREPRESENTATION ; FRAUD.

FALSE RETURN. A return made by the sheriff, or other ministerial officer, to a writ, in which is stated a fact contrary to the truth, and injurious to one of the parties or some one having an interest in it.

In this case the officer is liable for damages to the party injured ; 2 Esp. 475. When the sheriff has levied on property sufficient to satisfy an execution, and yet return it unsatisfied, he is *prima facie* liable to the plaintiff for the full amount of the judgment, and he must show such facts as will exonerate or excuse him ; 74 N. Y. 395. In some states, every return of process, untrue in fact, is held to expose the sheriff to all the penalties of a false return ; 74 N. C. 473 ; 81 *id.* 368. But when the actual damage is the result of the negligence of the party complaining, the sheriff will only be liable for nominal damages ; 98 Mass. 211 ; 103 *id.* 507 ; 6 Nev. 83 ; 10 Hun 531. See RETURN OF WRITS.

FALSE SWEARING. In English Law. The misdemeanor committed by a person who swears falsely before any person authorized to administer an oath upon a matter of public concern, under such circumstances that the false swearing would have amounted to perjury if committed in a judicial proceeding ; as where a person makes a false affidavit under the Bills of Sale Acts. Steph. Cr. Dig. 84.

FALSE TOKEN. A false document or sign of the existence of a fact,—in general used for the purpose of fraud. See 3 Term 98 ; 2 Starkie, Ev. 563 ; 1 Bish. Cr. L. 585 ; 13 Wend. 311 ; 14 *id.* 570 ; 9 *id.* 182.

FALSE VERDICT. One obviously opposed to the principles of right and justice.

The false verdict of jurors, whether occasioned by embracery or not, was anciently

considered as criminal, and, therefore, exemplarily punished by attaint, but by 6 Geo. IV. c. 50 the writ of attaint was wholly abolished and superseded by the practice of setting aside the first verdict and granting new trials; 3 Bla. Com. 402.

FALSE WEIGHTS AND MEASURES. Weights and measures which do not conform to those established by law.

In the laws of King Edgar, nearly a century before the Conquest, we find an injunction that one measure kept at Winchester should be observed throughout the realm. In England the prerogative of fixing the standard anciently vested in the crown; in Normandy in the duke. "The regulation of weights and measures cannot, however, with propriety be referred to the king's prerogative; for from Magna Charta to the present time there are about twenty acts of parliament to fix and establish the standard and uniformity of weights and measures." 1 Bla. Com. 274, n. In a case before the Court of King's Bench it was held that although it was the custom of the town to sell eighteen ounces in a pound of butter, yet the jury of the court-leet were not justified in seizing the butter of a person who sold pounds less than that, but more than sixteen ounces each, the statutable weight; 3 T. R. 271; and it has been determined that no practice or usage could countervail the statutes 22 Car. II. c. 8 and 22 & 23 Car. II. c. 12, which enact that if any person shall either buy or sell salt or grain by any other measure than the Winchester bushel, he shall forfeit forty shillings and also the value of the grain or salt so sold or bought; one-half to the poor, the other to the informer; 4 T. R. 750; 5 *id.* 358. In this country the power to fix the standard of weights and measures is in congress; Const. U. S. art 1, s. 8. See WEIGHTS; MEASURES.

FALSEDAD. In Spanish Law. Falseness; deviation from the truth. *Las Partidas*, pt. 3, tit. 26, l. 1.

FALSEHOOD. Any untrue assertion or proposition. A wilful act or declaration contrary to the truth. See 51 N. H. 207.

It has been said that the use of the term falsehood does not always and necessarily imply a lie or wilful untruth, but is generally used in the second sense here given. It is committed either by the wilful act of the party, or by dissimulation, or by words. It is wilful, for example, when the owner of a thing sells it twice, by different contracts, to different individuals, unknown to them; for in this the seller must wilfully declare the thing is his own when he knows that it is not so. It is committed by dissimulation when a creditor, having an understanding with his former debtor, sells the land of the latter, although he has been paid the debt which was due to him. Falsehood by word is committed when a witness swears to what he knows not to be true.

Crabbe thus distinguishes between falsehood and untruth: "The latter is an untrue saying, and may be unintentional, in which case it reflects no disgrace on the agent. A falsehood and a lie are intentional false sayings, differing only in degree of the guilt of the offender; falsehood being not always for the express purpose of deceiving, but a lie always for the worst of purposes." See Rosc. Cr. Ev. 362; DECEIT; FRAUD; MISREPRESENTATION.

FALSELY. Under a statute making it a misdemeanor "wilfully to make a false answer," an indictment charging that one "falsely and fraudulently answered," is bad for omitting "wilfully;" 1 Den. C. C. 157.

In an indictment for forgery the averment that defendant swore falsely was held insufficient, without the additional words "corruptly and wilfully;" Cro. Eliz. 201; and "falsely and corruptly" were held insufficient without "wilfully;" *id.* 143; and falsely and maliciously were held insufficient without "wilfully and corruptly," with a *quere* whether one of the last two words would suffice without the other; 7 D. & R. 665; but in Cox's case, Leach 69, it was held that wilfully was not required at common law but was necessary under stat. 5 Eliz. c. 9. An indictment for perjury was held good without the averment that the defendant did falsely, corruptly, and wilfully swear, etc., and the court said: "The words falsely, corruptly, and wilfully . . . are mere expletives to swell the sentence, in the language of Lord Hardwicke, 1 Atk. 50;" 3 Yeates 407, 413. In obtaining money under false pretences it is not enough to charge that the defendant falsely pretended by certain pretences set forth, without specially averring the falsity of the pretences; 2 M. & S. 379.

The use of the word falsely in a statute (against counterfeiting) implies that there must be a fraudulent or criminal intent in the act; 5 McLean 208, 211. See also 4 B. & C. 329; 6 Com. Dig. 58; Stark. Cr. Pl. 86.

In an action for libel, "wrongfully and falsely published" will, it seems, amount to maliciously published, but it is better to add falsely and maliciously; 1 Chit. Pl. 421 and note (x); the word falsely must have great stress laid on it in an action for slander; 2 Wils. 300, 301. Case will lie for falsely and maliciously suing out a commission in bankruptcy; 2 Wils. 145; or for falsely, maliciously, and without probable cause procuring a search warrant; 1 D. & R. 97. In an action on the case for conspiracy or for malicious prosecution the allegation that the prosecution was false and malicious is not sufficient without adding probable cause; 2 Munf. 10; *contra* as to conspiracy; 1 Binn. 172.

FALSI CRIMEN. A fraudulent subornation or concealment of truth.

FALSIFICATION. In Equity Practice. The showing an item in the debit of an account to be either wholly false or in part erroneous. 1 Sto. Eq. Jur. § 525.

FALSIFY. In Chancery Practice. To prove that an item in an account before the court as complete, which is inserted to the debit of the person falsifying, should have been omitted.

When a bill to open an account has been filed, the plaintiff is sometimes allowed to surcharge and falsify such account; and if anything has been inserted that is a wrong charge, he is at liberty to show it; and that is a *falsification*. 2 Ves. 565; 11 Wheat. 237. See SURCHARGE.

In Criminal Law. To alter or make false.

The alteration or making false of a record is punishable at common law or by statute in the states, and, if of records of the United States courts, by act of congress of April 30, 1790; U. S. Rev. Stat. § 5394.

In Practice. To prove a thing to be false. Co. Litt. 104 *b*.

FALSIFYING A RECORD. A crime against public justice punishable in Eng-

land by 24 & 25 Vict. c. 98, and by statute in the several states and District of Columbia.

FALSIFYING JUDGMENTS. A term sometimes used for reversing judgments. See 4 Steph. Com. 553.

FALSING. In Scotch Law. Making or proving false. Bell, Dict.

FALSING OF DOOMS. In Scotch Law. Protesting against a sentence and taking an appeal to a higher tribunal. Bell, Dict.

An action to set aside a decree. Skene.

FALSO RETORNO BREVIUM (L. Lat.). **In Old English Law.** The name of a writ which might have been sued out against a sheriff for falsely returning writs. Cunningham, Law Dict.

FALSONARIUS. A person guilty of forgery; a counterfeiter.

FALSUS. Deceiving; fraudulent; erroneous. In the first two senses it is applied to persons in respect to their acts and conduct, as well as to things; and in the third sense it is applied to persons on the question of personal identity.

FAMA. Rumor; report; fame.

FAMACIDE. A killer of reputation; a slanderer. Black, L. Dict.

FAMILIA (Lat.). **In Roman Law.** A family.

This word had four different acceptations in the Roman law. In the first and most restricted sense it designated the *pater-familias*,—his wife, his children, and other descendants subject to his paternal power. In the second and more enlarged sense it comprehended all the *agnates*,—that is to say, all the different families who would all be subject to the paternal authority of a common chief if he were still living. Here it has the same meaning as *agnatio*. In a third acceptation it comprises the slaves and those who are *in mancipio* of the chief,—although considered only as things, and without any tie of relationship. And, lastly, it signifies the whole fortune or patrimony of the chief. See PATER-FAMILIAS; 1 Ortolan 28.

In Old English Law. A household. All the servants belonging to one master. Du Cange; Cowel. A sufficient quantity of land to maintain one family. The same quantity of land is called sometimes *mansa* (a manse), *familia*, *carucata*. Du Cange; Cunningham, Law Dict.; Cowel; Creasy, Church Hist.

FAMILIÆ EMPTOR. In the Roman Law. An intermediate person who purchased the aggregate inheritance when sold *per æs et libram*, in the progress of making a will under the twelve tables. The purchaser was merely a man of straw, transmitting the inheritance to the *hæres* proper. Brown.

FAMILIÆ ERCISCUNDÆ (Lat.). **In Civil Law.** An action which lay for any of the co-heirs for the division of what fell to them by inheritance. Stair, Inst. l. 1, tit. 7, § 15.

FAMILIARES REGIS. Persons of the king's household. The ancient titles of the six clerks of chancery in England. 2 Reeve, Hist. Eng. Law 249, 251.

FAMILY. Father, mother, and children. All the individuals who live under the authority of another, including the servants of the family. 2 Fed. Rep. 432. All the relations who descend from a common ancestor or who spring from a common root. La. Code, art. 3522, no. 16; 9 Ves. 323. The primary meaning of a testator's "family" in a will is children; 3 Ch. Div. 672.

In common parlance it consists of those who live under the same roof with the *pater familias;* those who form his fireside. But when they branch out and became the heads of new establishments, they cease to be part of the father's family; 4 Term 797; 154 Mass. 299.

While usually importing a household, including parents, children, and servants, it is not necessary, to sustain the family relation between parents and children, that they should reside together; 21 Or. 230.

The term as used in connection with homestead and exemption laws is important. See a full discussion of the cases in Thomps. Homest. & Ex. It is said to mean, in the Texas constitution, "every collective body of persons living together within the same curtilage, subsisting in common, directing their attention to a common object—the promotion of their mutual interests and social happiness." 31 Tex. 680. "A family is the collective body of persons who live in one house, under one head or manager." 52 Ia. 431; 53 *id.* 706; s. c. 36 Am. Rep. 248 (and note).

The meaning of the term is usually a matter of statutory or constitutional interpretation. A widower with whom lived his son and son's wife and a household servant is the head of a family; 52 Ia. 431; but a widower keeping house with a female relative whom he is not bound to support has no family; 48 Tex. 517. An unmarried woman keeping house and taking care of two children of a deceased sister is the head of a family; 53 Ia. 706. A widower without children, who takes his mother to live with him, is the head of a family; 11 Ia. 104. A widower and grown-up daughter constitute a family; 14 How. Pr. 521; or merely a widower; 95 Cal. 397. An unmarried man who succeeds his father in taking care of his minor sisters may be deemed the head of a family; 27 Ark. 658. So of an unmarried man supporting his widowed sister and her small children; 20 Mo. 75; and of an unmarried man whose widowed sister lived with him and kept his house; per Dillon, J.; 16 N. B. R. 382; s. c. Fed. Cas. No. 733. So of an unmarried woman with her illegitimate child; 47 Cal. 73. But not of a man who has no family; 9 Ala. 981; 10 Allen 425. A single person in the actual occupancy of a homestead, although not the head of a family, is entitled to a homestead exemption as a family; 60 N. W. Rep. (S. D.) 159. A husband and wife are a family, as to exempt prop-

erty; 14 How. Pr. 519; so as to homestead; 21 Ill. 45. But having a wife and keeping house is not marrying and having a family; 11 Pai. 159. See Thomp. Homest. & Ex. §§ 44–68.

In the construction of wills, the word family, when applied to personal property, is synonymous with *kindred* or *relations*. It may, nevertheless, be confined to particular relations by the context of the will, or may be enlarged by it, so that the expression may in some cases mean children, or next of kin, and in others may even include relations by marriage; Schoul. Wills 537. The primary meaning of the word family is children, and it must be so construed in all cases unless the context shows that it was used in a different sense; 85 Va. 509. It has been more commonly held that parents are not included in the term; 8 Ves. 604; 2 Redf. Wills 73; 1 Rop. Leg. 115; 2 Ves. 110; 5 Maule & S. 126; 11 Paige 159; it may include a wife as well as children; 8 Allen 339. A statute providing that real estate shall not go "out of the family" restricts the descent to the issue of the ancestor; 3 N. J. L. 481. See HEAD OF A FAMILY.

FAMILY ARRANGEMENT. An agreement made between a father and his son, or children, or between brothers, to dispose of property in a different manner to that which would otherwise take place.

In these cases, frequently, the mere relation of the parties will give effect to bargains otherwise without adequate consideration. 1 Chitty, Pr. 67; 1 Turn. & R. 13; 23 S. W. Rep. (Tenn.) 72; 50 Mo. App. 1.

Such an arrangement may be upheld, although there were no rights in dispute at the time of making it, and the court will not be disposed to scan with much nicety the quantum of the consideration; L. R. 2 Ch. 294. A family arrangement is not by itself a valuable consideration; Brett, L. C. in Mod. Eq. 294. Wherever doubts and disputes have arisen with regard to the rights of different members of a family (especially when relating to legitimacy) and fair compromises have been entered into to preserve harmony, those arrangements have been sustained, albeit, perhaps, resting upon grounds which would not have been considered satisfactory if the transaction had occurred between mere strangers; Sugden, L. C., in 2 Dr. & War. 503. The impossibility of estimating money considerations in family arrangements has led to their exemption from the rules which affect other arrangements; 7 Cl. & F. 280.

In ordinary cases a father's dealings with his child who has just come of age are open to suspicion, and so are dealings with a reversioner, but if these are in the nature of a family arrangement, the court will regard them, not with suspicion, but with favor; 2 Giff. 232. It is not essential that the son should have independent advice, nor will inquiry be made as to how far the father's influence was exerted. At the same time any unusual benefit secured to the father will be scrutinized and perhaps expunged; 41 Ch. D. 200; and only the usual provisions should be inserted. It seems that resettlements under a family arrangement will justify the execution of a power under which the donee retains some benefit, which would otherwise be a fraud on the power. See 1 Swans. 129. An agreement between the children of a testator that the shares of the children shall be considered as vesting at the death of the testator divested of the survivorship clause contained in the will, will be upheld in equity; 172 Pa. 104.

Evidence of circumstances to show a family arrangement at the execution of deeds is admissible, and a deed otherwise invalid would be good evidence if it formed a component part of such arrangement; 9 S. & R. 268. See FAMILY MEETING.

FAMILY BIBLE. A Bible containing a record of the births, marriages, and deaths of the members of a family.

An entry by a father, made in a Bible, stating that Peter, his eldest son, was born in lawful wedlock, of Maria, his wife, at a time specified, is evidence to prove the legitimacy of Peter; 4 Campb. 401. But the entry in order to be evidence must be an original entry; and, when it is not so, the loss of the original must be proved before the copy can be received; 6 S. & R. 135. See 10 Watts 82.

A family Bible, containing entries of family incidents, where the parties who made the entries are dead, will be received in evidence; Whart. Ev. § 219; Tayl. Ev. 572; 1 Greenl. Ev. § 104; L. R. 1 Ex. 255; 30 Ia. 301; 53 Ga. 535. See 11 Cl. & F. 85; 39 Conn. 563. In order to make an entry evidence as to the birth or death of a child, it must be shown that the entry is in the handwriting of a parent; 30 Ia. 301. Entries in a family Bible or Testament are admissible in evidence even without proof that they have been made by a parent or relative; 52 Md. 709.

FAMILY MEETING (called, also, *family council*).

In Louisiana. Meetings of at least five relations of minors or other persons on whose interest they are called upon to deliberate, or, in default of relations, then of the friends of such minors or other persons. See 45 La. Ann. 857.

The appointment of the members of the family meeting is made by the judge. The relations or friends must be selected from among those domiciliated in the parish in which the meeting is held: the relations are selected according to their proximity, beginning with the nearest. The relation is preferred to the connection in the same degree; and among relations of the same degree the eldest is preferred. The under-tutor must also be present. 6 Mart. La. N. S. 455.

The family meeting is held before a justice of the peace, or notary public, appointed by the judge for the purpose. It is

called for a fixed day and hour, by citations delivered at least three days before the day appointed for that purpose.

The members of the family meeting, before commencing their deliberations, take an oath before the officer before whom the meeting is held, to give their advice according to the best of their knowledge touching the interests of the person respecting whom they are called upon to deliberate. The officer before whom the family meeting is held must make a particular procès-verbal of the deliberations, cause the members of the family meeting to sign it, if they know how to sign, and must sign it himself, and deliver a copy to the parties that they may have it homologated.

The sale of minor's property without the advice of a family meeting is null and void as against the purchaser; 45 La. Ann. 857.

FAMILY PHYSICIAN. A physician who regularly attends and is consulted by the members of the family as their medical adviser; but he need not attend in all cases or be consulted by all the members of the family. 17 Minn. 519; 58 Mo. 424.

FAMILY USE. That use ordinarily made by and suitable for the members of a household whether as individuals or collectively. 52 Cal. 120. The supply of water in a muncipal corporation for family use includes the supply of gaols, hospitals, almshouses, schools, and other municipal institutions; *id.* See FAMILY; GROCERIES.

FAMOSUS (Lat.). Defamatory; slanderous; scandalous. Used in civil and old English law to express that which affected injuriously the character or reputation.

FAMOSUS LIBELLUS (Lat.). Among the civilians these words signified that species of *injuria* which corresponds nearly to libel or slander.

FANAL. In French Law. A small lighthouse. A lamp or apparatus in such lighthouse. A lantern placed high up on the stern of a vessel.

FANATIC. A religious enthusiast; a bigot; a person entertaining wild and extravagant notions, or affected by zeal or enthusiam, especially upon religious subjects.

The word was formerly defined in English law as a person pretending to be inspired, and was said to be a term applied to "Quakers, Anabaptists, and all other sectaries, and factious dissenters from the church of England." Jac. L. Dict. See Stat. 13 Car. II. c. 6.

FANEGA. In Spanish Law. A measure of land, which is not the same in every province. *Diccionario de la Acad.*; 2 White, Recop. 49. In Spanish America, the fanega consisted of six thousand four hundred square varas, or yards. 2 White, Recop. 138.

FARANDMAN. In Scotch Law. A traveller; a merchant-stranger. Skene.

FARDEL. The fourth part of a yardland. Spelman, Gloss. According to others, the eighth part. Noy, Complete Lawyer 57; Cowel. See Cunningham, Law Dict.

FARDELLA. In Old English Law. A bundle; a pack; a fardel. Fleta, lib. 1, c. 22, § 10.

FARDING-DEAL. The fourth part of an acre of land. Spelm. Gloss.

FARE. A voyage or passage. The money paid for a voyage or passage. The latter is the modern signification. See 26 N. Y. 526; TICKET.

In case of a water company it means the tax or compensation which the company may charge for furnishing a supply of water. 111 N. C. 615. See RATES.

FARINAGIUM. A mill. Spelm. A toll of the grist of meal or flour. Jac. L. Dict.

FARLEY or FARLEU. Money paid in lieu of a heriot (*q. v.*). Applied also to the best chattel as distinguished from heriot,—the best beast. Cowel.

FARLINGARII. Whoremongers; adulterers.

FARM. A certain amount of provision reserved as the rent of a messuage. Spelman, Gloss.

Rent generally which is reserved on a lease; when it was to be paid in money, it was called *blanche firme*. Spelman, Gloss.; 2 Bla. Com. 42.

A term. A lease of lands; a leasehold interest. 2 Sharsw. Bla. Com. 17; 1 Reeve, Hist. Eng. Law 301, n.; 2 Chit. Pl. 879, n. e. The land itself, let to farm or rent. 2 Bla. Com. 368.

A portion of land used for agricultural purposes, either wholly or in part. 18 Pick. 553; 2 Binn. 238.

A body of land, usually under one ownership, devoted to agriculture; either to the raising of crops, or pasturage, or both. It is not understood to have any necessary relation to, or to be circumscribed by, political subdivisions. A farm may consist of any number of acres, of one quarter section or less, or many quarter sections; of one field, or many fields; may lie in one township and county, or in more than one; 32 N. E. Rep. (Ill.) 693. See 47 How. Pr. 446.

It is usually the chief messuage in a village or town whereto belongs a great demesne of all sorts. Cowel; Cunningham, Law Dict.; *Termes de la Ley*.

A large tract or portion of land taken by a lease under a yearly rent payable by the tenant. Tomlin, Law Dict.

From this latter sense is derived its common modern signification of a large tract used for cultivation or other purposes, as raising stock, whether hired or owned by the occupant, including a messuage with out-buildings, gardens, orchard, yard, etc. Plowd. 195; Touchst. 93.

In American law, the word has almost exclusively this latter meaning of a portion of land used for agricultural purposes, either wholly or in part. 2 Binn. 238; 18 Pick. 553; 6 Metc. 529; 2 Hill. R. P. 338.

By the convevance of a farm will pass a messuage, arable land, meadow, pasture, wood, etc., belonging to or used with it. Co. Litt. 5 *a*; Shepp. Touchst. 93; 4 Cruise, Dig. 321; Plowd. 167.

In a will, the word farm may pass a freehold, if it appear that such was the intention of the testator; 6 Term 345; 9 East 448. See 6 East 604, n.; 8 *id.* 339.

FARM LET. Technical words in a lease creating a term for years. Co. Litt. 45 *b*; 2 Mod. 250; 1 Washb. R. Pr. Index, *Lease.*

FARM OUT. To rent for a certain term. The collection of the revenue among the Romans was farmed out to persons called *publicani.* The same system existed in France before the revolution of 1789; and in England the excise taxes were farmed out, and thereby their evils were greatly aggravated. The farming of the excise was abolished in Scotland by the union, having been before that time abandoned in England. In all these cases the custom gave rise to great abuse and oppression of the people, and in France most of the farmers-general, as they were called, perished on the scaffold. See Int. Cyc. titles Farmers-general, Excise, *Publicani.*

FARMER. The lessee of a farm. It is said that every lessee for life or years, although it be but of a small house and land, is called *farmer.* This word implies no mystery, except it be that of husbandman. Cunn. Law Dict; Cowel; 3 Sharsw. Bla. Com. 318.

In common parlance, and as a term of description in a deed, farmer means one who cultivates a farm, whether he owns it or not. There may also be a farmer of the revenue or of other personal property as well as lands. Plowd. 195; Cunn. Law Dict.

FARMER GENERAL. See FARM OUT.

FARO. A gambling game of cards in which checks, commonly known as "chips," are used to represent money, which is staked upon the order in which the cards turn up as dealt. The players all play against the dealer, who is termed the banker. See GAMING.

FARRAGO LIBELLI (Lat.). An ill-composed book containing a collection of miscellaneous subjects not properly associated or scientifically arranged. Whart.

FARRIER. One who takes upon himself the public employment of shoeing horses.

Like an innkeeper, a common carrier, and other persons who assume a *public* employment, a farrier is bound to serve the public as far as his employment goes, and an action lies against him for refusing, when a horse is brought to him at a reasonable time for such purpose, if he refuses; Oliph. Horses 131; and he is liable for the unskilfulness of himself or servant in performing such work; 1 Bla. Com. 431; but not for the malicious act of the servant in purposely driving a nail into the foot of the horse with the intention of laming him; 2 Salk. 440; Hanover, Horses 215.

FARTHING. In English Law. The one-fourth part of a penny (*q. v.*).

FARTHING OF GOLD. An ancient coin of the value of one-fourth part of a noble. 9 Hen V. c. 7.

FARTHING OF LAND. Sometimes written *farundel* or *farthingdell.* See FARDING-DEAL.

FARVAND. Standing by itself, this word signifies "passage by sea or water." In charter-parties, it means voyage or passage by water. 18 C. B. 880.

FARYNDON INN. The ancient designation of Serjeants' Inn, Chancery Lane, London. See INNS OF COURT.

FAS (Lat.). Right; justice. Calvinus, Lex.; 3 Bla. Com. 2. See PER FAS ET NEFAS.

FASHIONS. See PERISHABLE GOODS.

FASIUS. A faggot of wood.

FAST BILL OF EXCEPTIONS. One which may be taken in Georgia in injunction cases and the like, in time and manner to secure speedy hearing. It is certified within twenty days after the decision. 66 Ga. 353.

FAST-DAY. A day of penitential observance and religious abstinence. As to counting it in legal proceedings, see 1 Chit. Archb. Pr., 12th ed. 160; HOLIDAY.

FAST ESTATE. Real property. A term sometimes used in wills. 6 Johns. 185; 9 N. Y. 502.

FASTERMANNES. Securities. Bondsmen. Spelman, Gloss. Men *fast* bound as sureties of the peace for each other under the Saxon law. Encyc. Lond.

FASTI. See DIES FASTI.

FAT CATTLE. See PERISHABLE GOODS.

FATHER. He by whom a child is begotten.

In England, by 43 Eliz. c. 2, the father and mother, grandfather and grandmother of poor, old, blind, and impotent persons are obliged to furnish them with necessaries, if of sufficient ability. Statutes of the same tenor have been enacted in some states. The English statute may be considered as a part of the common law of the United States. In some states the failure to support, or the abandonment of, a minor child is a penal offence. Except under this statute, there appears to be no civil obligation on a parent to support his minor child; 11 C. B. 452; L. R. 3 Q. B. 559; or to pay his debts; 6 M. & W. 482. To the same effect in the United States; 110 Ind. 74; 38 N. J. L. 383; 13 Barb. 502; but the contrary view is held in many cases; 79 Ia. 151; Tiffany, Pers. & Dom. Rel. 233, and cases cited; see 2 Kent 190. Where a parent, though able, neglects to provide the necessaries of life and necessary medical attend-

ance for a minor child, and thereby causes its death, he is guilty of manslaughter, and, if wilfully done, of murder; Tiff. Pers. & Dom. Rel. 232; Clark, Cr. L. 177. A widow is likewise bound to maintain her minor children; 56 N. Y. 435; 10 Mo. App. 344; *contra*, 76 Ala. 534; 64 Ill. 383. A child is not bound at common law to maintain his parents; 70 Ind. 239; 45 N. H. 358; 32 Conn. 142; but in many states a liability to support indigent parents is imposed by statute, and in such case a third person may recover from the child for necessaries furnished to such parent; 88 Mich. 91; 64 N. W. Rep. (S. D.) 1123. A parent is not liable for his child's torts, unless committed by the child as his agent; 63 Ill. 312; 45 Kan. 423; 3 Fed. Rep. 862; nor is he criminally liable for his child's acts; Tiffany, Pers. & Dom. Rel. 241. See also 66 Cal. 368; 60 Wis. 511.

If the father be without means to maintain and educate his children according to their future expectations in life, courts of equity will make an allowance for these purposes out of the income of their estates, and, in an urgent case, will even break into the principal; 19 Ala. N. S. 650; 1 P. Wms. 493; 4 Johns. Ch. 100; 2 Ired. 354; 2 Ashm. 332; 5 R. I. 269; 1 Coop. Eq. 52. The father is not bound, without some agreement, to pay another for maintaining his children; 9 C. & P. 497; nor is he bound by their contracts, even for necessaries, unless an actual authority be proved, or a clear omission of his duty to furnish such necessaries; 20 Eng. L. & Eq. 281; 10 Barb. 483; 15 Ark. 137; 3 N. H. 270; 2 Bradf. Surr. 287; 18 Ga. 457; Ewell, Lead. Cas. 61, n.; 45 Ill. App. 447; 8 Misc. Rep. 646; or unless he suffers them to remain away with their mother, or forces them from home by hard usage; 3 Day 37; but, especially in America, very slight evidence may sometimes warrant the confidence that a contract for the infant's necessaries is sanctioned by the father; Tiffany, Per. & Dom. Rel. 233; thus he is held bound where he knows the circumstances and does not object; 26 Vt. 9; 12 Met. 343; 29 Tex. 135. See PARENT; MOTHER. Where the court takes away from the father the care and custody of the children, chancery directs maintenance out of their own fortunes, whatever may be their father's circumstances; 2 Russ. 1; Macphers. Inf. 224. And if their custody be given to the mother by a decree of divorce it has been held that the duty of supporting them devolves on her; 136 Mass. 187; 26 Barb. 184; but the father still remains liable; 45 Ohio St. 452. The obligation of the father to maintain the child extends only to providing necessary support, and ceases as soon as the child is able to provide for itself, or it becomes of age, however wealthy the father may be; 2 Kent 190; unless the child becomes chargeable to the public as a pauper; 1 Ld. Raym. 699; or be physically or mentally incapable of self-support; 12 Pa. C. C. R. 447. The obligation also ceases during the minority of the child, if the child voluntarily abandons the home of his father, either for the purpose of seeking his fortune in the world or to avoid parental discipline and restraint; 16 Mass. 28; 4 Ill. 179; 14 Ala. 435. There is no legal obligation to educate the child, although some *dicta* and statements by textwriters are to the contrary; 1 Bla. Com. 150; 2 Kent 189; but the duty is said by a recent writer to be only a moral one, and he adds that there is no case which enforces such an obligation; Tiff. Dom. Rel. 238; 44 Mo. App. 308. Where the child's fortune warrants a greater expenditure than the father's means will permit, or where the father is unable to support the child, an allowance to the father may be made by a court of equity out of the child's property for his maintenance and education; Coop. *t.* Eld. 52; 4 Sandf. Ch. 617; 63 N. H. 14; 2 Kent, Com. 191; Tiff. Pers. & Dom. Rel. 236.

During the lifetime of the father, he is guardian by nature or nurture of his children. As such, however, he has charge only of the person of the ward, and no right to the control or possession either of his real or personal estate; 7 Johns. Ch. 3; 3 Pick. 213; 14 Ala. 388; 29 W. Va. 251. As to the father's right to the custody of his children, see 4 Ad. & E. 624; 2 Cox, C. C. 242; [1892] App. Cases 425; 25 Kan. 308; 26 *id.* 650; Reed, J., in Col. App. 525; 141 Mass. 203; CUSTODY. The rights of the father, while his children remain in his custody, are to have authority over them, to enforce all his lawful commands, and to correct them with moderation for disobedience; 2 Humphr. 283; and these rights, the better to accomplish the purposes of their education, he may delegate to a tutor or instructor; 2 Kent 205. See ASSAULT; CORRECTION. As to criminal liability of the father, see 95 N. C. 588. He may maintain an action for the seduction of his daughter, or for any injury to the person of his child, so long as he has a right to its services; 2 M. & W. 539; 13 Gratt. 726; 6 Ind. 262; 24 Wend. 429; 7 Watts 62; 48 Ill. App. 371; and may even be justified in committing a homicide in protecting his child; 1 Bla. Com. 450; and the fact that a child by her father as next friend has recovered damages for a personal injury does not bar a subsequent action by him for loss of service occasioned by the same injury; 125 Mass. 130; 66 Tex. 225. The authorities are not uniform as to whether the right of the father to recover for a tort committed against the child is to be limited to the theory of loss of service, and therefore based entirely upon the doctrine of an implied relation of master and servant. Such would seem to be the English rule, which gives no remedy, even for expenses, when the child is of such tender age as to be incapable of service; 8 Scott N. R. 741; 7 D. & R. 133. Some American cases follow the same principle; 26 Mo. App. 75; 60 N. H. 20; but the trend of the authorities is otherwise, and as was said by the Circuit Court of Appeals, in a case of injury to a child of five years of age, "they approve a more reasonable doctrine, and,

basing the right of action on the parental relation instead of that of master and servant, allow the father to recover his consequential loss, irrespective of the age of the minor;" 8 C. C. A. 169; s. c. 59 Fed. Rep. 417; 2 Cush. 347; 109 N. Y. 95; 49 Cal. 236; 32 Ohio St. 300; 7 Ala. 169; 50 Ark. 477; Tiff. Pers. & Dom. Rel. 274; and see SEDUCTION; ENTICE. Generally, the father is entitled to the services or earnings of his children during their minority, so long as they remain members of his family; 4 Mas. 380; 2 Gray 257; 17 Ala. N. S. 14; 1 Bla. Com. 453; 60 Mich. 635; but he may relinquish this right in favor of his children; Field, Inf. 68; 2 Metc. Mass. 39; 7 Cow. 92; 14 Ala. N. S. 753; 11 Humphr. 104; 29 Vt. 514; 21 Pa. 222; 2 Ind. App. 264; and he will be presumed to have thus relinquished this right if he abandoned or neglects to support and educate his children; Ware 462; 3 Barb. 115; 6 Ala. N. S. 501; 15 Mass. 272; 65 N. H. 644; 92 Cal. 195; but where a father verbally agrees that his daughter shall reside in a stranger's house as a servant, he does not thereby surrender his parental control, so as to bar his right to recover for her seduction; 86 Pa. 358. An infant husband is entitled to his own wages, so far as necessary for the support of himself and family, although he married without his father's consent; 157 Mass. 73.

The emancipation of a minor may be proved by the act of the father in allowing him to draw his own wages, as well as by other acts, and no proof of a formal contract is necessary; 2 Ind. App. 264.

As to his right to earnings and emancipation, see also 2 Mass. 113; 50 N. H. 501; 1 Ware, 1st ed. 462; 39 Conn. 270; s. c. 2 Am. L. Reg. N. S. 715, with note by Redfield; 24 Me. 531; 63 N. H. 415. The father, as such, has no claim to any property acquired by the child other than earnings; 14 Allen 497.

An agreement of the father, by which his minor child is put out to service, ceases to be binding upon the child after the father's death, unless made by indentures of apprenticeship; 34 N. H. 49; 45 Mo. App. 415; 29 W. Va. 751. The power of the father ceases on the arrival of his children at the age of twenty-one; though if after that age they continue to live in the father's family, they will not be allowed to recover for their services to him upon an implied promise of payment; 3 Pa. 473; 33 N. H. 581; 22 Mo. 439; 6 Ind. 60; 10 Ill. 296; the presumption being that such services are gratuitous, but this may be rebutted; 109 N. C. 710; but see 50 Fed. Rep. 881; 145 Pa. 582. See also 34 Vt. 429; 44 N. H. 293.

A stepfather is not bound to support and educate his stepchildren; 32 Minn. 385; 113 Ill. 61; nor is he entitled to their custody, labor, or earnings, unless he assumes the relation of parent; 11 Barb. 224; 19 Pa. 360; 18 Ill. 46; 1 Busb. 110; 3 N. Y. 312; Schouler, Dom. Rel. 321; 100 N. C. 46; 17 Or. 115; but see 63 N. H. 14.

See also Schouler; Tiffany; Reeve, Dom. Rel.; KIDNAPPING; CHILD; INFANT.

FATHER-IN-LAW. The father of one's spouse.

FATHOM. A measure of length, equal to six feet. Used as a nautical measure.

The word is probably derived from the Teutonic word *fad*, which signifies the thread or yarn drawn out in spinning to the length of the arm, before it is run upon the spindle. Webster; Minsheu.

FATUA MULIER. A whore. Du Fresne.

FATUM. In Civil Law. Fate. An overruling power. An event which can neither be anticipated nor prevented. See DAMNUM FATALE.

FATUOUS PERSON. In Scotch Law. One entirely destitute of reason; *is qui omnino desipit.* Erskine, Inst. b. 1, tit. 7, s. 48. An idiot. Jacob. One who is incapable of managing his affairs, by reason of a total defect of reason. He is described as having uniform stupidity and inattention of manner and childishness of speech. Bell's Law. Dict.

FATUUS. An idiot or fool. Bract. f. 420 b. Silly; ill-considered; foolish; indiscreet.

FATUUM JUDICIUM. A foolish judgment or verdict. As applied to the latter it is one rather false by reason of folly than criminally so as amounting to perjury. Bract. f. 289.

FAUBOURG. A district or part of a town adjoining the principal city; as a faubourg of New Orleans. 18 La. 286.

FAUCES TERRÆ (Lat. jaws of the land). Projecting headlands or promontories, including arms of the sea. Such arms of the sea are said to be inclosed within the *fauces terræ*, in contradistinction to the open sea; 1 Kent 367. See ARM OF THE SEA.

FAULT. An improper act or omission, which arises from ignorance, carelessness, or negligence. The act or omission must not have been meditated, and must have caused some injury to another. *Lec. Elém.* § 783.

In legal literature it is the equivalent of "negligence." An error or defect of judgment or conduct; any deviation from prudence, rectitude, or duty; any shortcoming or neglect of care or performance resulting from inattention, incapacity, or perversity; a wrong tendency, course, or act; 2 Ind. App. 427.

Gross fault or neglect consists in not observing that care towards others which a man the least attentive usually takes of his own affairs. Such fault may, in some cases, afford a presumption of fraud, and in very gross cases it approaches so near as to be almost undistinguishable from it, especially when the facts seem hardly consistent with an honest intention. But there may be a gross fault without fraud; 2 Stra. 1099; Story, Bailm. § 18; Toullier, l. 3, t. 3, § 231.

Ordinary fault consists in the omission of that care which mankind generally pay

to their own concerns; that is, the want of ordinary diligence.

A slight fault consists in the want of that care which very attentive persons take of their own affairs. This fault assimilates itself to, and in some cases is scarcely distinguishable from, mere accident or want of foresight.

This division has been adopted by common lawyers from the civil law. Although the civilians generally agree in this division, yet they are not without a difference of opinion. See Pothier, *Observation générale sur le précédent Traité et sur les suivants*, printed at the end of his *Traité des Obligations*, where he cites Accussus, Alciat, Cujas, Duaren, D'Avezan, Vinnius, and Heineccius, in support of this division. On the other side the reader is referred to Thomasius, tom. 2, *Dissertationem*, page 1006; Le Brun, cited by Jones, Bailm. 27; and Touiller, *Droit Civil Francais*, liv. 3, tit. 3, § 231.

These principles established, different rules have been made as to the responsibilities of parties for their faults in relation to their contracts. They have been reduced to three. See BAILMENT; DOLUS; NEGLIGENCE.

FAUTOR. **In Spanish Law.** Accomplice; the person who aids or assists another in the commission of a crime.

FAUX. **In French Law.** A falsification or fraudulent alteration or suppression of a thing by words, by writings, or by acts without either. Biret, *Vocabulaire des Six Codes.*

Toullier says (tom. 9, n. 188), "*Faux* may be understood in three ways: in its most extended sense, it is the alteration of truth, with or without intention; it is nearly synonymous with lying; in a less extended sense, it is the alteration of truth, accompanied with fraud, *mutatio veritatis cum dolo facta;* and lastly, in a narrow, or rather the legal, sense of the word, when it is a question to know if the *faux* be a crime, it is the fraudulent alteration of the truth in those cases ascertained and punished by the law." See CRIMEN FALSI.

FAVOR. Bias; partiality; lenity; prejudice.

The grand jury are sworn to inquire into all offences which have been committed and into all violations of law, without fear, *favor*, or affection. See GRAND JURY. When a juror is influenced by bias or prejudice, so that there is not sufficient ground for a principal challenge, he may nevertheless be challenged for favor. See CHALLENGE; Bac. Abr. *Juries*, E; 7 Pet. 160.

FEAL. Truthful; true. The tenants by knight's service used to swear to their lords to be feal and leal. *Feal homager*, faithful subject.

FEAL AND DIVOT. A right in Scotland, similar to the right of turbary in England for fuel, etc. Wharton.

It is a predial servitude peculiar to the law of Scotland, in virtue of which the proprietor of the dominant tenement possesses the right of turning up and carrying off turf from the servient tenement for the purpose of building fences, roofing houses, and the like. This, as well as the servitude of fuel, implies the right of using the nearest ground of the servient tenement on which to lay and dry the turf peats or fuel. These servitudes do not extend beyond the ordinary uses of the actual occupants of the dominant tenements, and cannot be taken advantage of for such a purpose as to burn limestone for sale. They are not included in the servitude of pasturage, but must be constituted either by express grant, or by possession following on the usual clause of parts and pertinents; Ersk. ii. tit. ix. s. 17. The etymology of these words has been much disputed. *Feal* or *fail* is said to come from the Suio-Gothic *wall*, any grassy part of the surface of the ground; and Jamieson derives divot from *delve* (Sax. *delfan* or *delvan*), or, as another alternative, says that it may have been formed by the monkish writers of old charters from *defodere*, to dig the earth. The former is the more probable conjecture. Int. Cyc.

FEALTY. That fidelity which every man who holds lands of another owes to him of whom he holds.

Under the feudal system, every owner of lands held them of some superior lord, from whom or from whose ancestors the tenant had received them. By this connection the lord became bound to protect the tenant in the enjoyment of the land granted to him; and, on the other hand, the tenant was bound to be faithful to his lord and to defend him against all his enemies. This obligation was called *fidelitas* or fealty; 1 Bla. Com. 233; 2 *id.* 86; Co. Litt. 67 *b*.

This fealty was of two sorts: that which is general, and is due from every subject to his prince; the other special, and required of such only as in respect of their fee are tied by this oath to their landlords; 1 Bla. Com. 367; Cowel.

The oath or obligation of fealty was one of the essential requisites of the feudal relation; 2 Sharsw. Bla. Com. 45, 86; Littleton §§ 117, 131; Wright, Ten. 35; *Termes de la Ley*; 1 Washb. R. P. 19; see 1 Poll. & Maitl. 277-287, and was as follows: "Hear this ye good people that I (such a one by name) faith will bear to our lord King Edward from this day forward of life and limb, of body and chattels and earthly honor, and the services which belong to him for the fees and tenements which I hold of him will lawfully perform to him as they become due to the best of my power, so help me God and the saints." Stubbs, Const. Hist. § 463 n. Fealty was due alike from freeholders and tenants for years as an incident to their estates to be paid to the reversioner; Co. Litt. 67 *b*. Chal. R. P. 13. Tenants at will did not have 'fealty; 2 Burton, R. P. 395, n.; 1 Washb. R. P. 371. It has now fallen into disuse, and is no longer exacted; 3 Kent 510; Wright, Ten. 35, 55; Cowel.

FEAR. **In Criminal Law.** Dread; consciousness of approaching danger.

Fear in the person robbed is one of the ingredients required to constitute a robbery from the person; and without this the felonious taking of the property is a larceny. It is not necessary that the owner of the property should be in fear of his own person; but fear of violence to the person of his child; 2 East, Pl. Cr. 718; or to his property; *id.* 731; 2 Russ. Cr. 72; is sufficient; 2 Russ. Cr. 71. See 35 Ind. 460; 53 Mo. 581; PUTTING IN FEAR.

FEASANCE. A doing; a performing or performance. *Feasant*, doing or making, —as *damage feasant* (*q. v.*). *Feasor*, doer, maker,—as *feasors del estatute*, makers of the statute; Dyer 3 *b*.

FEASTS. Certain established periods in the Christian church. Formerly the days of the feasts of saints were used to indicate the dates of instruments and memorable events, 8 Toullier, n. 81. The feasts of the English church were formerly used to divide the terms of the legal year, but this division was abolished by the judicature act. See TERM.

FECIAL LAW. A branch of Roman jurisprudence concerned with embassies, declarations of war, and treaties of peace: so called from *feciales* (*q. v.*), who were

charged with its administration. It more nearly resembles the international law of modern times than any other department of the Roman law. See JUS FECIALE.

FECIALES. Amongst the ancient Romans, that order of priests who discharged the duties of ambassadors. Subsequently their duties appear to have related more particularly to the declaring war and peace. Calvinus, Lex.

FEDERAL. A term commonly used to express a league or compact between two or more states.

In the United States the central government of the Union is federal. The constitution was adopted "to form a more perfect union" among the states, for the purpose of self-protection and for the promotion of their mutual happiness. Freeman's Hist. Fed. Govt.; Austin, Jurispr. Lect. 6; see 92 U. S. 542.

FEDERAL COURTS. See UNITED STATES COURTS.

FEDERAL GOVERNMENT. A union or confederation of sovereign states, created either by treaty, or by the mutual adoption of a federal constitution, for the purpose of presenting to the world the appearance of a single state, while retaining the rights and power of internal regulation and administration, or at least of local self-government.

The more extended the renunciation of individual sovereignty, the more powerful does the new government become and the more nearly does it approach to a substantial union. No real diminution of sovereignty is necessarily involved except the relinquishment of the power of conducting independent relations with foreign powers.

"There are two different modes of organizing a federal union. The federal authorities may represent the governments solely, and their acts may be obligatory only on the governments as such, or they may have the power of enacting laws and issuing orders which are binding directly on individual citizens. The former is the plan of the (old) German so-called confederation, and of the Swiss constitution previous to 1847. It was tried in America for a few years immediately following the war of independence. The other principle is that of the existing constitution of the United States, and has been adopted within the last dozen years by the Swiss confederacy. The federal congress of the American union is a substantive part of the government of every individual state. Within the limits of its attributions, it makes laws which are obeyed by every citizen individually, executes them through its own officers, and enforces them by its own tribunals. This is the only principle which has been found, or which is even likely to produce an effective federal government. A union between the governments only is a mere alliance, and subject to all contingencies which render alliances precarious." Mills, Representative Government 301.

A primary difficulty, it has been said, in framing a federal government and a source of danger to its permanence, is liability to disagreements between the constituent governments or between one or more of the local governments and the federal government as to the limits of their respective powers. The scheme adopted in the American system as a provision for such cases has been thus described: "Under the more perfect mode of federation, where every citizen of each particular state owes obedience to two governments—that of his own state, and that of the federation—it is evidently necessary not only that the constitutional limits of the authority of each should be precisely and clearly defined, but that the power to decide between them in any case of dispute should not reside in either of the governments, or in any functionary subject to it, but in any umpire independent of both. There must be a supreme court of justice, and a system of subordinate courts in every state of the union, before whom such questions shall be carried, and whose judgment on them, in the last stage of appeal, shall be final. Every state of the union, and the federal government itself, as well as every functionary of each, must be liable to be sued in those courts for exceeding their powers, or for non-performance of their federal duties, and must in general be obliged to employ those courts as the instruments for enforcing their federal rights. This involves the remarkable consequence, actually realized in the United States, that a court of justice, the highest federal tribunal, is supreme over the various governments, both state and federal, having the right to declare that any new law made, or act done by them, exceeds the powers assigned to them by the federal constitution, and in consequence has no legal validity." "The tribunals which act as umpires between the federal and state governments naturally also decide all disputes between two states, or between a citizen of one state and the government of another. The usual remedies between nations, war and diplomacy, being precluded by the federal union, it is necessary that a judicial remedy should supply the place. The supreme court of the federation dispenses international law, and is the first great example of what is now one of the most prominent wants of civilized society, a real international tribunal." *Id.* 305. See Freeman, Fed. Gov't.

The American union is the most striking illustration of federal government in existence, and its permanent character was settled by the civil war which finally determined its indestructibility by action of individual states. In Europe, the empire of Germany and the republic of Switzerland are instances of the operation of successful federal governments, as are most of the South American States; while in the British Empire the Dominion of Canada and the pending Australian federation now nearly completed, as also the Greater Republic of Central America, are indications of a tendency in that direction which existing conditions are likely to increase very rapidly. See these several titles, and also UNITED STATES OF AMERICA; GOVERNMENT.

FEDERAL QUESTION. See UNITED STATES COURTS.

FEE. A reward or wages given to one for the execution of his office, or for professional services, as those of a counsellor or physician. Cowel.

Fees differ from costs in this, that the former are, as above mentioned, a recompense to the officer for his services; and the latter, an indemnification to the party for money laid out and expended in his suit; 11 S. & R. 248; 9 Wheat. 262. See 4 Binn. 267. Fees are synonymous with charges; 66 Me. 124.

See CHAMPERTY; ETHICS, LEGAL.

That which is held of some superior on condition of rendering him services.

A fee is defined by Spelman (Feuds, c. 1) as the right which the tenant or vassal has to the *use* of lands while the absolute property remains in a superior. But this early and strict meaning of the word speedily passed into its modern signification of *an estate of inheritance*; 2 Bla. Com. 106; Cowel; *Termes de la Ley*; 1 Washb. R. P. 51; Co. Litt. 1 *b*; 1 Prest. Est. 420; 3 Kent 514. The term may be used of other property as well as lands; Old Nat. Brev. 41.

The term is generally used to denote as well the land itself so held, as the estate in the land, which seems to be its stricter meaning. Wright, Ten. 19, 49; Cowel. The word fee is explained to signify that the land or other subject of property belongs to its owner, and is transmissible, in the case of an individual, to those whom the law appoints to succeed him, under the appellation of heirs: and, in the case of corporate bodies, to those who are to take on themselves the corporate function, and, from the manner in which the body is to be continued, are denominated successors; 1 Co. Litt. 271 *b*; Wright, Ten. 147, 150; 2 Bla. Com. 104, 106.

The compass or circuit of a manor or lordship. Cowel.

A *fee-simple* is an estate limited to a man and his heirs absolutely. See FEE-SIMPLE.

A *fee-tail* is one limited to particular classes of heirs. See FEE-TAIL.

A *determinable fee* is one which is liable to be determined, but which may continue forever. See DETERMINABLE FEE.

A *qualified fee* is an interest given to a man *and certain of his heirs* at the time of its limitation. See QUALIFIED FEE; 75 Md. 397.

A *conditional fee* includes one that is either to commence or determine on some condition; 10 Co. 95 *b*; Prest. Est. 476; Fearne, Cont. Rem. 9. See CONDITIONS; SHELLEY'S CASE, RULE IN.

FEE AND LIFE-RENT. In Scotch Law. Two estates in land—the first of which is the full right of proprietorship, the second the limited right of usufruct during life—may be held together, or may co-exist in different persons at the same time. The settling of the limits of the rights which in the latter case they respectively confer is of very great practical importance, and, from the loose way in which both expressions have been used by conveyancers, by no means free from difficulty. "In common language, they are quite distinct; life-rent importing a life-interest merely,—fee a full right of property in reversion after a life-rent. But the proper meaning of the word life-rent has sometimes been confounded by a combination with the word fee, so as in some degree to lose its appropriate sense, and occasionally to import a fee. This seems to have begun chiefly in destinations 'to husband and wife, in conjunct fee and life-rent and children in fee;' where the true meaning is, that each spouse has a joint life-rent while both live, but each has a possible fee, as it is uncertain which is to survive. The same confusion of terms came to be extended to the case of a destination to parent and child—'to A. B. in life-rent, and the heirs of the marriage in fee'—where the word life-rent was held to confer a fee on the parent. It came gradually to be held as the technical meaning of the word life-rent to a parent, with fee to his children *nascituri*, that the word life-rent meant a fee in the father. Finally the expression came to be held as strictly limited in its proper meaning by the accompanying word allenarly, or some similar expression of restriction; or where the fee was given to children *nati* and *nominatim*, there being in that case no necessity to divert the word life-rent from its proper meaning, or, on a similar principle, where the setttlement was by means of a trust created to make up the fee." Bell, Prin. s. 1712. See also Ersk. Prin. 420; FIAR.

FEE-BILL. A schedule of the fees to be charged by clerks of courts, sheriffs, or other officers, for each particular service in the line of their duties.

FEE EXPECTANT. A name sometimes applied to an estate created where lands are given to a man and his wife and the heirs of their bodies. See also FRANK MARRIAGE.

FEE-FARM. Land held of another in fee,—that is, in perpetuity by the tenant and his heirs at a yearly rent, without fealty, homage, or other services than such as are specially comprised in the feoffment. Cowel. Fealty, however, was incident to a holding in fee-farm, according to some authors. Spelman, Gloss.; *Termes de la Ley.*

Land held at a perpetual rent. 2 Bla. Com. 43.

FEE-FARM RENT. The rent reserved on granting a fee-farm. It might be one-fourth the value of the land, according to Cowel, one-third, according to other authors. Spelman, Gloss.; *Termes de la Ley.*

FEE-SIMPLE. An estate of inheritance. Co. Litt. 1 *b*; 2 Bla. Com. 106. The word simple adds no meaning to the word fee standing by itself. But it excludes all qualification or restriction as to the persons who may inherit it as heirs, thus distinguishing it from a fee-tail, as well as from an estate which, though inheritable, is subject to conditions or collateral determination. 1 Washb. R. P. 51; Wright, Ten. 146; 1 Prest. Est. 420; Littleton § 1.

It is the largest possible estate which a man can have, being an absolute estate. It is where lands are given to a man and to his heirs absolutely, without any end or limitation put to the estate. Plowd. 557; 2 Bla. Com. 106; Chal. R. P. 191. See 54 Me. 426; 42 Vt. 686.

Where the granting clause of a deed conveys an estate in fee-simple, a subsequent proviso that the grantee shall not convey without the consent of the grantor is void as a restriction or alienation, general as to time and person, and therefore repugnant to the estate created; 64 Cal. 363.

In modern estates the terms fee, fee-simple, and fee-simple absolute are substantially synonymous; 45 Mo. 170.

The word "heirs" is necessary, in a conveyance, to the creation of a fee-simple, and no expression of intention, in substituted terms, will have an equivalent effect; 36 N. J. L. 434; 92 Ill. 377; 48 Md. 344; but see 54 N. H. 290; 2 Head 389; but it is otherwise in a will; 74 Pa. 173; 7 R. I. 188.

In the absence of statute, a conveyance of property to a trustee, with power to sell and convey the fee, vests in such trustee an estate in fee-simple, without the use of the word "heirs;" 113 Mo. 188. The common-law rule that a fee-simple cannot be conveyed without the word "heirs" does not apply to an exception, or an easement appurtenant to other land of the grantor or of the right to take profit in the soil; 85 Me. 448.

FEE-TAIL (Fr. *tailler*, to dock, to shorten). An inheritable estate which can descend to certain classes of heirs only. It is necessary that they should be heirs "of the body" of the ancestor, and these are proper words of limitation. It corresponds with the *feudum talliatum* of the feudal

law. The estate itself is said to have been derived from the Roman system of restricting estates. 1 Spence, Eq. Jur. 21; 1 Washb. R. P. 66; 2 Bla. Com. 112, n. See, also, Co. 2d Inst. 333; Tudor, Lead. Cas. 607; 4 Kent 14; Chal. R. P. 259; and it is said to exist by virtue of the statute *de donis;* Crabb, R. P. § 971. See, generally, 1 Gray 286; 35 N. H. 176; 113 Mo. 175; 88 Ga. 251; 155 Mass. 323; 146 Pa. 242.

An estate-tail may be general, *i.e.* limited to the heirs of the body merely: or special, *i.e.* limited to a special class of such heirs, *e.g.* heirs male or heirs female, or those begotten of a certain wife named; 1 H. & J. (Md.) 111. In the last case specified, if the wife died without issue, the husband was called tenant in tail after possibility of issue extinct.

The restrictions against alienation could be evaded at common law by levying a fine, suffering a recovery. In this country, an entail can generally be barred by deed.

FEED. This word is used in its ordinary sense with reference to cattle and hogs which are said to be made marketable by feeding. 66 Ill. 102.

It is also used in the sense of lending additional strength or subsequent support, as "the estate which becomes vested feeds the estoppel;" 5 Man. & Ry. 202, 207; so a subsequent title acquired by the mortgagor is said "to feed the mortgage." See GRAFT.

It is also used in the phrase *feeding of a cow by and on the land* to signify from the land while there is food on it, and with hay by the owner of the land while at other times; 2 Q. B. Div. 49.

FEGANGI. An escaping thief caught with stolen goods in his possession. Spel. Glos.

FEHMGERICHTE. An irregular tribunal which existed and flourished in Westphalia during the thirteenth and fourteenth centuries.

From the close of the fourteenth century its importance rapidly diminished: and it was finally suppressed by Jerome Bonaparte in 1811. See Bork, *Geschichte der Westphalichen Vehmgerichte;* Paul Wigand, *Das* Fehmgericht Westphaleus.

FEIGNED ACTION. In Practice. An action brought on a pretended right, when the plaintiff has no true cause of action, for some illegal purpose. In a feigned action the words of the writ are true; it differs from *false action*, in which case the words of the writ are false. Co. Litt. 361, § 689.

FEIGNED DISEASES. Simulated maladies. Diseases are generally feigned from one of three causes—fear, shame, or the hope of gain. Thus a man engaged in the military or naval service may pretend to be afflicted with various maladies, in order to escape the performance of military duty; the mendicant, to avoid labor and to impose on public or private beneficence; the criminal, to prevent the infliction of punishment. The spirit of revenge, and the hope of receiving exorbitant damages, have also induced some to magnify slight ailments into alarming illness. On this subject, Fodere (vol. ii. 452) observes, at the time when the conscription was in full force in France, "that it is at present brought to such perfection as to render it as difficult to detect a feigned disease as to cure a real one." Zacchias has given five rules for detecting feigned diseases. (1) Inquiry should be made of the relatives and friends of the suspected individual as to his physical and moral habits, and as to the state of his affairs and what may possibly be the motive for feigning disease, particularly whether he is not in immediate danger of some punishment, from which this sickness may excuse him. (2) Compare the disease under examination with the causes capable of producing it; such as the age, temperament, and mode of life of the patient. (3) The aversion of persons feigning disease to take proper remedies. This indeed will occur in real sickness; but it rarely happens when severe pain is present. (4) Particular attention should be paid to the symptoms present, and whether they necessarily belong to the disease. (5) Follow the course of the complaint, and attend to the circumstances which successively occur. Wharton.

FEIGNED ISSUE. In Practice. An issue brought by consent of the parties, or by the direction of a court of equity, or of such courts as possess equitable powers, to determine before a jury some disputed matter of fact which the court has not the power or is unwilling to decide. A series of pleadings was arranged between the parties, as if an action had been commenced at common law upon a *bet* involving the fact in dispute. 3 Bla. Com. 452. This is still the practice in most of the states retaining the distinction between the procedure in law and in equity. Under the reformed codes of some states issues may be framed in certain exceptional cases. In England, the practice has been disused since the passing of the stat. 8 and 9 Vict. c. 109, s. 19, permitting any court to refer any question of fact to a jury in a direct form. The act 21 and 22 Vict. c. 27, provided for trial by jury in the court of chancery.

FELAGUS (Lat.). One bound for another by oath; a sworn brother. Du Cange. A friend bound in the decennary for the good behavior of another. One who took the place of the deceased. Thus, if a person was murdered, the recompense due from the murderer went to the father or mother of the deceased; if he had none, to the lord; if he had none, to his *felagus*, or sworn brother. Cunningham, Law Dict.; Cowel; Du Cange.

FELD (obs. for field). As used in compound words it is said to signify wild. Blount.

FELE. See FEAL.

FELLOW. A co-worker. A partaker or sharer of. A companion; associate; comrade. One united in a legal relation. An incorporated member of a college or collegiate foundation (whether in a university or otherwise).

FELLOW-HEIR. A co-heir.

FELLOW-SERVANTS. Those engaged in the same common pursuit, under the same general control. Cooley, Torts 541.

All who serve the same master, work under the same control, derive authority and compensation from the same common source, are engaged in the same general business, though it may be in different grades or departments of it, are fellow-servants who take the risk of each other's negligence. Thomp. Negl. 1026. As to the rights and liabilities growing out of this relation, see MASTER AND SERVANT.

FELO DE SE (Lat.). **In Criminal Law.** A felon of himself; a self-murderer. See SUICIDE.

FELON. One convicted and sentenced for a felony.

A felon is infamous, and cannot fill any office or become a witness in any case unless pardoned, except in cases of absolute necessity for his own preservation and defence: as, for example, an affidavit in relation to the irregularity of a judgment in a cause in which he is a party; 2 Stra. 1148; 1 Mart. La. 25; Stark. Ev. pt. 2, tit. *Infamy*. A conviction in one state where the witness is offered in another does not affect his competency; see 17 Mass. 515; 2 H. & M'H. 120, 378; 1 Harr. & J. 572.

A person who has committed a felony, been convicted, served his sentence, and been discharged, has been held to be no longer a felon; 3 Exch. Div. 352; where it was held that such person can recover against one who has called him a felon.

FELONIA (Lat.). Felony. The act or offence by which a vassal forfeited his fee. Spelman, Gloss.; Calvinus, Lex. *Per feloniam*, with a criminal intention. Co. Litt. 391.

Felonicé was formerly used also in the sense of feloniously. Cunningham, Law Dict. See next title.

FELONICE. Feloniously. Cun. Dict. Anciently it was said that this word must be used in all indictments for felony; 4 Bla. Com. 407; and Lord Coke includes it among the *voces artis*,—words of art, which cannot be dispensed with by any periphrasis or circumlocution. 4 Coke 39; Co. Litt. 391 *a*. See FELONIOUSLY.

FELONIOUS. Having the quality of a felony; malignant; malicious; villainous; perfidious. In a legal sense, done with intent to commit a crime, of the nature of a felony; done with deliberate purpose to commit a crime; in a felonious manner, with deliberate intention to commit a crime; 47 Kan. 201.

FELONIOUS HOMICIDE. The killing of a human creature, of any age or sex, without justification or excuse. It may include killing oneself as well as any other person; 4 Bla. Com. 188. The mere intention to commit homicide was anciently held to be equally guilty with the commission of the act; Foster, Cr. L. 193; 1 Russ. Cr. 46, note; but a recent work states that in ancient law the mere attempt to commit a crime was not punishable; 2 Poll. & Maitl. 507. See HOMICIDE; ATTEMPT.

FELONIOUSLY. In Pleading. This is a technical word which at common law was essential to every indictment for a felony, charging the offence to have been committed feloniously: no other word nor any circumlocution could supply its place; Com. Dig. *Indictment* (G 6); Bac. Abr. *Indictment* (G 1); 2 Hale, Pl. Cr. 172, 184; 1 Ben. & H. Lead. Cr. Cas. 154. It is still necessary in describing a common-law felony, or where its use is prescribed by statute; Whart. Cr. Pl. § 260; 41 Miss. 570; 18 Tex. 387; 25 Mo. 324; 68 N. C. 211; 17 Ind. 307; 34 N. H. 510.

In an indictment it is equivalent to purposely or unlawfully; 47 Kan. 201.

An indictment for burglary which does not allege that the breaking and entering was "feloniously and burglariously" done is bad, and the defect is not cured by verdict; 35 W. Va. 280.

FELONY. An offence which occasions a total forfeiture of either lands or goods, or both, at common law, to which capital or other punishment may be superadded, according to the degree of guilt. 4 Bla. Com. 94; 1 Russ. Cr. 78; Co. Litt. 391; 1 Hawk. Pl. Cr. c. 37; 5 Wheat. 153. The essential distinction between felony and misdemeanor (*q. v.*) is lost in England since the Felony Act of 1870, though such other differences as existed before that act still exist. Moz. & W. Law Dict. At the present day in this country it simply denotes the degree or class of crime committed; 1 Bish. New Cr. L. § 616.

Blackstone derives it from the Saxon *peo* or *peoh*, fee or feud, and the German *lon*, price, as being a crime punishable with the loss of the feud or benefice. 4 Com. 95. But it is observed that this Saxon word originally signified money or goods, and only in a translated sense feud or inheritance; Lye, Sax. Dict.; and another commentator remarks, "as in petit larceny the lands are not liable to escheat, and petit larceny has always been ranked among felonies, a later writer seems inclined to derive it from *pœlen* in the sense of offending. 2 Wooddes, 510." Bac. Abr. *Felony*. Pothier defines felony as an atrocious wrong committed by a vassal towards his lord, by which the former forfeited his fief to the latter.

In American law the word has no clearly defined meaning at common law, but includes offences of a considerable gravity; 1 Park. Cr. Rep. 39; 4 Ohio St. 542. In general, what is felony under the English common law is such under ours; 1 Bish. Cr. L. § 617; Clark, Cr. L. 33. A crime is not a felony unless so declared by statute, or it was such at the common law; 17 R. I. 698. If a statute creates a non-capital

offence, not declaring it to be felony, the law will give it the lower grade of misdemeanor; 91 N. C. 561.

The United States Revised Statutes contain no definition of the word, and the meaning of § 4090, referring to "offences against the public peace amounting to felony under the laws of the United States," is not altogether clear. It is defined, however, by statute clearly and fully in many of the states, usually in effect, that all offences punishable either by death or imprisonment in the state prison shall be felonies. 137 N.Y. 29; 98 Mo. 668; 6 Dak. 46; 2 Flip. 551. Express words or necessary implication are required and doubtful words will not suffice; 1 Bish. New Cr. L. § 622. "When an act of congress makes punishable a crime which under the common law is felony, *a fortiori* when directly or by necessary implication, it declares a thing to be felony, it is felony; but where a national statute creates a non-capital offence, and is silent as to its grade, it is misdemeanor." 1 Bish. New Cr. L. § 671. See 9 Fed. Rep. 886, which holds that common-law felonies are not within the purview of the constitution unless congress so enacts.

Where a statute permits a milder punishment than imprisonment or death, this discretion does not prevent the offence being felony; 48 Me. 218; 20 Cal. 117; 117 Mo. 618. See 89 Va. 570; 38 W. Va. 58; 98 Mo. 668; *contra* in Illinois; 94 Ill. 501. It has also been held that common-law felonies, punishable less severely than the statutory standard, do not, therefore, cease to be felonies; 10 Mich. 169; 3 Hill, N. Y. 395; but see 5 *id.* 260; 1 Bish. Cr. L. § 620.

Receiving stolen goods was a felony so as to justify arrest without a warrant; 5 Cush. 281; 6 Binn. 316; 2 Term 77; and held the following were not: adultery; 2 Bail. 149; 5 Rand. 627; 16 Vt. 551; assault with intent to murder; 13 Ired. 505; impeding an officer in the discharge of his duty; 25 Vt. 415; involuntary manslaughter by negligence; 15 Ga. 349; 7 S. & R. 423; mayhem; 5 Ga. 404; 7 Mass. 245; perjury; 1 R. M. Charlt. 228; 5 Exch. 378; piracy; 1 Salk. 85; 10 Wheat. 495. In England none of the maritime crimes were felony; Story, Const. § 1162.

One may be guilty of misprision of felony, but not of a misdemeanor. In misdemeanor or treason one may commit the crime of a principal by procuring another to do the action in his absence; but in felony such person is only an accessory before the fact. A person against whose property a misdemeanor has been committed may sue the offender at once, but in case of felony he must by the better opinion first begin prosecution; 1 Bish. New Cr. L. § 609. Felonies cannot be prosecuted by information; 9 Fed. Rep. 893. See COMPOUNDING A FELONY.

FELONY ACT. The stat. 33 & 34 Vict. c. 23, abolishing forfeitures for felony, and sanctioning the appointment of *interim curators* and *administrators* of the property of felons. Moz. & W.; 4 Steph. Com. 10, 459.

FEMALE. The sex which bears the young.

It is a general rule that the young of female animals which belong to us are ours; *nam fœtus ventrem sequitur.* Inst. 2. 1. 19; Dig. 6. 1. 5. 2. The rule was, in general, the same with regard to slaves; but when a female slave came into a free state, even without the consent of her master, and was there delivered of a child, the latter was free.

FEME, FEMME. A woman.

FEME COVERT. A married woman. See MARRIED WOMAN; COVERTURE.

FEME SOLE. A single woman, including those who have been married, but whose marriage has been dissolved by death or divorce, and, for most purposes, those women who are judicially separated from their husbands. Moz. & W. Dict.; 2 Steph. Com. 250.

FEME SOLE TRADER. A married woman, who, by the custom of London, trades on her own account, independently of her husband; so called, because, with respect to her trading, she is the same as a *feme sole.* Jacob, Dict.; 1 Cro. 63; 3 Keb. 902; 2 Bish. M. W. § 528. The custom was recognized as common law in South Carolina, but did not extend beyond trading in merchandise; 1 Hill, S. C. 429; 2 Bay 164; under it a woman could not be a *feme sole* carrier; 1 McMullan 50. By statute in several states a similar custom is recognized; thus in Pennsylvania, by act of Feb. 22, 1718, the wives of mariners who had gone to sea were recognized as *feme sole* traders when engaged in any work for their livelihood, and by act of May 4, 1855, the benefits of this act are extended to all those wives whose husbands, from drunkenness, profligacy, or other cause, neglect or refuse to provide for them, or desert them; 2 P. & L. Dig. 2895. By the latter act she may make application to the court of common pleas and obtain a decree and certificate that she is authorized to do business under said act; *id.* It is not necessary that there should be a decree in order that a wife may have the benefit of the act; it is remedial, and to be construed benignly; 59 Pa. 13; 131 *id.* 241; mere non-support does not entitle her to the privileges of the act; there must be profligacy, drunkenness, or wilful absence or neglect; 110 Pa. 486; but if, deserted by her husband, she engages in business, she cannot be held liable as a *feme sole* trader unless she has been decreed such; 34 Leg. Int. 5. She may convey her real estate by deed in which her husband does not join; 95 Pa. 472; and the title passes free from any claim of the husband as tenant by the curtesy; 104 Pa. 298; in which the act was declared constitutional. The husband is liable for necessaries, notwithstanding the wife has been declared a *feme sole* trader; 9 Phila.

236; and actual residence with her husband does not take away her privileges under the act; 101 Pa. 371; and so in South Carolina; 2 Bay 162; 2 Bish. M. W. § 528. As her powers are in some respects greater than those of a married woman under the act of June 8, 1893, there is no reason for regarding the early Pennsylvania acts as superseded by the later act; 2 P. & L. Dig. 2895, note.

In North Carolina the doctrine that a *feme covert* may be a sole trader was considered with deliberation, and it was held that it did not obtain in that state; 1 Jones, Eq. 1. In an appeal from the District of Columbia it was said by the supreme court that "the law seems to be settled that when a wife is left by her husband, without maintenance and support, has traded as a *feme sole*, and has obtained credit as such, she ought to be liable for her debts," whether the husband was banished for crime or abandoned her; but by Maryland law a deed of real estate acquired by her while a *feme sole* trader, abandoned by her husband, was held void; 1 Pet. 105. In California under a sole trader act, excluding from the benefits of the act a married woman carrying on business in her own name, but managed by her husband, it was held that she could not escape liability as sole trader on the ground that she permitted such management; 43 Cal. 105. See 24 Miss. 416.

A married woman by statute authorized to carry on trade and perform labor or services on her sole and separate account, is personally liable on a note given for property purchased for business purposes; in such a case the court said: "The power of a married woman to make contracts relating to her separate business is incident to the power to conduct it. . . . The power to engage in business would be a barren and useless one disconnected with the right to conduct it in the way and by the means usually employed." 53 N. Y. 422; *id.* 93; 106 *id.* 74.

See, generally, Husb. Married Women, c. xi.; 2 Bish. M. W. c. xlii.

FEMICIDE. The killing of a woman. One who kills a woman. See HOMICIDE.

FEMININE. Of or belonging to females.

When the feminine is used, it is generally confined to females; as, if a man bequeathed all his mares to his son, his horses would not pass. See 3 Brev. 9.

FENATIO, or FEONATIC. In Forest Law. The fawning of deer; the fawning season. Spel. Glos.

FENCE. A building or erection between two contiguous estates, so as to divide them, or on the same estate, so as to divide one part from another. It may be of any material presenting a sufficient obstruction; 77 Ill. 169; and has been held to include a gate; 63 Me. 308. See 19 Can. L. J. 204.

Fences are regulated by local laws. In general fences on boundaries are to be built on the line, and the cost, when made no more expensively than is required by law, is borne equally between the parties; 2 Miles 337, 395; 2 Me. 72; 11 Mass. 294; 3 Wend. 142; 15 Conn. 526; 50 Iowa 237. For modifications of the rule, see 32 Pa. 65; 28 Mo. 556. One adjoining land-owner can compel another to contribute to the expense of maintaining a partition fence only when the fence completes an inclosure which contains no other lands than those of the latter; 50 Ohio St. 722. A partition fence is presumed to be the common property of both owners of the land; 8 B. & C. 257, 259, note *a*; 20 Ill. 334; 24 Minn. 307. When built upon the land of one of them it is his; but if it were built equally upon the land of both, at their joint expense, each would be the owner in severalty of the part standing on his own land; 5 Taunt. 20; 2 Greenl. Ev. § 617. See 2 Washb. R. P. 79.

A class of cases has arisen, in this country, regarding the *responsibility of steam railway companies* for protecting their tracks by fences. In some cases they are required by statute to do so, but unless so required they are not under any obligation to do so, having no other duty than other land-owners; 3 Wood, R. R. 1843; 78 Fed. Rep. 94. A railroad company, when not required by law to fence its tracks, in doing so only exercises extraordinary diligence to prevent danger to cattle, and is not liable if it fails to maintain such fence; 35 S. W. Rep. (Ind. Ter.) 238. When the company is required by statute to fence its track, a failure to do so renders it liable to an employe for an injury caused thereby; 60 Fed. Rep. 370; and see 25 L. R. A. 320, note.

But in a very recent case (78 Fed. Rep. 94) the circuit court of appeals held that the Virginia fence act imposed a duty only to the owners of stock and not to the railroad's employes; and that the violation of the act is no ground of recovery for the death of an employe, killed by the derailing of his train by cattle which came upon the track at a place where the right of way was not fenced. The court distinguished the cases in 111 Mo. 173; 124 *id.* 140; 119 N. Y. 468, as arising under a special statute.

Mandamus is the proper remedy to compel the performance of the statutory duty; 12 L. R. A. 180, note.

The power of the states to require such fencing by statute is fully sustained; 70 Tex. 298; s. c. 35 Am. & Eng. R. R. Cas. 286; and the extent and manner of it are within the legislative discretion; 19 *id.* 545; s. c. 109 Ill. 402; and such statutes are valid under the police power; *id.* 402, 537; 140 *id.* 309; 35 Minn. 503; 16 Kan. 573; 66 Pa. 164; 26 Mo. 441; (a leading case collecting authorities and approving; 27 Vt. 141;) and are not unconstitutional as imposing expense on one for the sole benefit of another; 68 Mo. 56.

As a means of compelling railroads to fence their tracks statutes have been enacted in many states making them absolutely liable in damages for killing stock,

by analogy to the similar statutes respecting damage by fires from locomotives (*q. v.*); but such statutes have generally been held unconstitutional where the question has been raised; 58 Ala. 594; 62 *id.* 71; 6 Utah 253; 8 Mont. 271, 279; 98 N. C. 778; 18 Colo. 600; 16 Kan. 573; 1 Wash. 206; 25 L. R. A. 320, note.

In some states the common law requiring the owner of cattle to keep them within a sufficient enclosure is held not to be in force, and in such case a railroad company, while not required to fence, and fully authorized to transact its lawful business on its track, must exercise reasonable care to avoid injuring cattle which have wandered on their premises, and it is liable for accidents which by ordinary care could have been prevented; 46 Miss. 575; 71 Ala. 545; 27 Conn. 393; 31 Fla. 669; 59 Md. 306; 24 Vt. 487; 89 Mo. 147; 3 Wood, R. R. 1846. Where it is the duty of the company, arising out of the contract, to fence its track, a failure to comply with the terms of such contract renders the company liable for all injuries to animals consequent thereon.

See, generally, as to fencing railroads; 3 Wood, R.R. §§ 417 and 421, where these cases are collected; 5 L. R. A. 737, note, and 8 *id.* 135, both citing statutes and decisions; 11 *id.* 427 (Missouri statutes and decisions); Whart. Negl. 892; 93 Mich. 607; 65 Hun 622; 42 Ill. App. 90; 119 N. Y. 468; 124 Mo. 140; 111 *id.* 173.

Barbed wire fences have given rise to much litigation in this country. It is held that one is not necessarily negligent in using a barbed wire fence, but it should be so used and cared for as not to endanger persons and property, and the use of such fences imposes upon those who use them care reasonably proportionate to their danger; 112 Ind. 504; and a railroad company using barbed fences must use due diligence in running its trains, not only to avoid killing stock, but to avoid precipitating them by fright against the fence to be mangled or bruised; 62 Ga. 680. On his own land one may maintain such a fence, and it is not illegal; 82 Tex. 26, affirming 70 *id.* 123; and expressly disapproving 2 Tex. Unrep. Cas. 254; s. c. 2 Tex. L. Rev. 338 (commented on, 29 Alb. L. J. 23); in which it was held that "such fences are dangerous unless constructed with planks in connection with the wire." But this case was also reviewed with all analogous cases in 8 Ont. H. B. Div. 583; where it was held that it was not negligence *per se* to maintain such fences and they were not a nuisance. The owner is bound to keep the wires properly stretched and not hanging loose; 79 Cal. 317; 112 Ind. 504. See 10 N. J. L. 43. One who has allowed the use of his land by the public before stretching a barbed wire fence across the way is bound to give notice, in order to escape liability for injury resulting from ignorance of the obstruction; 31 N. E. Rep. (Ind.) 559. If it was negligence to maintain such a fence near a private road, it would be negligence in a person riding a horse difficult to control, to approach it; 82 Tex. 26. See, generally, 16 N. J. L. 105.

In Scotch Law. To hedge in or protect by certain forms. *To fence a court*, to open in due form. Pitcairn, Cr. Law, pt. 1, p. 75.

FENCE-MONTH. A month in which it is forbidden to hunt in the forest. It begins fifteen days before midsummer and ends fifteen days after. Manw. For. Laws, c. 23. There were also fence-months for fish. Called, also, *defence-month*, because the deer are then defended from "scare or harm." Cowel; Spelman, Gloss.; Cunningham, Law Dict.

FENERATION. The action or practice of lending on interest; usury. In some modern dictionaries, applied to interest on money lent. Feneration at the rate of an eightieth part by the month; Colebrook, Dig. Hindu Law, I. 7.

FENGELD (Sax.). A tribute exacted for repelling enemies. Spelman, Gloss.

FENIAN. A member of a secret political association of Irish or Irish-Americans founded in New York about 1857, and having for its object to secure the independence of Ireland. As to its organization and its operation, see Enc. tit. Fenian Society,

According to some authorities this word is also defined a champion, hero, giant; or in the plural, invaders or foreign spoilers.

A very late authority designates the word as "one of the names of the ancient population of Ireland confused in modern times with *fiann*, the name of a body of warriors who are said to have been the defenders of Ireland in the time of Finn and other legendary Irish kings." Murray, New Eng. Dict. This is in allusion to the popular tradition attributing the name to a race of heroes in Irish legendary history. See Cent. Dict.; Enc. Dict.; Enc. Brit. ix. 75.

FEOD. Said to be compounded of the two Saxon words *feoh* (stipend) and *odh* (property); by others, to be composed of *feoh* (stipend) and *hod* (condition). 2 Bla. Com. 45; Spelman, Gloss. See FEE; FEUD.

FEODAL. Belonging to a fee or feud; feudal. More commonly used by the old writers than *feudal*.

FEODAL ACTIONS. Real actions. 3 Bla. Com. 117.

FEODAL LAW. Feodal system. See FEUDAL LAW.

FEODALITY. Fidelity or fealty. Cowell. See FEALTY.

FEODARUM, or FEUDARAM CONSUETUDINES. See FEUDAL LAWS.

FEODARY. An officer in the court of wards, appointed by the master of that court, by virtue of the statute 32 Hen. VIII. c. 46, to be present with the escheator at the finding offices and to give in evidence for the king as to value and tenure. He was

also to survey and receive rents of the ward-lands and assign dower to the king's widows. The office was abolished by stat. 12 Car. II. c. 24; Kennett, Gloss.; Cowel.

FEODATORY, or FEUDATORY. The grantee of a feud or fee. The tenant or vassal who held an estate by feudal service. *Termes de la Ley;* 2 Bla. 46.

FEODI FIRMA (L. Lat.). Fee-farm, which see.

FEODUM. The form in use by the old English law-writers instead of *feudum*, and having the same meaning. *Feudum* is used generally by the more modern writers and by the *feudal* law-writers. Littleton § 1; Spelman, Gloss. There were various classes of *feoda*. See FEUDUM.

FEOFFAMENTUM. A feoffment. 2 Bla. Com. 310.

FEOFFARE. To bestow a fee. 1 Reeve, Hist. Eng. Law 91.

FEOFFATOR. A feoffor; he who gives or grants a fee, or who makes a feoffment. Bract. fols. 12 *b*, 81.

FEOFFATUS. A feoffee; one to whom a fee is given or a feoffment made. Bract. fols. 17 *b*, 44 *b*.

FEOFFEE. He to whom a fee is conveyed. Littleton § 1; 2 Bla. Com. 20.

FEOFFEE TO USES. A person to whom land was conveyed for the use of a third party. One holding the same position with reference to a use that a trustee does to a trust. 1 Greenl. Cruise, Dig. 333. He answers to the *hæres fiduciarius* of the Roman law.

FEOFFMENT. A gift of any corporeal hereditaments to another. It operates by transmutation of possession; and it is essential to its completion that the seisin be passed. Watk. Conv. 183.

The conveyance of a corporeal hereditament either by investure or by livery of seisin. 1 Sullivan, Lect. 143; 1 Washb. R. P. 33; Chal. R. P. 363.

The instrument or deed by which such hereditament is conveyed.

This was one of the earliest modes of conveyance used in the common law. It signified originally the grant of a fee or feud; but it came in time to signify the grant of a free inheritance in fee, respect being had rather to the perpetuity of the estate granted, than to the feudal tenure; 1 Reeve, Hist. Eng. Law 90. The feoffment was likewise accompanied by livery of seisin; 1 Washb. R. P. 33. The conveyance by feoffment with livery of seisin has become infrequent, if not obsolete, in England, and in this country has not been used in practice; Cruise, Dig. tit. 32, c. 4, § 3; Shepp. Touchst. c. 9; 2 Bla. Com. 20; Co. Litt. 9; 4 Kent 467; Perkins, c. 3; Com. Dig.; 12 Viner, Abr. 167; Bacon, Abr.; Dane, Abr. c. 104; 1 Sullivan, Lect. 143; Stearn, Real Act. 2; 8 Cra. 229.

FEOFFMENT TO USE. A feoffment of lands made to one person for the benefit or to the use of another. In such case the feoffee was bound in conscience to hold the lands according to the use, and could himself derive no benefit. Sometimes such feoffments were made to the use of the feoffor. The effect of such conveyance was entirely changed by the statute of uses. See Wms. R. P., 6th ed. 155; USE. Since the statute a feoffment directed to operate to the use of any other person than the feoffee, though it be a common-law conveyance, so far as it conveys the land to the feoffee, derives its effect from the statute of uses, so far as the use is limited by it to the person or persons in whose favor it is declared. Thus, if A be desirous to convey to B in fee, he may do so by enfeoffing a third person, C, to hold to him and his heirs to the use of B and his heirs, the effect of which will be to convey the legal estate in fee-simple to B. For since the statute of uses, the legal estate passes to the feoffee by means of the livery as it would have done before; but no sooner has this taken place than the limitation to uses begins to operate, and C thereby becomes seised to the use defined or limited, the consequence of which is that by force of the legislative enactment the legal estate is *eo instanti* taken out of him, and vests in B, for the like interest as was limited in the use, *i. e.* in fee-simple. B thus becomes the legal tenant as effectually as if the feoffment had been made to himself, and without the intervention of a trustee. This method is not much practised in consequence of the livery of seisin, which has become obsolete. See 2 Sand. Us. 13; Watk. Conv. 288; FEOFFMENT.

FEOFFOR. He who makes a feoffment. 2 Bla. Com. 20; Litt. § 1.

FEOH (Sax.). A reward; wages; a fee. The word was in common use in these senses. Spelman, Feuds.

FEORME. A certain portion of the produce of the land due by the grantee to the lord according to the terms of the charter. Spel. Feuds c. 7.

FERÆ BESTIÆ. Wild beasts.

FERÆ NATURÆ (Lat. of a wild nature; untamed). A term used to designate animals not usually tamed, or not regarded as reclaimed so as to become the subject of property.

Such animals belong to the person who has captured them only while they are in his power; for if they regain their liberty his property in them instantly ceases, unless they have *animum revertendi*, which is to be known only by their habit of returning; 2 Bla. Com. 386; 3 Binn. 546; Brooke, Abr. *Propertie* 37; Com. Dig. *Biens*, F; 7 Co. 17 *b*; Inst. 2. 1. 15; [1896] 1 Q. B. 166.

Property in animals *feræ naturæ* is not acquired by hunting them and pursuing them; if, therefore, another person kills such animal in the sight of the pursuer, he has a right to appropriate it to his own use; 3 Cai. 175. But if the pursuer brings the

animal within his own control, as by entrapping it or wounding it mortally, so as to render escape impossible, it then belongs to him; *id.*; though if he abandons it another person may afterwards acquire property in the animal; 20 Johns. 75. The owner of land has a qualified property in animals *feræ naturæ* when, in consequence of their inability and youth, they cannot go away. See Year B. 12 Hen. VIII. (9 B, 10 A); 2 Bla. Com. 394; Bacon, Abr. *Game.*

The supreme court of the United States recently held a Louisiana statute constitutional which prescribed that dogs are only to be regarded as personal property when recorded on assessment rolls. The court said: "The very fact that they are without protection of the criminal laws shows that property in dogs is an imperfect or qualified nature, and that they stand, as it were, between animals *feræ naturæ*, in which until subdued there is no property, and domestic animals, in which the right of property is complete." Sentell *v.* N. O. & C. R. R. Co., April 26, 1897. See DOGS; GAME; ANIMALS.

FERCOSTA (Ital.). **In Scotch Law.** A kind of small vessel or boat. Skene.

FERDELLA TERRÆ. A fardel land; ten acres; or perhaps a yard-land. Cowel.

FERDFARE (Sax.). A summons to serve in the army. An acquittance from going into the army. Fleta, lib. 1, c. 47, 23.

FERDINGUS. Apparently a freeman of the lowest class, being named after the *cotseti.* Anc. Inst. Eng.

FERDWITE. An acquittance of manslaughter committed in the army; also a fine imposed on persons for not going forth on a military expedition. Cowel.

FERIA (Lat.). **In Old English Law.** A week-day; a holiday; a day on which process may not be served; a fair; a ferry. Du Cange; Spelman, Gloss.; Cowel; 4 Reeve, Hist. Eng. Law 17.

FERIÆ (Lat.). **In Civil Law.** Holidays. Numerous festivals were called by this name in the early Roman empire. In the later Roman empire the single days occurring at intervals of a week apart, commencing with the seventh day of the ecclesiastical year, were so called. Du Cange.

All *feriæ* were *dies nefasti.* All *feriæ* were divided into two classes,—"*feriæ publicæ*" and "*feriæ privatæ.*" The latter were only observed by single families or individuals in commemoration of some particular event which had been of importance to them or their ancestors. Smith, Dict. Antiq.

FERIAL DAYS. Originally and properly, days free from labor and pleading. In statute 27 Hen. VI. c. 5, working-days. Cowel.

FERITA. In European Law. A wound; stroke. Spel. Glos.

FERLING. In English Law. The fourth part of a penny; also, the quarter of a ward in a borough.

FERLINGATA. A fourth part of a yard-land.

FERLINGUS, or FERLINGUM. A furlong (*q. v.*). Co. Litt. 5 *b.*

FERM, or FEARM. A house or land, or both, let by lease. Cowel.

FERME (Sax.). A farm; a rent; a lease; a house or land, or both, taken by indenture or lease. Plowd. 195; Vicat, Voc. Jur.; Cowel. See FARM.

FERMER, FERMOR. A lessee; a farmer. One who holds a term, whether of lands or an incorporeal right, such as customs or revenue.

FERMIER. In French Law. One who farms any public revenue.

FERMISONA. The winter season for killing deer.

FERMORY. In Old Records. A place in monasteries, where they received the poor (*hospicio excipiebant*), and gave them provisions (*ferm, firma*). Spel. Glos.

FERNIGO. In English Law. A waste ground or place where ferns grow. Cowel.

FERRATOR. A farrier (*q. v.*).

FERRI. In Civil Law. To be borne, *i. e.* on or about the person, in contradistinction from *portari*, to be carried on an animal.

FERRIAGE. The toll or price paid for the transportation of persons and property across a ferry. 35 Cal. 606.

FERRIFODINA. In Old English Law. An iron mine. Townsh. Pl. 273.

FERRUM (Lat. iron). **In Old English Law.** A horse-shoe.

FERRUERE. The shoeing of horses. Kelham.

FERRY. A liberty to have a boat upon a river for the transportation of men, horses, and carriages with their contents, for a reasonable toll. 42 Me. 9; 3 Zabr. 206; Woolr. Ways 217. The term is also used to designate the place where such liberty is exercised; 4 Mart. La. N. S. 426. Ferry properly means a place of transit across a river or arm of the sea; but in law it is treated as a franchise, and defined as the exclusive right to carry passengers across a river, or arm of the sea, from one vill to another, or to connect a continuous line of road leading from one township or vill to another. It is not a servitude or easement. It is wholly unconnected with the ownership or occupation of land, so much so that the owner of the ferry need not have any property in the soil adjacent on either side. 12 C. B. N. S. 32.

An exclusive right of ferry exists where one acquires the sole and exclusive privilege of taking tolls for such service. The ele-

ment of receiving payment is essential, as one may lawfully transport his own goods in a boat, where an exclusive right of ferry is held by another ; 73 Mo. 655.

In England, ferries are established by royal grant or by prescription, which is an implied grant ; in the United States, by legislative authority, exercised either directly or by a delegation of powers to courts, commissioners, or municipalities ; 7 Pick. 344 ; 11 Pet. 420 ; 20 Conn. 218 ; 8 Me. 365 ; 18 Ark. 19. Without such authority no one, though he may be the owner of both banks of the river, has the right to keep a public ferry ; 3 Mo. 470 ; 13 Ill. 27 ; 6 Ga. 130 ; 11 Pet. 420 ; Willes 508 ; though after twenty years' uninterrupted use such authority will be presumed to have been granted ; 2 Dev. 402 ; 1 N. & M'C. 389 ; 4 Ill. 53 ; 7 Ga. 348 ; but see 10 Ky. L. Rep. 940. The franchise of a ferry will, in preference, be granted to the owner of the soil, but may be granted to another ; and by virtue of the right of eminent domain the soil of another may be condemned to the use of the ferry, upon making just compensation ; 6 B. & C. 703 ; 5 Yerg. 189 ; 7 Humph. 86 ; 2 Dev. 403 ; 9 Ga. 359 ; 6 Dana 242 ; 8 Me. 365 ; 2 Cal. 262. If the *termini* of the ferry be a highway, the owner of the fee will not be entitled to compensation ; 3 Kent 421 ; 4 Zabr. 718 ; 7 Gratt. 205 ; 1 T. B. Monr. 348 ; though in Pennsylvania and other states a different doctrine prevails ; 9 S. & R. 31 ; 3 Watts 219 ; 20 Wend. 111 ; 4 Am. L. Reg. N. S. 520 ; 3 Yerg. 387. See EMINENT DOMAIN.

One state has the right to establish ferries over a navigable river separating it from another state or from a foreign territory, though its jurisdiction may extend only to the middle of such river ; and the exercise of this right does not conflict with the provision in the constitution of the United States conferring upon congress the power "to regulate commerce with foreign nations and among the several states," nor with any law of congress upon that subject ; 11 Wend. 586 ; 3 Yerg. 387 ; 3 Zabr. 206 ; 2 Gilm. 197 ; 38 N. Y. 39 ; 74 Tex. 480. The granting of a temporary license to operate a ferry within the city limits, is valid ; 108 Mo. 550. A state may at its pleasure erect a new ferry so near an older ferry as to impair or destroy the value of the latter by drawing away its custom, unless the older franchise be protected by the terms of its grant ; 15 Pick. 243 ; 6 Dana 43 ; 9 Ga. 517 ; 6 How. 507 ; 16 *id.* 524 ; 7 Ill. 197 ; 1 La. Ann. 288 ; 10 Ala. N. S. 37 ; 25 Wend. 628. See 145 Pa. 404 ; 138 U. S. 287. But if an individual, without authority from the state, erect a new ferry so near an older ferry, lawfully established, as to draw away the custom of the latter, such individual will be liable to an action on the case for damages, or to a suit in equity for an injunction in favor of the owner of the latter ; 6 M. & W. 234 ; 67 N. W. Rep. (S. D.) 57 ; 3 Wend. 618 ; 17 Ala. N. S. 584 ; 16 B. Monr. 699 ; 4 Jones 277 ; 3 Murph. 57 ; but he may transport his own goods in his own boats where another has an exclusive right of ferry ; 73 Mo. 655 ; 51 Mo. App. 228 ; 74 Tex. 480. The grant to a city by the legislature of the right of licensing ferries, does not empower the city to grant exclusive ferry privileges ; 108 Mo. 550.

The franchise of a ferry is an incorporeal hereditament, and as such it descends to heirs, is subject to dower, may be leased, sold, and assigned ; 5 Com. Dig. 291 ; 12 East 334 ; 2 McLean 376 ; 3 Mo. 470 ; 7 Ala. N. S. 55 ; 9 *id.* 529 ; 51 Mo. App. 228 ; 65 Miss. 351 ; and when created by act of the legislature can be conveyed only by deed ; 188 Ill. 518 ; but, nevertheless, being a franchise in which the public have rights and interests, it is subject to legislative regulation for the enforcement and protection of such rights and interests ; Cooley, Const. Lim. 732 ; 10 Barb. 223 ; 4 Zabr. 718 ; 11 B. Monr. 361 ; 9 Mo. 560.

The owners of ferries are common carriers, and liable as such for the carriage of the goods and persons which they receive upon their boats. They are bound to have their ferries furnished with suitable boats, and to be in readiness at all proper times to transport all who apply for a passage ; Ang. High. 437 ; 3 Humphr. 245 ; 3 Pa. 342 ; 5 Mo. 36 ; 12 Ill. 344 ; 5 Cal. 360 ; 10 M. & W. 161 ; 34 Ark. 385 ; 100 Ala. 323. They must have their flats so made and so guarded with railings that all drivers with horses and carriages may safely enter thereon ; and as soon as the carriage and horses are fairly on the drops or slips of the flat, and during their transportation, although driven by the owner or his servant, they are in the possession of the ferryman, and the owners of the ferry are answerable for the loss or injury of the same unless occasioned by the fault of the driver ; 1 M'Cord 439 ; 16 E. L. & Eq. 437 ; 14 Tex. 290 ; 28 Miss. 792 ; 4 Ohio St. 722 ; 7 Cush. 154 ; they are not required to have railings at the end of their boats when not in actual use, so as to prevent runaway teams from entering and passing over the same to the river ; 46 Minn. 388 ; see NEGLIGENCE ; but it is also well settled that if the owner retains control of the property himself and does not surrender the charge to the ferryman, such strict liability does not attach, and he is only responsible for actual negligence ; 26 Ark. 3 ; S. C. 7 Am. Rep. 595 ; 52 N. Y. 32 ; 10 M. & W. 546 ; 36 Am. Rep. 504, n. See 91 Ga. 422. If the ferry be rented, the tenant and not the owner is subject to these liabilities, because such tenant is *pro hac vice* the owner ; 1 Ala. 366 ; 12 Ired. 1 ; 26 Barb. 618 ; 22 Vt. 170. See article in 4 Am. L. Reg. N. S. 517 ; 19 *id.* 148 ; Washb. Easements ; Ang. Pat. Fed. Restr. s. t. Act. Water Courses.

See COMMERCE ; TAXATION ; RATES.

FERRYMAN. One employed in taking persons across a river or other stream, in boats or other contrivances, at a ferry. 3 Ala. 160 ; 8 Dana 158.

FESTAS IN CAPPIS. In Old English Law. Grand holidays, on which

choirs were accustomed to wear caps. Jac. L. Dict.

FESTING-MAN. A bondsman; a surety; a pledge; a frank-pledge. It was one privilege of monasteries that they should be free from *festing-men*, which Cowel explains to mean not to be bound for any man's forthcoming who should transgress the law. Cowel.

FESTING-PENNY. Earnest (*q. v.*) given to servants when hired or retained. The same as *arles-penny*. Cowel.

FESTINUM REMEDIUM (Lat. a speedy remedy). A term applied to those cases where the remedy for the redress of an injury is given without any unnecessary delay. Bacon, Abr. *Assise*, A. The action of dower is *festinum remedium*, and so is that of assise.

FESTUCA. In Frankish Law. A rod or staff or (as described by other writers) a stick, on which imprecatory runs were cut, which was used as a gage or pledge of good faith by a party to a contract, or for symbolic delivery in the conveyance or quit-claim of land, before a court of law, anterior to the introduction of written documents by the Romans. 2 Poll. & Maitl. 86, 184, 190; Maitl. Domesday Book and Beyond 323.

FESTUM (Lat.). A feast, a holiday, a festival.

FETTERS. A sort of iron put on the limbs of a malefactor or a person accused of crime.

When a prisoner is brought into court to plead, he shall not be put in fetters; Co. 2d Inst. 315; Co. 3d Inst. 34; 2 Hale, Pl. Cr. 119; Kel. 10; 1 Chitty, Cr. Law 417; 4 Bla. Com. 322.

In the first case in this country in which the old common-law doctrine was considered and enforced, the court held that to try a prisoner in shackles was to deprive him of his rights, and that a conviction, under such circumstances, would be reversed; 42 Cal. 165, followed in 64 Mo. 61 (affg. 1 Mo. App. 438). A single expression on this subject seems to be opposed to these cases. An English writer, commenting on the action of a barrister who withdrew and refused to proceed with a case because the judge ordered his client fettered during the trial, considers the removal of fetters to be a mere matter of courtesy, being designed to relieve the prisoner, so far as is practicable, from all that might enlist prejudice against him or disturb his self-possession, and that such removal cannot be considered a matter of right; 43 L. T. 390.

An officer having arrested a defendant on a civil suit, or a person accused of a crime, has no right to handcuff him unless it is necessary or he has attempted to make his escape; 4 B. & C. 596. It is not conclusive on a question of escape that the arresting officer did not handcuff the prisoner; 94 N. C. 829.

FEU. In Scotch Law. A holding or tenure where the vassal in place of military service makes his return in grain or money. Distinguished from wardholding, which is the military tenure of the country. Bell, Dict.; Erskine, Inst. lib. ii. tit. 3, § 7.

FEU ANNUALS. In Scotch Law. The *reddendo*, or annual return from the vassal to a superior in a feu holding. Wharton, Dict., 2d Lond. ed.

FEU ET LIEU (Fr.). **In Old French Canadian Law.** Hearth and home, meaning actual settlement by a tenant on the land.

FEU HOLDING. A holding by tenure of rendering grain or money in place of military service. Bell, Dict.

FEUAR. In Scotch Law. The tenant or vassal of a feu. Bell, Dict.

FEUD. Land held of a superior on condition of rendering him services. 2 Bla. Com. 106.

A hereditary right to use lands, rendering services therefor to the lord, while the property in the land itself remains in the lord. Spelman, Feuds c. 1.

The same as *feod*, fief, and *fee*. 1 Sullivan, Lect. 128; 1 Spence, Eq. Jur. 34; Dalrymple, Feud. Pr. 99; 1 Washb. R. P. 18; Mitch. R. P. 80.

In Scotland and the North of England, a combination of all the kin to revenge the death of any of the blood upon the slayer and all his race. *Termes de la Ley;* Whishaw. See FEUDUM.

FEUDA. Fees.

FEUDAL ACTIONS. See FEODAL ACTIONS.

FEUDAL LAW, FEODAL LAW. A system of tenures of real property which prevailed in the countries of western Europe during the middle ages, arising from the peculiar political condition of those countries, and radically affecting the law of personal rights and of movable property.

Although the feudal system has never obtained in this country, and is long since extinct throughout the greater part of Europe, some understanding of the theory of the system is essential to an accurate knowledge of the English constitution, and of the doctrines of the common law in respect to real property. The feudal tenure was a right to lands on the condition of performing services and rendering allegiance to a superior lord. It had its origin in the military immigrations of the Northmen, who overran the falling Roman empire. Many writers have sought to trace the beginning of the system in earlier periods, and resemblances more or less distinct have been found in the tenures prevailing in the Roman republic and empire, in Turkey, in Hindustan, in ancient Tuscany, as well as in the system of Celtic clanship. Hallam, Mid. Ag. vol. 1; Stuart, Soc. in Europe; Robertson, Hist. of Charles V.; Pinkerton, Diss. on the Goths; Montesquieu, *Esp. des Lois*, livre xxx. c. 2; Meyer, *Esprit, Origine et Progrés des Inst. judiciaires*, tom. 1, p. 4.

But the origin of the feudal system is so obvious in the circumstances under which it arose, that perhaps there is no other connection between it and these earlier systems than that all are the outgrowth of political conditions somewhat similar. It has been said that the system is nothing more than the natural fruit of conquest; but the fact that the conquest was by immigrants, and that the con-

querors made the acquired country their permanent abode, is an important element in the case, and in so far as other conquests have fallen short of this, the military tenures resulting have fallen short of the feudal system. The military chieftains of the northern nations allotted the lands of the countries they occupied among themselves and their followers, with a view at once to strengthen their own power and ascendency and to provide for their followers.

Some lands were allotted to individuals as their own proper estates, and these were termed allodial; but, for the most part, those lands which were not retained by the chieftain he assigned to his *comites*, or knights, to be held by his permission, in return for which they assured him of their allegiance and undertook for him military service.

It resulted that there was a general dismemberment of the political power into many petty nations and petty sovereignties. The violence and disorders of the times rendered it necessary both for the strong to seek followers and for the weak to seek a protecting allegiance; and this operated on the one hand to lead the vassals to divide again among their immediate retainers the lands which they had received from the paramount lord, upon similar terms, and by this subinfeudation the number of fiefs was largely increased; and the same circumstances operated on the other hand to absorb the allodial estates by inducing allodial proprietors to surrender their lands to some neighboring chieftain and receive them again from him under feudal tenure. Every one who held lands upon a feudal tenure was bound, when called upon by his benefactor or immediate lord, to defend him, and such lord was, in turn, subordinate to his superior, and bound to defend him, and so on upwards to the paramount lord or king, who in theory of the law was the ultimate owner of all the lands of the realm. The services which the vassals were bound to render to their lords were chiefly military; but many other benefits were required, such as the power of the lord or the good will of the tenant would sanction.

This system came to its height upon the continent in the empire of Charlemagne and his successors. It was completely established in England in the time of William the Norman and William Rufus, his son; and the system thus established may be said to be the foundation of the English law of real property and the position of the landed aristocracy, and of the civil constitution of the realm. And when we reflect that in the middle ages real property had a relative importance far beyond that of movable property, it is not surprising that the system should have left its traces for a long time upon the law of personal relations and personal property. The feudal tenures were originally temporary, at the will of the lord, or from year to year; afterwards they came more commonly to be held for the life of the vassal; and gradually they acquired an inheritable quality, the lord recognizing the heir of the vassal as the vassal's successor in his service.

The chief incidents of the tenure by military service were—*Aids*,—a pecuniary tribute required by the lord in an emergency, *e. g.* a ransom for his person if taken prisoner, or money to make his son a knight or to marry his daughter. *Reliefs*,—the consideration which the lord demanded upon the death of a vassal for allowing the vassal's heir to succeed to the possession; and connected with this may be mentioned *primer seisin*, which was the compensation that the lord demanded for having entered upon the land and protected the possession until the heir appeared to claim it. *Fines upon alienation*,—a consideration exacted by the lord for giving his consent that the vassal should transfer the estate to another, who should stand in his place in respect to the services owed. *Escheat*.—Where on the death of the vassal there was no heir, the land reverted to the lord; also, where the vassal was guilty of treason; for the guilt of the vassal was deemed to taint the blood, and the lord would no longer recognize him or his heirs. *Wardship and Maritage*.—Where the heir was a minor, the lord, as a condition of permitting the estate to descend to one who could not render military service, assumed the guardianship of the heir, and, as such, exercised custody both of his person and of the property, without accounting for the profits, until the heir, if a male, was twenty-one and could undertake the military services, or, if a female, until she was of a marriageable age, when on her marriage her husband might render the services. The lord claimed, in virtue of his guardianship, to make a suitable match for his ward, and if wards refused to comply they were mulcted in damages.

Feudal tenures were abolished in England by the statute 12 Car. II. c. 24; but the principles of the system still remain at the foundation of the English and American law of real property. Although in many of the states of the United States all lands are held to be allodial, it is the theory of the law that the ultimate right of property is in the state; and in most of the states escheat is regulated by statute. "The principles of the feudal system are so interwoven with every part of our jurisprudence," says Ch. J. Tilghman, "that to attempt to eradicate them would be to destroy the whole." 3 S. & R. 447; 9 *id.* 333. "Though our property is allodial," says Ch. J. Gibson, "yet feudal tenures may be said to exist among us in their consequences and the qualities which they originally imparted to estates; as, for instance, in precluding every limitation founded on an abeyance of the fee." 3 Watts 71; 1 Whart. 337; 7 S. & R. 188; 13 Pa. 35.

Many of these incidents are rapidly disappearing, however, by legislative changes of the law.

The principles of the feudal law will be found in Littleton's Ten.; Wright's Tenures; 2 Bla. Com. c. 5; Dalrymple's Hist. of Feudal Property; Sullivan's Lectures; Book of Fiefs; Spelman's Treatise of Feuds and Tenures; Cruise's Digest; *Le Grand Coutumier;* the Salic Laws; the Capitularies; *Les Etablissements de St. Louis; Assise de Jérusalem;* Pothier, *des Fiefs;* Merlin, *Rép. Feodalité;* Dalloz, Dict. *Feodalité;* Guizot, *Essais sur l'Histoire de France*, Essai 5ème; Introduction to Robertson's Charles V.; Poll. & Maitl. Hist. Eng. Law; Stubbs, Const. Hist.

The principal original collection of the feudal law of continental Europe is a digest compiled at Milan in the twelfth century, *Feudorum Consuetudines*, which is the foundation of many of the subsequent compilations. The American student will perhaps find no more convenient source of information than Blackstone's Commentaries, Sharswood's ed., vol. 2, 43, and Greenleaf's Cruise, Dig. Introd.

FEUDARY. A tenant who holds by feudal tenure. Held by feudal service. Relating to feuds or feudal tenures. See FEODARY.

FEUDBOTE. A recompense for engaging in a feud, and the damages consequent, it having been the custom in ancient times for all the kindred to engage in their kinsman's quarrel. Jac. L. Dict.

FEUDE, or DEADLY FEUD. A German word, signifying implacable hatred, not to be satisfied but with the death of the enemy. Such was that among the people in Scotland and in the northern part of England, which was a combination of all the kindred to revenge the death of any of the blood upon the slayer and all his race. *Termes de la Ley.*

FEUDIST. A writer on feuds, as Cujacius. Spel. Gloss.

FEUDORUM LIBRI. The Books of Feuds published during the reign of Henry III., about the year 1152. The particular customs of Lombardy as to feuds began about that time to be the standard of authority to other nations, by reason of the greater refinement with which that branch of learning had been there cultivated. This compilation was probably known in England, but does not appear to have had any other effect than to influence English lawyers to the more critical study of their own tenures, and to induce them to extend the learning of real property so as to embrace more curious matter of similar kind. "Thus, tenures in England continued a

peculiar species of feuds, partaking of certain qualities in common with others; but when once established here, growing up with a strength and figure entirely their own. While most of the nations of Europe referred to the Books of Feuds as the grand code of law by which to correct and amend the imperfections in their own tenures, there is not in English law books any allusion that intimates the existence of such a body of constitutions." 2 Reeves, Hist. Eng. Law 55.

FEUDO. In Spanish Law. Feud or fee. White, New Recop. b. 2, tit. 2, c. 2.

FEUDUM. A feud, fief, or fee. A right of using and enjoying forever the lands of another, which the lord grants on condition that the tenant shall render fealty, military duty, and other services. Spelman, Gloss. It is not properly the land, but a right in the land. This form of the word is used by the feudal writers. The earlier English writers generally prefer the form *feodum;* but the meaning is the same.

Feudum antiquum. A fee descended from the tenant's ancestors. 2 Bla. Com. 212. One which has been possessed by the relations of the tenant for four generations. Spelman, Gloss.

Feudum apertum. A fee which the lord might enter upon and resume either through failure of issue of the tenant or any crime or legal cause on his part. Spelman, Gloss. 2 Bla. Com. 245.

Feudum francum. A free feud. One which was noble and free from talliage and other subsidies to which the *plebeia feuda* (vulgar feuds) were subject. Spelman, Gloss.

Feudum hauberticum. A fee held on the military service of appearing fully armed at the *ban* and *arriere ban.* Spelman, Gloss.

Feudum improprium. A derivative fee.

Feudum individuum. A fee which could descend to the eldest son alone. 2 Bla. Com. 215.

Feudum laicum. A lay fee.

Feudum ligium. A liege fee. One where the tenant owed fealty to his lord against all other persons. Spelman, Gloss.; 1 Bla. Com. 367.

Feudum maternum. A fee descending from the mother's side. 2 Bla. Com. 212.

Feudum militare. A knight's fee, held by knight service and esteemed the most honorable species of tenure. 2 Bla. Com. 62.

Feudum nobile. A fee for which the tenant did guard and owed fealty and homage. Spelman, Gloss.

Feudum novum. One which began with the person of the feudatory, and did not come to him by descent.

Feudum novum ut antiquum. A new fee held with the qualities and incidents of an ancient one. 2 Bla. Com. 212; Wms. R. P. 126.

Feudum paternum. A fee which the paternal ancestors had held for four generations. Calvinus, Lex.; Spelman, Gloss. One descendible to heirs on the paternal side only. 2 Bla. Com. 223. One which might be held by males only. Du Cange.

Feudum proprium. A genuine original feud or fee, of a military nature, in the hands of a military person. 2 Sharsw. Bla. Com. 57.

Feudum talliatum. A restricted fee. One limited to descend to certain classes of heirs. 2 Bla. Com. 112, n.; 1 Washb. R. P. 66; Spelman, Gloss.

The distinction between *feodum antiquum* and *feodum novum* has had an important bearing upon the law of descent with respect to the admission of collaterals and the exclusion of ascendants. The theory of Blackstone, which is characterized by both Christian and Pollock & Maitland as "ingenious," will be found fully stated in 2 Com. 211, while for the latest criticism of it and other theories on the subject, see 2 Poll. & Maitl. 285.

FEW. An indefinite expression for a small or limited number. In cases where exact description is required, the use of the word will not answer; 53 Vt. 60; 2 Car. & P. 300; Black, L. Dict.

FIANCER. To pledge one's faith. Kelham.

FIANZA (Span.). Surety. The contract by which one person engages to pay the debt or fulfil the obligations of another if the latter should fail to do so.

FIAR. In Scotch Law. One whose property is charged with a life-rent. Where a right is taken to a husband and wife in conjunct fee and life-rent, the husband, as the *persona dignior,* is the only fiar. Ersk. Prin. 421.

FIARS PRICES. The value of grain in the different counties of Scotland, fixed yearly by the respective sheriffs, in the month of February, with the assistance of juries. These regulate the prices of grain stipulated to be sold at the fiar's prices, or when no price has been stipulated. Ersk. 1, 4, 6.

FIAT. An order of a judge or of an officer whose authority, to be signified by his signature, is necessary to authenticate the particular acts. A short order or warrant of the judge, commanding that something shall be done. See 1 Tidd, Pr. 100, 108.

FIAT IN BANKRUPTCY. An order of the lord chancellor that a commission of bankruptcy shall issue. 1 Deac. Bank. 106.

Fiats are abolished by 12 & 13 Vict. c. 116.

FIAUNT. An order; command. See FIAT.

FICTION. The legal assumption that something which is or may be false is true.

The expedient of fictions is sometimes resorted to in law for the furtherance of justice. The law-making power has no need to resort to fictions: it may establish its rules with simple reference to the truth; but the courts, which are confined to the administration of existing rules, and which lack the power to change those rules, even in hard cases, have frequently avoided the injustice that their application to the actual facts might cause, by assuming, in behalf of justice, that the actual facts are different from what they really are.

Thus, in English law, where the administration of criminal justice is by prosecution at suit of the crown, the courts, rather than disregard the rules under which all other parties stand in respect to their neglect to appear and prosecute their suits, adopt the fiction that the king is legally ubiquitous and always in court, so that he can never be non-suited. The employment of fictions is a singular illustration of the justice of the common law, which did not hesitate to conceal or affect to conceal the fact, that a rule of law has undergone alteration, its letter remaining unchanged.

Fictio in the old Roman law was properly a term of pleading and signified a false averment on the part of the plaintiff which the defendant was not allowed to traverse: as that the plaintiff was a Roman citizen, when in truth he was a foreigner. The object of the fiction was to give the court jurisdiction; Maine, Anc. Law 25.

Fictions are to be distinguished on the one hand from presumptions of law, and on the other hand from estoppels. A presumption is a rule of law prescribed for the purpose of getting at a certain conclusion, though arbitrary, where the subject is intrinsically liable to doubt from the remoteness, discrepancy, or actual defect of proofs.

Thus, an infant under the age of seven years is conclusively presumed to be without discretion. Proof that he had discretion the court will not listen to. In the nature of the subject, there must be a limit, which it is better should be a general though arbitrary one than be fluctuating and uncertain in each case. An estoppel, on the other hand, is the rule by which a person is precluded from asserting a fact by previous conduct inconsistent therewith on his own part or the part of those under whom he claims, or by an adjudication upon his rights which he cannot be allowed to question.

This distinction is thus expressed by a Scotch writer:—"A *fictio juris* differs from a presumption. Things are presumed which are likely to be true; but a fiction of law assumes for truth what is either false, or at least is as probably false as true. Thus, an heir is feigned or considered in law as the same person with his ancestor; thus, also, writings against which certification is obtained in a reduction-improbation are judged to be false, *fictione juris*, though the most convincing proof shall be brought that they once existed and were genuine. Fictions of law must in all their effects be always limited to the special purpose of equity for which they were introduced. Ersk. Prin. 531.

The familiar fictions of the civil law and of the earlier common law were very numerous; but the more useful of them have either been superseded by authorized changes in the law or have gradually grown as it were into distinct principles, forming exceptions or modifications of those principles to evade which they were at first contrived. As there is no just reason for resorting to indirection to do that which might be done directly, fictions are rapidly disappearing before the increasing harmony of our jurisprudence. See 4 Benth. Ev. 300; 2 Pothier, Obl., Evans' ed. 43. But they have doubtless been of great utility in conducing to the gradual amelioration of the law; and, in this view, fiction, equity, and legislation have been named together as the three instrumentalities in the improvement of the law. They have been employed historically in the order here given. Sometimes two of them will be seen operating together, and there are legal systems which have escaped the influence of one or the other of them. But there is no instance in which the order of their appearance has been changed or inverted. Maine, Anc. Law 24.

Theoretical writers have classified fictions as of five sorts: *abeyance*, when the fee of land is supposed to exist for a time without any particular owner during an outstanding freehold estate; 2 Bla. Com. 107; 1 Cruise, Dig. 67; 1 Com. Dig. 175; 1 Viner, Abr. 104; the doctrine of *remitter*, by which a party who has been disseised of his freehold, and afterwards acquires a defective title, is remitted to his former good title; that one thing done to-day is considered as done at a preceding time by the doctrine of *relation;* that, because one thing is proved, another shall be presumed to be true, which is the case in all *presumptions;* that the heir, executor, or administrator stand by *representation* in place of the deceased. Again, they have been classified as of three kinds: positive, when a fact which does not exist is assumed; negative, when a fact which does exist is ignored; and fictions by relation, when the act of one person is taken as if it were the act of a different person,—*e. g.*, that of a servant as the act of his master; when an act at one time or place is treated as if performed at a different time or place; and when an act in relation to a certain thing is treated as if it were done in relation to another thing which the former represents, —*e. g.*, where delivery of a portion of goods sold is treated as giving possession of the whole; Best, Pres. 27.

Fictions being resorted to simply for the furtherance of justice; Co. Litt. 150; 10 Co. 42; 1 Cowp. 177; several maxims are fundamental to them. *First*, that that which is impossible shall not be feigned; D'Aguesseau, *Œuvres*, tome iv. pp. 427, 447 *c*, *Plaidoyer;* 2 Rolle 502. *Second*, that no fiction shall be allowed to work an injury; 3 Bla. Com. 43; 17 Johns. 348. *Third*, a fiction is not to be carried further than the reasons which introduced it necessarily require; 1 Lilly, Abr. 610; 2 Hawk. Pl. Cr. 320; Best, Pres. § 20.

Consult Dalloz, Dict.; Burg. Ins. 139; Ferguson, Moral Phil. pt. 5, c. 10, § 3; 1 Toullier 171, n. 203; 2 *id.* 217, n. 203; 11 *id.* 10, n. 2; Maine, Anc. Law; Benth. Jud. Ev.; 1 Poll. & Maitl. 469.

FICTITIOUS ACTION. A suit brought on pretence of a controversy when no such controversy in truth exists. Such actions have usually been brought on a pretended wager, for the purpose of obtaining the opinion of the court on a point of law. Courts of justice were constituted for the purpose of deciding really existing questions of right between parties; and they are not bound to answer impertinent questions which persons think proper to ask them in the form of an action on a wager; 12 East 248. Such an attempt has been held to be a contempt of court; and Lord Hardwicke in such a case committed the parties and their attorneys; Rep. *t.* Hardw. 237. See, also, Comb. 425; 1 Co. 83; 6 Cra. 147; FEIGNED ACTIONS.

FICTITIOUS PARTY. Where a suit is brought in the name of one who is not in being, or of one who is ignorant of the suit and has not authorized it, it is said to be brought in the name of a fictitious plaintiff. To bring such a suit is deemed a contempt of court; 4 Bla. Com. 133.

FICTITIOUS PAYEE. When a contract, such as negotiable paper, is drawn in favor of a fictitious person, and has been indorsed in such name, it is deemed payable to bearer as against all parties who are privy to the transaction; and a holder in good faith may recover on it against them; Pars. Bills & N. 591, n.; 2 H. Bla.

178, 288; 19 Ves. 311; 30 Miss. 122; 54 Ill. 239; 11 Barb. 248; 2 Yeates 480. And see 10 B. & C. 468; 2 Sandf. 38; 2 Duer 121; 104 Mass. 336; 2 Neb. 29.

The maker of such a note, by negotiating it, transfers title to it without indorsement, and it is presumed that the note came into the possession of the holders with the names of all the indorsers on it, and *prima facie* he is created as a holder for value; 5 N. Y. Supp. 753; 6 Bosw. 202; 3 Hill 112; provided that the acceptor or indorser be ignorant of the fact that the payee is fictitious; 21 Ohio St. 483; 1 Camp. 130; and to entitle the holder of such a note to a recovery it must appear affirmatively that he was ignorant of the fact that the payee was a fictitious person; 4 E. D. Sm. 83. It was said by Lord Ellenborough that as between the original parties who put it into circulation with a knowledge of the fiction, it might be held void as an inoperative instrument, but if money from the holder actually gets into the hands of the acceptor it may be recovered back as money had and received; 1 Camp. 130; *id.* addenda, 180 *b*, 9. See also Peak. Add. Cas. 146; Sto. Prom. Notes 39. In the hands of a *bona fide* holder the note or bill is good against the maker; 79 N. Y. 536; 22 Ia. 404; 11 Ind. 103; 40 N. H. 21.

A *bona fide* holder for a valuable consideration of a bill drawn payable to a fictitious person and indorsed in that name by the drawer may recover the amount of it in an action against the acceptor for money paid or money had and received upon the idea that there was an appropriation of so much money to be paid to the person who should become the holder of the bill; 3 Term 174; and the mere fact of the acceptance of such a bill is evidence that the value has been received for it; *id.* 182; in this case three judges thought that the bill was to be considered as payable to bearer, and in the leading case of Minet *v.* Gibson that view was taken and it was held that a recovery from the acceptor may be had upon a count upon a bill payable to bearer, where such acceptor is aware that the payee is a fictitious person; 3 Term 481. This judgment was affirmed by the House of Lords, though with a dissent by Eyre, C. B., and Heath, J., judges, with whom Lord Thurlow coincided; 1 H. Bla. 569; s. c. 6 Bro. P. C. 235. The case has been termed "anomalous" by a text writer who quotes the dissenting opinion of Eyre, C. B., as one "whose reasoning, it is conceived, has never been refuted;" 2 Ames, Bills & Notes 864. But the same writer admits that "the doctrine of the case has been generally adopted;" *id.* In an action on such a bill, to show that the acceptor is aware that the payee is a fictitious person, evidence is admissible to show the circumstances under which he had received other bills payable to fictitious persons; 2 H. Bla. 187, 288. See also 18 C. B. N. S. 694; L. R. 1 C. P. 463.

When a note is made payable to the name of some person not having any interest, and not intended to become a party to the transaction, whether a person of such a name is or is not known to exist, the payee may be deemed fictitious; 2 N. H. 446.

A note payable to a company or firm having no existence legal or *de facto*, has been held to be such a note; 11 Ind. 101; 40 N. H. 21; 4 E. D. Smith 83. See 6 Wend. 627; Byles, Bills, Wood's ed. 383.

FIDE-JUBERE. **In Civil Law.** To become *fide-jussor*; to pledge one's self; to act as surety for another. Among the words designated as words of obligation or forms of stipulation. *Fide-jubes?* do you make yourself *fide-jussor?* *Fide-jubeo*, I do make myself *fide-jussor*. Inst. 3. 15. 1.

FIDE-JUSSIO. An act by which any one binds himself as an additional security for another. This giving security does not destroy the liability of the principal, but adds to the security of the surety. Vicat, Voc. Jur.; Hallifax, Annals, b. 2, c. 16, n. 10.

FIDE-JUSSOR. **In Civil Law.** One who becomes security for the debt of another, promising to pay it in case the principal does not do so. 3 Bla. Com. 108, 291.

He differs from a co-obligor in this, that the latter is equally bound to a debtor with his principal, while the former is not liable till the principal has failed to fulfil his engagement; Dig. 12. 4. 4; 16. 1. 13; 24. 3. 64; 38. 1. 37; 50. 17. 110; 6. 14. 20; Hall, Pr. 33; Dunl. Adm. Pr. 300; Clerke, Prax. tit. 63.

The obligation of the fide-jussor was an accessory contract; for, if the principal obligation was not previously contracted, his engagement then took the name of mandate. *Lec. Elém.* § 872; *Code Nap.* 2012.

FIDE-PROMISSOR. See FIDE-JUSSOR.

FIDEI-COMMISSARIUS (L. Lat.). **In Civil Law.** One who has a beneficial interest in an estate which, for a time, is committed to the faith or trust of another. This term has nearly the same meaning as *cestui que trust* has in the common law. 1 Greenl. Cruise, Dig. 295; Story, Eq. Jur. § 966.

Fidei-commissary and *fide-commissary*, anglicized forms of this term, have been proposed to take place of the phrase *cestui que trust*, but do not seem to have met with any favor.

According to Du Cange, the term was sometimes used to denote the executor of a will.

FIDEI-COMMISSUM (L. Lat.). **In Civil Law.** A trust. A devise was made to some person (*hæres fiduciarius*), and a request annexed that he should give the property to some one who was incapable of taking directly under the will. Inst. 2. 23. 1; 1 Greenl. Cruise, Dig. 295; 15 How. 367, 407, 409. A gift which a man makes to another through the agency of a third person, who is requested to perform the will of the giver. The Louisiana civil code prohibits *fidei-commissa;* 3 La. Ann. 432;

thus abolishing express trusts, but not affecting implied trusts; 2 How. 619.

The rights of the beneficiary were merely rights in curtesy, to be obtained by entreaty or request. Under Augustus, however, a system was commenced, which was completed by Justinian, for enforcing such trusts. The trustee or executor was called *hæres fiduciarius*, and sometimes *fide-jussor*. The beneficial heir was called *hæres fidei-commissarius*.

The uses of the common law are said to have been borrowed from the Roman *fidei-commissa;* 1 Greenl. Cruise 295; Bacon, Read. 19; see Bisph. Eq. 50; 1 Madd. 446; Story, Eq. Jur. § 966. The *fidei-commissa* are supposed to have been the origin of the common-law system of entails; 1 Spence, Eq. Jur. 21; 1 Washb. R. P. 60. This has been doubted by others. See SUBSTITUTION.

FIDELIS. Faithful; trustworthy.

FIDELITAS. Fealty; fidelty.

FIDEM MENTIRI. When a tenant does not keep that fealty which he has sworn to the lord. Leg. Hen. I. c. 53.

FIDES. Faith; honesty; confidence. See GOOD FAITH,

FIDUCIA (Lat.). **In Civil Law.** A contract by which we sell a thing to some one—that is, transmit to him the property of the thing, with the solemn forms of emancipation—on condition that he will sell it back to us. This species of contract took place in the emancipation of children, in testaments, and in pledges. Pothier, Pand.

FIDUCIARIUS TUTOR. See PUPIL; TUTOR.

FIDUCIARY. This term is borrowed from the civil law. The Roman laws called a fiduciary heir the person who was instituted heir, and who was charged to deliver the succession to a person designated by the testament. Merlin, *Répert.* But Pothier, Pand. vol. 22, says that *fiduciarius hæres* properly signifies the person to whom a testator has sold his inheritance under the condition that he should sell it to another. Fiduciary may be defined in trust, in confidence.

The law forbids one standing in such a position making any profit at the expense of the party whose interests he is bound to protect, without full disclosure; Bisph. Eq. § 238; 10 H. L. Cas. 26, 31, 45. What constitutes a fiduciary relation is often a subject of controversy. It has been held to apply to all persons who occupy a position of peculiar confidence towards others, such as a trustee, executor, or administrator, director of a corporation or society; 52 Barb. 581; 78 Pa. 392; agent; 1 Johns. Ch. 550; medical or religious adviser; 24 Pa. 232; article in 10 Jur. N. S. 91; husband and wife; 86 Pa. 512; or a son; 13 Ch. Div. 338. See L. R. 3 Eq. 461; Hill, Trustees 547. Many cases have arisen in New York under the laws allowing arrest for debts incurred in a fiduciary capacity. The term seems to refer rather to the good faith than the ability of the party; 8 How. Pr. 298. See 4 Sandf. 707; 6 How. Pr. 86; 2 Abb. Pr. 444; 24 How. Pr. 274; 5 Rob. (N. Y.) 502. Under the bankrupt laws of 1841, and March 2, 1867, § 33, providing that debts contracted in a fiduciary capacity should not be barred by a discharge, the following cases fall within the act; an agent who appropriates money put into his hands for a specific purpose of investment; 1 Edm. 206; collector of city taxes who retains money officially collected; 7 Metc. 152; one who receives a note or other security for collection; 5 Denio 269; commission merchant; 54 Ga. 125; and it does not alter the rule that the debt has been reduced to judgment before the discharge; 52 Iowa 158. This exception from the operation of a discharge in bankruptcy relates to technical trusts, not merely such as the law implies from the contract, but those actually and expressly constituted; 87 N. Y. 307; 129 *id.* 23. In the following cases the debt has been held not a fiduciary one; a factor who retains the money of his principal; 2 How. 202, 208; 2 La. Ann. 1023; 104 Mass. 245; an agent under an agreement to account and pay over monthly; 5 Biss. 324; one with whom a general deposit of money is made; 72 N. C. 463; a debt created by a person acting as an attorney in fact; 127 Mass. 41. See, also, 82 N. C. 395; 57 Miss. 598; 90 Ill. 371; 31 La. An. 809; 46 Cal. 547.

FIDUCIARY CONTRACT. An agreement by which a person delivers a thing to another on the condition that he will restore it to him. The following formula was employed: *Ut inter bonos agere oportet, ne propter te fidemque tuam frauda.* Cicero, *de Offic.* lib. 3, cap. 13; *Leç. du Dr. Civ. Rom.* § 237. See 2 How. 202; 6 W. & S. 18; 7 Watts 415.

FIEF. A fee, feod, or feud.

FIEF D'HAUBERK. A fee held on the military tenure of appearing fully armed on the *ban* and *arriere-ban*. *Feudum hauberticum.* Spelman, Gloss.; Calvinus, Lex.; Du Cange. A knight's fee. 2 Bla. Com. 62.

FIEF TENANT. The holder of a fief or fee.

FIEL. In Spanish Law. An officer who keeps possession of a thing deposited under authority of law. *Las Partidas*, pt. 3, tit. 9, l. 1.

FIELD. A cultivated tract of land. 81 N. C. 585; 97 Mass. 412; but not a one-acre lot used for cultivating vegetables; 7 Heisk. 510.

FIELDAD. In Spanish Law. Sequestration. This is allowed in six cases by the Spanish law where the title to property is in dispute. *Las Partidas*, pt. 3, tit. 3, l. 1.

FIELD-ALE, or FILKDALE. The drinking of ale by bailiffs and other officers in the *field*, at the expense of the hundred;

an old English custom long since prohibited. Toml.

FIERDING COURTS. Ancient Gothic courts "in the lowest instance;" so called because four were instituted within every superior district or hundred. Their jurisdiction was limited within forty shillings, or three marks; 3 Steph. Com. 393; 3 Bla. Com. 34; Stiernhook, *De Jure Goth.* i. 1, c. 2.

FIERI FACIAS (Lat. that you cause to be made). **In Practice.** A writ directing the sheriff to cause to be made of the goods and chattels of the judgment-debtor the sum or debt recovered.

It receives its name from the Latin words in the writ, used when legal proceedings were conducted in Latin (*quod fieri facias de bonis et catallis*, that you cause to be made of the goods and chattels). It is the form of execution in common use where the judgment-debtor has personal property.

The foundation of this writ is a judgment for debt or damages; and the party who has recovered such a judgment is generally entitled to it, unless he is delayed by the stay of execution which the law allows in certain cases after the rendition of the judgment, or by proceedings in error.

The execution, being founded on the judgment, must, of course, follow and be warranted by it; 2 Saund. 72 *h*, *k*; Bingh. Judg. 186; 2 Cow. 454. Hence, where there is more than one plaintiff or defendant, it must be in the name of all the plaintiffs against all the defendants; 6 Term 525. It is either for the plaintiff or the defendant. When it is against an executor or administrator for a liability of the testator or intestate, it is conformable to the judgment, and must be only against the goods of the deceased, unless the defendant has made himself personally liable by his false pleading, in which case the judgment is *de bonis testatoris si, et si non, de bonis propriis;* 1 S. & R. 453; 4 *id.* 394; 18 Johns. 502; 1 Hayw. 598; 2 *id.* 112.

At common law, the writ bound the goods of the defendant or party against whom it was issued, from the teste day; by which is to be understood that the writ bound the property against the party himself, and all claiming by assignment from or by representation under him; 4 East 538; so that a sale by the defendant of his goods to a *bona fide* purchaser did not protect them from a *fieri facias* tested before, although not issued or delivered to the sheriff till after the sale; Cro. Eliz. 174; Cro. Jac. 451; 1 Sid. 271; but by the statute of frauds, 29 Car. II. c. 3, § 16, it was enacted "that no writ of *fieri facias*, or other writ of execution, shall bind the property of the goods of the party against whom such writ of execution issued forth, but from the time that such writ shall be delivered to the sheriff," etc., who must "indorse upon the back thereof the day of the month and year whereon he or they received the same;" and the same or similar provisions have been enacted in most of the states; 2 S. & R. 157; 1 Whart. 377; 8 Johns. 446; 3 Harr. Del. 512; 32 Mo. 387; 14 Wis. 202. The property in the goods is not altered, but remains in the defendant until the *actual* execution of the writ; Wats. Sher. 176.

The execution of the writ is made by levying upon the goods and chattels of the defendant or party against whom it is issued; and, in general, seizing a part of the goods in the name of the whole on the premises is a good seizure of the whole; 1 Ld. Raym. 725; 4 Wash. C. C. 29; 1 Munf. 269; 2 Hill, N. Y. 666; 5 Ired. 192; 7 Ala. N. S. 619. But see 1 Whart. 377; 6 Halst. 218. It may be executed at any time before and on the return-day; 13 Tex. 507; but not on Sunday, where it is forbidden by statute (29 Car. II. c. 7, which has been substantially followed in the United States); Watson, Sher. 173; 5 Co. 92; Comyns, Dig. *Execution*, C 5. After the death of the plaintiff, the sheriff may execute a *fi. fa.* tested in his lifetime, and under it seize his goods in the hands of his executor or administrator; Wats. Sher. 173.

The sheriff cannot break the outer door of a house for the purpose of executing a *fieri facias;* 5 Co. 92; nor unlatch an outer door; 4 Hill, N. Y. 437; nor can a window be broken for this purpose; W. Jones 429. He may, however, enter the house, if it be open, and, being once lawfully entered, he may break open an inner door or chest to seize the goods of the defendant, even without any request to open them; 4 Taunt. 619; 3 B. & P. 223; Cowp. 1; Troub. & H. Pr. 1116. Although the sheriff is authorized to enter the house of the party to search for goods, he cannot enter that of a stranger for that purpose, without being guilty of a trespass, unless the defendant's goods are actually in the house; Comyns, Dig. *Execution* (C 5). The sheriff may break the outer door of a barn; 1 Sid. 186; 1 Kebl. 689; or of a store disconnected with the dwelling-house and forming no part of the curtilage; 16 Johns. 287. See 1 Sm. L. Cas., 9th Am. ed. 228, with note on the subject; BREAKING.

At common law a *fi. fa.* did not authorize a sheriff to seize bank-bills, checks, or promissory notes; but it is otherwise now, by stat. 1 & 2 Vict. c. 110, § 12, and 3 & 4 Vict. c. 82; and this is now the law of many of the United States; 2 Va. Cas. 246; 1 Bail. 39; Hempst. 91; 4 N. H. 198; 29 Pa. 240. So money may be taken; 1 Bail. 39; 1 Cra. 117; 12 Johns. 220. The writ applies generally to goods and chattels, but the common-law rules as to what may be taken are very much extended; see as to the different species of property in England; Watson, Sheriff ch. x. sec. ii., and as to what interest may be taken; *id.* sec. iii.; as to railway property; 24 Am. & Eng. R. R. Cas. 5; copyright and patent; 40 Am. Rep. 123; growing crops; 31 Am. L. Reg. 602; seat in the stock exchange; 28 Cent. L. J. 444; board of trade shares; 22 Am. L. Reg. 438; 3 Am. & Eng. Corp. Cas. 171; 4 *id.* 65; property in *custodia legis;* 28 Am. Rep. 35; interest of heirs; 44 Am. Dec. 338; trust funds; 7 Cent. L. J. 483; equitable interest; 9 Can. L. T. 125, 145; 17 Can. L. J. 54; pension money;

21 Ir. L. T. 47. For the form of the writ, see 3 Sharsw. Bla. Com. App. xxvii.; as to proceeding in equity in aid of executions at law, see CREDITORS' BILL. See, generally, Murfree, Freeman, Executions ch. X; Watson, Sheriff; EXECUTION; LEVY; SHERIFF.

FIERI FECI (L. Lat.). **In Practice.** The return which the sheriff or other proper officer makes to certain writs, signifying, "I have caused to be made."

When the officer has made this return, a rule may be obtained upon him after the return-day, to pay the money into court, and, if he withholds payment, an action of debt may be had on the return, or assumpsit for money had and received may be sustained against him; 3 Johns. 183.

FIFTEENTHS. An aid; aid granted from time to time to the crown by parliament, consisting of a fifteenth part of the personal property in every township, borough, and city in the kingdom. In the eighth year of Edward III. the valuation of the kingdom was fixed and a record made in the exchequer of the amount (twenty-nine thousand pounds). This valuation was not increased as the property in the kingdom increased in value; whence the name came in time to be a great misnomer. Co. 2d Inst. 77; 1 Poll. & Maitl. 604; 2 Bla. Com. 309; Cowel.

FIGHT. Does not necessarily imply that both parties should give and take blows. It is sufficient that they voluntarily put their bodies in position with that intent. 73 N. C. 155; 46 Ga. 148. See PRIZE-FIGHT.

FIGHTWITE (Sax.). A mulct or fine for making a quarrel to the disturbance of the peace. Called also by Cowel *forisfactura pugnæ*. The amount was one hundred and twenty shillings. Cowel.

FIGURES. Numerals. They are either Roman, made with letters of the alphabet: for example, MDCCLXXVI; or they are Arabic, as follows: 1776.

Roman figures may be used in contracts and law proceedings, and they will be held valid; but Arabic figures, probably owing to the ease with which they may be counterfeited or altered, have been holden not to be sufficient to express the sum due on a contract; but it seems that if the amount payable and due on a promissory note be expressed in figures or ciphers, it will be valid. Story, Bills § 42, note; Story, Pr. Notes § 21.

Figures to express numbers are not allowable in indictments; but all numbers must be expressed in words at length, except in setting forth a copy of a written instrument. And complaints are governed by the same rule in cases over which magistrates have final jurisdiction. But the decisions on this point are not uniform. And in most of them the proper distinction between the use of figures in the caption and in the body of an indictment has not been observed. In America, perhaps the weight of authority is contrary to the law as above stated. But, at all events, a contrary practice is unclerical, uncertain, and liable to alteration; and the courts which have sustained such practice have uniformly cautioned against it. See 13 Viner, Abr. 210; 1 Chitty 319; 34 Conn. 280; 35 Me. 489.

Bills of exchange, promissory notes, checks, and agreements of every description are usually dated with Arabic figures: it is, however, better to date deeds and other formal instruments by writing the words at length. See 5 Toullier, n. 336; 4 Yeates 278; 2 Johns. 233; 2 Miss. 256; 6 Blackf. 533; 1 Vt. 336.

FILACER. An officer of the common pleas, king's bench, and exchequer, whose duty it was to file the writs on which he made process. There were fourteen of them; and it was their duty to make out all original process. Cowel; Blount. The office was abolished in 1837.

FILARE. In Old English Practice. To file. Townsh. Pl. 67.

FILE (Lat. *Filum*). A thread, string, or wire upon which writs and other exhibits in courts and offices are fastened or filed for the more safe-keeping and ready turning to the same. Spelman, Gloss.; Cowel; Tomlin, Law Dict. Papers put together and tied in bundles. A paper is said also to be filed when it is delivered to the proper officer, and by him received to be kept on file. 13 Viner, Abr. 211; 1 Littleton 113; 1 Hawk. Pl. Cr. 7, 207. See where filed by a wife as agent; 120 Mass. 130.

The origin of the term indicates very clearly that the filing of a paper can only be effected by bringing it to the notice of the officer, who anciently put it upon the string or wire; 38 Ala. 248.

Filing a paper, in modern usage, consists in placing it in the custody of the proper official by the party charged with the duty, and the making of the proper indorsement by the officer. 2 S. Dak. 525. In the sense of a statute requiring the filing of a paper or document, it is filed when delivered to and received by the proper officer to be kept on file. The word carries with it the idea of permanent preservation of the thing so delivered and received; that it may become a part of the public record. It is not synonymous with deposited; 67 Hun 560.

FILEINJAID (Brit.). A name given to villeins in the laws of Hoel Dda. Barring. Obs. St. 302.

FILIATE. To declare whose child a bastard is. 2 W. Bla. 1017.

FILIATION. In Civil Law. The descent of son or daughter, with regard to his or her father, mother, and their ancestors.

Nature always points out the mother by evident signs, and, whether married or not, she is always certain: *mater semper certa est, etiamsi vulgo conceperit.* There is not the same certainty with regard to the father, and the relation may not know or may feign ignorance as to the paternity; the law has therefore established a legal presumption to serve as a foundation for paternity and filiation.

When the mother is or has been married, her husband is presumed to be the father of the children born during the coverture, or within a competent time afterwards, whether they were conceived during the coverture or not: *pater is est quem nuptiæ demonstrant.*

This rule is founded on two presumptions: one on the cohabitation before the birth of the child; and the other that the mother has faithfully observed the vow she made to her husband.

This presumption may, however, be rebutted by showing either that there has been no cohabitation, or some physical or other impossibility that the husband could be the father. See ACCESS; BASTARD; GESTATION; NATURAL CHILDREN; PATERNITY; PUTATIVE FATHER.

FILICETUM. In English Law. A ferny or bracky ground; a place where fern grows. Co. Litt. 4 *b*; Shep. Touch. 95.

FILIOUS. In Old Records. A godson. Spel. Glos.

FILIUS (Lat.). A son. A child.

As distinguished from heir, *filius* is a term of nature, *hæres* a term of law. 1 Powell, Dev. 311. In the civil law the term was used to denote a child generally. Calvinus, Lex.; Vicat, Voc. Jur. Its use in the phrase *nullius filius* would seem to indicate a use in the sense of legitimate son, a bastard being the legitimate son of nobody; though the word is usually rendered a son, whether legitimate or illegitimate. Vicat, Voc. Jur.

FILIUS FAMILIAS (Lat.). A son who is under the control and power of his father. Story, Confl. Laws § 61; Vicat, Voc. Jur.

FILIUS MULIERATUS (Lat.). The first legitimate son born to a woman who has had a bastard son by her husband before her marriage. Called, also, *mulier, mulier puisné.* 2 Bla. Com. 248.

FILIUS NULLIUS (Lat. son of nobody). A bastard. Called, also, *filius populi* (son of the people). 1 Bla. Com. 459; 6 Co. 65 *a.*

FILIUS POPULI. A son of the people; a natural child.

FILL. To occupy the whole capacity or extent of, so as to leave no space vacant.

To possess and discharge the duties of an office. The election of a person to an office constitutes the essence of his appointment, but the office cannot be considered as actually filled until his acceptance, either expressed or implied; 2 N. H. 202.

In a subscription for shares in a corporation the word "fill" amounts to a promise to pay assessments; 10 Me. 478. As to the use of the word in connection with a doctor's prescription, see 61 Ga. 505; DRUGGIST.

FILLY. A young mare; a female colt. An indictment charging the theft of a "filly" is not sustained by proof of the larceny of a "mare;" 1 Tex. App. 448.

FILUM AQUÆ (Lat. a thread of water). This may mean either the middle line or the outer line. *Altum filum* denotes high-water mark. Blount. *Filum* is, however, used almost universally in connection with *aquæ* to denote the middle line of a stream. *Medium filum* is sometimes used with no additional meaning. The common-law rule was that conveyances of land bounded on streams, above tide water, extend *usque ad filum aquæ.* See RIVER; WATER-COURSE.

FILUM FORESTÆ (Lat.). The border of the forest. 2 Bla. Com. 419; 4 Inst. 303; Manw. *Purlieu.*

FILUM VIÆ (Lat.). The middle line of a road; a term used to indicate the middle line or thread of a street or road. 2 Sm. L. Cas. 98. See 121 Mass. 18; 119 *id.* 231; 88 Pa. 453; 57 Mo. 582; 87 Ill. 348. Where a description of land gives a street or road as a boundary, it is presumed that the title passes *ad medium filum viæ;* 33 Pa. 124. See BOUNDARY; HIGHWAY; STREET.

FIN. End; limit; period of limitation.

FIN DE NON RECEVOIR. In French Law. An exception or plea founded on law, which without entering into the merits of the action shows that the plaintiff has no right to bring it, either because the time during which it ought to have been brought has elapsed, which is called *prescription,* or that there has been a compromise, accord, and satisfaction, or any other cause which has destroyed the right of action which once subsisted. Pothier, *Proc. Civ.* pt. 1, c. 2, s. 2, art. 2; Story, Confl. Laws § 580.

FINAL. Last; conclusive; pertaining to the end. In law it is usually employed in contrast with interlocutory (*q. v.*) with respect to pendency of suits.

FINAL COSTS. Such costs as are to be paid at the end of the suit; costs, the liability for which depends upon the final result of the litigation.

FINAL DECISION. One from which no appeal or writ of error can be taken. 47 Ill. 167; 6 El &. Bl. 408.

FINAL DECREE. See DECREE.

FINAL DISPOSITION. Such a conclusive determination of the subject-matter embraced in a submission to arbitrators, that after the award is made nothing further remains to fix the rights and obligations of the parties, and no further controversy or litigation can arise thereon.

Such an award that the party against whom it is given may perform it without any further ascertainment of rights or obligation. See 50 Me. 401.

FINAL HEARING. The trial of an equity case upon the merits, as distinguished from the hearing of any preliminary questions arising in the cause, which are termed interlocutory. 24 Wis. 171.

FINAL JUDGMENT. See JUDGMENT.

FINAL PASSAGE. **In Parliamentary Law.** The vote on a passage of a bill or resolution in either house of the legislature after it has received the prescribed number of readings and has been subjected to such action as is required by the fundamental law governing the body or its own rule. See 54 Ala. 613.

FINAL PROCESS. Writs of execution. So called to distinguish them from *mesne process*, which includes all process issuing before judgment rendered. 3 Steph. Com. 489.

FINAL RECOVERY. The ultimate judgment of a court. 100 Mass. 91. It has also been construed as referring to the verdict, as distinguished from the judgment. 6 Allen 243.

FINAL SENTENCE. One which puts an end to a case. Distinguished from interlocutory. See SENTENCE.

FINAL SETTLEMENT. **In Probate and Administration.** The final account of an executor or administrator closing the business of the estate, with the order of the court thereon approving it and discharging the accountant. 13 N. E. Rep. ( )131 ; 4 Wash. 632; 87 Ind. 114; 65 Ala. 442.

FINALIS CONCORDIA (Lat.). A decisive agreement. A fine. A final agreement.

A final agreement entered by the parties by permission of court in a suit actually brought for lands. Subsequently the bringing suit, entry of agreement, etc., became merely formal, but its entry upon record gave a firm title to the plaintiff ; 1 Washb. R. P. 70 ; 1 Spence, Eq. Jur. 143 ; Tudor, Lead. Cas. 689.

Finis est amicabilis compositio et finalis concordia ex consensu et concordia domini regis vel justiciarum (a fine is an amicable settlement and decisive agreement by consent and agreement of our lord the king or his justices). Glanville, lib. 8, c. 1.

Talis concordia finalis dicitur eo quod finem imposuit negotio, adeo ut neutra pars litigantium ab eo de cetero poterit recidere (such concord is called final because it puts an end to the business, so that neither of the litigants can afterwards recede from it). Glanville, lib. 9, c. 3 ; Cunningham, Law Dict.

FINANCES. The public revenue or resources of a government or state. The income or means of an individual or corporation. It is somewhat like the *fiscus* of the Romans. The word is generally used in the plural.

Money resources generally. The state of the finances of an individual or corporation, being his condition in a monetary point of view. The cash he has on hand, and that which he expects to receive, as compared with the engagements he has made to pay.

FINANCIER. One who manages the finances or public revenue. Persons skilled in matters appertaining to the judicious management of money affairs.

FIND. The word find or finding does not always imply the same thing in legal proceedings. Where a cause is tried by the court, the finding means the fact which the court considers the evidence establishes, but find, as used in a statute in respect to the truth of a complaint for the revocation of a license, implies that the board is satisfied from the evidence, and the conclusion may be informally expressed. 74 Wis. 267.

FINDER. One who lawfully comes to the possession of another's personal property, which was then lost.

The finder of lost property at common law had a valid claim to the same against all the world except the true owner ; 1 Stra. 504 ; 62 Me. 275 ; 1 E. D. Sm. 393 ; 11 R. I. 588 ; 28 Gratt. 601 ; 16 Ore. 269 ; and money or property found on the premises of another has been held, in the case of a servant in a hotel, as against the proprietor, to belong to the finder ; 90 Pa. 377 ; so a stranger who finds money in a shop may retain it as against the shop-owner ; 21 L. J. Q. B. 75 ; unless it has been simply laid aside and left by mistake ; 10 Allen (Mass.) 548 ; 1 Misc. Rep. (N. Y.) 22 ; or a conductor who finds money on the cars may retain it as against the company ; 56 N. Y. 175 ; or an employe in a mill, who finds bank-notes among old papers bought to be manufactured over ; 62 Ind. 281. Drift-logs found on the banks of a river may be rightfully retained by the finder as against the riparian owner ; 86 Tenn. 14 ; but an aerolite which buries itself in the ground belongs rather to the owner of the soil on which it falls than to one who observes it and digs it out ; 86 Ia. 71. In a very recent English case, where a workman employed by a corporation to clear out a pool on its land found two rings in the mud at the bottom of the pool, the corporation was held entitled to recover the rings in an action of detinue ; [1896] 2 Q. B. 44. In that case Lord Russell of Killowen, C. J., put the decision on the ground that the possession of land carried with it everything attached to it, or under it, and he expressly distinguished the last English case above cited, which, he said, stood by itself on the special ground that the notes being dropped in the public part of the shop were never in the custody of the shopkeeper ; accordingly he says : "It is somewhat strange that there is no more direct authority on the question ; but the general principle seems to me to be that where a person has possession of house or land, with a manifest intention to exercise control over it and the things which may be upon or in it, then, if something is found on that land, whether by an employe of the owner or by a stranger, the presumption is that the possession of that thing is in the owner of the *locus in quo*."

A commentator upon these cases says : "This language applies to land with respect to which the public has no easement, which differentiates the case from findings in shops and other public places. The real distinction, however, is this, that those things belong to the owner of the premises

in which they are found, which, either from their nature, or from the circumstances attending the loss, become practically part and parcel of the freehold, such as the rings, covered by the water and mud, which undoubtedly belonged to the owner of the land, and the aerolite which buried itself in the ground to the depth of three feet; or, to use the language of some of the cases, those things belong to the owner which may be regarded as *accretions* to his land, such as the aerolite, the rings, or drift-logs; though the latter may be pursued and taken by a former finder, from whom they have escaped." 36 Am. L. Reg. N. S. 588.

Where a man buys a chattel which unknown to himself and the vendor contains valuable property, he will, as to that, be considered merely as a finder. When a person purchased at a public auction a bureau, and appropriated to his own use a purse containing money, found in a secret drawer, the existence of which at the time of the sale was not known to any one, it was held that there was a delivery of the bureau but not of the purse and money, and it was a simple case of finding and subject to the law in such cases; 7 M. &. W. 623. See Br. Leg. Max., 8th Am. ed. 807.

The finder is entitled to certain rights, and liable to duties which he is obliged to perform. This is a species of deposit, which, as it does not arise *ex contractu*, may be called a *quasi* deposit; and it is governed by the same general rules as common deposits. The finder is required to take the same reasonable care of the property found as any voluntary depositary *ex contractu;* Doctor & Stud. Dial. 2, c. 38; 2 Bulstr. 306, 312; 1 Rolle 125; 50 Vt. 688; 107 Mass. 251.

The finder is not bound to take the goods he finds; yet, when he does undertake the custody, he is required to exercise reasonable diligence in preserving the property; and he will be responsible for gross negligence. Some of the old authorities laid down that "if a man find butter, and by his negligent keeping it putrefy, or if a man find garments, and by his negligent keeping they be moth-eaten, no action lies." So it is if a man find goods and then lose them again. Bacon, Abr. *Bailment*, D; and in support of this position, Leon. 123, 223; Ow. 141; 2 Bulstr. 21, are cited. But these cases, if carefully examined, will not, perhaps, be found to decide the point as broadly as it is stated in Bacon. A finder would be held responsible for gross negligence, or fraud; Story, Bailm. § 85.

On the other hand, the finder of an article is entitled to recover all expenses which have necessarily occurred in preserving the thing found; Domat, l. 2, t. 9, s. 2, n. 2. But unlike salvors by water, he can claim nothing beyond this; 2 H. Bla. 254; 37 Conn. 96; 27 Ohio 435; Shoul. Bailm. 28.

And when the owner does not reclaim the goods lost, they belong to the finder; 1 Bla. Com. 296; 2 *id.* 9; 2 Kent 290; and should there be several finders, they share in common; 33 Atl. Rep. (N. J.) 1055. The acquisition of treasure by the finder is evidently founded on the rule that what belongs to none naturally becomes the property of the first occupant: *res nullius naturaliter fit primi occupantis.* Money or goods that are *lost* are the only kind that can be said to be *found.* It is property that the owner has involuntarily parted with, and not property that he has intentionally concealed in the earth for safekeeping; 16 Ore. 269. Money left on a desk in a bank, provided for the use of the depositors, is not lost so as to entitle the finder to the same, as against the bank; 1 Misc. Rep. 22. It seems that the title of the owner to property lying at the bottom of the sea is not divested, however long it may remain there, and no other person can acquire such title except by condemnation and sale in admiralty; 38 Fed. Rep. 503. One who finds property at sea is only a salvor. When a ship was almost becalmed in high seas a floating chest was found and with but little trouble taken on board. It contained 70 doubloons. It was held that the finders were not entitled to the whole property, though no claims or marks of ownership, but should be compensated by a moiety as for salvage services. The other moiety was directed to be paid into court; Fed. Cas. No. 6620.

As to the criminal responsibility of the finder, the result of the authorities is that if a man finds goods that have been actually lost, or are reasonably supposed by him to have been lost, and appropriates them, with intent to take the entire dominion over them, really believing when he takes them that the owner cannot be found, it is not larceny; but if he takes them with the like intent, though lost or reasonably supposed to be lost, but reasonably believing that the owner can be found, it is larceny; 1 Den. Cr. Cas. 335, 387; 2 *id.* 8; Clark, Cr. L. 255; 29 Ohio St. 184; s. c. 23 Am. Rep. 731; 11 Cox, C. C. 103, 227, 353; 2 C. & K. 841; 53 Ind. 343. If a finder attempts to retain lost property as against the owner, or converts it to his own use, when he knows the owner, he will be guilty of larceny; 1 Humph. 228; 2 Sneed 285. See as to this rule and its qualification Broom, Com., 4th ed. 955; Mart. & Yerg. 226. There must be a felonious intent; 116 Mass. 42; s. c. 17 Am. Rep. 138 and note. Though it is the duty of the finder to seek out the owner and restore the property with due diligence, yet the want of promptness on the part of the finder does not prove felonious intent in keeping the property; 22 Ill. App. 177. The question is, whether the finder, when he came into possession, believed the owner could be found; 2 Green, Cr. L. Rep. 35. In Regina *v.* Thurborn, Parke, B., observes that it cannot be doubted that if, at this day, the punishment of death was assigned to theft and usually carried into effect, the misappropriation of lost goods would never be held to constitute that offence. Whart. Cr. L. § 901. See TAKING.

See as to title by accession, accretion, and by finding, 35 Cent. Law J. 368.

FINDING. The result of the delibera-

tions of a jury or a court. 1 Day 238; 2 *id.* 12; 16 Blatchf. 65.

If the court below neglect or refuse to make a finding one way or the other as to the existence of a material fact which has been established by uncontradicted evidence, or if it finds such a fact when not supported by any evidence whatever, and an exception be taken, the question may be brought up for review in that particular. Both of these are questions of law and proper subjects for review in an appellate court; 147 U. S. 72.

Where a case is tried by a court without a jury, its findings upon questions of fact are conclusive, in the United States supreme court; 121 U. S. 535; 120 *id.* 20. Error in the findings of fact by the court are not subject to revision if there is any evidence upon which such findings could be made; 134 U. S. 494.

FINE. In Conveyancing. An amicable composition or agreement of a suit, either actual or fictitious, by leave of the court, by which the lands in question become, or are acknowledged to be, the right of one of the parties. Co. Litt. 120; 2 Bla. Com. 349; Bacon, Abr. *Fines and Recoveries.* Fines were abolished in England by stat. 3 & 4 Wm. IV. c. 74. Their use was not unknown in the United States, but has been either expressly abolished or become obsolete. See 1 Steph. Com. 514.

A fine is so called because it puts an *end* not only to the suit thus commenced, but also to all other suits and controversies concerning the same matter. Such concords, says Doddridge (Eng. Lawyer 84), have been in use in the civil law, and are called transactions, whereof they say thus: *Transactiones sunt de eis quæ in controversia sunt, a lite futura aut pendente ad certam compositionem reducuntur, dando aliquid vel accipiendo.* Or shorter, thus: *Transactio est de re dubia et lite incipite ne dum ad finem ducta, non gratuita pactio.* It is commonly defined an assurance by matter of record, and is founded upon a supposed previously existing right, and upon a writ requiring the party to perform his covenant; although a fine may be levied upon any writ by which lands may be demanded, charged, or bound. It has also been defined an acknowledgment on record of a previous gift or feoffment, and *prima facie* carries a fee, although it may be limited to an estate for life or in fee-tail. Prest. Conv. 200, 202, 268, 269; 2 Bla. Com. 348.

The stat. 18 Edw. I., called *modus levandi fines*, declares and regulates the manner in which they should be levied and carried on; and that is as follows: The party to whom the land is conveyed or assured commences an action at law against the other, generally an action of covenant, by suing out a writ of *præcipe*, called a writ of covenant, that the one shall convey the lands to the other, on the breach of which agreement the action is brought. The suit being thus commenced, then follows the *licentia concordandi*, or leave to compromise the suit. The *concord*, or agreement itself, after leave obtained by the court: this is usually an acknowledgment from the deforciants that the lands in question are the lands of the complainants. The *note* of the fine, which is only an abstract of the writ of covenant and the concord; naming the parties, the parcels of land, and the agreement. The foot of the fine, or the conclusion of it, which includes the whole matter, reciting the parties, day, year, and place, and before whom it was acknowledged or levied. See Cruise, Fines; Bacon, Abr. *Fines and Recoveries;* Comyns, Dig. *Fine.*

In Corporation Law. A term applied to the charge made against a member of a building and loan association who fails to make his monthly payment when due. It has been lately held, that such fines are not by way of penalty, but are rather to be considered as liquidated damages, fixed by consent of the parties, for the loss sustained by the association by reason of the failure of the defaulting member to make prompt payment, and since such payments are essential to the success of the plan of the association, and for the interest of its members as a whole, the fines will be enforced, independently of statutory provisions, if reasonable in amount and equitable in their application; 36 S. W. Rep. (Ark.) 1085. This case also holds that a fine of "ten cents per share, to be imposed for each and every month that payment is not made," is reasonable. It has also been held that where the by-law provides for a fine of twenty cents per month on each one hundred dollars borrowed, the fine for one month is not repeated and added to that of each succeeding month, but only twenty cents on each one hundred dollars can be imposed in any one month; and when the constitution of a building association prescribes the fines to be imposed on delinquent members, it thereby fixes the limit beyond which the association cannot go; but it may by by-law waive some part of the fines so authorized, and impose smaller ones, and in that case the by-law will govern; 25 S. E. Rep. (W. Va.) 537.

In Criminal Law. Pecuniary punishment imposed by a lawful tribunal upon a person convicted of crime or misdemeanor. See Shepp. Touchst. 2; Bacon, Abr. *Fines and Amercements;* 1 Bish. Cr. L. § 940. It may include a forfeiture or penalty recoverable in a civil action; 11 Gray 373; 6 Neb. 37.

The amount of the fine is frequently left to the discretion of the court, who ought to proportion the fine to the offence. To prevent the abuse of excessive fines, the constitution of the United States directs that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Amendm. to the Constitution, art. 8; Cooley, Const. Lim. 377.

This applies to national and not to state legislation; 5 Wall. 480; 7 Pet. 243. The supreme court cannot, on *habeas corpus*, revise the sentence of an inferior court on the ground that the fine was excessive; 7 Pet. 568.

FINE AND RECOVERY ACT. The statute 3 & 4 Will. IV. c. 74. This act abolished fines and recoveries. 2 Sharsw. Bla. Com. 364, n.; 1 Steph. Com. 514. See FINE.

FINE CAPIENDO PRO TERRIS. An obsolete writ which lay for a person who, upon conviction by jury, had his lands and goods taken, and his body imprisoned, to be remitted his imprisonment, and have his lands and goods redelivered to him, on obtaining favor of a sum of money, etc. Reg. Orig. 142.

FINE FOR ALIENATION. A sum of money which a tenant by knight's ser-

vice, or a tenant *in capite* by socage tenure, paid to his lord for permission to alienate his right in the estate he held to another, and by that means to substitute a new tenant for himself. 2 Bla. Com. 71, 89; 6 N. Y. 467, 495. These fines are now abolished. In France, a similar demand from the tenant, made by the lord when the former alienated his estate, was called *lods et vente*. This imposition was abolished, with nearly every other feudal right, by the French revolution.

FINE FOR ENDOWMENT. A fine anciently payable to the lord by the widow of a tenant without which she could not be endowed of her husband's lands. Abolished under Henry I., and by Magna Charta. Moz. & W.

FINE NON CAPIENDO PRO PULCHRE PLACITANDO. An obsolete writ to prohibit officers of court from taking fines for fair pleading.

FINE PRO REDISSEISINA CAPIENDO. An old writ which lay for the release of one imprisoned for a redisseisin, on payment of a reasonable fine. Reg. Orig. 222.

FINE SUR COGNIZANCE DE DROIT COME CEO QUE IL AD DE SON DONE. A fine upon acknowledgment of the right of the cognizee as that which he hath of the gift of the cognizor. By this the deforciant acknowledges in court a former feoffment or gift in possession to have been made by him to the plaintiff. 2 Bla. Com. 352; Cunningham, Law Dict.; Shepp. Touchst. c. 2; Comyns, Dig. *Fine.*

FINE SUR COGNIZANCE DE DROIT TANTUM. A fine upon acknowledgment of the right merely. Generally used to pass a reversionary interest which is in the cognizor. 2 Bla. Com. 351; Jacob, Law Dict.; Comyns, Dig.

FINE SUR CONCESSIT. A fine granted where the cognizor, in order to make an end of disputes, though he acknowledges no precedent right, yet grants to the consignee an estate *de novo*, usually for life or years, by way of a supposed composition. 2 Bla. Com. 353; Shepp. Touchst. c. 2.

FINE SUR DONE, GRANT ET RENDER. A double fine, comprehending the fine *sur cognizance de droit come ceo* and the fine *sur concessit*. It may be used to convey particular limitations of estates and to persons who are strangers or not named in the writ of covenant; whereas the fine *sur cognizance de droit come ceo*, etc., conveys nothing but an absolute estate, either of inheritance, or at least freehold. Salk. 340. In this last species of fines the cognizee, after the right is acknowledged to be in him, grants back again or renders to the cognizor, or perhaps to a stranger, some other estate in the premises. 2 Bla. Com. 353; Viner, Abr. *Fine;* Comyns, Dig. *Fine;* 1 Washb. R. P. 33.

FINE-FORCE. An absolute necessity or inevitable constraint. Old N. B. 78; Plowd. 94; 6 Co. 11; Cowel.

FINEM FACERE (Lat.). To make or pay a fine. Bracton 106; Skene.

FINES LE ROY. In Old English Law. A sum of money which any one is to pay the king for any contempt or offence; which fine any one that commits any trespass, or is convict that he falsely denies his own deed, or did anything in contempt of the law, shall pay to the king. *Termes de la Ley;* Cunningham, Law Dict.

FINIRE. In English Law. To fine, or pay a fine. Cowel. To end or finish a matter.

FINIS. End; conclusion; limit.

FINISHED.

The question whether a house has been "finished" is one of fact; and the owner's moving into it is not conclusive proof of the fact, where the owner accepted an order to be paid when the house is finished; 121 Mass. 584.

FINITIO. An ending; death as the end of life. Blount; Cowel.

FINIUM REGUNDORUM ACTIO. In Civil Law. An action for regulating boundaries. 1 Mackeldey, Civ. Law § 271.

FINORS. Those that purify gold and silver, and part them by fire and water from coarser metals; and therefore in the statute of Hen. VII. c. 2, they are also called "parters." *Termes de la Ley.*

FIRDFARE. In English Law. A summoning forth to a military expedition (*indictio ad profectionem militarem*). Spel. Glos.

FIRDIRINGA (Sax.). A preparation to go into the army. Leg. Hen. I.

FIRDSOCNE (Sax.). Exemption from military service. Spelman, Gloss.

FIRDWITE (Sax.). A mulct or penalty imposed on military tenants for their default in not appearing in arms or coming to an expedition. Cowel. A penalty imposed for murder committed in the army. Cowel.

FIRE. The effect of combustion. Webster, Dict.

The legal sense of the word is the same as the popular. 1 Pars. Marit. Law 231.

Fire is not a peril of the sea. In Scotch law, however, fire is an inevitable accident. Bell, Dict.

Whether a fire arises purely by accident, or from any other cause, when it becomes uncontrollable and dangerous to the public, a man may, in general, justify the destruction of a house on fire for the protection of the neighborhood; for the maxim *salus populi est suprema lex* applies in such case; 11 Co. 13. See ACCIDENT; ACT OF GOD; EMINENT DOMAIN; 3 Wms. Saund. 422 *a*, note 2; 3 Co. Litt. 57 *a*, n. 1; 1 Cruise, Dig. 151, 152; 1 Rolle, Abr. 1; Bacon, Abr. *Action*

on the Case, F ; 2 *Lois des Bâtim.* 124 ; 1 Term 310 ; 6 *id.* 489 ; Ambl. 619.

When real estate is let, and the tenant covenants to pay the rent during the term, unless there are proper exceptions to such covenants, and the premises are afterwards destroyed by fire during the term, the rent must be paid although there be no enjoyment ; for the common rule prevails, *res perit domino*. The tenant, by the accident, loses his term ; the landlord, the residence ; Story, Eq. Jur. § 102 ; Woodf. L. & T. 408.

The owner of property may kindle and have a fire on his own premises for any lawful purpose, such as burning waste in husbandry, without liability for injury to the property of another, if it is done with due care as to time, manner, and circumstances, and with respect to casual fires, also having due regard to the conditions of weather, wind, and proximity of inflammable material ; Thomas, Negl. 640 ; Webb, Poll. Torts 616, and note. Even in the extreme case of one who had been warned of the danger that his haystack would take fire and endanger others, the contention that the question should have been put to the jury whether he had acted *bona fide*, to the best of his judgment, and that the standard of ordinary prudence was too uncertain as a criterion, was unsuccessfully pressed, and the care of a prudent man was held to be the proper measure of duty ; 3 Bing. N. C. 468.

Very early in England, the duty of every man to safely keep his own fire was a stringent "custom of the realm," *i. e.* at common law ; Y. B. 2 Hen. IV. 18, pl. 5 ; and this, it is said, may be founded on ancient German custom, when a man carries fire more than nine feet from his hearth, only at his peril ; Ll. Langob, cc. 147, 148 (A. D. 643), Poll. Torts 616. The rule applied as well to out-door fires, and in "a case grounded upon the common custom of the realm for negligently keeping his fire" ; 1 Ld. Raym. 264 ; s. c. 1 Salk. 13. Liability for domestic fires begun accidentally and without accident is removed in England by stats. of Anne and Geo. III. ; 11 Q. B. 347. The rule of modern times is without doubt affected by the great increase of business uses to which fire is applied, such as for mills, railroads, and the like, and in England the leading case of Rylands *v.* Fletcher (which itself concerned a reservoir, but the application of which has passed far beyond the class of facts on which it was determined), laid down the rule "that the person who, for his own purposes, brings on his lands, and collects and keeps there, anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape." This principle was expressly applied to railroads ; L. R. 3 Q. B. 733 ; and to an engine brought on a highway ; 5 Q. B. Div. 597. The case of Rylands *v.* Fletcher is itself one of those landmarks of judicial decision, the results and extent of which are difficult to estimate, and it is not easy to conceive of a subject-matter to which it can apply with greater force than to fire.

In the United States, as to Rylands *v.* Fletcher, judicial opinion is not uniform ; it has been approved ; 106 Mass. 194 ; 125 *id.* 232 ; 135 *id.* 508 ; and distinctly disapproved ; 51 N. Y. 476. See Big. L. Cas. 497. But it may be safely asserted as a rule that "a man who negligently sets fire on his own land, and keeps it negligently, is liable to an action at common law for any injury done by the spreading or communication of the fire directly from his own land to the property of another, whether through the air or along the ground and whether he might or might not have reasonably anticipated the particular manner and direction in which it is actually communicated ;" 107 Mass. 494 ; 70 N. Y. 112 ; 28 Minn. 139 ; 46 *id.* 147 ; 95 Mich. 303 ; 43 Cal. 437. One accidentally but not negligently firing his house is not liable for the spread of the fire by wind ; 99 Ind. 16. The spreading of a fire does not raise a presumption of negligence ; 81 Mo. 80 ; if there was none in starting it ; 64 Miss. 661 ; 44 N. J. L. 280. As to setting fire and restraining it, the rule is that ordinary prudence, honest motives, in the one, and due diligence as to the other, exempt one from liability ; 3 Ia. 80 ; and the burden of proof is on the plaintiff ; 18 Me. 32. The same principles as a rule apply to fires generally as to those caused by locomotives when there is statutory authority for doing so.

Although it is well settled, both in this country and in England, that the right to operate a railroad includes the use of fire in locomotives ; 93 Pa. 341 ; 140 N. Y. 308 ; and, if every *reasonable* precaution has been observed to prevent injury, the railroad company will not be liable ; 114 N. Y. 11 ; 4 Md. 242 ; yet it must show the absence of negligence on its part, at least so far as concerns safety of construction and care in the operation of its locomotives, and the freedom of the track from combustibles (see *infra*) ; Webb, Poll. Torts 561, n. ; 49 Fed. Rep. 807 ; 3 Houst. 447 ; 41 La. Ann. 96 ; 86 Mich. 615. In some states this burden is put upon the company by statute ; 39 Md. 115 ; 50 Ia. 338 ; 63 Ill. 95 ; and in others by decisions adopting the rule ; 58 Mo. 498 ; 44 N. J. L. 247 ; 90 N. C. 374 ; 4 Neb. 268 ; 14 Cal. 387 ; in other states the plaintiff must fix upon defendant both the origin of the fire, and negligence in one of the points referred to ; 36 Ia. 121 ; 31 Ind. 143 ; 142 N. Y. 11 ; 91 U. S. 454. But the owner is, in the absence of statute, held to the duty of ordinary care, and his negligence will defeat recovery ; 44 Mich. 169 ; 90 Ill. 586 ; or if the spreading of the fire was due to the negligence of the servants of the owner there is no liability ; 69 Miss. 139. It has been held that the fact that fire has been communicated by a passing locomotive is *prima facie* evidence of negligence ; 4 U. S. App. 427 ; 85 Mo. 178 ; 36 Neb. 189 ; 63 Hun 632 ; 62 Miss. 383 ; 42 Ill. App. 527 ; 22 Fed. Rep. 811. See 11 L. R. A. 506, note. The company must exercise as great a degree of care to protect the public from injury by fire as is required in favor of its patrons ; 67 Hun 469 ; and the failure to provide the *best* appliances to prevent injury to property by fire is want of ordinary care ; 44 Pac. Rep. (Nev.) 423 ; *contra*, 33 S. W. Rep. (Tex.) 280 ; but the rule is that the company is only bound to *exercise due care with respect to providing* the best appliances ; 32 S. W. Rep. (Tex.) 846 ; 140 N. Y. 308 ; 142 *id.* 11 ; and compliance with a statute requiring a guard against the emission of sparks, except dur-

ing certain months, does not exempt the company from the exercise of that care to which they are bound in law, to avoid injuring the property of their neighbor; 11 Ohio Cir. Ct. Rep. 378.

A question, the settlement of which has caused much litigation, was whether a railroad company was liable for damage to property *not adjoining* the track, nor set on fire *directly* from the locomotive, but by the spreading of the fire from the property first ignited. The rule now firmly established is that the company is liable for such injury naturally and by the ordinary course of events resulting from the fire started by the locomotive; 38 N. H. 242; 62 Conn. 331; 42 Me. 579; 98 Mass. 414; 107 *id.* 494; even where the property was at a considerable distance from the track; C. P. 98; s. c. 6 *id.* 14; 30 Mich. 181; or if several owners intervene; 13 Metc. 99.

The stubborn resistance to the establishment of this rule and its extended discussion by the courts of so many jurisdictions would be surprising but that it is readily accounted for by the fact that early decisions in New York and Pennsylvania were made the basis of strong contention against it in every state when the question first arose. Ryan *v.* N. Y. C. R. Co., 35 N. Y. 210, and Pa. R. R. Co. *v.* Kerr, 62 Pa. 353, where the cases relied upon to sustain the position that where the fire communicated from the sparks to a house near the track, and thence extended to another at a distance, the company was not liable for the loss of the latter, notwithstanding its negligence in allowing the sparks to escape. In the New York case it was determined that the negligence was too remote, and the injury not the natural and probable result; but later in the same court, in an action against a railroad company for fire, resulting from the ignition of a tie by coal from a locomotive, an effort was made to distinguish the case, and it was held that the question of proximate cause was properly left to the jury; 49 N. Y. 420. It was further shaken (usually upon the idea of distinguishing it), in 56 *id.* 200; 99 *id.* 158; and its weight as authority practically ended by 115 *id.* 579; and 118 N. Y. 224. The Pennsylvania case was also "distinguished" in a case in which the same court held that where sparks from an engine fired a railroad tie and it resulted in burning two fields and fences, the proximity of the cause is a question for the jury, who must determine whether the facts constituted a continuous succession of events so linked as to be a natural whole, or whether the chain is so broken as to become independent, and the final result cannot be said to be the natural and probable consequence of the negligence of the defendants, and that it *might* and ought to have been foreseen under the circumstances; 80 Pa. 373; but Pa. R. R. Co. *v.* Kerr was expressly approved and followed in a later case in which damage by a fire, spread by burning oil carried by a running stream, was held too remote, and the stream was considered to be an intervening agent; in this case the court said that the facts were ascertained and there was nothing to put to the jury, and on this theory it was distinguished from the case in 80 Pa. This case had what the chancellor of New Jersey termed substantially its counterpart in that state, in a claim for damages against a receiver operating a railroad, and strong disapproval of the Pennsylvania case and the earlier case in New York was expressed. The stream was considered similar to other material forces, and a natural link in the chain of causation, and the receiver was held liable, the rule as applied being thus stated: "When a fire originates in the negligence of a defendant, and is carried by a material force, whether it be the wind, the law of gravitation, combustible matter existing in a state of nature, or other means, to the plaintiff's property and destroys it, and it appears that no object intervened between the point where the fire started and the injury, which would have prevented the injury, if due care had been taken, the defendant is legally answerable for the loss;" 22 N. J. Eq. 647. The only point which suggested difficulty in applying to this class of cases the general doctrine of liability for the result of negligence is brought out with distinctness in the different views taken by the Pennsylvania and New Jersey courts of cases precisely similar as to the facts, and that difference may be considered as concerning rather the doctrine of proximate cause than as having special relation to fires from locomotives. The cases in 35 N. Y. 214 and 62 Pa. 353 are said to "stand alone" and to be "in conflict with every English or American case as yet reported"; 59 Ill. 349; "much shaken" and "each qualified and explained in its own jurisdiction, by later decisions so as to take from its weight"; 62 Conn. 331; and finally the United States supreme court, speaking through a Pennsylvania justice says of the two cases: "Those cases have been the subject of much criticism since they were decided; and it may, perhaps, be doubted whether they have always been understood. If they were intended to assert the doctrine that when a building has been set on fire through the negligence of a party, and a second building has been fired from the first, it is a conclusion of law that the owner of the second has no recourse to the negligent wrong-doer, they have not been accepted as authority for such doctrine, even in the states where the decisions were made." Strong, J., in 94 U. S. 469, 474, citing 49 N. Y. 420 and 80 Pa. 373; and cases *contra* of other states.

The result is to settle the rule as stated that, whether the fire is traceable to its negligence directly or indirectly, the company is liable when the fire started by its locomotive was the proximate cause of the injury complained of, and this applies as well to the class of cases hereafter noted in this title. The application of the doctrine is illustrated by a very recent case which held that when the fire negligently set was carried by moderately high wind, though not unusual, the wind was not the proximate cause, and the company was liable; 2 Kan. App. 319. When the fire is communicated indirectly, the question as to what is the proximate cause of the injury is ordinarily not one of science or of legal knowledge, but of fact for the jury to determine, in view of the accompanying circumstances; 94 U. S. 469; 59 Ill. 349; 71 *id.* 572; 39 Md. 115; 40 N. J. L. 299; 50 Cal. 578; 53 Mo. 366; 16 Kan. 262; and, notwithstanding the earlier cases discussed *supra;* 143 N. Y. 182; and 90 Pa. 122.

A railroad company has the right to keep its right of way free from combustibles by burning off grass, etc., but in such case it is bound at its peril to keep such fire within bounds; 110 Ind. 538. See 11 L. R. A. 506, note. Indeed, though not an insurer, the railroad company must keep its track reasonably clear of such danger; 62 N. W. Rep. (Mich.) 365; 23 S. W. Rep. (Tex.) 421; 33 Fla. 406; 105 Mass. 199; 39 N. J. L. 209 (but see 34 Pac. Rep. (Wyo.) 953); and is liable for damages from fire, caused by its negligence with respect to a fire which spreads from the track; 115 N. C. 667; and the care exercised in constructing and operating the engine is no defence; 57 Ill. App. 69; 54 N. W. Rep. (Wis.) 779; 24 S. E. Rep. (Va.) 264; nor is the diligence of the company in attempting to quench the fire; 67 N. W. Rep. (Wis.) 1129; it is for the jury to determine the question of negligence or care with respect to allowing weeds to grow on the right of way; 75 Va. 499; 58 Wis. 335; or the time and manner of setting and guarding the fire; 63 N. W. Rep. (Mich.)

647; the company must exercise ordinary care which is proportioned to, and measured by, the amount of danger, and is liable for the want of it; 26 S. W. Rep. (Tex.) 1052; such fire if started for a lawful purpose is itself no evidence of negligence, which must be proved by the person complaining; 60 N. W. Rep. (S. D.) 69; nor is unlawful speed of a train unless the fire would not otherwise have occurred; 32 S. W. Rep. (Tex.) 834.

It has been held that when a fire is caused by the sparks of a locomotive, communicating with dried grass which a railroad company has permitted to accumulate in the line of its track, and thence spreading to the property of an adjacent land-owner, it is a question for a jury whether the company was guilty of negligence, irrespective of any question as to negligence or omission of duty on the part of the land-owner; 26 Wisc. 223; s. c. 7 Am. Rep. 69; 40 Cal. 14; s. c. 6 Am. Rep. 595; *contra*, 54 Ill. 504; s. c. 5 Am. Rep. 155; 11 W. Va. 14; 12 So. Rep. (Miss.) 156. Direct evidence of the accumulation of such inflammable material was held sufficient evidence of defendant's liability; 29 Minn. 58; 74 N. C. 377; 92 Ill. 437; but allowing such accumulation is not negligence *per se*, unless such as a prudent man having regard to the same hazard would not permit; 30 Ia. 78; 87 Ind. 198; and there must be a connection between the negligence and the injury and no intervening cause (such as in this case a high wind carrying a burning brand over a ridge to a marsh adjoining plaintiff's); 79 Wis. 140.

Generally the accumulation of inflammable material near the track is contributory negligence; 42 Neb. 105; 63 Tex. 57; but it is not so to permit the natural growth of stubble and grass to remain; 87 Mo. 117; nor to deposit wood near the track under a contract with the company; 57 Ind. 150; erecting a wooden building near a railroad track is not negligence *per se*; 94 Ky. 71; but the owner assumes the risks incident thereto, and cannot recover if it is burned without fault on the part of the company; 62 N. W. Rep. (Mich.) 365. In Indiana a plaintiff must not only aver freedom from fault but absence on his part of contributory negligence; 96 Ind. 40, 62. And what is termed the Illinois negligence rule is: where fire is ignited on the right of way of a railroad, by reason of an accumulation of grass left there, and communicated to the adjoining field by the negligence of the owner in not keeping it free from combustible materials, the owner cannot recover for the injury thereby occasioned, unless the negligence of the company is greater than his own; 54 Ill. 504.

In many states statutes have been passed making railroad companies absolutely liable for damage caused by fires from locomotives, and such statutes have been almost uniformly held to be constitutional; 105 Mass. 199; 145 *id.* 129; 37 Me. 92; 85 *id.* 502; 54 Conn. 447. In two very recent cases the United States supreme court held that such a statute does not violate the constitution of the United States, as depriving the company of property without due process of law, or as denying it the equal protection of the laws, or as impairing the obligation of the contract made between the state and the company by its incorporation under general laws imposing no such liability; 165 U. S. 1; *id.* 27. Such statutes apply to property not adjoining the right of way, if set on fire by intervening property ignited by the locomotive; 62 *id.* 340; 41 S. C. 86; 2 Colo. App. 159; and are not void as interfering with the federal jurisdiction over interstate commerce; 63 N. H. 25; 16 S. E. Rep. (S. C.) 429. In Iowa it was held that the company was *prima facie* liable; 50 Ia. 340. Under such a statute imposing absolute liability contributory negligence is not a defence; 25 L. R. A. (Mo.) 161; and the company is liable for the spreading of the fire even when the person whose property was first set on fire requested the railroad men to let it burn, as he wished to burn up the bogs; 52 Conn. 264. See 25 L. R. A. 161.

As to liability for damages from fires by reason of the failure to furnish water to extinguish them, see WATER.

See, generally, Thomas, Negl. 646; 1 L. R. A. 625, note; 21 *id.* 255; 22 Abb. N. C. 377; NEGLIGENCE; RAILROAD.

FIRE AND SWORD. Letters of fire and sword were the ancient means for dispossessing a tenant who retained possession contrary to the order of the judge and diligence of the law. They were directed to the sheriff, and ordered him to call the assistance of the county to dispossess the tenant. Bell, Dict.; Erskine, Inst. lib. iv. tit. 3, § 17.

FIRE-ARM. An instrument used in the propulsion of shot, shell, or bullets by the action of gunpowder exploded within it.

In 1637 a royal charter was granted to the gunmakers of London empowering them to search for, prove, and mark hand guns, pistols, etc., and by the statutes of 1818 and 1855 the proving of all fire-arms was made compulsory. These statutes have been superseded by the gun-barrel proof act 31 and 32 Vict., which regulates the duties and powers of the London and Birmingham proof-houses, and which makes the forging or counterfeiting of proof-marks or stamps, and the selling, or having in possession for the purpose of sale, of fire-arms bearing such forged or counterfeited mark or stamp, a misdemeanor.

As to what constitutes a fire-arm, the decisions have been somewhat conflicting. A pistol so dilapidated that it could not be discharged by the trigger has been held to be a firearm and a deadly weapon; 53 Ala. 508; so where the mainspring was so disabled as not to allow it to be discharged in the regular way; 61 Ga. 417; but not so where the weapon could not be discharged by a cap on the tube; 46 Ala. 88. The separate parts of a pistol found on the offender's person was held a fire-arm; 62 *id.* 3. See ARMS; WEAPON.

FIRE-ESCAPE. An apparatus constructed to afford a safe and convenient method of escape from a burning building.

Regulations have been enacted in most of the states, often by municipal ordinances, providing that all factories, hotels, schools, buildings, theatres, hospitals, public buildings, and flat or tenement houses shall be equipped with safe and suitable means of escape in case of fire. Such regulations are of a highly penal character, and are to be strictly construed; 105 Pa. 222; 106 *id.* 321; 15 R. I. 112. They are not of such a character as to interfere with the use and enjoyment of private property; 10 Daly 377.

The original duty to provide fire-escapes rests with the owner or proprietor; 78 N. Y. 310; 58 Hun 376; and the fact that he has erected them in compliance with the statute will not exempt him from providing additional ones when ordered so to do; 10 Daly 377; but in some states it has been held that when the real owner has leased his premises the tenant in actual occupancy and possession, who places his operatives in a position of danger and enjoys the benefit of their services, becomes responsible under the law; 105 Pa. 222; 106 *id.* 321; 42 Ohio St. 458; (*contra*, 16 N. Y. Sup. Ct. Rep. 750.) But these cases seem to place the question of liability more on the ground of the relation of master and servant, it being held that as an absolute duty is laid upon the owner by statute, a servant sustaining an injury by breach of such duty may maintain an action on the case for such injury; 70 N. Y. 126; 11 R. I. 451. A building becomes a public nuisance if not supplied with such appliances as required by statute; 16 Abb. 195. And the mere relation of landlord and tenant will not bar the action; 78 N. Y. 310. It is not the duty of the tenant to search for defects and report them to the owner; *id.*; nor will the owner be permitted to wait until he is officially directed to provide fire-escapes; *id.*; 58 Hun 376; although no such obligation existed at common law; 30 S. W. Rep. (Tenn.) 393; 131 N. Y. 90; 126 Mass. 84; 30 Am. Rep. 661.

They must be reasonably secure, although they need not be the best that can be devised; 131 N. Y. 90; and the number required depends on the size of the building, the number of employes, and the inflammable character of the materials there used; 61 Hun 254; having erected a reasonably safe fire-escape, the owner is not responsible if a fire cuts off access to it; 106 Pa. 321. See Thomas, Negl. 772; Ray, Neg. Imp. Dut. 660; NEGLIGENCE.

FIRE INSURANCE. A contract to indemnify the insured for loss or damage, occasioned by fire, during a specified period. Flanders, Fire Ins. 17. See INSURANCE.

FIRE ORDEAL. See ORDEAL.

FIRE POLICY. See INSURANCE; POLICY.

FIRE-PROOF. Incombustible; not in danger from the action of fire.

A statement that a building is fire-proof necessarily excludes the idea that it is of wood, and necessarily implies that it is constructed of some substance fitted for the erection of fire-proof buildings. The characterization of one portion of a building as fire-proof suggests a comparison with other portions of the same building, and warrants the conclusion that the specified portion is different from the remainder; 102 N. Y. 459; 7 N. E. Rep. 321. In an insurance policy, a condition that books be kept in a fire-proof safe is complied with if the safe be of the kind commonly regarded as fire-proof; 4 Tex. Civ. App. 82. The insured does not by this clause warrant his safe to preserve the books; *id.* Such a clause, commonly called the iron-safe clause, is a warranty the breach of which avoids the policy; 29 S. W. Rep. (Tex.) 218; 31 *id.* 321; but not when the stipulation was inserted by fraud without knowledge of the insured; 84 Ga. 759. See INSURANCE.

FIRE RAISING. In Scotch Law. The wilfully setting on fire buildings, growing or stored cereals, growing wood, or coalheughs. Ersk. Pr. 577. See ARSON.

FIRE-WORKS. A contrivance of inflammable and explosive materials combined of various proportions for the purpose of producing in combustion beautiful or amusing scenic effects, or to be used as a night signal on land or sea, or for various purposes in war. Cent. Dict.

Percussion caps for signalling railway trains are held to be explosive preparations, although the court considered they were not "fireworks" as the latter term is known to commerce; 3 B. & S. 128. Under a clause in an insurance policy forbidding the keeping of gunpowder, fireworks are not prohibited; 66 Cal. 178. See INSURANCE; RISKS AND PERILS; CAUSA PROXIMA NON REMOTA SPECTATUR.

FIREBARE. A beacon or high tower by the seaside, wherein are continual lights, either to direct sailors in the night, or to give warning of the approach of an enemy. Cowell.

FIREBOTE. An allowance of wood or *estovers* to maintain competent firing for the tenant. A sufficient allowance of wood to burn in a house. 1 Washb. R. P. 99. Tenant for life or years is entitled to it; 2 Bla. Com. 35. Cutting more than is needed for present use is waste; 3 Dane, Abr. 238; 8 Pick. 312; Cro. Eliz. 593; 7 Bingh. 640. The rules in England and in this country are different in relation to the kind of trees which the tenant may cut; 7 Pick. 152; 7 Johns. 227; 6 Barb. 9; 2 Zabr. 521; 2 Ohio St. 180; 13 Pa. 438; 3 Leon. 16.

FIRKIN. A measure of capacity, equal to nine gallons. The word firkin is also used to designate a weight, used for butter and cheese, of fifty-six pounds avoirdupois.

FIRLOT. A Scotch measure of capacity containing two gallons and a pint. Spelman.

FIRM. The persons composing a partnership, taken collectively.

The name or title under which the members of a partnership transact business.

The word is used as synonymous with partnership. The words "house," "concern," and "company" are also used in the same sense. This name is in point of law conventional, and applicable only to the persons who, on each particular occasion when the name is used, are members of the firm. A firm is usually described, in legal proceedings, as certain persons trading or carrying on business under and using the name, style, and firm of, etc. See 9 Q. B. 361; 9 M. & W. 347; 1 Chitty, Bailm. 49.

The firm name is part of the good will of a partnership, and where, on a dissolution, one of the partners transfers to the others all his interest in the firm business and assets, with the understanding that they are to succeed to the business, the retiring partner cannot use the firm name in a business of like kind carried on in the vicinity; 33 N. E. Rep. (Ohio) 88.

It may be that the names of all the members of the partnership appear in the name or style of the firm, or that the names of only a part appear, with the addition of "and company," or other words indicating a participation of others, as partners, in the business; 16 Pick. 428; or that the name of only one of the partners, without such addition, is the name of the firm. It sometimes happens that the name of neither of the partners appears in the style of the firm; 9 M. & W. 284. In New York, Georgia, and Louisiana, no partner is permitted to transact business in the name of a person not interested in the firm. A. & E. Encyc.

The proper style of the firm is frequently agreed upon in the partnership articles; and where this is the case, it becomes the duty of every partner, in signing papers for the firm, to employ the exact name agreed upon; Colly. Partn. § 215; Story, Partn. § 202. This may be necessary, not only to bind the firm itself; Story, Partn. § 102; but also to prevent the partner signing from incurring a personal liability both to third persons and to his copartners; Story, Partn. §§ 102, 202; 2 Jac. & W. 268; 11 Ad. & E. 339; Pothier, Partn. nn. 100, 101. Where persons associate themselves together and carry on business under a common name, and the association is not a corporation, they may be regarded as partners, whatever name they may have adopted; 4 Ind. App. 20.

So, the name which a partnership assume, recognize, and publicly use becomes the legitimate name and style of the firm, not less so than if it had been adopted by the articles of copartnership; 2 Pet. 186, 198; 21 Md. 538; and a partner has no implied authority to bind the firm by any other than the firm name thus acquired; 9 M. & W. 284; 35 S. C. 572; 48 Ga. 570; 51 Wis. 170. Wherefore, where a firm consisted of J B & C H, the partnership name being J B only, and C H accepted a bill in the name of "J B & Co.," it was held that J B was not bound thereby; 9 M. & W. 284. See Daveis 325.

If the firm have no fixed name, a signing by one, in the name of himself and company, will bind the partnership; 2 Ohio 61; 57 Ga. 36; and a note in the name of one, and signed by him "For the firm, etc.," will bind the company; 5 Blackf. 99. Where the business of a firm is to be carried on in the name of B & D, a signature of a note by the names and surnames of the respective parties is a sufficient signature to charge the partnership; 3 C. B. 792. Where a written contract is made in the name of one, and another is a *secret* partner with him, both may be sued upon it; 2 Ala. 134; 5 Watts 454.

Where partners agree that their business shall be conducted in the name of one person, whether himself interested in the partnership business or not, that is the partnership name, and the partners are bound by it; 6 Hill 322; 1 Denio 405, 471, 481; 50 Ark. 62. By agreement among themselves, the individual names of partners, or of any one of them, may be used to bind the firm and create obligations good against the partnership; 73 Wis. 70. Where the name used is the name of one of the partners, and he does business also on his own private account, a contract signed by that name will not bind the firm, unless it appears to have been entered into for the firm; but, if there be no proof that the contract was made for the firm, the presumption will be that it was made by the partner on his own separate account, and the firm will not be responsible; Story, Partn. § 139; Pars. (Jas.) Partn. 76; 5 Pick. 11; 1 Du. N. Y. 405; 17 S. & R. 165; 5 Mass. 176; 5 Pet. 529. See PARTNERS; PARTNERSHIP.

The name of the firm should be distinct from the names of all other firms. When there is confusion in this respect, the partners composing one firm may, in some cases, be made responsible for the debts of another. See Peake, Cas. 80; 7 East 210; 2 Bell, Comm. 670; 3 Mart. La. N. S. 39; Pars. Partn. 120. As to the right of a surviving partner to carry on the business in the name of the firm, see 7 Sim. 127; Story, Partn. § 100, n.; Colly. Partn. § 162, n.

Merchants and lawyers have different notions respecting the nature of a firm. Merchants are in the habit of looking upon a firm as a body distinct from the members composing it; Lindl. Partn. 213: 39 La. Ann. 362; 14 Fed. Rep. 615. See 64 Ga. 243; 77 Ind. 361; 64 Ia. 261. The law looks to the partners themselves; any change among them destroys the identity of the firm; what is called the property of the firm is their property, and what are called the debts and liabilities of the firm are their debts and their liabilities. In point of law, a partner may be the debtor or creditor of his copartners; but he cannot be either debtor or creditor of the firm of which he is himself a member; 4 Mylne & C. 171.

A firm can neither sue nor be sued, otherwise than in the name of the partners composing it; Pars. (Jas.) Partn. 76. Consequently, no action can be brought by the firm against one of its partners, nor by one of its partners against it; for in any such action one person at least would appear

both as plaintiff and defendant, and it is considered absurd for any person to sue himself, even in form; 1 B. & Ald. 664; 4 Mylne & C. 171; 6 Taunt. 598; 6 Pick. 320; 5 Gill & J. 487. For the same reason, one firm cannot bring an action against another if there be one or more persons partners in both firms; 6 Taunt. 597; 2 B. & P. 120; unless by statute; as in Pennsylvania, by the act of April 14, 1838.

An appeal or writ of error taken in the name of a firm and not giving the names of the individuals comprising it will be dismissed, and the defect cannot be amended; 11 Wall. 86; 21 How. 393; 22 *id.* 87.

Whenever a firm is spoken of by its name or style, the courts admit evidence to show what persons did in fact constitute the firm at the time in question; 6 Taunt. 15; 4 Maule & S. 13; 2 Keen 255. If persons trade or carry on business under a name, style, or firm, whatever may be done by them under that name is binding as much as if real names had been used; 1 Chitty, Bailm. 707; 2 C. & P. 296; 2 Campb. 548.

Any change in the persons composing a firm is productive of a new signification of the name. If, therefore, a legacy is left to a firm, it is a legacy to those who compose it at the time the legacy vests; see 2 Keen 255; 3 Mylne & C. 507; 7 De G. M. & G. 673; and if a legacy is left to the representatives of an old firm, it will be payable to the executors of the survivors of the partners constituting the firm alluded to, and not to its successors in business; 11 Ir. Eq. 451; 1 Lindl. Partn. 216. Where a creditor takes a note made by one partner in the firm name after its dissolution, whereby the time of payment of a firm debt is extended, the other party is discharged from liability; 17 S. E. Rep. (Ga.) 280. Again, an authority given to a firm of two partners cannot, it would seem, be exercised by them and a third person afterwards taken into partnership with them; 6 Bing. N. C. 201. See 4 Ad. & E. 832; 16 Sim. 121; 7 Hare 351; 4 Ves. 649.

A name may be a trade-mark; and, if it is, the use of it by others will be illegal, if they pass off themselves or their own goods for the firm or the goods of the firm whose name is made use of; 2 Keen 213; 4 K. & J. 747. Moreover, if this is done intentionally, the illegality will not be affected by the circumstance that the imitators of the trademark are themselves of the same name as those whose mark they imitate; 13 Beav. 209; 3 De G. M. & G. 896.

Where one partner acts for the firm in demanding illegal charges and detains goods until they are paid, every member of the firm is liable for damages; 130 N. Y. 340.

An action by a firm may be defeated by a defence founded on the conduct of one of the partners. If one member of a firm is guilty of a fraud in entering into a contract on behalf of the firm, his fraud may be relied on as a defence to an action on the contract brought by him and his copartners; for their innocence does not purge his guilt. See Ry. & M. 178; 2 Beav. 128; 10 *id.* 523; 3 Drew. 3; 9 B. & C. 241. The above rule seems not to rest upon the ground that the act of the one partner is imputable to the firm; Pars. (Jas.) Part. 139; it governs when the circumstances are such as to exclude the doctrine of agency. Thus, if a partner pledges partnership property, and in so doing clearly acts beyond the limits of his authority, still, as *he* cannot dispute the validity of his own act, he and his copartners cannot recover the property so pledged by an action at law; 5 Exch. 489. So, although a partner has no right to pay his own separate debt by setting off against it a debt due from his creditor to the firm, yet if he actually agrees that such set-off shall be made, and it is made accordingly, he and his copartners cannot afterwards in an action recover the debt due to the firm; 7 M. & W. 204; 9 B. & C. 532; 1 Lindl. Partn. 169, 170; 1 Maule & S. 751. When a partner executing a firm note waives exemptions, and signs the firm name, the waiver is confined to the partner signing; 94 Ala. 626. An individual note given by a partner, and indorsed by him in the firm name without authority, in satisfaction of a debt which the creditor knows to be that of the individual, is not enforceable by the latter against the firm; 18 N. Y. Sup. 867.

If a person becomes surety *to* a firm, it is important to ascertain whether he clearly contemplated changes in the firm, and agreed to become surety to a fluctuating body, or not. If he did, his liability is not discharged by any change among the members constituting the partnership at the time he became surety; 10 B. & C. 122; 5 B. & Ald. 261; but if no such intention can be shown, then a contract of suretyship entered into with a firm will be deemed to be binding so long only as the firm remains unchanged, and consequently any change in it, whether by the death or the retirement of a partner; 7 Hare 50; 3 Q. B. 703; 10 Ad. & E. 30; or by the introduction of a new partner; 2 W. Bla. 934; immediately puts an end to the surety's liability so far as subsequent events are concerned. In all such cases the surety's position and risk are altered, and, whether he has in fact been damnified by the change or not, he has a right to say, *non in hœc fœdera veni.* Similar doctrines apply to cases where a person becomes surety *for* the conduct of a firm; 5 M. & W. 580. See 6 Q. B. 514; 4 B. & P. 34; 8 Cl. & F. 214; 1 Lindl. Partn. 172-174; De G. 300; 2 Rose 239, 328; 4 Dow. & C. 426.

Consult, Parsons (J.), Principles Partn.; Parsons; Story, Partn.; Bates, Lim. Part.

FIRM NAME. The name or title of a firm in business. See FIRM.

FIRMA (L. Lat.). A farm or rent reserved on letting lands, anciently frequently reserved in provisions. Spelman, Gloss.; Cunningham, Law Dict.

A banquet; supper; provisions for the table. Du Cange.

A tribute or custom paid towards entertaining the king for one night. Domesday; Cowel.

A rent reserved to be paid in money, called then *alba firma* (white rents, money rents). Spelman, Gloss.

A lease. A letting. *Ad firmam tradidi* (I have farm let). Spelman, Gloss.

A messuage with the house, garden, or lands, etc., connected therewith. Co. Litt. 5 *a*; Shepp. Touchst. 93. See FARM.

FIRMA FEODI (L. Lat.). Fee-farm. See FEODI-FIRMA.

FIRMAN. A passport granted by the Great Mogul to captains of foreign vessels to trade within the territories over which he has jurisdiction; a permit.

FIRMARATIO. The right of a tenant to his lands and tenements. Cowel.

FIRMARIUM. A place in monasteries and elsewhere where the poor were received and supplied with food. Spelman.

FIRMARIUS (L. Lat.). A fermor. A lessee of a term. *Firmarii* comprehend all such as hold by lease for life or lives or for year, by deed or without deed. Co. 2d Inst. 144, 145; 1 Washb. R. P. 107; 8 Pick. 312; 7 Ad. & E. 637.

FIRMITAS. In English Law. An assurance of some privilege, by deed or charter.

FIRMLY. Where a statute requires an affidavit that an appellant from an award of a board of arbitrators "firmly believes injustice has been done," it is not sufficient to express belief, omitting the word firmly. The word is a strong expression intended to put the affiant on his guard. It cannot be dispensed with without substituting something equal to it in substance; as to what shall be so considered, there may be liberal construction. Verily is as strong a word as firmly, and is sufficient; 4 S. & R. 134.

FIRMURA. Liberty to scour and repair a mill-dam, and carry away the soil, etc. Blount.

FIRST. In a will the word "first" may not import precedence of one bequest over another. 59 Me. 330; 57 *id.* 523.

FIRST-CLASS. Occupying the highest standing in a particular classification. In a contract for "first-class" work, it is for the jury to decide as to whether the terms were substantially complied with; 67 Hun 652.

FIRST-CLASS MATTER. Matter received at the United States post-offices, in writing or sealed against inspection.

FIRST-CLASS MISDEMEANANT. Under the Prisons Act (28 & 29 Vict. c. 126, s. 67) prisoners in the county, city, and borough prisons convicted of misdemeanor and not sentenced to hard labor, are divided into two classes, one of which is called the first division; and it is in the discretion of the court to order that such a prisoner be treated as a *misdemeanant of the first division*, usually called "first-class misdemeanant," and as such not to be deemed a criminal prisoner, *i. e.* a prisoner convicted of a crime.

FIRST FRUITS. The first year's whole profits of the spiritual preferments. There were three valuations (*valor beneficium*) at different times, according to which these first fruits were estimated, made in 1253, 1288, and 1318. A final valuation was made by the 26 Hen. VIII. c. 3.

They now form a perpetual fund, called Queen Anne's bounty, the income of which is used for the augmentation of poor livings. 1 Sharsw. Bla. Com. 284, and notes; 2 Burn, Eccl. Law 260.

FIRST IMPRESSION (Lat. *primæ impressionis*). First examination. First presentation to a court for examination or decision. A cause which presents a new question for the first time, and for which, consequently, there is no precedent applicable in all respects, is said to be a case of the first impression. Austin, Jur. sect. xxv. *ad fin.*

FIRST PURCHASER. In the English law of descent, the first purchaser was he who first acquired an estate in a family which still owns it. A purchase of this kind signifies any mode of acquiring an estate, except by descent. 2 Bla. Com. 220.

FISC. In Civil Law. The treasury of a prince; the public treasury. 1 Low. C. 361.

Hence, to *confiscate* a thing is to appropriate it to the *fisc*. Paillet, *Droit Public*, 21, n., says that *fiscus*, in the Roman law, signified the treasure of the prince, and *ærarium* the treasure of the state. But this distinction was not observed in France. See Law 10, ff. *De jure Fisci*.

FISCAL. Belonging to the fisc, or public treasury. A fiscal agent does not necessarily imply a depositary of the public funds, so as, by the simple use of it in a statute without any directions in this respect to make it the duty of the state treasurer to deposit with him any moneys in the treasury; 27 La. Ann. 29.

FISH. An animal which inhabits the water, breathes by means of gills, swims by the aid of fins, and is oviparous.

Fishes in rivers and in the sea are considered as animals *feræ naturæ*; consequently, no one has any property in them until they have been captured; and, like other wild animals, if, having been taken, they escape and regain their liberty, the captor loses his property in them.

FISH ROYAL. A whale, porpoise, or sturgeon thrown ashore on the coast of England belonged to the king as a branch of his prerogative. Hence these fish are termed royal fish. Hale, *De Jure Mar.* pt. 1, c. 7; 1 Sharsw. Bla. Com. 290; Plowd. 305; Bracton, l. 3, c. 3.

FISHERY. A place prepared for catching fish with nets or hooks. This is com-

monly applied to the place of drawing a seine or net. 1 Whart. 131.

A common of fishery is not an exclusive right, but one enjoyed in common with certain other persons. 3 Kent 329.

A free fishery is said to be a franchise in the hands of a subject, existing by grant or prescription, distinct from an ownership in the soil. It is an exclusive right, and applies to a public navigable river, without any right in the soil. 3 Kent 329.

A several fishery is one by which the party claiming it has the right of fishing, independently of all other, so that no person can have a coextensive right with him in the object claimed; but a partial and independent right in another, or a limited liberty, does not derogate from the right of the owner. 5 Burr. 2814.

A distinction has been made between a common fishery (*commune piscarium*), which may mean for all mankind, as in the sea, and a common of fishery (*communium piscariæ*), which is a right, in common with certain other persons, in a particular stream. 8 Taunt. 183. Angell seems to think that *common of fishery* and *free fishery* are convertible terms. Law of Watercourses, c. 6, ss. 3, 4.

Woolrych says that sometimes a free fishery is confounded with a several, sometimes it is said to be synonymous with common, and again it is treated as distinct from either. Law of Waters, etc., 97.

A several fishery, as its name imports, is an exclusive property; this, however, is not to be understood as depriving the territorial owner of his right to a several fishery when he grants to another person permission to fish; for he would continue to be the several proprietor, although he should suffer a stranger to hold a coextensive right with himself. Woolr. Wat. 96.

These distinctions in relation to several, free, and common of fishery are not strongly marked, and the lines are sometimes scarcely perceptible. "Instead of going into the black-letter books to learn what was a fishery, and a free fishery, and a several fishery," says Huston, J., "I am disposed to regard our own acts, even though differing from old feudal law." 1 Whart. 132.

The right of fishery is to be considered with reference to navigable waters and to waters not navigable; meaning, by the former, those in which the tide ebbs and flows; by the latter, those in which it does not. By the common law of England the fisheries in all the navigable waters of the realm belong to the crown by prerogative, in such way, nevertheless, as to be common to all the subjects: so that an individual claiming an exclusive fishery in such waters must show it strictly by grant or prescription. In that country navigable waters meant tide waters, but different conditions have resulted in the application of the rule *cessat ratio cessat lex*, and while the same principle is recognized that navigable waters belong to the state and non-navigable ones to the riparian proprietor, the recognition of tide-water as the test of navigability is abandoned. See NAVIGABLE WATERS.

In rivers not navigable the fisheries belong to the owners of the soil or to the riparian proprietors; 2 Bla. Com. 39; Gould, Wat. 42, 48; Hale, *De Jure Mar.* c. 4; 1 Mod. 105; 4 Burr. 2162; Dav. 155; 7 Co. 16 *a*; Plowd. 154 *a*. In such rivers the owner of the adjoining soil has an exclusive right of fishery in front of his land to the thread of the river, except so far as this right has been qualified by legislative regulation; but this right is limited to the taking of fish, and does not carry with it the right to prevent the passage of fish to lakes and ponds for breeding purpose; 5 Pick. 99. The common-law doctrine accepting the tide-water test of navigability has been declared to be the law in several of the United States; 17 Johns. 195; 20 *id.* 90; 3 N. H. 321; 1 Pick. 180; 5 *id.* 199; 5 Day 72; 1 Baldw. 60; 5 Mas. 191; 5 Harr. & J. 193; 2 Conn. 481; 108 Mass. 446, 447; 37 Me. 472. But in some states, as Pennsylvania, North Carolina, and South Carolina, the right of fishery in the great rivers of those states, though not tide-waters, is held to be vested in the state and open to all the world; 2 Binn. 475; 14 S. & R. 71; 1 M'Cord 580; 3 Ired. 277; 34 Ohio 492. See 89 Pa. 346; 75 Hun 472. This modification of the common-law doctrine has been applied not to the abandonment of the distinction between the public and private rights of fisheries as affected by navigability, but to the establishment of a different test of navigability, made necessary by the difference of physical conditions in the two countries already alluded to. So in the leading Pennsylvania case the point of the decision was that neither the quality of fresh or salt water, nor the flux or reflux of the tide, would determine whether a river should be considered navigable or not; 2 Binn. 475. After changing the test of navigability, these cases applied the rule of the public character of streams actually navigable which had been in England determined by the mere test of tide water. See 7 Pet. 320; 60 Pa. 339.

In this country each state has the exclusive control of fisheries in the tide waters and beds of tide waters within its jurisdiction, subject to the paramount right of navigation; 139 U. S. 240; 94 *id.* 391. This right is said by Cooley to be "considered as pertaining to the state by virtue of an authority existing in every sovereign," and which is called the eminent domain. Some of these rights are complete without any action on the part of the state, as is the case with . . . the rights of fishery in public waters." Cooley, Const. Lim. 651, 524. The jurisdiction of a state is coextensive with its territory, coextensive with its legislative powers, and within what are generally recognized as the territorial limits of a state, by the law of nations, a state can define its boundaries on the sea and the boundaries of its counties; 3 Wheat. 386; within its limits a state has authority to regulate the time and manner of the taking of fish by the public in the waters therein; 1 Metc. 95; 20 Pick. 186; 24 Me. 482; 75 *id.* 597; and so far as public and common rights are concerned, the state has control over fisheries; 85 Me. 118.

The control of fisheries to the extent of at least a marine league from the shore belongs to the nation on whose coast the fisheries are prosecuted. Bays wholly within the territory of a nation, not exceeding two marine leagues in width at

the mouth, are within its territorial jurisdiction; 139 U. S. 240.

The fact that congress has never assumed control over fisheries is persuasive evidence that the right to control them remains in the state; 139 U. S. 240. In England it was held that the ownership of the crown in the bed of navigable waters is for the benefit of the subject, and cannot be used in any such manner to derogate from or interfere with the right of navigation, which belongs by law to all subjects of the realm; and that consequently the grantees of a particular portion, who occupied it for a fishery, could not be lawfully authorized to charge and collect anchorage dues from vessels anchoring therein; 20 C. B. N. S. 1.

By the award of the arbitrators under the treaty with Great Britain (27 Stat. L. 948), it was settled that the United States had no exclusive jurisdiction in Behring Sea outside the ordinary three-mile limit, and no right of property in, or protection over, the fur seals frequenting the islands of the United States when found outside of such three-mile limit. Therefore the act of March 2, 1889, declaring that Rev. St. sec. 1956, which forbids the killing of fur-bearing animals in Alaska and the waters thereof, shall apply to "all the dominion of the United States in the waters of Behring Sea," must be construed to mean the waters within three miles of the shores of Alaska; 75 Fed. Rep. 513.

Private or several fisheries in navigable waters may be established by the legislatures, or may, perhaps, be acquired by prescription clearly proved; 16 Pet. 369; 6 Cow. 369; 5 Ired. 118; 4 Md. 262; 10 Cush. 369; 39 Mich. 626; and in some of the United States there are such private fisheries, established during the colonial period, which are still held and enjoyed as such; as, in the Delaware; 1 Whart. 145; 1 Baldw. 76. The right of private fishery may exist not only in the riparian proprietor, but also in another who has acquired it by grant or otherwise; Co. Litt. 122 *a*, n. 7; Schultes, Aq. Rights 40; Ang. Waterc. 184; Gould, Wat. 183; 33 N. J. L. 223. But see 2 Salk. 637. Such a right is held subject to the use of the waters as a highway; Ang. Tide-Wat. 80; 1 South. 61; 1 Jones, N. C. 299; 1 Campb. 516; 1 Whart. 136; and to the free passage of the fish; 7 East 195; 1 Rice 447; 5 Pick. 199; 10 Johns. 236; 2 Cush. 251; 15 Me. 303. See as to right of fishery; 9 L. R. A. 236, 807; as to prescription to such rights; 14 *id.* 386; on land of another; 13 Am. St. Rep. 416.

The free right of fishery in navigable waters extends to the taking of shell-fish between high and low water-mark; 2 B. & P. 472; 5 Day 22; 37 Me. 472; 15 How. 132; 103 Mass. 217.

Oysters which have been taken, and have thus become private property, may be planted in a new place flowed by tide-water, and where there are none naturally, and yet remain the private property of the person planting them; 14 Wend. 42; 34 Barb. 592; 2 R. I. 434; 47 Hun 366. A state may pass laws prohibiting the citizens of other states from taking oysters within its territorial limits; 4 Wash. C. C. 371; 12 R. I. 385; 94 U. S. 391; Angell, Tide-Wat. 156. See 40 Fed. Rep. 625. The exclusive right to take oysters in a navigable bay cannot be acquired by prescription; 25 S. W. Rep. (Tex.) 650.

The preservation of game and fish is within the proper domain of the police power of a state; 152 U. S. 133. See as to river and lake fisheries, 14 Law Mag. & Rev. 4th 220; France and Canada; 15 *id.* 301; United States and Canada; 13 *id.* 282; 21 Am. L. Rev. 369, 431; 1 Rev. Crit. 38.

See, generally, 2 Bla. Com. 39; 3 Kent 409; Bacon, Abr. *Prerogative;* Schultes, Aq. Rights; Ang. Waterc. §§ 61–89; Washburn, Easements; Woolrych, Waters; Ang. Tidew. ch. 7; 23 Am. St. Rep. 837; 18 Myer, Fed. Dec. 208; 3 Wait, Act. & Def. 355.

FISH COMMISSIONER.

The Act of February 9, 1871, provides for the appointment of a commissioner of fish and fisheries, with all necessary powers looking to the preservation and increase of food fishes throughout the country. U. S. Rev. Stat. § 4395.

FISHERIES COMMISSION.

The relation of the United States with the British provinces on the Atlantic has been the subject of important negotiations. By the treaty of 1818, the United States have the right to fish on certain specified coasts of British America without reference to the distance from shore, while as to all other coasts they are excluded from fishing within three marine miles of the shore. The treaty of Washington of 1871 removes the three-mile restriction. Art. XIX. yields a corresponding right to all British subjects as to the Atlantic coasts of the United States north of the 39th parallel, and concedes to each nation the right to import, free of duty, fish and fish oils into the ports of the other. The treaty was to continue in operation for ten years, and further until two years' notice from either party. In Art. XXII. it is stated that the British government asserts that these provisions of the treaty would work greatly to her disadvantage. Provision was accordingly made, by the same article, for the appointment of a commission, which is known as the *Fisheries Commission*, to determine the amount of compensation to be paid by the United States. The tribunal, consisting of three members, met at Halifax, N. S., June 15, 1877, and the business sessions lasted from July 28 to November 23, 1877. The award was five and one-half million dollars in gold to Great Britain. The United States commissioner did not sign the award, stating that, "in his opinion the advantages accruing to Great Britain under the treaty of Washington are greater than those conferred on the United States. . . . He deemed it his duty to state further, that it is questionable whether it is competent for the board to make an award under the treaty, except with the unanimous consent of its members." See U. S. Rev. Stat. §§ 2503, 2506; 12 Am. Law Rev. 380.

FISHGARTH. A dam or weir in a river for taking fish. Cowel.

FISHING BANKS. A fishing ground of comparative shoal water in the sea. 21 Ore. 523.

FISHING-BILL. A term used in equity for a bill that seeks a discovery upon general, loose, and vague allegations. Story, Eq. Pl. § 325; on that ground alone, such a bill will be at once dismissed; 32 Fed. Rep. 263.

FISK. In Scotch Law. The revenue of the crown. Generally used of the personal estate of a rebel which has been forfeited to the crown. Bell, Dict.

FISTUCA (Lat.; spelled, also, *festuca*; called, otherwise, *baculum*, *virga*, *fustis*). The rod which was transferred, in one of the ancient methods of feoffment, to denote a transfer of the property in land. Spelman, Gloss. See FESTUCA.

FIT. Suitable; appropriate; conformable to a duty. Fit for cultivation refers to that condition of soil which will enable a farmer with a reasonable amount of skill to raise regularly and annually, by tillage, grain or other staple crops; 34 Cal. 581; 13 Ired. L. 37; 29 Kan. 596.

FIVE MILE ACT. An act of parliament passed in 1665, 17 Chas. II. c. 2, forbidding nonconformists who refused to take the oath of non-resistance to come within five miles of any corporation in which they had preached since the passing of the act of oblivion in 1660. This act was nullified by the toleration act of 1689.

FIX. To determine; to settle; 52 N. W. Rep. (S. D.) 673. A constitutional provision to the effect that the general assembly shall fix the compensation of officers, means that it shall prescribe or "fix" the rule by which such compensation is to be determined. 18 Ohio 9.

FIXING BAIL. In Practice. Rendering absolute the liability of special bail.

The bail are fixed upon the issue of a *ca. sa.* (*capias ad satisfaciendum*) against the defendant; 2 N. & M'C. 569; 16 Johns. 117; 3 Harr. N. J. 9; 11 Tex. 15; and a return of *non est* thereto by the sheriff; 4 Day 1; 2 Bail. 492; 3 Rich. S. C. 145; 1 Vt. 276; 7 Leigh 371; made on the return-day; 2 Metc. Mass. 590; 1 Rich. S. C. 421; unless the defendant be surrendered within the time allowed *ex gratia* by the practice of the court; 3 Conn. 316; 9 S. & R. 24; 2 Johns. 101; 1 Dev. N. C. 91; 11 Gill & J. 92; 8 Cal. 552; 17 Ga. 88.

In New Hampshire, 1 N. H. 472; Massachusetts, 2 Mass. 485; Missouri, 69 Mo. 359; Tennessee, 5 Yerg. 183; and Texas, 7 Tex. App. 279; bail are not fixed till judgment on a *sci. fa.* is obtained against them, except the death of the defendant after a return of *non est* to an execution against him.

The death of the defendant after a return of *non est* by the sheriff prevents a surrender, and fixes the bail inevitably; 5 Binn. 332; 4 Johns. 407; 3 M'Cord 49; 4 Pick. 120; 4 N. H. 29; 12 Wheat. 604. See 1 Ov. 224; 1 Ohio 35; 2 Ga. 331.

In Georgia and North Carolina, bail are not fixed till judgment is obtained against them; 3 Dev. 155; 61 Ga. 197, 492. See BAIL.

FIXTURES. Personal chattels affixed to real estate, which may be severed and removed by the party who has affixed them, or by his personal representative, against the will of the owner of the freehold. There is much dispute among the authorities as to what is a proper definition. Bro. Fixt. 1; Tyler's Fixt. 35; 6 Am. L. Rev. 412, where various definitions are reviewed.

Anything fixed or attached to a building, and used in connection with it, movable or immovable. Whenever the appendage is of such a nature that it is not part and parcel of the building, but may be removed without injury to the building, then it is a movable fixture and does not pass with a conveyance of the freehold. If, however, it be so connected with the building, that it cannot be severed from it without injury to the building, then it is part of the realty and passes with the conveyance of the soil; 95 Ala. 77.

Questions frequently arise as to whether given appendages to a house or land are to be considered part of the real estate, or whether they are to be treated as personal property: the latter are movable, the former not.

The annexation may be actual or constructive. 1st, By actual annexation is understood every mode by which a chattel can be joined or united to the freehold. The article must not be merely laid upon the ground; it must be fastened, fixed, or set into the land, or into some such erection as is unquestionably a part of the realty; otherwise it is in no sense a fixture; Bull. N. P. 34; 3 East 38; 9 *id.* 215; Pothier, *Traité des Choses* § 1; 20 Wend. 636; 3 Blackf. 111. Locks, iron stoves set in brickwork, posts, window-blinds, and a mirror firmly attached to the chimney breast by molding, afford examples of actual annexation; see 5 Hayw. 109; 20 Johns. 29; 1 Harr. & J. 289; 3 M'Cord 553; 9 Conn. 63; 1 Miss. 508, 620; 7 Mass. 432; 15 *id.* 159; 4 Ala. 314; 36 W. Va. 671; 43 Ill. App. 585; 2d, by constructive annexation. Some things have been held to be parcel of the realty, which are not annexed or fastened to it; for example, deeds or chattels which relate to the title of the inheritance and go to the heir; Shep. Touch. 469; 31 Barb. 632; 41 N. H. 503. Cars used in connection with a drier in a brickyard, and which are indispensable to the use of the drier, are part of the realty, and a mechanic's lien will attach thereto; 37 Ill. App. 69. So wires and insulators used in forming and completing the connection between an electric light and power plant and the places supplied with light and heat by such plant; 32 Atl. Rep. (N. J.) 69; 48 Kans. 182; gas burners, chandeliers, and the like; 31 N. J. L. 181; 4 Metc. Ky. 357; 18 L. T. N. S. 300. Tubs, vats, and casks placed in a brewery with a design of permanent use therein and which are too large to pass out of any existing opening are part of the realty; 47 Fed. Rep. 756. So deer in a park, fish in a pond, and doves in a dove-house, go to the heir, and not to the executor, being, like keys and heirlooms, constructively annexed to the inheritance; Shep. Touch. 90; Pothier, *Traité des Choses* § 1. But loose, movable machinery used in prosecuting any business to which the freehold is adapted cannot be

considered part of the real estate nor in any way appurtenant to it; 12 N. H. 205; 6 Exch. 295; 14 Allen 136; 55 Fed. Rep. 229. See, however, 2 W. & S. 116, 390.

The criterion of an irremovable fixture is the united application of three requisites: (1) real or constructive annexation of the article in question to the freehold; (2) appropriation or adaptation to the use or purpose of that part of the realty with which it is connected; (3) the intention of the party making the annexation to make the article a permanent accession to the freehold; 117 Ind. 176; 42 Kan. 213.

The general rule is, that fixtures once annexed to the freehold become part of the realty. But to this rule there are exceptions: as, first, where there is a manifest intention to use the fixture in some employment distinct from that of the occupant of the real estate; second, where it has been annexed merely for the purpose of carrying on a trade; 3 East 88; 4 Watts 330; for the fact that it was put up for such a purpose indicates an intention that the thing should not become part of the freehold. See 1 H. Bla. 260. Buildings may, by agreement of parties, be erected upon land without becoming affixed thereto; 150 U. S. 483. But if there is a clear intention that the thing should be permanently annexed to the realty, its being used for purposes of trade would not, perhaps, bring the case within one of the exceptions; 1 H. Bla. 260. The tendency of modern authorities is to make the intention of the parties the general rule for deciding whether an article is realty or personalty; L. R. 7 C. P. 328; 12 N. Y. 170; 17 Am. Dec. 690; 96 Ala. 44. But the intention must be definitely expressed by words or acts; mere unexpressed mental intention is of no avail; 16 Ill. 430; 43 N. H. 390; 43 P. 308. See 42 Mich. 389, and note. This intention will prevail except as against innocent purchasers; 117 Ind. 176.

With respect to the different classes of persons who claim the right to remove a fixture, it has been held that where the question arises between *an executor and the heir at law* the rule is strict that whatever belongs to the estate to which the fixture appertains will go to the heir; but if the ancestor manifested an intention (which it is said may be inferred from circumstances) that the things affixed should be considered personalty, they will be so treated, and will go to the executor. See Bac. Abr. *Executor, Administrator;* 2 Stra. 1141; 1 P. Wms. 94; Bull. N. P. 34; 12 Cl. & F. 313; 36 Am. Rep. 446. As between *a vendor and a vendee* the same strictness applies as between an executor and an heir at law; for all fixtures which belong to the premises at the time of the sale, or which have been erected by the vendor, whether for purposes of trade or manufacture or not, as potash-kettles for manufacturing ashes, and the like, chandeliers and gas-brackets, pass to the vendee of the land, unless they have been expressly reserved by the terms of the contract; 6 Cow. 663; 20 Johns. 29; Ewell, Fixt. 271; Tyler, Fixt. 519; 26 Weekly Law Bul. 149: (see also 1 Daly, N. Y. 487; 10 Rich. L. 135;) a faucet attached to a hot-water boiler and a rosebush in the yard pass by deed of the realty; 19 N. Y. Sup. 831; but a filter capable of delivering 105 gallons of water per minute, resting loosely on a factory floor, is a fixture; 62 Hun 618. The same rule applies as between *mortgagor* and *mortgagee;* 15 Mass. 159; 147 *id.* 500; 1 Atk. 477; 16 Vt. 124; 12 N. H. 205; Ewell, Fixt. 271. Wires for conducting an electrical current to lamps pass as fixtures under a mortgage of the electric light plant; 12 Pac. Rep. (Ariz.) 694; and the annunciator and all the wires of an electric-bell system are part of the realty of a hotel and pass as fixtures under a mortgage; 63 N. W. Rep. (Minn.) 257; in which case steam radiators and an office-desk attached to the building were held to be fixtures, while gas-burners and chandeliers were held not to pass as such to the mortgagee; *contra,* as to the last point; 24 N. Y. Supp. 70; and in 28 Atl. Rep. (Pa.) 694, it was held that steam radiators and valves were not annexed to the realty, but being exactly analogous to gas fixtures were severable from the realty. The question whether ranges, hot-water boilers, sinks, and wash-tubs are fixtures under a mortgage depends on when and how they are attached to the house; 24 N. Y. Supp. 70; and as between a *devisee and the executor,* things permanently annexed to the realty at the time of the testator's death pass to the devisee,—his right to fixtures being similar to that of a vendee; 2 B. & C. 80; Ferard, Fixt. 246. Tapestry which has been cut and pieced so as to cover the walls of a room and the space left by the doors and mantelpiece, and was hung by being nailed to wooden buttons let into the plaster and nailed to the brick work, passed as a fixture under the devise of the mansion-house; [1896] 2 Ch. 497; see also 3 L. R. Eq. 382, where, under the provisions of a will, tapestry, pictures, and frames filled with satin and attached to the walls, and also statues, figures, vases, and stone garden seats purchased and set in place by the testator who was tenant for life, which were essentially part of the house or the architectural designs of the building or grounds, however fastened, were fixtures, and could not be removed, but glasses and pictures not in panels, not being part of the building, were not fixtures.

Where a husband, managing his wife's property as her agent, voluntarily, at his own expense, places thereon a boiler, engine, and connections for furnishing power, and subsequently joins his wife in executing a mortgage on the land, the boiler and engine are not trade fixtures, and the husband, as against the purchasers at sheriff's sale on proceeding, under the mortgage, has no right to remove them; 180 Pa. 283.

But as between a *landlord and his tenant* the strictness of the ancient rule has been much relaxed. The rule here is understood to be that a tenant, whether for life, for years, or at will, may sever at any

time before the expiration of his tenancy, and carry away all such fixtures of a chattel nature as he has himself erected upon the demised premises for the purposes of *ornament, domestic convenience*, or *to carry on trade;* provided, always, that the removal can be effected without material injury to the freehold; 16 Day 322; 16 Mass. 449; 2 Dev. 376; 1 Bail. 541; 19 N. Y. 234; Ewell, Fixt. 76; 69 Tex. 146; 42 Kan. 23; 47 Ill. App. 33; and this is so whether it be made of wood or brick; 142 U. S. 396. There have been adjudications to this effect with respect to bakers' ovens; salt-pans; carding-machines; cider mills and furnaces; steam-engines; soap-boilers' vats and copper stills; mill-stones; Dutch barns standing on a foundation of brick-work set into the ground; a varnish-house built upon a similar foundation, with a chimney; and to a ball-room, erected by the lessee of an inn, resting upon stone posts slightly imbedded in the soil; and also in regard to things ornamental or for domestic convenience: as, furnaces; stoves; cupboards and shelves; bells and bell-pulls; gas-fixtures; portable hot-air furnace; 4 Gray 256; 127 Mass. 125, and note; 34 Am. Rep. 353; 89 Pa. 506; 92 Mich. 552; 55 Fed. Rep. 229; pier and chimney-glasses, although attached to the wall with screws; marble chimney-pieces; grates; window-blinds and curtains. The decisions, however, are adverse to the removal of hearth-stones, doors, windows, locks and keys; because such things are peculiarly adapted to the house in which they are affixed; also, to all such substantial additions to the premises as conservatories, greenhouses (except those of a professional gardener), stable, pig-styes and other out-houses, shrubbery and flowers planted in a garden. Nor has the privilege been extended to erections for agricultural purposes; though it is difficult to perceive why such fixtures should stand upon a less favored basis than trade fixtures, when the relative importance of the two arts is considered; Tayl. Landl. & Ten. § 544; 3 East 38; 13 Pa. 438. But some American authorities question the correctness of the doctrine in its application to the United States; 2 Pet. 137; 20 Johns. 29; Ferard, Fixt. 60. A railroad company, occupying land under an agreement, on the termination of such, may remove the rails which have been laid; 142 U. S. 396.

The time for exercising the right of removal is a matter of some importance. A tenant for years may remove them at any time during his term and afterwards, if he is in possession and holding over rightfully; 7 M. & W. 14; 14 Cal. 59; 40 Ind. 145; 55 Fed. Rep. 229. But tenants for life or at will, having uncertain interests in the land, have, after the determination of their estates not occasioned by their own fault, a reasonable time within which to remove their fixtures; 3 Atk. 13; 19 N. J. 238; 102 Mass. 193; but a tenant at will whose tenancy can only be terminated after reasonable notice, has not this privilege; 37 Minn. 459.

If a tenant quits possession of the land without removing such fixtures as he is entitled to, the property in them immediately vests in the landlord, and though they are subsequently severed, the tenant's right to them does not revive. If, therefore, a tenant desires to have any such things upon the premises at the expiration of his term, for the purpose of valuing them to an incoming tenant, or the like, he should take care to get the landlord's consent; otherwise he will lose his property in them entirely; 1 B. & Ad. 394; 2 M. & W. 450; Tyl. Fixt. 73; 32 W. Va. 66. The rights of parties with respect to particular articles are sometimes regulated by local customs, especially as between outgoing and incoming tenants; and in cases of this kind it becomes a proper criterion by which to determine the character of the article, and whether it is a fixture or not.

See, generally, on this subject, Vin. Abr. *Landl. and Tenant* (A); Bac. Abr. *Executors*, etc. (H 3); Comyns, Dig. *Biens* (B,C); 2 Sharsw. Bla. Com. 281, n. 23; Pothier, *Traité des Choses;* 4 Co. 63, 64; Co. Litt. 53 *a*, and note 5, by Hargrave; F. Moore 177; 2 Washb. R. P.; Brown; Amos & Ferard; Tyler; Ewell, Fixtures; 6 Am. L. Rev. 412; 17 Am. Dec. 686; 24 Alb. Law J. 314; 10 L. R. A. 723, note.

FLACO. A place covered with standing water.

FLAG. A symbol of nationality carried by soldiers, ships, etc., and used in many places where such a symbol is necessary or proper.

Nationality is determined by the flag when all other requisites are complied with; 5 East 398; 3 B. & P. 201; 1 C. Rob. Adm. 1; 1 Dods. Adm. 81, 131; 9 Cra. 388; 2 Pars. Marit. Law 114, 118, n. 129.

A ship navigating under the flag and pass of a foreign country is to be considered as bearing the national character of the country under whose flag she sails; Wheat. Int. L., 3d Eng. ed. § 340. In an unusual case during the French and German war a vessel really of Swiss (neutral) ownership bore the German flag because Swiss subjects were not permitted to fly the Swiss federal flag and France had refused to recognize any Swiss maritime flag. The French Conseil des Prises held, reversing the decision below, that she was not a German vessel and restored her to her owners; Dalloz, *Jur. Gén.* pt. iii. p. 94 (14 espèce).

A cargo documented as foreign property in the same manner as the ship by which it is carried, and covered by a foreign flag, is not, under the English rule, the subject of capture; 5 Rob. Rep. 2; *id.* 5, note. In that country, although the ship is held to be bound by the character imposed upon it by the authority of the government from which all the documents issue, yet goods which have no dependence upon the authority of the state may be differently considered; and if the goods be laden in time of peace, though sailing under a foreign flag, they are not subjects of capture; *id.;* but these licenses are construed with

great liberality in the British courts of admiralty; Stew. Vice Adm. 360.

The doctrine of the courts in this country has been very strict as to this point, and it has been frequently decided that sailing under the license and passport of protection of the enemy in furtherance of his views and interests was, without regard to the object of the voyage or the port of destination, such an act of illegality as subjected both ship and cargo to confiscation as prize of war; 8 Cra. 181; *id.* 203; *id.* 444; 2 Wheat. 143; 4 *id.* 100. These decisions placed the objection to such licenses on the ground of pacific dealing with an enemy and as amounting to a contract that the party to whom the license is given should, for that voyage, withdraw himself from the war and enjoy the repose and blessings of peace. The illegality of such intercourse was strongly condemned; and it was held that, the moment a vessel sailed on a voyage with an enemy's license on board, the offence was irrevocably committed and consummated, and that the *delictum* was not done away even by the termination of the voyage, but the vessel and cargo might be seized after arrival in a port of the United States and condemned as lawful prize. See 1 Kent 85, 164; Wheat. Int. L. (3d Eng. ed.) 340.

By the rules of the United States Navy the use of a foreign flag to deceive an enemy is permissible, but it must be hauled down before a shot is fired, and under no circumstances will it be allowable to commence an action or to fight a battle without the display of the national flag; Snow, Int. L. 96.

Law of the Flag. An expression applied to the municipal law of the country to which a ship belongs of which the flag is the symbol, when that law is resorted to in preference to the *lex loci contractus* for the construction and effect of a contract or the determination of a liability affecting the ship or her cargo.

The law of the flag is "to regulate the liabilities and regulations which arise among the parties to the agreement, be it of affreightment or by hypothecation, upon this principle, that the ship-owner who sends his vessel into a foreign port gives a notice by his flag to all who enter into contracts with the shipmaster, that he intends the law of that flag to regulate those contracts, and that they must either submit to its operation or not contract with him or his agent at all;" Foote, Priv. Int. L. 403; and in England this rule is usually followed, the tendency being that, in the absence of indication of the intention of the parties the presumption is in favor of the law of the ship's flag; Scrutton, Chart. Part. 11; *contra*, 3 Moo. P. C. N. S. 272; 120 U. S. 397; 12 Q. B. D. 589; 10 *id.* 540; in which cases it was held that the *lex loci contractus* must prevail. In his treatise on merchant shipping (3d ed. 170) MacLachlin thus states the rule as to the *effect of the law of the flag on the authority of the master.* "The agency of the master is devolved upon him by the law of the flag. The same law that confers his authority, ascertains its limits, and the flag at the mast-head is notice to all the world of the extent of such power to bind the owners or freighters by his act. The foreigner who deals with this agent has notice of that law, and, if he be bound by it, there is no injustice. His notice is the national flag which is hoisted on every sea and under which the master sails into every port, and every circumstance that connects him with the vessel isolates that vessel in the eyes of the world, and demonstrates his relation to the owners and freighters as their agent for a specific purpose and with power well defined under the national maritime law; *id.;* this was suggested by the author quoted as a possible explanation of the apparently anomalous exception of bottomry bonds from the general rule that the *lex loci contractus* prevails.

This precise rule was followed in the leading English case of Lloyd *v.* Guibert, where the question was as to the master's authority to bind the *ship-owner;* L. R. 1 Q. B. 115; S. C. 6 B. & S. 100, and 33 L. J. Q. B. 245; S. C. on appeal 35 *id.* 74; 6 B. & S. 120.

In this case, in the Queen's Bench, Blackburn, J., in language almost exactly following that above quoted, applied the law of the flag (French), which did not recognize a personal liability of the owner in a bottomry bond, as against the *lex loci contractus* (Danish), or the laws of the place of performance (English), or that of the place when the cargo was loaded (Haytien). The court after noting the "singular absence of authority" said that two American cases had been cited; 1 La. 528 and 3 Sto. 465, adding that "neither of these decisions is binding on us, but we have derived very great assistance from them." As to the last of these cases there follows this comment: "The very learned judgment of Mr. Justice Story just referred to affords a complete answer to a plausible argument in which was suggested that the general maritime law clothed the master with power to bind his owners absolutely, and that the municipal law of the owner's country was analogous to secret restrictions in the ostensible authority of a partner or other agent clothed with general power." In the Exchequer Chamber, where the judgment was affirmed, Willes, J., said: "The general rule, that where the contract of affreightment does not provide otherwise, there, as between the parties to such contract, in respect of sea damage and its incidents, the law of the ship should govern, seems to be not only in accordance with the probable intention of the parties, but also most consistent and intelligible, and therefore most convenient to those engaged in commerce." The same doctrine was applied by the English Court of Appeal to the master's control over the cargo as well as the ship, by Brett, L. J., in L. R. 7 P. D. 137; by Dr. Lushington in Br. & L. 38, and in a later case by Sir J. Hannen, who sus-

tained a sale of part of a damaged cargo, where it was shown *by the result* to have been unnecessary, such sale being authorized by the law of the flag; [1891] Prob. 328. But see 1 La. 249; *id.* 528, where the *lex loci contractus* was held to prevail.

In 3 Sto. 465, although the law of the flag was, in fact, enforced, the decision cannot be said to have followed the rule laid down by MacLachlin, as in that case the particular point decided was as to liability of the owner to the freighter, when the former was a citizen of a state the laws of which did not recognize such liabilities, while by the law of the state in which the freighter resided and also of the foreign port where the cargo was shipped, such a liability existed, and the *lex domicilii* of the ship-owners was held to govern the contract. See also 8 Pet. 538; BOTTOMRY.

As to the effect of the law of the flag upon the *construction of a contract of affreightment*, the decisions in this country as a rule are usually governed by the *lex loci contractus*. In the case of The Brantford City, Judge Brown thus stated this rule: "The 'law of the flag' . . . does not embody any rule of legal construction. Literally, it is but a concise phrase to express a simple fact, namely, the law of the country to which the ship belongs, and whose flag she bears, whether it accords with the general maritime law or not. In so far, however, as the law of the flag does not represent the general maritime law, it is but the municipal law of the ship's home. It has, therefore, no force abroad, except by comity. But foreign law is not adopted by comity, unless some good reason appear in the particular case why it should be preferred to the law of the former. The most frequent and controlling reasons are the actual or presumed intent of the parties or the evident justice of the case arising from its special circumstances.

On this ground, the law of the ship's home is applied by comity, to regulate the mutual relations of the ship, her owner, master, and crew, as among themselves; their liens for wages, and modes of discipline; 1 W. Rob. 35; 1 Low. 455; 3 Fed. Rep. 577; 29 *id.* 127. For the same reason it is also applied, by comity, to torts on the high seas, as between vessels of the same nation, or vessels of different nations subject to similar laws, though not if they are subject to different laws; 105 U. S. 24. Independently of the intent of the parties, the law of the flag has no application to cases of tort, as between ships or persons of different nationalities and conflicting laws; and Federal law, by which stipulations of a common carrier exempting him from the consequence of his own negligence are held to be against public policy and void, is controlling in suits brought here upon shipments made here on board foreign ships under bills of lading signed by foreign masters, though such stipulations be valid by the law of the ship's flag." 29 Fed Rep. 373.

This case is expressly approved by the supreme court in a case upon the same point, which is the leading American case upon this branch of the subject; 129 U. S. 397, 461. See comments on this case by the circuit court of appeals; 67 Fed. Rep. 493. Precisely the contrary view, under almost identical circumstances, was held in the case of The Missouri and the doctrine of Lloyd *v.* Guibert was held to extend to this particular point; 41 Ch. Div. 321. Where both the law of the flag and the *lex loci contractus* were British, the law of England was held to govern the contract; 63 Fed. Rep. 268; 60 *id.* 627; affg. 56 *id.* 247. In a shipment of goods in England, in an English vessel, on an ordinary bill of lading, the liability of the vessel is to be determined according to the law of the place of shipment, as the law of the flag; 19 Fed. Rep. 101. So also where the bill of lading was made expressly subject to "a live stock contract," and there was an express provision in that contract that all questions relating to the bill of lading should be determined by British law; 24 Fed. Rep. 922. But the circuit court of appeals, in a similar case, where *the bill of lading* contained the "so-called flag clause" (that liability should be determined by the law of England, but there was *no reference to this in the charter*, made in this country), held it no evidence to modify the latter and that it was ineffective to substitute the law of the flag for the *lex loci contractus* with respect to the stipulation for exemption from liability for negligence; 66 Fed. Rep. 607; affg. 56 *id.* 126.

Generally it may be said that the doctrine of the Missouri is in conflict with the current of authority in England, it being usually held in that country that as to such stipulations in the bill of lading the *lex loci contractus* prevails; 9 Q. B. D. 118; 10 *id.* 521, 540; 12 *id.* 596; 3 Moo. P. C. N. S. 272; and to the same effect and under precisely similar circumstances is a judgment of the court of cassation in France, imperfectly stated in a note to the case last cited and fully reported in 75 *Journal du Palais* (1864) 225, and see 1 Dalloz 449. This question, it may be remarked, is as yet scarcely to be considered as settled by any hard-and-fast rule of law, and the only certain guide, says Bowen, L. J., "is to be found in applying sound ideas of business, convenience, and sense to the language of the contract itself with a view to discovering from it the true intention of the parties."

Flag of Truce. A white flag displayed by one of two belligerent parties to notify the other party that communication and a cessation of hostilities are desired.

Although each party has the right to send such a flag, there is no obligation on the commander of the enemy's forces to receive it; Snow, Int. L. 96; although it is usual to do so except in very exceptional cases; Davis, Int. L. 238; but if he receive the flag he may take all reasonable precautions to protect himself from any injury that may result from the presence of an enemy within his lines; he may detain the messenger at the outposts or may cause

him to be blindfolded, but such messenger is entitled, if the bearer of a *bona fide* message, to complete inviolability of person; but during an engagement, firing is not necessarily to cease on the appearance of a flag of truce, unless it be made clear that it is exhibited as a token of submission; Snow, Int. L. 97. The rules of war justly forbid the sending of flags of truce for the purpose of obtaining information either directly or indirectly, and a messenger forfeits his inviolability of person and may be detained and subjected to punishment as a spy if he take advantage of his mission to abet an act of treachery. See Davis; Snow, Int. L.; and also article 45 of the Project of an International Declaration concerning the laws and customs of war proposed in the Brussels conference of 1874. This proposal, though not formally adopted because of a failure of unanimous assent, is of great value as a compact statement of the generally accepted views at that time of the great powers of Europe on the subjects covered by it. It may be found in Wheat. Int. L., 3d Eng. ed. § 411 *l*.

In naval operations the senior officer alone is authorized to dispatch or admit flags of truce. The firing of a gun from the senior officer's vessel is generally understood as a warning to approach no nearer. The flag of truce should be met at a suitable distance by a boat or vessel in charge of a commissioned officer having a white flag plainly displayed from the time of leaving until her return, and the same precautions must be observed in dispatching such a flag; Snow, Int. L. 97.

FLAG OF THE UNITED STATES. By the act entitled "An act to establish the flag of the United States," passed April 4, 1318, 3 Story, U. S. Laws 1667, it is enacted—

§ 1. That from and after the fourth day of July next, the flag of the United States be thirteen horizontal stripes, alternate red and white; that the union be twenty stars, white in a blue field.

§ 2. That, on the admission of every new state into the Union, one star be added to the union of the flag; and that such addition shall take effect on the fourth day of July then next succeeding such admission. See Preble, Hist. of Amer. Flag.

It has been held in an unreported case in Illinois that a statute requiring the national flag to be floated over every school-house during school hours is unconstitutional, on the ground that, it transcended the police power of the state, Wright, J., contending that the legislature could not enact a statute with penal sanctions unless it had for its object "the maintenance of the police authority of the state, the morals of the state, or the health of the state. The question that arose in this case was whether, in a group of college buildings, each building was compelled to display a separate flag, and the decision that one flag floated from a flagstaff for the group of buildings, was not a compliance with the law is severely criticised in 30 Am. L. Rev. 746.

FLAGELLAT. Whipped; scourged. An entry on old Scotch records. 1 Pitc. Crim. Tr. pt. 1, p. 7.

FLAGRANS (Lat.). Burning; raging; in actual perpetration. *Flagrante bello*, while war is actually in progress. *Flagrant necessity*, an urgent and immediate peril or emergency which will excuse an act under other circumstances unlawful.

FLAGRANS CRIMEN. In Roman Law. A term denoting that a crime is being or has just been committed: for example, when a crime has just been committed and the *corpus delictum* is publicly exposed, or if a mob take place, or if a house be feloniously burned, these are severally *flagrans crimen*.

The term used in France is *flagrant delit*. The Code of Criminal Instruction gives the following concise definition of it, art. 41; "Le délit qui se commet actuellement ou qui vient de se commettre, est un flagrant délit."

FLAGRANTE DELICTO (Lat.). In the very act of committing the crime. 4 Bla. Com. 307.

FLANGE WHEEL. A wheel contrived for an omnibus, with a disc capable of being lowered against the wheel into a groove in the rail of the tramway and drawn up when running on the pavement, has been held a flange wheel. 6 C. P. D. 70.

FLAT. When used as a description of anything respecting an arm of the sea means a level place over which the water stands or flows. 34 Conn. 424.

A floor or separate division of a floor, fitted for housekeeping and designed to be occupied by a single family. Cent. Dict.

A building, the various floors of which are fitted up as flats, either residential or business.

A flat is in law a house, though in fact only a part of one in the ordinary sense; L. R. 8 Q. B. D. 423; and the contract between the owner and the occupier is classed among "contracts for permissive use." Holland, Jur. 254.

The owner of a building who rents flats therein retains control of all portions not actually demised to tenants; [1893] Q. B. 177; 9 Allen 17; he is bound to keep such portions in a reasonable state of repair, and a failure so to do renders him liable in damages; 101 Mass. 251; 106 *id.* 94; 129 *id.* 33; 151 *id.* 162; 81 Me. 318; 67 *id.* 545; 31 Hun 30; 93 N. Y. 7; 98 *id.* 635; 127 *id.* 381; 130 *id.* 269; 4 C. B. N. S. 556; 3 C. P. 326; but the owner is not an insurer, and when he has constructed his roofs, pipes, or drains with the reasonable foresight commonly exercised by prudent men, he will not be responsible for a latent defect or an unusual stress of circumstances; 27 N. B. 499; L. R. 6 Ex. 217; 39 N. Y. Sup. Ct. Rep. 246; 5 Q. B. D. 602. Where the upper rooms only are leased, a covenant is im-

plied on the part of the lessor to give such rooms the necessary support; 26 N. Y. 498; 28 Mo. App. 116; and he is under a negative duty to do nothing to lessen or decrease such support, or to render it insecure; 50 Hun 181; 46 *id.* 521.

It is the duty of the owner to keep the elevators in a reasonable state of repair, employ competent persons to work them, exercise due regard to the safety of the persons using them, keep the approaches to them properly lighted, and keep the entrance to them on each floor closed when the cage is not at that floor; 3 T. L. R. 500. See ELEVATOR.

As regards the furnishing of artificial light in halls and passage-ways, it has been held that in the absence of contractual obligation there is no legal duty on the part of the owner to furnish such light; 26 N. Y. Supp. 801; 131 N. Y. 674; *contra*, 154 Mass. 235.

The janitor, being appointed and removable by the owner, is, when engaged in the discharge of his general duties, the landlord's servant. Any particular tenant may sue the owner for damages, if the general services so contracted for are not rendered, but when a janitor is engaged by a tenant on some special service, such tenant becomes *dominus pro tempore*, and as such he incurs a liability similar to the landlord's; so when he attempts to interfere with or assume the direction of the janitor when the latter is discharging any general duty. See [1893] 1 Ch. 1. In either case his duties and liabilities are regulated by the general principles of the law of Master and Servant (*q. v.*).

The distinction between the tenants of flats and lodgers and guests at a hotel is, that while the latter may have the exclusive enjoyment of their lodgings or rooms, they have not, as have the tenants of flats, the exclusive possession; 30 L. J. M. C. 74.

See, generally, APARTMENT; LEASE; LANDLORD AND TENANT.

FLAVIANUM JUS (Lat.). A treatise on civil law, which takes its name from its author, Cneius Flavius. It contains forms of actions. Vicat, Voc. Jur.

FLECTA. A feathered or fleet arrow. Cowell.

FLEDUITE. A discharge or freedom from amercements where one having been an outlawed fugitive cometh to the place of our lord of his own accord. *Termes de la Ley.*

The liberty to hold court and take up the amercements for beating and striking. Cowel.

The fine set on a fugitive as the price of obtaining the king's freedom. Spelman, Gloss.

FLEDWITE. A discharge from amercements where one having been a fugitive came to peace with the king of own accord or with license. *Termes de la Ley;* Cun. L. Dict. But some authorities add to this definition a *quære* whether it is not rather a fine set upon a fugitive to be allowed to return to the king's place. Cowel; Holthouse.

FLEE FROM JUSTICE. To leave one's home, residence, or known place of abode, or to conceal one's self therein, with intent in either case to avoid detection or punishment for some public offence. 48 Mo. 240; 3 Dill. 381.

FLEET. A place of running water where the tide or float comes up.

A famous prison in London, so called from a river or ditch which was formerly there, on the side of which it stood. It was used especially for debtors and bankrupts, and persons charged with contempt of the courts of chancery, exchequer, and common pleas. Abolished in 1842 and pulled down in 1845. Such persons as had been sent there were thereafter sent to the Marshalsea. Moz. & W.; Hayden's Dict. Dates.

FLEET BOOKS. The original records of the marriages celebrate in the Fleet Prison between 1686 and 1754. These books are not, it is said, admissible in evidence to prove a marriage, as they were not made under public authority, but on a question of pedigree they might, perhaps, be admitted to show the name under which a woman passed at the time of her marriage there. Tayl. Ev. § 1430. These books are now deposited in the office of the registrar-general.

FLEM. A fugitive bondman or villein. Spelman. The possession of the goods of such fugitives was called *flemeswite*. Fleta, lib. 1, c. 147.

FLESH. Includes live flesh and dead flesh. 2 Pa. Dist. Rep. 487.

FLET. A house or home. Cowell.

FLETA. The title of an ancient law-book, supposed to have been written by a judge while confined in the Fleet Prison; written about 1290.

It is written in Latin, and is divided into six books. The author lived in the reigns of Edward II. and Edward III. See lib. 2, cap. 66, § *Item quod nullus;* lib. 1, cap. 20, § *que cœperunt;* 10 Coke, pref. Edward II. was crowned A. D. 1306. Edward III. was crowned 1326, and reigned till A. D. 1377. During this period the English law was greatly improved, and the lawyers and judges were very learned. Hale, Hist. Comm. Law 162; 4 Bla. Com. 427, says of this work "that it was for the most part law until the alteration of tenures took place." The same remark he applies to Britton and Hengham.

But a late work speaks of it as "little better than an ill-arranged epitome." 1 Poll. & M. Hist. Engl. Law 188.

FLICHWITE. A fine on account of brawls or quarrels. Spel. Gloss.

FLIGHT. In Criminal Law. The evading the course of justice by a man's voluntarily withdrawing himself. Formerly, if the jury found that the party *fled for it*, whether he were found guilty or not of the principal charge, he forfeited his goods and chattels. 4 Bla. Com. 387. Evidence

of the flight of an accused person has a tendency to establish guilt; 164 U. S. 492. See FUGITIVE FROM JUSTICE; EXTRADITION.

FLIGHTWITE. The same as FLEDWITE (*q. v.*).

FLOAT. A certificate authorizing the party possessing it to enter a certain amount of land. 20 How. 504. See 7 C. C. A. 293.

A Mexican grant of quantity, as of a certain number of leagues of land lying within a larger tract, whose boundaries are given, is a float, subject to location within the tract by the government before it can attach to any specific lands; 149 U. S. 652; 127 *id.* 428.

FLOATABLE. A stream capable of floating logs, etc., is said to be floatable. 2 Mich. 519.

FLOATING CAPITAL. Capital retained for the purpose of meeting current expenditure.

It includes raw materials destined for fabrication, such as wool and flax products in the warehouses of merchants or manufacturers; such as cloth or linen and money for wages and stores. De Laveleye, Pol. Ec.

FLOATING DEBT. That mass of lawful and valid claims against a corporation, for the payment of which there is no money in the corporate treasury specifically designed, nor any system of taxation or other means of providing money to pay, particularly provided. 71 N. Y. 374.

FLODEMARK. High-tide mark. Blount. The mark which the sea at flowing water and highest tides makes upon the shore. And. 189; Cunningham, Law Dict.

FLOGGING. Thrashing or beating with a whip or lash. This system of punishment was abolished in the army by act of Aug. 5, 1861; U. S. Rev. Stat. § 1342; in the navy June 6, 1872; *id.* § 1642. See WHIPPING.

FLOOD. An inundation of water over land not usually covered by it. Such an accident is an Act of God. 4 Harr. Del. 449. See ACT OF GOD.

FLOODING LAND. See EMINENT DOMAIN; WATER; WATERCOURSE.

FLOOR. The section of a building between horizontal planes. 145 Mass. 8. "Floor cloth canvas" has been held to be synonymous with "oil cloth foundations"; 1 Otto 362. In a lease the words "first floor" are equivalent to the "first story" of a building and include the walls unless other words control the meaning; 145 Mass. 8.

FLORENTINE PANDECTS. A copy of the Pandects, discovered accidentally at Amalphi, Italy, about 1137, and afterwards removed to Florence. Butl. Hor. Jur. 90.

FLORIDA. The name of one of the states of the United States of America, being the fourteenth admitted to the Union. It was discovered by Ponce de Leon in 1513; settled by Huguenots in 1562, and permanently settled by Spaniards at St. Augustine in 1565; and ceded to Great Britain in 1763, to Spain in 1783, and to United States in 1819. The Americans took possession in 1821.

It was admitted into the Union in 1845 by virtue of the act of congress entitled: "An act for the admission of the states of Iowa and Florida into the Union," approved March 3, 1845, and the present constitution was adopted Feb. 25, 1868.

The declaration of rights, in addition to the usual guarantees, provides as follows: That the paramount allegiance of every citizen is due to the federal government, and that no power exists with the people of the state to dissolve its connection therewith; and that the state shall ever remain a member of the American Union, and any attempt to dissolve said union shall be resisted with the whole power of the state.

THE LEGISLATIVE POWER.—This is vested in a senate and a house of representatives, two distinct branches, which, together, constitute and are entitled "the legislature of the state of Florida." Its sessions are biennial, commencing on the first Tuesday after the first Monday in January. The *senate* consists of not less than one-fourth nor more than one-half as many members as the house, elected for the term of four years.

The house of representatives consists of not more than seventy members chosen for the term of two years. The members of both houses are elected by the qualified voters biennially on the first Tuesday after the first Monday of November. Representatives must be qualified electors. There are the usual provisions for organization of the two houses, for compelling attendance of members, and exempting them from arrest, for punishment and expulsion of members, for securing freedom of debate, for preserving and publishing records of the proceedings, etc.

THE EXECUTIVE POWER.—*The governor* is elected for four years by the qualified electors at the time of the election of the members of the legislature. He must have been a qualified elector for nine years, and a citizen of the state for three years next preceding his election. His powers are those usually incident to the office.

In case of a vacancy in the office of governor, the lieutenant-governor, and in case of his default, the president *pro tem.* of the senate acts in his place.

Administrative department. The governor is assisted by a cabinet of administrative officers, consisting of a secretary of state, attorney-general, comptroller, treasurer, superintendent of public instruction, adjutant-general, and commissioner of lands and immigration.

THE JUDICIAL POWER.—This is vested in a supreme court, circuit courts, county courts, and justices of the peace. The legislature may also establish courts for municipal purposes only.

The judges of the supreme, circuit, and county courts are appointed by the governor and confirmed by the senate; those of the supreme court hold office for life or good behavior; those of the circuit court for eight years; those of the county courts for four years.

The supreme court, except in cases otherwise directed in the constitution, has appellate jurisdiction only. The court, however, has power to issue writs of *certiorari, mandamus, prohibition, quo warranto, habeas corpus*, and such other writs as may be necessary and proper to the complete exercise of its jurisdiction.

The circuit court. The state is divided into seven circuits, and the circuit courts held within such circuits have original jurisdiction in all cases in equity, also in all cases at law in which the demand or the value of the property involved exceeds $100, and in all cases involving the legality of any tax, assessment, toll, or municipal fine, and of the action of forcible entry and unlawful detainer, and of actions involving the title or right of possession of real estate, and of all criminal cases, except such as may be cognizable by law by inferior courts. They have appellate jurisdiction of matters of probate and minors' estates, and final appellate jurisdiction of all civil cases before justices of the peace involving $25 and upwards, and of misdemeanors tried before such justices. They may issue such writs as may

be necessary to the complete exercise of their jurisdiction.

There is a *county court* in each county, having the usual probate powers and the care of decedents' and minors' estates. The judges exercise the civil and criminal jurisdiction of justices of the peace. They have jurisdiction in such cases of forcible entry and unlawful detainer of land as may be provided by law.

The governor may appoint as many *justices of the peace* as he may deem necessary. Their civil jurisdiction extends to cases at law involving not over $100. They hold office for four years, but may be removed by the governor for reasons satisfactory to him.

Cases may be tried before a practising attorney as referee, upon the application of the parties, subject to appeal.

FLORIN (called also *Guilder*). A coin, originally made at Florence.

The name formerly applied to coins, both of gold and silver, of different values in different countries. In many parts of Germany, the florin, which is still the integer or money-unit in those countries, was formerly a gold piece, value about two dollars and forty-two cents. It afterwards became a silver coin, variously rated at from forty to fifty-six cents, according to locality; but by the German conventions of 1837 and 1838 the rate of nine-tenths fine and one hundred and sixty-three and seven-tenths grains troy per piece was adopted, making the value forty-one cents. This standard is the only one now used in Germany; and the florin or guilder of the Netherlands is, also, coined at nearly the same standard (weight, one hundred and sixty-six grains; fineness, eight hundred and ninety-six thousandths), the value being the same. The florin of Tuscany is only twenty-seven cents in value.

FLOTAGES. Things which float by accident on the sea or great rivers. Blount.

The commissions of water-bailiffs. Cunningham, Law Dict.

FLOTSAM, FLOTSAN. A name for the goods which float upon the sea when cast overboard for the safety of the ship, or when a ship is sunk. Distinguished from *Jetsam* and *Ligan*. Bracton, lib. 2, c. 5; 5 Co. 106; Comyns, Dig. *Wreck*, A; Bacon, Abr. *Court of Admiralty*, B; 1 Bla. Com. 292. See JETTISON; LIGAN.

FLOUD-MARKE. Flode-mark, which see.

FLOWAGE. The overflowing with water, the water which thus overflows. Webster.

The natural flowage of water from an upper estate to a lower one is a servitude which the owner of the latter must bear, though the flowage be not in a natural watercourse with well defined banks; 95 Mich. 586; 46 Cal. 346; 98 *id.* 157. Where one drains water from his land into the highway, causing another's crops to be damaged by flowage through a drain connected with the highway, he is liable; 44 Ill. App. 649. See EMINENT DOMAIN; WATER; WATERCOURSE.

FLOWING LANDS. Raising and settling back water on another's land by a dam placed across a stream or watercourse which is the natural drain and outlet for the surplus water on such land, 2 Gray 235. See EMINENT DOMAIN; WATER; WATERCOURSE.

FLUCTUS. Flood; flood tide. Bracton fol. 255.

FLUMEN (L. Lat.). **In Civil Law.** The name of a servitude which consists in the right of turning the rain-water, gathered in a spout, on another's land. Erskine, Inst. b. 2, t. 9, n. 9; Vicat, Voc. Jur. See STILLICIDIUM.

FLUMINÆ VOLUCRES. Wild fowl; water fowl. 11 East 571.

FLUVIOUS. A public river; flood tide.

FLY FOR IT. Anciently, it was the custom in a criminal trial, to inquire after a verdict of not guilty, "Did he fly for it?" Abolished by 7 & 8 Geo. IV. c. 28. Wharton.

FLYING SWITCH. This is made by uncoupling the cars from the locomotive while in motion, and throwing the cars on to the side track, by turning the switch, after the engine has passed it, upon the main track. 29 Iowa 39. See RAILROAD.

FLYMA. One escaped from justice; a fugitive. Anc. Inst. *Flyman Frymth.* was the offence of harboring a fugitive; *id.*

FOCAGE. Housebote; firebote. Cowel.

FOCALE (L. Lat.). **In Old English Law.** Firewood. The right of taking wood for the fire. *Fire-bote.* Cunningham, Law Dict.

FODERUM (L. Lat.). Food for horses or other cattle. Cowel.

In feudal law, fodder and supplies provided as a part of the king's prerogative for use in his wars or other expeditions. Cowel.

FODERTORIUM. Provisions to be paid by custom to the royal purveyors. Cowel.

FŒDUS (Lat.). A league; a compact.

FŒMINA VERO CO-OPERTA. A feme covert.

FŒNERATION. See FENERATION.

FŒNUS NAUTICUM (Lat.). The name given to marine interest.

The amount of such interest is not limited by law, because the lender runs so great a risk of losing his principal. Erskine, Inst. b. 4, t. 4, n. 76. See MARINE INTEREST.

FŒSA. Herbage; grass. Cowel.

FŒTICIDE. In Medical Jurisprudence. Of late years this term has been applied to designate the act by which criminal abortion is produced. 1 Beck, Med. Jur. 288; Guy, Med. Jur. 133. See INFANTICIDE.

FŒTURA (L. Lat.). **In Civil Law.** The produce of animals, and the fruit of other property, which are acquired to the owner of such animals and property by virtue of his right. Bowyer, Mod. C. L. c. 14, p. 81.

FŒTUS (Lat.). **In Medical Jurisprudence.** An unborn child. An infant *in ventre sa mère.*

An arbitrary distinction is made by some writers between *fœtus* and *embryo*, the latter term being used for the product of conception up to the fourth month of gestation and the former term after the fourth month.

Although it is often important to know the age of the fœtus, there is great difficulty in ascertaining the fact with the precision required in courts of law.

The great difference between children at birth, as regards their weight and size, is an indication of their condition while within the womb, and is a sufficient evidence of the difficulty as to the age of the fœtus by its weight and size at different periods of its existence.

Thousands of healthy infants have been weighed immediately after birth, and the extremes have been found to be two and eighteen pounds. It is very rare indeed to find any weighing as little as two pounds, but by no means uncommon to find them weighing four pounds. So it is with the length, which varies as much as that of the adult does from the average height of the race.

Neither can anything positive be learned from the progress of development; for although the condition of the bones, cartilages, and other parts will generally mark with tolerable accuracy the age of a healthy fœtus, yet an uncertainty will arise when it is found to be unhealthy. It has been clearly proved, by numerous dissections of new-born children, that the fœtus is subject to diseases which interfere with the proper formation of parts, exhibiting traces of previous departure from health, which had interfered with the proper formation of parts and arrested the process of development.

Interesting as the different periods of development may be to the philosophical inquirer, they cannot be of much value in legal inquiries from their extreme uncertainty in denoting precisely the age of the fœtus by unerring conditions.

See Amer. Text Book Obstetrics; 1 Beck, Med. Jur. 249; Billord on Infants, Stewart trans. 36, 37, and App.; Ryan, Med. Jur. 137; 1 Chitty, Med. Jur. 403; Dean, Med. Jur.; 2 Witth & Beck. Med. Jur. 291. And see the articles BIRTH. DEAD-BORN; EN VENTRE SA MERE; FŒTICIDE; INFANTICIDE; LIFE; PREGNANCY; QUICKENING.

FOG. Watery vapor precipitated in the lower part of the atmosphere, and disturbing its transparency. It differs from cloud only in being near the ground. Webster.

Every vessel must, in a fog, mist, falling snow, or heavy rain storm, go at a moderate speed, having careful regard to the existing circumstances and conditions; 137 U. S. 330. A speed of six miles per hour is excessive for a steamer in a dense fog, where she is emerging from New York harbor and is likely to meet vessels from many points of the compass; 153 U. S. 64.

The owner of a sailing vessel cannot substitute for the fog-horn which she is required by the sailing regulations to carry, an instrument blown by steam, and in their opinion more efficient than the fog-horn; 5 U. S. App. 314. See 153 U. S. 94. A vessel is not properly equipped at sea which has no spare mechanical fog-horn; 55 Fed. Rep. 117.

A steamer failing to slack its speed in a fog is at fault in case of collision; 5 U. S. App. 314; 1 *id.* 614; 54 Fed. Rep. 542; 52 *id.* 400; [1892] Prob. 105. See COLLISION.

FOGAGIUM (L. Lat.). Coarse, rank grass which has not been eaten off in the summer. Cowel.

FOI. In French Feudal Law. Faith; fealty. Guyot, Inst. Feod. c. 2.

FOINISUM. The fawning of deer. Spel. Gloss.

FOITERERS. Vagabonds. Blount.

FOLC-GEMOTE (spelled, also, *folkmote, folcmote, folkgemote;* from *folc*, people, and *gemote*, an assembly).

A general assembly of the people in a town, burgh, or shire.

During the time at which the separate tribal nations of Britain were under the control or supremacy of the kingdoms of Northumbria, York, and West Saxony successively, the term was applied to the *concilium* of the freeholders of each village. Tacitus calls it the nation assembled in arms. Their meetings were held each fortnight, and the members bound themselves reciprocally to the peaceable behavior of themselves, their families, and their dependents; 2 Burke, Abr. Eng. Hist. ch. 7. They chose their rulers, the folc kings, at this tribal moot, settled matters of unjust trading, the common tillage and pasturage, and all things that concerned the common householder; 1 Soc. Eng. 125, 136. The conqueror so far as possible endeavored to preserve the customs of the people, but with the growth of the royal power the most important questions were referred to the councillors of the king, comprising the bishops, abbots, and eorldermen who succeeded the folc kings in the folks or shires and designated the witenagemote or council of the wise men; this in turn dissolved into the *curia regis;* Inderwick, King's Peace. About this period the spelling of the word changes from folc-moot to folk-moot. The meeting of the folk-moot was then transferred to London, and was held thrice a year, and the principal duties that devolved upon it were to hear royal proclamations and statutes, to choose mayors and burgesses, and to pronounce upon offenders the sentence of outlawry; 1 Poll. and Maitl. 642. The folk-moot and the witenagemote are said to have been the foundation of the English Parliament. See Stubbs, Sel. Chars. 10-13; Inderwick, King's Peace; Bagehot, Physics and Politics; Manwood, For. Laws; Spelman, Gloss.; De Brady, Gloss.; Cunningham, Law Dict.; PARLIAMENT; WITTENAGEMOTE.

FOLCLAND (Sax.). Land of the people. Spelman, Gloss. Said by Blackstone to be land held by no assurance in writing, but to have been distributed amongst the common people at the pleasure of the lord, and resumable at his discretion. 2 Bla. Com. 90; Cowel.

It was, however, probably, land which belonged to the community, and which, being parcelled out for a term to people of all conditions, reverted again to the commons at the expiration of the term. 1 Spence, Eq. Jur. 8; Whart. Law Dict., 2d Lond. ed.

The subject of land-tenure among the Anglo-Saxons is very obscure. Doubtless all land was originally held in common by the tribe or kingdom, and out of this after a time portions of it were disposed of to individuals. Individual ownership was generally designated by the term *alod*, which comprised original allotments which had the name *ethel*, and those which were carved out of the common lands by grant or charter. The tenure of the latter was designated by the term bocland, which is described as "land which is held under a book, under a privilegium, modelled on Roman precedents, expressed in Latin words, armed with ecclesiastical sanctions, and making for alienation and individualism." 8 Eng. Hist. Rev. 1-17. The folcland which was not granted as bocland could be let out for temporary occupation as *laenland*. A late theory maintained, in the review quoted, by Dr. Vinogradoff is that folcland indicated an estate, not *belonging* to the folk, but *held by* folk-right or customary law, and not subject to disposition of the holder. *id.;* Medley, Eng. Const. Hist. 16. On this theory the modern copy-holders are termed the historical successors of the owners of folcland; *id.* 36; Pollock, Land Laws 48. Nothing is certain except that the terms referred to were used, but their precise scope is the merest speculation, and successive writers invent new theories with the freedom which is invited by the lack of definite historical or documentary information. The subject affords ample scope for theorizing, as most of what is written up-

on the subject is of this character, and it is said that the word folkland is only found technically used three times in Anglo-Saxon documents.

The theory of Vinogradoff above stated is earnestly supported by Professor Maitland, in his Domesday Book and Beyond (which appears while this article is still in press). He says, referring to the author cited: "His argument has convinced us: but as it is still new we will take leave to repeat it with some few additions of our own." The subject of book-land and folk-land is elaborately discussed and the three documents in which the latter word occurs, as above stated, are fully described. The conclusion is thus stated: "Land, it would seem, is either book-land or folk-land. Book-land, is land held by book, by a royal and ecclesiastical *privilegium*. Folk-land is land held without book, by unwritten title, by the folk-law. 'Folk-land, is the term which modern historians have rejected in favour of the outlandish *alod*. The holder of folk-land is a free land owner, though at an early date the king discovers that over him and his land there exists an alienable superiority. Partly by alienations of this superiority, partly perhaps by gifts of land of which the king is himself the owner, book-land is created. Edward's law speaks as though it were dealing with two different kinds of land. But really it is dealing with two different kinds of title . . . the same land might be both book-land and folk-land, the book-land of the minster, the folk-land of the free men who were holding, not indeed 'of' but still 'under' the minster. They or their ancestors had held under the king, but the king had booked their land (which also in a certain sense was his land) to a church. . . . 'Bookland' is a briefer term than 'land held by book-right'; 'folk-land' is a briefer term than 'land held by folk-right.' The same piece of land may be held by book-right and by folk-right; it may be book-land and folk-land too."

See Medley, Eng. Const. Hist. 16; Stubbs, Const. Hist. 36; 1 Poll. and Maitl. 38; Kemble, Sax. in Eng. 306; Lodge, Essays in Anglo-Saxon Law 68; Maitland, Domesday Book 226, 258.

FOLC-RIGHT. The common right of all the people. A law common to all the realm, mentioned by King Edward the elder. It is doubtless in the same sense that the phrase common law originated. 1 Bla. Com. 65, 67.

FOLD-COURSE. In English Law. Land used as a sheep-walk.

Land to which the sole right of folding the cattle of others is appurtenant: sometimes it means merely such right of folding. The right of folding on another's land, which is called common foldage. Co. Litt. 6 *a*, note 1; W. Jones 375; Cro. Car. 432; 2 Ventr. 139.

FOLD-SOKE. A feudal service which consisted in the obligation of the tenant not to have a fold of his own but to have his sheep lie in the lord's fold. He was said to be *consuetus ad foldam*, tied to his lord's fold. The basis of this service is thus expressed by a recent writer: "It is manure that the lord wants; the demand for manure has played a large part in the history of the human race." Maitland, Domesday Book 76. In East Anglia the peasants had sheep enough to make this an important social institution; *id.* 442.

FOLDAGE. A privilege possessed in some places by the lord of a manor, which consists in the right of having his tenants' sheep to feed on his fields, so as to manure the land. The name of foldage is also given in parts of Norfolk to the customary fee paid to the lord for exemption at certain times from this duty. Elton, Com. 45, 46. See FOLD-SOKE.

FOLGARII. Menial servants; followers. Bract.

FOLGERE. In Old English Law. A freeman who has no house or dwelling of his own, but is the follower or retainer of another (heorthfaest), for whom he performs certain predial services. Anc. Inst. Eng.

FOLGERS. Menial servants or followers. Cowel.

FOLGOTH. Official dignity.

FOLIO. A leaf. The references to the writings of the older law-authors are usually made by citing the folio, as it was the ancient custom to number the folio instead of the page, as is done in modern books.

A certain number of words specified by statute as a *folio*. Wharton. Originating, undoubtedly, in some estimate of the number of words which a *folio* ought to contain.

In Michigan it has been held that a legal *folio* is one hundred words; 38 Mich. 639; and that number is generally made a *folio* by statute; R. S. U. S. § 828.

FOLK-LAND. See FOLC-LAND.

FOLK-MOOT. See FOLC-GEMOTE; WITTENA-GEMOTE.

FOLLOWING BASIS. An agreement that an adjustment in general average shall be made on the "following basis," followed by a statement of the amount to be contributed for the valuation of the ship after collision, and the valuation of the freight and the cargo, does not mean that the freight shall be assessed on its gross valuation, but merely that the valuation shall be taken as the foundation upon which the adjustment shall be made according to law; and if the law applicable prescribes that the freight shall be assessed at one half its gross value, as in California, this will prevail. 58 Fed. Rep. 801.

FONDS PERDUS. In French Law. Capital is said to be invested *a fonds perdus* when it is stipulated that in consideration of the payment of an amount as interest, higher than the normal rate, the lender shall be repaid his capital in this manner, The borrower, after having paid the interest during the period determined, is free as regards the capital itself. Arg. Fr. Merc. Law 560.

FONSADERA. In Spanish Law. Any tribute or loan granted to the king for the purpose of enabling him to defray the expenses of a war.

FONTANA. A fountain of water. Bract. fol. 233.

FOOD. What is fed upon to support life by being received within and assimilated by the organism of an animal or

plant; nutriment; aliment; provisions; victuals. Webster.

The exposure of unwholesome provisions for sale as food is not criminal, unless the person guilty thereof knew of their unwholesome character; 44 Mo. App. 429. Although a statute suppressing the manufacture of oleomargarine may be unnecessarily oppressive, redress can only be had through the legislature; 127 U. S. 678. See OLEOMARGARINE.

A dealer who sells food sealed in a can to a buyer who knows that the seller has not prepared nor inspected it, and is ignorant of its contents, except so far as results from the fact that he has purchased it from others, gives no implied warranty that it is wholesome and fit for use; 38 N. Y. Supp. 1052. See ADULTERATION; HEALTH.

FOOT. A measure of length, containing one-third of a yard, or twelve inches. See ELL. Figuratively it signifies the conclusion, the end; as, the foot of the fine, the foot of the account. See 10 Metc. 26; 5 McLean 306.

FOOT OF THE FINE. The fifth part or the conclusion of a fine. It includes the whole matter, reciting the names of the parties, day, year, and place, and before whom it was acknowledged or levied. 2 Bla. Com. 351.

FOOTGELD. An amercement for not cutting out the ball or cutting off the claws of a dog's feet (expediating him). To be quit of *footgeld* is to have the privilege of keeping dogs in the forest *unlawed* without punishment or control. Manw. For. Laws, pt. 1, p. 86; Crompton, Jur. 197; *Termes de la Ley;* Cunningham, Law Dict.; EXPEDITATION.

FOOTPRINTS. Impressions made by the feet of persons, or their shoes, boots, or other covering for the feet, on the ground, snow, or other surface. In the same category are also impressions of shoe-nails, patches, abrasions, or other peculiarities therein. When found at or near the scene of a crime they often lead to the identification of guilty parties.

"The presumption founded on these circumstances has been appealed to by mankind in all ages, and in inquiries of every kind, and it is so obviously the dictate of reason, if not of instinct, that it would be superfluous to dwell upon its importance." Will, Circ. Ev. 194. It is said that evidence of footprints and their correspondence with defendant's feet may be proved even when his agency is disputed, not as alone convincing, or indeed, available, but as tending to establish a case; Whart. Cr. Ev. § 795; even where the defendant's proof tended to establish an *alibi;* 25 S. W. Rep. (Tex.) 629. Evidence of footprints alone has been held insufficient to convict; 1 F. & F. 354; 19 Ia. 230; 17 Fla. 669; and unless the measurement is careful and accurate, or there is some peculiarity shown, the probative force is slight; 31 Fla. 240; 3 N. Y. Crim. Rep. 406; 57 Ga. 482; 89 Mo. 168; but in many cases such peculiarities have been shown and evidence of the footprints admitted; 8 Tex. Cr. App. 30; 117 Ill. 271; 59 Ga. 738; 17 Kan. 458; 10 Crim. L. Mag. 890; but a conviction on such evidence will be reversed for refusal to admit proof for the defendant that he has never worn a shoe which would make such a print; 12 Tex. Crim. App. 219; the discovery and comparison should be prompt with relation to the crime; 53 Ga. 253; and the measurement should be accurate; 12 Tex Crim. App. 219; 8 *id.* 332; though it need not be immediate, the question of time going to the weight of the evidence, not to its competency; 68 Cal. 576.

The identification of such tracks is a matter of common observation, which does not require expert testimony; 63 N. Y. 590; 68 Ala. 569; 84 N. C. 756; and only the peculiarity of the tracks and the facts of identification may be proved, but not the opinion of the witness whether they were made by the defendant; 7 Neb. 320; 88 Ala. 193; 98 *id.* 10; but a witness has been permitted to prove the measurement of the tracks and their exact correspondence with the shoe of the defendant; 30 Tex. App. 482; the examination and the comparison need not be made in the presence of the defendant; 84 N. C. 756; nor can he be compelled to put his foot in the track to make evidence against himself; 63 Ga. 667; but where he was compelled to do so the evidence was admitted; 74 N. C. 646; and tracks have been voluntarily made by the accused before the jury for comparison with those proved; 80 Ga. 269. Comparison of the shoes with the footmarks should be made before the former are put in the marks; 1 Lew. C. C. 116; and where this was not done the evidence on the subject was rejected; *id.*

Such evidence, even if established beyond doubt, is liable, as in all cases of circumstantial evidence, to be the subject of fabrication, or erroneous inference; see the case of Mayenc, Gabriel 403, where the shoes of another person were put on by one committing a crime; and the celebrated case of Thornton, fully reported in Will, Circ. Ev. 286, where an *alibi* was successfully proved after apparently conclusive circumstantial evidence, including footprints.

Proof may be made by horse-tracks corresponding with those made by a horse of defendant; 32 Tex. Crim. App. 112; or that shoes taken from such horse fitted the tracks; 23 Ala. 44; and when the prisoner had reversed the shoes of his horse after reaching the house, to give the impression that two persons had been there, the artifice led to his detection by the discovery of recent nail-marks in the horse's hoof; Spooner's Case, 2 Chand. Am. Crim. Tr.; but horse-tracks alone are not sufficient to convict; 65 Ia. 614; and see 8 Tex. Cr. App. 332.

For a full discussion of the subject, see Will, Circ. Ev. 194-204, in which will be

found most of the cases here cited and many others.

FOR. In place of or in front of. 37 Wis. 265. Because or on account of; by reason of; as agent for; in behalf of. 31 N. Y. 103; AGENT. Used in connection with a period it means "during," where publication is required for at least thirty days, one publication thirty days before the sale would not be a compliance. 18 Neb. 139. And see 16 Ohio 563; 12 Kan. 493. It may, if necessary, be inserted in a statute by judicial construction; 25 Minn. 522.

In a contract it implies a condition precedent; Hob. 41; 5 M. &. S. 187. See also 12 Mod. 455.

In French Law. A tribunal. *Le for interieure*, the interior forum; the tribunal of conscience. Poth, Obl. pt. 1, c. 11, art. 3.

FOR ACCOUNT OF. A phrase used in an order, draft, or memorandum to designate the person against whom, or account against which, the thing or sum is to be charged.

FOR AT LEAST. As applied to a number of days required for notice this phrase includes either the first or last day, but not both. 28 Atl. Rep. (N. J.) 578. See TIME.

FOR COLLECTION. See INDORSEMENT.

FOR DEPOSIT TO THE CREDIT OF. See INDORSEMENT.

FOR GOOD CAUSE. A statute authorizing a continuance "for good cause" in the absence of a party is satisfied by proof of the illness of plaintiff in another state, and the ignorance of his attorney of the names of the witnesses and the details of the case. 35 Cal. 636.

FOR THAT. In Pleading. Words used to introduced the allegations of a declaration. "For that" is a positive allegation; "For that whereas" is a recital. Hamm. N. P. 9.

FOR THAT WHEREAS. Introductory words in pleading. See Hamm. N. P. 9. These words are used in the introduction of the statement of the plaintiff's case as a recital in the declaration in all actions except trespass, in which there being no recital the expression was "For that." 1 Burr. Inst. Cler. 170.

FOR USE. Words used to describe a suit, judgment, or decree in which the nominal plaintiff sues for the benefit or advantage of another. This is necessary in some cases where an assignee is obliged to sue in the name of the assignor. The style of the suit is "for use, etc., *vs.* B."

Loans *for use* are distinguished from loans *for consumption;* the former being those in which the article bailed is to be used and returned and the latter those in which it may be consumed and returned in kind.

FOR WHOM IT MAY CONCERN. A general clause in a policy of insurance, intended to apply to all persons who have any insurable interest. 1 Phill. Ins. 152. This phrase, or some similar one, must be inserted, to give any one but the party named as the insured rights under the policy. See 1 Term 313, 464; 1 B. & P. 316, 345; 2 Maule & S. 485; 12 Mass. 80; 13 *id.* 589; 6 Pick. 198; 2 Pars. Marit. Law 29, 477; 13 East 274.

FORAGE. Hay and straw for horses, particularly in the army. Jac.

FORAGIUM. Straw when the corn is threshed out. Cowel.

FORANEUS. One from without; a foreigner; a stranger. Calv. Lex.

FORATHE. One who can take oath for another who is accused of one of the lesser crimes. Manw. For. Laws 3; Cowel.

FORBALCA. In Old Records. A forebalk; a balk (that is, an unplowed piece of ground) lying forward or next the highway. Cowel.

FORBANER. To deprive forever. To shut out. 9 Ric. II. cap. 2; 6 Hen. VI. cap. 4; Cowel.

FORBANNITUS. A pirate; an outlaw.

FORBARRE. To deprive one of a thing forever. Cowel.

FORBATUDUS. The aggressor slain in combat. Jac.

FORBEARANCE. A delay in enforcing rights. The act by which a creditor waits for the payment of a debt due him by the debtor after it has become due. It is sufficient consideration to support assumpsit.

An agreement to forbear bringing a suit for a debt due, although for an indefinite time, and even although it cannot be construed to be an agreement for a perpetual forbearance, if followed by actual forbearance for a reasonable time, is a good consideration for a promise; 133 Mass. 287; 123 *id.* 297; 110 *id.* 389.

See ASSUMPSIT; CONSIDERATION.

FORCE. Restraining power; validity; binding effect.

A law may be said to be in force when it is not repealed, or, more loosely, when it can be carried into practical effect. An agreement is in force when the parties to it may be compelled to act, or are acting, under its terms and stipulations.

Strength applied. Active power. Power put in motion.

Actual force is where strength is actually applied or the means of applying it are at hand. Thus, if one break open a gate by violence, it is lawful to oppose force to force. See 2 Salk. 641; 8 Term 78, 357. See BATTERY.

Implied force is that which is implied by law from the commission of an unlawful act. Every trespass *quare clausum fregit*

is committed with implied force. Co. Litt. 57 *b*, 161 *b*, 162 *a*; 1 Saund. 81, 140, n. 4; 5 Term 361; 8 *id.* 78, 358; Bac. Abr. *Trespass;* 3 Wils. 18; Fitzh. N. B. 890; 5 B. & P. 365, 454.

Mere nonfeasance cannot be considered as force, generally; 2 Saund. 47; Co. Litt. 161.

If a person with force break a door or gate for an illegal purpose, it is lawful to oppose force to force; and if one enter the close of another *vi et armis*, he may be expelled immediately, without a previous request; for there is no time to make a request; 2 Salk. 641; 8 Term 78, 357. When it is necessary to rely upon actual force in pleading, as in the case of a forcible entry, the words "*manu forti*," or "with a strong hand," should be adopted; 8 Term 357; 4 Cush. 441. But in other cases the words "*vi et armis*," or "with force and arms," are sufficient.

Municipal officers seizing private property under an order condemning it for a street, are not guilty of forcible trespass if they use no more force than necessary, even though the owner be present forbidding them; 100 N. C. 497.

FORCE AND ARMS. A phrase used in declarations of trespass and in indictments, but now unnecessary in declarations, to denote that the act complained of was done with violence. 2 Chitty, Pl. 846, 850; 2 Steph. Com. 364. See FORCE.

FORCE AND FEAR, called also "*vi metuque*," means that any contract or act extorted under the pressure of force (*vis*) or under the influence of fear (*metus*) is voidable on that ground, provided, of course, that the force or the fear was such as influenced the party. Brown.

FORCE MAJEURE (Fr.). Superior or irresistible force. Emerig. Tr. des Ass. c. 12. See VIS MAJOR.

FORCED HEIRS. In Louisiana. Those persons whom the testator or donor cannot deprive of the portion of his estate reserved for them by law, except in cases where he has a just cause to disinherit them. La. Civ. Code, art. 1482. As to the portion of the estate they are entitled to, see LEGITIME. The causes for which forced heirs may be deprived of this right must be stated in the testament and also established by proof by the other heirs; *id.* Art. 1492.

FORCED OUT. Where a license to a corporation was to cease if the licensor was "forced out of the company," and one who had acquired all the stock, except that held by the licensor, procured from the company an assignment of all its property, and induced it to cease doing business, it was held that the licensor was "forced out of the company." 148 Ill. 115.

FORCED SALE. In Practice. A sale made at the time and in the manner prescribed by law, in virtue of execution issued on a judgment already rendered by a court of competent jurisdiction; a sale made under the process of the court, and in the mode prescribed by law. 6 Tex. 110.

A forced sale is a sale against the consent of the owner. The term should not be deemed to embrace a sale under power in a mortgage. 15 Fla. 336.

FORCES. The military and naval resources of a country.

FORCHEAPUM. Pre-emption. Blount.

FORCIBLE ENTRY OR DETAINER. A forcible entry or detainer consists in violently taking or keeping possession of lands or tenements, by means of threats, force, or arms, and without authority of law. Comyns, Dig.; Woodf. Landl. & Ten. 973; 2 Bish. Cr. L. 489.

Such an entry as is made with strong hand, with unusual weapons, and unusual number of servants or attendants, or with menace of life or limb; an entry which only amounts in law to a trespass is not within statutes relating thereto. 21 Or. 541.

To make an entry forcible, there must be such acts of violence, or such threats, menaces, or gestures, as may give reason to apprehend personal injury or danger in standing in defence of the possession. But the force made use of must be more than is implied in any mere trespass; 8 Term 357; 10 Mass. 409; 1 Add. Pa. 14; Tayl. Landl. & Ten. § 786.

Driving the tenant from the premises by deadly weapons and an array of numbers is a forcible entry; 100 N. C. 466. It is sufficient to support an action of forcible entry that it was made against the will of the individual when in peaceable possession, and there need have been no actual force; 46 Mo. App. 11; 48 *id.* 148; 52 *id.* 226.

Proceedings in case of a forcible entry or detainer are regulated by the statutes of the several states, and relate to a restitution of the property, if the individual who complains has been dispossessed, as well as to the punishment of the offender for a breach of the public peace. And the plea of ownership is no justification for the party complained of; for no man may enter even upon his own lands in any other than a peaceable manner. Nor will he be excused if he entered to make a distress or to enforce a lawful claim, nor if possession was ultimately obtained by entreaty; Woodf. L. & T. 741, n.; 3 Mass. 215; 1 Dev. & B. 324; 8 Litt. 184; 8 Term 361; but, *contra*, it has been held, that an intruder in quiet possession of land may be forcibly expelled by the owner; 21 Or. 541; 64 Cal. 5. If the owner is guilty of a breach and trespass on the person of the intruder in taking possession of his land, he is liable for that, but his possession is lawful, and an action of trespass *quare clausum* is not maintainable against him; 9 Allen 530; 1 W. & S. 90; 54 Pa. 86. This follows the English doctrine as expressed by Parke, B., that, where a breach of the peace has been committed by a freeholder who, in order to get

possession of his land, assaults a person wrongfully holding possession of it, although the freeholder may be responsible to the public for a forcible entry, he is not liable to the other party; and in an action brought against him, it is a sufficient justification that the tenant was in possession against the will of the owner; 14 M. & W. 437. See article in 4 Am. Law Rev. 429. A lessee never in possession cannot maintain unlawful detainer against the lessor, either at common law or statute; 48 Mo. App. 19. A change of possession pending a suit for forcible entry and detainer does not affect the right of recovery; 141 Ill. 395.

Upon an indictment for this offence at common law, the entry must appear to have been accompanied by a public breach of the peace; and, upon a conviction for either a forcible entry or detainer, the court will award restitution of the premises in the same manner as a judge in a civil court, under a statutory proceeding, is authorized to do upon a verdict rendered before him; 1 Ld. Raym. 512; 8 Term 360; Cro. Jac. 151; Al. 50; Tayl. Landl. & Ten. § 794.

Neither title nor right of possession is at issue, or can be made at issue, in an action of forcible entry and detainer; 8 Mont. 365.

FORDA. In Old Records. A ford or shallow, made by damming or penning up the water. Cowel.

FORDAL (Sax.). A butt or headband. A piece.

FORDANNO. A first assailant. Spel. Glos.

FORDIKA. In Old Records. Grass or herbage growing on the edge or bank of dykes or ditches. Cowel.

FORE (Sax.). Before. (Fr.) Out. Kelham.

FORECLOSE. To shut out; to bar. Used of the process of destroying an equity of redemption. 1 Washb. R. P. 589; Dan. Ch. Pr. 1204; Coote, Mortg. 511; 9 Cow. 382.

FORECLOSURE. In Practice. A proceeding in chancery by which the mortgagor's right of redemption of the mortgaged premises is barred or closed forever.

The modern significance of the term, as applied to mortgages, is that of a sale under a judgment of foreclosure, and not the judgment itself; 93 Cal. 600.

This takes place when the mortgagor has forfeited his estate by non-payment of the money due on the mortgage at the time appointed, but still retains the equity of redemption; in such case, the mortgagee may file a bill calling on the mortgagor, in a court of equity, to redeem his estate presently, or, in default thereof, to be forever closed or barred from any right of redemption.

In some cases, however, the mortgagee obtains a decree for a sale of the land under the direction of an officer of the court, in which case the proceeds are applied to the discharge of incumbrances, according to their priority. See 2 Johns. Ch. 100; 9 Cow. 346; 1 Sumn. 401; 7 Conn. 152; 5 N. H. 30; 1 Hayw. 482; 5 Ohio 554; 5 Yerg. 240; 2 Pick. 540; 2 Gall. 154; 4 Me. 495; 1 Washb. R. P. 589; Dan, Ch. Pr. 1204; Beach, Mod. Eq. Pr. 735.

In an action to foreclose a mortgage, there is no occasion for an entry for breach of condition; 60 Com. 24. Where, before beginning suit to foreclose for default in paying interest, the defaulted interest was paid and accepted, such acceptance is a waiver of any claim of forfeiture on account of the default; 85 Iowa 612.

As to the subject generally, and also as to Railway Foreclosure, see MORTGAGE.

FOREFAULT. In Scotch Law. To forfeit; to lose.

FOREGIFT. A premium paid by a lessee for his lease, separate and distinguished from the rent. A payment in advance.

FOREGOERS. Royal purveyors. 26 Edw. III. c. 5.

FOREHAND RENT. In English Law. A species of rent which is a premium given by the tenant at the time of taking the lease, as on the renewal of leases by ecclesiastical corporations, which is considered in the nature of an improved rent. 1 Term 486; 3 Atk. Ch. 473; Crabb, R. P. § 155.

FOREIGN. That which belongs to another country; that which is strange. 1 Pet. 343.

Every nation is foreign to all the rest; and the several states of the American Union are foreign to each other with respect to their municipal laws; 2 Wash. C. C. 282; 4 Conn. 517; 2 Wend. 411; 12 S. & R. 203; 2 Hill, S. C. 319; 7 T. B. Monr. 585; 5 Leigh 471; 3 Pick. 293; 10 Wall. 192; 99 Mass. 338.

But the reciprocal relations between the national government and the several states composing the United States are not considered as foreign, but domestic; 5 Pet. 398; 6 *id.* 317; 9 *id.* 607; 4 Cra. 384; 4 Gill & J. 1, 63.

FOREIGN ANSWER. An answer not triable in the county where it is made. Stat. 15 Hen. VI. c. 5; Blount.

FOREIGN APPOSER. An officer in the exchequer who examines the sheriff's *estreats*, comparing them with the records, and apposeth (interrogates) the sheriff what he says to each particular sum therein. Coke, 4th Inst. 107; Blount; Cowel, *Foreigne*. The word is written *opposer*, *opposeth*, by Lord Coke; and this signification corresponds very well to the meaning given by Blount, of examiner (interrogator) of the sheriff's accounts.

FOREIGN ASSIGNMENT. An assignment made in a foreign country or in another state. 2 Kent 405. See ASSIGNMENT.

FOREIGN ATTACHMENT. A process by virtue of which the property of an absent and non-resident debtor is seized for the purpose of compelling an appearance, and, in default of that, to pay the claim of the plaintiff. See ATTACHMENT.

FOREIGN BILL OF EXCHANGE. A bill that is drawn in one country and made payable in another; and so if the parties to it reside in the same state, but the bill is drawn in one state and made payable in another state. Tiedeman, Com. Rep. § 3. See BILL OF EXCHANGE.

FOREIGN BOUGHT AND SOLD. A custom in London, which, being found prejudicial to sellers of cattle in Smithfield, was abolished. Wharton.

FOREIGN CHARITY. One created or endowed to be administered in a state or country foreign to that of the domicil of the benefactor. A bequest by a testator whose will is probated in one state establishing a charitable use to be administered by a corporation to be created by and in another state; all the trustees (thirteen in number) except two being non-residents of the state of domicil of the testator, is a foreign charity. The court of chancery of New Jersey will not administer such a charity, but when it is valid by the law of that state and of the state where it is to be executed, and the trustees have the legal capacity to receive the fund and carry out the charity, the court will order its payment to them, leaving it to the courts of the other state to see to its due administration. 34 N. J. Eq. 101. Such is the general rule; Boyle on Char. 134; Perry, Tr. § 741; Tudor, Char. Tr. 259; Hill, Trust. 468; Sto. Eq. Jur. § 1184; 19 Beav. 597. See also 2 Swanst. *181; Amb. 236; 1 Russ. 112; 1 Phil. 185; 18 Beav. 552; Taml. 79. CHARITABLE USE.

FOREIGN COINS. Coins issued by the authority of a foreign government.

There were formerly several acts of Congress passed which rendered certain foreign gold and silver coins a legal tender in payment of debts upon certain prescribed conditions as to the fineness and weight, but by the third section of the act of Feb. 21, 1857, 11 Stat. L. 163, it was provided:—That all former acts authorizing the currency of foreign gold or silver coins, and declaring the same a legal tender in payment for debts, are repealed; but it shall be the duty of the director of the mint to cause assays to be made from time to time of such foreign coins as may be known to our commerce, to determine their average weight, fineness, and value, and to embrace in his annual report a statement of the results thereof.

The value of foreign coin as expressed in the money of account of the United States shall be that of the pure metal of such coin of standard value; and the values of the standard coins in circulation of the various nations of the world shall be estimated annually by the director of the mint, and be proclaimed by the secretary of the treasury; R. S. § 3564; 23 Wall. 246.

The value of foreign coins as ascertained by the estimate of the director of the mint and proclaimed by the secretary of the treasury is conclusive upon custom-house officers and importers; 115 U. S. 25.

FOREIGN COMMERCE. "Commerce which in some sense is necessarily connected with these nations, transactions which either immediately or at some stage of their progress must be extra-territorial. The phrase can never be applied to transactions wholly internal." . . . "Nor . . . because the products of domestic enterprise in agriculture or manufactures, or in the arts, may ultimately become the subjects of foreign commerce, that the control of the means or the encouragements by which enterprise is fostered and protectedis legitimately within the import of the phrase foreign commerce." 14 How. 568, 573.

FOREIGN CORPORATION. One created by or under the laws of any other state or government.

A corporation is a person in most senses and for most purposes of legal administration, and for the purposes of determining the jurisdiction of the federal courts it is a citizen, but it is not such in the sense that a natural person is one, and hence for most purposes corporations are "foreign" as between the states. It is settled that it is not a citizen within the meaning of the constitutional guarantees entitling "the citizens of each state to all privileges and immunities of citizens in the several states;" 13 Pet. 519; 10 Wall. 566; 125 U. S. 181; 136 *id.* 114; 48 Ill. 172; 47 Ind. 236; 23 N. J. L. 429. It is said that *corporations* are persons within the meaning of the clauses of the fourteenth amendment to the constitution concerning the deprivation of property, and concerning the equal protection of the laws; Miller, Const. U. S. 668; but another recent writer considers it "past all doubt that the framers of this provision had no idea in their minds that it would be turned into a means of protecting *foreign* corporations and guaranteeing to them the same privileges which are enjoyed by domestic corporations. Such a doctrine would sweep away all the previous constitutional doctrine on the question of the *status* of foreign corporations," giving them the privileges and immunities which they have been held not to possess, and practically preventing their taxation and regulation, or any discrimination in the privileges or terms of business accorded to them and to domestic corporations. "Down to the present time, such construction has not been arrived at, although, such is the steady tendency of the federal judiciary to enlarge the rights of corporations, that it cannot be predicted whether it will not be reached in the near future;" 6 Thomp. Corp. § 7877. The *status* of foreign corporations is settled by decisions of the United States Supreme Court from which certain general principles are readily deducible, and are very well stated in 6 Thompson, Corp. §§ 7875 and 7781. "A corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law, and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its

creation, and cannot migrate to another sovereignty;" Taney, C. J., in Bank of Augusta *v.* Earle, 13 Pet. 519; 1 Black 286; 32 W. Va. 164. It may contract in other states within the scope of its own powers and subject to the laws of the *lex loci contractus* or the *lex loci solutionis*, as the case may be, as it was aptly said, natural persons may contract where they do not reside. "And what greater objection can there be to the capacity of an artificial person, by its agents, to make a contract within the scope of its limited powers, in a sovereignty in which it does not reside, provided such contracts are permissible by the law of the place?" 1 Pars. Sel. Cas. (Pa.) 180, 225. See 13 Pet. 388; 12 N. Y. 495; 18 Wis. 109; 10 Mo. 1059; 11 Paige 635. In the absence of proof, the validity of such contracts is presumed; 90 Ala. 207; 45 Ga. 34; 3 Duer 648.

In a very recent case it was said that a corporation organized under the laws of one state, which carries on its business in another state, carries with it into the latter state its corporate powers unless prohibited from exercising any of them by the laws or public policy of the state in which it so carries on business; 73 Fed. Rep. 956.

"Every power, however, which a corporation exercises in another state, depends for its validity upon the laws of the sovereignty in which it is exercised, and a corporation can make no valid contract without their sanction, express or implied;" Taney, C. J., in 13 Pet. 519, 588; any other exercise of power by it rests absolutely upon the doctrine of comity; *id.;* and is subject to the laws and regulations, process and remedial jurisdiction of the state of business or temporary domicil; 81 Me. 477; 2 Paine 501; 25 N. J. L. 381; 39 Fed. Rep. 290; 99 Mass. 148; 48 Barb. 478; and this comity stops short of permission to exercise any powers in excess either of the powers of domestic corporations of the same class; 38 Barb. 574; 128 N. Y. 205; 50 Fed. Rep. 338; 33 Am. & Eng. Corp. Cas. 15, 16; or of the powers authorized by its own charter; 3 Head 337; 51 Mich. 145; 4 Johns. Ch. 370. So a telegraph company incorporated in Maryland, whose operations were by its charter limited to that state was refused, by the Delaware courts, a mandamus to compel a telephone company to furnish to it a telephone in aid of its business in Delaware; 31 Atl. Rep. (Del.) 714.

Foreign corporations are sometimes by the legislation of a state made domestic corporations for certain purposes, as for jurisdiction; 12 Wall. 65; 46 Fed. Rep. 47; 107 U. S. 581; 118 *id.* 161; and to determine when this is so is sometimes a matter of great difficulty; 6 Thomp. Corp. § 7891; but where, by the concurrent action of two states, a railroad company is chartered or consolidated for police and jurisdictional purposes, it is as a whole treated as a domestic corporation of each state; *id.;* and cases cited in notes 2 and 3; 1 Black 286; 22 Fed. Rep. 561, 568; 12 Gratt. 655; 41 *id.* 551; 18 Md. 193; 5 R. I. 233; 12 Wall. 65; 25 Neb. 156, 164. See also as to the *status* of such corporations; 5 Railw. & Corp. L. J. 515.

The right of federal control of interstate commerce results in certain restraints upon the power of the states to regulate and tax foreign corporations so far as their business is held to be foreign or interstate commerce within the meaning of the federal constitution. The only limitation, however, on the powers of a state to exclude or exact conditions from a foreign corporation arises when the corporation is in the employ of the federal government or its business is strictly commerce, interstate or foreign; 125 U. S. 181; 119 *id.* 110. Such commerce receives the same protection when carried on by corporations or by individuals; 114 U. S. 196; and includes transportation; 15 Wall. 232; 125 U. S. 465; 135 *id.* 161; telegraph lines; 127 *id.* 640; which are also subject to federal regulation under acts of congress authorizing their location under certain conditions, on post roads; U. S. Rev. Stat. § 1977; 96 U. S. 11; 105 *id.* 460; the sale of merchandise by a corporation of one state whether made without the state or by commercial travellers, to a resident of another; 92 Ala. 145; 57 Ark. 24; the sale of patented or copyrighted articles or books; 2 Biss. 309; 53 Ind. 454, the right to vend them anywhere within the United States being secured by the constitution and patent and copyright laws; Const. U. S. art. 1, § 8; U. S. Rev. Stat. § 4884; but insurance is not commerce, and hence corporations engaged in that business may be regulated; 8 Wall. 168; 10 *id.* 566; 118 Pa. 322; 83 Wis. 667; 62 Ga. 379.

Subject to these constitutional limitations, the states may in their discretion, impose conditions upon foreign corporations, as essential to enable them to do business; 125 U. S. 181; 136 *id.* 114; 119 *id.* 110; they may discriminate between them and domestic corporations by a tax upon the privilege of doing business in the state, and, if it be considered good policy, make that discrimination so burdensome as to amount to exclusion; 48 Ill. 172; and the federal constitution does not secure to them against inequality of taxation either as to system or rates as compared with domestic corporations; 129 Pa. 463; 33 Fed. Rep. 121; but such tax was held contrary to the state constitution; 74 Cal. 113; though "it is clear that it violates no principle of the federal constitution as the supreme court of California seem to suppose;" 6 Thomp. Corp. § 7877, n. 3; and another state court has said that the state cannot impose upon foreign and domestic corporations taxes differing in principle; per Beasley, C. J., 31 N. J. L. 531; but this reasoning has been characterized as a *dictum;* 6 Thomp. Corp. § 8090; as the corporation in question being engaged in interstate commerce was exempt from discrimination on that ground; And see 42 La. Ann. 428. In the United States circuit court in California it was held by Field and Sawyer, JJ., that the principle of taxation prescribed by the state consti-

tution was in violation of the protection secured by the fourteenth amendment against unequal taxation; 13 Fed. Rep. 722; 18 *id.* 385. These decisions, though appealed from, are said not to have been determined by the supreme court; 33 *id.* 121; where it was held that a tax upon some special business carried on by individuals or corporations is not prohibited. And the supreme court, before any of these cases, had held that the provision of the Illinois constitution, requiring taxation to be uniform and equal, means by general law, uniform as to the class upon which it operates; 92 U. S. 575; in which the syllabus, thus stating the decision, is said to be evidently drawn by the justice writing the opinion (Miller, J.); 6 Thomp. Corp. § 8088. Again it was held that the amendment "does not prevent the classification of property for taxation"; 115 U. S. 321; nor "prohibit special legislation," as to lay a tax on the franchise or business of a corporation measured by its dividends; 134 *id.* 594; or gross receipts; 142 *id.* 339, affg. 44 Fed. Rep. 310. See also 134 U. S. 232. The provisions of state constitutions securing uniformity and equality of taxation have been held not violated by a specific tax upon a particular business; 60 Ga. 597; 33 Fed. Rep. 121; or on gross receipts of a *foreign* corporation on business within the state; 142 U. S. 339; or upon such corporations as a class; 85 Pa. 513, cited with approval in the last case.

The state power of *taxation* of such corporations is subject to certain restrictions in addition to those already stated, but as a general rule the property of the corporation owned or used within the state is alone the proper subject of taxation. The difficulty is to determine from the cases what this is. The power has been sustained as to franchises; 6 Wall. 594, 611; even of an interstate corporation acting under U. S. R. S. § 5263; 125 U. S. 530; 141 *id.* 40; as to tangible property within the state even if employed in interstate commerce; 18 Wall. 5, 203; 105 U. S. 460; 125 *id.* 530; 127 *id.* 117, 640; and with respect to the *situs* for this purpose, personal property may be separated from its owner; 141 *id.* 18, in which the principle was applied to rolling-stock (*q. v.*), of which as a general rule the *situs* is the domicil of the corporation; 50 Md. 417; 53 Mo. 18; but subject to exceptions growing out of its character and use; 39 Ia. 56; 62 Ill. 395. See 6 Thomp. Corp. § 8097, and note 3.

This power does not reach the capital of a company domiciled without the state, though a tax on a proportion of it has been sustained as a license; 47 Ind. 511; and so has a tax called an excise, on capital of a corporation having its domicil within and its business without the state; 99 Mass. 148; or a franchise tax assessed according to legislative discretion; 97 N. Y. 136; measured by the capital found to be employed within the state; 91 N. Y. 574; 104 *id.* 240; which is justified on the theory that part of the capital is employed within the state; 129 N. Y. 558. See TAXATION. Independently of the power of taxation foreign corporations may be excluded from doing business in other states or, if permitted to do it, are subject to such terms and conditions as the legislature may see fit to impose; 99 Mass. 148; 28 Ohio St. 521; 47 Ind. 236; 29 Mich. 238; 18 How. 404; 5 Sawy. 88; 8 Wall. 168; 10 *id.* 410. Such conditions may include: restrictions upon the right of eminent domain (*q. v.*); payment of license fees; 125 U. S. 181; provisions that any restriction imposed by the home state of the foreign corporation shall also be imposed upon corporations of that state in the domestic state; 92 N. Y. 311; 104 Ill. 653; such provisions when, as is usual, they are in the form of a license or tax are not objectionable on the ground of inequality; 115 Ind. 257, 596; 29 Kan. 672. So statutes are upheld requiring such corporations to file their charter, etc.; 130 U. S. 291; or their agents to file evidence of their authority; 101 Ind. 413; or to keep a known place of business, and a resident agent; or to appoint an attorney for service of process in suits against the company; 4 Colo. 369; in default of which contracts are voidable; 5 Sawy. 88; 6 Ore. 431; 91 Ala. 337; and all such statutes are self-enforcing; 91 *id.* 337.

When by constitution or statute such corporations are restricted from *doing business* within the state, in default of compliance with the provisions thereof, the decisions are not uniform as to what amounts to a violation of the prohibition. Such a statute does not prevent a foreign trust company, which has not complied therewith, from purchasing securities of a railroad company in the state, and taking a mortgage upon its property to secure them, since such isolated act is not doing business in the state; 47 Fed. Rep. 593; writing a policy of insurance by a foreign insurance company upon property situated in Wisconsin involves the doing of business in Wisconsin, although the contract was in point of fact executed in another state; 76 Wis. 285. A foreign insurance company is not considered as doing business in Pennsylvania where no person in the state is authorized to accept application for insurance, receive or collect money thereon, or on any other account for the company, but all applications are sent direct to the foreign office; 172 Pa. 117. The same question arises when corporations "doing business" within a state are taxed, and these words are held to mean the transaction of a substantial part, not the whole, of its business; 105 N. Y. 76; the maintenance of a sale agency; 44 Fed. Rep. 324; or having part of its railroad in another state than that of its incorporation; 21 Wall. 492, affg. 66 Pa. 84; but not a mere license; 117 N. Y. 241; nor having an office in the state of its creation when its manufacturing business is carried on in another state; 46 N. J. Eq. 270.

The conclusion from an examination of the authorities is stated to be, that isolated transactions do not amount to such doing business as is prohibited, therefore the or-

dinary operations of commerce are not restricted nor the right to make contracts, which is secured by the construction of the commercial clause of the federal constitution, as already stated: 6 Thomp. Corp. § 7936. In the work already cited are collected a great number of acts held valid in states where statutes of the class referred to are in operation. A familiar case is that of a policy of insurance written on property in a state whose laws have not been complied with by the company; a distinction has been taken between one procured by the company or a broker for it, and those solicited by citizens of the state and written in isolated instances, the *situs* of the contract in the latter case being the state of the insurance company; 31 Mich. 346; 37 N. J. L. 33. But this distinction is criticised and said not to be sound; 4 Thomp. Corp. § 7937, n. 2; and the weight of authority is said to be that where the foreign insurance company has an agency in another state, and has not complied with its restrictive statutes, a policy written out and returned from the home office, upon an application received and transmitted by the agent, is valid, although the agent has not complied with the statutes of the foreign state; 7 Biss. 315, 372.

Most of the statutes of this class prescribe penalties, either by *qui tam* action or indictment, upon agents for violations of them, and it is held that such a state statute making it a misdemeanor for a person in the state to procure insurance for a resident there from an insurance company not incorporated under its laws, and which had not filed the bond required by the laws of the state relative to insurance, is not a regulation of commerce, and does not conflict with the constitution of the United States; 155 U. S. 648. Such an act in Pennsylvania was held not to apply to the owner of property who merely obtained insurance on his own property; 139 Pa. 605.

A foreign corporation which has not complied with a statute requiring all foreign corporations to file a statement in the office of the secretary of state showing the location of its agent, the names of its officers, etc., as a condition precedent to doing business in the state, cannot recover upon a bond conditioned for the faithful discharge of the duty of an agent appointed to conduct business in the state; 74 Fed. Rep. 597; 92 Pa. 352; 7 Biss. 30; *contra*, 21 N. Y. Supp. 876; 32 Ohio St. 388. The agent of a foreign corporation which has not filed its statement under this act, is presumed to know of his incapacity and becomes personally liable to one with whom he dealt on account of such corporation, and this responsibility is in addition to the statutory penalty for acting as the agent of a foreign corporation without complying with the provisions of the act; 145 Pa. 30.

When such restrictive statutes exist, contracts made in violation of them are treated in some states as voidable at the election of the other party; 3 N. Y. 266; 37 N. J. L. 33; 6 Gray 376; 42 N. H. 547; 45 Mich. 103; except as against a *bona fide* holder of negotiable paper for value and without notice; 8 Gray 206; or it is held that the remedy is suspended until the statute is complied with; 64 Ind. 1. 548; or that they are only void when the statute expressly so provides, as held in an able and learned opinion by Bartholomew, J., in 3 N. Dak. 138; s. c. 54 N. W. Rep. 544; 62 N. H. 622; 5 Biss. 381; 37 Fed. Rep. 242; 155 Mass. 259; or not void when the statute provides a penalty; 132 U. S. 282; 36 Ia. 546; 33 W. Va. 566; 83 Ala. 115 (but see 88 *id.* 275, 280, and 89 *id.* 198). In other states it is held that the contract cannot be enforced; 80 Pa. 15; 11 Wis. 394; 55 Ill. 85; 55 Vt. 526; but the corporation cannot set up its own non-compliance with a statute to avoid its own contract; 145 Pa. 30; 102 Mass. 221; 141 Ill. 85; 68 Ind. 347; 80 Ia. 56; 102 U. S. 415. Such contracts may be validated by the legislature, by subsequent act; 93 Ill. 483. The rule avoiding them as against public policy is not to be extended; L. R. 19 Eq. 465. Whether compliance with such statutes is presumed or must be averred and proved is a point on which the decisions differ; it is held that there is such presumption in 55 Ark. 163, 625; 36 Mich. 261; 73 Mo. 368; 106 Ind. 242; and an analogous case is 28 N. Y. 324. On the other hand, it has been frequently held that compliance must be averred and proved; 89 Ala. 198; 88 *id.* 275, 280; 55 Vt. 526; but this view is considered illogical and unsound by a recent writer; 31 Am. L. Rev. 19; and also by a leading authority who considers the best opinion to be that compliance need not be averred; 6 Thomp. Corp. § 7965; citing as conclusive the analogous case in which failure of a liquor dealer to have a license is held to be a good defence to an action for liquor sold; 145 U. S. 421; although no one would think of averring and proving his license. With much reason, therefore, it was held that such averment is not necessary, and nothing short of a distinct averment of non-compliance will make proof to the contrary necessary; 55 Ark. 625.

The question of the power of a foreign corporation to take hold and transmit title to land is one of public policy, and no general rule can be formulated from the decisions and statutes which must (as in most matters affecting land titles) be referred to with reference to a particular state. Enabling statutes will be found in many states, either general, or where such legislation is permissible, for special cases. It can at least be suggested that in the absence of any such legislation, or of express decisions, serious doubt will arise as to the power. The conclusion is reached by Judge Thompson that in the absence of prohibitory local law, there is much authority that, if authorized to do so in the state of their creation, corporations may hold land in other states; 117 Ill. 237; 19 Fed. Rep. 73; 25 Vt. 433; 5 McLean 111; 25 Mich. 214; unless forbidden to do so either by the public policy of the state; 8 Biss. 234; 73 Ill. 142; or its statute law; 132 Pa. 591, where the

subject is considered at length by Paxson, J., with respect to general enabling laws and proceedings by the state in such cases; 14 Pet. 122; 32 Fed. Rep. 22. See 6 Thomp. Corp. § 7914.

It is sometimes held that the power exists for business purposes, as an office; 13 Pa. 13; 67 Ill. 568; 117 *id.* 237; and it has been held that a Connecticut company having no business there could operate as a land company in New Hampshire; 19 Fed. Rep. 73; *contra*, 67 Ill. 567; but the tendency of American legislation is to permit the holding of land by foreign corporations, for business but not for speculation; 6 Thomp. Corp. § 7917. The right of such corporation to take and hold title to real estate cannot be questioned in ejectment by it against a former managing director; 153 U. S. 523. See ALIEN.

The power of acquiring land has been held to exist until forbidden; 101 U. S. 352; and as against every one except the state, proceeding for a forfeiture; 14 Pet. 122; 73 Ind. 68; 110 Ill. 65; 117 *id.* 237; 98 U. S. 621. Of such proceedings it is said that the only one in this country is that in Pennsylvania cited *infra*; 6 Thomp. Corp. § 7918, n. 3.

Land may generally be taken by devise; 24 Pa. 474; 31 W. Va. 621; but only by corporations having charter power so to take; 29 Barb. 650; 72 Ill. 50; see 15 Ohio St. 537; 38 Conn. 342; and upon the question of devise generally, see 9 Cow. 437. Foreign corporations have usually the power to acquire land by foreclosure of mortgages; 30 N. J. Eq. 408; 6 McLean 1; 15 Gray 491; and in such cases the state only and not the mortgagor can set up a want of power; 28 Neb. 672; 79 Ind. 172.

In all cases involving the right of foreign corporations to hold lands the *lex rei sitæ* governs; Sto. Confl. L. § 428; 4 Sandf. 252; 29 Barb. 650. See ESCHEAT.

Whenever a foreign corporation has the power to contract in a state or country it may enforce it or recover damages for a breach in like manner as other persons may do in like case; 2 Stra. 807; 2 Ld. Raym. 1535, note; 5 Cra. 61; 13 Pet. 519; 6 Cow. 46; 4 Johns. Ch. 370; 18 Wis. 109; 6 Metc. 391; 5 McLean 111; 13 Vt. 97; 17 Me. 34; 1 Hill, S. C. 44. From these and many other cases it is clearly a principle long and well settled that, unless prohibited by local statutory law, a corporation of one state may sue in another by its corporate title. Such prohibitory legislation exists in many states as already sufficiently shown; *supra*. When it does not exist this right of action extends to all cases and causes of action as to which a remedy exists in favor of other persons or domestic corporations; 6 Thomp. Corp. § 7978; and see *id.* §§ 7380–8. An action by such corporation for libel has been sustained; 35 Ill. App. 627.

In such actions when, as in most jurisdictions, it is unnecessary to aver or prove the corporate existence in suits by or against corporations (see 6 Thomp. Corp. § 7658), or at least only to make very formal allegation of it (*id.* § 7661); the same rule applies to foreign corporations; *id.* § 7984; 31 Ind. 283; 26 Ohio St. 562; nor, as has been held, in the absence of a statute either expressly or by authoritative construction requiring it, need there be an averment of compliance with statutory pre-requisites for doing business; 2 Dak. 280; 40 N. Y. Supp. 360; 25 S. E. Rep. (Va.) 8; the ground of dispensing with the averment of compliance with such statutes is the presumption of legality and compliance with local law, discussed, *supra*.

Apart from this question, which only affects the right of action upon contracts made within the state, the foreign corporation has, as to all other matters, the same rights and remedies as other non-residents; 4 Colo. 369; 67 Ind. 549; 3 N. M. 237. See 73 Cal. 599. It may foreclose a mortgage even when by statute disqualified from acquiring real estate; 91 Pa. 491; 36 Minn. 108; *contra*, 89 Ala. 198; and purchase at the execution sale; 94 Ind. 14; or maintain an action on an insurance policy; 11 Colo. 419; or for a tax wrongfully paid; 9 Mont. 145. Where a foreign corporation, by the law of its domicil, continues to exist after the expiration of its charter for the purpose of suing on debts accrued before such expiration, it may also sue in such case in New York; 40 N. Y. Supp. 360.

In suits against foreign corporations the question of jurisdiction is of first importance, and it is the general rule that a corporation, like a natural person, cannot be sued *in personam* in a state within whose limits it has never been found; 6 Thomp. Corp. § 7988. This conclusion springs naturally from the principle that a "corporation being the creation of local law, can have no legal existence beyond the limits of the sovereignty where created;" 8 Wall. 181; but this rule is subject to exceptions growing out of the theory that, under certain circumstances, such corporations will be held in law to have acquired a domicil within a state, at least so far as to subject them to suit.

In England in spite of *dicta* to the contrary; L. R. 7 Q. B. 293; 1 Ex. Div. 237; there was said by the Lord Chief Justice to be no case prior to 1885 holding foreign corporations suable in that country; 54 L. J. Q. B. Div. 527. The necessities of the case resulted in a rule authorized by statute providing for acquiring jurisdiction over a foreign corporation carrying on business in England by service on a "head officer" in charge of its business there; and the court of appeal sustained the jurisdiction so acquired; 53 L. J. Q. B. Div. 508; 33 Ch. Div. 446. See 5 H. L. Cas. 416.

In the United States the exceptions to the general rule first stated are thus classified by Thompson: (1) Where a corporation had established a permanent agency in the state or country; (2) when it is agreed with the state that process may be served in it; (3) when it is agreed with the opposite party that an action may be

brought against it to enforce a contract against it in a state or country other than its domicil; 6 Thomp. Corp. § 7988. These exceptions were rendered necessary to meet the case of corporations in recent years doing business so extensively outside of the domicil of their creation, and particularly of what are known as "tramp corporations," purposely organized in another state to do business in their own and evade its laws; besides, trading corporations being equally migratory with individuals, the reason originally assigned for want of jurisdiction had ceased to exist; *id.* § 7989. Accordingly it may be considered that corporations may acquire business domicils in other states and countries, and, wherever they do so, they may be sued without the aid of local statute law; *id.* In most, if not all of the states, however, statutes exist requiring foreign corporations to appoint an agent for process as a condition of doing business in the state, and so, also, by local statutes, jurisdiction is affirmatively assumed. See 129 Mass. 444; 4 Mo. App. 595; 74 Mo. 457; 3 Hun 171; 40 N. H. 548; 41 Ga. 660; 46 Ala. 641; 83 *id.* 498; 32 N. J. L. 15; 24 *id.* 222; 29 Fed. Rep. 17; 44 *id.* 31; 115 N. Y. 437. Delaware Constitution, 1897, Art. ix. § 5. The principles upon which the jurisdiction rests are that it must appear in the record that the corporation was engaged in business in the state, and that the person upon whom service was made represented the company *there* in the business; and while the certificate of service is *prima facie* evidence of the latter fact, it is open to contradiction when the record is offered in evidence in another state; Field, J., in 106 U. S. 350.

A corporation may subject itself to the jurisdiction of a foreign state by contract with a private person; 60 L. T. N. S. 924; or with the state; 91 Ala. 337. See 6 Thomp. Corp. § 7992.

Foreign corporations are sometimes held not liable to suit, except *ex contractu*, upon domestic contracts; 55 Ga. 194; or for torts committed within the state; 112 N. Y. 315; 76 Ala. 388; 16 Fed. Rep. 436; 25 N. J. L. 381; unless the statutory jurisdiction extends to any cause of action; 84 N. Y. 63; 40 Md. 595; 21 Wis. 506; nor are they liable to suits by non-residents on foreign contracts; 46 Vt. 697; *contra*, 132 Mass. 432.

The United States circuit court has no inherent power, as a court of equity, at the suit of domestic shareholders, to dissolve an English mining company, owning and operating a mine in the United States, and to wind up its business operations; nor has it any such power under the act of parliament known as the "Companies Act, 1862;" 58 Fed. Rep. 644; S. C. 7 C. C. A. 412.

With respect to what constitutes a valid service on a foreign corporation, the subject is generally regulated by statutes which must be consulted with reference to any given case, and reference may be made to 6 Thomp. Corp. Ch. 198, where the decisions are collected as to service on different classes of officers and agents. The decisions of the United States Supreme Court establish the rule that jurisdiction cannot be acquired by service upon an officer casually within the state for purposes not connected with the business of the corporation; 18 How. 404; 106 U. S. 350; 137 *id.* 98; 149 *id.* 94; 150 *id.* 653; 156 *id.* 518. The same view is supported by the weight of authority in the state courts; 141 Pa. 462; 71 Ga. 246; 26 Minn. 233; 91 Ill. 170; 32 N. J. L. 15; 2 McArthur 146; 40 Ill. App. 547; Alderson, Jud. Writs and Proc. 219; Murfree, For. Corp. 210; *contra*, 87 N. Y. 137; 61 Mich. 226; 47 La. Ann. 389; but in two of these states the federal courts have refused to follow the ruling of the state court; 22 Fed. Rep. 635; 44 *id.* 31; 68 *id.* 442.

So an insurance company having an isolated transaction in a state through a broker who deals with the company through another broker is not "doing business" or "found" in the state so as to be liable to substituted service or to service on the brokers; 55 Fed. Rep. 751.

Foreign corporations, it is said, cannot be logically dealt with as non-residents within the meaning of attachment laws, where they have become domesticated so far as to be liable to actions *in personam;* 6 Thomp. Corp. § 8060; 29 Mo. 75; 7 Bush 116. See 27 N. J. L. 206; 64 Ga. 18. Formerly a foreign attachment could not be issued in courts of the United States; 4 Cra. 421; 3 Dill. 474; 103 U. S. 794; but in 1872 the federal, circuit, and district courts were authorized to adopt the state laws in force relative to attachments; U. S. Rev. Stat. § 915; and the federal courts now apply state statutes relating to attachments to foreign corporations; 51 Fed. Rep. 580. Such corporations may also be summoned as garnishees whenever they would be liable for the debt attached, or by residence or agency are amenable to process; 9 N. H. 394; 31 Pa. 114; 102 Ill. 249; 9 Conn. 430; or when they do business in the state and have a managing agent there; 51 Fed. Rep. 580.

It has been held that the dissolution of a corporation dissolves a foreign attachment against it, on the ground that to compel an appearance was the primary object of the process; 8 W. & S. 207; but the soundness of this case has been doubted on the ground that jurisdiction having attached to the *res* continues for the real object of the suit,—satisfaction of the demand; 6 Thomp. Corp. § 8062; and this view is supported by another case which holds that comity does not interfere with it; 68 Ill. 348. But in a very recent case it was held that a state statute providing that corporations shall continue to exist for a certain period after the time fixed for dissolution, for the purpose of prosecuting and defending suits, and that no body of persons acting as a corporation shall set up want of legal organization as a defence to a suit against them as a corporation, does not control or affect foreign corporations merely doing business in the state; and a suit against

such a corporation abates upon its dissolution, so that, if a judgment be thereafter entered against it, the same is void; 74 Fed. Rep. 425. See DISSOLUTION of CORPORATIONS.

A corporation, by doing business in another state and becoming liable to suit there, both in state and federal courts, does not lose its right to claim, for the purposes of federal jurisdiction, a citizenship in the state by which it was created; Murfr. For. Corp. 236. When sued in a foreign state it may remove the cause to a federal court; *id.*; 104 U. S. 5; 22 Fed. Rep. 353. But it is otherwise if the effect of the legislation under which it enters the foreign state be to confer corporate privileges upon it in that state. In such case the company is a citizen of both states; 22 Fed. Rep. 568; 104 U. S. 5.

See, generally, Murfree; Reno. For. Corp.; Patterson, Fed. Restraint St. Action § 118; Beach, Insurance Ch. 2; Thompson, Corp. tit. xix.; INTERSTATE COMMERCE; POLICE POWER; TAXATION; UNITED STATES COURTS; MERGER.

FOREIGN COUNTY. Another county. It may be in the same kingdom, it will still be foreign. See Blount, *Foreign.*

FOREIGN COURT. The circuit court of the United States is not a foreign court relatively to the court of chancery of New Jersey; 19 Am. L. Reg. N. S. 426.

FOREIGN CREDITOR. One who is resident in a state or country foreign to that of the domicil of the debtor or the *situs* of his property.

FOREIGN DECREE. See FOREIGN JUDGMENT.

FOREIGN DIVORCE. One obtained in a state or country other than that in which the marriage was solemnized and the parties, or at least the one against whom the proceeding is taken, are domiciled. See DIVORCE.

FOREIGN DOMICIL. See DOMICIL.

FOREIGN DOMINION. In English Law. A country, at one time subject to a foreign prince; which, by conquest or cession, has become a part of the dominion of the British Crown. 5 B. & S. 290.

FOREIGN ENLISTMENT ACT. The statute 59 Geo. III. c. 69, for preventing British citizens from enlisting as sailors or soldiers in the service of a foreign power. Wharton, Lex.; 4 Steph. Com. 226. See NEUTRALITY.

FOREIGN EXCHANGE. Drafts drawn on a foreign state or county. See BILL OF EXCHANGE.

FOREIGN FACTOR. One who resides in a country foreign to that of his principal. See FACTOR.

FOREIGN FISHING. Oil, manufactured from whales caught by the crew of an American vessel, is not the product of foreign fishing within the purview of the revenue laws of the United States, though it has since been owned and brought into port by persons in the foreign service. 2 Sumn. 336.

FOREIGN-GOING SHIP. In the English Merchant Shipping Act, any ship employed in trading between some place or places in the United Kingdom, and other places specified in said act outside the limits of the kingdom.

FOREIGN JUDGMENT. A judgment of a foreign tribunal.

It is a general rule that foreign judgments are admitted as conclusive evidence of all matters directly involved in the case decided, where the same question is brought up incidentally. 1 Greenl. Ev. 547, and note; 12 Pick. 572; 7 Bost. L. Rep. 461. Such judgments and decrees *in rem*, whether relating to immovable property or movables within the jurisdiction of the foreign court, are binding everywhere; L. R. 4 H. L. 414; [1897] 1 Q. B. 55; [1896] 2 Q. B. 455. This rule applies to admiralty proceedings *in rem* founded on actual possession of the subject-matter, and garnishment proceeding in a like case.

It seems to be the better opinion that judgments *in personam* regular on their face, which are sought to be enforced in another country, are conclusive evidence, subject to a re-examination, in the courts where the new action is brought, only for irregularity, fraud, or lack of jurisdiction as to the cause or parties; 1 Greenl. Ev. § 546; Westl. Priv. Int. Law 372; Story, Confl. Laws § 607; 2 Swanst. 325; Dougl. 6, n.; 3 Sim. 458; 6 Q. B. 288; 4 Munf. 241; 15 N. H. 227; 13 Gray 591; 99 Mass. 273; 20 Conn. 544; 21 Iowa 58; but see 28 Conn. 28; 8 Paige, Ch. 44; 5 Wall. 290. It was formerly held that they were *prima facie* evidence merely. See 2 H. Bla. 410; Dougl. 1, 6; 3 Maule & S. 20; 9 Mass. 462; 34 N. J. Eq. 130; 13 Gray 591; 21 Ia. 370; 13 John. 192; 88 Me. 406. But this theory has been entirely overthrown, the doctrine of their conclusive character having been settled in England by the case of Bank of Australia *v.* Nias, L. R. 6 Q. B. 179. It is also fully recognized in this country; 26 N. Y. 148; 49 *id.* 571; 5 Hamm. 545; 54 Me. 28; 55 *id.* 389; and see the case of Hilton *v.* Guyot, *infra.*

The subject of the conclusiveness of foreign judgments has been treated with much diversity of opinion in the English courts. That they are *prima facie* evidence to sustain an action is clear according to all the authorities, but whether conclusive, and if not so in all cases, what defences may be admitted, was for a long time not definitely settled by the English courts. The cases were very fully reviewed by Judge Redfield with this result.

"So that now it may be regarded as fully established in England, that the contract resulting from a foreign judgment is equally conclusive, in its force and operation, with

that implied by any domestic judgment. But there is still a very essential and important distinction between the two. Domestic judgments rest upon the conclusive force of the record, which is absolutely unimpeachable. Foreign judgments are mere matters *en pais*, to be proved the same as an arbitration and award, or an account stated; to be established, as matter of fact before the jury; and by consequence subject to any contradiction or impeachment which might be urged against any other matter resting upon oral proof. Hence any fraud which entered into the concoction of the judgment itself is proper to be adduced, as an answer to the same; but no fraud which occurred and was known to the opposite party, before the rendition of such foreign judgment, and which might, therefore, have been brought to the notice of the foreign court, can be urged in defence of it. It is proper to add, that while the English courts thus recognize the general force and validity of foreign judgments, it has been done under such limitations and qualifications that great latitude still remains for breaking the force of, and virtually disregarding such foreign judgments as proceed upon an obvious misapprehension of the principles governing the case; or where they are produced by partiality or favoritism, or corruption, or where upon their face they appear to be at variance with the instinctive principles of universal justice. But these are rare exceptions." Sto. Confl. Laws, Redfield's ed. § 618 *a*–618 *k*. And a very recent commentator states precisely the same conclusion from the English cases; 35 Am. L. Reg. N. S. 277.

An English writer on the subject attributes the vacillation of the courts of that country to the fact that two doctrines have been discussed as the basis of the conclusive effect given to a foreign judgment. The earlier theory was that of comity, which, as defined by Blackburn, J., in opposing the doctrine, is that "it is an admitted principle of the law of nations, that a state is bound to enforce within its territories the judgment of a foreign tribunal;" L. R. 6 Q. B. 139. This doctrine was supported by Lords Nottingham, Ellenborough, Kenyon, Cockburn, and Brougham, and Chief Baron Pigot, Sir G. Jessel, and Sir R. Phillimore; 2 Swanst. 326, n.; 4 Campb. 28; 4 M. & S. 141; 7 Term 681; 30 L. J. C. P. 177; 2 Cl. & F. 470; Ir. Rep. 1 C. L. 471; 50 L. J. P. 30; L. R. 4 P. C. 144. Of the objections raised the most important was said to be uncertainty; Piggott, For. Judg. 6. See Sto. Confl. Laws § 598. The other theory, termed that of obligation, is that when a competent court has adjudicated a certain sum to be due, a legal obligation arises to pay that sum, and an action of debt to enforce the judgment may be sustained. This was first enunciated by Parke, Baron, in 1845; 9 M. & W. 810; 14 L. J. Ex. 145; it was approved in 1870 by Blackburn and Mellor, JJ.; L. R. 6 Q. B. 139; and by the same judges and Lush and Hannen, JJ., *id.* 155.

Both ideas are involved in what the English writer last cited terms the theory of obligation and comity, which is in substance this: A legal obligation arises in the state where the judgment was rendered, accompanied by a correlative sanction under which the obligation may be made effective so long as the defendant is within the jurisdiction of the foreign court; but when, by his absence from that jurisdiction, the remedy is no longer available, the obligation will, in another state or country, be clothed by comity with an auxiliary sanction to replace the correlative sanction which it has lost; Piggott, For. Judg. 18.

The foreign court must have had jurisdiction, and when the defendant was not a subject of or resident in the country in which the judgment was obtained, so that there existed nothing imposing on him any duty to obey it, the judgment cannot be enforced in an English court; L. R. 6 Q. B. 155; 67 L. T. 767. But the conclusiveness of a judgment when there was jurisdiction is illustrated by a decision that a mistake of English law as to an English contract, apparent on the face of the proceedings, was not ground of defence to a foreign judgment; L. R. 6 Q. B. 139.

In this country the subject has recently been elaborately discussed by the United States Supreme Court in the case of Hilton *v.* Guyot, in the argument and opinions of which are collected all the authorities. In that case it was held that "when an action is brought in a court of this country, by a citizen of a foreign country, against one of our own citizens, to recover a sum of money adjudged by a court of that country to be due from the defendant to the plaintiff, and the foreign judgment appears to have been rendered by a competent court, having jurisdiction of the cause and of the parties, and upon due allegations and proofs, and opportunity to defend against them, and its proceedings are according to the course of a civilized jurisprudence, and are stated in a clear and formal record, the judgment is *prima facie* evidence, at least, of the truth of the matter adjudged; and it should be held conclusive upon the merits tried in the foreign court, unless some special ground is shown for impeaching the judgment, as by showing that it was affected by fraud or prejudice, or that, by the principles of international law, and by the comity of our own country, it should not be given full credit and effect;" 159 U. S. 113.

In the opinion of the majority of the court, Mr. Justice Gray reviews all the leading American and English cases, and examines in detail existing laws and usages of civilized nations, and reaches the conclusion that "where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other coun-

tries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact."

But the court go further and rest the decision upon the principle of reciprocity, adopting and applying the rule that "judgments rendered in France, or in any other foreign country, by the laws of which our own judgments are reviewable upon the merits, are not entitled to full credit and conclusive effect when sued upon in this country, but are *prima facie* evidence only of the justice of the plaintiff's claim."

Accordingly, it was held that, such being the practice of the French courts, with regard to American judgments, the judgment recovered in France, which was the cause of action, was not conclusive, but subject to review upon its merits.

Chief Justice Fuller delivered a dissenting opinion in which concurred Harlan, Brewer, and Jackson, JJ., taking the ground that the question was not one of comity, but to be determined upon the broad principle of public policy that there should be an end of litigation, and that this applied equally to foreign and domestic judgments.

The principles of this decision were at the same term applied to a Canadian judgment which was held conclusive inasmuch as the pleadings showed a submission to the jurisdiction of a competent court. Mere averments that the judgment was "irregular and void," and that there was "no jurisdiction or authority on the part of the court to enter such a judgment upon the facts and the pleadings" are but averments of legal conclusions and so insufficient to impeach the judgment; and it was held that, in answer to an action upon a foreign judgment the specific facts must be given upon which it is supposed to be irregular and void or based upon fraud. If rendered upon regular proceedings and due notice or appearance, and not procured by fraud, in a foreign country, by whose laws a judgment of one of our own courts, under like circumstances, is held conclusive of the merits, it is conclusive between the parties in an action brought upon it in this country, as to all matters pleaded and which might have been tried; 159 U. S. 235.

Foreign adjudications as respects torts are not binding; Whart. Confl. L. § 793, 827; and a judgment in Germany for infringement of trade-mark cannot be set up in the United States; 50 Fed. Rep. 369. See TRADE-MARK.

The various states of the United States are considered as foreign to each other, with respect to this subject; 137 U. S. 287. In Louisiana it has been decided that a judgment rendered by a Spanish tribunal under the former government of that state is not a foreign judgment; 4 Mart. La. 301, 310.

Foreign judgments may be evidenced by *exemplifications* certified under the great seal of the state or country where the judgment is recorded, or under the seal of the court where the judgment remains; 1 Greenl. Ev. § 501; by *a copy* proved to be a true copy, or by the certificate of an officer authorized by law, which certificate must itself be properly authenticated; 2 Cra. 238; 5 *id.* 335; 2 Cai. 155; 7 Johns. 514; 8 Mass. 273; 60 Ill. App. 309. The acts of foreign tribunals which are recognized by the law of nations, such as courts of admiralty and the like, are sufficiently authenticated by copies under seal of the tribunal; 5 Cra. 335; 3 Conn. 171. The record of a judgment of a foreign court, not of record and of inferior territorial jurisdiction, is not admissible in evidence, in the absence of proof of facts showing that the court had jurisdiction; 37 Ill. App. 23. See 113 N. C. 453.

The constitution of the United States provides that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state; Const. Art. IV. § 1. It is enacted by the act of May 26, 1790, that the records and judicial proceedings of the courts of any state shall be proved or admitted in any other court within the United States, by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form. And the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from whence the said records are or shall be taken; and by the act of March 27, 1804, that from and after the passage of this act all records and exemplifications of office books, which are or may be kept in any public office of any state, not appertaining to a court, shall be proved or admitted in any other court or office in any other state, by the attestation of the keeper of the said records or books, and the seal of his office thereto annexed, if there be a seal, together with a certificate of the presiding justice of the court of the county or district, as the case may be, in which such office is or may be kept, or of the governor, the secretary of state, the chancellor, or the keeper of the great seal of the state, that the said attestation is in due form and by the proper officer; and the said certificate, if given by the presiding justice of a court, shall be further authenticated by the clerk or prothonotary of the said court, who shall certify, under his hand and the seal of his office, that the presiding justice is duly commissioned and qualified; or, if the said certificate be given by the governor, the secretary of state, the chancellor, or keeper

of the great seal, it shall be under the great seal of the state in which the said certificate is made. And the said records and exemplifications, authenticated as aforesaid, shall have such faith and credit given to them in every court and office within the United States as they have by law or usage in the courts or offices of the state from whence the same are or shall be taken; and the provisions of both acts shall extend to the records, etc., of the territories; U. S. Rev. Stat. § 906.

The object of this clause was to prevent judgments from being disregarded in other states; 25 Mich. 247; it relates only to the validity and force of judgments rendered in one state where proved in another; 12 Fed. Rep. 375. It does not change the nature of a judgment; 13 Pet. 312; but places judgments rendered in another state on a different footing from what are known at common law as foreign judgments; 9 Wheat. 1; 3 N. J. L. 466; 6 *id.* 236. The clause makes the record evidence but does not affect the jurisdiction either of the court in which the judgment is rendered or of that in which it is offered in evidence. The judgment of a foreign state differs only from a foreign judgment in not being re-examinable for fraud in obtaining them, if the court had jurisdiction; 127 U. S. 265, 292. A judgment rendered in another state is to be regarded as a domestic judgment; 27 Pa. 247; 53 Vt. 177; but it is not on the footing of a domestic judgment so far as to be enforced by execution, but the manner of their enforcement is left to the state in which they are sued on, pleaded, or offered in evidence. When pleaded and proved they are conclusive, and if their enforcement is denied it amounts to the denial of a right secured by the constitution of the United States; 146 U. S. 657. The constitution and the rule of comity include only judgments in civil actions, not in criminal prosecutions; 17 Mass. 514. A judgment for a penalty cannot be enforced in another state, but whether a law is penal is to be determined by the courts called upon to enforce it; and if the court of another state declines to give it full faith and credit because, in its opinion, it is for a penalty, it denies the constitutional right; 146 U. S. 657. As to the effect of a decree of divorce in another state, see DIVORCE. The judgment of a state court has the same validity and effect in any other state as it has in the state where it was rendered; 6 Wheat. 129; 9 How. 520; 50 Mo. App. 373; 141 U. S. 87; 48 Fed. Rep. 510. The judicial proceedings within the act are only such as have been rendered by a competent court, with full jurisdiction; 9 Mass. 462; 45 Ill. App. 533; 50 N. J. L. 636; 17 Wend. 521; 11 How. 165; it may be a superior court of record or an inferior tribunal; 30 N. H. 78; 13 Ohio 209; including a judgment of the justice of the peace; 94 Tenn. 721. A judgment may be attacked on the ground of a want of jurisdiction; Mill. Const. U. S. 632; 18 Wall. 457; 1 Tex. Civ. App. 315; 27 Ohio St. 600; 22 S. E. Rep. (S. C.) 178; 99 Cal. 374; 138 U. S. 439; 133 *id.* 107; thus a judgment against a defendant who was not served with proper process, and who did not appear, would be entitled to no credit in another state; 11 How. 165; 137 U. S. 287; 2 Misc. Rep. 570; but facts establishing the want of jurisdiction must be shown; 74 Fed. Rep. 51. A judgment of a foreign state, against several defendants jointly, in an action in which one of them was not served with process, cannot, in Rhode Island, be enforced against one of such defendants who in the foreign action was served with process; 33 Atl. Rep. (R. I.) 4. See 4 Harring. 281; 3 *id.* 241, 517. In cases where the court had jurisdiction of the parties and of the subject-matter, fraud in obtaining the judgment may be set up as a defence; 139 Ill. 311; 70 Hun 197; or if it will constitute a ground of collateral attack; *id.*; 148 Ill. 536; but see 5 Wall. 290; but fraud cannot be pleaded as a ground of attack, in one Federal court, upon a judgment obtained in another; 138 U. S. 439. The constitution does not give to a judgment all the attributes to which it was entitled in the state where it was rendered; 7 Gill. & J. 434; but if duly certified, it is admissible in evidence in any state; 7 Cal. 54, 247; a state may give a judgment rendered in another state any effect it may think proper, always provided it does not derogate from the legal effect conferred upon it by the constitution and the laws of congress in this behalf; 9 Mass. 462. In case, however, full faith and credit is not given to the judgment of another state, any judgment thereon will be erroneous; 7 Wall. 139. When the court rendering the judgment has jurisdiction, its judgment is final as to the merits; 5 Wall. 302; 14 Tex. 352; 9 Mass. 462; 7 Gill. 430; 67 Fed. Rep. 459; 62 N. W. Rep. (Neb.) 306; but no greater effect can be given to a judgment than it had in the state where it was rendered; 17 Wall. 529; 18 N. Y. 468. If a judgment or decree is enforcible in the state where it is rendered, it is enforcible in any other state; 9 Pet. 86; but the constitutional provision does not give validity to a void judgment or decree; 12 Wheat. 213; 4 N. J. L. 192; 14 Pet. 49; 148 N. Y. 34. It does not impose on any state the duty of following the decision of another state as to the construction of the statutes of the latter; 3 McCrary 609; 18 Hun 507; nor enforcing within its territory the law of another state. A judgment entered in pursuance of a warrant of attorney, in a state in which such judgments are authorized, has the same force when sued on in another state as a judgment in an adversary proceeding; an action thereon can only be defeated by want of jurisdiction by fraud in procuring the judgment, or defences based on matter arising after the judgment was rendered; any defence to the original cause of action is conclusively negatived by the judgment; but the sufficiency of the warrant may be inquired into and is to be determined from the evidence of the law of the state of its

entry; 62 N. W. Rep. (Neb.) 306. Where a judgment is revived by *scire facias*, without service on or appearance by the defendant, the plaintiff cannot recover thereon in another state where the defendant resides, after the statute of limitations has run against the original judgment; such revival is either a new proceeding substituted for an action of debt, and hence invalid without service, or a continuation of the original action, and therefore barred; 161 U. S. 642; 35 Atl. Rep. (Vt.) 489. And in an action on such judgment the statute of the former governs and not that of the place where the judgment was rendered; 65 Hun 17.

A judgment *in personam* against a corporation, obtained in a federal court of a sister state, is conclusive on the merits of the case in the courts of every other state when made the basis of an action; and the directors and managers of the corporation are as conclusively bound by the judgment as the corporation itself; 46 Fed. Rep. 584.

Judgments of the Indian courts in the Indian Territory stand on the same footing with those of the Federal territorial courts, and are entitled to the same faith and credit; 59 Fed. Rep. 836.

The provisions of the act of Congress relating to the authentication of records and judicial proceedings must be complied with in order to secure the admission of the exemplification as evidence in a suit upon the judgment in another state; it is not necessary that such exemplification should be used in pleading or in a statement of claim or affidavit of defence; 124 Pa. 280. As to pleading, see 27 Cent. L. J. 400; 26 Abb. N. C. 315.

As to the effect to be given to foreign judgments, see Story, Confl. Laws; Freem. Judgt. 596; Dalloz, *Étranger;* Piggott, Foreign Judgments; 20 Myers, Federal Decisions 668; 4 Law Magazine & Rev., 4th ed. 417; CONFLICT OF LAWS; JUDGMENT; FOREIGN CORPORATION.

FOREIGN JURISDICTION. The exercise by one government, within the territory of another, of powers acquired by it in any manner whatsoever, whether by treaty, grant, usage, sufferance, or otherwise.

A jurisdiction other than that of the former.

FOREIGN JURISDICTION ACT. In English Law. The stat. 6 & 7 Vict. c. 94, by which it was provided that the crown may exercise any power or jurisdiction it may have in any foreign place or country in the same manner as if obtained by cession or conquest; and that any act done in pursuance of such power or jurisdiction shall be as valid as if done according to the local law then in force in such place. 1 Steph. Com. 103.

FOREIGN JURY. One drawn from a county other than that in which issue is joined. See JURY.

FOREIGN KINGDOM. One under the dominion of a foreign prince. 19 Johns. 375.

FOREIGN LANGUAGE. When in an action of slander the words complained of were spoken in German a declaration setting forth the words in English is not sufficient; the words must be stated in the foreign language as spoken, with an averment of the signification in English, and that they were understood by those who heard them; 3 Wend. 394. See also Cro. Eliz. 496, 865; SLANDER.

When a will was made and proved in French and in the probate it was translated into English, but as it appeared, falsely, the translation was not conclusive, but the English court of chancery held that it might determine according to what the translation ought to be; 1 P. Wms. 526.

FOREIGN LAW. The laws of a foreign country.

The courts do not take judicial notice of foreign laws; and they must, therefore, be proved as matters of fact; 4 Mood. Parl. Cas. 21; 3 Esp. 163; 1 D. & L. 614; 40 Tex. 291; 9 Humphr. 546; 2 Barb. Ch. 582; 19 Vt. 182; 9 Mo. 3; 60 Ind. 128; 64 Ga. 184; 8 Mass. 99; 2 Dow. & C. 171; 4 Conn. 517; 1 Paige 220; 10 Watts 158; 9 Gill 1; *written laws*, by the text, or a collection printed by authority, or a copy certified by a proper officer, or, in their absence, perhaps, by the opinion of experts as secondary evidence; Story, Confl. Laws § 641; 1 Greenl. Ev. § 486; 14 How. 426; 2 Cra. 237; 8 Ad. & E. 208; 6 Wend. 475; 10 Ala. N. S. 885; 1 Tex. 93; 10 Ark. 516; they may be construed with the aid of text-books as well as of experts; 2 Low. 142; where experts are called, the sanction of an oath is said to be required; 4 Conn. 517; 12 *id.* 384. See 12 Vt. 396; Story, Confl. Laws § 641; 1 Greenl. Ev. § 488, note. As to the manner of proving *unwritten* laws of foreign countries, the decisions show a divergence of opinion; the rule, as laid down by Lowell, J., in the case of The Pashawick, 2 Low. 142, where the reasoning of Lord Stowell, in Dalrymple *v.* Dalrymple, 2 Hagg. Consist. 54, is cited with approval, is, that the unwritten law of *England* may be proved in the United States courts not by experts only, but also by text-writers of authority, and by the printed reports of adjudged cases; Whart. Ev. § 300. But mere citations of English statutes and authorities cannot be accepted as proving English laws; 50 Fed. Rep. 73. But in respect to the laws of other foreign countries, where a system obtains wholly different from our own, the rigid proof by the testimony of experts alone should be insisted on. See 11 Cl. & F. 85; 14 E. L. & Eq. 249; 4 Cow. 508, n.; 1 Wall. Jr. C. C. 47; 4 Johns. Ch. 507; as to who can prove such laws; 48 N. H. 176; 1 Johns. 395; 2 La. Ann. 391. It need not be a lawyer; 74 Ill. 197; 26 N. H. 152; 8 C. B. 812; 37 Neb. 614; 129 U. S. 397. The United States courts take judicial notice of the laws of every state and territory in the United States; 35

Fed. Rep. 642; but the decisions of the various state courts are not harmonious on this point as far as regards the laws of each other. In Tennessee; 9 Heisk. 873; and Rhode Island; 11 R. I. 411; the courts will take judicial notice of the laws of sister states; in Illinois, of the jurisdiction of courts in other states; 17 Ill. 577; and the supreme court has decided that where a state recognizes acts done in pursuance of the laws of another state, the courts of the first state should take judicial cognizance of such laws so far as may be necessary to judge of the acts alleged to be done under them; 8 Wall. 513. In Louisiana, where a statute of another state has been properly brought to the notice of the court, it will in all future cases take notice of that statute and presume the law of the foreign state to be the same until some change is shown; 21 La. Ann. 594; 5 Ind. App. 89. In Pennsylvania it has been held that the courts should take notice of the local laws of a sister state in the same manner as the supreme court of the United States would do on a writ of error to a judgment; 27 Pa. 479; but see, *contra*, 9 Wis. 328; 20 Am. L. Reg. N. S. 385. See 31 Fla. 10. A copy of the authorized statute-book is recognized as proof of a foreign law in Pennsylvania; 2 Pa. 85; and the construction of those statutes may be proved either by the reports of cases, or by one familiar therewith; 163 Pa. 245; 170 Pa. 84.

Foreign unwritten laws, customs, and usages may be proved, and are ordinarily proved, by parol evidence; and when such evidence is objected to on the ground that the law in question is a written law, the party objecting must show that fact; 15 S. & R. 87; 2 La. 154.

The manner of proof varies according to circumstances. As a general rule, the best testimony or proof is required; for no proof will be received which presupposes better testimony attainable by the party who offers it. When the best testimony cannot be obtained, secondary evidence will be received; 2 Cra. 237. See 14 Cent. L. J. 125, where there is a general article on this title. A foreign law must be proved like any other fact, and in the absence of such proof it will be presumed that the common law prevails, in the foreign jurisdiction; 52 Mo. App. 60.

Exemplified or sworn copies of written laws and other public documents must, as a general thing, be produced when they can be procured; but should they be refused by the competent authorities, then inferior proof may be admitted; *id.*

When our own government has promulgated a foreign law or ordinance of a public nature as authentic, that is held sufficient evidence of its existence; 1 Cra. 38; 1 Dall. 462; 12 S. & R. 203.

When foreign laws cannot be proved by some mode which the law respects as being of equal authority to an oath, they must be verified by the sanction of an oath.

The usual modes of authenticating them are by an exemplification under the great seal of a state, or by a copy proved by oath to be a true copy, or by a certificate of an officer authorized by law, which must itself be duly authenticated; 2 Cra. 238; 2 Wend. 411; 6 *id.* 475; 5 S. & R. 523; 15 *id.* 84; 2 Wash. C. C. 175; 32 Md. 274; 33 Ark. 645; 67 Ill. 545.

Witnesses in Cuba examined under a commission touching the execution of a will testified, in general terms, that it was executed according to the law of that country; and, it not appearing from the testimony that there was any written law upon the subject, the proof was held sufficient; 8 Paige, Ch. 446.

A defendant pleaded infancy in an action upon a contract governed by the law of Jamaica: held that the law was to be proven as a matter of fact, and that the burden lay upon him to show it; 8 Johns. 190.

Proof of such unwritten law is usually made by the testimony of witnesses learned in the law and competent to state it correctly under oath; 2 Cra. 237; 1 Pet. C. C. 225; 2 Wash. C. C. 175; 15 S. & R. 84; 4 Johns. Ch. 520; Cowp. 174; 2 Hagg. Adm. App. 15–144; 100 Mass. 79; 14 How. 400.

In England, certificates of persons in high authority have been allowed as evidence in such cases; 3 Hagg. Eccl. 767, 769.

The public seal of a foreign sovereign or state affixed to a writing purporting to be a written edict, or law, or judgment, is of itself the highest evidence, and no further proof is required of such public seal; 2 Cra. 238; 2 Conn. 85; 1 Wash. C. C. 363; 4 Dall. 413, 416; 6 Wend. 475; 9 Mod. 66; 35 Fed. Rep. 134.

But the seal of a foreign court is not, in general, evidence without further proof, and must, therefore, be established by competent testimony; 3 Johns. 310; 2 H. & J. 193; 4 Cow. 526, n.; 3 East 221.

By the act of May 26, 1790, it is provided "that the acts of the legislatures of the several states shall be authenticated by having the seal of their respective states affixed thereto;" R. S. § 905. See RECORD. It may here be observed that the rules prescribed by acts of congress do not exclude every other mode of authentication, and that the courts may admit proof of the acts of the legislatures of the several states, although not authenticated under the acts of congress. Accordingly, a printed volume, purporting on its face to contain the laws of a sister state, is admissible as *prima facie* evidence to prove the statute law of that state; 4 Cra. 384; 12 S. & R. 203; 6 Binn. 321; 5 Leigh 571; 5 Ind. App. 89; 97 Ala. 417; 70 Hun 145; 53 Mo. App. 617; *contra*, 2 Hawks 441; 2 Harring. 34; 2 Wend. 411; 2 La. Ann. 654; 9 Wis. 328. By act of Aug. 8, 1846, a standard copy of the laws and treaties of the United States is fixed, and made competent evidence in all courts without further proof or authentication. R. S. § 908.

Foreign laws have, as such, no extra-territorial force, but have an effect by comity; Sto. Const. § 1305. In the absence of pleading and proof to the contrary, the laws of another state are presumed to be like those

of the state in which the action is brought; 35 Neb. 375; 37 *id.* 644; 93 Cal. 172; 144 Pa. 205; 76 Hun 200. See 142 U. S. 101; 40 La. Ann. 766; 85 Tenn. 616. While a state court is bound to take judicial cognizance of the principles of common law as it prevails in other states, this is not true of the statutes of such states; 40 La. Ann. 766; 50 Ark. 237; 73 Wis. 332; 86 Tenn. 50; 38 Minn. 421. But see 156 Mass. 65. Until the fact is shown, they will be assumed to be the same as those of the *forum;* 1 Harr. & J. 637. See 5 Cl. & F. 14; 3 H. L. C. 19; LEX FORI.

A person claiming title under a foreign corporation is chargeable with knowledge of its chartered powers and restrictions; 19 N. Y. 207.

The effect of foreign laws when proved is properly referable to the court; the object of the proof of foreign laws is to enable the court to instruct the jury what is, in point of law, the result from foreign laws to be applied to the matters in controversy before them. The court are, therefore, to decide what is the proper evidence of the laws of a foreign country; and when evidence is given of those laws, the court are to judge of their applicability to the matter in issue; Story, Confl. Laws § 638; Greenl. Ev. 486; 2 H. & J. 193; 3 *id.* 234, 242; 4 Conn. 517; Cowp. 174; 20 A. L. Reg. N. S. 379. As to proof of foreign laws generally, see 14 Cent. L. J. 125; 19 *id.* 226, 242; 17 Myers, Fed. Dec. 456; 7 Law Mag. & Rev., 4th 269; 5 Am. L. Reg. 321; 8 So. L. Rev. 150; 13 Alb. L. J. 183; by experts, 18 *id.* 17; by oral proof, 25 L. R. A. 449.

As to criminal cases, see 11 Crim. L. Mag. 776; penal actions, 2 L. R. A. 779; presumptions, 24 Alb. L. J. 204; Lawson, Pres. Ev. 358–80. See CONFLICT OF LAWS; LEX LOCI CONTRACTUS.

FOREIGN MATTER. Matter which must be tried in another county. Blount. Matter done or to be tried in another county. Cowel.

FOREIGN MINISTER. An ambassador or envoy from a foreign country. See AMBASSADOR.

FOREIGN OFFICE. The department of state through which the British sovereign communicates with foreign powers.

FOREIGN PLEA. See PLEA.

FOREIGN PORT. A port or place which is wholly without the United States. 19 Johns. 375; 2 Gall. 4, 7; 1 Brock. 235. A port without the jurisdiction of the court; 1 Dods. 201; 4 C. Rob. 1; 1 W. Rob. 29; 6 Exch. 886; 1 Bl. & H. 66, 71. The ports of the several states of the United States are foreign to each other so far as regards the authority of masters to pledge the credit of their vessels for supplies; 10 Wall. 192; 99 Mass. 388. Practically, the definition has become, for most purposes of maritime law, a port at such distance as to make communication with the owners of the ship *very* inconvenient or almost impossible. See 1 Pars. Mar. Law 142, n.; PORT.

FOREIGN PROCESS ACTS. English statutes providing for the service of process of certain courts in places beyond their territorial jurisdiction.

FOREIGN SERVICE. *Servitium forinsecum.* See FORINSECUS.

FOREIGN STATE. A foreign nation or country. In the United States the states are considered as foreign to each other with respect to those subjects which are controlled by their municipal law. See FOREIGN JUDGMENT; EXTRADITION; FUGITIVE FROM JUSTICE.

FOREIGN TRADE. The exportation and importation of commodities to or from foreign countries, as distinguished in the United States from interstate or coastwise trade. See 1 Holmes 421; FOREIGN COMMERCE.

FOREIGN VESSEL. A vessel owned by residents in or sailing under the flag of a foreign nation. This term does not mean a vessel in which foreigners domiciled in the United States have an interest; 1 Gal. 58.

An omission in the registry and enrolment of an American vessel does not make her foreign, but, at best, only deprives her of her American privileges. Crabbe 271. See FLAG. The patent laws were not intended to apply to and govern a vessel of a foreign, friendly nation; 19 How. 183. See PATENT.

FOREIGN VOYAGE. A voyage whose termination is within a foreign country. 3 Kent 177, n. The length of the voyage has no effect in determining its character, but only the place of destination; 1 Stor. 1; 3 Sumn. 342; 2 Bost. L. Rep. 146; 2 Wall. C. C. 264; 1 Pars. Mar. Law 31.

FOREIGN WATERS. By U. S. Rev. St. § 4370 tugboats towing in whole or in part in foreign waters are exempt from a penalty therein imposed on foreign tugboats for towing vessels of the United States.

Where the treaty between the United States and Great Britain of June 15, 1846, fixed the boundary between the two countries in the strait of San Juan de Fuca by a line following the middle of the strait, but also secured to each nation a right of free navigation over all the waters of the strait, all the waters north of the boundary line were held to be "foreign waters," within the meaning of said section; 7 U. S. App. 188; S. C. 50 Fed. Rep. 437; reversing 48 *id.* 319.

FOREIGNER. One who is not a citizen. Cowel.

In the Old English Law, it seems to have been used of every one not an inhabitant of a city, at least with reference to that city; 1 H. Bla. 213. See, also, Cowel, *Foreigne.*

In the United States, any one who was born in some other country than the United States, and who owes allegiance to some foreign state or country. 1 Pet. 343, 349. An alien. See ALIEN ; CITIZEN.

FOREJUDGE. To deprive a man of the thing in question by sentence of court.

Among foreign writers, says Blount, forejudge is to banish, to expel. In this latter sense the word is also used in English law of an attorney who has been expelled from court for misconduct. Cowel ; Cunningham, Law Dict.

FOREMAN. The presiding member of a grand or petit jury. See GRAND JURY ; JURY.

FORENSIC. See FORENSIS.

FORENSIC MEDICINE. See MEDICAL JURISPRUDENCE.

FORENSIS. Forensic. Belonging to court. *Forensis homo*, a man engaged in causes. A pleader ; an advocate. Vicat, Voc. Jur. ; Calvinus, Lex.

FORESAID. In Scotch Law. Aforesaid. Sometimes *foresaids*, in the plural ; 2 How. St. Tr. 715 ; and also in the form *forsaidis ;* 1 Pitc. Cr. Tr. pt. 1, 107.

FORESCHOKE (Lat. *Derelictum*). Forsaken ; especially with reference to lands abandoned by the tenant. *Termes de la Ley ;* Cowel ; Moz. & W.

FORESHORE. That part of the land immediately in front of the shore ; the part of it which is between high and low water marks, and alternately covered with water and left dry by the flux and reflux of the tides. It is indicated by the middle line between the highest and lowest tides (spring and neap).

FOREST. A certain territory of wooded ground and fruitful pastures, privileged for wild beasts and fowls of forest, chase, and warren, to rest and abide in the safe protection of the prince for his princely delight and pleasure, having a peculiar court and officers. Man. For. Laws, cap. 1, num. 1 ; *Termes de la Ley ;* 1 Bla. Com. 289.

A royal hunting-ground which lost its peculiar character with the extinction of its courts or when the franchise passed into the hands of a subject, Spelman, Gloss. ; Cowel ; Man. For. Laws, cap. 1 ; 2 Bla. Com. 83 ; 1 Steph. Com. 665.

FOREST COURTS. In English Law. Courts instituted for the government of the king's forest in different parts of the kingdom, and for the punishment of all injuries done to the king's deer or *venison*, to the *vert* or greensward, and to the *covert* in which the deer were lodged. They comprised the courts of attachments or woodmote, of regard, of swanimote, and of justice-seat (which several titles see) ; but since the revolution of 1688 these courts, it is said, have gone into absolute desuetude. 3 Steph. Com. 439 ; 2 Bla. Com. 71. But see 8 Q. B. 981, where a mandamus to the verderers of a royal forest was refused, on the ground that the court of the Chief Justice in Eyre had power to compel the verderers to permit the exercise of the rights sought to be enforced.

FOREST LAW. The old law relating to the forest, under which the most horrid tyrannies were exercised, in the confiscation of lands for the royal forests. Hallam's Const. Hist. ch. 8.

The privilege of reserving the forest for the use of the sovereign alone was instituted by the Saxon kings, who, however, occasionally conferred it upon a subject by special license ; and a charter of the forest is said to have been issued by Canute at Winchester in the year 1016, but the authenticity of this document is doubted by Lord Coke ; Inst. iv. 320. There is, however, no doubt that this monarch issued the *Constitutiones de Foresta*, by which document he appointed four chiefs of the forest (*primarii*) who administered justice ; under these were four *mediocres* who undertook the care of the venison and vert ; and who in turn superintended two *tithing-men* whose duties were to care for the vert and venison by night and who, if slaves, became free on being appointed to this office. Complaints against the *mediocres* and the *tithing-men* were heard by the *primarii* and by them disposed of, and complaints against the *primarii* were dealt with by the king himself ; Hallam, Anc. Laws and Inst. sec. 10. If a freeman used violence towards a primarius of the forest, he lost his freedom and his goods ; if a villein, he lost his right hand ; and for a repetition of the offence by either, he forfeited his life. Offences against the vert were dealt with leniently as compared with those against the venison, and there was also a difference in the penalties imposed for killing a royal beast and a beast of the forest ; thus for killing the latter, a freeman was fined, while for the former he lost his liberty. A difference was also recognized according to the rank of the offender, as, if a bishop, abbot, or baron killed a royal beast he was subject to a fine, at the pleasure of the king, while for the same offence a slave lost his life. Certain animals are enumerated in this document for the killing of which no penalty was attached, and the wild boar is especially mentioned as never having been held to be an animal of venison ; *id.* sec. 27.

Under the Confessor these laws were not enforced with the rigidity of Canute, the penalties for trespass were moderate, and the administration of the forest law did not seem to be a subject of complaint from any class of people, but William the Conqueror soon altered this condition of affairs. The hunting of wild beasts of the forest being his chief pastime he immediately claimed absolute and exclusive right to all forests then existing, and allowed no one to enter without his license ; he extended those already existing by laying waste whole towns and villages ; and he devastated vast tracts in Hampshire and Yorkshire to form the new forest, "denuding the land of both God and man to make of it a home for wild beasts." Lappenburg, England, under the Anglo-Norman Kings 214. The Conqueror appointed new judges of the forests to supersede the former judges and keepers ; he created the office of chief justice of the forest and the verderers subordinate to the chief justice, who could convict offenders and send them before the chief justice, but who had no power to punish such offenders. The verderers sat at Swanimote and all within the limits of the forest were bound to attend this court thrice a year, and to serve on inquests and juries when required. The *agistators*, the *forestarii*, and the *regarders* were also appointed by the Normans as officers of the forest, but without judicial powers. The highest penalty enforced for offences in the forest during the reign of William I. seems to have been the loss of a limb or the eyes of the offender, and this was enforced and fines were imposed for the most trivial offences ; Sax. Chronicles ; Comp. fol. 194.

These abuses were continued until about the year 1215, the most extensive afforestations having been made under Richard I. and John. In the 47th and 48th clauses of the great charter certain provisions are found relating to the forest, but although the belief that John issued a charter distinct from these clauses is very ancient, it is erroneous ; the docu-

ment given in Matthieu Paris under the name, being the forest charter of Henry III. with an altered salutation. Stubbs' Charters 338. In the great charter the heavy burden of attending the forest courts is remitted and this provision was conferred in the *charta de foresta*, and thus the exact analogy established by Henry II. between the courts of the shire and those of the forest was abolished. The *charta de foresta* disafforested the lands appropriated by Richard and John and all those seized by Henry II. which had operated to the injury of the land-owners and outside of the royal demesne; it greatly mitigated the punishment for destroying game, and provided that for that offence no man should lose life or limb, and that his punishment shall be limited to a fine or imprisonment for a year and a day; the following curious provision occurs in cap. ii.: "Whatsoever archbishop, bishop, earl, or baron coming to us at our commandment, passing by our forest, it shall be lawful for him to take and kill one or two of our deer by view of our forester, if he be present; or else he shall cause him to blow a horn for him, that he seem not to steal our deer; and likewise they shall do returning from us," and this clause is still unrepealed. By reason of "the cruel and insupportable hardships which those forest laws created for the subject," says Blackstone, "we find the immunities of *charta de foresta* as warmly contended for, and extorted from the king with as much difficulty, as those of Magna Charta itself"; 2 Com. 416.

After this charter was issued, the forest laws not being enforced fell gradually into desuetude, until Charles I. attempted to revive them in order to replenish his exchequer, and the forest court of justice seat fined certain persons heavily for alleged encroachments on the ancient boundaries of the forest, although the right to such land was fortified by several centuries of possession. This was one of the first grievances on which the long parliament acted, and since the passing of the act "certainty of forests"; 16 Car. I. c. 16, where it was declared that all land should be held disafforested where no justice seat, swanimote, or court of attachment had been holden for sixty years next before the first year of the reign of Charles I., the laws of the forest have practically ceased, and by acts 14 and 15 Vict. c. 43, 16 and 17 Vict. c. 42, and 19 and 20 Vict. c. 32, many of the royal forests have been disafforested on the plea of public necessity. See Hallam, Hist. Eng. Const.; Stubbs' Charters; Inderwick, King's Peace; CHARTA DE FORESTA.

FORESTAGIUM. A tribute payable to the king's foresters. Cowel.

FORESTALL. To intercept or obstruct a passenger on the king's highway. Cowel; Blount. To beset the way of a tenant so as to prevent his coming on the premises. 3 Bla. Com. 170. To intercept a deer on his way to the forest before he can regain it. Cowel. See FORESTALLING THE MARKET.

FORESTALLER. One who commits the offence of forestalling. Used, also, to denote the crime itself; namely, the obstruction of the highway, or hindering a tenant from coming to his land. 3 Bla. Com. 170. Stopping a deer before he regains the forest. Cowel.

FORESTALLING THE MARKET. Buying victuals on their way to the market before they reach it, with the intent to sell again at a higher price. Cowel; Blount; 4 Bla. Com. 158. Every device or practice, by act, conspiracy, words, or news, to enhance the price of victuals or other provisions; Co. 3d Inst. 196; 1 Russ. Cri. 169; 4 Bla. Com. 158. See 13 Viner, Abr. 430; 1 East 132; 3 M. & S. 67. At common law, as well as by stat. 5 & 6 Edw. VI. c. 14, this was an indictable offence against public trade, but since the stat. 7 & 8 Vict. c. 24, the practice of forestalling is no longer illegal. See ENGROSS.

In the United States forestalling the market takes the form of "corners" or of "trusts," which are attempts by one person or a conspiracy or combination of persons to monopolize an article of trade or commerce, or to control or regulate, or to restrict its manufacture or production in such a manner as to enhance the price; 78 Ind. 487; 68 N. Y. 558; A. & E. Encyc. See TRUST.

FORESTARIUS. A forester. An officer who takes care of the woods and forests. *De forestario apponendo*, a writ which lay to appoint a forester to prevent further commission of waste when a tenant in dower had committed waste. Bracton 316; Du Cange.

FORESTER. A sworn officer of the *forest*, appointed by the king's letters patent to walk the forest, watching both the vert and the venison, attaching and presenting all trespassers against them within their own bailiwick or walk. These letters patent were generally granted during good behavior; but sometimes they held the office in fee. Blount; Cowel.

FORETHOUGHT FELONY. In Scotch Law. Murder committed in consequence of a previous design. Erskine, b. iv. tit. 4, c. 50; Bell, Dict.

FORFANG. A taking beforehand. A taking provisions from any one in fairs or markets before the king's purveyors are served with necessaries for his majesty. Blount; Cowel.

FORFEIT. To lose as the penalty of some misdeed or negligence. The word includes not merely the idea of losing, but also of having the property transferred to another without the consent of the owner and wrongdoer.

Lost by omission or negligence or misconduct. 48 Minn. 13.

This is the essential meaning of the word, whether it be that an offender is to forfeit a sum of money, or an estate is to be forfeited to a former owner for a breach of condition, or to the king for some crime. Cowel says that *forfeiture* is general and *confiscation* a particular forfeiture to the king's exchequer. The modern distinction, however, *seems* to refer rather to a difference between forfeiture as relating to acts of the owner and confiscation as relating to acts of the government; 1 Stor. 134; 13 Pet. 157; 11 Johns. 293. Confiscation is more generally used of an appropriation of an enemy's property; forfeiture, or the taking possession of property to which the owner, who may be a citizen, has lost title through violation of laws. See 1 Kent 67; 1 Stor. 134. A provision in an agreement, that for its breach the party shall "forfeit" a fixed sum, implies a penalty, not liquidated damages; 15 Abb. Pr. 273; 17 Barb. 260.

FORFEIT AND PAY. An agreement in a contract to forfeit and pay a specified sum in default of performance, is an agreement for liquidated damages; 57 Ark. 168; even where under the contract a bond is given as an earnest of good faith; *id.*

FORFEITABLE. Subject to forfeiture; as a franchise for misuser or non-user, or lands or property for crime.

FORFEITURE. A punishment annexed by law to some illegal act or negli-

gence in the owner of lands, tenements, or hereditaments, whereby he loses all his interest therein, and they become vested in the party injured as a recompense for the wrong which he alone, or the public together with himself, hath sustained. 2 Bla. Com. 267. A sum of money to be paid by way of penalty for a crime. 21 Ala. N. S. 672; 10 Gratt. 700.

Forfeiture by alienation. By the English law, estates less than a fee may be forfeited to the party entitled to the residuary interest by a breach of duty in the owner of the particular estate; as if a tenant for his own life aliens by feoffments or fine for the life of another, or in tail, or in fee, or by recovery; there being estates, which either must or may last longer than his own, the creating them is not only beyond his power, but is a forfeiture of his own particular estate; 2 Bla. Com. 274; 1 Co. 14 *b*.

In this country such forfeitures are almost unknown, and the more just principle prevails that the conveyance by the tenant operates only on the interest which he possessed, and does not affect the remainderman or reversioner; 4 Kent 81, 424; 5 Ohio 30; 1 Pick. 318; 1 Rice 459; 2 Rawle 168; 1 Wash. Va. 381; 11 Conn. 553; 22 N. H. 500; 21 Me. 372. See, also, Stearn, Real Act. 11; 2 Sharsw. Bla. Com. 121, n.; Wms. R. P. 25; 5 Dane, Abr. 6; 1 Washb. R. P. 92, 197.

Forfeiture for crimes. Under the constitution and laws of the United States, Const. art. 3, § 3; Act of April 30, 1790, § 24, forfeiture for crimes is nearly abolished. And when it occurs the state recovers only the title which the owner had; 4 Mass. 174. See, also, Dalr. Feuds, p. 145; Fost. Cr. Law 95; 1 Washb R. P. 92; Story, Const. 1296; 100 N. C. 240.

Forfeiture for treason. The constitution of the United States, art. 3, § 2, provides that no attainder of treason shall work forfeiture except during the life of the person attainted. The Confiscation Act provided that only the life estate of the convicted person can be condemned and sold; 9 Wall. 350; 18 *id.* 156. It was merely an exercise of the war power; 11 Wall. 304; and did not apply to the confiscation of enemies' property; 1 Woods 221.

Forfeiture by non-performance of conditions. An estate may be forfeited by a breach or non-performance of a condition annexed to the estate, either expressed in the deed at its original creation, or implied by law, from a principle of natural reason; 2 Bla. Com. 281; Littleton § 361; 1 Prest. Est. 478; Tud. Lead. Cas. 794; 5 Pick. 528; 2 N. H. 120; 5 S. & R. 375; 32 Me. 394; 18 Conn. 535; 12 S. & R. 190; 3 Wash. St. 424; 1 Tex. Civ. App. 245. Such forfeiture may be waived by acts of the person entitled to take advantage of the breach; 1 Conn. 79; 1 Johns. Cas. 126; 1 Washb. R. P. 454; 36 W. Va. 639. In order to authorize a claim to forfeiture of valuable property on account of violation of a condition, proceedings to enforce must be had at once; 17 Or. 140.

Equity will not lend its aid to enforce a forfeiture because of a breach of condition subsequent in a deed, although the aid is sought upon the special ground of removing a cloud on the title; 127 Ill. 101; nor will it concern itself to make up the loss of interest to one who refused the principal in the hope that he could enforce, upon purely technical grounds, a forfeiture of lands sold and all payments made thereon, under the terms of a harsh and unconscionable contract; 74 Fed. Rep. 52.

Forfeiture by waste. Waste is a cause of forfeiture. 2 Bla. Com. 283; Co. 2d Inst. 299; 1 Washb. R. P. 118.

Forfeiture of property and rights cannot be adjudged by legislative acts, and confiscation without a judicial hearing after due notice would be void as not being due process of law. Nor can a party by his misconduct so forfeit a right that it may be taken from him without judicial proceedings, in which the forfeiture shall be declared in due form; Cooley, Const. Law 450; 38 Miss. 434; 24 Ark. 161; 27 *id.* 26. Where no express power of removal is conferred upon the executive, he cannot declare an office forfeited for misbehavior; the forfeit must be declared by judicial proceedings; 8 B. Monr. 648; 36 N. J. L. 101.

Forfeiture of wages. A provision in a contract for service to the effect that the wages of an employe shall be forfeited for neglect or misconduct which brings damage to the company, should be strictly construed as against the company; 35 Ill. App. 481. Where, after being discharged, a railroad employe sues for wages, claiming to have been hired by the month, and this being admitted by the company, which sets up the defence that he was dismissed for cause, it is error to instruct the jury that they may find for the plaintiff if they believe from the evidence that he was hired by the month; 16 Mo. App. 522, reconciled in 20 Mo. App. 564. See WAGES; MASTER AND SERVANT.

Forfeiture of vessel. Rev. Stat. U. S. § 5283, provides for the forfeiture of every vessel which, within the limits of the United States, is fitted out and armed, or attempted to be so, to be employed in the service of any foreign prince, state, or people, to commit hostilities against the subjects, citizens, or property of a prince, state, or people with which the United States are at peace. *Held*, that under this section no forfeiture can be claimed of a vessel which is only employed to transport arms and munitions of war to a vessel fitting out to pursue the forbidden warlike enterprises; 47 Fed. Rep. 84; 48 *id.* 99; 49 *id.* 646.

Forfeiture of charter. A private corporation may be dissolved by a forfeiture of its charter for the non-user or misuser of its franchises; 9 Cra. 43; 24 Pick. 52; 137 N. Y. 606. Accidental negligence or abuse of power will not warrant a forfeiture; there must be some plain abuse of its powers or neglect to exercise its franchises, and the acts of misuse or non-use must be wil-

ful and repeated; 51 Miss. 602; 14 Am. L. Reg. 577; 17 S. W. Rep. (Tenn.) 128. Thus long-continued neglect on the part of a turnpike company to repair its road is cause of forfeiture; 8 R. I. 182, 521. So a bridge company is subject to forfeiture of its charter if it neglect for a long time to rebuild a bridge which has been carried away by a flood; 23 Wend. 254. Where a franchise has been granted by the legislature to construct a street railway within a certain time, with a condition that it will be forfeited if the provisions of the act are not complied with, a failure to lay the track within the time limited works a forfeiture of the right, without a suit by the state, and the franchise may be conferred upon any other person or persons; 45 Cal. 365. Where the legislature forbids the owning of lands by a corporation the state may, on a violation of the prohibition, declare a forfeiture of the franchise; 132 Pa. 591. A forfeiture must be judicially declared; 7 Cold. 420; 49 How. Pr. 20; 72 N. Y. 245; 130 *id.* 232. A forfeiture can be enforced by *scire facias* or a *quo warranto* only at the suit of the government, which created the corporation; 46 Md. 1; 26 Pa. 31; 46 N. J. Eq. 118. (As to the distinction between these proceedings, see 3 Term 199.) But not at the suit of an individual; 7 Pick. 344; 24 How. 278. The state may waive a cause of forfeiture; 9 Wend. 351; 73 Tex. 435. Equity has no jurisdiction in the matter; Moraw. Priv. Corp. 10, 40; 1 N. J. Eq. 369; 8 Humph. 253.

FORFEITURE OF A BOND. A failure to perform the condition on which the obligee was to be excused from the penalty in the bond. Courts of equity and of law in modern practice will relieve from the forfeiture of a bond; and, upon proper cause shown, criminal courts will, in general, relieve from the forfeiture of a recognizance to appear. See 3 Yeates 93; 2 Wash. C. C. 442; 2 Blackf. 104, 200; 1 Ill. 257.

FORFEITURE OF MARRIAGE. A penalty incurred by a ward in chivalry when he or she married contrary to the wishes of his or her guardian in chivalry.

The latter, who was the ward's lord, had an interest in controlling the marriage of his female wards, and he could exact a price for his consent; and at length it became customary to sell the marriage of wards of both sexes; 2 Bla. Com. 70.

When a male ward refused an equal match provided by his guardian, he was obliged, on coming of age, to pay him the value of the marriage,—that is, as much as he had been *bona fide* offered for it, or, if the guardian chose, as much as a jury would assess, taking into consideration all the real and personal property of the ward; and the guardian could claim this value although he might have made no tender of the marriage; Co. Litt. 82 *a*; Co. 2d Inst. 92; 5 Co. 126 *b*; 6 *id.* 70 *b*.

When a male ward between the age of fourteen and twenty-one refused to accept an offer of an equal match (one without disparagement), and during that period formed an alliance elsewhere without his guardian's permission, he incurred forfeiture of marriage,—that is, he became liable to pay double the value of the marriage. Co. Litt. 78 *b*, 82 *b*.

FORFEITURE OF SILK. In English Law. When the importation of silk was prohibited it was customary at each term of the Exchequer to proclaim a forfeiture of such as was suffered to lie in the docks.

FORFEITURES ABOLITION ACT. The same as the Felony Act of 1870, abolishing forfeitures for felony in England.

FORGAVEL. A small rent reserved in money; a quit-rent. Sometimes written *forgabulum*.

FORGE. To fabricate by false imitation; especially, in law, to make a false instrument in similitude of an instrument by which one person could be obligated to another for the purpose of fraud and deceit. 92 Cal. 563. See 42 Me. 392.

FORGERY. The falsely making or materially altering, with intent to defraud, any writing which, if genuine, might apparently be of legal efficacy or the foundation of a legal liability. 2 Bish. Cr. Law § 523; 29 Fla. 408.

The fraudulent making and alteration of a writing to the prejudice of another man's right. 4 Bla. Com. 247. The essence of forgery consists in making an instrument appear to be that which it is not; L. R. 1 C. C. R. 200.

Bishop, 2 Cr. Law § 523, n., has collected nine definitions of forgery, and justly remarks that the books abound in definitions. Coke says the term is "taken metaphorically from the smith, who beateth upon his anvil and forgeth what fashion and shape he will." Co. 3d Inst. 169.

A person may commit forgery by fraudulently making, over his own signature, a paper writing which, if genuine, would possess legal efficacy, and might operate to the prejudice of another's rights; 85 Tenn. 232. One may have authority to sign the name of another to an instrument for the payment of money in a stated amount, or for a legal purpose, and yet commit a forgery by signing for a larger amount, or for an illegal purpose with intent to defraud; 51 Ark. 88.

A clerk in the telegraph office who sent to a bookmaker a telegram offering to bet on a certain horse, which purported to be sent before the race, and to be signed by a person who had authorized him to telegraph bets in his name, but which was in fact sent after the clerk knew that the horse had won the race, was held guilty of forgery under a statute against procuring money by virtue of any forged or altered instrument. Lord Russell of Killowen, C. J., and Vaughan Williams, J., doubted as to the statute, but not that it was forgery at common law; [1896] 1 Q. B. 309.

The making of a whole written instrument in the name of another with a fraudulent

intent is undoubtedly a sufficient making; although otherwise where one executes a promissory note as *agent* for a principal from whom he has no authority; 15 Hun 155; but a fraudulent insertion, alteration, or erasure, even of a letter, in any material part of the instrument, whereby a new operation is given to it, will amount to a forgery; 1 Stra. 18; 5 Strobh. 581; L. R. 1 C. C. R. 200; and this, although it be afterwards executed by a person ignorant of the deceit; 2 East, Pl. Cr. 855.

The fraudulent application of a true signature to a false instrument for which it was not intended, or *vice versa*, will also be a forgery; 11 Gratt. 822; 1 Add. 44. For example, it is forgery in an individual who is requested to draw a will for a sick person in a particular way, instead of doing so, to insert legacies of his own head, and then procure the signature of such sick person to be affixed to the paper without revealing to him the legacies thus fraudulently inserted; Noy 101; F. Moore 759, 760; Co. 3d Inst. 170; 1 Hawk. Pl. Cr. c. 70, s. 2; 2 Russ. Cr. 318; Bacon, Abr. *Forgery* (A); but one was not held to be guilty of forgery, who in writing a promissory note for an illiterate person to execute, inserts therein an amount larger than directed; 89 Ga. 788.

It has even been intimated by Lord Ellenborough that a party who makes a copy of a receipt and adds to such copy material words not in the original, and then offers it in evidence on the ground that the original has been lost, may be prosecuted for forgery; 5 Esp. 100.

It is a sufficient making where, in the writing, the party assumes the name and character of a person in existence; 2 Russ. Cri. 327. But the adoption of a false *description* and *addition* where a false name is not assumed and there is no person answering the description, is not a forgery; 1 Russ. & R. 405.

Making an instrument in a fictitious name, or the name of a non-existing person, is as much a forgery as making it in the name of an existing person; 2 Russ. Cri. 328; 32 Tex. Cr. R. 74; 90 Ga. 347; and although a man may make the instrument in his own name, if he represent it as the instrument of another of the same name, when in fact there is no such person, it will be a forgery in the name of a non-existing person; 2 Leach 775; 2 East, Pl. Cr. 963; 7 Pet. 132; 5 City H. Rec. 87. See 52 Iowa 68. But the correctness of this decision has been doubted; Rosc. Cr. Ev. 384. One who, with intent to forge the check of "R. & M.," signs the name "A. E. R. & Co." thereto, believing it to be the true name of the firm, is not guilty of forgery; 90 Cal. 586.

Though, in general, a party cannot be guilty of forgery by a mere *non-feasance*, yet if in drawing a will he should fraudulently omit a legacy which he had been directed to insert, and by the omission of such bequest it would cause a material alteration in the limitation of a bequest to another, as, where the omission of a devise of an estate for life to one causes a devise of the same lands to another to pass a present estate which would otherwise have passed a remainder only, it would be a forgery; 1 Hawk. Pl. Cr. c. 70, s. 6; 2 East, Pl. Cr. 856; 2 Russ. Cr. 320.

It may be observed that the offence of forgery may be complete without a publication of the forged instrument; 2 East, Pl. Cr. 855; 3 Chitty, Cr. Law 1038.

With regard to the thing forged, it may be observed that it has been holden to be forgery at common law fraudulently to falsify or falsely make records and other matters of a public nature; 1 Rolle, Abr. 65, 68; a parish register; 1 Hawk. Pl. Cr. c. 70; a letter in the name of a magistrate, or of the governor of a gaol directing the discharge of a prisoner; 6 C. & P. 129; Mood. 379; the making a false municipal certificate with intent to defraud is forgery, notwithstanding the city has not power to issue such certificates; 68 Mo. 150; the alteration of a document to prevent the discovery of an embezzlement; 11 Crim. L. Mag. 47.

With regard to private writings, forgery may be committed of any writing which, if genuine, would operate as the foundation of another man's liability or the evidence of his right; 3 Greenl. Ev. § 103; 2 Mass. 397; 12 S. & R. 237; 8 Yerg. 150; as, a check; 5 Leigh 707; an assignment of a legal claim; an indorsement of a promissory note; 11 Gratt. 822; 3 Ohio 229; writing the name of the payee falsely and fraudulently on the back of a treasury warrant payable to order; 37 Fed. Rep. 108; a receipt or acquittance; 15 Mass. 526; an acceptance of a bill of exchange, or an order for the delivery of goods; 8 C. & P. 629; 3 Cush. 150; 26 Tex. App. 176; 11 Crim. L. Mag. 245; 31 Tex. Cr. R. 587; or an order for money; 79 Ga. 344; a deposition to be used in court; 50 Me. 409; a private act of parliament; 4 How. St. Tr. 951; a copy of any instrument to be used in evidence in the place of a real or supposed original; 8 Yerg. 150; false entries in the books of a mercantile house, but not necessarily so in every case; 32 Penn. 529; 46 N. H. 266; a letter of recommendation of a person as a man of property and pecuniary responsibility; 2 Greenl. Ev. § 365; a false testimonial to character; Templ. & M. 207; 1 Den. Cr. Cas. 492; Dearsl. 285; a railway-pass; 2 C. & K. 604; a railroad-ticket; 3 Gray 441; or fraudulently to testify or falsely to make a deed or will; 1 Hawk. Pl. Cr. b. 1, c. 70, § 10; a certified bill of costs; 85 Tenn. 232; or of a contract which, if genuine, would be void as against public policy; 100 Cal. 664. Forgery may be of a printed or engraved as well as of a written instrument; 3 Gray 441; 9 Pick. 312; 127 U. S. 457; but falsely to subscribe a person's name to a recommendation of a medicine is not forgery; 2 Pear. 351; nor to alter a lease by interlineations in order to conform it to the purpose of parties; 89 Pa. 432; nor is the private memorandum-book

of a public officer, not required to be kept by law, the subject of forgery; 3 Col. 571; nor is the forging of his docket entries by a justice of the peace indictable, under a statute making forging of the record of a court of record an indictable offence; 1 Houst. Cr. Cas. 110; nor the changing the date of tax receipts which still show on their face that they were given for the taxes of the year previous; 66 Miss. 14; a forgery must be of some document or writing; therefore, the printing an artist's name in the corner of a picture, in order falsely to pass it off as an original picture by that artist, is not a forgery; 1 Dearsl. & B. 460; Clark, Cr. L. 295.

The intent must be to defraud another; 83 Ia. 128; 83 Ala. 46; but it is not requisite that any one should have been injured; it is sufficient that the instrument forged might have proved prejudicial; 3 Gill & J. 220; 4 Wash. C. C. 726; 31 Tex. Cr. R. 51; it has been holden that the jury ought to infer an intent to defraud the person who would have to pay the instrument, if it were genuine, although from the manner of executing the forgery, or from the person's ordinary caution, it would not be likely to impose upon him; and although the object was general to defraud whoever might take the instrument, and the intention of the defrauding in particular the person who would have to pay the instrument, if genuine, did not enter into the contemplation of the prisoner; Russ. & R. 291; 101 N. C. 770; 11 Crim. L. Mag. 231; 44 La. Ann. 962. See Russ. Cri. b. 4, c. 32, s. 3; 2 East, Pl. Cr. 853; 1 Leach 367; Rosc. Cr. Ev. 400; Clark, Cr. L. 300.

Most, and perhaps all, of the states in the Union have passed laws making certain acts to be forgery with the result, upon the whole, of enlarging the meaning of the term, and the national legislature has also enacted several on this subject, which are here referred to; but these statutes do not take away the character of the offence as a misdemeanor at common law, but only provide additional punishment in the cases particularly enumerated in the statutes; 3 Cush. 150; 3 Gray 441. It has been held that the crime of uttering forged commercial paper is included in the common-law definition of the word "forgery" as used in a treaty, and that a prisoner charged with it should be surrendered, although under the law of the other treaty power that crime is known as "fraud" by means of forgery, and "forgery" is only falsification of public documents; 55 Fed. Rep. 376.

The act of offering for sale and selling a forged instrument is a sufficient representation as to its genuineness; 73 Ia. 128.

See, generally, Hawk. Pl. Cr. b. 1, cc. 51, 70; 3 Chitty, Cr. Law 1022; 2 Russ. Cr. b. 4, c. 32; 2 Bish. Cr. Law c. 22; 2 Bish. Cr. Proc. § 398; Rosc. Cr. Ev.; Starkie, Ev.; 1 Whart. Cr. L. c. 9; COUNTERFEIT.

FORGERY ACT, 1870. The stat. 33 & 34 Vict. c. 58, was passed for the punishment of forgers of stock certificates, and for extending to Scotland certain provisions of the Forgery Act of 1861; Moz. & W.

FORHERDA. In Old English Law. A headland, or foreland. Cowel.

FORI DISPUTATIONES. In Civil Law. Arguments in court. Disputations or arguments before a court. Eminent citizens and statesmen often debated in the forum, and their answers to questions put were gradually adopted by the courts and incorporated into the body of the Roman law under this name. 1 Kent 530; Vicat, Voc. Jur. verb. *Disputatio.*

FORINSECUS (Lat.), **FORINSIC.** Outward; on the outside; without; foreign; belonging to another manor. *Silio forinsecus*, the outward ridge or furrow. *Servitium forinsecum*, the payment of aid, scutage, and other *extraordinary* military services. *Forinsecum manerium*, the manor, or that part of it which lies outside the bars or town and is not included within the liberties of it. Cowel; Blount; Cunningham, Law Dict.; Jacob, *Foreign Service*; 1 Reeve, Hist. Eng. Law 273.

FORIS (Lat.). Out at the doors, out of door; abroad; without. Harp. Lat. Dict.

FORISBANITUS. Banished. Mat. Par. 1245.

FORISFACERE (Lat.). To forfeit. To lose on account of crime. It may be applied not only to estates, but to a variety of other things, in precisely the popular sense of the word forfeit. Spelman, Gloss.; Du Cange.

To confiscate. Du Cange; Spelman, Gloss.

To commit an offence; to do a wrong. To do something beyond or outside of (*foris*) what is right (*extra rationem*). Du Cange. To do a thing against or without law. Co. Litt. 59 *a*.

To disclaim. Du Cange.

FORISFACTUM (Lat.). Forfeited. *Bona forisfacta*, forfeited goods; 1 Bla. Com. 299. A crime. Du Cange; Spelman, Gloss.

FORISFACTURA (Lat.). A crime or offence through which property is forfeited. Leg. Edw. Conf. c. 32.

A fine or punishment in money.

Forfeiture. The loss of property or life in consequence of crime. Spelman, Gloss.

Forisfactura plena. A forfeiture of all a man's property. Things which were forfeited. Du Cange; Spelman, Gloss.

FORISFACTUS (Lat.). A criminal. One who has forfeited his life by commission of a capital offence. Spelman, Gloss; Leg. Rep. c. 77; Du Cange. *Si quispiam forisfactus poposcerit regis misericordiam, etc.* (if any criminal shall have asked pardon of the king, etc.). Leg. Edw. Conf. c. 18.

Forisfactus servus. A slave who has been a free man but has forfeited his freedom by crime. Leg. Athelstan, c. 3; Du Cange.

FORISFAMILIATED, FORISFAMILIATUS. In Old English Law. Por-

tioned off. A son was *forisfamiliated* when he had a portion of his father's estate assigned to him during his father's life, in lieu of his share of the inheritance, when it was done at his request and he assented to the assignment. The word etymologically denotes *put out of the family* (*foris familiam ponere*, from which is *forisfamiliare*; Glanv. l. 7, c. 3) mancipated. 1 Reeve, Hist. Eng. L. 110; Bract, fol. 64.

FORIS FAMILIATION. The separation of a child from the father's family. Bell; Toml.

One who is no longer an heir of the parent was termed *forisfamiliatus*. Du Cange; Spelman, Gloss; Cowel. Similar in some degree to the modern practice of advancement.

FORISJUDICATIO (Lat.). **In Old English Law.** Forejudger. A forejudgment. A judgment of court whereby a man is put out of possession of a thing. Co. Litt. 100 *b*; Cunningham, Law Dict.

FORISJUDICATUS (Lat.). Forejudged; sent from court; banished. Deprived of a thing by judgment of court. Bracton, 250 *b*; Co. Litt. 100 *b*; Du Cange.

FORISJURARE (Lat.). To forswear; to abjure; to abandon. *Forisjurare parentilam.* To remove oneself from parental authority. The person who did this lost his rights as heir. Du Cange; Leg. Hen. I. c. 88.

Provinciam forisjurare. To forswear the country. Spelman, Gloss.; Leg. Edw. Conf. c. 6.

FORJUDGE. See FOREJUDGE.

FORJURER (L. Fr.). **In Old English Law.** To abjure; to forswear. *Forjurer royalme*, to abjure the realm. Britt. cc. 1, 16.

FORLER-LAND. Land in the diocese of Hereford, which had a peculiar custom attached to it, but which has been long since disused, although the name is retained. Butl. Surv. 56.

"Some of the peculiar customs of Hereford are recently published, as that "the reeve of the borough may have been directly accountable to the king," while "in most cases the king's farmer was the sheriff of the shire." Maitl. Domesd. 209. So also, "at Hereford the reeve's consent was necessary when a burgage was to be sold, and he took a third of the price. When a burgess died the king got his horse and arms (these Hereford burgesses were fighting men); if he had no horse, then ten shillings "or his land with the houses." Any one who was too poor to do his service might abandon his tenement to the reeve without having to pay for it. Such an entry as this seems to tell us that the services were no trivial return for the tenements;" *id.* 199.

FORM. In Practice. The model of an instrument or legal proceeding, containing the substance and the principal terms, to be used in accordance with the laws.

The legal order or method of legal proceedings or construction of legal instruments.

Form is usually put in contradistinction to substance. For example, by the operation of the statute of 27 Eliz. c. 5, s. 1, all merely formal defects in pleading, except in dilatory pleas, are aided on general demurrer. The difference between matter of form and matter of substance, in general, under this statute, as laid down by Lord Hobart, C. J., is that "*that* without which *the right* doth sufficiently appear to the court is *form*;" but that any defect "by reason whereof the *right appears not*" is a defect in substance; Hob. 233. A distinction somewhat more definite is that if the *matter* pleaded be in itself insufficient, without reference to the manner of pleading it, the defect is substantial; but that if the fault is in the manner of alleging it, the defect is formal; Dougl. 683.

For example, the omission of a consideration in a declaration in assumpsit, or of the performance of a condition precedent, when such condition exists, of a conversion of property of the plaintiff, in trover, of knowledge in the defendant, in an action for mischief done by his dog, of malice, in an action for malicious prosecution, and the like, are all defects in *substance*. On the other hand, duplicity, a negative pregnant, argumentative pleading, a special plea, amounting to the general issue, omission of a day, when time is immaterial, of a place, in transitory actions, and the like, are only faults in form; Bacon, Abr. *Pleas*, etc. (N 5, 6); Comyns, Dig. *Pleader* (Q 7); 10 Co. 95 *a*; 2 Stra. 694; Gould, Pl. c. 9, §§ 17, 18; 1 Bla. Com. 142.

At the same time that fastidious objections against trifling errors of form, arising from mere clerical mistakes, are not encouraged or sanctioned by the courts, it has been justly observed that "infinite mischief has been produced by the facility of the courts in overlooking matters of form: it encourages carelessness, and places ignorance too much upon a footing with knowledge amongst those who practise the drawing of pleadings;" 1 B. & P. 59; 2 Binn. 434.

FORMA. Form; the prescribed or established form or method of legal proceedings; applied to obsolete actions "which are frequently mere establishments, *Forma et figura judicii*," the form and shape of judicial action. 3 Bla. Com. 271.

FORMA PAUPERIS. See IN FORMA PAUPERIS.

FORMALITIES. Customary behavior, dress, or ceremony; ceremonial. Cent. Dict. **In England.** Robes worn by the magistrates of a city or corporation, etc., on solemn occasions. Encyc. Lond.

FORMALITY. The conditions which must be observed in making contracts, and the words which the law gives to be used in order to render them valid; it also signifies the conditions which the law requires to make regular proceedings.

FORMATA. Canonical letters. Spelman.

FORMATA BREVIA. See BREVIA FORMATA.

FORMED ACTION. An action for which a form of words is provided which must be exactly followed. 10 Mod. 140.

FORMEDON. An ancient writ provided by stat. Westm. 2 (13 Edw. I.) c. 1, for him who hath right to lands or tenements by virtue of a gift in tail. Stearn, Real Act. 322; Andr. Steph. Pl. 66.

It is a writ in the nature of a writ of right, and is the highest remedy which a tenant in tail can have. Co. Litt. 316.

This writ lay for those interested in an estate-tail who were liable to be defeated of their right by a discontinuance of the estate-tail, who were not entitled to a writ of right

absolute, since none but those who claimed in fee-simple were entitled to this; Fitzh. N. B. 255. It is called *formedon* because the plaintiff in it claimed *per formam doni*.

It is of three sorts: in the remainder; in the reverter; in the descender; 2 Prest. Abstr. 343.

The writ was abolished in England by stat. 3 & 4 Will. IV. c. 27.

FORMEDON IN THE DESCENDER. A writ of formedon which lies where a gift is made in tail and the tenant in tail aliens the lands or is disseised of them and dies, for the heir in tail to recover them, against the actual tenant of the freehold; Fitzh. N. B. 211; Littleton § 595.

If the demandant claims the inheritance as an estate-tail which ought to come to him by descent, from some ancestor to whom it was first given, his remedy is by a writ of *formedon in the descender;* Stearn, Real Act. 322.

It must have been brought within twenty years from the death of the ancestor who was disseised; 21 Jac. I. c. 16; 3 Brod. & B. 217; 6 East 83; 4 Term 300; 2 Sharsw. Bla. Com. 193, n.

FORMEDON IN THE REMAINDER. A writ of formedon which lies where lands are given to one for life or in tail with remainder to another in fee or in tail, and he who had the particular estate dies without issue, and a stranger intrudes upon him in remainder and keeps him out of possession. Fitzh. N. B. 211; Stearn, Real Act. 323; Littleton § 597; 3 Bla. Com. 293.

FORMEDON IN THE REVERTER. A writ of formedon which lies where there is a gift in tail, and afterwards, by the death of the donee or his heirs without issue of his body, the reversion falls in upon the donor, his heirs or assigns.

In this case the demandant must suggest the gift, his own right as derived from the donor, and the failure of heirs of the donee; 3 Bla. Com. 293; Stearn, Real Act. 323; Fitzh. N. B. 212; Littleton § 597.

FORMELLA. A certain weight of more than seventy pounds, mentioned in stat. 51 Hen. III. Cowel.

FORMER RECOVERY. A recovery in a former action. The term former adjudication is sometimes, though infrequently, used.

It is a general rule that in a real or personal action a judgment unreversed, whether it be by confession, verdict, or demurrer, is a perpetual bar, and may be pleaded to any new action of the same or a like nature, for the same cause; Bacon, Abr. *Pleas* (I 12, n. 2); 6 Co. 7; Hob. 4, 5; Ventr. 70.

There are two exceptions to this general rule. *First*, in the case of mutual dealings between the parties, when the defendant omits to set off his counter-demand, he may recover in a cross action. *Second*, when the defendant in ejectment neglects to bring forward his title, he may avail himself of a new suit; 1 Johns. Cas. 492, 502, 510. It is evident that in these cases the cause of the second action is not the same as that of the first, and, therefore, a former recovery cannot be pleaded. In real actions, one is not a bar to an action of a higher nature; 6 Co. 7. See 12 Mass. 337; RES JUDICATA.

FORMIDO PERICULI (Lat.). Fear of danger. 1 Kent, Com. 23.

FORMS OF ACTION. This term comprehends the various classes of personal action at common law, viz.: trespass, case, trover, detinue, replevin, covenant, debt, assumpsit, *scire facias*, and revivor, as well as the nearly obsolete actions of account and annuity, and the modern action of mandamus. They are now abolished in England by the Judicature Acts of 1873 and 1875, and in many of the states of the United States, where a uniform course of proceeding under codes of procedure has taken their place. But the principles regulating the distinctions between the common-law actions are still found applicable even where the technical forms are abolished.

FORMULA. In common-law practice, a set form of words used in judicial proceedings. In the civil law, an action. Calvin; Black.

FORMULÆ. In Roman Law. Directions sent by the magistrate to the judge for the dispositions of cases, with respect to which the *legis actiones* (established actions, or, more accurately according to English legal idiom, forms of action) were inadequate. Sand. Just. Introd. lxviii.

The introduction of the *formulæ* marked a distinct change in the Roman system of civil process, and they were in turn succeeded by an equally radical change. These periods have been designated as three great epochs. First, was the system of the *legis actiones*, defined as "certain hard, sharply defined forms which a rude civilization prescribed for all proceedings." These, as civilization advanced, were necessarily replaced by more convenient forms of action, and were finally practically suppressed. The new system of *formulæ* was a very flexible form of organizing the proceedings adopted by the prætors, by which they were "enabled to give a means enforcing every right which the more enlarged views of an advancing civilization pronounced to be founded on equity." The prætors (in the provinces, præfects) sat as magistrates. From them the directions were sent to the judge in formal shape for each case; and the different forms in which these directions were given were expressed by the *formulæ*. They were binding on the judge, but no form was binding on the magistrate, who could avail himself "of any equitable doctrine, which a more refined jurisprudence or his own sense of what was right suggested to him," and so "vary the *formula*, so as to

render substantial justice." "These *formulæ* (which were preserved and collected), so flexible in their general character, yet couched in terms always precise and simple, furnish one of many admirable instances of the power of the Romans to express correctly the subtlest legal ideas; and it was by this machinery that the prætors principally introduced their great legal changes."

The *formula* ordinarily consisted of these three parts:

The *demonstratio* or statement of the fact or facts which the plaintiff alleges as the ground of his case.

The *intentio*, the really important part of the *formula*, a precise statement of the demand which the plaintiff made against (*tendebat in*) his adversary. It was necessary that it should exactly meet the law which would govern the facts alleged by the plaintiff if true.

The *condemnatio*, the direction to condemn or absolve according to the true circumstances of the case. In three actions, —to divide a family inheritance, or property held in common, or settle boundaries, the judge was required to adjudicate. This was termed the *adjudicatio*. In these actions, therefore, the parts of the *formula* would be four—*demonstratio, intentio, adjudicatio*, and *condemnatio*, in case, as might happen, the judge should order a payment in money by some of the parties to equalize the division; the *condemnatio*, under this system, being always pecuniary.

This system finally gave place to that which prevailed in the third period of the Roman system, "that of the *extraordinaria judicia*, by which, under the later emperors, the supreme authority took the whole conduct of the proceeding into its own hands, and arrived at what seemed to it to be just, in as direct and speedy a manner as it found possible. See a clear and satisfactory statement of the Roman system of civil process during these three periods; Sand. Just. Introd. lxi. See also Mackeld. Rom. Law § 204.

FORMULARIES. A collection of the forms of proceedings among the Franks and other early European nations. Co. Litt. Butler's note, 77.

FORNAGIUM. The fee taken by a lord of his tenants, bound to bake in his common oven, for liberty to use their own. Cowel; Moz. & W.

FORNICATION. In Criminal Law. Unlawful carnal knowledge by an unmarried person of another, whether the latter be married or unmarried.

Fornication is distinguished from adultery by the fact that the guilty person is not married. Four cases of unlawful intercourse may arise: where both parties are married; where the man only is married; where the woman only is married; where neither is married. In the first case such intercourse must be adultery; in the second case the crime is fornication only on the part of the woman, but adultery on the part of the man; in the third case it is adultery in the woman, and fornication (by statute in some states, adultery) in the man; in the last case it is fornication only in both parties.

In some states it is indictable by statute; 6 Vt. 311; 2 Tayl. C. 165; 2 Gratt. 555; and where it is there may be a conviction for this offence on an indictment for adultery; 2 Dall. 124; 4 Ired. 231; 1 Bish. Crim. L. 795. In Pennsylvania it is a misdemeanor for which an indictment lies, and is also a constituent of incest, adultery, seduction under promise of marriage, and rape; 149 Pa. 35.

FORNIX (Lat. a vault or arch). A brothel,—so-called because formerly situated in underground vaults. Fornication. *Fornix et cætera.* Fornication and the rest; fornication and bastardy (*qq. v.*).

FORNO. In Spanish Law. An oven. Las Partidas, pt. 3, t. 32. l. 18.

FORO. In Spanish Law. The place where tribunals hear and determine causes, —*exercendarum litium locus.* This word, according to Varo, is derived from *ferendo*, and is so called because all lawsuits have reference to things that are vendible, which presupposes the administration of justice to take place in the markets.

FOROS. In Spanish Law. Emphyteutic rents. Schm. C. L. 309.

FORPRISE. An exception; reservation; excepted; reserved. Anciently, a term of frequent use in leases and conveyances. Cowel; Blount.

In another sense, the word is taken for any exaction. Cunningham, Law Dict.

FORSCHEL, or FORSCHET. A strip of land lying next to the highway. Cowel.

FORSES. Waterfalls. Cam. Brit.

FORSPEAKER. An attorney or advocate. One who speaks for another. Blount.

FORSPECA, FORSPEECA. Prolocutor; paranymphus. Anc. Inst. Eng.

FORSTAL. An intercepting or stopping in the highway. See FORESTALL.

Forstaller, forstall, forstallare, forstallment, forstaller, may all be found under FORESTALL, etc.

FORSWEAR. In Criminal Law. To swear to a falsehood.

This word has not the same meaning as perjury. It does not, *ex vi termini*, signify a false swearing before an officer or court having authority to administer an oath, on an issue. A man may be forsworn by making a false oath before an incompetent tribunal, as well as before a lawful court. Hence, to say that a man is forsworn will or will not be slander, as the circumstances show that the oath was or was not taken before a lawful authority; Heard, Lib. & S. §§ 16, 34; Cro. Car. 378; Bacon, Abr. *Slander* (B 3); Cro. Eliz. 609; 1 Johns. 505; 13 *id.* 48, 80; 12 Mass. 496; 1 Hayw. 116.

FORT. Something more than a mere military camp, post, or station; it implies a fortification or a place protected from

attack by some such means as a moat, wall, or parapet. 12 Fed. Rep. 424.

FORTALICE, or FORTELACE. A fortress or place of strength which anciently did not pass without a special grant. 11 Hen. VII. c. 18. They were originally built for the defence of the country, either against foreign invasions, or civil commotions; and were anciently held to be *inter regalia*, corresponding with the Roman *res publicæ*, such as navigable rivers, ports, ferries, and the like, but they now pass with the lands in every charter; Ersk. Pr. 165.

FORTALITIUM. A fortalice (*q. v.*). Strictly, in old Scotch law, a fortified house or town, or one having a moat around it.

FORTAXED. Wrongly or extortionately taxed.

FORTHCOMING. In Scotch Law. The action by which an arrestment (attachment) of goods is made available to the creditor or holder.

The arrestee and common debtor are called up before the judge, to hear sentence given ordering the debt to be paid or the arrested goods to be given up to the creditor arresting. Bell, Dict.

FORTHCOMING BOND. A bond given for the security of the sheriff, conditioned to produce the property levied on when required. 2 Wash. Va. 189; 11 Gratt. 522; 61 Ga. 520; 87 *id.* 566.

The measure of damages for breach of a forthcoming bond would be the value of the property at the time the bond was given, provided that value did not exceed the amount of the execution, debt, interest, and costs; 91 Ga. 132. See BOND.

FORTHWITH. As soon as by reasonable exertion, confined to the object, it may be accomplished. This is the import of the term; it varies, of course, with every particular case; 4 Tyrwh. 837; Styles, Reg. 452; 75 Pa. 378. See 101 Ill. 621; 11 H. L. Cas. 337; 67 N. Y. 274; 58 Md. 261; 7 Ch. Div. 238; 9 Q. B. 684; 44 Ohio St. 437. When a defendant is ordered to plead forthwith, he must plead within twenty-four hours: Wharton. In other matters of practice, the word has come to have the same meaning; 2 Edw. 328. A demand for an account forthwith is not the same in substance and effect as a demand for an account within 15 days; 64 Vt. 309. Where a verdict was returned between noon and one P.M. on Saturday, while the justice was hearing other cases, an entry of judgment on the verdict on Monday was sufficient under a statute requiring it to be rendered "forthwith;" 56 Minn. 350. Where a chattel mortgage must "be forthwith deposited" to affect subsequent *bona fide* purchasers, the filing more than three months after execution was notice to purchasers who took title after the filing; 23 Tex. 338. A statute providing that an order to revive an action may be made forthwith, means at the first term after plaintiff's death; 22 S. W. Rep. (Ky.) 434. When an insurance policy required notice of loss to be given forthwith, it was sufficient twelve days after the fire when no harm was caused by delay; 50 Kan. 453.

FORTIA (Lat.). A word of art, signifying the furnishing a weapon of force to do the fact, and by force whereof the fact was committed, and he that furnished it was not present when the act was done. Co. 2d Inst. 182.

The general meaning of the word is an unlawful force. Spelman, Gloss.; Du Cange. *Fortia frisca.* Fresh force (*q. v.*).

FORTILITY. In Old English Law. A fortified place; a castle; a bulwark. Cowel; 11 Hen. VII. c. 18.

FORTIN. A little fort; a field fort. Enc. Dict.

FORTIOR (Lat.). Stronger. A term applied in the law of evidence to that species of presumption, arising from facts shown in evidence, which is strong enough to shift the burden of proof to the opposite party. Burr. Circ. Ev. 64.

FORTIORI. See A FORTIORI.

FORTIS (Lat.). Strong. *Fortis et sana*, strong and sound; staunch and strong; as a vessel. Townsh. Pl. 227.

FORTLETT. A place or port of some strength; a little fort. Old. Nat. Brev. 45.

FORTRET. A little fort; a fort.

FORTUIT (Fr.). Accidental; casual; fortuitous. *Cas fortuit*, a fortuitous event. *Fortuitment*, accidentally; by chance.

FORTUITOUS. Depending on or happening by chance; casual; not designed; adventitious. **In Civil Law.** Resulting from unavoidable causes.

FORTUITOUS COLLISION. An accidental collision.

FORTUITOUS EVENT. In Civil Law. That which happens by a cause which cannot be resisted.

That which neither of the parties has occasioned or could prevent. *Lois des Bât.* pt. 2, c. 2. An unforeseen event which cannot be prevented. Dict. de Jurisp. *Cas fortuit.*

There is a difference between a fortuitous event, or inevitable accident, and irresistible force. By the former, commonly called the act of God, is meant any accident produced by physical causes which are irresistible; such as a loss by lightning or storms, by the perils of the seas, by inundations and earthquakes, or by sudden death or illness. By the latter is meant such an interposition of human agency as is, from its nature and power, absolutely uncontrollable. Of this nature are losses occasioned by the inroads of a hostile army, or by public enemies. Story, Bailm. § 25; *Lois des Bât.* pt. 2, c. 2, § 1.

Fortuitous events are fortunate or unfortunate. The accident of finding a treasure is a fortuitous event of the first class. *Lois des Bât.* pt. 2, c. 2, § 2.

Involuntary obligations may arise in consequence of fortuitous events. For example, when to save a vessel from shipwreck, it is necessary to throw goods overboard, the loss must be borne in com-

mon; there arises, in this case, between the owners of the vessel and of the goods remaining on board, an obligation to bear proportionately the loss which has been sustained. *Lois des Bât.* pt. 2, c. 2, § 2. See ACT OF GOD.

FORTUNA (Lat.). Fortune; also treasure-trove. Jac.; Moz. &. W.

FORTUNE-TELLER. One who pretends to be able to reveal future events; one who pretends to the knowledge of futurity.

It was a practice during the Middle Ages, and is still far from dying out, though laws for its suppression have been passed, and many fortune-tellers have been convicted and punished. Encyc. Dict.

FORTUNIUM. In Old English Law. A tournament or fighting with spears, and an appeal to fortune therein.

FORTY-DAYS-COURT. The court of attachments (*q. v.*) in the forests.

FORUM. At Common Law. A place. A place of jurisdiction. The place where a remedy is sought. Jurisdiction. A court of justice.

Forum actus. The forum of the place where an act was done.

Forum conscientiæ. The conscience.

Forum contentiosum. A court. 3 Bla. Com. 211.

Forum contractus. Place of making a contract. 2 Kent 463.

Forum domesticum. A domestic court. 1 W. Blackst. 82.

Forum domicilii. Place of domicil. 2 Kent 463.

Forum ecclesiasticum. An ecclesiastical court.

Forum ligeantiæ rei. The forum of the allegiance of the defendant.

Forum originis. The forum of birth.

Forum regium. The court of the king. Stat. Westm. 2, c. 43.

Forum rei. This expression is used alternatively for the forum of the defendant's domicil, in which case it is the genitive of *reus*, or the forum of the thing in controversy, when it is the genitive of *res*.

Forum rei gestæ. Place of transaction. 2 Kent 463.

Forum rei sitæ. The place where the thing is situated.

The tribunal which has authority to decide respecting something in dispute, located within its jurisdiction: therefore, if the matter in controversy is land or other immovable property, the judgment pronounced in the *forum rei sitæ* is held to be of universal obligation, as to all matters of right and title on which it professes to decide, in relation to such property. And the same principle applies to all other cases of proceedings *in rem*, where the subject is movable property, within the jurisdiction of the court pronouncing judgment. Story, Confl. Laws §§ 532, 545, 551, 591, 592; Kaimes, Eq. b. 3, c. 8, § 4; 1 Greenl. Ev. § 541.

Forum seculare. A secular court.

In Roman Law. The paved open space in cities, particularly in Rome, where were held the solemn business assemblies of the people, the markets, the exchange (whence *cedere foro*, to retire from 'change, equivalent to "to become bankrupt"), and where the magistrates sat to transact the business of their office. It corresponded to the ἀγορα of the Greeks. Dion. Hal. l. 3, p. 200. It came afterwards to mean any place where causes were tried, *locus exercendarum litium.* Isidor. l. 18, Orig. A court of justice.

The obligation and the right of a person to have his case decided by a particular court.

It is often synonymous with that signification of *judicium* which corresponds to our word court (which see), in the sense of jurisdiction: *e. g.*, *foro interdicere*, l. 1, § 13, D. 1, 12; C. 9, § 4, D. 48, 19; *fori præscriptio*, l. 7, pr. D. 2, 8; l. 1, C. 3, 24; *forum rei accusator sequitur*, l. 5, pr. C. 3, 13. In this sense the *forum* of a person means both the obligation and the right of that person to have his cause decided by a particular court. 5 Glück, Pand. 237. What court should have cognizance of the cause depends, in general, upon the person of the defendant, or upon the person of some one connected with the defendant.

Jurisdictions depending upon the person of the defendant. By modern writers upon the Roman law, this sort of jurisdiction is distinguished as that of common right, *forum commune*, and that of special privilege, *forum privilegiatum.*

(*A.*) *Forum commune.* The jurisdiction of common right was either general, *forum generale*, or special, *forum speciale.*

(*a.*) *Forum generale.* General jurisdiction was of two kinds, the *forum originis*, which was that of the birthplace of the party, and the *forum domicilii*, that of his domicil. The *forum originis* was either *commune* or *proprium.* The former was that legal *status* which all free-born subjects of the empire, wherever residing, had at Rome when they were found there and had not the *jus revocandi domum* (*i. e.*, the right of one absent from his domicil of transferring to the *forum domicilii* a suit instituted against him in the place of his temporary sojourn). L. 2, §§ 3, 4, 5, D. 5, 1; l. 28, § 4, D. 4, 6; 3 Glück, Pand. 188. After the privilege of Roman citizenship was conferred by Caracalla upon all free-born subjects of the empire, the city of Rome was considered the common home of all, *communis omnium patria*, and every citizen, no matter where his domicil, could, unless protected by special privilege, be sued at Rome while there present. Noodt, Com. ad Dig. 5, 1, p. 153; Hofacker, Pr. Jur. Civ. § 4221. The *forum originis proprium*, or *forum originis speciale*, was the court of that place of which at the time of the party's birth his father was a citizen, though that might possibly be neither his own birthplace nor the actual domicil of his father. Except in particular places, as Delphi and Pontus, where the nativity of the mother conferred the privilege of citizenship upon her son, the birthplace of the father only was regarded. L. 1, § 2, D. 50, 1. The case of the *nullius filius* was also an exception. Such a person having no known father derived his *forum originis* from the birthplace of his mother. L. 9, D. 50, 1.

Adoption might confer a twofold citizenship, that of the natural and that of the adoptive father; l. 7, C. 8, 48; but the latter was lost by emancipation; L. 16, D. 50, 1. In general, the birthplace of the father alone fixed the *forum originis* of the son. Amaya, Com. ad Tit. Cod. *de incolis*, n. 21, *seq.* 99. The *forum originis* was unchangeable, and continued although the party had established his domicil in another place: consequently, he could always be sued in the courts of that jurisdiction whenever he was there present; 6 Glück, Pand. p. 260.

Forum domicilii. The place of the domicil exercised the greatest influence over the rights of the party. (As to what constitutes domicil, see DOMICIL.) In general, one was subject to the laws and courts of his domicil alone, unless specially privileged. L. 29, D. 50, 1. This legal status, *forum domicilii*, was *universal*, in the sense that all suits of whatever nature, real or personal, petitory or possessory, might be instituted in the courts of the defendant's domicil even when the thing in dispute was not situated within the jurisdiction of such court, and the defendant was not present at such place at the commencement of the suit; 6 Glück,

Pand. 287 *et seq.* It seems, however, that as regarded *real* actions the *forum domicilii* was concurrent with the *forum rei sitæ*, *id.* 290, and, in general, was concurrent with *special* jurisdictions of all kinds; although in some exceptional cases the law conferred exclusive cognizance upon a *special* jurisdiction, *forum speciale*. In cases of concurrence the plaintiff had his election of the jurisdiction.

In another sense the *forum domicilii* was *personal*, as it did not necessarily descend to the heir of defendant. See jurisdiction *ex persona alterius*, at the end of this article.

Forum speciale, particular jurisdiction. These were very numerous. The more important are: (1.) *Forum continentiæ causarum.* Sometimes two or more actions or disputed questions are so connected that they cannot advantageously be tried separately, although in strictness they belong to different jurisdictions. In such cases the modern civil law permits them to be determined in a single court, although such court would be incompetent in regard to a portion of them taken singly. This beneficial rule did not exist in the Roman law, though formerly supposed to be derived thence. See 11 Glück, Pand. § 750, and cases there cited. (2.) *Forum contractus*, the court having cognizance of the action on a contract. If the place of performance was ascertained by the contract, the court of that place had exclusive jurisdiction of actions founded thereon; 6 Glück, Pand. 296. If the place of performance was uncertain, the court of the place where the contract was made might have jurisdiction, provided the defendant at the time of the institution of the suit was either present at that place or had attachable property there. *Id.* 298.

(3.) *Forum delicti*, *forum deprehensionis*, is the jurisdiction of the person of a criminal, and may be the court of the place where the offence was committed, or that of the place where the criminal was arrested. The latter jurisdiction, *forum deprehensionis*, extended at most only to the preliminary examination of the person arrested; and even this was abolished by Justinian, Nov. lxix. c. 1, cxxxiv. c. 5, on the ground that the examination as well as the punishment should take place on the spot where the crime was committed; 6 Glück, Pand. § 517.

(4.) *Forum rei sitæ* is the jurisdiction of the court of that place where is situated the thing which is the object of the action. Such court had jurisdiction over all actions affecting the possession of the thing, and over all petitory actions *in rem* against the possessor in that character, and all such actions *in personam* so far as they were brought for the recovery of the thing itself. But such court had not jurisdiction of purely personal actions. *Id.* § 519.

Forum arresti is a jurisdiction unknown to the Roman law, but of frequent occurrence in the modern civil law. It is that over persons or things detained by a judicial order, and corresponds in some degree to the *attachment* of our practice. *Id.* § 519.

Forum gestæ administrationis, the jurisdiction over the accounts and administration of guardians, agents, and all persons appointed to manage the affairs of third parties. The court which appointed such *administrator*, or wherein the cause was pending in which such appointment was made, or within whose territorial limits the business of the administration was transacted, had exclusive jurisdiction over all suits arising out of his acts or brought for the purpose of compelling him to account, or brought by him to recover compensation for his outlays; L. 1, C. 3, 21; 6 Glück, Pand. § 521.

Privileged jurisdictions, *forum privilegiatum*. In general, the privileged jurisdiction of a person held the same rank as the *forum domicilii*, and, like that, did not supplant the particular jurisdictions above named save in certain exceptional cases. The privilege was general in its nature, and applied to all cases not specially excepted, but it only arose when the person possessing it was sued by another; for he could not assert it when he was the plaintiff, the rule being, *actor sequitur forum rei*, the plaintiff must resort to the jurisdiction of the defendant. It was in general limited to *personal* actions; all *real* actions brought against the defendant in the character of possessor or the thing in dispute followed the *forum speciale*. The privilege embraced the wife of the privileged person and his children so long as they were under his *potestas*. And lastly, when a *forum privilegiatum* purely personal conflicted with the *forum speciale*, the former must yield; 6 Glück, Pand. 339-341. To these rules some exceptions occur, which will be mentioned below.

Privileged persons were: 1. *Personæ miserabiles*, who were persons under the special protection of the law on account of some incapacity of age, sex, mind, or condition. These were entitled, *whether as plaintiffs or defendants*, to carry their causes directly before the emperor, and, passing over the inferior courts, to demand a hearing before his supreme tribunal, whenever they had valid grounds for doubting the impartiality or fearing the procrastination of the inferior courts, or for dreading the influence of a powerful adversary; 6 Glück, Pand. § 522. On the other hand, if their adversary, on any pretext whatever, had himself passed by the inferior courts and applied directly to the supreme tribunal, they were not bound to appear there if this would be disadvantageous to them, but in order to avoid the increase of costs and other inconveniences, might decline answering except before their *forum domicilii*. The *personæ miserabiles* thus privileged were minor orphans, widows, whether rich or poor, persons afflicted by chronic disease or other forms of illness (*diuturno morbo fatigati et debiles*), which included paralytics, epileptics, the deaf, the dumb, and the blind, etc., persons impoverished by calamity or otherwise distressed, and the poor when their adversary was rich and powerful, *præsertim cum alicujus potentiam perhorrescant.* This privilege was, however, not available, when both parties were *personæ miserabiles;* when it had been waived either expressly or tacitly; when the party had become *persona miserabilis* since the institution of the action,—except always the case of reasonable suspicion in regard to the impartiality of the judge; when the party had become *persona miserabilis* through his own crime or fraud; when the cause was trivial, or belonged to the class of unconditionally privileged cases having an exclusive *forum;* and when the cause of action was a right acquired from a *persona non miserabilis.* 6 Glück, Pand. § 522.

Clerici, the clergy. The privilege of clerical persons to be impleaded only in the episcopal courts commenced under the Christian emperors. Justinian enlarged the jurisdiction of these courts, not only by giving them exclusive cognizance of affairs and offences purely ecclesiastical, but also by constituting them the ordinary primary courts for the trial of suits brought against the clergy even for temporal causes of action. Nov. 83, Nov. 123, cap. 8, 21, 22, 23. The causes of action cognizable in the *forum ecclesiasticum* were—1. *causæ ecclesiasticæ mere tales*, purely ecclesiastical, *i.e.*, those pertaining to doctrine, church services, and ceremonies, and right to membership; those relating to the synodical assemblies and church discipline; those relating to offices and dignities and to the election, ordination, translation, and deposition of pastors and other office-bearers of the church, and especially those relating to the validity of marriages and to divorce; or, 2. *causæ ecclesiasticæ mixtæ*, mixed causes, *i.e.*, disputes in regard to church lands, tithes, and other revenues, their management and disbursement, and legacies to pious uses, in regard to the boundaries of ecclesiastical jurisdictions, in regard to patronage and advowsons, in regard to burials and to consecrated places, as graveyards, convents, etc., and, lastly, in regard to offences against the canons of the church, as simony, etc. But the privilege here treated of was the *personal* privilege of the clergy when defendant in a suit to have the cause tried before the episcopal court: when plaintiff, the rule *actor sequitur forum rei* prevailed. All persons employed in the church service in an official capacity, even though not in holy orders, were thus privileged. But the privilege did not embrace *real* actions, nor personal actions brought to recover the possession of a thing: these must be instituted in the *forum rei sitæ*. The jurisdiction extended to all personal actions, criminal as well as civil; although in criminal actions the ecclesiastical courts had no authority to inflict corporeal or capital punishment, being restricted to the canonical judgments of deprivation, degradation, excommunication, etc. 6 Glück, Pand. § 523.

Academici. In the modern civil law the officers and students of the universities are privileged to be sued before the university courts. This species of privilege was unknown to the Roman law. See 6 Glück, Pand. § 524.

Milites. Soldiers had special military courts as well in civil as criminal cases. In civil matters, however, the *forum militare* had preference only over the courts of the place where the soldier defendant was stationed; as he did not forfeit his domicil by absence on military duty, he might al-

ways be sued for debt in the ordinary *forum domicilii*, provided he had left there a *procurator* to transact his business for him, or had property there which might be proceeded against. L. 3. C. 2, 51; l. 6, *eodem*; l. 4, C. 7, 53. Besides this, the privilege of the *forum militare* did not extend to such soldiers as carried on a trade or profession in addition to their military service and were sued in a case growing out of such trade, although in other respects they were subject to the military tribunal. L. 7, C. 3, 13. If after an action had been commenced the defendant became a soldier, the privilege did not attach, but the suit must be concluded before the court which had acquired jurisdiction of it. The *forum militare* had cognizance of *personal* actions only. Actions arising out of *real* rights could be instituted only in the *forum rei sitæ*. In the Roman law, ordinary crimes of soldiers were cognizable in the *forum delicti*. The modern civil law is otherwise. 6 Glück, Pand. 418, 421.

There are many classes of persons who are privileged in respect to jurisdiction under the modern civil law who were not so privileged by the Roman law. Such are officers of the court of the sovereign, including ministers of state and councillors, ambassadors, noblemen, etc. These do not require extended notice.

Jurisdiction ex persona alterius. A person might be entitled to be sued in a particular court on grounds depending upon the person of another. Such were—1. *The Wife*, who, if the marriage had been legally contracted, acquired the *forum* of her husband; l. 65, D. 5, 1; l. ult. D. 50, 1; l. 19, D. 2, 1; and retained it until her second marriage; l. 22, § 1, D. 50, 1; or change of domicil; § 93, Voet. Com. ad Pand. D. 5, 1. 2. *Servants*, who possessed the jurisdiction of their master as regarded the *forum domicilii*, and also the *forum privilegiatum*, so far at least as the privilege was that of the class to which such master belonged and was not purely personal, Glück, Pand. § 510 *b*. 3. *The hæres*, who in many cases retained the jurisdiction of his testator. When sued in the character of heir in respect to causes of action upon which suit had been commenced before the testator's death, he must submit to the *forum* which had acquired cognizance of the suit; Ll. 30, 34, D. 5, 1. When the cause of action accrued, but the action was not commenced, in the lifetime of the testator, the heir must submit to *special jurisdictions* to which the testator would have been subjected, as the *forum contractus* or *gestæ administrationes*, especially if personally present or possessing property within such jurisdiction; L. 19, D. 5, 1. But it is even now disputed whether in such case he was bound to submit to the general jurisdiction, *forum domicilii*, or the privileged jurisdiction, *forum privilegiatum*, of his testator; though the weight of the authorities is on the side of the negative; Glück, Pand. § 560 *b*. If the cause of action arose after the death of the testator, as in the case of the *querela inofficiosi testamenti*, of partition, of suits to recover a legacy or to enforce a testamentary trust, the heir must be pursued in his own jurisdiction, *i.e.*, the *forum domicilii* or *forum rei sitæ*; 6 Glück, Pand. 252, and authorities there cited. And, *a fortiori*, if the action against the heir was not in that character, but merely in the capacity of possessor of the thing in dispute, the suit must be brought before the *forum* to which he was himself subject; *id.* p. 251.

FORUTH. A long slip of ground. Cowel.

FORWARDING MERCHANT. A person who receives and forwards goods, taking upon himself the expenses of transportation, for which he receives a compensation from the owners, but who has no concern in the vessels or wagons by which they are transported, and no interest in the freight.

Such a one is not deemed a common carrier, but a mere warehouseman or agent; 12 Johns. 232; 7 Cow. 497; see 15 Minn. 270; 2 Wheel. Abr. 142; nor is he an insurer; 27 Cal. 11. He is required to use only ordinary diligence in sending the property by responsible persons; 2 Cow. 593; 6 Allen 254; 64 N. Y. 300. See Story, Bailm. § 502; Ang. Car. § 75; 2 Wend. 594; COMMON CARRIERS.

FOSSA (Lat.). **In English Law.** A ditch full of water, where formerly women who had committed a felony were drowned; the grave. Cowel. See FURCA.

FOSSAGE, FOSSAGIUM. In Old English Law. A composition paid in lieu of the duty of cleaning out and repairing the moat surrounding a fortified town. A duty or tax paid for that work.

FOSSATORIUM OPERATIO (Lat.). The service of laboring done by the inhabitants and adjoining tenants, for repair and maintenance of the ditches round a city or town. A contribution in lieu of such work, called *fossagium*, was sometimes paid. Kennett; Cowel.

FOSSATUM. A canal; a moat; a place inclosed by a ditch; a trench.

FOSSELUM. A small ditch. Cowel.

FOSSWAY, or FOSSE. One of the four great roads of England built by the Romans; so called from the ditch on each side.

Trevisa describes it thus: "The first and gretest of the foure weyes is called *fosse*, and stretches oute of the southe into the north, and begynneth from the corner of Cornewaile, and passeth forth by Devenshyre by Somersete, and forth besides Tetbury, upon Cotteswold, besides Coventre, unto Leyster, and so forth, by wylde pleynes towards Newerke, and endeth at Lincoln" (Polychron l. 1, c. xiv.). Wharton.

FOSTER-LAND. Land given for finding food for any person, as for monks in a monastery. Cowel.

FOSTER-LOAN (Sax.). A nuptial gift; the jointure for the maintenance of a wife. Toml.

FOSTER-SHIP. Forester-ship.

FOSTERING. An ancient custom in Ireland, in which persons put away their children to fosterers. Fostering was held to be a stronger alliance than blood, and the foster children participated in the fortunes of their foster fathers. Hallam's Const. Hist. ch. 18; Moz. & W.

FOSTERLEAN. The remuneration paid for the rearing or fostering of a child. The jointure of a wife. Jacob; Encyc. Dict.

FOUND. A person is said to be found within a state when actually present therein, but as applied to a corporation it is necessary that it is doing business in such state through an officer or agent or by statutory authority in such manner as to render it liable then to suit and to constructive or substituted service of process. See 55 Fed. Rep. 751; FOREIGN CORPORATION; SERVICE; NON EST INVENTUS.

FOUNDATION. The establishment of a charity. That upon which a charity is founded and by which it is supported.

This word, in the English law, is taken in two senses, *fundatio incipiens*, and *fundatio perficiens*. As to its political capacity, an act of incorporation is metaphorically called its foundation; but as to its dotation, the first gift of revenues is called the foundation. 10 Co. 23 *a*.

FOUNDER. One who endows an institution. One who makes a gift of revenues to a corporation. 10 Co. 33; 1 Bla. Com. 481.

In England, the king is said to be the founder of all civil corporations; and where there is an act of incorporation, he is called the general founder, and he who endows is called the perficient founder. 1 Bla. Com. 481.

FOUNDERS' SHARES. In English Company Law. Shares issued to the founders of (or vendors to) a public company as a part of the consideration for the business, or concession, etc., taken over, and not forming a part of, the ordinary capital. As a rule, such shares only participate in profits after the payment of a fixed minimum dividend on paid-up capital. Encyc. Dict.

FOUNDEROSUS. Out of repair. Cro. Car. 366.

FOUNDLING. A new-born child abandoned by its parents, who are unknown. The settlement of such a child is in the place where found. *Foundling hospitals* are charitable institutions which exist in many countries for the care of such children. In England they are regulated by stat. 13 Geo. II. c. 29. See Int. Cyc. *h. t.*

FOUNDRY. Works for the casting of metals, without regard to whether they are cast for agricultural and mechanical, or other purposes. 44 La. Ann. 793.

FOUR (Fr.). An oven; kiln; bakehouse. *Four banal* (*banal* of a manner; common), an oven owned by the proprietor of the estate, to which the tenants were obliged to bring their bread for baking. Also the proprietary right to maintain such an oven.

FOUR CORNERS. The four corners of an instrument means that which is contained on the face of it (without any aid from the knowledge of the circumstances under which it was made). This is said to be within its four corners, because every deed is still supposed to be written on one entire skin, and so to have but four corners. Wharton.

FOUR SEAS. The seas surrounding England. These were divided into the Western, including the Scotch and Irish; The Northern, or North Sea; The Eastern, being the German Ocean; The Southern, being the British Channel. Selden, Mare Clausum, lib. 2, c. 1.

Within the four seas means within the jurisdiction of England; 4 Co. 125; Co. 2d Inst. 252. See LIMITATION.

FOURCHER (Fr. to fork), **or FOURCH. In English Law.** A method of delaying an action formerly practised by defendants.

When an action was brought against two, who, being jointly concerned, were not bound to answer till both appeared, and they agreed not to appear both in one day, and the appearance of one excused the other's default, who had a day given him to appear with the other: the defaulter, on the day appointed, appeared; but the first then made default: in this manner they *forked* each other, and practised this for delay. See Co. 2d Inst. 250; Booth, Real Act. 16.

FOURIERISM. A social system invented by Charles Fourier, characterized by Mill as "the most skilfully combined and with the greatest foresight of objections, of all forms of socialism." Pol. Econ. II. I 4, which see and also Int. Cyc. for fuller accounts of the system, and Cent. Dict. and Encyc. Dict. for briefer ones.

FOUTGELD. See FOOTGELD.

FOWLS OF WARREN. Such fowls as are preserved under the game-laws in warrens. According to Manwood, these are partridges and pheasants. According to Coke, they are either *campestres*, as partridges, rails, and quails, *sylvestres*, as woodcocks and pheasants, or *aquatiles*, as mallards and herons. Co. Litt. 233.

FOX'S LIBEL ACT. An act passed in England in 1792, which provided that in prosecutions for libel, the jury might give a general verdict of guilty or not guilty upon the whole matter put at issue upon the indictment, and should not be required by the court to find the defendant guilty merely upon proof of the publication of the alleged libel, in the sense ascribed to it in the indictment.

FOY (L. Fr.). Faith; allegiance; fidelity.

FRACTION, FRACTIO. The act of breaking, or the state of being broken, especially by violence; a breaking or fracture. A fragment; a separated portion; a disconnected part. Cent. Dict.

FRACTION OF A DAY. A portion of a day. The dividing a day. Generally, the law does not allow the fraction of a day, and the day on which an act is done must therefore be either entirely included or excluded; 2 Bla. Com. 141; 25 Fla. 371; 11 Mass. 204; 64 Pa. 240; 20 Vt. 653; and, therefore, judgments entered on the same day are regarded as entered at the same time, and create liens equal in point of priority; 4 McLean 555; 8 W. & S. 304; but this is merely a legal fiction, which does not apply where it is necessary to distinguish between the two parts of a day; 3 Burr. 1344; 11 H. L. Cas. 411; and, therefore, it has been said that there is no such general rule of law, but that common sense and common justice sustain the propriety of considering fractions of a day whenever

it will promote the purposes of substantial justice; 2 Stor. 571; 100 U. S. 689; 104 *id.* 474; 37 Ill. 239; 3 La. Ann. 430; 60 Me. 88; 16 Ohio 111; thus, the bankrupt act of 1841 was repealed by the act of March 3, 1843, which was not signed by the president till the evening of that day; proceedings in bankruptcy begun on the morning of that day were held to have been begun before the passage of the act; *id.;* tobacco stamped, sold, and removed in the morning of March 3, 1875, was not considered subject to an increased tax-rate imposed by the act of that date, which was not signed by the president until a later hour of that day; 97 U. S. 381; where a township voted aid bonds on the morning of an election day in Illinois, at which a constitutional provision was adopted forbidding the issuing of such bonds, the court found as a fact that the township vote was had before the adoption of the constitution, and, therefore, sustained the validity of the bonds; 104 U. S. 469. Although the law does not generally consider fractions of a day, yet when substantial justice requires it, courts may ascertain the precise time when a statute is approved or an act done; 147 U. S. 640. In 97 U. S. 170, the court held that the president's proclamation of June 13, 1865, removing restrictions upon trade, etc., took effect as of the beginning of that day and refused to consider the fraction of a day. In computing the time for the performance of official duties, each fraction of a day is to be considered as a full day; 12 Colo. 285. See FROM; FULL AGE; TIME; DAY.

FRACTITIUM. Arable land. Toml.; Moz. & W.

FRACTURA NAVIUM. Breaking up of ships or wreck of shipping at sea. Very like *naufrage* (*q. v.*).

FRAIS (Fr.). Costs; charges; expenses.

FRAIS DE JUSTICE. Costs incurred incidentally to the action. See 1 Troplong, 135, n. 122; 4 Low. C. 77. *Frais d'un procès.* Costs of a suit.

FRAIS JUSQU'A BORD (Fr.). **In French Commercial Law.** Expenses up to the time that goods are actually shipped on board of a vessel, including such items as packing, porterage, or cartage, commissions, etc. 16 Fed. Rep. 336. A shipment on which the seller pays the *frais jusqu'a bord*, would correspond to a sale of the goods "free on board" (*q. v*).

FRANC. A French coin, of the value of about twenty cents.

FRANC ALEU. In French Law. An absolutely free inheritance. Allodial lands. Generally, however, the word denotes an inheritance free from seignorial rights, though held subject to the sovereign. Dumoulin, *Cout. de Par.* § 1; Guyot, Rép. Univ.; 3 Kent 498, n.; 8 Low. C. 95.

FRANC TENANCIER. In French Law. A freeholder.

FRANCE. A republic of Europe. The present constitution was voted by the national assembly in 1871 and revised July 1, 1884, and June, 1885. The executive is a president who appoints the ministry. The legislative department is vested in a senate of 300 members, elected by the delegates of the municipalities, and a chamber of deputies of 584 members, elected by universal suffrage for a term of four years. The president is nominated for seven years by the senate and chamber of deputies. He initiates legislation concurrently with the two houses and makes all civil and military appointments. All his acts must be countersigned by a minister, and he cannot declare war without the previous consent of the two chambers. With the consent of the senate he may dissolve the chamber of deputies, but in such an event there must be a new election held within three months. In the administration of justice the country is divided into twenty-six courts of appeal, each having nine to twelve conseillers and a president. Three conseillers are commissioned twice a year at least to hold criminal assizes in the chief towns. Persons accused of misdemeanors are tried without a jury before three judges in the courts of correctional police of which there is one in every chief town of an arrondissement. There are tribunals of simple police which exercise summary jurisdiction in minor offences. In every canton and in every city *quartier* there is a *juge de paix.* The court of cassation, which is the supreme court of appeals, holds its sittings in Paris. See EXECUTIVE POWER; CODE.

FRANCHILANUS. A freeman. Chart. Hen. IV. A free tenant. Spel. Glos.

FRANCHISE. A special privilege conferred by government on individuals, and which does not belong to the citizens of the country generally by common right. Ang. & A. Corp. § 4; 4 Neb. 416, 420.

A certain privilege conferred by grant from government and vested in individuals. 3 Kent 458.

A royal privilege or branch of the king's prerogative subsisting in the hands of a subject. Finch i. 164; 2 Bla. Com. 37; 3 Cruise, Dig. 278; 13 Pet. 595; 36 W. Va. 802.

A very recent writer, who finds in the history of early English tenures a universality of oppressive services which literaly made life a burden to the average land-holder, considers the first use of the terms "liberty" and "franchise" to be an expression of the relief of the possessor from some part of this burden. He says: "Lastly in our thirteenth century we learn that privileges and exceptional immunities are 'liberties' and 'franchises.' What is our definition of a liberty, a franchise? A portion of royal power in the hands of a subject. In Henry III.'s day we do not say that the Earl of Chester is a freer man, more of a *liber homo*, than is the Earl of Gloucester, but we do say that he has more, greater, higher liberties." Maitl. Domesd. 43.

The right or privilege of being a corporation, and of doing such things, and such things only, as are authorized by the corporation's charter. 122 Ill. 293.

"The word franchise is generally used to designate a right or privilege conferred by

law. What is called 'the franchise of forming a corporation,' is really but an exemption from the general rule of the common law prohibiting the formation of corporations. All persons in this state have now the right of forming corporate associations upon complying with the simple formalities prescribed by the statute. The right of forming a corporation, and of acting in a corporate capacity under the general incorporation laws, can be called a franchise only in the sense in which the right of forming a limited partnership, or of executing a conveyance of land by deed is a franchise. Horton, C. J., in 40 Kan. 96.

It is a privilege emanating from the sovereign power of the state, owing its existence to a grant or, as at common law, to prescription, which presupposes a grant, and vested in individuals or a body politic something not belonging to the citizen of common right. 142 Ill. 494.

Commenting on Blackstone's definition, Thompson says: "It has been well observed that, under our American systems of government and laws, this definition is not strictly correct; since our franchises spring from contracts between the sovereign power and private citizens, made upon a valuable consideration, for purposes of public benefit as well as of individual advantage." 4 Thomp. Corp. § 5335.

In a popular sense, the word seems to be synonymous with right or privilege: as, the elective franchise.

There are two franchises, distinct in their nature, and yet governed by substantially the same rules as to grant and exercise, which may be enjoyed by a corporation. One is the franchise of being or existing as a corporation, that is, possessing a unity and perpetuity of existence, though composed of an aggregate of changing members; the other is the exercise of rights, like the right of eminent domain or the partial appropriation of public property by exclusive use, as in ferries. Either of these franchises is a branch of sovereignty. 1 Bouv. Inst. 1690.

A franchise to be a corporation, however, is distinct from a franchise as a corporation to maintain and operate a railway; the latter may be mortgaged, without the former, and pass to a purchaser at a foreclosure sale; 112 U. S. 609.

The grant of letters patent for an invention is a franchise; (1891) 2 Q. B. 263; and so is a charter of incorporation from the state; 36 W. Va. 802.

To be a franchise, the right possessed must be such as cannot be exercised without the express permission of the sovereign power—a privilege or immunity of a public nature which cannot be legally exercised without legislative grant; 40 Minn. 213; 38 *id.* 366.

In a case already cited it is said that a franchise, or the right to be and act as an artificial body, is vested *in the individuals* who compose the corporation, and not in the corporation itself; 122 Ill. 293. "But this," it is said, "is an imperfect statement of the true conclusion,—which is, that a *primary franchise*, that is to say, *the franchise of being a corporation*, vests in the individuals who compose the corporation; while those *secondary franchises* which are *vendible* by the corporation, necessarily, and for that reason alone, must be deemed to vest in the corporation. However, judicial theory is so confused on the subject, that proceedings by information in the nature of a *quo warranto*, to vacate the franchises of corporations, are sometimes brought against the individuals who compose the corporation, and sometimes against the corporation itself." 4 Thomp. Corp. § 5337.

Franchises are only grantable by the sovereign power, and in the United States they are usually held by the corporations created for the purpose, and can be held only under legislative grant; 15 Pick. 243; 73 Ill. 541; 13 Pet. 519; 15 Johns. 358; and may be accompanied with such conditions as its legislature may judge most befitting to its interest and policy; 134 U. S. 594; 143 *id.* 305.

The state is presumed to grant corporate franchises in the public interest, and to intend that they shall be exercised through the proper officers and agencies of the corporation, and does not contemplate that corporate powers will be delegated to others. Any conduct which destroys their functions, or maims or cripples their separate activity, by taking away the right to freely and independently exercise the functions of their franchise, is contrary to a sound public policy; 71 Fed. Rep. 787.

The grant of a franchise by the legislature is a contract and cannot be resumed by the state or its benefits impaired or diminished without the consent of the parties; 4 Wheat. 519; 3 Wall. 51; 3 Kent Com. 458; it is within the protection of that clause of the constitution of the United States which forbids the states from impairing the obligation of contracts; 10 Wall. 511; 9 Yerg. 490; 30 Ark. 128, 693; 97 U. S. 454; but this does not apply to mere personal privileges to members of a corporation, such as the exemption of a servant of such body from militia duty, or serving on juries, etc.; 4 Lea 316; such an exemption was held in this case unconstitutional; *contra*, 88 Ala. 176, where such an exemption was held part of the franchise granted to the corporation; and it may become a vested right which cannot be taken away by subsequent legislation; 67 Mo. 637 (overruling 5 Mo. App. 220). See IMPAIRING THE OBLIGATION OF CONTRACTS.

By the constitution or laws of many of the states, charters can only be granted subject to amendment or repeal. As to the power of the legislature in such cases, see 109 Mass. 103; 63 Me. 269; 41 Iowa 297; Beach, Pub. Corp. 63; 146 U. S. 258; but municipal franchises are entirely under the control of the legislature; Cooley, Const. Lim. 336; 10 How. 402; 94 U. S. 113; 128 *id.* 174.

The grant of a franchise is construed

strictly and in case of doubt most favorably to the public; 130 U. S. 1; 11 Conn. 185; 80 Me. 544; 25 Cal. 283; 69 Tex. 306; 9 Ga. 475; 127 Ind. 369; and in the absence of doubt the obvious meaning of the words is to be followed; 34 Fed. Rep. 579; 79 Ala. 465; such a grant is not held to be exclusive unless from its nature a presumption arises that it was so intended; 11 Pet. 420; 2 Port. 296; 21 Vt. 590; 127 Ind. 369; 17 Conn. 40, 454; 6 Paige 554; nor is a proviso to be so interpreted as to defeat the grant; 87 Pa. 34; 27 *id.* 303; 46 *id.* 112.

Franchises are held subject to the exercise of the right of eminent domain, which see for a discussion of this branch of the subject. See also 2 Gray 1, 35; 4 *id.* 474; 23 Pick. 360; 66 Pa. 41; 5 Johns. Ch. 101; 13 How. 71; 105 U. S. 13; 148 *id.* 312.

They are also said to be liable for the debts of the owner; 2 Washb. R. P. 24; but it is the general rule that they cannot be levied upon and sold under execution without authority or statute; 34 La. Ann. 1225; 40 Mo. 140; 9 Sm. & M. 394; 10 Lea 488; though it may be otherwise provided by statute; 70 Pa. 355. See 111 N. C. 615; 98 Cal. 311. See as to levy on franchises, 4 Am. & Eng. Corp. Cas. 138; 15 Am. Dec. 595.

As a general rule franchises cannot be sold or assigned without the consent of the legislature; Moraw. Priv. Corp. 930; 65 Pa. 278; 40 Me. 140; 27 N. J. Eq. 557. The primary franchise to be a corporation, and such others as involve the performance of public duties are inalienable; 10 Allen 448, 459; 11 *id.* 65; 32 N. H. 484; 56 Pa. 413; 46 Md. 1; 21 How. 441; 4 Biss. 35; 71 Tex. 274; 11 C. B. 775; 17 How. 30; 83 Va. 707; 84 *id.* 648; 101 U. S. 71.

The secondary franchises of a quasi-public corporation cannot be aliened without legislative authority; *id.;* 130 *id.* 1; 139 *id.* 24; 6 H. L. Cas. 113; 1 McCrary 541; 3 Fed. Rep. 417, 423, 430. The same principles apply to a mortgage or lease of a franchise, see cases cited, and also, 24 N. J. Eq. 455; 115 Mass. 347; 101 U. S. 71; 8 Phila. 94. The power to sell includes the power to mortgage; 119 U. S. 191.

The franchises which pass by a judicial sale of a railroad and franchises are those which are essential to the operation of the corporation but do not include such special privileges as an exemption from taxation; 93 U. S. 217. A corporation having public duties cannot transfer a portion of them; 50 Ind. 85; but the attempt to divide the franchise only concerns the public and cannot be objected to by a rival company; 45 Cal. 365.

An irrigation company may make a valid conveyance of all its property and right of way; 40 Kan. 96; 38 Cal. 300. See, generally, as to the sale of franchises, 4 Thomp. Corp. ch. cxvi.; as to their constitutional protection see the IMPAIRING OF OBLIGATION OF CONTRACTS; as to their control and regulation by the state, see POLICE POWER; and 12 Cent. L. J. 194; as to the regulation of tolls and charges, see RATES; and as to their taxation, see that title, and 17 L. R. A. 92; as to conflicting franchises, see 4 Am. L. Mag. 71.

The remedy for a non-user or misuser of a franchise by a corporation duly created and organized is by *quo warranto* or *scire facias*, which titles see. A court of equity will not in such case interfere or declare the franchise to be forfeited; 1 N. J. Eq. 369; 2 Johns. Ch. 371; but see 4 Thomp. Corp. § 4538. Where a franchise is asserted in a proceeding to claim a right under it, its existence may be denied by way of defence; 47 Ohio St. 1. But a franchise set up by a corporation in defence if it is in *de facto* possession of it cannot be disputed except by a person or corporation, who in the proceeding claims a better title; 64 Cal. 69. See also as to *quo warranto* for misuser, 30 Am. Dec. 48; and as to compulsory exercise of franchises, 15 L. R. A. 321.

See, generally, Thompson, Corporations, title 19; 18 Myer, Fed. Dec. 866; Foote & Everett, Incorporated Companies Operating under Municipal Franchises; FORFEITURE; DISSOLUTION.

FRANCIA. France. Bract. fol. 427 *q.*

FRANCIGENA. A designation formerly given to aliens in England.

FRANCUS. Free; a freeman; a Frank. Spel. Glos.

Francus bancus. Free bench (*q. v.*).

Francus homo. A freeman.

Fruncus plegius. Frank pledge (*q. v.*)

Francus tenens. A freeholder. See ESTATE OF FREEHOLD.

FRANK. In Old English Law. Free. Usually employed in compounds, as *frankbank*, free bench (*q. v.*).

To send letters and other mail matter free of postage. See FRANKING PRIVILEGE.

FRANKALMOIGNE. A species of ancient tenure, still extant in England, whereby a religious corporation, aggregate or sole, holds its lands of the donor, in consideration of the religious services it performs.

The services rendered being divine, the tenants are not bound to take an oath of fealty to a superior lord. A tenant in frankalmoigne is not only exempt from all temporal service, but the lord of whom he holds is also bound to acquit him of every service and fruit of tenure which the lord paramount may demand of the land held by this tenure. The services to be performed are either spiritual, as prayers to God, or temporal, as the distribution of alms to the poor. Of this latter class is the office of the queen's almoner, which is usually bestowed upon the Archbishop of York, with the title of Lord High Almoner. The spiritual services which were due before the Reformation are described by Littleton § 135; since that time they have been regulated by the liturgy or Book of Common Prayer of the Church of England; Co. 2d Inst. 502; Co. Litt. 93, 494 *a.* Hargr. ed. note (b); 2 Bla. Com. 101.

In the United States, religious corpora-

tions hold land by the same tenure with which all other corporations and individuals hold. Our religious corporations are generally restricted to the holding of whatever quantity of land is required for the immediate purposes of their incorporation; sometimes, as in Pennsylvania, the maximum value of the lands is fixed by statute. Subject to this restriction, they have a fee-simple estate in their lands for the purpose of alienation, but only a determinable fee for the purpose of enjoyment. On a dissolution of the corporation, the fee will revert to the original grantor and his heirs; but such grantor will be forever excluded by an alienation in fee; and in that way the corporation may defeat the possibility of a reverter; 2 Kent 281; 2 Prest. Est. 50. And see 3 Binn. 626; 1 Watts 218; 3 Pick. 232; 12 Mass. 537; 8 Dana 114.

FRANK-CHASE. A liberty or right of free chase. Cowel.

FRANK-FEE. Lands not held in ancient demesne. Called "lands pleadable at common law." Reg. Orig. 12, 14; Fitzh. N. B. 161; *Termes de la Ley.*

That which a man holds to himself and his heirs and not by such service as is required in ancient demesne, according to the custom of the manor. The opposite of copyhold. Cowel. A fine had in the king's court might convert demesne-lands into frank-fee; 2 Bla. Com. 368.

FRANK-FERME. Lands or tenements where the nature of the *fee* is changed by *feoffment* from knight's service to yearly service and whence no homage but such as is contained in the feoffment may be demanded. Britton, c. 66, n. 3; Cowel; 2 Bla. Com. 80.

FRANK-FOLD. The right of the lord to fold his tenant's sheep for manuring the land. *Termes de la Ley*; Cowel; Keilw. 198. See FOLDAGE.

FRANK-LAW. An obsolete expression signifying the rights and privileges of a citizen, and seeming to correspond to our term "civil rights."

FRANK-MARRIAGE. A species of estate-tail where the donee had married one of kin (as daughter or cousin) to the donor and held the estate subject to the implied condition that the estate was to descend to the issue of such marriage. On birth of issue, as in other cases of estate-tail before the statute *De donis*, the birth of issue was regarded as a condition performed, and the estate thereupon became alienable by the donee; 1 Cruise, Dig. 71; 1 Washb. R. P. 67.

The estate is said to be in frank-marriage because given in consideration of marriage and free from services for three generations of descendants; Blount; Cowel. See, also, 2 Bla. Com. 115; 1 Steph. Com. 232.

FRANK-PLEDGE. A pledge or surety for freemen. *Termes de la Ley.*

The bond or pledge which the inhabitants of a tithing entered into for each one of their number that he should be forthcoming to answer every violation of law. Each boy, on reaching the age of fourteen, was obliged to find some such pledge, *or be committed to prison;* Blount; Cowel; 1 Bla. Com. 114.

FRANK-TENEMENT. A freehold. See LIBERUM TENEMENTUM.

FRANKING PRIVILEGE. The privilege of sending certain matter through the public mails without payment therefor.

It was first claimed by the house of commons in 1660, and was confirmed by statute in 1764. The establishment of the penny postage in 1840 caused the abolition of the custom in England. See 1 Bla. Com. 323; 2 Steph. Com. 570, n.

It was formerly enjoyed by various officers of the federal government, including members of both houses of congress, theoretically for the public good.

By the act of January 31, 1873, the franking privilege was abolished from and after July 1, 1873, and the act of March 3, 1873, repealed all laws permitting the transmission by mail of any free matter whatever. The act of March 3, 1875, s. 5, permits members of congress to send free public documents and acts; a qualified exercise of the privilege has been extended to certain officials, where public convenience seemed to require it. By the act of March 3, 1877 (19 Stat. L. 335), it is made lawful to transmit through the mail free of postage, any letters, packages, or other matters relating exclusively to the business of the Government of the United States, provided that every such letter or package bears over the words "Official Business," an endorsement showing the name of the department or bureau from whence transmitted. This provision was extended by the act of March 3, 1879 (20 Stat. L. 362), to all officers of the government and made applicable to all official mail matter. By the act of January 12, 1895 (25 Stat. L. 622), members of congress are entitled to send through the mails free, under their frank, any mail matter to any government official or to any person, correspondence not exceeding one ounce in weight, upon official or departmental business. They may also frank the congressional record or any part thereof. U. S. Rev. Stat. 1 Supp. 70.

FRANKLEYN (spelled, also, *Francling* and *Franklin*). A freeman; a freeholder; a gentleman. Blount; Cowel.

FRASSETUM. A wood or wood ground where ash trees grow. Co. Litt. 4 b.

FRATER (Lat.). Brother.

Frater consanguineus. A brother born from the same father, though the mother *may* be different.

Frater nutricius. A bastard brother.

Frater uterinus. A brother who has the same mother but not the same father.

Blount; Vicat, Voc. Jur.; 2 Bla. Com. 232.

Fratres conjurati. Sworn brothers or companions for the defence of their sovereign or for other purposes. Hoved. 445.

Fratres poes. Certain friars who were accustomed to wear white and black garments. Walsingham 124. See BROTHER.

FRATERIA. A fraternity, brotherhood, or society of religious persons, who were mutually bound to pray for the good health and life, etc., of their living brethren, and the souls of those that were dead. Cowel.

FRATERNIA. A fraternity or brotherhood.

FRATERNITY. A body of men associated for business, pleasure, or social intercourse, by some common tie, either natural, as of the like business, interest or character, or formal, as for religious or social purposes.

"Some people of a place united together, in respect of a mystery and business, into a company." 1 Salk. 193.

FRATRIAGE. A younger brother's inheritance.

FRATRICIDE. One who has killed a brother or sister; also the killing of a brother or sister. Black, L. Dict.

FRAUD. An endeavor to alter rights, by deception touching motives, or by circumvention not touching motives Bigelow, Fraud 5.

Fraud is sometimes used as a term synonymous with *covin*, *collusion*, and *deceit*, but improperly so. *Covin* is a secret contrivance between two or more persons to defraud and prejudice another of his rights. *Collusion* is an agreement between two or more persons to defraud another under the forms of law, or to accomplish an illegal purpose. *Deceit* is a fraudulent contrivance by words or acts to deceive a third person, who, relying thereupon, without carelessness or neglect of his own, sustains damages thereby. Co. Litt. 357 *b*; Bacon, Abr. *Fraud*.

Actual or positive *fraud* includes cases of the intentional and successful employment of any cunning, deception, or artifice, used to circumvent, cheat, or deceive another. 1 Story, Eq. Jur. § 186.

For instance, the misrepresentation by word or deed of material facts, by which one exercising reasonable discretion and confidence is misled to his injury, whether the misrepresentation was known to be false, or only not known to be true, or even if made altogether innocently; the suppression of material facts which one party is legally or equitably bound to disclose to another; all cases of unconscientious advantage in bargains obtained by imposition, circumvention, surprise, and undue influence over persons in general, and especially over those who are, by reason of age, infirmity, idiocy, lunacy, drunkenness, coverture, or other incapacity, unable to take due care of and protect their own rights and interests; bargains of such an unconscionable nature and of such gross inequality as naturally lead to the presumption of fraud, imposition, or undue influence, when the decree of the court can place the parties *in statu quo;* cases of surprise and sudden action, without due deliberation, of which one party takes advantage; cases of the fraudulent suppression or destruction of deeds and other instruments, in violation of, or injury to, the rights of others; fraudulent awards with intent to do injustice; fraudulent and illusory appointments and revocations under powers; fraudulent prevention of acts to be done for the benefit of others under false statements or false promises; frauds in relation to trusts of a secret or special nature; frauds in verdicts, judgments, decrees, and other judicial proceedings; frauds in the confusion of boundaries of estates and matters of partition and dower; frauds in the administration of charities; and frauds upon creditors and other persons standing upon a like equity, are cases of actual fraud. 1 Story, Eq. Jur. c. 6.

Legal or *constructive fraud* includes such contracts or acts as, though not originating in any actual evil design or contrivance to perpetrate a fraud, yet by their tendency to deceive or mislead others, or to violate private or public confidence, are prohibited by law.

Thus, for instance, contracts against some general public policy or fixed artificial policy of the law; cases arising from some peculiar confidential or fiduciary relation between the parties, where advantage is taken of that relation by the person in whom the trust or confidence is reposed, or by third persons; agreements and other acts of parties which operate virtually to delay, defraud, and deceive creditors; purchases of property, with full notice of the legal or equitable title of other persons to the same property (the purchaser becoming, by construction, *particeps criminis* with the fraudulent grantor); and voluntary conveyances of real estate, as affecting the title of subsequent purchasers; 1 Story, Eq. Jur. c. 7. See Bisph. Eq. 205.

According to the civilians, *positive* fraud consists in doing one's self, or causing another to do, such things as induce the opposite party into error, or retain him there. The intention to deceive, which is the characteristic of fraud, is here present. Fraud is also divided into that which has induced the contract, *dolus dans causam contractui*, and incidental or accidental fraud. The former is that which has been the cause or determining motive of the contract, that without which the party defrauded would not have contracted, when the artifices practised by one of the parties have been such that it is evident that without them the other would not have contracted. *Incidental* or *accidental* fraud is that by which a person, otherwise determined to contract, is deceived on some accessories or incidents of the contract,—for example, as to the quality of the object of the contract, or its price,—so that he has made a bad bargain. Accidental fraud does not, according to the civilians, avoid the contract, but simply subjects the party to damages. It is otherwise where the fraud has been the determining cause of the contract, *qui causam dedit contractui:* in that case the contract is void. Toullier, Dr. Civ. Fr. liv. 3, t. 3, c. 2, n. § 5, n. 86, *et seq.* See, also, 1 Malleville, *Analyse de la Discussion du Code Civil*, pp. 15, 16.

What constitutes fraud. 1. It must be such an appropriation as is not permitted

by law. 2. It must be with knowledge that the property is another's, and with design to deprive him of it. 3. It is not in itself a crime, for want of a criminal intent; though it may become such in cases provided by law. Livermore, Penal Law 739; See Poll. Contr. (6th ed.) 534, *et seq.*

Fraud, in its ordinary application to cases of contracts, includes any trick or artifice employed by one person to induce another to fall into or to detain him in an error, so that he may make an agreement contrary to his interest; and it may consist in misrepresenting or concealing material facts, and may be effected by words or by actions. See 143 U. S. 79.

Where a party intentionally or by design misrepresents a material fact or produces a false impression, in order to mislead another, or to obtain an undue advantage of him, there is a positive fraud in the fullest sense of the term; 85 Tenn. 139. It must relate to facts then existing or which had previously existed; 11 Colo. 15; 127 Ill. 187. If a person take upon himself to state as true that of which he is wholly ignorant, he will, if it be false, incur the same legal responsibility as if he had made the statements with knowledge of its falsity; 125 Pa. 52; 147 Mass. 403; 71 Wis. 196; 73 *id.* 39; 75 Mich. 188; 73 Iowa 749.

While, on the one hand, the courts have aimed to repress the practice of fraud, on the other, they have required that before relieving a party from a contract on the ground of fraud, it should be made to appear that on entering into such contract he exercised a due degree of caution. *Vigilantibus, non dormientibus, subveniunt leges.* A misrepresentation as to a fact the truth or falsehood of which the other party has an opportunity of ascertaining, or the concealment of a matter which a person of ordinary sense, vigilance, or skill might discover, does not in law constitute fraud. See 130 U. S. 648. Misrepresentation as to the legal effect of an agreement does not avoid it as against a party whom such misrepresentation has induced to enter into it, —every man being presumed to know the legal effect of an instrument which he signs or of an act which he performs. Ans. Contr. 154. But see 69 Tex. 503.

An intention to violate entertained at the time of entering into a contract, but not afterward carried into effect, does not vitiate the contract; per Tindal, C. J., 2 Scott 588; 4 B. & C. 506; per Parke, B., 4 M. & W. 115, 122; but making a promise as an inducement to a contract, with no intention of performing it, constitutes a fraud for which the contract may be rescinded; 78 Cal. 126; 40 Minn. 476; but see 42 Ill. App. 548. When one person misrepresents or conceals a material fact which is peculiarly within his own knowledge, or, if it is also within the reach of the other party, is a device to induce him to refrain from inquiry, and it is shown that the concealment or other deception was practised with respect to the particular transaction, such transaction will be void on the ground of fraud; 6 Cl. & F. 232; Comyn, Contr. 38; per Tindal, C. J., 3 M. & G. 446, 450. See 85 Ill. 304; 32 N. J. Eq. 372; 12 Ves. 78. And even the concealment of a matter which may disable a party from performing the contract is a fraud; 9 B. & C. 387; per Littledale, J.

Equity doctrine of fraud. It is sometimes inaccurately said that such and such transactions amount to fraud in equity, though not in law; according to the popular notion that the law allows or overlooks certain kinds of fraud which the more conscientious rules of equity condemn and punish. But, properly speaking, fraud in all its shapes is as odious in law as in equity. The difference is that, as the law courts are constituted, and as it has been found in centuries of experience that it is convenient they should be constituted, they cannot deal with fraud otherwise than to punish it by the infliction of damages. All those manifold varieties of fraud against which specific relief, of a preventive or remedial sort, is required for the purposes of substantial justice, are the subjects of equity and not of law *jurisdiction.*

What constitutes a case of fraud in the view of courts of equity, it would be difficult to specify. It is, indeed, part of the equity doctrine of fraud not to define it, not to lay down any rule as to the nature of it, lest the craft of men should find ways of committing fraud which might escape the limits of such a rule or definition. "The court very wisely hath never laid down any general rule beyond which it will not go, lest other means for avoiding the equity of the court should be found out." Per Hardwicke, C., in 3 Atk. 278. It includes all acts, omissions, or concealments which involve a breach of legal or equitable duty, trust or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another. "It may be stated as a general rule that fraud consists in anything which is calculated to deceive, whether it be a single act or combination of circumstances, whether it be by suppression of the truth or suggestion of what is false; whether it be by direct falsehood, or by *innuendo*, by speech or by silence, by word of mouth or by a look or a gesture. Fraud of this kind may be defined to be any artifice by which a person is deceived to his disadvantage." Bisph. Eq. § 206.

It is said by Lord Hardwicke, 2 Ves. Ch. 155, that in equity fraud may be presumed from circumstances, but in law it must be proved. His meaning is, unquestionably, no more than this: that courts of equity will grant relief upon the ground of fraud established by a degree of presumptive evidence which courts of law would not deem sufficient proof for their purposes; that a higher degree, not a different kind, of proof may be required by courts of law to make out what they will act upon as fraud. Both tribunals accept presumptive or circumstantial proof, if of sufficient force. Circumstances of mere suspicion, leading to no

certain results, will not, in either, be held sufficient to establish fraud.

The equity doctrine of fraud extends, for certain purposes, to the violation of that class of so-called imperfect obligations which are binding on conscience, but which human laws do not and cannot ordinarily undertake to enforce: as in a large variety of cases of contracts which courts of equity do not set aside, but at the same time refuse to lend their aid to enforce; 2 Kent 39; 1 Johns. Ch. 630; 1 Ball & B. 250. The proposition that "fraud must be proved and not assumed," is to be understood as affirming that a contract, honest and lawful on its face, must be treated as such until it is shown to be otherwise by evidence, either positive or circumstantial. Fraud may be inferred from facts calculated to establish it. Per Black, C. J., in 22 Pa. 179; 148 *id.* 234; 59 Fed. Rep. 70.

The following classification of frauds as a head of equity jurisdiction is given by Lord Hardwicke, J., in Chesterfield *v.* Janssen, 2 Ves. Ch. 125; 1 Atk. 301; 1 Lead. Cas. Eq. 428.

1. Fraud, or *dolus malus*, may be actual, arising from facts and circumstances of imposition. 2. It may be apparent from the intrinsic nature and subject of the bargain itself, such as no man in his senses and not under delusion would make, on the one hand, and no honest or fair man would accept, on the other. 3. It may be inferred from the circumstances and condition of the parties: for it is as much against conscience to take advantage of a man's weakness or necessity as of his ignorance. 4. It may be collected from the nature and circumstances of the transaction, as being an imposition on third persons.

Effect of. Fraud, both at law and in equity, when sufficiently proved and ascertained, avoids a contract *ab initio*, whether the fraud be intended to operate against one of the contracting parties, or against third parties, or against the public; Ans. Contr. 162; 1 W. Blackst. 465; Dougl. 450; 3 Burr. 1909; 3 V. & B. 42; 1 Sch. & L. 209; Domat, Lois Civ. p. 1, l. 4, t. 6, s. 3, n. 2; see 49 Conn. 98; but the injured party may elect to allow the transaction to stand; L. R. 2 H. L. 246; 49 N. Y. 626; 7 Bush 63.

The fraud of an agent by a misrepresentation which is embodied in the contract to which his agency relates, avoids the contract. But the party committing the fraud cannot in any case himself avoid the contract on the ground of the fraud; Chitty, Contr. 590, and cases cited. The party injured may lose the right to avoid the contract by *laches*; 47 N. H. 208; 21 Wis. 88; Bisph. Eq. § 202; 130 Mass. 50; 55 N. H. 508; 78 N. Y. 159; 67 Ill. 450. But no delay will constitute *laches* except that occurring after the discovery of the fraud; 11 Cl. & F. 714; 4 How. 561; 23 Iowa 467; 43 *id.* 556; 35 Ala. 560; 30 Minn. 64. The injured party must repudiate the transaction *in toto*, if at all; he may not adopt it in part and repudiate it in part; 12 How. 51; 25 Beav. 594. See 2 Phil. 425.

As to frauds in contracts and dealings, the common law subjects the wrong-doer, in several instances, to an action on the case, such as actions for fraud and deceit in contracts on an express or implied warranty of title or soundness, etc. But fraud gives no action in any case without damage; 3 Term 56; and in matters of contract it is merely a defence; it cannot in any case constitute a new contract; 7 Ves. 211; 2 Miles 229. It is essentially *ad hominem*; 4 Term 337.

A person cannot recover for fraudulent representations where he did not rely upon them, but relied upon information from other sources and upon his own judgment; 118 Ind. 565; 39 Kan. 752; 76 Iowa 507; 84 Ala. 95; 23 Neb. 817; 135 U. S. 609. Fraud must be clearly proved and it is proper so to instruct the jury; 148 Pa. 234. There is no error in charging that fraud is never presumed, and must be shown by satisfactory proof; 59 Fed. Rep. 70.

In Criminal Law. Without the express provision of any statute, all deceitful practices in defrauding or endeavoring to defraud another of his known right, by means of some artful device, contrary to the plain rules of common honesty, are condemned by the common law, and punishable according to the heinousness of the offence; Co. Litt. 3 *b*; Dy. 295; Hawk. Pl. Cr. c. 71.

In considering fraud in its *criminal* aspect, it is often difficult to determine whether facts in evidence constitute a fraud, or amount to a felony. It seems now to be agreed that if the *property* obtained, whether by means of a false token or a false pretence, be parted with absolutely by the owner, it is a fraud; but if the *possession* only be parted with, and that possession be obtained by fraud, it will be felony; Bacon, Abr. *Fraud;* 2 Leach 1066; 2 East, Pl. Cr. c. 673.

Of those gross frauds or cheats which, as being "levelled against the public justice of the kingdom," are punishable by indictment or information at the common law; 2 East, Pl. Cr. c. 18, § 4, p. 821; the following are examples:—uttering a fictitious bank bill; 2 Mass. 77; selling unwholesome provisions; 4 Bla. Com. 162; *mala praxis* of a physician; 1 Ld. Raym. 213; rendering false accounts, and other frauds, by persons in official situations; Rex *v.* Bembridge, cited 2 East 136; 5 Mod. 179; 2 Campb. 269; 3 Chitty, Cr. Law 666; fabrication of news tending to the public injury; Stark. Lib. 546; Hale, Summ. 132; and per Scroggs, C. J., Rex *v.* Harris, Guildhall, 1680; cheats by means of false weights and measures; 2 East, Pl. Cr. c. 18, § 3, p. 820; and generally, the fraudulent obtaining the property of another by any deceitful or illegal practice or token (short of felony) which affects or may affect the public; 2 East, Pl. Cr. c. 18, § 2, p. 818; as with the common cases of obtaining property by false pretences. See DECEIT; MISREPRESENTATION.

FRAUDARE. In Civil Law. To cheat; defraud; deceive.

FRAUDS, STATUTE OF. The name commonly given to the statute 29 Car. II. c. 3, entitled "An Act for the Prevention of Frauds and Perjuries."

The multifarious provisions of this celebrated statute appear to be distributed under the following heads. 1. The creation and transfer of estates in land, both legal and equitable, such as at common law could be effected by parol, *i. e.* without deed. 2. Certain cases of contracts which at common law could be validly made by oral agreement. 3. Additional solemnities in cases of wills. 4. New liabilities imposed in respect of real estate held in trust. 5. The disposition of estates *pur auter vie*. 6. The entry and effect of judgments and executions. The first and second heads, however, comprise all that in the common professional use of the term is meant by the Statute of Frauds.

And they present this important feature, characterizing and distinguishing all the minor provisions which they both contain, *i. e.* that whereas prior to their enactment the law recognized only two great classes of contracts, conveyances, etc.,—those which were by deed and those which were by *parol*, including under the latter term alike what was written and what was oral,—these provisions introduced into the law a distinction between *written* parol and *oral* parol transactions, and rendered a writing necessary for the valid performance of the matters to which they relate. Those matters are the following:—conveyances, leases, and surrenders of interests in lands; declarations of trusts of interest in lands; special promises by executors or administrators to answer damages out of their own estate; special promises to answer for the debt, default, or miscarriage of another; agreements made upon consideration of marriage; contracts for the sale of lands, tenements, or hereditaments, or any interest in or concerning them; agreements not to be performed within the space of one year from the making thereof; contracts for the sale of goods, wares, and merchandise for the price of ten pounds sterling or upwards. All these matters must be, by the statute, put in writing, signed by the party to be charged, or his attorney. It has been a question whether a promise to accept a bill of exchange is within the statute, and in some jurisdictions it is required by statute to be in writing. See ACCEPTANCE. It has been recently held in England that, apart from the special statute, it need not be in writing and is not within the statute of frauds; [1894] 2 Q. B. 885; 91 U. S. 406; 142 *id.* 116; 34 Fed. Rep. 866; 9 Wash. 659.

As to contracts of indemnity to a third person see INDEMNITY; 42 Am. St. Rep. 186–94; as to contracts to be performed within a year see 164 U. S. 418.

In regard to contracts for the sale of goods, wares, and merchandise, the payment of earnest-money, or the acceptance and receipt of part of the goods, etc., dispenses with the written memorandum. See EARNEST; SALE.

The substance of the statute, as regards the provisions above referred to, has been re-enacted in almost all the states of the Union; and in many of them, other points coming within the same general policy, but not embodied in the original English statute, have been made the subject of more recent enactments: as, for instance, the requirement of writing to hold a party upon a representation as to the character, credit, etc., of a third person, which was provided in England by 9 Geo. IV. cap. 14, § 6, commonly called Lord Tenterden's Act. The legislation of the different states on these matters will be found collected in the Appendix to Browne on the Statute of Frauds.

See Throop, Val. of Verb. Agr; Reed; Wood, Stat. Frauds. For sufficiency of memorandum required by the statute, see 34 Cent. L. J. 6. As to the various subjects affected by the statute of frauds see the several titles, and for reference to authorities on the different branches of the subject, see the classified list in the St. Louis Law Library Catalogue.

FRAUDULENT CONVEYANCE. A conveyance, the object, tendency, or effect of which is to defraud another, or the intent of which is to avoid some duty or debt due by or incumbent on the party making it. 2 Kent 440; 4 *id.* 462; and if fraudulent as to any provision therein, is void *in toto* as against creditors; 29 W. Va. 203.

Fraudulent conveyances received early attention; and the statutes of 13 Eliz. c. 5, and 27 Eliz. c. 4, made perpetual by 29 Eliz. c. 18, declared all conveyances made with intent to defraud creditors, etc., to be void. By a liberal construction, it has become the settled English law that a voluntary conveyance shall be deemed fraudulent against a subsequent purchaser even with notice; 9 East 59; 2 Bla. Com. 296; Roberts, Fraud. Conv. 2, 3.

Voluntary conveyances are not so construed in the United States, however, where the subsequent purchaser has notice, especially if there be a *good* consideration; Wait, Fraud. Convey. 97; 2 Gray 447.

These statutes have been generally adopted in the United States as the foundation of all the state statutes upon this subject; 1 Story, Eq. Jur. 353; 4 Kent 462.

The mere fact of indebtedness alone will not render a voluntary conveyance void, if the grantor has property amply sufficient remaining to pay his creditor; 71 Tex. 592; 22 Neb. 172.

A voluntary gift for charitable purposes is not to be treated as "covinous," within the meaning of 27 Eliz. c. 4, and is not avoided by a subsequent conveyance for value; [1892] App. Cas. 412.

When a mortgage is given to one person for the purpose of securing debts due to himself and others, with intent on the part

of the mortgagor to defraud other creditors, it is valid as to an innocent beneficiary whose debt is an honest one, although the mortgagee himself is a party to the fraud; 6 U. S. App. 510.

Voluntary conveyances by a debtor who is financially embarrassed are *prima facie* fraudulent as to existing creditors, and where a conveyance is made *mala fide*, and the fraud is participated in by both parties thereto, it cannot be upheld in derogation of the claims of creditors, existing or subsequent; 39 Minn. 527; 50 Ark. 42; 36 Fed. Rep. 29.

But although such conveyance is void as regards purchasers and creditors, it is valid as between the parties; 5 Binn. 109; 3 W. & S. 255; 4 Ired. 102; 20 Pick. 247, 354; 1 Ohio 469; 2 South. 738; 2 Hill, S. C. 488; 7 Johns. 161; 1 W. Bla. 262; 77 Iowa 203. An offence within the 13 Eliz. c. 5, § 3, is also indictable; 6 Cox, Cr. Cas. 31.

This subject is fully treated in a note to Twyne's case, 1 Sm. Lead. Cas. (continued in 18 Am. L. Reg. N. S. 137), and in Bump; May, Fraud. Conv. See BADGES OF FRAUD.

FRAUS (Lat.). Fraud. The term of the civil law was, however, *dolus* (*q. v.*). It has been said that *fraus* was distinguished from *dolus* and had a more extended meaning. Calv. Lex.

FRAUS DANS LOCUM CONTRACTUI. A misrepresentation or concealment of some fact that is material to the contract, and had the truth regarding which been known the contract would not have been made as made, is called a "fraud *dans locum contractui*," i. e. a fraud occasioning the contract, or giving place or occasion for the contract.

FRAUS LEGIS (Lat.). Fraud of law. **In Civil Law.** The institution of legal proceedings for a fraudulent purpose. See IN FRAUDUM LEGIS.

FRAXINETUM. In Old English Law. A wood of ashes; a place where ashes grow. Co. Litt. 4 *b*; Shep. Touchst. 95.

FRAY. See AFFRAY.

FRECTUM. Freight. *Quoad frectum navium suarum*, as to the freight of his vessels. Blount.

FREDSTOLE. Freedstole. The seat of peace, a name given to a seat or chair near the altar, to which all fled who sought to obtain the privilege of sanctuary. Encyc. Dict. A sanctuary. Gib. Cod.

FREDUM. A fine paid for obtaining pardon when the peace had been broken. Spelman, Gloss.; Blount. A sum paid the magistrate for protection against the right of revenge. 1 Robertson, Charles V., App. note xxiii.

Freda was a Frankish term answering to the Saxon "wites.' Maitl. Domesd. 278.

FREDWIT, or FREDWITE. A liberty to hold courts and take up the fines for beating and wounding. Cowel; Cunningham, Law Dict.

To be free from fines.

FREE. Not bound to servitude. At liberty to act as one pleases. This word is put in opposition to slave. U. S. Const. art. 1, § 2. Used in distinction from being bound as an apprentice.

The Declaration of Independence asserts that all men are born free; and in this sense the term is usually supposed to mean all mankind; though this seems to be doubted in 19 How. 393.

Certain: as, *free* services. These were also more honorable.

Confined to the person possessing, instead of being held in common: as, *free fishery*.

FREE ALMS. See FRANK-ALMOIGNE.

FREE BENCH. Copyhold lands which the wife has for dower after the decease of her husband. Kitch. 102; Bracton, lib. 4, tr. 6, cap. 13, num. 2; Fitzh. N. B. 150; Plowd. 411.

Dower in copyhold lands. 2 Bla. Com. 129. The quantity varies in different sections of England; Co. Litt. 110 *b*; L. R. 16 Eq. 592; incontinency was a cause of forfeiture, except on the performance of a ridiculous ceremony; Cowel; Blount.

FREE BORD. An allowance of land outside the fence which may be claimed by the owner. An allowance, in some places, two and a half feet wide outside the boundary or enclosure. Blount; Cowel.

FREE BOROUGH MEN. Such great men as did not engage like the frank-pledge men for their decennier. Jac. L. Dict.

FREE CHAPEL. A chapel founded by the king and exempted from the jurisdiction of the ordinary. It may be one founded or endowed by a private person under a grant from the king; Cowel; *Termes de la Ley*.

FREE COURSE. Having the wind from a favorable quarter. To prevent collision of vessels, it is the duty of the vessel having the wind free to give way to a vessel beating up to windward and tacking; 3 Hagg. Adm. 215. At sea, such vessel meeting another close-hauled must give way, if necessary to prevent the danger of collision; 3 C. & P. 528. See 2 W. Rob. 225; 2 Dods. 87; MARITIME LAW.

FREE ENTRY, INGRESS AND EGRESS. The right to go upon land from time to time as required to assert any right, as to take emblements.

FREE FISHERY. See FISHERY.

FREE FOLD. See FOLDAGE; FRANK-FOLD.

FREE ON BOARD. A phrase applied to the sale of goods which denotes that the seller has contracted for their delivery on the vessel, cars, etc., without cost to the buyer for packing, portage, cartage, and the like. See FRAIS JUSQU'A BORD; F. O. B.

In such a contract the seller is under no obligation to act until the buyer names the ship to which the delivery is to be made; 117 Pa. 508; Abb. f. o. b.

FREE PLEDGE. See FRANKPLEDGE.

FREE SERVICES. Such as it was not unbecoming the character of a soldier or freeman to perform: as, to serve under his lord in the wars, to pay a sum of money, and the like. 2 Bla. Com. 62; 1 Washb. R. P. 25.

FREE SHIPS. Neutral ships. "*Free ships make free goods*" is a phrase often used in treaties to denote that the goods on board neutral ships shall be free from confiscation even though belonging to an enemy; Wheat. Int. L. 507; 1 Kent 126. The doctrine is recognized, except as to goods contraband of war, in the Declaration of Paris (1856), *q. v.*, and the controversy over it has been brought to a close as regards all maritime nations but the United States. This declaration, while a great step in favor of neutrals, does not free neutral commerce from the belligerent right of search for the purpose of ascertaining the true character of a ship sailing under a neutral flag, and for contraband goods. Pomeroy, Int. L. 220. While the United States are not a party to the declaration of Paris, yet, during the civil war, its second and third articles, relating to this subject, were adhered to by both parties; Wheat. Int. L. 475 *a*. See 3 Phill. Int. L. 3d ed. 238; Upton, Mar. Warfare 186; Wheat. Int. L. 581; FLAG, for a full discussion; NEUTRALITY; DECLARATION OF PARIS.

FREE SOCAGE. Tenure in free socage is a tenure by certain and honorable services which yet are not military. 1 Spence, Eq. Jur. 52; Dalrymple, Feuds, c. 2, § 1; 1 Washb. R. P. 25; called, also, free and common socage. See SOCAGE.

FREE SOCMEN. Tenants in free socage. 2 Bla. Com. 79.

FREE TENURE. Freehold tenure.

FREE WARREN. A franchise for the preserving and custody of beasts and fowls of warren. 2 Bla. Com. 39, 417; Co. Litt. 233. This franchise gave the grantee sole right of killing, so far as his warren extended, on condition of excluding other persons. 2 Bla. Com. 39.

FREEDMAN. **In Roman Law.** A person who had been released from a state of servitude. See LIBERTINE.

The term is frequently applied to the emancipated slaves in the southern states. By the fourteenth amendment of the constitution, citizenship was conferred upon them; Cooley, Const. Lim. 361. See 16 Wall. 36; 93 U. S. 542. The fifteenth amendment protects the elective franchise of freedmen and others of African descent; and this was the object of its adoption; Cooley, Const. Lim. 752.

FREEDOM. The condition of one to whom the law attributes the single individual right of personal liberty, limited only, in the domestic relations, by powers of control which are associated with duties of protection. See MARRIED WOMEN; PARENT AND CHILD; GUARDIAN AND WARD; MASTER AND APPRENTICE.

This right becomes subject to judicial determination when the law requires the public custody of the person as the means of vindicating the rights of others. The security of the liberty of the individual and of the rights of others is graduated by the intrinsic equity of the law, in purpose and application. The means of protecting this liberty of the individual without hazarding the freedom of others must be sought in the provisions of the remedial and penal law.

Independently of forfeiture of personal liberty under such laws and of its limitations in the domestic relations, freedom, in this sense, is a *status* which is invariable under all legal systems. It is the subject of judicial determination when a condition incompatible with the possession of personal liberty is alleged against one who claims freedom as his *status*. A community wherein law should be recognized, and wherein nevertheless this status should not be enjoyed by any private person, is inconceivable; and, wherever its possession is thus controverted, the judicial question arises of the personal extent of the law which attributes liberty to free persons. The law may attribute it to every natural person, and thereby preclude the recognition of any condition inconsistent with its possession. This universal extent of the law of free condition will operate in the international as well as in the internal private law of the state. In most European countries the right of one, under the law of a foreign country, to control the person of another who by such law had been his slave or bondman is not recognized under that international rule for the allowance of the effect of a foreign law which is called *comity*, because the law of those countries attributes personal liberty as a right to every natural person. 1 Hurd, Law of Freedom §§ 116, 300.

In other countries the power of the master under a foreign law is recognized in specified cases by a statute or treaty, while an otherwise universal attribution of personal liberty precludes every other recognition of a condition of bondage. On this principle, in some of the United States, an obligation to render personal service or labor, and the corresponding right of the person to whom it is due, existing under the law of other states, were not enforced except in cases of claim within art. 4, sec. 2, ¶ 3 of the constitution of the United States; 18 Pick. 193; 20 N. Y. 562.

Legal rights are the effects of civil society. No legal condition is the reservation of a state of nature anterior to civil society. Freedom, as here understood, is the effect of law, not a pre-existing natural element. It is, therefore, not necessarily attributed to all persons within any one

jurisdiction. But personal liberty, even though not attributed universally, may be juridically regarded as a right accordant with the nature of man in society; and the effect of this doctrine will appear in a legal presumption in favor of free condition, which will throw the burden of proof always on him who denies it. This presumption obtained in the law of Rome (XII Tab. T. vi. 5; Dig. lib. 40 tit. 5, l. 53; lib. 43, tit. 29, s. 3, l. 9; lib. 50, tit. 17, ll. 20, 22) even when slavery was derived from the *jus gentium*, or that law which was found to be received by the general reason of mankind; 1 Hurd, Law of Freedom § 157.

In English law, this presumption in favor of liberty has always been recognized, not only in the penal and remedial law, but in applying the law of condition, at a time when involuntary servitude was lawful; Fortesque, cc. 42, 47; Co. Litt. fol. 124 *b*; Wood, Inst. c. 1, § 5. In the slave-holding states of the Union, a presumption against the freedom of persons of negro descent arose or was declared by statute; Cooper, Justin. 485; 1 Dev. 336; 8 Ga. 157; 5 Halst. N. J. 275. In interpreting manumission clauses in wills, the rule differed in the states according to their prevailing policy; Cobb, Slav. 298.

The condition of a private person who is legally secured in the enjoyment of those rights of action, in social relations, which might be equally enjoyed by all private persons.

The condition of one who may exercise his natural powers as he wills is not known in jurisprudence, except as the characteristic of those who hold the supreme power of the state. The freedom which one may have by his individual strength resembles this power in kind, and is no part of legal freedom. The legal right of one person involves correlative obligations on others. All persons must be restricted by those obligations which are essential to the freedom of others; 2 Harr. Cond. La. 208; but these are not inconsistent with the possession of rights which may be enjoyed equally by all. Such obligations constitute a condition opposed to freedom only as things which mutually suppose and require each other. Where the law imposes obligations incompatible with the possession of such rights as might be equally enjoyed by all, a condition arises which is contrary to freedom, see BONDAGE, and the condition of those who hold the rights correlative to such obligations becomes superior to freedom, as above defined, or is merged in the superiority of a class or caste. The rights and obligations of all cannot be alike; men must stand towards each other in unlike relations, since the actions of all cannot be the same. In the possession of relative rights they must be unequal. But individual (absolute) rights, which exist in relations towards the community in general, and capacity for relative rights in domestic relations, may be attributed to all in the same circumstances of natural condition. It is in the possession of these rights and this capacity that this freedom exists. As thus defined, it comprehends freedom in the narrower sense, as the greater includes the less; and when attributed to all who enjoy freedom in the narrower sense, as at the present day in the greater part of Europe and formerly in the free states of the Union, the latter is not distinguished as a distinct condition. But some who enjoy personal liberty might yet be so restricted in the acquisition and use of property, so unprotected in person and limited in the exercise of relative rights, that their condition would be freedom in the narrower sense only. During the middle ages, in Europe, it was possible to discriminate the existing free conditions as thus different; and the restrictions formerly imposed on free colored persons in the slaveholding states of the Union created a similar distinction between their freedom and that which, in all the states, was attributed to all persons of white race.

Freedom, in either sense, is a condition which may exist anywhere, under the civil power; but its permanency will depend on the guarantees by which it is defended. These are of infinite variety. In connection with a high degree of guarantee against irresponsible sovereign power, freedom, in the larger sense above described, may be called *civil freedom*, from the fact that such guarantee becomes the public law of the state. Such freedom acquires specific character from the particular law of some one country, and becomes the topic of legal science in the juridical application of the guarantees by which the several rights incident to it are maintained. This constitutes a large portion of the jurisprudence of modern states, and embraces, particularly in England and America, the public or constitutional law. The bills of rights in American constitutions, with their great original, Magna Charta, are the written evidences of the most fundamental of these guarantees. The provisions of the constitution of the United States which have this character operate against powers held by the national government, but not against those reserved to the states; 7 Pet. 243; Sedgw. Const. 597. It has been judicially declared that a person "held to service or labor in one state under the laws thereof escaping into another" is not protected by any of these provisions, but may be delivered up, by national authority, to a claimant, for removal from the state in which he is found, in any method congress may direct, and that any one claimed as such fugitive may be seized and removed from such state by private claimant, without regard either to the laws of such state or the acts of congress; 13 Pet. 597.

The other guarantees of freedom in either sense are considered under the titles EVIDENCE; ARREST; BAIL; TRIAL; HABEAS CORPUS; DE HOMINE REPLEGIANDO.

Irresponsible superiority, whether of one or of many, is necessarily antagonistic to freedom in others. Yet freedom rests on

law, and law on the supreme power of some state. The possession of this power involves a liberty of action ; but its possession by a body of persons, each one of whom must submit to the will of the majority, is not in itself a guarantee of the freedom of any one individual among them. Still, the more equally this power is distributed among those who are thus individually subject, the more their individual liberty of action in the exercise of this power approximates to a legal right,—though one beyond any incident to civil freedom as above defined,—and its possession may be said to constitute political freedom, so far as that may be ascribed to private persons which is more properly ascribed to communities. In proportion as this right is extended to the individual members of a community, it becomes a guarantee of civil freedom, by making a delegation of the power of the whole body to a representative government possible and even necessary, which government may be limited in its action by customary or written law. Thus, the political liberties of private persons and their civil freedom become intimately connected ; though political and civil freedom are not necessarily coexistent. 1 Sharsw. Bla. Com. 6, n., 127, n.

Political freedom is to be studied in the public law of constitutional states, and in England and America, particularly in those provisions in the bills of rights which affect the subject more in his relations towards the government than in his relations towards other private persons. See LIBERTY. The terms freedom and liberty are words differing in origin (German and Latin) ; but they are, in use, too nearly synonymous to be distinguished in legal definition. See LIBERTY ; Lieber, Civ. Lib. etc. 37, n.

FREEDOM OF THE CITY. In English Law. Immunity from county jurisdiction, and the privilege of corporate taxation and self-government held under a charter from the crown. This freedom is enjoyed of right, subject to the provision of the charter, and is often conferred as an honor on princes and other distinguished individuals. The freedom of a city carries the parliamentary franchise. Encyc. Dict. The rights and privileges possessed by the burgesses or freemen of a municipal corporation under the old English law ; now of little importance, and conferred chiefly as a mark of honor. See 11 Chic. L. J. (U. S.) 357.

The phrase has no place in American law, and as frequently used in addresses of welcome made to organizations visiting an American city, particularly by mayors, has no meaning whatever except as an expression of good will.

FREEDOM OF THE PRESS. See LIBERTY OF THE PRESS.

FREEDOM OF SPEECH. See LIBERTY OF SPEECH.

FREEHOLD. See ESTATE OF FREEHOLD.

FREEHOLD IN LAW. A freehold which has descended to a man, upon which he may enter at pleasure, but which he has not entered on. *Termes de la Ley.*

FREEHOLD LAND SOCIETIES. Societies in England designed for the purpose of enabling mechanics, artisans, and other working-men to purchase at the least possible price a piece of freehold land of a sufficient yearly value to entitle the owner to the elective franchise for the county in which the land is situated. Wharton.

FREEHOLDER. The owner of a freehold estate. Such a man must have been anciently a freeman ; and the gift to any man by his lord of an estate to him and his heirs made the tenant a freeman, if he had not been so before. See 1 Washb. R. P. 29, 45. One who owns land in fee, or for life, or for some indeterminate period. The estate may be equitable or legal. 75 N. C. 13.

FREEMAN. One who is not a slave. One born free or made so.

In Old English Law. A freeholder, as distinguished from a villein.

An inhabitant of a city. Stat. 1 Hen. VI. c. 11, 3 Steph. Com. 196 ; Cunningh. Law Dict.

FREEMAN'S ROLL. A list of persons admitted as burgesses or freemen for the purposes of the rights reserved by the Municipal Corporation Act. 5 & 6 Will. IV. c. 76. Distinguished from the Burgess Roll ; 3 Steph. Com. 197. The term was used, in early colonial history, of some of the American colonies.

FREIGHT. In Maritime Law. The sum agreed on for the hire of a ship, entirely or in part, for the carriage of goods from one port to another. 13 East 300. All rewards or compensation paid for the use of ships. 1 Pet. Adm. 206 ; 2 Boulay-Paty, t. 8, s. 1 ; 2 B. & P. 321 ; 4 Dall. 459 ; 2 Johns. 346 ; 3 Pardessus, n. 705 ; Chitty, Com. L. 407. The price to be paid for the actual transportation of goods by sea from one place to another. 154 Pa. 242.

The amount of freight is usually fixed by the agreement of the parties ; and if there is no agreement, the amount is to be ascertained by the usage of the trade and the circumstances and reason of the case ; 3 Kent 173. Pothier is of opinion that when the parties agree as to the conveyance of the goods, without fixing a price, the master is entitled to freight at the price usually paid for merchandise of a like quality at the time and place of shipment, and if the prices vary he is to pay the mean price ; Pothier, Charte-Part. n. 8. But there is a case which authorizes the master to require the highest price : namely, when goods are put on board without his knowledge ; *id.* n. 9. When the merchant hires the whole ship for the entire voyage, he must pay the freight though he does not fully lade the ship ; Chitty, Com. L. 407 ; 24 Wend. 304 ; he is, of course,

only bound to pay in proportion to the goods he puts on board, when he does not agree to provide a full cargo. If the merchant agrees to furnish a return cargo, and he furnishes none, and lets the ship return in ballast, he must make compensation to the amount of the agreed freight ; Roccus, notes 72–75 ; 1 Pet. Adm. 207 ; 10 East 530 ; 2 Vern. 210. See L. R. 6 Q. B. 528 ; 15 East 264 ; DEAD FREIGHT.

The general rule is that the *delivery* of the goods at the place of destination, in fulfilment of the agreement of the charter-party or bill of lading, is required, to entitle the master or owner of the vessel to freight ; 2 Johns. 327 ; 3 *id.* 321 ; 142 N. Y. 90 ; 5 Harring. 293 ; 21 How. 527. But to this rule there are several exceptions.

When a cargo consists of live stock, and some of the animals die in the course of the voyage, without any fault or negligence of the master or crew, and there is no express agreement respecting the payment of freight, it is, in general, to be paid for all that were put on board ; but when the contract is to pay for the transportation of them, then no freight is due for those which die on the voyage ; Molloy, b. 2, c. 4, s. 8 ; Dig. 14, 2, 10 ; Abbott, Shipp., 13th ed. 534. See 37 Fed. Rep. 268.

An *interruption* of the regular course of the voyage, happening without the fault of the owner, does not deprive him of his freight if the ship afterwards proceeds with the cargo to the place of destination, as in the case of capture and recapture ; 3 C. Rob. 101 ; 3 Kent 223 ; but where a voyage is broken up by reason of the inexcusable delay of the ship, resulting in damage to the shippers, he need not pay the freight ; 39 Fed. Rep. 44. In case of the blockade of, or the interdiction of, commerce with the port to which the cargo is destined, and the return of the goods to the owner, no freight will be due ; 2 Johns. 336 ; 10 East 526 ; but see 4 Dall. 455.

A shipowner who is prevented from performing the voyage by a wrongful act of the charterer is *prima facie* entitled to the freight that he would have earned, less what it would have cost him to earn it ; 128 U. S. 474.

When the ship is forced into a port short of her destination, and cannot finish the voyage, if the owner of the goods will not allow the master a reasonable time to repair, or to proceed in another ship, the master will be entitled to the whole freight ; and if, after giving his consent, the master refuses to go on, he is not entitled to freight. See DEVIATION.

When the merchant *accepts* of the goods at an intermediate port, it is the general rule of marine law that freight is to be paid according to the proportion of the voyage performed ; and the law will imply such contract ; 2 McLean 423 ; 2 Johns. 323. The acceptance must be voluntary, and not one forced upon the owner by any illegal or violent proceedings, as from it the law implies a contract that freight *pro rata parte itineris* shall be accepted and paid ; 2 Burr. 883 ; 7 Term 381 ; 2 S. & R. 229 ; 7 Cra. 358 ; 6 Cow. 504 ; 3 Kent 182 ; Com. Dig. *Merchant* (E 3), note, pl. 43, and the cases there cited. See 61 Fed. Rep. 390.

But if the master refuse to repair his vessel and send on the goods, or to procure other vessels for that purpose and the owner of the goods then receives them, such an acceptance will not be such a voluntary one as to make him liable for freight *pro rata ;* 5 Cow. 504 ; 16 Am. Dec. 443 ; 2 Bosw. 195 ; and where the port designated in the charter-party was unsafe, the master was held justified in discharging part of his cargo at another port in order to be able to proceed with the rest to the point designated ; [1896] 1 Q. B. 586 ; L. R. 6 P. D. 68.

When the ship has *performed* the whole voyage, and has brought only a part of her cargo to the place of destination, there is a difference between a general ship and a ship chartered for a specific sum for the whole voyage. In the former case, the freight is to be paid for the goods which may be delivered at their place of destination ; in the latter, it has been questioned whether the freight could be apportioned ; and it seems that in such case a partial performance is not sufficient, and that a special payment cannot be claimed except in special cases ; 1 Johns. 24 ; 1 Bulstr. 167 ; 7 Term 381 ; 2 Campb. 466. These are some of the exceptions to the general rule called for by principles of equity, that a partial performance is not sufficient, and that a partial payment or ratable freight cannot be claimed.

If goods are *laden* on board, the shipper is not entitled to their return and to have them relanded without paying the expenses of unloading and the whole freight and surrendering the bill of lading or indemnifying the master against any loss or damage he may sustain by reason of the non-delivery of the bill; 6 Duer, N. Y. 194; 8 N. Y. 529. In general, the master has a lien on the goods, and need not part with them until the freight is paid ; 21 How. 527 ; and when the regulations of the revenue require them to be landed in a public warehouse, the master may enter them in his own name and preserve the lien ; Abb. Ship. pt. 3, ch. 3, § 11. His right to retain the goods may, however, be waived either by an express agreement at the time of making the original contract, or by his subsequent agreement or consent. The refusal of a master to deliver a cargo until security is furnished for the freight gives no right of action to the charterer, as the cargo is subject to a lien for freight ; 48 Fed. Rep. 591. See LIEN ; MARITIME LIEN ; AVERAGE.

If freight be *paid in advance* and the goods are not conveyed and delivered according to the contract, it can, in all cases, in the absence of an agreement to the contrary, be recovered back by the shipper ; 5 Sandf. 578.

The captor of an enemy's vessel is entitled to freight from the owner of the goods if he perform the voyage and carries the goods to the port of original destination ; 1 Kent 131 ; but in such cases the doctrine of freight

pro rata is entirely rejected ; 4 Rob. Rep. 278 ; 5 *id.* 67 ; 6 *id.* 269.

See, generally, 3 Kent 173 ; Abbott, Shipping ; Parsons, Marit. Law ; Marshall, Ins.; Comyns, Dig. *Merchant* (E 3 *a*) ; Boulay-Paty ; Pothier, Charte-Part.

Other common carriers and railroads. In this connection the term is sometimes used as synonymous with merchandise.

As to the regulation of rates for carrying freight by statute, see IMPAIRING THE OBLIGATION OF CONTRACTS ; RATES ; INTER-STATE COMMERCE. As to discrimination in the charges, see DISCRIMINATION.

FREIGHTER. He to whom a ship or vessel has been hired, and who loads her under his contract. He who loads a general ship. 3 Kent 173 ; 3 Pardessus, n. 704.

The freighter is entitled to the enjoyment of the vessel according to contract, and the vessel hired is the only one that he is bound to take ; there can, therefore, be no substitution without his consent. When the vessel has been chartered only in part, the freighter is only entitled to the space he has contracted for ; and in case of his occupying more room or putting on board a greater weight, he must pay freight on the principles mentioned under the article of FREIGHT.

The freighter hiring a vessel is required to use the vessel agreeably to the provisions of the charter-party, or, in the absence of any such provisions, according to the usages of trade ; he cannot load the vessel with merchandise which would render it liable to condemnation for violating the laws of a foreign state ; 3 Johns. 105. He is also required to return the vessel as soon as the time for which he chartered her has expired, and to pay the freight.

FRENCH SPOLIATION CLAIMS. On January 20, 1885 (23 Stat. L. 283), the congress of the United States, authorized all citizens of the United States or their legal representatives, to present to the court of claims valid claims which they had against France for spoliations of property on the high seas prior to 1801. These spoliations were committed by French war vessels and privateers in pursuance of governmental orders, inspired by alleged violations of the treaty of 1778 by the United States, and extended from about 1796 to 1801. The United States authorized retaliatory measures in 1798, and according to their supreme court, war existed between the two countries. Napoleon having succeeded to the Directory, made a treaty with the United States by which the respective pretensions of the two nations were abandoned. The claimants insisted that this proceeding was a trading off of their claims against France for a national consideration, and that their own government became liable therefor, and the court of claims has so advised congress.

FRENDLESMAN (Sax.). An outlaw. So called because of his outlawry he was denied all help of friends after certain days. Cowel ; Blount.

FRENDWITE. A fine exacted from him who harbored an outlawed friend. Cowel ; Cunningham. A quittance for *for. fang* (exemption from the penalty of taking provisions before the king's purveyors had taken enough for the king's necessities). Cowel.

FREOBORGH. A free-surety or free-pledge. Spelman, Gloss. See FRANK-PLEDGE.

FREQUENT. To visit often ; to resort to often or habitually. 109 Ind. 175.

FRERE. A brother. Britt. c. 75.

FRESH DISSEISIN. Such disseisin as a man may seek to defeat of himself, and by his own power, without the help of the king or judges. There was no limit set to the time within which this might be done. It is set in one case as a disseisin committed within fifteen days. Bracton, lib. 4, cap. 5. In another case it was held a fresh disseisin when committed within a year. Britton, cap. 32, 43, 65 ; Cowel.

FRESH FINE. A fine levied within a year. Stat. Westm. 2 (13 Edw. I.), cap. 45 ; Cowel.

FRESH FORCE. Force done within forty days. Fitzh. N. B. 7 ; Old N. B. 4. The heir or reversioner in a case of disseisin by *fresh force* was allowed a remedy in chancery by bill before the mayor. Cowel.

FRESH SUIT. Where a man robbed follows the robber with all diligence, apprehends and convicts him of felony by verdict, even if it requires a year, it is called *fresh suit*, and the party shall have his goods again. The same term was applied to other cases ; Cowel ; 1 Bla. Com. 297.

FRESHET. A flood or overflowing of a river by means of rains or melted snow ; an inundation. 3 Phila. 42.

FRETTUM. Freight. Moz. & W.

FRETUM. A strait. *Fretum Brittanicum*, the strait between Dover and Calais.

FRIAR. A member of an order of religious persons, of whom there were four principal branches : 1. Minors, Grey Friars, or Franciscans. 2. Augustines. 3. Dominicans, or Black Friars. 4. White Friars, or Carmelites. Cowel ; Whart. ; Moz. & W.

FRIBUSCULUM. In Civil Law. A slight dissension between husband and wife, which produced a momentary separation, without any intention to dissolve the marriage,—in which it differed from a divorce. Pothier, Pand. lib. 50, s. 106 ; Vicat, Voc. Jur. This amounted to a separation in our law. See SEPARATION.

FRIDBORG, FRITHBORG. Frank-pledge. Cowel. Security for the peace. Spelman, Gloss.

FRIDHBURGUS (Sax.). A kind of frank-pledge whereby the principal men

were bound for themselves and servants. Fleta, lib. 1, cap. 47. Cowel says it is the same with frank-pledge.

FRIEND OF THE COURT. See AMICUS CURIÆ.

FRIENDLESS MAN. An outlaw. Cowel.

FRIENDLY SOCIETIES. Associations for the purpose of affording relief to the members and their families in case of sickness or death. They are governed by numerous acts of parliament, and were first authorized in 1793.

FRIENDLY SUIT. A suit brought by a creditor in chancery against an executor or administrator, being really a suit by the executor or administrator, in the name of a creditor against himself, in order to compel the creditors to take an equal distribution of the assets. 2 Wms. Ex. 1915. See AMICABLE ACTION; CASE STATED.

FRIGHT. An ordinary witness not an expert may testify that a horse appeared to be frightened; 117 Mass. 122. Although this was a *dictum*, it was followed in the court of another state which held that such witness might testify that horses were frightened by water being thrown upon them; 60 Ia. 429.

FRIGIDITY. Impotence.

FRILING, or FREOLING. A freeman born. Jac. L. Dict.; Spel. Glos.

FRIPPER, FRIPPERER. One who scours and dresses up old clothes to sell again. Moz. & W.

FRISCUS. Fresh uncultivated ground. Mon. Angl. tit. 2, p. 56. Fresh, not salt. Reg. Orig. 97. Recent or new.

FRITHBOTE. A satisfaction or fine for a breach of the peace. See FREDUM.

FRITHBREACH. The breaking of the peace. Cowel.

FRITHGAR. The year of jubilee or of meeting for peace and friendship. Jac. L. Dict.

FRITHGILDA. A guild hall. A company or fraternity for the maintenance of peace and security; a fine for breach of the peace. Jac. L. Dict.

FRITHMAN. A member of a company or fraternity. Blount.

FRITHSOCNE. Surety of defence. Jurisdiction of the peace. The franchise of preserving the peace. Cowel; Spelman, Gloss.

FRITHSOEN, or FRITHSTOL. Asylum; sanctuary. See FREDSTOLE.

FRITHSOKE, or FRITHSOKEN. The right of liberty of having a view; frank-pledge. Fleta. See FRITHSOCNE, which seems to be interchangeable. Cowel; Cun. L. Dict.

FRITHSPLOT, or FRITHGEARD. A spot or plot of land, encircling some stone, tree, or well, considered sacred, and, therefore, affording sanctuary to criminals. Whart.

FRIVOLOUS. An answer or plea is frivolous which controverts no material allegation in the complaint, and which is manifestly insufficient. Under the English common-law amendment act, and by the codes of some of the states, the court is authorized to strike out such a plea, so that the plaintiff can obtain judgment without awaiting the regular call of the cause; 1 Abb. Pr. 41; 8 *id.* 149; 3 Sandf. 732. See 1 Misc. Rep. 483; 74 Hun 639; 53 Minn. 98; 51 Wis. 430.

An answer cannot be stricken out on the ground that it is frivolous, where an extended argument or illustration is required to demonstrate its frailty; 67 Hun 648; 74 *id.* 527. A pleading interposed for delay is frivolous, but a pleading is not frivolous because vague; 7 Wis. 383; 16 How. Pr. 135; 2 N. Dak. 72.

Frivolous is not synonymous with irrelevant; 5 Abb. Pr. N. S. 338, 343; 53 Barb. 650.

FRODMORTEL, or FREOMORTEL. An immunity for committing manslaughter. Mon. Angl. t. 1. 173.

FROM. The legal effect of this word has been a fruitful subject of judicial discussion resulting in a great diversity of construction of the word as used with respect to both time and place. Many attempts have been made to lay down a general rule to determine whether it was to be treated as inclusive or exclusive of a *terminus a quo*, whether of time or place. Very long ago a critical writer, after reviewing the cases up to that date, undertook to formulate such a rule thus: From, as well in strict grammatical sense, as in the ordinary import thereof, when referring to a certain point as a *terminus a quo*, always excludes that point; though in vulgar acceptation it were capable of being taken indifferently, either inclusively or exclusively, yet in law it has obtained a certain fixed import and is always taken as exclusive of the *terminus a quo*. Powell, Powers 449. This conclusion states a rule applied in the majority of cases, and it was said that the prepositions "from," "until," "between," generally exclude the day to which they relate, but the general rule will yield to the intent of parties; 120 Mass. 94. But the rule has not been unvarying, and many courts have not hesitated to follow the views of Lord Mansfield, in Cowp. 714 (overruling his own decision of three years before, *id.* 189), that it is either exclusive or inclusive according to context and subject-matter, and the court will construe it to effectuate the intent of parties and not to destroy it.

As to time, after an examination of authorities, Washington, J., laid down what he considered the settled principles to be deduced from them: (1) When time is computed *from* an act done, the day of its per-

formance is included; (2) when the words are from the date, if a present interest is to commence, the day is included, if it is a terminus from which to impute time the day is excluded; 4 Wash. C. C. 240; in which the latter principle was applied to a lease, as it was also in Lord Raym. 84; and to a bond; 15 S. & R. 135; and the first proposition has been laid down with reference to the words "from and after the passage of this act;" 9 Cra. 104; 1 Paine 261; 1 Gall. 348; *contra*, 1 Nott. & McC. 505. See 3 Cra. 399. From is generally held a word of exclusion; 9 Wend. 346; Anth. 243; 33 Me. 67; 18 *id.* 106; 12 R. I. 319; 1 Pick. 485; 7 Allen 487. But a promise made November 1st, 1811, and sued November 1st, 1817, was held barred by statute of limitation; 15 Mass. 193; Hobart 139. In many cases it is held to be either exclusive or inclusive according to the intention of the parties; 24 Barb. 9; 1 Hayw. N. C. 114; 2 Pars. Cont. 175. Where an act was to be done in a given number of days *from the time of the contract*, the day on which the contract was made was included; 24 Ind. 194; but if the contract merely says in so many days it means so many days from the day of date, and that is excluded; 9 N. H. 304. A fire policy *from one given date to another* includes the last day, whether the first is included was not decided; L. R. 5 Exch. 296. In most cases when something is required to be done in a given time from the day on which an event has happened, that day is excluded, as in case of proving claims against the estate of a decedent or insolvent; 19 Conn. 376; enrolling deeds, after execution; 5 Tenn. 283; appeal from arbitrators, afterward; 3 S. & R. 496; 1 *id.* 411; issuing a *scire facias* to revive a judgment, after entry; 6 W. & S. 327; the time an execution runs, after its date; 6 Cow. 659; redemption from execution sale; *id.* 518; allowing appeal from a justice; 2 Cow. 605. The principle is thus well expressed. When time is to be computed from a particular day or a particular event, as when an act is to be performed within a specified period from or after a day named, that day is excluded and the last day included; 2 Wall. 177; 3 Denio 16. But it was held that in considering the question of barring a writ of error, the day of the decree is included; 13 B. Mon. 460.

From the expiration of a policy means from the expiration of the time from which the policy was effected and not the time at which the risk is terminated by alienation; 2 Mass. 318. Six months *from testator's death* allowed a legatee to give security not to marry, are exclusive of that day; 15 Ves. 248. Where an annuity is given, and *from and after the payment thereof* and subject thereto, the principal over, the gift over is subject to make up deficiency of income; *aliter* if the gift over were from and after the annuitant's death, merely; L. R. 2 Ch. App. 644, reversing L. R. 4 Eq. 58. *From time to time*, as applied to the payment of expenses or damages caused by building a railroad; L. R. 5 Ex. 6; or the appointment, by a married woman, of rents and profits; 1 Ves. Jr. 189 and note; 3 Bro. C. C. 340; 12 Ves. 501, do not require periodical payments or appointments, nor restrain the party from a sweeping discharge or disposition of the whole subject-matter at once. From time to time is not sufficient in a bail bond which under the statute should stipulate for appearance from term to term; 25 S. W. Rep. (Tex.) 1072. *From day to day*, in reference to adjournments, usually means to the next day but, under a statute authorizing the adjournment of a sale from day to day, a sale is good if made by adjournment to a day, certain, which did not immediately succeed the first; 4 Watts 363. *From henceforth* in a lease means from the delivery; 5 Co. 1; so also does one from March 25th last past (the execution being March 25th); 4 B. & C. 272; or one from an impossible date (as February 30th), or no date, but if it has a sensible date, the word date in other parts of it means date, not delivery; 4 B. & C. 908. Where authority is given to commissioners to build a bridge and *then and from thenceforth*, the county to be liable, means only after the bridge is built; 16 East 305.

Whenever they are used with respect to places it is said that "from," "to," and "at" are taken inclusively according to the subject-matter; 91 U. S. 343 (fixing the terminus of a railroad in an act of congress). *From an object to an object* in a deed excludes the terminus referred to; 52 Me. 252; 84 *id.* 459. *From place to place* means from one place in a town to another in the same town; 7 Mass. 158; 11 Gray 81. *From a street* means from any part of it according to circumstances; 74 Pa. 259. *From a town* is not always and indeed is seldom exclusive of the place named; it generally means from some indefinite place within that town; 3 Cra. C. C. 599, 606. Authority in a railroad charter to construct a railroad *from a city* to another point gives power to construct the road from any point within the city; 52 Ga. 244; 99 Pa. 155; 3 Head 596; *contra* 8 Rich. L. 177. And see 10 Johns 393, where in a similar case "to" was construed "into;" and 6 Paige 554 where, "at or near" was held equivalent to "within." But *from a town* to another in an indictment for transportation of liquor does not charge it as done within the town; 84 Me. 459. To construe reasonably the expression a road *from a village* to a creek within the same village, in a statute, requires that it be taken inclusively; 7 Barb. 416. Sailing *from a port* means out of it; 2 Mass. 129.

Descent *from a parent* cannot be construed to mean through a parent, it must be immediate, from the person designated; 2 Pet. 58, 86; 4 Ind. 51; but the words *from the part of the father* include a descent, either immediately from the father or from any person in the line of the father; 1 S. & R. 222.

The words to be paid for in *from six to eight weeks* have no definite meaning and it was properly left to the jury to say if the suit was brought prematurely; L. R.

9 C. P. 20. *From the loading* in a marine policy ordinarily means that the risk is covered after the goods are on board, but this meaning may be qualified by any words in the policy indicating a different intention; 16 East 240; L. R. 7 Q. B. 580, 702. A contract to deliver *from one to three thousand bushels* gives the seller an option to deliver any quantity he chooses within the limits named; 4 Me. 497. Appraisers living from one to one and a half miles away, in a fairly well settled community, are *prima facie from the neighborhood;* 22 S. W. Rep. (Mo.) 688.

FRONT. Ordinarily, as applied to a lot or tract of land, that part of it which abuts on, or gives access from, it to a highway whether natural or artificial. But sometimes as in a covenant to keep up sidewalks, the front of a corner lot may mean the side; 31 Ia. 89.

When the contract of sale calls for a store fifty-six feet *front and rear* and the deed describes the lot as nineteen feet wide, there being visible monuments,—side walls,—the later control and front and rear will be taken as the depth of the lot, though the natural meaning would be the width; 10 Paige 386.

A covenant not to open or put out a door to the *front of the street* means a door giving access to the street and not close upon it, and the covenant is broken if the door be eight feet back of the actual front; Dowl. & Ry. 556, 563.

The words *front to the river* (in French and Spanish deeds, *face au fleuve*, or *frente al rio*), used in describing part of a plantation, *prima facie* designate a riparious estate, unless, taken in such sense, they have an incongruous or absurd result; 6 Mart. La. 19, 224, in which the meaning of this expression was learnedly and elaborately defined. It is otherwise as to a sale of part of a tract when at the time of sale the vendor owned another part between that sold and the river; in the last case the words are descriptive of the situation of the property; 8 Mart. La. 572.

And the words *front of the levee* (*frente a la levee*) when there was land outside of the levee susceptible of ownership does not signify a boundary on the river; 9 Mart. La. 656, 719.

FRONT FOOT. As used in an act providing that property shall be assessed in proportion to the "front foot" has been held synonymous with "abutting foot." 131 Mo. 19.

FRONT OF AN ACRE. An expression which "has no proper application to a line, and has not a natural or generally acknowledged and received sense. It is too vague to determine the length of the front line of a lot as a basis for a decree for specific performance;" 3 Del. Ch. 466.

FRONTAGE, FRONTAGER. In English Law. A frontager is a person owning or occupying land which abuts on a highway, river, sea-shore, or the like. The term is generally used with reference to the liability of frontagers on streets to contribute towards the expense of paving, draining, or other works on the highway carried out by a local authority, in proportion to the frontage of their respective tenements. Public Health Act, 11 & 12 Vict. c. 63. There is no liability at common law binding a frontager on the sea to maintain a sea-wall on his land; 1 Q. B. D. 225. Such an owner has an easement of access, as it is called, to a highway or water on which his land fronts or abuts, which is a right distinct from the right of the public to pass over or navigate upon it; but it does not warrant an action by the frontager for obstruction to navigation without proof of special damage; L. R. 5 App. Cas. 84.

The corresponding American term is abutter (*q. v.*)

FROZEN SNAKE. A term used to impute ingratitude and held libellous, the court taking judicial notice of its meaning without an innuendo. 12 Ad. & El. 624.

FRUCTUARIUS (Lat.). One entitled to the use of profits, fruits, and yearly increase of a thing. A lessee; a fermor. Bracton, 241; Vicat, Voc. Jur.

Sometimes, as applied to a slave, he of whom any one has the usufruct. Vicat, Voc. Jur.

FRUCTUS (Lat.). The right of using the increase of fruits: equivalent to usufruct.

That which results or springs from a thing: as, rents, interest, freight from a ship, etc.

All the natural return, increase, or addition which is added by nature or by the skill of man, including all the organic products of things. Vicat, Voc. Jur.; 1 Mackeldey, Civil Law § 154.

FRUCTUS CIVILES (Lat. civil fruits). All revenues and recompenses which, though not *fruits* properly speaking, are recognized as such by the law. 1 Kauffmann, Mackeld. § 154; Calvinus, Lex.; Vicat, Voc. Jur.

FRUCTUS INDUSTRIALES (Lat.). Those products which are obtained by the labor and cultivation of the occupant: as, corn or peaches; 1 Kauffman, Mackeld. § 154, n.; 40 Md. 212; 118 Mass. 325. Emblements are such in the common law; 2 Steph. Com. 258; Vicat, Voc. Jur.

Fruits and vegetables produced by cultivation, as distinguished from the products of perennials; such as trees, bushes, etc., which are *fructus naturales*. 49 Minn. 412.

FRUCTUS LEGIS. The fruit of the law *i. e.* execution.

FRUCTUS NATURALES (Lat.). Those products which are produced by the powers of nature alone: as wool, metals, milk, the young of animals, and the fruit of trees and other perennial plants. 1 Kauffmann, Mackeld. § 154; Calvinus, Lex. See FRUCTUS INDUSTRIALES.

FRUCTUS PENDENTES (Lat.). The fruits united with the thing which produces them. These form a part of the principal thing; 1 Kauffmann, Mackeld. § 154. Sometimes called *fructus stautes*, standing fruits.

FRUCTUS REI ALIENAE. Fruits taken from another's estate; the fruits of another's property.

FRUCTUS SEPARATI. In Civil Law. Separate fruits, the fruits of a thing when they are separated from it. Dig. 7, 4, 13.

FRUGES (Lat.). Anything produced from vines, underwood, chalk-pits, stone-quarries. Dig. 50. 16. 77.

Grains and leguminous vegetables. In a more restricted sense, an esculent growing in pods. Vicat, Voc. Jur.; Calvinus, Lex.

FRUIT. The produce of a tree or plant which contains the seed or is used for food.

This term, in legal acceptation, is not confined to the produce of those trees which, in popular language, are called fruit trees, but applies also to the produce of oak, elm, and walnut trees. It denotes the produce not only of orchard, but of timber trees. 5 B. & C. 847.

FRUIT FALLEN. The produce of any possession detached therefrom, and capable of being enjoyed by itself. Thus a next presentation, when a vacancy has occurred, is a fruit fallen from the advowson. Whart.

FRUITS OF CRIME. In the Law of Evidence. Material objects acquired by means and in consequence of the commission of crime, and sometimes the subject-matter of the crime. Burr. Circ. Ev. 445; Benth. Jud. Ev. 31.

FRUMENTUM. In Civil Law. Grain. That which grows in an ear. Dig. 50.

FRUMGYLD. The first payment made to the kindred of a slain person in recompense for his murder. Blount; *Termes de la Ley;* Leg. Edmundi, cap. ult.

FRUMSTOLL (Sax.). A chief seat or mansion-house. Cowel. An original or paternal dwelling. Anct. Inst. Eng.

FRUSCA TERRA. In Old Records. Uncultivated and desert ground. 2 Mon. Angl. 327; Cowel.

FRUSSURA. Plowing; a breaking. Cowel.

FRUSTRUM TERRÆ. A piece or parcel of land lying by itself. Co. Litt. 5 *b*.

FRUTECTUM, FRUTETTUM, or FRUTICETUM. A place where shrubs or herbs grow. Jac.; Blount; Spel. Glos.

FRUTOS. In Spanish Law. Fruits; products; profits; grains. White, New Recop. b. 1, tit. 7, c. 5, § 2.

FRYMITH, FYNMITH. In English Law. The affording harbor and entertainment to any one. Anc. Inst. Eng.

FRYTHE (Sax.). **In Old English Law.** A plain between woods. Co. Litt. 5 *b*. An arm of the sea, or a strait between two lands. Cowel.

FUAGE, FOCAGE. Hearth-money. A tax laid upon each fireplace or hearth. 1 Bla. Com. 324; Spelman, Gloss. An imposition of a shilling for every hearth, levied by Edward III. in the dukedom of Aquitaine.

FUDGE. When a libellous statement was copied from a prior publication and published with the word fudge prefixed thereto, it was left to the jury to say whether the word was added to vindicate the character of the plaintiff, or merely to create an argument in favor of the publisher in case of an action; 6 C. & P. 245.

FUER. To fly; which may be by bodily flight, or by non-appearance when summoned to appear in a court of justice, which is flight in the interpretation of the law. Cowel; Toml.; Whart.

FUERO. In Spanish Law. Compilations or general codes of law.

The usages and customs which, in the course of time, had acquired the force of unwritten law.

Letters of privilege and exemption from payment of certain taxes, etc.

Charters granted to cities or towns on condition of their paying certain dues to the owner of the land of which they had enjoyment.

Acts of donation granted by some lord or proprietor in favor of individuals, churches, or monasteries.

Ordinances passed by magistrates in relation to the dues, fines, etc., payable by the members of a community.

Letters emanating from the king or some superior lord, containing the ordinances and laws for the government of cities and towns, etc.

This term has many and very various meanings, as is shown above, and is sometimes used in other significations beside those here given. See, also, Schmidt, Span. Law 64; Escriche, Dict. Razz. *Feuro.*

FUERO DE CASTILLA. In Spanish Law. The body of laws and customs which formerly governed the Castilians.

FUERO DE CORREOS Y CAMINOS. In Spanish Law. A special tribunal taking cognizance of all matters relating to the post-office and roads.

FUERO DE GUERRA. In Spanish Law. A special tribunal taking cognizance of all matters in relation to persons serving in the army.

FUERO JUZGO. In Spanish Law. The code of laws established by the Visigoths for the government of Spain, many of whose provisions are still in force. See

the analysis of this work in Schmidt's Span. Law 30.

FUERO DE MARINA (called, also, *Jurisdiccion de Marina*). **In Spanish Law.** A special tribunal taking cognizance of all matters relating to the navy and to the persons employed therein.

FUERO MUNICIPAL. In Spanish Law. The body of laws granted to a city or town for its government and the administration of justice.

FUERO REAL. In Spanish Law. A code of laws promulgated by Alonzo el Sabio in 1255, and intended as an introduction to the larger and more comprehensive code called *Las Siete Partidas*, published eight years afterwards. For an analysis of this code, see Schmidt, Span. Law 67.

FUERO VIEJO. The title of a compilation of Spanish Law, published about A. D. 992. Schm. Civil Law, introd. 65.

FUGA CATALLORUM. In Old English Law. A drove of cattle. Fleta; Blount.

FUGACIA. A chase. Cowel; Blount.

FUGAM FECIT (Lat. he fled). **In Old English Law.** A phrase in an inquisition, signifying that a person fled for treason or felony. The effect of this is to make the party forfeit his goods absolutely, and the profits of his lands until he has been pardoned or acquitted.

FUGATOR. In English Law. A privilege to hunt. Blount.

A driver. *Fugatores carrucarum*, drivers of wagons. Fleta, lib. 2, c. 78.

FUGITATE. In Scotch Practice. To outlaw by the sentence of a court; to outlaw for non-appearance in a criminal case. 2 Allison Prac. 350. See next title.

FUGITATION. In Scotch Law. A declaration that a criminal who does not appear on the day to which he is cited is a fugitive, in consequence of which he is subject to single escheat: Ersk. Prin. 591 (*i. e.* forfeiture all moveables to the crown; *id.* 155); and he may also be denounced a rebel; *id.*

FUGITIVE FROM JUSTICE. One who, having committed a crime, flees from the jurisdiction within which it was committed, to escape punishment.

As one state cannot pursue those who violate its laws into the territories of another, and as it concerns all that those guilty of the more atrocious crimes should not go unpunished, the practice prevails among the more enlightened nations of mutually surrendering such fugitives to the justice of the injured state. This practice is founded on national comity and convenience, or on express compact. The United States recognize the obligation only when it is created by express agreement. They have contracted the obligation with many foreign states by treaty, and with one another by their federal constitution and laws. See EXTRADITION.

Surrender under Treaties. The treaties enumerate the crimes for which persons may be surrendered, and in some other particulars limit their own application. They also contain some provisions relating to the mode of procedure; but, as it was doubted whether such stipulations had the force of law; Park. Cr. Cas. 108; congress passed the act of August 12, 1848, entitled "An act for giving effect to certain treaty stipulations between this and foreign governments for the apprehension and delivery up of certain offenders." 9 Stat. L. 302. This has since been amended; and the statutes on the subject are found in U. S. Rev. Stat. §§ 5270–5280.

These acts embody those provisions contained in the treaties relating to the procedure, and contain others designed to facilitate the execution of the duty assumed by treaty.

The following are the leading provisions of the law relating to the practice: 1. A complaint made under oath or affirmation charging the person to be arrested with the commission of one of the enumerated crimes. 2. A warrant for the apprehension of the person charged may be issued by any of the justices of the supreme court or judges of the several circuit or district courts of the United States, or the judge of a court of record of general jurisdiction of any state, or the commissioners authorized so to do by any of the courts of the United States. 3. The person arrested is to be brought before the officer issuing the warrant, to the end that the evidence of criminality may be considered. 4. Copies of the depositions upon which an original warrant in the country demanding the fugitive may have been granted, certified under the hand of the person issuing such warrant, and attested upon the oath of the party producing them to be true copies of the original depositions, may be received in evidence of the criminality of the person apprehended. 5. The degree of evidence must be such as, according to the laws of the place where the person arrested shall be found, would justify his apprehension and commitment for trial if the crime or offence had there been committed. 6. If the evidence is deemed sufficient, the officer hearing it must certify the same, together with a copy of all the testimony taken before him, to the secretary of state, and commit the prisoner to the proper gaol until the surrender be made, which must be within two calendar months. 7. The secretary of state, on the proper demand being made by the foreign government, orders, under his hand and seal of office, in the name and by authority of the president, the person so committed to be delivered to such person as may be authorized, in the name and on behalf of such foreign government, to receive him. 8. The demand must be made by and upon those officers who represent the sovereign power of their states. 7 Op. Attys. Gen. 6; 8 *id.* 521. By act of Aug. 3, 1882, it is

directed that all extradition cases under treaties shall be heard publicly; U. S. Rev. Stat. 1 Supp. 371.

The convenient and usual method of action is for some police officer or other special agent, after obtaining the proper papers in his own country, to repair to the foreign country, carry the case through with the aid of his minister, receive the fugitive, and conduct him back to the country having jurisdiction of the crime; 8 Op. Attys. Gen. 521.

In all the treaties the parties stipulate upon mutual requisitions, etc., to deliver up to justice all persons who, being charged with crime, "shall seek an asylum or shall be found in the territories of the other." The terms of this stipulation embrace cases of absence without flight, as well as those of actual flight; 8 Op. Attys. Gen. 306. The treaties of the United States do not guarantee a fugitive an asylum in any foreign country. So far as they regulate the right of asylum at all, they limit it; 119 U. S. 700. See as to the right of asylum, 6 Law Mag. & Rev. 4th, 262. After the arrest, and until the surrender, it is the duty of the United States to provide a suitable place of confinement and safely keep the prisoner; 8 Op. Attys. Gen. 396. If, however, the prisoner escapes, he may be retaken in the same manner as any person accused of any crime against the laws in force in that part of the United States to which he shall so escape may be retaken on an escape; U. S. Rev. Stat. § 5272.

It is provided in all the treaties that the expense of the apprehension and delivery shall be borne and defrayed by the party making the requisition. The substance of the various treaties is set forth under EXTRADITION.

Inter-State Rendition. In art. iv. sec. 2, of the constitution, it is provided that "A person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime."

The act of congress of February 12, 1793, 1 Stat. L. 302, prescribes the mode of procedure, and requires, on demand of the executive authority of a state and production of a copy of an indictment found or an affidavit made before a magistrate charging the person demanded with treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the state from whence the person so charged fled, that the executive authority of the state or territory to which such person shall have fled shall cause the person charged to be arrested and secured, and notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and cause the fugitive to be delivered to such agent when he shall appear; but if such agent do not appear within six months, the prisoner shall be discharged. It further provides that if any person shall by force set at liberty or rescue the fugitive from such agent while transporting the fugitive to the state or territory from which he fled, the person so offending shall, on conviction, be fined not exceeding five hundred dollars and be imprisoned not exceeding one year, and that all costs or expenses incurred in the apprehending, securing, and transmitting such fugitive shall be paid by the state or territory making the demand. U. S. Rev. Stat. § 5278–9.

In the execution of the obligation imposed by the constitution, the following points deserve attention:—

The crime, other than treason or felony, for which a person may be surrendered. Some difference of opinion has prevailed on this subject, owing to some diversity of the criminal laws of the several states; but the better opinion appears to be that the terms of the constitution extend to all acts which by the laws of the state where committed are made criminal; 6 Pa. L. J. 412; 1 Kent 42, n.; 9 Wend. 212; 13 Ga. 97; 3 Zabr. 311; 24 How. 107; 56 N. Y. 187. The word "crime" embraces every species of indictable offence; 24 How. 99; including an act not criminal at the time the constitution was adopted but made so afterwards; 37 N. J. 147; 56 N. Y. 182; and an act which is criminal under the law of the state from which the accused has fled, but is not so under the law of the state into which he has fled; 24 How. 103. It has been held that the offence must be a crime; a prosecution under bastardy proceedings will not support an application for extradition; 25 Alb. L. J. 108 (Michigan).

The accusation must be in the form of an affidavit or indictment found and duly authenticated. If by affidavit, it should be sufficiently full and explicit to justify arrest and commitment for hearing; 6 Pa. L. J. 412; 3 McLean 121; 1 Sandf. 701; 3 Zabr. 311; 116 Mo. 505; 52 Wis. 699. The demand must be made by the governor of the state; 9 Gray 262.

The accused must have fled from the state in which the crime was committed; and of this the executive authority of the state upon which the demand is made should be reasonably satisfied. This is sometimes done by affidavit. The governor upon whom the demand is made acts judicially, so far as to see whether the case is a proper one; 31 Vt. 279; but he cannot look behind the indictment in which the crime is charged; 32 N. J. 145; 16 Wall. 366. The duty to surrender the fugitive is obligatory; 24 How. 103; 16 Wall. 370; 32 N. J. 145. But in the case of a conflict of jurisdiction between the two states the surrender may be postponed; 16 Wall. 366; 51 How. Pr. 422. As to executive discretion, see 13 Am. L. Rev. 181.

In the absence of direct evidence on the question of flight, if it appear from the indictment or affidavit produced that the crime charged is atrocious in its nature, was recently committed, and the prosecution promptly instituted, the unexplained

presence of the accused in another state immediately after the commission of the crime ought perhaps to be regarded as *prima facie* evidence of flight, sufficient, at least, to warrant an order of arrest. The order of surrender is not required, by the act of congress, to be made at the same time with the order of arrest, and time, therefore, can be taken, in doubtful cases, after the accused is arrested and secured, to hear proofs to establish or rebut such *prima facie* evidence; 6 Am. Jur. 226; 7 Bost. Law Rep. 386. Where an officer of a bank, the business of which is under his control, goes to another state and allows the bank, while to his knowledge in an insolvent condition, to receive a deposit, in violation of the state law, he is guilty of the offence, though not in the state at the time of the deposit or afterwards, and is a fugitive from the justice of that state; 49 Fed. Rep. 833.

Under a statute providing interstate extradition, a person is a fugitive from justice when he has committed a crime within a state, and withdrawn from the jurisdiction of its courts without waiting to abide the consequences, and it matters not that some other cause than a desire to flee induced such withdrawal; 14 U. S. App. 87.

One who sets in motion the agencies for the commission of a crime, but departs from the state before the offence is consummated, is a fugitive from justice within the meaning of the statute relating to extradition; 49 Fed. Rep. 833.

In order to constitute "fleeing from justice," under R. S. sec. 1045, it is not necessary that there should be an intent to avoid the justice of the United States. It is sufficient that there is an intent to avoid the justice of the state having jurisdiction over the same territory and the same act. It is sufficient that there is a flight with the intention to avoid prosecution whether one has been begun or not; 160 U. S. 128.

The accused person may be arrested to await a demand; 49 Cal. 436; but he cannot be surrendered before a formal demand is made; 17 B. Monr. 677. But if he be so surrendered and returned to the state from which the requisition came, this is not a ground of discharge then; 18 Pa. 39.

The surrender of the accused must be made to an agent of the executive authority of the demanding state, duly appointed to receive the fugitive.

The proceedings of the executive authorities are subject to be reviewed on *habeas corpus* by the judicial power, and if found void the prisoner may be discharged; 3 McLean 121; 3 Zabr. 311; 9 Tex. 635; 49 Cal. 434; 106 Mass. 223; 56 N. Y. 182; 49 Fed. Rep. 833. But the courts have no jurisdiction to compel the executive to comply with a requisition; 24 How. 66; 5 Cal. 237. Nor have the federal courts such jurisdiction; 24 How. 66. Nor will the court on *habeas corpus* try the validity of the indictment under which he is charged; 32 Tex. Cr. R. 301.

As to the trial of an offender for a different offence than that for which he was surrendered, or when his surrender was improperly obtained, see EXTRADITION.

FUGITIVE'S GOODS. Under the old English Law, where a man fled for felony, and escaped, his own goods were not forfeited as *bona fugitivorum* until it was found by proceedings of record (*e. g.* before the coroner in the case of death) that he fled for the felony. Foxley's Case, 5 Co. 109 *a*. See FUGAM FECIT; WAIFS.

FUGITIVE SLAVE. One who, held in bondage, flees from his master's power.

Prior to the adoption of the constitution of the United States, the duty of surrendering slaves fleeing beyond the jurisdiction of the state or colony where they were held to service was not regarded as a perfect obligation, though, on the ground of inter-state comity, they were frequently surrendered to the master. Instances of such surrender or permission to reclaim occur in the history of the colonies as early as 1685; Hurd, Hab. Corp. 592. As slavery disappeared in some states, the difficulty of recovering in them slaves fleeing from those where it remained was greatly increased, and on some occasions reclamations became quite impracticable. The subject engaged the attention of the convention of 1787; and, at the instance of members from slaveholding states, a provision was inserted in the constitution for the surrender of such persons escaping from the state where they owed service, into another, which provision was considered a valuable accession to the security of that species of property; 4 Elliott, Debates 487, 492; 5 *id.* 176, 286.

This provision is contained in art. iv. sec. 2 of the constitution, and is as follows:—

"No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due."

Congress, conceiving it to be the duty of the federal government to provide by law, with adequate sanctions, for the execution of the duty thus enjoined by the constitution, by the act of February 12, 1793, and again by the amendatory and supplementary act of September 18, 1850, regulated the mode of arrest, trial, and surrender of such fugitives. Some of the states have, also, at times passed acts relating to the subject; but it has been decided by the supreme court of the United States that the power of legislation in the matter was vested exclusively in congress, and that all state legislation inconsistent with the laws of congress was unconstitutional and void; 16 Pet. 608; 11 Ill. 332.

These acts of congress were held to be constitutional and valid in all their provisions; 16 Pet. 608; 5 S. & R. 62; 9 Johns. 67; 2 Paine 348; 7 Cush. 285; 6 McLean 355; 21 How. 506.

The 3d and 4th sections of act of 1793, 1 Stat. L. 302, authorized the arrest of a slave by the owner, his agent or attorney, and on proof before a United States judge or a magistrate, a certificate of ownership should be given and would be a warrant for removal. Under the act of 1850, 9 Stat. L. 462, the marshals of the United States were required to arrest such slaves.

The act of 1850, and the 3d and 4th sections of the act of 1793 were repealed by the act of June 28, 1864, 13 Stat. at L. 200. For some decisions as to the question of the interference between the acts of 1793 and 1850, see 5 McLean 469; 13 How. 429.

In the practical application of the provisions of the acts of 1793 and 1850 for the reclamation of fugitive slaves, it was held that the owner was clothed with authority in every state of the Union to seize and recapture his slave wherever he could do it without any breach of the peace or illegal violence; 16 Pet. 608; that he might arrest him on Sunday, in the night-time, or in the house of another if no breach of the peace was committed; Baldw. 577; that if the arrest was by agent of the owner, he must be authorized by written power of attorney executed and authenticated as required by the act; 6 McLean 259; and if his authority was demanded it should be shown; 3 McLean 631; but he was not required to

exhibit it to every one who might mingle in the crowd which obstructed him; 4 McLean 402; that, if resisted by force in making the arrest, the owner might use sufficient force to overcome the unlawful resistance offered without being guilty of the offence of riot; 3 Am. L. J. 258; 7 Pa. L. J. 115; Baldw. 577; that whilst the examination was pending before the magistrate who had jurisdiction of the case, the person arrested was in custody of the law, and might be imprisoned for safekeeping; 2 Paine 348; 4 Wash. C. C. 461; 6 McLean 355; that the act of Sept. 18, 1850, did not operate as a suspension of the writ of *habeas corpus*; 5 Op. Attys. Genl. 254; but that that writ could not be used by state officers to defeat the jurisdiction acquired by the federal authorities in such cases; 7 Cush. 285; 5 McLean 92; 1 Blatchf. 635; 21 How. 506.

The provisions of the constitution and laws above cited were held to extend only to cases where persons held to service or labor *in one state or territory* by the laws thereof *escaped into another*. Hence, if the owner voluntarily took his slave into such other state or territory, and the slave left him there or refused to return, he could not institute proceedings under those laws for his recovery; 4 Wash. C. C. 396; 10 Pa. 517; 10 How. 82. And children, born in a state where slavery prevailed, of a negro woman who was a fugitive slave, were not fugitive slaves or slaves who had *escaped* from service in another state, within the meaning of the constitution and acts of congress; 23 Ala. N. S. 155.

Since the adoption of the thirteenth amendment of the U. S. constitution, the above is entirely obsolete and possesses no more than an historical interest.

FULL. Complete; entire; detailed.

FULL AGE. The age of twenty-one, by common law, of both males and females, and of twenty-five by the civil law. Litt. § 259; 1 Bla. Com. 463; Vicat, Voc. Jur. Full age is completed on the day preceding the anniversary of birth; Salk. 44, 625; 2 Ld. Raym. 1096; 2 Kent 263; 3 Harr. Del. 557; 4 Dana 597. See FRACTION OF A DAY.

This period is arbitrary, and is fixed by statute. In the United States the common-law period has been generally adopted. In Arkansas, California, Colorado, Idaho, Illinois, Iowa, Kansas, Maryland, Minnesota, Missouri, Nebraska, Nevada, North Dakota, Ohio, South Dakota, Vermont, and Washington, however, a woman is of full age at eighteen. 2 Kent 233. In Louisiana and Texas, the common-law rule, and not that of the civil law, prevails; 7 Tex. 502. See AGE.

FULL ANSWER. One which meets all the legal requirements.

FULL BLOOD. Whole blood; generally used to denote brothers and sisters who descend from the same father and mother.

FULL CONFIDENCE. Under a bequest to the wife of testator "absolutely, with full power for her to dispose of the same as she may think fit for the benefit of my family, having full confidence that she will do so," the words full confidence do not constitute a trust, but are merely an expression of the testator's wishes and belief, as distinguished from a direction amounting to an obligation; 8 Ch. D. 540.

FULL COURT. A court in banc with all the judges on the bench who are qualified to sit. It is not unusual for counsel in a case of great public importance, in the absence of one or more of the judges, to ask for a postponement of a trial or argument in order that the cause may be heard and determined by a full court and not by a mere quorum. The granting of such an application is not a matter of right, but, in a case which appears to the court to justify it, the course proposed will generally be taken. Such applications are not unusual in the United States Supreme Court, in cases involving grave constitutional questions, and in the state courts in cases involving the life of a party or some grave public question. Sometimes where a case has been decided by a majority of a quorum, but a minority of the whole number of judges, a motion for a rehearing by the full court is allowed.

Formerly in England the expression was used when other judges sat with the judge who regularly held the court. Thus the Full Court of Appeal in Chancery consisted of the Lord Chancellor and Lords Justices sitting together. The Full Court in Divorce and Matrimonial Causes consisted of the Judge Ordinary and at least two other members of the court. These arrangements are, nominally at least, superseded under the Judicature Acts.

FULL DEFENCE. See DEFENCE.

FULL FAITH AND CREDIT. A phrase used in the constitution of the United States, which provides that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. See FOREIGN JUDGMENTS.

FULL LIFE. Life in fact and in law.

FULL PROOF. **In Civil Law.** Proof of two witnesses, or a public instrument. Halifax, Civil Law b. 3, c. 9, nn. 25, 30; 3 Bla. Com. 370.

Evidence which satisfies the minds of the jury of the truth of the fact in dispute, to the entire exclusion of every reasonable doubt. 38 N. J. L. 450. See PLENA PROBATIO.

FULL RIGHT. The union of a good title with actual possession.

FULL SUPPLY. In a contract to furnish ice, and, in case of inability "to lay up a full supply," to be bound only to deliver such proportion "as the quantity of ice laid up to be the full supply," the words full supply had reference to the capacity of the ice-houses, and the contracting party was only bound to use reasonable and practicable means according to the usage of trade. 69 N. Y. 45, 52.

FULL WAGES. The seventh article of the Laws of Oleron provides: That if a mariner be taken sick on the voyage, he ought to be put on shore, and care should be taken of him at the expense of the ship; when the vessel is ready to sail, she is not to wait for him; but, still he is to be entitled to his full wages if he recover; and if he does not, his wife, or next of kin, is to have them; deducting only such charges as the master has been at for him. The phrase full wages means the same wages which he

would have been entitled to had he lived and served out the whole voyage of the vessel. 1 Wash. C. C. 414; 2 H. Bla. 606, note.

FULLUM AQUÆ. A fleam, or stream of water. Blount.

FUMAGE, FUAGE, or FOUAGE. In English Law. A tax paid to the sovereign for every house that had a chimney. It is probable that the hearth-money imposed by 13 & 14 Car. II. c. 10, took its origin hence. This hearth-money was declared a great oppression, and abolished by 1 W. & M. Stat. 1, c. 10, but a tax was afterwards laid upon houses, except cottages, and upon all windows, by 1 Wm. III. c. 18. The window duty was repealed by 14 & 15 Vict. c. 36. Whart.

FUNCTION. The occupation of an office: by the performance of its duties, the officer is said to fill his function. Dig. 32. 65. 1.

FUNCTIONARY. One who is in office or in some public employment.

FUNCTUS OFFICIO (Lat.). A term applied to something which once has had life and power, but which has become of no virtue whatsoever.

For example, a warrant of attorney on which a judgment has been entered is *functus officio*, and a second judgment cannot be entered by virtue of its authority. When arbitrators cannot agree and choose an umpire, they are said to be *functi officio*. Wats. Arb. 94. If a bill of exchange be sent to the drawee, and he passes it to the credit of the holder, it is *functus officio*, and cannot be further negotiated; 5 Pick. 85. When an agent has completed the business with which he was intrusted, his agency is *functus officio*.

FUND. "Merely a name for a collection or an appropriation of money. It may be nothing but a designation of one branch of the accounts of the state; or of a certain amount of money, when collected to be applied to a particular purpose. It may have no property and represent no investments; and what are called its revenues may include all the moneys appropriated or directed to be paid to it, or for its benefit, or that of the objects it represents." 34 Barb. 135. See 24 N. J. Eq. 358; 7 H. L. Cas. 273; 69 Ia. 278.

FUNDAMENTAL. This word is applied to those laws which are the foundation of society. Those laws by which the exercise of power is restrained and regulated are fundamental. The constitution of the United States is the fundamental law of the land. See Wolffius, Inst. Nat. § 984.

FUNDAMUS. We found. One of the words by which a corporation may be created in England. 1 Bl. Comm. 473; 3 Steph. Comm. 173.

FUNDATIO (Lat.). A founding.

FUNDATOR. A founder (*q. v.*)

FUNDI PATRIMONIALES. Lands of inheritance.

FUNDITORES. Pioneers. Jac. L. Dict.

FUNDING SYSTEM. The practice of borrowing money to defray the expenses of government.

In the early history of the system it was usual to set apart the revenue from some particular tax as a *fund* to the principal and interest of the loan. The earliest record of the funding system is found in the history of Venice. In the year 1171, during a war between the republic and the Byzantine emperor Manual Commenas, a Venetian fleet ravaged the eastern coasts, but, being detained by negotiations at Chios, suffered severely from the plague. The remnant of the expedition, returning, took with it the frightful pestilence, which ravaged Venice and produced a popular commotion in which the doge was killed. To carry on the war, the new doge, Sebastian Giani, ordered a forced loan. Every citizen was obliged to contribute one-hundreth of his property, and he was to be paid by the state five per cent. interest, the revenues being mortgaged to secure the faithful performance of the contract. To manage the business, commissioners were appointed, called the Chamber of Loans, which after the lapse of centuries grew into the Bank of Venice. Florence and other Italian republics practised the system; and it afterwards became general in Europe. Its object is to provide large sums of money for the immediate exigencies of the state, which it would be impossible to raise by direct taxation.

In England the funding system was inaugurated in the reign of William III. The Bank of England, like the Bank of Venice and the Bank of St. George at Genoa, grew out of it. In order to make it easy to procure money to carry on the war with France, the government proposed to raise a loan, for which, as usual, certain revenues were to be set aside, and the subscribers were to be made a corporation, with exclusive banking privileges. The loan was rapidly subscribed for, and the Bank of England was the corporation which it brought into existence. It was formerly the practice in England to borrow money for fixed periods; and these loans were called terminable annuities. Of late years, however, the practice is different,—loans being payable only at the option of the government; these are termed interminable annuities. The rate of interest on the earlier loans was generally fixed at three and a half per cent. and sold at such a rate below par as to conform to the state of the money-market. It is estimated that two-fifths of the entire debt of England consists of this excess over the amount of money actually received for it. The object of such a plan was to promote speculation and attract capitalists; and it is still pursued in France.

Afterwards, however, the government

receded from this policy, and, by borrowing at high rates, were enabled, when the rate of interest declined, by offering to pay off the loan, to reduce the interest materially. The national debt of England consists of many different loans, all of which are included in the term *funds*. Of these, the largest in amount and importance are the "three per cent. consolidated annuities," or consols, as they are commonly called. They originated in 1751, when an act was passed consolidating several separate three per cent. loans into one general stock, the dividends of which are payable on the 5th of January and 5th of July at the Bank of England. The bank being the fiscal agent of the government, pays the interest on most of the funds, and also keeps the transfer-books. When stock is sold, it is transferred on the books at the bank to the new purchaser, and the interest is paid to those parties in whose names the stock is registered, at the closing of the books a short time previous to the dividend-day. Stock is bought and sold at the stock exchange generally through brokers. Time sales, when the seller is not the actual possessor of the stock, are illegal, but common. They are usually made deliverable on certain fixed days, called accounting-days; and such transactions are called "for account," to distinguish them from the ordinary sales and purchases for cash. Stock-jobbers are persons who act as middlemen between sellers and purchasers. They usually fix a price at which they will sell and buy, so that sellers and purchasers can always find a market for stock, or can purchase it in such quantities as they may desire, without delay or inconvenience.

In America the funding system has been fully developed. The general government, as well as those of all the states, have found it necessary to anticipate their revenue for the promotion of public works and other purposes. The many magnificent works of internal improvement which have added so much to the wealth of the country were mainly constructed with money borrowed by the states. The canals of New York, and many railroads in the western states, owe their existence to the system.

The funding system enables the government to raise money in exigencies, and to spread over many years the taxation which would press too severely on one. It affords a ready method of investing money on good security, and it tends to identify the interest of the state and the people. But it is open to many objections,—the principal of which is that it induces statesmen to countenance expensive and oftentimes questionable projects who would not dare to carry out their plans were they forced to provide the means from direct taxation. McCulloch, Dict. of Comm.; Sewell, Banking.

FUNDS. Cash on hand: as, A B is in funds to pay my bill on him. Stocks: as, A B has one thousand dollars in the funds. By public funds is understood the taxes, customs, etc., appropriated by the government for the discharge of its obligations.

In England "The Funds" are synonymous with "Government Funds," or "Public Funds;" 7 H. L. C. 280; and generally mean funded securities guaranteed by the English government; 27 L. J. Ch. 448; but do not include foreign bonds guaranteed by England; 2 Coll. 324; nor bank stock; 7 H. L. C. 273.

FUNDUS (Lat.). Land. A portion of territory belonging to a person. A farm. Lands, including houses; 4 Co. 87; Co. Litt. 5 *a*; 3 Bla. Com. 209.

FUNERAL EXPENSES. Money expended in procuring the interment of a corpse.

The person who orders the funeral is responsible personally for the expenses, and if the estate of the deceased should be insolvent, he must lose the amount. But if there are assets sufficient to pay these expenses, the executor or administrator is bound, upon an implied assumpsit, to pay them; 1 Campb. 298; Holt 309; 1 Hawks 394; 13 Viner, Abr. 563. See 7 Misc. Rep. 237.

Frequent questions arise as to the amount which is to be allowed to the executor or administrator for such expenses. It is exceedingly difficult to gather any certain rule from the numerous cases which have been decided upon this subject. Courts have taken into consideration the circumstances of each case, the rank in life of the decedent, whether his estate was insolvent or not, and when the executors have acted with common prudence or in obedience to the will, their expenses have been allowed. In a case where the testator directed that his remains should be buried at a church thirty miles distant from the place of his death, the sum of sixty pounds sterling was allowed; 3 Atk. 119. In another case, under peculiar circumstances, six hundred pounds were allowed; Chanc. Prec. 29. In a case in Pennsylvania, where the intestate left a considerable estate, and no children, $258.75 was allowed, the greater part of which had been expended in erecting a tombstone over a vault in which the body was interred; 14 S. & R. 64; a sum of $127 for burial expenses is not unreasonable where deceased left an estate worth $800; 67 Hun 617. The expense of raising a monument comes under the head of funeral expenses; 76 Cal. 589; 14 Hun 296; 3 Misc. Rep. 170.

Funeral expenses usually have priority in the order of payment of debts.

A husband is liable for the funeral expenses of his wife; 1 H. Bla. 90; 12 C. B. N. S. 344; 98 Mass. 538; and the liability is imposed by law *quasi ex contractu;* Tiff. Pers. & Dom. Rel. 128. In some cases it is held that when he has paid them the husband is not entitled to reimbursement out of the wife's separate estate; 53 Ala. 89; 52 Conn. 425; 100 Cal. 345; *contra*, 33 Ch. Div. 575; 6 Madd. 90; 14 Hun 562; 44 Ohio St. 184, where the wife's executor paid them. The rule is not affected by the fact that the wife was separated by her fault from the husband; 43 Ill. App. 39; or that she be-

queathed money to another person who assisted in managing the funeral; 41 Mich. 590. See 2 Wms. Exer. 166, n.; 3 *id.* 275, n.; 2 Bla. Com. 508; Godolph. p. 2; 3 Atk. 249; Bacon, Abr. *Executors*, etc. (L 4); Viner, Abr. *Funeral Expenses*.

See, generally, 27 Am. St. Rep. 732; 33 N. J. Eq. 524–9; DEAD BODY.

FUNGIBLE. A term applicable to things that are consumed by the use, as wine, oil, etc., the loan of which is subject to certain rules, and governed by the contract called *mutuum*. See Schmidt, Civ. Law of Spain and Mexico 145; Story, Bailm.

FUR (Lat.). A thief. One who stole without using force, as distinguished from a robber. See FURTUM.

FUR. Skins valuable chiefly on account of the fur. Skins is a term appropriated to those valuable chiefly for the skin. The word hides is inapplicable to fur skins. 7 Cow. 202, 214.

FUR MANIFESTUS (Lat.). **In the Civil Law.** A manifest thief. A thief who is taken in the very act of stealing.

FURANDI ANIMUS. An intention of stealing.

FURCA. A fork. A gallows or gibbet. Bract. fol. 56.

FURCA ET FLAGELLUM (Lat. gallows and whip). The meanest of servile tenures, where the bondman was at the disposal of the lord for life and limb. Cowel.

FURCA ET FOSSA (Lat. gallows and pit). A jurisdiction of punishing felons,—the men by hanging, the women by drowning. Skene; Spelman, Gloss.; Cowel.

FURIGELDUM. A mulct paid for theft. Jac. L. Dict.

FURIOSITY. Madness by which the judgment is prevented from being applied to the ordinary purposes of life. Bell. It is distinguished from fatuity or idiotcy. Toml.

FURIOSUS (Lat.). An insane man; a madman; a lunatic.

In general, such a man can make no contract, because he has no capacity or will; *Furiosus nullum negotium genere potest, quia non intelligit quod agit.* Inst. 3. 20. 8. Indeed, he is considered so incapable of exercising a will, that the law treats him as if he were absent; *Furiosi nulla voluntas est. Furiosus absentis loco est.* Dig. 1, ult. 40, 124, 1. See INSANE; NON COMPOS MENTIS.

FURLINGUS (Lat.). A furlong, or a furrow one-eighth part of a mile long. Co. Litt. 5 *b*.

FURLONG. A measure of length, being forty poles, or one-eighth of a mile.

FURLOUGH. A permission given in the army and navy to an officer or private to absent himself for a limited time.

FURNAGE (from *furnus*, an oven). A sum of money paid to the lord by the tenants, who were bound by their tenure to bake at the lord's oven, for the privilege of baking elsewhere. The word is also used to signify the gain or profit taken and received for baking.

FURNITURE. Personal chattels in the use of a family.

"The word relates, ordinarily, to movable personal chattels. It is very general, both in meaning and application; and its meaning changes, so as to take the color of, or be in accord with, the subject to which it is applied. Thus, we hear of the furniture of a parlor, of a bed-chamber, of a kitchen, of shops of various kinds, of a ship, of a horse, of a plantation, etc. The articles, utensils, implements, used in these various connections, as also those used in a drug or other store, as the furniture thereof, differ in kind according to the purpose which they are intended to subserve; yet being put and employed in their several places as the equipment thereof, for ornament, or to promote comfort, or to facilitate the business therein done, and being kept, or intended to be kept, for those or some one of those purposes, they pertain to such places respectively, and collectively constitute the *furniture* thereof; 63 Ala. 410.

"The expression household furniture must be understood to mean those vessels, utensils, or goods, which, not becoming fixtures, are designed in the manufacture originally and chiefly for use in the family, as instruments of the household and for conducting and managing household affairs. Neither of these articles would seem to hold such a place in the domestic economy. The trunk, though perhaps often made to some extent to take the place of the chest of drawers, the bureau or the wardrobe, is nevertheless in its construction designed for and adapted to the use of the traveller as such, rather than the householder. By the cabinet box we understand an article designed, in material and workmanship, rather for ornament than use, intended for keeping jewelry and other small articles of value; thus ministering to the taste of the owner rather than the necessities or convenience of the household; 33 N. H. 345. Accordingly a trunk and cabinet box were held not to be furniture."

It is held that by the term household furniture in a will, all personal chattels will pass which may contribute to the use or convenience of the householder or the ornament of the house: as, plate, linen, china (both useful and ornamental), and pictures; 1 Johns. Ch. 329, 388; 1 S. & S. 189; 2 Will. Ex. 752; Jarm. Wills 712, n.; 3 Ves. 312; 24 Or. 2; 3 Ves. 311; 41 N. J. Eq. 93; bronzes, statuary, and pictures; 124 Mass. 221; 41 N. J. Eq. 93; but a watch will not; 33 Me. 535; nor will books; 3 Ves. 311; or furniture of a school-room in a boarding school kept by a teacher; 60 Pa. 220; or silver plate used in a hotel; 1 Rob. 21. A sewing machine and piano were held exempt from attachment as "house-

hold furniture" ; 13 R. I. 20 ; but a doubt was expressed as to the piano, and as to that it was held *contra* in 30 Vt. 224 ; 18 Wis. 163.

FURNITURE OF A SHIP. This term includes everything with which a ship requires to be furnished or equipped to make her seaworthy ; it comprehends all articles furnished by ship-chandlers, which are almost innumerable. 1 Wall. Jr. 369.

FURNIVAL'S INN. A place in Holborn which was formerly an Inn of Chancery. 1 Steph. Com. 19, n. See INNS OF COURT.

FURST AND FONDUNG. Time to advise or take counsel. Jac. L. Dict.

FURTA. A right or privilege derived from the king as supreme lord of a state to try, condemn, and execute *thieves* and felons within certain bounds or districts of an honour, manor, etc. Cowell seems to be doubtful whether this word should not read *furca*, which means directly a gallows. Cowel ; Holthouse, L. Dict.

FURTHER ADVANCE. A second or subsequent loan of money to a mortgagor by a mortgagee, either upon the same security as the original loan was advanced upon, or an additional security. Equity considers the arrears of interest on mortgage security converted into principal, by agreement between the parties, as a further advance. Whart.

FURTHER ASSURANCE. See COVENANT FOR FURTHER ASSURANCE.

FURTHER CONSIDERATION. It frequently happens that a decree in Chancery directs accounts and inquiries to be taken before the chief clerk. The hearing of any question arising out of such inquiries is called a hearing on further consideration. Hunt. Eq. Rules Sup. Ct. xl. 10.

FURTHER DIRECTIONS. When accounts in Chancery were taken before Masters, a hearing after a master had made his report in pursuance of the directions of the decree was called a hearing on further directions. This stage of suit is now called a hearing on further consideration. Hunt. Eq. See 2 Dan. Ch. Pr., 5th ed. 1233, n.

FURTHER HEARING. In Practice. Hearing at another time.

Prisoners are frequently committed for further hearing, either when there is not sufficient evidence for a final commitment, or because the magistrate has not time, at the moment, to hear the whole of the evidence. The magistrate is required by law, and by every principle of humanity, to hear the prisoner as soon as possible after a commitment for further hearing ; and if he neglects to do so within a reasonable time, he becomes a trespasser ; 10 B. & C. 28 ; 5 M. & R. 53. Fifteen days was held an unreasonable time, unless under special circumstances ; 4 C. & P. 134 ; 6 S. & R. 427.

In Massachusetts, magistrates may, by statute, adjourn the case for ten days ; Gen. Stat. c. 170, § 17. It is the practice in England to commit for three days, and then from three days to three days ; 1 Chitty, Cr. Law 74.

FURTHER MAINTENANCE OF ACTION, PLEA TO. A plea grounded upon some fact or facts which have arisen since the commencement of the suit, and which the defendant puts forward for the purpose of showing that the plaintiff should not further maintain his action. Brown.

FURTIVE. In Old English Law. Stealthily ; by stealth. Fleta, lib. 1, c. 38, 3.

FURTUM (Lat.). Theft. The fraudulent appropriation to one's self of the property of another, with an intention to commit theft, without the consent of the owner. Fleta, l. 1, c. 36 ; Bract. 150 ; Co. 3d Inst. 107.

The thing which has been stolen. Bract. 151.

FURTUM CONCEPTUM (Lat.). The theft which was disclosed when, upon searching any one in the presence of witnesses in due form, the thing stolen is found. Detected theft is, perhaps, the nearest concise translation of the phrase, though not quite exact. Vicat, Voc. Jur.

FURTUM GRAVE (Lat.). Aggravated theft. Formerly, there were three classes of this theft : *first*, by landed men ; *second*, by a trustee or one holding property under a trust ; *third*, theft of the *majora animalia* (larger animals), including children. Bell, Dict.

FURTUM MANIFESTUM (Lat.). Open theft. Theft where a thief is caught with the property in his possession. Bract. 150 *b*.

FURTUM OBLATUM (Lat.). The theft committed when stolen property is offered any one and found upon him. The crime of receiving stolen property. Calvinus, Lex. ; Vicat, Voc. Jur.

FUSTIGATIO. In English Law. A beating with sticks or club ; one of the ancient kinds of punishment of malefactors. Bract. fol. 104 *b*, lib. 3, tr. 1, c. 6.

FUSTIS. In Old English Law. A staff used in making livery of seisin. Bract. fol. 40.

FUTHWITE, or FITHWITE. A fine for fighting or breaking the peace. Cowel ; Cun. L. Dict.

FUTURE ACQUIRED PROPERTY. Mortgages, especially of railroad companies, are frequently made in terms to cover after acquired property ; such as rolling stock, etc. Such mortgages are valid ; 64 Pa. 366 ; 32 N. H. 484 ; 95 U. S. 10 ; L. R. 16 Eq. 383. This may include future net earnings ; 15 Ia. 284 ; the proceeds to be received from the sale of surplus lands ; L. R. 2 Ch. 201 ; a ditch or flume in process of construction, which was

held to cover all improvements and fixtures thereafter to be put on the line thereof; 26 Cal. 620; rolling stock, etc.; 64 Pa. 366; 49 Barb. 441. Future calls of assessments on stock cannot be mortgaged; L. R. 10 Eq. 681; but it has been held that calls already made could be; *id.*

By statutes in most of the states a will speaks as of the death of the testator and ordinarily passes property acquired after its date. See EXPECTANCY; MORTGAGE.

FUTURE ADVANCES. See MORTGAGE.

FUTURE DEBT. In Scotch Law. A debt which is created, but which will not become due till a future day. 1 Bell, Com. 315.

FUTURE ESTATE. An estate which is to commence in possession in the future (*in futuro*). It includes remainders, reversions, and estates limited to commence *in futuro* without a particular estate to support them, which last are not good at common law except in the case of terms for years. See 2 Bla. Com. 165. In New York law it has been defined "an estate limited to commence in possession at a future day, either without the intervention of a precedent estate, or on the determination by lapse of time, or otherwise, of a precedent estate created at the same time," thus excluding reversions, which cannot be said to be *created* at the same time, because they are a remnant of the original estate remaining in the grantor; 11 N. Y. Rev. Stat. 3d ed. 9, § 10. See, also, How. St. Mich. § 5526; Gen. St. Minn. 1878, c. 45, § 10; 89 Mich. 428; 52 N. W. Rep. (Minn.) 920.

FUTURE USES. See CONTINGENT USES.

FUTURES. This term has grown out of those purely speculative transactions, in which there is a nominal contract of sale for future delivery, but where in fact none is ever intended or executed. The nominal seller does not have or expect to have the stock or merchandise he purports to sell, nor does the nominal buyer expect to receive it or pay the price. Instead of that, a percentage or "margin" is paid, which is increased or diminished as the market rates go up or down and accounted for to the buyer. This is simple speculation and gambling; mere wagering on prices within a given time. 14 R. I. 138.

FUTURI (Lat.). Those who are to be. Part of the commencement of old deeds. "*Sciant præsentes et futuri, quod ego, talis, dedi et concessi,*" etc. (Let all men now living and to come know that I, A B, have, etc.). Bract. 34 *b*.

FUZ, or FUST. A Celtic word, meaning a wood or forest.

FYGTWITE. One of the fines incurred for homicide. See FIGHTWITE.

FYKE. A bow-net for catching fish. Pub. St. Mass. 1882, p. 129.

FYLE. In Scotch Law. To defile; to declare foul or defiled. Hence to find a prisoner guilty.

FYLIT. In Scotch Practice. Fyled; found guilty. See FYLE.

FYNDRINGA (Sax.). An offence or trespass for which the fine or compensation was reserved to the king's pleasure. Leges Hen. I. c. 10. Its nature is not known. Spelman reads *fynderinga*, and interprets it *treasure trove;* but Cowel reads *fyrderinga*, and interprets it a joining of the king's *fird* or host, a neglect to do which was punished by a fine called *firdnite*. See Cowel; Spelman, Gloss. Du Cange agrees with Cowel.

FYRD, or FYRDUNG. The military array or land force of the whole country. Contribution to the fyrd was one of the imposts forming the *trinoda necessitas*. Whart.

FYRDWITE. A fine for neglect of military duty. If the lord did not respond to the king's call for the quota of *milites* which he was required to send, he must pay the fine for each man short. The man was bound to the lord, not to the king. Maitl. Domesd. 159, 161. See FYRTHWITE.

FYRTHWITE, or FRIDWITE. A mulct paid by one who deserted the army. Cowel; Cun. L. Dict. Doubtless these words and Fyrdwite (*q. v.*) were different forms of the same thing.

G.

G The seventh letter of the alphabet. In Law French it is often used at the beginning of words for the English W, as in *gage* for *wage*, *garranty* for *warranty*, *gast* for *waste*.

GABEL (Lat. *vectigal*). A tax, imposition, or duty. This word is said to have the same signification that *gabelle* formerly had in France. Cunningham, Dict. But this seems to be an error; for gabelle signified in that country, previous to its revolution, a duty upon salt. Merlin, *Rép.* Coke says that *gabel* or *gavel*, *gablum*, *gabellum*, *gabelletum*, *galbelletum*, and *gavilletum*, signify a rent, duty, or service yielded or done to the king or any other lord. Co. Litt. 142 *a*. See GAVEL.

GABELLA. A tax or duty on personalty. Cowel; Spel. Gloss.

GABLATORES. Those who paid gabel (*q. v.*). Cowel.

GABLUM (spelled, also, *gabulum gabula*). The gable-end of a building. Kennett, Paroch. Antiq. p. 201; Cowel.
A tax. Du Cange.

GABULUS DENARIORUM. Money rent. Seld. Tit. 321.

GAFOL (spelled, also, *gabella*, *gavel*), Rent; tax; interest of money.
Gafol gild. Payment of such rent, etc. *Gafol land* was land liable to tribute or tax; Cowel; or land rented; Saxon Dict. See Taylor, Hist. of Gavelkind pp. 26, 1021; Anc. Laws & Inst. of Eng. Gloss.; Maitl. Domesd. 44.

GAGE, GAGER (Law Lat. *vadium*). Personal property placed by a debtor in possession of his creditor as a security for the payment of his debt; a pawn or pledge (*q. v.*). Granv. lib. 10, c. 6; Britton c. 27.
To pledge; to wage. Webster, Dict.
Gager is used both as noun and verb: e. g. *gager del ley*, wager of law; Jacobs; *gager ley*, to wage law; Britton c. 27; *gager deliverance*, to put in sureties to deliver cattle distrained; *Termes de la Ley;* Kitchen fol. 145; Fitzh. N. B. fol. 67, 74.
Estates in gage are those held in *vadio* or pledge; *vivum vadium* is a vifgage or living pledge; a mortgage is *mortuum vadium*, a *dead-gage* or pledge; for, whatsoever profit it yields, it redeems not itself, unless the whole amount secured is paid at the appointed time. Cowel.

GAGER DE DELIVERANCE. One who had distrained and was sued, but had delivered the cattle distrained, was obliged not only to avow the distress but also to furnish pledge or surety to deliver them, or, as it was called, *gager deliverance*, literally, to deposit or undertake for the discharge. See Fitz. N. B. 67; Kelham, Dict.

GAGER DEL LEY. Wager of law (*q. v.*).

GAINAGE. Wainage, or the draught-oxen, horses, wain, plough, and furniture for carrying on the work of tillage. Also, the land tilled itself, or the profit arising from it. Old. N. B. fol. 117.

GAINER. To obtain by husbandry. *Gainure.* Tillage. *Gainery.* Tillage or the profit therefrom or from the beasts used in it. *Gainé, gaignent* (*que*), who plough or till. Kelham; Stat. Westm. 1, cc. 16, 17.

GAINOR. One who occupies or cultivates arable land; a sokeman (*q. v.*). Old N. B. 12.

GAJUM. A thick wood. Spell. Gloss.

GALE. The payment of a rent or annuity. GABEL.

GALEA, GALEE, GALOIE, or GALEIS. A galley, galleys. Spel. Gloss.; Kelham.

GALENES. In Old Scotch Law. A kind of compensation for slaughter. Bell, Dict.

GALLON. A liquid measure, containing two hundred and thirty-one cubic inches, or four quarts. The *imperial* gallon contains about 277 and the ale gallon 282 cubic inches.

GALLOWS. An erection on which to hang criminals condemned to death. In the thirteenth century there was in certain cases power given to him who caught a thief with stolen goods upon him, to hang him, and it is said that "the manorial gallows was a common object of the country." 1 Poll. & Maitl. 564. See INFANGENETHEF; UTFANGENETHEF.

GAMACTA. A stroke or blow. Spel. Gloss.

GAMALIS. A child born in lawful wedlock; also one born to betrothed but unmarried parents. Spel. Gloss.

GAMBLE. To engage in unlawful play. To play games for stakes or bet in them. It is the most apt word in the language to express these ideas; 2 Yerg. 472; a *gambler* is one who follows or practices games of chance or skill with the expectation and purpose of thereby winning money or other property. Per Ames, J., 113 Mass. 193. A *common gambler* is one who furnishes facilities for gambling, or keeps or exhibits a gambling table, establishment, device, or apparatus. 1 Dak. 291, citing cases. A *gambling policy* is a life-insurance policy taken out by one who has no insurable interest in the life of the assured. See INSURABLE INTEREST. A *gambling device* is any contrivance or apparatus by which it

is determined who is the winner or loser in a chance or contest on which money or value is staked or risked. See 2 Whart. Cr. L. § 1465; 27 Ark. 362; 49 Minn. 443; 1 Kan. 474; 46 Mo. 375; 1 Cra. C. C. 535; 17 Tex. 191; GAMING; WAGER.

GAMBLING CONTRACTS. See WAGER.

GAME. Birds and beasts of a wild nature, obtained by fowling and hunting. Bacon, Abr. See 11 Metc. 79.

As applied to animals it is to be understood in its ordinary sense, in the absence of statutory definition; 15 S. E. Rep. (Ga.) 458.

GAME LAWS. Laws regulating the killing or taking of birds, and beasts, as game. The English game laws are founded on the idea of restricting the right of taking game to certain privileged classes, generally landholders, and are said to be directly descended from the old forest laws. The doctrine as laid down by Blackstone that the sole right of hunting and killing game was at common law vested in the crown has been controverted by Prof. Christian who clearly demonstrated that the owner of the soil, or the lessee or occupier, if no reservation was made in the lease, possessed the exclusive right to such game restriction. In 1831 the English law was so modified as to enable any one to obtain a certificate or license to kill game, on payment of a fee. An account of present game laws of England will be found in Appleton's New Am. Cyc. vol. viii.; Eng. Cyc., Arts. & Sc. Div. and Int. Cyc. *h. t.*

The laws relating to game in the United States are generally, if not universally, framed with reference to protecting the animals from indiscriminate and unreasonable havoc, leaving all persons free to take game under certain restrictions as to the season of the year and the means of capture. The details of these regulations must be sought in the statutes of the several states.

As the most effective means of enforcing such statutes, most of them prohibit all persons, including licensed dealers, under penalty, from buying or selling or even having in possession or control any game purchased within a certain period after the commencement of the close season. The enforcement of these penalties has been fruitful of much litigation.

A statute forbidding any one to kill, sell, or have in possession woodcock, etc., between specified days has been held not to apply to such *lawfully* taken in another state; 128 Mass. 410; 51 Ohio St. 209 (followed in 59 N. W. Rep. (Minn.) 1099); 139 Pa. 298; *contra* as to game *unlawfully* taken in another state; 35 Am. Rep. 390, note; 19 Kan. 127; L. R. 2 C. P. Div. 553; 71 Mich. 325; it has been held not to be an offence to expose live birds for sale under a statute prohibiting the killing or having possession of certain birds after the same are killed; 134 N. Y. 393, reversing 12 N. Y. St. 24; and the mere possession of game during the closed season does not constitute an offence if it were killed during the open season; 88 Me. 385; but a statute which *forbids* the sale or having in possession for the purpose of sale, of such game during the close season, is constitutional and a valid exercise of the police power, even if it were killed out of the state; 68 N. W. Rep. (Mich.) 227; 103 Cal. 476; 58 Minn. 393; 51 N. Y. Sup. Ct. 306; 51 Ohio St. 209; or killed within the lawful time; 60 N. Y. 10; 95 U. S. 465. The police power residing in the state authorizes it to forbid the killing of game within the state with the intention of procuring its transportation beyond the state limits, and such a prohibition is constitutional; 61 Conn. 144; s. c. 161 U. S. 516, Field & Harlan, JJ., dissenting; nor is such prohibition in violation of the interstate commerce clause of the constitution; 56 Ark. 267; but such an act is unconstitutional when applied to imported game sold in the original packages; 103 Col. 476. See also as to the keeping of game in cold storage; 7 Mo. App. 524; and the catching of trout artificially propagated; 160 Mass. 157.

See, generally, Austin, Farm and Game Law; 28 Weekly Law Bul. 325; 30 Law Mag. & Rev. 177; 7 Crim. L. Mag. 227; and as to validity, 31 Cent. L. J. 273.

GAMING. A contract between two or more persons by which they agree to play by certain rules at cards, dice, or other contrivance, and that one shall be the loser and the other the winner. Gaming is not an offence *eo nomine;* 25 S. W. Rep. (Tex.) 423.

When considered in itself, and without regard to the end proposed by the players, there is nothing in it contrary to natural equity, and the contract will be considered as a reciprocal gift, which the parties make of the thing played for, under certain conditions.

There are some games which depend altogether upon skill, others which depend upon chance, and others which are of a mixed nature. Billiards is an example of the first; lottery, of the second; and backgammon, of the last. See 8 Ired. 271. The decisions as to what constitutes gaming have not been altogether uniform; but under the statutes making it a penal offence, it may be defined as a staking on chance where chance is the controlling factor; that betting on a horse race is so, see 18 Me. 337; 23 Ill. 493; 8 Blackf. 332; 9 Ind. 35; 4 Mo. 536; 51 Ill. 473; *contra*, 23 Ark. 726; 31 Mo. 35; 8 Gratt. 592; that a billiard table is a gaming table; 28 How. Pr. 247; 39 Iowa 42; *contra*, 15 Ind. 474; 34 Miss. 606. Baseball is a game of skill within the criminal offence to bet on such a game; 58 Ark. 79. The following are additional examples of illegal gaming: cock fighting and betting thereon; 8 Metc. 232; 1 Hump. 486; the game of "equality;" 1 Cra. 535; a "gift enterprise;" 5 Sneed 507; 3 Heisk. 488; "keno;" 48 Ala. 122; 7 La. An. 651; "loto;" 1 Mo. 722; betting on "pool;"

39 Mo. 420; a ten-pin alley; 29 Ala. 32; *contra*, 18 S. E. Rep. (N. C.) 169. See 32 N. J. L. 158; stock-clock; 49 Minn. 443; crap; 32 Tex. Cr. R. 187; throwing dice or playing any game of hazard, to determine who shall pay for liquor or other article bought; 14 Gray 26, 390; or throwing dice for money; 91 Ga. 152; one who keeps tables on which "poker" is played, but is not directly interested in the game, is not guilty of gaming under the Virginia code; 32 Gratt. 884; merely betting at "faro" is not carrying on the game; 53 Cal. 246; the law against any game cannot be evaded by changing the name of the game; 17 Tex. 191; athletic contests, when not conducted brutally, even when played for a stake, have been held lawful; 2 Whar. Cr. L. § 1465; betting upon a foot race is gaming within the meaning of a statute; 149 Mass. 124; pin pool has been held not to be a gambling game; 43 La. Ann. 1076.

In general, at common law, all games are lawful, unless some fraud has been practised or such games are contrary to public policy. Each of the parties to the contract must have a right to the money or thing played for. He must have given his full and free consent, and not have been entrapped by fraud. There must be equality in the play. The play must be conducted fairly. But, even when all these rules have been observed, the courts will not countenance gaming by giving too easy a remedy for the recovery of money won at play; Bacon, Abr. It has been held that money lost at a game of "five-up" may be recovered; 12 So. Rep. (Miss.) 333. See also 48 Mo. App. 48; 16 S. E. Rep. (Ga.) 90.

But when fraud has been practised, as in all other cases, the contract is void; and in some cases, when the party has been guilty of cheating, by playing with false dice, cards, and the like, he may be indicted at common law, and fined and imprisoned according to the heinousness of the offence; 1 Russ. Cr. 406.

Statutes have been passed in perhaps all the states forbidding gaming for money at certain games, and prohibiting the recovery of money lost at such games; and a court of equity will not lend its aid in a gambling transaction either to the winner to compel payment of his unpaid accounts or to the loser who has paid his losses to enable him to recover them back, whether the loser pays his losses in cash or in negotiable securities; 173 Pa. 525.

Statutes which forbid or regulate places of amusement that may be resorted to for the purpose of gaming or which forbid altogether the keeping of instruments made use of for unlawful games, are within the police power of the legislature, and therefore constitutional; Cooley, Const. Lim. 749. See 8 Gray 488; 29 Me. 457; 33 N. H. 426.

The uncorroborated testimony of an accomplice is sufficient to warrant a conviction of gaming; 89 Ga. 393.

See, generally, Oliphant, Gaming (58 L. L.); 4 Pothier 549–83; 5 Crim. L. Mag. 529; 6 *id.* 507; 18 Myer's Fed. Dec. 615; 4 Lawson, Crim. Def. 636, 752; GAMING HOUSES; WAGER; HORSE RACE; PRIZE FIGHT.

GAMING CONTRACTS. See WAGER.

GAMBLING DEVICE. An invention or contrivance to determine the question as to who wins or who loses his money on a contest of chance. 52 N. W. Rep. (Minn.) 42.

GAMING HOUSES. In Criminal Law. Houses kept for the purpose of permitting persons to gamble for money or other valuable thing. They are nuisances in the eyes of the law, being detrimental to the public, as they promote cheating and other corrupt practices; 1 Russ. Cr. 299; Rosc. Cr. Ev. 663; 3 Den. 101. See 53 N. J. L. 664; 85 Me. 237; 53 Mo. App. 571.

In an indictment under a statute prohibiting gaming houses, the special facts making such a house a nuisance must be averred; Whar. Cr. Law § 1466; Whar. Cr. Pl. and Pr. §§ 154, 230; 5 Cra. 378. The proprietor of a gaming establishment cannot take advantage of a statute enabling a person losing money at a game of chance to recover it back; 14 Bush 538.

They are sometimes prosecuted as disorderly houses (*q. v.*).

GANANCIAL. In Spanish Law. Property held in community.

The property of which it is formed belongs in common to the two consorts, and, on the dissolution of the marriage, is divisible between them in equal shares. It is confined to their future acquisitions *durante el matrimonio*, and the *frutos* or rents and profits of the other property. See 1 Burge, Confl. Laws 418; Aso & M. Inst. b. 1, t. 7, c. 5, § 1.

All that which is increased or multiplied during marriage. By multiplied is understood all that is increased by onerous cause or title, and not that which is acquired by a lucrative one; 22 Mo. 254. See 18 Tex. 634; COMMUNITY.

GANANCIAS. In Spanish Law. Gains or profits from the employment of ganancial property. White, N. Rec. b. 1, tit. 7, c. 5.

GANG-WEEK. In England, the time when the bounds of the parish are lustrated or gone over by the parish officers—Rogation week. Lond. Encyc.

GANGIATORI. Officers in ancient times whose duty it was to examine weights and measures. Skene.

GANTELOPE. A military punishment, in which the criminal running between the ranks receives a lash from each man. Lond. Encyc. This was called "running the gauntlett," the word itself being pronounced "gauntlett."

GAOL. (This word, sometimes written *jail*, is said to be derived from the Spanish *jaulu*, a cage (derived from *caula*), in French *gêole*, gaol. 1 M. & G. 222, note *a*.) A place for the confinement of persons

arrested for debt or for crime and held in the custody of the sheriff. Webst. Dict.

A prison or building designated by law or used by the sheriff for the confinement or detention of those whose persons are judicially ordered to be kept in custody. See 6 Johns. 22; 14 Viner, Abr. 9; Bacon, Abr.; Dane, Abr. Index; 4 Com. Dig. 619. It may be used also for the confinement of witnesses; and, in general, now there is no distinction between a jail and a prison, except that the latter belongs to a greater extent of country; thus, we say a state's prison or penitentiary and a county jail. Originally, a jail seems to have been a place where persons were confined to await further proceedings—*e. g.* debtors till they paid their debts, witnesses and accused persons till a certain trial came on, etc.—as opposed to prison, which was for confinement, as punishment. See 2 Poll. & Maitl. 514, 518. A gaol is an inhabited dwelling-house, and a house within the statutes against arson; 2 W. Bla. 682; 1 Leach, 4th ed. 69; 2 East, Pl. Cr. 1020; 2 Cox, Cr. Cas. 65; 18 Johns. 115; 4 Call. 109; 4 Leigh. 683. See PENITENTIARY; PRISON; JAIL.

GAOL-DELIVERY. **In English Law.** To insure the trial, within a certain time, of all prisoners, a patent, in the nature of a letter, was issued from the king to certain persons, appointing them his justices and authorizing them to deliver his gaols. 3 Bla. Com. 60; 4 *id.* 269. This was the humblest of the temporary judicial commissions so frequent in the fourteenth century; 1 Poll. & Maitl. 179; but so few men were kept in prison, that the work was regarded as easy work which might be entrusted to knights of the shire; 2 *id.* 642. See GENERAL GAOL DELIVERY; OYER AND TERMINER.

GAOL LIBERTIES, GAOL LIMITS. A space marked out by limits, which is considered as a part of the prison, and within which prisoners are allowed to go at large on giving security to return. Owing to the rigor of the law which allowed *capias*, or attachment of the person, as the first process against a debtor, statutes were from time to time passed enlarging the gaol liberities, in order to mitigate the hardships of imprisonment: thus, the whole city of Boston was held the "gaol liberties" of its county gaol. And so with a large part of New York city. Act of March 13, 1830. The prisoner, while within the limits, is considered as within the walls of the prison; 6 Johns. 121.

GAOLER. The keeper of a gaol or prison; one who has the legal custody of the place where prisoners are kept.

It is his duty to keep the prisoners in safe custody, and for this purpose he may use all necessary force; 1 Hale, Pl. Cr. 601; and a prisoner who assaults him in endeavoring to break gaol may be lawfully killed by him; 1 Russ. Cr. Sharsw. ed. 860, 895. But any oppression of a prisoner, under a pretended necessity, will be punished; for the prisoner, whether he be a debtor or a criminal, is entitled to the protection of the laws from oppression. He was indictable if by oppression he induced a prisoner to accuse another; 4 Bla. Com. 128; but this statute was repealed by 4 Geo. IV. c. 64, s. 1, *id.* note. He is also indictable for suffering an escape (*q. v.*), or for extortion; 1 Russ. Cr. Sharsw. ed. 208.

When a county court delivers persons convicted by it of murder to a gaoler for safe-keeping till brought back for execution, the governor has no authority to countermand a subsequent order of that court requiring the gaoler to deliver them up, nor will the fact that a writ of error and supersedeas had been awarded each of the prisoners by the supreme court justify the gaoler in refusing to deliver up the prisoners on the order of the court that committed them; but the fact that a court having jurisdiction has granted the prisoners a writ of habeas corpus will justify such a refusal; 23 S. E. Rep. (Va.) 296.

GARANDA, or GARANTIA. A warranty. Spel. Gloss.

GARANTIE. In French law, this word corresponds to warranty or covenants for title in English law. In the case of a sale this *garantie* includes two things: (1) Peaceful possession of the thing sold; and (2) absence of undisclosed defects (défauts cachés) Brown.

GARATHINX. In old Lombardic law. A gift; a free or absolute gift; a gift of the whole of a thing. Spel. Gloss.

GARAUNTOR. **In Old English Law.** A warrantor or vouchee, who is obliged by his warranty (*garauntie*) to warrant (*garaunter*) the title of the warrantee (*garaunte*), that is, to defend him in his seisin, and if he do not defend, and the tenant be ousted, to give him land of equal value. Britt. c. 75.

GARB, or GARBA. A bundle or sheaf of corn; bundle. Fleta 1, 2, c. xii.

GARBALLO DECIMÆ or **GARBALLES DECIMÆ** (L. Lat.; from *garba*, a sheaf). **In Scotch Law.** Tithes of corn: such as wheat, barley, oats, pease, etc. Also called parsonage tithes (*decimæ rectoriæ*). Erskine, Inst. b. 11, tit. 10, § 13.

GARBLE. In English statutes, to sort or cull out the good from the bad in spices, drugs, etc. Cowel.

A *garbler of spices* was anciently in London an officer to inspect drugs and spices, with power to enter and search any shop or warehouse and garble and clean the goods or direct it to be done. Stat. 6 Anne, c. 16; Mozl. & Whit.

GARCEONS, GARCEONES. Servants who follow a camp. Journeymen. Kelham, Wals. 242.

GARCIO STOLÆ (O. Fr. *Garceons*, servant). Groom of the stole. Pl. Cor. 21 Edw. I.

GARDE, or GARDIA (*Garder*, to watch). Wardship; custody; care. The judgment. The wardship of a city. Kelham.

GARDEIN. A constable; a keeper; a guardian. Kelham.

GARDEN. A piece of ground appropriated to raising plants and flowers.

A garden is a parcel of a house, and passes with it; 2 Co. 32; Plowd. 171; Co. Litt. 5 *b*, 56 *a*, *b*; Wood, Landl. and Tenn. 309. But see F. Moore 24; Bac. Abr. *Grants*, I. See CURTILAGE.

GARDIANUS. A guardian; defender; protector.

A warden. *Gardianus ecclesiæ*, a churchwarden. *Gardianus quinque portuum*, warden of the Cinque Ports (*q. v.*). In feudal law, *gardio*. Spelman, Gloss.

GARDINUM. In Old English Law. A garden. Reg. Orig. 1, b. 2.

GARENE (L. Fr.). A warren; a privileged place for keeping animals.

GARLANDA. A chaplet, coronet, or garland.

GARNESTURA. In Old English Law. Victuals, arms, and other implements of war, necessary for the defence of a town. Mat. Par. 1250. See GARNISTURA.

GARNISH. In English Law. Money paid by a prisoner to his fellow-prisoners on his entrance into prison.

To warn. To garnish the heir is to warn the heir. Obsolete.

GARNISHEE. In Practice. A person who has money or property in his possession belonging to a defendant, which money or property has been attached in his hands, with notice to him of such attachment; he is so called because he has had warning or notice of the attachment.

From the time of the notice of the attachment, the garnishee is bound to keep the money or property in his hands, to answer the plaintiff's claim, until the attachment is dissolved or he is otherwise discharged. See Serg. Att. 88; Wade, Att. 331; Drake, Att.; Comyns., Dig. *Attachment*, E.

Ordinarily all persons or corporations who may be sued, may also be summoned as garnishees; but a municipal corporation cannot be; 92 Ga. 261; 95 *id.* 747; 95 Tenn. 492; 11 Utah 209; 16 So. Rep. (Ala.) 713; 38 Ill. App. 27; 43 Kan. 294; 11 Mo. 60; nor can a receiver; 11 Ga. 13; 23 Texas 508; 115 Mass. 67; 114 Ill. 287; or trustee appointed by the court; 12 Md. 124; 106 Pa. 418; 44 N. H. 127; and the garnishment of an agent is insufficient as a garnishment of the principal; 62 Mo. App. 50; but an attorney may be summoned as garnishee of his client in some cases; 3 Ala. 312; 99 Mass. 187; 77 Me. 195; 20 La. Ann. 188; 63 N. H. 166.

Any rights of the garnishee under existing contracts with the principal debtor, he is entitled to have the benefit of, as against the attaching creditor; 152 U. S. 596. No judgment can be rendered against a garnishee unless one is obtained against the principal defendant; 46 Ill. App. 458. It is competent for garnishees to represent in their own defence the rights of a third party to whom they are in law liable; 121 U. S. 430. A garnishee has the right to set up any defence against attachment process which he could have done against the debtor in the principal action; 120 U. S. 506.

There are garnishees also in the action of detinue. They are persons against whom process is awarded, at the prayer of the defendant, to warn them to come in and interplead with the plaintiff; Brooke, Abr. *Detinue*. See ATTACHMENT.

GARNISHMENT. A warning to any one for his appearance, in a cause in which he is not a party, for the information of the court and explaining a cause. Cowel.

Now generally used of the process of attaching money or goods due a defendant in the hands of a third party. The person in whose hands such effects are attached is the *garnishee*, because he is *garnished*, or warned, not to deliver them to the defendant, but to answer the plaintiff's suit. The use of the form "garnishee" as a verb is a prevalent corruption in this country.

It is attachment in the hands of a third person, and so is a species of seizure by notice; 41 Kan. 297, 596.

For example, in the practice of Pennsylvania, when a writ of attachment issues against a debtor, in order to secure to the plaintiff a claim due by a third person to such debtor, it is served on such third person, which notice or service is a garnishment, and he is called the garnishee.

In detinue, the defendant cannot have a *sci. fa.* to garnish a third person unless he confess the possession of the chattel or thing demanded; Brooke, Abr. And when the garnishee comes in, he cannot vary or depart from the allegation of the defendant in his prayer of garnishment. The plaintiff does not declare *de novo* against the garnishee; but the garnishee, if he appears in due time, may have oyer of the original declaration to which he pleads.

Where plaintiff in execution paid to the sheriff $1,000 as the value of the debtor's homestead interest, and the land was sold under execution, the money in the sheriff's hands was subject to garnishment at the instance of the other judgment creditors; 60 Ill. App. 65; money taken from a person without his consent by a sheriff acting as trespasser in so doing, and delivered by him to a third person claiming title thereto, is not subject of garnishment in the hands of the sheriff or to the third parties as the property of the person from whom it was taken; 40 Pac. Rep. (Wash.) 223.

See Brooke, Abr.; Drake; Wade; Shinn, Attachment; ATTACHMENT.

GARNISTURA. In Old English Law. Garniture; whatever is necessary for the fortification of a city or camp, or for

the ornament of a thing. 8 Rymer 328; Du Cange; Cowel; Blount. See GARNESTURA.

GARROTE. A mode of capital punishment practised in Spain and Portugal formerly by a simple strangulation. The victim, usually in a sitting posture, is fastened by an iron collar to an upright post, and a knob, operated by a screw or lever, dislocates the spinal column, or a small blade severs the spinal cord at the base of the brain. Cent. Dict.; Encyc. Dict.

GARSUMME. **In Old English Law.** An amercement or fine. Cowel. See GRESSUME; GROSSOME; GERSUMA.

GARTH. **In English Law.** A yard; a homestead in the north of England. Cowel; Blount.

A yard, garden, or backside. Kelham.

GARYTOUR. **In Old Scotch Law.** Warder. 1 Pitc. Crim. Tr. pt. 1, p. 8.

GAS. An aeriform fluid, used for illuminating purposes and for fuel.

From a legal point of view it is to be considered with respect to the companies by which it is usually furnished, their *status* and obligations as affected by the nature of the business; and also whether the gas furnished by them is manufactured or natural.

Nature of the business. The business is not an ordinary one in which any person may engage as of common right, but a franchise of a public nature which, in the absence of constitutional restriction, may be granted by the legislature; 115 U. S. 650; *id.* 683; 33 Fed. Rep. 659; 84 Ky. 166. A grant of the right to lay pipes is valid, but it is a franchise to be strictly construed, and is void if the conditions are not complied with, pursuant to the legislative declaration in the grant; *id.* 46. Such a company cannot sell, lease, or assign its corporate privileges without consent of the legislature; 85 Me. 532.

They are not, however, always treated as strictly public corporations, but in some cases such a company is said to be simply "a private manufacturing corporation which furnishes gas to individuals as agreed. This of itself does not make it a public corporation;" 63 N. Y. 326. A company furnishing gas to a municipality under contract is not performing such public service as to exempt it from ordinary taxation; 20 S. W. Rep. (Ky.) 434.

A gas company having power to manufacture and sell gas has an implied power to make all contracts necessary to that end; 83 Mo. 495.

Natural Gas. The gas obtained from wells in coal and oil regions, and used for lighting and heating. In *nature and character*, such gas has been termed "a mineral with peculiar attributes which require the application of precedents arising out of ordinary mineral rights, with more careful consideration of the principles involved than of the mere decisions. . . . Water and oil, and still more strongly, gas, may be classed by themselves, if the analogy be not too fanciful, as minerals *ferœ naturœ*. In common with animals, and unlike other minerals, they have the power and the tendency to escape without the volition of the owner. Their 'fugitive and wandering existence within the limits of a particular tract is uncertain;' (per Agnew, C. J. in 80 Pa. 147). They belong to the owner of the land, and are part of it, so long as they are on or in it, and are subject to his control; but when they escape, and go into other land, or come under another's control, the title of the former owner is gone. Possession of the land, therefore, is not necessarily possession of the gas. If an adjoining, or even a distant, owner, drills his own land, and taps your gas, so that it comes into his well and under his control, it is no longer yours, but his." Per Mitchell, J., in 130 Pa. 235.

Under a lease of land for the sole purpose of drilling and operating for oil and gas, the lessee's right in the surface of the land is in the nature of an easement of entry and examination, with a right of possession where the particular place of operation is selected, and the easement of ingress and egress, transportation and storage; *id.*

Whether the words "other valuable volatile substance" in a lease when they were used with petroleum, rock, or carbon oil, will include gas is a question for a jury, as the words have no settled meaning; 11 Pa. 31. The words oil and gas in a lease have been held not synonymous; 6 Atl. Rep. (Pa.) 74; it is a fuel; 114 Ind. 338; but it has been held that a company incorporated for supplying heat cannot also furnish natural gas; 108 Pa. 126.

Natural gas is as much an *article of commerce* as any other product of the earth; 120 Ind. 575; and a state statute making it unlawful for any person to conduct natural gas out of the state violates the provisions of the federal constitution vesting in congress the regulation of interstate commerce; *id.*; 118 Pa. 468.

The business of transporting and furnishing natural gas is a *public use*, and the right of eminent domain may be constitutionally granted to companies engaged in it; 5 Cent. Rep. (Pa.) 564; the business is transportation of freight; 118 Pa. 408. Because of the public nature of the business taxation may be authorized for supplying it to municipal corporations; 39 Fed. Rep. 651; and any unreasonable restraint upon the business is against public policy; 130 Ill. 268. It was held that under the Pennsylvania general incorporation act of 1874, under which companies for the manufacture and supply of gas were formed, natural gas companies could not be incorporated; 108 Pa. 111; 111 *id.* 35. Consequently a general law was passed providing for such companies under which, when lawfully incorporated, may they exercise the right of eminent domain and the grant of the power is constitutional; 120 Ind. 581; 63 Barb. 437; 115 Pa. 4; 160 *id.* 367;

and the use of city streets for that purpose imposes no additional servitude; *id.* In Pennsylvania, the courts of common pleas may hear and determine controversies between natural gas companies and municipalities as to the manner of laying their pipes; 115 Pa. 4.

A right to take natural gas from land under the Pennsylvania act of Apr. 7, 1870, P. L. 58, is not land held in fee, subject to be sold under a special *fi. fa*, against an insolvent corporation; 162 Pa. 78. The lessee for oil and gas, having drilled a well and tapped the gas-bearing strata (the only one in the land), has both the possession of the gas and the right to it, and the owner will be enjoined from drilling; 130 Pa. 235. A lessee for oil only who took from the well both oil and gas was held not accountable to the lessee for the gas, which is, like air and water, the subject only of qualified property by occupancy; 28 W. Va. 210. From the nature of the gas, a lease of well-rights is necessarily exclusive so far as concerns the leased premises themselves; *id.*; 130 Pa. 235. A person who has a natural gas well on his premises has the right to explode nitro-glycerine therein for the purpose of increasing the flow, although such explosion may have the effect to draw gas from the land of another; 131 Ind. 599.

See also as to natural gas, 30 Cent. L. J. 497; 29 Am. L. Reg. 93, 102; 34 Am. & Eng. Corp. Cas. 46–8.

The rights and liabilities of gas companies are, in the main, the same, whether they are engaged in the business of supplying artificial or natural gas.

Municipal lighting. The business is usually carried on by companies acting either under a legislative or municipal franchise or contract, or directly by the municipality under express legislative authority or implied power.

As to the implied power of a municipality to light its streets, etc., see ELECTRIC LIGHT.

A municipal corporation having power to light its own streets, and erect and maintain gas works has implied power to contract with others to do so; 84 Ky. 166. A municipal council exceeds its power, in granting an exclusive privilege; 43 Ohio St. 257; at least, without legislative authority; 3 Cent. Rep. (Pa.) 921. The authority to lay mains and pipes in streets and provide gas does not give an exclusive right to the use of the streets for that purpose; 21 Ohio L. J. 94.

A city engaged in making and selling gas is *quoad hoc* a private corporation, not legislating but making contracts which bind it as a natural person, and cannot be impaired by the legislature; 31 Pa. 175.

The grant of an exclusive privilege is a contract none the less because the business requires supervision by public authority, and such grant does not restrict the power of regulation by the state; 115 U. S. 650. A grant by a city, under legislative authority, of an exclusive privilege for a term of years of supplying the city and its people with gas, does not prevent the city from erecting its own gas works under a state law giving it power to do so; 146 U. S. 258. the grant of an exclusive privilege with an option to the city to buy the plant does not bind the city to maintain it when the sale of the plant is refused on application, but the city must elect whether it will purchase at the price fixed by referees before they are chosen, and until the city does so agree it is not a breach of contract for the company to refuse to join in selecting referees; 87 Ala. 245. Under a grant for a term of years of the exclusive privilege for this purpose, the right to use the streets for light other than gas is not implied and must be authorized; 11 Ky. L. Rep. 840. In this case it was held that the city had power to contract with another person for electric lighting, and pay for both gas and electricity, but it could not dispense with the gas company's gas without liability for breach of contract. When an exclusive privilege of lighting the city and using the streets was given by the city to one company for a term of years, in consideration of low rates, to citizens, it did not estop the municipal corporation from subscribing to the stock of a new gas company seeking to introduce gas; 8 Wall. 64. As to municipal authority to light streets, see 150 Mass. 592; 8 L. R. A. 487; ELECTRIC LIGHT.

The use of highways. The right to lay gas pipes in public highways can in general be granted only by the legislature. Such is the established rule both in England and in this country; 16 Q. B. 1012; 23 L. J. Q. B. 42; 2 Ex. Div. 429; 4 Bell, App. Cas. 374; 2 El. & El. 650; 29 N. J. Eq. 242; 18 Ohio St. 262. In a city it may be granted by the municipal or local authorities when empowered by the legislature to do so; 25 Conn. 19; 30 Barb. 24; in Massachusetts it was said to be not clear whether the city could act without authority from the state; per Gray, J., in 13 Allen 160; but in Michigan it was held to be essentially a matter of local control; 38 Mich. 154. The city may forbid opening the streets within certain periods as a regulation, but a prohibition of digging up the street to introduce gas on the opposite side of it is an unreasonable exercise of authority; 12 Pa. 318. In rural highways the laying of gas pipes is held to impose a new servitude not contemplated in the condemnation; 62 N. Y. 386; Mills, Em. Dom. § 55; 160 Pa. 367; but in city streets it does not; *id.* See 12 Am. & Eng. Corp. Cas. 334; EMINENT DOMAIN; HIGHWAY; STREET.

Obligation to supply gas. The difference of opinion as to the public character of gas companies necessarily results in contradictory decisions as to whether the companies are under a public duty to supply gas on request. By the more recent decisions they are held to be subject to the duty of furnishing gas upon reasonable terms to any one who applies for it, especially if the franchise is exclusive; 25 Md. 1; 7 Gas J. 418; 14 *id.* 927; 17 *id.* 663; 6 Wis. 539; 12 Rob. La. 378; 67 Cal. 120; 4 Cush. 60; and the rule also applies where it is not; 52 Mich.

499; and companies may be compelled to do so by mandamus; 45 Barb. 136. On the other hand it has been held that they are under no public duty to supply gas; 30 Conn. 521; 6 C. B. N. S. 239; 20 U. C. Q. B. 233; 12 Allen 75; L. R. 15 Eq. 157; 27 N. J. L. 245. The last case was put solely on the lack of precedent and is practically overruled; 29 N. J. Eq. 77. See 34 N. E. Rep. (Ind.) 818.

The principle of Munn *v.* Illinois has been applied to gas works; 47 Ohio St. 1. But the right to regulate rates is not arbitrary, even where given to a municipality by the legislature; the right to charge reasonable rates is part of the contract of the company with the state, and this reasonableness is a matter for judicial determination; 72 Fed. Rep. 818. See RATES.

A gas company which has been granted the exclusive privilege of supplying gas in a city for a certain number of years, under an agreement that at all times it would supply the citizens for private use with a sufficient quantity of gas, need not leave a gas meter in the house of a citizen who is using electric light, furnished by another company, so that in case of accident to the electric light he may use the gas; 13 So. Rep. (Ala.) 618.

Rules and Regulations. In the conduct of their business such companies may make and enforce rules and regulations if fair and reasonable. Regulations have been held to be reasonable, requiring a deposit; 6 Wis. 539; 52 Mich. 499; and that a written application should be signed; 11 Wis. 234; but such an application cannot be made to embrace an agreement to be bound by illegal rules and regulations; 15 Wis. 318. Regulations may be enforced respecting the care and treatment of meters; 12 Phila. 511; and inspection of the same, and of pipes; 30 Gas J. 336; but visits must be made at stated times and with notice; 6 Wis. 539. Regulations held unreasonable or oppressive, and therefore non-enforcible, are that after the admission of gas the pipes may not be opened without a permit under penalty of treble damage; *id.;* that meters be placed upon main pipes of apartment buildings instead of smaller pipes of individual occupants; 104 Mass. 95; that rents should be payable half yearly in advance with penalty twenty days after default enforcible by cutting off the attachment until payment of the arrears and additional half year in advance; 29 N. J. Eq. 77.

The right to cut off the supply. The company or the municipality has, as a general rule, the right to cut off the supply of gas if the bill for supplying it is not paid within a limited period. Such a provision by ordinance is a reasonable regulation; 132 Pa. 288; and furnishing gas without objection or account of former indebtedness is not a waiver of the right to shut off the gas for such prior indebtedness; 45 Barb. 136; but in New York the right was held not to extend to indebtedness of a former occupant of the premises; 38 N. Y. Super. Ct. 185; L. R. 4 C. P. D. 410; 12 Rob. (La.) 307. Even when the company has the right by statute to cut off the supply for non-payment of regular charges it does not extend to charges for special service; 20 U. C. Q. B. 233; nor can the supply be cut off from one house for non-payment for another supplied under a different contract; 25 Md. 1; 7 Grant, U. C. 112; and even when the contract authorizes refusal to continue a supply in case of default in payment for "any premises" of the owner it will apply only to future defaults; 1 Mackey 331. Whenever there is a controversy as to the indebtedness the consumer may have an injunction; 66 How. Pr. 314. As to the measure of damages see that title. See also WATER.

Liability for negligence. Gas companies and others using or generating gas, artificial or natural, are subject to the general principle that one who uses a force which he cannot control is liable for the consequences, and where it may be controlled by due care and scientific knowledge and appliances he who receives the profit must bear the responsibility; 3 C. B. 1; they are liable for negligence which must involve the omission of, required by, or the doing of something forbidden by, reasonable care; 122 Mass. 219; 2 Fost. & F. 437; what is such care is not capable of exact definition but must vary with and conform to the exigencies of the situation; 8 Gray 123; 129 Mass. 318; the obligation is increased by the dangerous character of the force under control; 152 Pa. 355; 12 R. I. 149; 31 S. W. Rep. (Mo.) 115, affirmed, 34 *id.* 508; and it extends to the company's agents and servants; 82 Ky. 432; 12 R. I. 149. The company is liable for such consequences as were natural and probable and, in view of the nature of the agency, ought to have been foreseen; 99 Pa. 1; 152 *id.* 355; 8 Allen 169; 3 *id.* 410. See CAUSA PROXIMA NON REMOTA; 78 Cal. 517; 44 N. Y. 459.

Where the municipality is held liable in damages for an injury resulting from the negligence of a gas company in failing to keep in repair its apparatus located under the sidewalk, the company is liable over to the municipality; 161 U. S. 316.

The company is bound to exercise reasonable care in the location, structure, and repair of its pipes to prevent escape of gas so as to become dangerous to life or property; L. R. 7 Exch. 96; 129 Mass. 318; 129 Ind. 472; Whether by reason of explosion or inhalation; 65 Hun 378; it must also provide with the like care for the inspection of pipes and repairing leaks; 34 S. W. Rep. (Ark.) 547; 4 Fost. & F. 324; and the discovery of such leaks; 82 Md. 113; 105 Mass. 411; 148 N. Y. 112; 152 Pa. 355; and the safe condition of its apparatus authorized to be placed under the streets; 161 U. S. 316. The failure to use such care makes the company jointly liable with one who seeks for the leak with a lighted match, for the results of an explosion; 34 S. W. Rep. (Ark.) 549. The mere fact that the gas was exploded by a lighted match will not relieve the company whose negli-

gence caused the leak; 152 Pa. 355. It is not contributory negligence to search for a gas leak with a lighted match; 33 S. W. Rep. (Ark.) 547; or a candle; 147 N. Y. 529. A city as a manufacturer and distributor of gas is liable for negligence of its officers, and its agents are bound to the exercise of due care in like manner as those of a private corporation; 105 Pa. 41; but not unless there is negligence; 13 Phila. 173.

Where the gas company is authorized by the legislature the public may not recover damages, but it will be liable to a private person; 64 Barb. 55; 6 Lans. 467. A gas company before turning on gas into an apartment house must use reasonable precautions to ascertain that the pipes in the building are in such condition that it will not flow out into the apartments of tenants, who have not applied for it, to their injury; per Peckham, J., in 147 N. Y. 529. For an elaborate note on the liability for negligence in the escape and explosion of gas, see 29 L. R. A. 337; 16 Alb. L. J. 466. See also NEGLIGENCE. As to gas as a nuisance, see that title.

Remedies. An *injunction* will be granted to restrain a company from improperly cutting off the supply on the ground of irreparable injury; 64 How. Pr. 33; L. R. 28 Ch. D. 138; 14 Gas J. 927; a private owner cannot ask for an injunction against acts of companies in laying pipes until a request to the municipal authorities to do it and their refusal; 142 Mass. 417; and one company will not be restrained at suit of another; 40 N. J. Eq. 427. When the gas becomes a nuisance by defective pipes, the municipality may abate it and will not be restrained, but when it is not a nuisance a bill for injunction will not be sustained at suit of the municipality; 5 Cent. Rep. (Pa.) 669.

Mandamus. Will lie to compel a supply of gas either artificial; 4 Cush. 60; 56 Cal. 431; 45 Barb. 137; or natural; 34 N. E. Rep. (Ind.) 818.

A claim that gas is of poor quality is no *defence* to an action for the supply of it; 32 Gas J. 5; 3 *id.* 5; but it may be shown that the gas was put out by air passing through the tubes, the contract being to pay for gas only, and the meter not being conclusive; 65 Hun 621. An action will not lie against a gas company by a consumer for the failure of the company to give him a supply of gas of the amount and purity required by law; [1896] 1 Q. B. 592.

Connecting a rubber pipe with gas mains and taking off the gas therefrom is *larceny;* Dears. C. C. 203; 1 Cr. Cas. Res. 172.

As to pipes in the ground, whether real or personal, see 12 Am. & Eng. Corp. Cas. 334; and as to gas apparatus generally, see FIXTURES.

See, generally, Foote & Everett, Inc. Comp. operating under Mun. Franchises; Greenough, Dig. Cas. as to Gas Comp.; Harris, Damages; 2 Lawson, Rights and Remedies 570; 27 Am. L. Reg. 277; 4 Am. & Eng. Corp. Cas. 70, 567; 16 *id.* 588–615.

GASTALDERS. A temporary governor of the country. Blount. A steward or bailiff. Spel. Gloss.

GASTEL (L. Fr.). Wastel; wastel-bread; the finest kind of wheat bread. Britt. c. 30; Kelham.

GASTINE (L. Fr.). Waste or uncultivated ground. Britt. c. 57.

GATE (Sax. *geat*), at the end of names of places, signifies way or path. Cunningham, Law Dict.

In the words *beast-gate* and *cattle-gate*, it means a right of pasture: these rights are local to Suffolk and Yorkshire respectively; they are considered as corporeal hereditaments, for which ejectment will lie; 2 Stra. 1084 1 Term 137; and are entirely distinct from right of common. The right is sometimes connected with the duty of repairing the *gates* of the pasture: and perhaps the name comes from this.

GAUDIES. A term used in the English universities to denote double commons.

GAUGER. An officer appointed to examine all tuns, pipes, hogsheads, barrels, and tierces of wine, oil, and other liquids, and to give them a mark of allowance, as containing lawful measure.

GAUGETUM. A guage or guaging; a measure of the contents of any vessel.

GAVEL. In Old English Law. Tribute; toll; custom; yearly revenue, of which there were formerly various kinds. Jacob, Law Dict.; Taylor, Hist. Gavelkind, 26, 102. See GABEL.

GAVELBRED. In English Law. Rent reserved in bread, corn, or provision; rent payable in kind. Cowel.

GAVELCHESTER. A certain measure of rent-ale. Cowel.

GAVELET. An obsolete writ, a kind of *cessavit* (*q. v.*), used in Kent. Cowel.

GAVELGELD. Sax *gavel*, rent, *geld*, payment). That which yields annual profit or toll. The tribute or toll itself. 3 Mon. Angl. 155; Cowel; Du Cange, *Gavelgida.*

GAVELHERTE. A customary service of ploughing. Du Cange.

GAVELKIND. The tenure by which almost all lands in England were held prior to the Conquest, and which is still preserved in Kent.

All the sons of a tenant of gavelkind lands take equally, or their heirs male and female by representation. The wife of such tenant is dowable of one-half the lands. The husband of such tenant has curtesy, whether issue be born or not, but only of one-half while without issue. Such lands do not escheat, except for treason or want of heirs. The heir of such lands may sell at fifteen years old, but must himself give livery. The rule as to division among brothers in default of sons is the same as among the sons. Digb. R. P. 46.

Coke derives *gavelkind* from "gave all

kinde;" for this custom gave to all the sons alike; 1 Co. Litt. 140 *a*; Lambard, from *gavel*, rent,—that is, land of the kind that pays rent or customary husbandry work, in distinction from lands held by knight service. Perambulations of Kent, 1656, p. 585. See Encyc. Brit.; Blount; 1 Bla. Com. 74; 2 *id.* 84; 4 *id.* 408; 1 Poll. & Maitl. 165; 2 *id.* 269, 416.

GAVELLER. An officer of the English crown, who had the management of the mines and quarries in the Forest of Dean and Hundred of St. Briavels, subject, in some respects, to the control of commissioners of woods and forests. He granted gales to free miners in their proper order, accepted surrenders of gales, and kept the registers required by the acts. There was a deputy-gaveller who appears to have exercised most of the gaveller's functions. Sweet.

GAVELMAN. A tenant who is liable to tribute. Somner, Gavelkind, p. 33; Blount. Gavelingmen were tenants who paid a reserved rent, besides customary service. Cowel.

GAVELMED. A customary service of mowing meadow-land or cutting grass (*consuetudo falcandi*). Somner, Gavelkind, App.; Blount.

GAVELREP. In Old English Law. Bedreap or bidreap; the duty of reaping at the bid or command of the lord. Somn. Gavelkind 19, 21; Cowel.

GAVELWERK (called also *Gavelweek*). A customary service, either *manuopera*, by the person of the tenant, or *carropera*, by his carts or carriages. Phillips, Purveyance; Blount; Somner, Gavelkind 24; Du Cange.

GAZETTE. The official publication of the British government, also called the *London Gazette*. It is evidence of acts of state, and of everything done by the queen in her political capacity. Orders of adjudication in bankruptcy are required to be published therein, and a copy of the *Gazette* containing such publication is conclusive evidence of the fact, and of the date thereof. Moz. & W.

GEBOCCED (Anglo-Saxon). Conveyed.

GEBUR (Sax.). A boor. Maitl. Domesd. 37.

GEBURSCRIPT. Neighborhood or adjoining district. Cowel.

GEBURUS. In Old English Law. A country neighborhood; an inhabitant of the same gaburscript, or village. Cowel.

GEBOCIAN (from Sax. *boc*). To convey *boc land*,—the grantor being said to *gebocian* the grantee of the land; 1 Reeve, Hist. Eng. Law. 10. But the better opinion would seem to be that *boc land* was not transferable except by descent. See Du Cange, *Liber;* BOCLAND; FOLCLAND.

GELD (from Sax. *gildan;* Law Lat. *geldum*). A payment; tax, tribute. Laws of Hen. I. c. 2; Charta Edredi Regis apud Ingulfum, c. 81; Mon. Ang. t. 1, pp. 52, 211, 379; t. 2, p. 161; Du Cange; Blount.

The compensation for a crime.

We find geld added to the word denoting the offence, or the thing injured or destroyed, and the compound taking the meaning of compensation for that offence or the value of that thing. Capitulare 3, anno 813, cc. 23, 25; Carl Magn. So, *wergeld*, the compensation for killing a man, or his value; *orfgeld*, the value of cattle; *angeld*, the value of a single thing; *octogeld*, the value eight times over, etc. Du Cange, *Geldum*.

GELDABILIS. In Old English Law. Taxable.

GELDABLE. Liable to be taxed. 1 Poll. & Maitl. 552; Kelham.

GELDING. A horse that has been castrated, and is thus distinguished from a horse in his natural and unaltered condition. 4 Tex. App. 220.

GEMMA (Lat). **In the Civil Law.** A gem; precious stones. Gems are distinguished by their transparency: such as emeralds, chrysolites, amethysts. Dig. 34, 2, 19, 17.

GEMOT (*gemote*, or *mote;* Sax., from *gemeltand*, to meet or assemble; L. Lat. *gemotum*). An assembly; a mote or moot, meeting or public assembly.

There were various kinds: as, the *witenagemot*, or meeting of the wise men; the *folc-gemot*, or *folc-moot*, the general assembly of the people; the *shire-gemot*, or county court; the *burg-gemot*, or borough court; the *hundred-gemot*, or hundred court; the *hali-gemot*, or court-baron; the *halmote*, a convention of citizens in their public hall; the *holy-mote*, or holy court; the *swanimote*, or forest court; the *wardmote*, or ward court; Cunningham, Law Dict. And see the several titles.

GENEALOGY. The summary history or table of a family, showing how the persons there named are connected together.

It is founded on the idea of a lineage or family. Persons descended from the common father constitute a family. Under the idea of degrees is noted the nearness or remoteness of relationship in which one person stands with respect to another. A series of several persons, descended from a common progenitor, is called a *line*. Children stand to each other in the relation either of full blood or half-blood, according as they are descended from the same parents or have only one parent in common. For illustrating descent and relationship, genealogical tables are constructed, the order of which depends on the end in view. In tables the object of which is to show all the individuals embraced in a family, it is usual to begin with the oldest progenitor, and to put all the persons of the male and female sex in descending, and then in collateral, lines. Other tables exhibit the ancestors of a particular person in ascending lines both on the father's and the mother's side. In this way four, eight, sixteen, thirty-two, etc., ancestors are exhibited, doubling at every degree. Some tables are constructed in the form of a tree, after the model of canonical law (*arbor consanguinitatis*), with the progenitor beneath, for the root or stem. See CONSANGUINITY.

GENEARCH. The head of the family.

GENEATH. In Saxon Law. A villein, or agricultural tenant (*villanus villicus*); a hind, or farmer (*fimarius rusticus*). Spel. Gloss.

GENER (Lat.). A son-in-law.

GENERAL AGENT. See AGENT.

GENERAL APPEARANCE. See APPEARANCE.

GENERAL ASSEMBLY. A name given in some of the states to the senate and house of representatives, which compose the legislative body.

GENERAL ASSIGNMENT. An assignment of all one's property for the benefit of his creditors, and necessarily includes an assignee who shall by the terms of the instrument, or as an inference from those terms, take as a trustee for the creditors. 18 N. Y. S. 234. See ASSIGNMENT.

GENERAL AVERAGE. A loss arising out of extraordinary sacrifices made, or extraordinary expenses incurred, for the joint benefit of a ship and cargo. 19 S. W. Rep. (Ky.) 10.

The scuttling of a ship by the municipal authorities of a port, without the direction of her master, to extinguish a fire in her hold, is not a general average loss; 157 U. S. 386; which see generally on the subject. See AVERAGE; FOLLOWING BASIS.

GENERAL CHALLENGE. A challenge for cause to a particular juror, upon a ground which disqualifies him from serving in any case. Cal. Pen Code § 1071.

GENERAL CHARACTER. The general character is the estimation in which a person is held in the community where he has resided, and, ordinarily, the members of that community are the only proper witnesses to testify as to such character. Accordingly a witness who goes to the place of the former residence of a party to learn his character will not be allowed to testify as to the result of his inquiries. 2 Wend. 354. See CHARACTER.

GENERAL CHARGE. The charge or instruction of the court to the jury upon the case, as a whole, or upon its general features and characteristics. See CHARGE.

GENERAL CIRCULATION. That of a general newspaper only, as distinguished from one of a special or limited character; 1 Lack. Leg. N. (Pa.) 114.

GENERAL COUNCIL. A council of bishops of the Roman Catholic Church, from different parts of the world.

A name sometimes applied to the British parliament.

GENERAL CREDIT. The character of a witness as one generally worthy of credit. There is a distinction between this and particular credit, which may be affected by proof of particular facts relating to the particular action; 5 Abb. Pr. N. S. 232.

GENERAL CUSTOM. See CUSTOM.

GENERAL DAMAGES. See DAMAGES.

GENERAL DEMURRER. See DEMURRER.

GENERAL DENIAL. See DENIAL; PLEA; TRAVERSE.

GENERAL DEPOSIT. Of money in a bank, it means one to be returned to the depositor in a like sum, but not the same money which was deposited. 43 Ill. App. 340; 43 Ala. 138. See DEPOSIT; SPECIAL DEPOSIT.

GENERAL ELECTION. An election of officers of the general government, either federal or state, as distinguished from an election of local officers.

One held to choose an officer after the expiration of the full term of the former officer, as distinguished from one held to fill a vacancy occurring before the expiration of the full term for which the incumbent was elected. 52 Cal. 164.

GENERAL EXECUTOR. See EXECUTOR.

GENERAL FIELD. A number of separate lots or parcels of land inclosed together and fenced as a single field. 14 Mass. 440.

GENERAL FUND. A phrase used in some states as a collective designation of all the assets of the state available for the support of the state government and for defraying the ordinary appropriations of the legislature. It is so used in New York; 27 Barb. 575, 588; and also in Delaware in the messages of the governor and other state papers to distinguish such funds as are available in the hands of the state treasurer for general purposes from assets of a special character, such as the school fund.

GENERAL GAOL DELIVERY. In English Law. One of the four commissions issued to judges holding the assizes, which empowers them to try and deliverance make of every prisoner who shall be in the gaol when the judges arrive at the circuit town, whether an indictment has been preferred at any previous assize or not.

It was anciently the course to issue special writs of gaol delivery for each prisoner, which were called writs *de bono et malo*; but, these being found inconvenient and oppressive, a general commission for all the prisoners has long been established in their stead. 4 Steph. Com. 333, 334; 2 Hawk. Pl. Cr. 14, 23.

Under this authority it was necessary that the gaol be cleared and delivered of all prisoners in it, whenever or before whomever indicated or for whatever crime. Such deliverance took place when the person is either acquitted, convicted, or sentenced to punishment. Bract. 110. See COURTS OF OYER AND TERMINER AND GENERAL GAOL DELIVERY; GAOL DELIVERY; ASSIZE.

GENERAL IMPARLANCE. In Pleading. One granted upon a prayer in which the defendant reserves to himself no exceptions.

GENERAL INCLOSURE ACT. The Stat. 41 Geo. III. c. 109, which consolidated a number of regulations respecting the inclosure of common fields and waste lands. See 8 and 9 Vict. c. 118; INCLOSURE.

GENERAL ISSUE. *In Pleading.* A plea which denies or traverses at once the whole indictment or declaration, without offering any special matter to evade it.

It is called the general issue because, by importing an absolute and general denial of what is alleged in the indictment or declaration, it amounts at once to an issue. 2 Bla. Com. 305. In the early manner of pleading, the general issue was seldom used except where the party meant wholly to deny the charges alleged against him. When he intended to excuse or palliate the charge, a special plea was used to set forth the particular facts. See 2 Poll. & Maitl. 617.

But now, since special pleading is generally abolished, the same result is secured by requiring the defendant to file notice of special matters of defence which he intends to set up on trial, or obliging him to use a form of answer adapted to the plaintiff's declaration, the method varying in different systems of pleading. Under the English Judicature Acts, the general issue is no longer admissible in ordinary civil actions, except where expressly sanctioned by statute.

In criminal cases the general issue is, not guilty. In civil cases the general issues are almost as various as the forms of action: in assumpsit, the general issue is *non assumpsit;* in debt, *nil debet;* in detinue, *non detinet;* in trespass, *non culpabilis* (not guilty); in replevin, *non cepit*, etc. Steph. Pl. 232.

GENERAL LAND OFFICE. A bureau in the United States government which has the charge of matters relating to the public lands.

It was established by the act of April 25, 1812, 2 Story, Laws 1238. Another act was passed March 24, 1824, 3 Story 1938, which authorized the employment of additional officers. And it was reorganized by an act entitled "An act to reorganize the General Land Office," July 4, 1836. It was originally a bureau of the treasury department, but was transferred in 1859 to the department of the interior. The statutes on the subject are comprised in U. S. Rev. Stat. §§ 446–461. As to the organization of the executive departments of the federal government, see DEPARTMENT. See also Zabriskie's Pub. Land Laws of U. S.

GENERAL LAW. Laws which apply to and operate uniformly upon all members of any class of persons, places, or things, requiring legislation peculiar to themselves in the matters covered by the laws. Binney, Restrictions upon Local and Special Legislation.

Statutes which relate to persons and things as a class. 77 Pa. 348. Laws that are framed in general terms, restricted to no locality, and operating equally upon all of a group of objects which, having regard to the purpose of the legislation, are distinguished by characteristics sufficiently marked and important to make them a class by themselves. 40 N. J. L. 123.

The later constitutions of many of the states place restrictions upon the legislature as to passing special laws in certain cases. In some states there is a provision that general laws only may be passed, in cases where such can be made applicable. Provisions requiring all laws of a general nature to be uniform in their operation do not prohibit the passage of laws applicable to cities of a certain class having not less than a certain number of inhabitants, although there be but one city in the state of that class; 18 Ohio N. S. 85; Cooley, Const. Lim. 156. See 37 Cal. 366.

The wisdom of these constitutional provisions has been the subject of grave doubt. See Cooley, Const. Lim. 156, n.

When thus used, the term "general" has a twofold meaning. With reference to the subject-matter of the statute, it is synonymous with "public" and opposed to "private"; 37 Cal. 366; 14 Wis. 372; 46 *id.* 218; Dwarris, Stat. 629; Sedgw. Stat. L. 30; but with reference to the extent of territory over which it is to operate, it is opposed to "local," and means that the statute to which it applies operates throughout the whole of the territory subject to the legislative jurisdiction; 4 Co. 75 *a*; 1 Bla. Com. 85; 83 Ill. 585; 87 Tenn. 304; 10 Wis. 180. Further, when used in antithesis to "special" it means relating to all of a class instead of to men only of that class; 70 Ill. 398; 26 Ind. 431; 22 Ia. 391; 77 Pa. 348; 32 Pac. Rep. (Nev.) 440.

When the constitution forbids the passing of special or local laws in specified cases, it is within the discretion of the legislature to decide whether a subject not named in the constitution is a proper subject for general legislation; the fact that a special law is passed in relation thereto is evidence that it was thought that a general law would not serve; and in such a case clear evidence of mistake is required to invalidate the enactment; 81 Cal. 489; 92 Ind. 236; 107 *id.* 15; 77 Ia. 513.

In deciding whether or not a given law is general, the purpose of the act and the objects on which it operates must be looked to. If these objects possess sufficient characteristics peculiar to themselves and the purpose of the legislation is germane thereto, they will be considered as a separate class, and legislation affecting them will be general; 49 N. J. L. 356; 41 Minn. 74; 131 Ind. 446; 87 Mich. 217; 124 Ill. 666; 87 Tenn. 214; but if the distinctive characteristics of the class have no relation to that purpose of the legislature, or if objects which would appropriately belong to the same class have been excluded, the classification is faulty, and the law not general; 87 Ga. 444; 91 Cal. 238; 32 Kan. 431; 51 N. J. L. 402; 52 *id.* 303; 19 Nev. 43; 2 N. Dak. 270; 106 Pa. 377. The effect, not

the form of the law, determines its character; 20 Ia. 338; 71 Mo. 645; 82 *id.* 231; 53 N. J. L. 4; 45 Ohio St. 63; 48 *id.* 211; 88 Pa. 258.

See 42 N. J. L. 357; *id.* 533; 40 *id.* 123; 31 Wis. 257. See LEGISLATIVE POWER; SPECIAL LAW; STATUTE.

GENERAL LEGACY. See LEGACY.

GENERAL LIEN. See LIEN.

GENERAL MALICE. See MALICE.

GENERAL MEETING. See MEETING.

GENERAL OCCUPANT. The man who could first enter upon lands held *pur autre vie*, after the death of the tenant for life, living the *cestui que vie*. At common law he held the lands by right for the remainder of the term; but this is now altered by statute, in England, the term going to the executors if not devised; 29 Car. II. c. 3; 14 Geo. II. c. 20; 2 Bla. Com. 258. This has been followed by some states; 1 Md. Code 666, s. 220, art. 93; in some states the term goes to heirs, if undevised; Mass. Gen. Stat. c. 91, § 1.

GENERAL ORDERS. Orders or rules of court, entered for the guidance of practitioners and the general regulation of procedure, or in some branch of its general jurisdiction; as opposed to a rule or an order made in a particular case. The rules of court.

GENERAL OWNER. The general owner of a thing is one who has the primary title to it; as distinguished from a *special* owner, who has a special interest in the same thing, amounting to a qualified ownership, such, for example, as a bailee lien. One who has both the right of property and of possession.

GENERAL PARTNERSHIP. See PARTNERSHIP.

GENERAL PROPERTY. The right and property in a thing enjoyed by the general owner (*q. v.*).

GENERAL RESTRAINT OF TRADE. A contract which forbids the party to it from engaging in a particular business without limitation either of time or locality. Such contracts are void. 2 Add. Cont., Abb. & Wood ed. 737.

One which forbids the person to employ his talents, industry, or capital in any undertaking within the limits of the state or country. 9 How. Pr. 337. See RESTRAINT; GOOD WILL.

GENERAL RETAINER. See RETAINER.

GENERAL RETURN DAY. In any court the day for the return of all process, such as writs of summons, subpœna, etc., issued returnable to a particular term of the court. See RETURN OF WRITS.

GENERAL RULES. Standing orders of a court for the regulation of its practice. See GENERAL ORDERS.

GENERAL SESSIONS. See COURT OF GENERAL QUARTER SESSIONS OF THE PEACE.

GENERAL SHIP. One which is employed by the charterer or owner on a particular voyage, and is hired by a number of persons, unconnected with each other, to convey their respective goods to the place of destination. A ship advertised for general receipt of goods to be carried on a particular voyage. The advertisement should state the name of the ship and master, the general character of the ship, the time of sailing, and the proposed voyages. See 1 Pars. Mar. Law 130; Abb. Shipp. 123.

The shippers in a general ship generally contract with the master; but in law the owners and the masters are separately bound to the performance of the contract, it being considered as made with the owners as well as with the master; Abb. Shipp. 319.

GENERAL SPECIAL IMPARLANCE. In Pleading. One in which the defendant reserves to himself "all advantages and exceptions whatsoever." 2 Chitty, Pl. 408. See IMPARLANCE.

GENERAL STATUTE. See GENERAL LAW.

GENERAL TAIL. See FEE-TAIL.

GENERAL TENANCY. A tenancy which is not fixed and made certain, as to its duration, by agreement of the parties. 22 Ind. 122.

GENERAL TERM. A phrase used in some jurisdictions to designate the regular session of a court, for the trial and decision of causes, as distinguished from a special term, for the hearing of motions or arguments, or the despatch of routine or formal business, or the trial of a special list or class of causes or a particular case. It is also sometimes used to designate a sitting of the court in banc (*q. v.*).

GENERAL TRAVERSE. See TRAVERSE.

GENERAL USAGE. See USAGE.

GENERAL VERDICT. See VERDICT.

GENERAL WARRANT. A process which used to issue from the state secretary's office, to take up (without naming any person in particular) the author printer, and publisher of such obscene and seditious libels as were particularly specified in it. The practice of issuing such warrants was common in early English history, but it received its death blow from Lord Camden, in the time of Wilkes. The latter was arrested and his private papers taken possession of under such a warrant, on a charge of seditious libel in publishing No. 45 of the North Briton. He recovered heavy damages against Lord Halifax who issued the warrant. Pratt, C. J., declared the practice to be "totally subversive of the liberty of

the subject," and with the unanimous concurrence of the other judges condemned this dangerous and unconstitutional practice. See May, Const. Hist. of England; 5 Co. 91; 2 Wils. 151, 275; 10 Johns. 263; 11 *id.* 500; Cooley, Const. Lim. 369. Such warrants were declared illegal and void for uncertainty by a vote of the house of commons. Com. Jour. 22, April, 1766; Whart. Law Dict.

A writ of assistance.

The issuing of these was one of the causes of the American republic. They were a species of general warrant, being directed to "all and singular justices, sheriffs, constables and all other officers and subjects," empowering them to enter and search any house for uncustomed goods, and to command all to assist them. These writs were perpetual, there being no return to them. They were not executed, owing to the eloquent argument of Otis before the supreme court of Massachusetts against their legality. See Tudor, Life of Otis 66; Story, Const. 1901.

GENERAL WARRANTY. See COVENANT OF WARRANTY; WARRANTY.

GENERAL WORDS. Such words of a descriptive character as are used in conveyances in order to convey, not only the specific property described, but also all kinds of easements, privileges, and appurtenances which may possibly belong to the property conveyed. Such words are in general unnecessary; but are properly used when there are any easements or privileges reputed to belong to the property not legally appurtenant to it.

Such words are rendered unnecessary by the English conveyancing act of 1881, under which they are presumed to be included.

See, as to the effect of such words in deeds, 1 Show. 150; 4 M. & S. 423; 1 Ld. Raym. 235, 662; 2 Tyrw. 178; Lofft 398; 4 Mo. 448; in a will; 1 P. Wms. 302; in a lease; 2 Moo. 592; in a release; 3 Mod. 277; 3 Lev. 273; in a covenant; 3 Moo. 703; in a statute; 1 Bla. Com. 88; Cowp. 360; 12 Mod. 166; 2 Co. 46; 1 Ld. Raym. 321.

GENERATIO. The issue or offspring of a mother monastery.

GENERATION. A simple succession of living beings in natural descent; the age or period between one succession and another. It is not equivalent to degree. 107 N. C. 609.

GENS (Lat.). **In Roman Law.** A union of families, who bore the same name, who were of an ingenuous (free) birth, *ingenui*, none of whose ancestors had been a slave, and who had suffered no *capitis diminutio* (reduction from a superior to an inferior condition), of which there were three degrees, *maxima, media, minima.* The first was the reduction of a free man to the condition of a slave, and was undergone by those who refused or neglected to be registered at the census, who had been condemned to ignominious punishments, who refused to perform military service, or who had been taken prisoners by the enemy, though those of the last class, on recovering their liberty, could be reinstated in their rights of citizenship. The second degree consisted in the reduction of a citizen to the condition of an alien (*Latinus* or *peregrinus*), and involved in the case of a *Latinus*, the loss of the right of legal marriage, but not of acquiring property, and in the case of the *peregrinus*, the loss of both. The third degree consisted in the change of condition of a *pater familias* into that of a *filius familias*, either by adoption or by legitimation.

Gentiles sunt, qui inter se eodem nomine sunt; qui ab ingenuis oriundi sunt; quorum majorum nemo servitutem servivit; qui capite non sunt deminuti. This definition is given by Cicero (Topic 6), after Scævola, the pontifex. But, notwithstanding this high authority, the question as to the organization of the *gens* is involved in great obscurity and doubt. The definition of Festus is still more vague and unsatisfactory. He says, "*Gentilis dicitur et ex eodem genere ortus, et is, qui simili nomine appellatur, ut ait Cincius: Gentiles mihi sunt, qui meo nomine appellantur.*" *Gens* and *genus* are convertible terms; and Cicero defines the latter word, "*Genus autem est quod sui similes communione quadam, specie autem differentes, duas aut plures complectitur partes.*" *De Oratore*, 1, 42. The *genus* is that which comprehends two or more particulars, similar to one another by having something in common, but differing in species. From this it may fairly be concluded that the *gens* or race comprises several families, always of ingenuous birth, resembling each other by their origin, general name,—*nomen*,—and common sacrifices or sacred rites,—*sacra gentilitia* (*sui similes communione quadam*),—but differing from each other by a *particular* name,—*cognomen* and *agnatio* (*specie autem differentes*). It would seem, however, from the litigation between the Claudii and Marcellii in relation to the inheritance of the son of a freedman, reported by Cicero, that the deceased, whose succession was in controversy, belonging to the gens Claudia, for the foundation of their claim was the gentile rights,—*gente*; and the Marcellii (plebeians belonging to the same gens) supported their pretensions on the ground that he was the son of their freedman. This fact has been thought by some writers to contradict that part of the definition of Scævola and Cicero where they say, *quorum majorum nemo servitutem servivit.* And Niebuhr, in a note to his history, concludes that the definition is erroneous: he says, "The claim of the patrician Claudii is at variance with the definition in the Topics, which excludes the posterity of freedmen from the character of gentiles; probably the decision was against the Claudii, and this might be the ground on which Cicero denied the title of gentiles to the descendants of freedmen. I conceive in so doing he must have been mistaken. We know from Cicero himself (*de Leg.* 11, 22) that no bodies or ashes were allowed to be placed in the common sepulchre unless they belonged to such as shared in the *gens* and its sacred rites; and several freedmen have been admitted into the sepulchre of the Scipios." But in another place he says, "The division into houses was so essential to the patrician order that the appropriate ancient term to designate that order was a circumlocution,—the *patrician gentes*; but the instance just mentioned shows beyond the reach of a doubt that such a gens did not consist of patricians alone. The Claudian contained the Marcellii, who were plebeians, equal to the Appii in the splendor of the honors they attained to, and incomparably more useful to the commonwealth; such plebeian families must evidently have arisen from marriages of disparagement, contracted before there was any right of intermarriage between the orders. But the Claudian house had also a very large number of insignificant persons who bore its name,—such as the M. Claudius who disputed the freedom of Virginia; nay, according to an opinion of earlier times, as the very case in Cicero proves, it contained the freedmen and their descendants. Thus, among the Gaels, the clan of the Campbells

was formed by the nobles and their vassals: if we apply the Roman phrase to them, the former *had* the clan, the latter only belonged to it." It is obvious that, if what is said in the concluding part of the passage last quoted be correct, the definition of Scævola and Cicero is perfectly consistent with the theory of Niebuhr himself; for the definition, of course, refers to the original stock of the gens, and not to such as might be attached to it or stand in a certain legal relation towards it. In Smith's Dictionary of Greek and Roman Antiquities, edited by that accomplished classical scholar, Professor Anthon, the same distinction is intimated, though not fully developed, as follows:—"But it must be observed, though the descendants of freedmen might have no claim as gentiles, the members of the gens might, as such, have claims against them; and in this sense the descendants of freedmen might be gentiles." This article by George Long is much quoted and contains references to the principal German authorities, and it may be consulted with profit. Hugo, in his history of the Roman Law, vol. 1, p. 83, says, "Those who bore the same name belonged all to the same *gens:* they were gentiles with regard to each other. Consequently, as the freedmen took the name of their former master, they adhered to his *gens*, or, in other words, stood in the relation of *gentiles* to him and his male descendants. Livy refers in express terms to the *gens* of an enfranchised slave (b. 39, 19), "*Tecenicæ Hispalæ . . . gentis enupsio;*" and the right of inheritance of the son of a freedman was conferred on the ground of civil relationship,—*gente.* But there must necessarily have been a great difference between those who were born in the *gens* and those who had only entered it by adoption, and their descendants; that is to say, between those who formed the original stock of the *gens*, who were all of patrician origin, and those who had entered the family by their own enfranchisement or that of their ancestors. The former alone were entitled to the rights of the *gentiles;* and perhaps the appellation itself was confined to them, while the latter were called *gentilitii*, to designate those against whom the *gentiles* had certain rights to exercise." In a lecture of Niebuhr on the Roman Gentes, vol. 1, p. 70, he says, "Such an association, consisting of a number of families, from which a person may withdraw, but into which he cannot be admitted at all, or only by being adopted by the whole association, is a *gens.* It must not be confounded with the *family*, the members of which are descended from a common ancestor; for the patronymic names of the *gentes* are nothing but symbols, and are derived from heroes." Arnold gives the following exposition of the subject:—"The people of Rome were divided into the three tribes of the Ramnenses, Titienses, and Luceres, and each of these tribes was divided into ten curiæ; it would be more correct to say that the union of ten curiæ formed the tribe. For the state grew out of the junction of certain original elements; and these were neither the tribes, nor even the curiæ, but the gentes or houses which made up the curiæ. The first element of the whole system was the *gens*, or house, a union of several families who were bound together by the joint performance of certain religious rites. Actually, where a system of houses has existed within historical memory, the several families who composed a house were not necessarily related to one another; they were not really cousins more or less distant, all descended from a common ancestor. But there is no reason to doubt that in the original idea of a house the bond of union between its several families was truly sameness of blood; such was likely to be the earliest acknowledged tie, although afterwards, as names are apt to outlive their meaning, an artificial bond may have succeeded to the natural one, and a house, instead of consisting of families of real relations, was made up sometimes of families of strangers, whom it was proposed to bind together by a fictitious tie, in the hope that law and custom and religion might together rival the force of nature." 1 Arnold, Hist. 31. Maine, in his chapter on the origin of property, selects the village community of India as a type of "an organized patriarchal society and an assemblage of co-proprietors" which "ought at once to rivet our attention from its exactly fitting in with the ideas which our studies in the law of persons would lead us to entertain respecting the original condition of property;" Anc. L. 252. After describing it somewhat fully he says: The type with which it should be compared is evidently not the Roman family, but the Roman *gens* or house. The *gens* was also a group on the model of a family; it was the family extended by a variety of fictions of which the exact nature was lost in antiquity. In historical times, its leading characteristics were the very two which Elphinstone remarks in the village community. There was always the assumption of a common origin, an assumption sometimes notoriously at variance with fact; and, to repeat the historian's words, "if a family became extinct, its share returned to the common stock." In old Roman Law, unclaimed inheritances escheated to the gentiles. It is further suspected by all who have examined their history that the communities, like the gentes, have been very generally adulterated by the admission of strangers, but the exact mode of absorption cannot now be ascertained; *id.* 256. Another writer considers that the *gens* "was something very nearly identical with a Celtic clan, the identity or similarity of name being always supposed to have arisen from relationship, and not from similarity of occupation, as in the case of the Smiths, Taylors, Lorimers, etc., of modern Europe. There was this peculiarity, however, about the gens which did not belong to the clan—viz., that it was possible for an individual born in it to cease to belong to it by *capitis diminutio*, or by adoption (by a family not of the same *gens*), or adrogation as it was called when the person adopted was *sui juris.*" Int. Cyc.

A recognized authority on the civil law refers to the obscurity of this subject in treating of successions. Under the twelve tables there were recognized only (1) *sui heredes;* (2) *agnati;* (3) *gentiles*, and in default of the latter the inheritance lapsed to the state. The prætors called the *cognati* for the first time to the succession, "probably because" says Sandars (Inst. 290), "at the time of the prætor's legislation there were few families that could boast a descent so pure and accurately known as to satisfy the requisite of *gentilitas.*" He also says in the same connection: "The subject of *gentilitas* is too obscure, and repays investigation too little, to permit us to enter into it here. Probably the original notion of *gentiles* was that of members of some pure uncorrupted patrician stock, though not necessarily of the same descent, but bearing the same name, and having the same *sacra.* Probably, also, freedmen and clients of *gentilés* were in some degree, considered as themselves *gentiles;* probably if their property was not claimed by their patron it went to the members of his *gens*, but they had not any claim on the property of any other *gentiles.* We know also that there were plebeian *gentes*, formed probably by the marriage of a patrician with a plebeian before the *plebs* received the *connubium.* Members of plebeian *gentes* would, we may suppose, have the rights of *gentilitas* towards other members of the same plebeian *gens*, and it would seem that they had them towards the members of the patrician *gens*, from which they were an offset; Cic. *de Orat.* i. 39. Of the mode in which the *gentiles* took the inheritance, we know nothing of, nor at how late a period of history the *gentes* were still really in existence. Gaius (iii. 17), treats the subject as one of mere antiquarian interest." In his introduction to the Institutes, Sandars gives generally his understanding of the nature of the *gens.* The body of Roman citizens was composed of two distinct divisions, the *populus* and the *plebs.* The former consisted of three tribes, each of ten *curiæ*, and each *curia* was divided into ten *decuriæ.* For the latter another name was *gens*, "and it included a great number of distinct families, united by having common sacred rites, and bearing a common name. In theory at least, the members of the same *gens* were descended from a common ancestor, and the families of the *gens* were subdivisions of the same ancestral stock, but both individuals and groups were occasionally admitted from outside. A pure unspotted pedigree was claimed by every member of a *gens*, and there was a theoretical equality among all the members of the whole tribe. The heads of the different families in these *gentes* met together in a great council, called the council of the curies (*comitia curiata*). A small body of three hundred, answering in number to the *gentes* in each of the three tribes, and called the senate, was charged with the office of initiating the more important questions submitted to the great council; and a king, nominated by the senate, but chosen by the curies, presided over the whole body, and was charged with the functions of executive government."

The gentiles inherited from each other in the absence of agnates. The rule of the Twelve Tables is, "*Si adenatos nec escit, gentilis familiam nancitor,*" which has been paraphrased, "*Si agnatus non reit, tum gentilis hæres esto.*"

GENTLEMAN. In English Law. A person of superior birth.

According to Coke, he is one who bears coat-armor, the grant of which adds gentility to a man's family. The eldest son had no exclusive claim to the degree; for, according to Littleton, "every son is as great a gentleman as the eldest." Co. 2d Inst. 667. Sir Thomas Smith, quoted by Blackstone, 1 Com. 406, says, "As for gentlemen, they are made good cheap in this kingdom; for whosoever studies the laws of the realm, who studies in the universities, who professeth liberal sciences, and (to be short) who can live idly and without manual labor, and will bear the port, charge, and countenance of a gentleman, shall be called master, and be taken for a gentleman." In the United States, this word is unknown to the law. See Pothier, Proc. Crim. sec. 1, App. § 3; 1 C. P. D. 60; 1 Ch. Div. 577; 3 H. & N. 382.

GENTLEWOMAN. An addition formerly appropriate in England to the state or degree of a woman. Co. 2d Inst. 667.

GENTOO LAW. See HINDU LAW.

GENUINE. Not false, fictitious, simulated, spurious, counterfeit. 37 N. Y. 492.

GEORGIA. The name of one of the original thirteen states of the United States of America.

It was called after George II., king of Great Britain, under whose reign it was colonized.

George II. granted a charter, dated June 9, 1732, to a company consisting of General James Oglethorpe, Lord Percival, and nineteen others, who planted a colony, in 1733, on the bank of the Savannah river, a short distance from its mouth.

The corporation thus created was authorized, for twenty-one years, to erect courts of judicature for all civil and criminal causes, and to appoint a governor, judges, and other magistrates. The territory was to be held, as of the manor of Hampton Court in Middlesex, in free and common socage, and not *in capite*.

This charter was to expire by its own limitation in 1753; and under it the colony was governed by trustees, who, on December 19, 1751, in anticipation of the expiration of the charter, offered to surrender it up to the crown. The offer was accepted and on June 23, 1752, the trustees closed their accounts, made their last grant, and affixed the seal to the deed of surrender, and the colony became a royal province, of which the first governor was appointed August 6, and landed October 29, 1754; the colony having in the meantime been governed by the Board of Trade and Plantations.

A state constitution was adopted in 1777, another in 1789, and a third in 1798, which, with some amendments, remained in force until the civil war. The state seceded January 19, 1861, and was readmitted to the Union under act of congress approved July 15, 1870.

The present constitution, as revised, compiled, and amended, was adopted by a convention at Atlanta and ratified by a vote of the people on 5th December, 1877.

THE LEGISLATIVE POWER.—This is vested in a senate and house of representatives, which together constitute the general assembly.

The senate is composed of forty-four members, elected one from each senatorial district. A senator must be at least twenty-five years old, a citizen of the United States and an inhabitant of the state for four years, and have actually resided one year next before his election within the district for which he is chosen.

The house of representatives is composed of one hundred and seventy-five members, elected three from each of the six largest counties, two from the twenty-six counties having the next largest population, and one from each of the remaining one hundred and five counties. A representative must be at least twenty-one years old, a citizen of the United States, and an inhabitant of the state two years, and have resided in the county for which he is chosen one year immediately preceding the election.

The members of both branches are elected annually, on the first Wednesday in October. The sessions are held biennially, commencing on the first Wednesday in November, and are limited to forty days, unless continued longer by a two-thirds vote in both houses.

THE EXECUTIVE POWER. *The Governor* is elected biennially by the qualified electors, or, in case no one has a majority, is selected by the general assembly from the two receiving the largest number of votes. He must be thirty years old, have been a citizen of the United States fifteen years, and a citizen of the state six years.

THE JUDICIAL POWER. *The supreme court for the correction of errors* was organized in 1845. It consists of a chief justice and two associate justices elected by the legislature for six years. This court sits only for the trial and correction of errors in law and equity in cases brought from the superior and city courts. It holds two sessions during the year at Atlanta. The court is required finally to determine each and every case on the docket at the first or second term after the writ of error or appeal is brought.

The superior court consists of sixteen judges, elected for their respective circuits, one for each, by the general assembly, for the term of four years. This court has exclusive jurisdiction in all felonies, in all cases respecting the titles to land, and in cases of divorce. In all other civil cases, it has concurrent jurisdiction with the inferior courts. All the powers of a court of equity are vested exclusively in the superior courts, and the judges of the superior courts have power, by writs of *mandamus*, *prohibition*, *scire facias*, *certiorari*, and all other necessary writs, not only to carry their own powers fully into effect, but to correct the errors of all inferior judicatories.

An ordinary is elected in each county, by the people, every four years, in whom is vested original jurisdiction over all testates' and intestates' estates. An appeal lies to the superior court. This court has no jury.

Justices of the peace are elected by the people, one for every militia district in the state: they hold their office for four years. An appeal lies from the magistrates to the jury of the district, composed of five men. Their civil jurisdiction extends to all sums not exceeding one hundred dollars.

Pleadings are simplified to the last degree. All suits are brought by petition to the court. The petition must contain the plaintiff's charge, allegation, or demand, plainly, fully, and distinctly set forth, and must be signed by the plaintiff or his attorney, and to it the clerk annexes a process, requiring the defendant to appear at the term to which the same is returnable. A copy is served on the defendant by the sheriff. The defendant makes his answer in writing, in which he plainly, fully, and distinctly sets forth the cause of his defence. The case then goes to the jury, without any replication or further proceedings; and the penal code declares that every indictment or accusation of the grand jury shall be deemed sufficiently technical and correct which states the offence in the terms or language of the code, *or so plainly* that the nature of the offence charged may be easily understood by the jury.

In all civil cases, either party may be examined by commission or upon the stand at the instance of his adversary, both at law and in equity.

No appeal lies in the superior courts from one jury to another, either at law or in equity, but the general assembly may provide by law for an appeal from one jury to another. The jurors are made judges of the law, as well as of the facts, in criminal cases. Divorces are granted upon certain legal grounds, prescribed by statutes, upon the concurrent verdicts of two juries at different terms.

GEREFA. Reeve, which see.

GERMAN. Whole or entire, as respects genealogy or descent: thus "brother-german" denotes one who is brother both by the father's and mother's side; "cousin-german," those in the first and nearest degree, *i. e.* children of brothers or sisters. Tech. Dict.; 4 M. & G. 56.

GERMANY. An Empire of Europe composed of twenty-six states. The legislative power is vested in two bodies, the bun-

desrath, or federal council, and the reichstag. The members of the bundesrath are annually appointed by the several states. The members of the reichstag are elected by ballot by universal suffrage for a period of five years, and may be prorogued for a period not to exceed ninety days, or it may be dissolved by the emperor. In case of dissolution new elections take place within sixty days and the new session must be opened within ninety days. All imperial laws must receive the votes of the majority of both bodies, and have the assent of the emperor. The bundesrath can declare war, make peace, enter into treaties with foreign nations and appoint and receive ambassadors, but if the territory of the empire is attacked, the emperor does not require the consent of the bundesrath to declare war, but can act independently. In connection with the chancellor the bundesrath also exercises some executive functions, through committees which are substantially boards of administration and consultation.

The Code Napoléon was until lately the common German law in many parts of Germany, and the Prussian code of Frederick the Great in other parts. In 1850 a new penal code was promulgated ; in 1862 a partial codification was effected ; and in 1869 a code of commercial law was enacted which is valid for the North German Confederation. Since 1870 there has been a universal criminal code for the whole empire and a common judicature was established in 1879. A new civil code was promulgated August 19, 1896, to go into effect, with other special codes, January 1, 1900. See CODE ; EXECUTIVE POWER.

GERONTOCOMI. In Civil Law. Officers appointed to manage hospitals for poor old persons. Clef des Lois Rom. *Administrateurs.*

GERSUME (Sax.). **In Old English Law.** Expense ; reward ; compensation ; wealth ; especially, the consideration or fine of a contract : e. g. *et pro hac concessione dedit nobis prædictus Jordanus* 100 *sol. sterling de gersume.* Old charter, cited Somner, Gavelkind, 177 ; Tabul. Reg. Ch. 377 ; 3 Mon. Ang. 720 ; 3 *id.* 126. It is also used for a fine or compensation for an offence. 2 Mon. Ang. 973.

GESTATION, UTERO-GESTATION. In Medical Jurisprudence. The time during which a female, who has conceived, carries the embryo or fœtus in her uterus.

This directly involves *the duration of pregnancy*, questions concerning which most frequently arise in cases of contested legitimacy. The descent of property and peerage may be made entirely dependent upon the settlement of this question, as to which see PREGNANCY.

There are some women to whom it is peculiar always to have the normal time of delivery anticipated by two or three weeks. Montgomery, Preg. 264. So, also, there are many cases establishing the fact that the usual period is sometimes exceeded by one, two, or more weeks, the limits of which it is difficult or impossible to determine. Coke seems inclined to adopt a peremptory rule that forty weeks is the longest time allowed by law for gestation. Co. Litt. 123 *b.* But although the law of some countries prescribes the time from conception within which the child must be born to be legitimate, that of England and America fixes no precise limit, but admits the possibility of the birth's occurring previous or subsequent to the usual time. The following are cases in which this question will be found discussed : 3 Bro. Ch. 349 ; Gardner Peerage case, Le Marchant Report ; Cro. Jac. 686 ; 7 Hazard, Reg. of Penn. 363 ; 2 Wh. & Stillé, Med. Jur. § 4 ; 2 Witth. & Beck. Med. Jur. 264. See PREGNANCY.

GESTIO (Lat.). **In Civil Law.** The doing or management of a thing. *Negotiorum gestio*, the doing voluntarily without authority business of another. L. 20, C. *de neg. gest. Gestio negotiorum*, one who so interferes with business of another without authority. *Gestio pro hœrede*, behavior as heir ; such conduct on the part of the heir as indicates acceptance of the inheritance and makes him liable for ancestor's debts universally : *e. g.* an entry upon, or assigning, or letting any of the heritable property, releasing any of the heritable property, releasing any of the debtors of the estate, or meddling with the title-deeds or heirship movables, etc. Erskine, Inst. 3. 8. 82 *et seq.* ; Stair, Inst. 3. 6. 1.

GEWRITE. In Saxon Law. Deeds or charters ; writings. 1 Reeve, Hist. Eng. Law, 10.

GIFT. A voluntary conveyance or transfer of property ; that is, one not founded on the consideration of money or blood.

A voluntary, immediate and absolute transfer of property without consideration. 139 Pa. 640.

As used by the old text writers it signified a distinct species of deed, applicable to the creation of an estate tail ; while a feoffment was strictly confined to the creation of a fee-simple estate. This use is almost obsolete ; Wharton. It has been said that the word denotes rather the motive of the conveyance ; so that a feoffment or grant may be called a gift when gratuitous. A gift is of the same nature as a settlement ; neither denotes a form of assurance, but the nature of the transaction. Watk. Conv. 199. The operative words of this conveyance are *do*, or *dedi—I give*, or *I have given.* The maker of this instrument is called the donor, and he to whom it is made, the donee, and the entail the gift or donation, the issue taking *per forman doni.* 2 Bla. Com. 316 ; Littleton 59 ; Shepp. Touchst. c. 11 ; 2 Poll. & Maitl. 12, 81, 211.

Gifts inter vivos are gifts made from one

or more persons, without any prospect of immediate death, to one or more others. *Gifts causa mortis* are gifts made in prospect of death.

Gifts *inter vivos* have no reference to the future, and go into immediate and absolute effect. Delivery is essential. Without actual possession, the title does not pass. A mere intention or naked promise to give, without some act to pass the property, is not a gift. There may be repentance (the *locus pœnitentiæ*) as long as the gift is incomplete and left imperfect in the mode of making it; 1 Pars. Contr. 245; 7 Johns. 26; but see 79 Ga. 11, where it was held that a *donatio inter vivos*, as distinguished from a *donatio mortis causa*, does not require actual delivery; and it is sufficient to complete a gift *inter vivos* that the conduct of the parties should show that the ownership of the chattels has been changed.

The subject of the gift must be certain; and there must be the mutual consent and concurrent will of both parties. There must be an intention on the part of the donor to make a gift; Thornt. Gifts & Adv. § 70, and expressions of it are admissible as part of the *res gestæ;* 1 Wils. Ch. 212; 2 Redf. 251, 261, 265; 117 N. Y. 343; and also declarations of the donor prior to the gift; 25 Barb. 33; if followed up by proof of delivery; 29 Ohio St. 13; and subsequent to the gift to support it; 87 Ga. 573; 140 Mass. 157; 169 Ind. 403; but not to disapprove it; 12 Allen 114. See Thornt. Gift §§ 222–232. Acceptance is also necessary; 58 N. H. 302; 28 Md. 327; 107 Mo. 459; and this is true under both the common and civil law; 39 Cal. 120. It must be in the life-time of the donor; 34 La. Ann. 709; but it is presumed if the gift is of value; 24 Tex. 468; 63 Mich. 181. Delivery must be according to the nature of the thing. It must be an actual delivery, so far as the subject is capable of delivery. If the thing be not capable of actual delivery, there must be some act equivalent to it; something sufficient to work an immediate change in the dominion of the property; 45 Mo. App. 160. The donor must part not only with the possession, but with the dominion. If the thing given be a *chose in action*, the law requires an assignment or some equivalent instrument, and the transfer must be executed; 1 Swanst. 436; 1 Dev. 309. Delivery first and gift afterwards of a chattel capable of delivery, is as effectual as gift first and delivery afterwards; 64 Law T. 645. The presumption of a resulting trust in favor of the donor arises where a conveyance has been made, without consideration, to one of an estate or other property which has been purchased with the money of another; but this presumption is rebutted where the purchase may fairly be deemed to be made for another from motives of natural love and affection; 85 Pa. 84; 32 Md. 78. Knowledge by the donee that the gift has been made is not necessary; L. R. 2 Ch. Div. 104. The gift is complete when the legal title has actually vested in the donee; 108 E. C. L. R. 435; and in cases of gifts by husband to wife, or parent to child living at home, the necessity for an actual change of possession does not exist; 61 Pa. 52. Where a father gives money deposited in bank to his infant son, the gift will not be defeated by the failure of the father to deliver to the son the pass book evidencing the gift, the father as natural guardian being the proper custodian of such book during the infancy of the son; 62 Hun 194. The instances here given are merely illustrative of the cases on the subject of the necessity of delivery, the number of which is almost without limit. For a full discussion of the subject, see Thornt. Gifts & Adv. ch. ix., where the cases are collected; 15 Am. L. Reg. N. S. 701, n.; 15 Va. L. J. 737; 32 Cent. L. J. 11; 25 Ir. L. T. 4, 409. As to what circumstances will dispense with actual physical delivery, see 9 *id.* 639; 26 Am. L. Reg. 587; Law Q. Rev. 446; see also DONATIO MORTIS CAUSA, with respect to delivery, the requisites of which in the two classes of gifts are the same; Thornt. Gifts § 130; 1 Nott & McC. 237; 2 Sandf. Ch. 400. "*Gifts inter vivos* and gifts *causa mortis* differ in nothing, except that the latter are made in expectation of death, become effectual only upon the death of the donor, and may be revoked. Otherwise, the same principles apply to each." 46 Me. 48; 3 Del. Ch. 51; 89 Mo. 546; 80 N. Y. 422; 78 Ky. 572; 54 Md. 175. A parol gift of land is valid when possession is taken and valuable improvements are made thereunder; 83 Tex. 563.

When the gift is perfect it is then irrevocable, unless it is prejudicial to creditors or the donor was under a legal incapacity or was circumvented by fraud; except in case of *donatio mortis causa* (*q. v.*), as to which one of the distinguishing characteristics is that it is revocable during the donor's life.

If a man, intending to give a jewel to another, say to him, *Here I give you my ring with the ruby in it*, etc., and with his own hand delivers it to the party, this will be a good gift notwithstanding the ring bear any other jewel, being delivered by the party himself to the person to whom given; Bacon, Max. 87. See 66 Hun 632.

Where a father bought a ticket in a lottery, which he declared he gave to his infant daughter E., and wrote her name upon it, and after the ticket had drawn a prize he declared that he had given the ticket to his child E., and that the prize money was hers, this was held sufficient for a jury to infer all the formality requisite to a valid gift, and that the title in the money was complete and vested in E. See 10 Johns. 293. Where notes are endorsed by the owner, placed in a pocketbook, and the packet marked with the name of the donees, a delivery to one of the donees is sufficient, though he at once returns the packet to the donor to keep for the present; 51 Mo. App. 237.

A certificate of deposit may be the sub-

ject of gift, and, when endorsed and delivered for such purpose, the gift is perfect and cannot be revoked by the donor before the money is collected; 97 Ala. 700. A written assignment, under seal, of money in the hands of a third person, delivered to the assignee, constitutes a valid gift and acceptance of the money; 141 N. Y. 179.

See two papers containing an extended examination and discussion of the authorities on the subject of gifts *causa mortis* of checks and orders published after the title on that subject had gone through the press; 36 Am. L. Reg. 247, 289.

A special act directing a board of supervisors of a city to pay a certain sum as compensation for the improvement of streets to an individual was held to be a gift of public money to an individual, and hence within the inhibition of the constitution and void; 99 Cal. 17.

See, generally, Thornton, Gifts and Advancements, and an elaborate classified list of authorities in the St. Louis Law Library Catalogue. DONATIO INTER VIVOS; DONATIO MORTIS CAUSA; DONATIO.

GIFT ENTERPRISE. A scheme for the division or distribution of certain articles of property, to be determined by chance, amongst those who have taken shares in the scheme; the phrase has attained such a notoriety as to justify courts in taking judicial notice of what is meant and understood; 81 Ind. 17; 106 Mass. 422. See LOTTERY; SALE.

GIFTOMAN. In Swedish Law. He who has a right to dispose of a woman in marriage.

The right is vested in the father, if living; if dead, in the mother. They may nominate a person in their place; but for want of such nomination the brothers-german, and for want of them the consanguine brothers, and in default of the latter the uterine brothers, have the right; but they are bound to consult the paternal or maternal grandfather. Swed. Code, *Marriage*, c. 1.

GILDA MERCATORIA (L. Lat.). A mercantile meeting.

If the king once grants to a set of men to have *gilda mercatoria*, mercantile meeting assembly, this is alone sufficient to incorporate and establish them forever. 1 Bla. Com. 473. A company of merchants incorporated. Stat. Will. Reg. Scot. c. 35; Leg. Burgorum Scot. c. 99; Du Cange; Spelman, Gloss.; 8 Co. 125 *a*; 2 Ld. Raym. 1134.

GILDO. In Saxon Law. Members of a *gild* or decennary. Oftener spelled *congildo*. Du Cange; Spelman, Gloss. *Geldum*.

GILL. A measure of capacity, equal to one-fourth of a pint. See MEASURE.

GIRANTEM. An Italian word which signifies the drawer. It is derived from *girare*, to draw, in the same manner as the English verb to murder is transformed into *murdrare* in our old indictments. Hall, Mar. Loans 183, n.

GIRTH. A girth, or yard, is a measure of length. The word is of Saxon origin, taken from the circumference of the human body. Girth is contracted from *girdeth*, and signifies as much as girdle. See ELL.

GIRTH AND SANCTUARY. In Scotch Law. A refuge or place of safety given to those who had slain a man in heat of passion (*chaude medley*) and unpremeditatedly. Abolished at the Reformation. 1 Hume 235; 1 Ross, Lect. 331.

GIST (sometimes, also, spelled *git*).

In Pleading. The essential ground or object of the action in point of law, without which there would be no cause of action. Gould, Pl. c. 4, § 12; 19 Vt. 102. The cause for which an action will lie; the ground or foundation of a suit, without which it would not be maintainable; the essential ground or object of a suit, without which there is not a cause of action. 101 Ill. 394. In stating the substance or gist of the action, everything must be averred which is necessary to be proved at the trial. The moving cause of the plaintiff's bringing the action, and the matter for which he recovers the principal satisfaction, is frequently entirely collateral to the gist of the action. Thus, where a father sues the defendant for a trespass for the seduction of his daughter, the gist of the action is the trespass and the loss of his daughter's services; but the collateral cause is the injury done to his feelings, for which the principal damages are given. See 1 Viner, Abr. 598; Tayl. Ev. 334; Bac., Abr. *Pleas*, B.; Doctr. Plac. 85; DAMAGES.

GIVE. A term used in deeds of conveyance. At common law, it implied a covenant for quiet enjoyment; 2 Hill. R. P. 366. So in Kentucky; 1 Pirtle, Dig. 211. In Maryland and Alabama it is doubtful; 7 G. & J. 311; 5 Ala. N. S. 555. In Ohio, in conveyance of freehold, it implies warranty for the grantor's life; 2 Hill. R. P. 366. In Maine it implies a covenant; 6 Me. 227; 23 *id.* 219. In New York it does not, by statute. See 14 Wend. 38. It does not imply a covenant in North Carolina; 1 Murph. 343; nor in England, by statute 8 & 9 Vict. c. 106, § 4. See COVENANT; GIFT.

The word give, in a statute providing that no person shall give away any intoxicating liquors, etc., does not apply to giving such liquor at private dwellings, etc., unless given to a habitual drunkard, or unless such dwelling, etc., becomes a place of public resort. 144 U. S. 323. See LIQUOR LAWS.

GIVER. He who makes a gift. By his gift, the giver always impliedly agrees with the donee that he will not revoke the gift.

GIVING IN PAYMENT. In Louisiana. A term which signifies that a debtor, instead of paying a debt he owes in money, satisfies his creditor by giving in payment a movable or immovable. See DATION EN PAIEMENT.

GIVING TIME. An agreement by which a creditor gives his debtor a delay or time in paying his debt beyond that contained in the original agreement. When other persons are responsible to him, either as drawer, indorser, or surety, if such time be given without the consent of the latter, it discharges them from responsibility to him; and the same effect follows if time is given to one of the joint makers of a note; 2 Dan. Neg. Inst. 299. See SURETYSHIP; GUARANTY.

GLADIUS (Lat.). In old Latin authors, and in the Norman laws, this word was used to signify supreme jurisdiction: *jus gladii.*

GLEANING. The act of gathering such grain in a field where it grew, as may have been left by the reapers after the sheaves were gathered.

There is a custom in England, it is said, by which the poor are allowed to enter and glean upon another's land after harvest, without being guilty of a trespass; 3 Bla. Com. 212. But it has been decided that the community are not entitled to claim this privilege as a right; 1 H. Bla. 51. In the United States, it is believed, no such right exists. It seems to have existed in some parts of France. Merlin, *Rèp. Glanage.* As to whether gleaning would or would not amount to larceny, see Wood. Landl. & T. 242; 2 Russ. Cr. 99. The Jewish law may be found in the 19th chapter of Leviticus, verses 9 and 10. See Ruth ii. 2, 3; Isaiah xxii. 6.

GLEBE. In Ecclesiastical Law. The land which belongs to a church. It is the dowry of the church. *Gleba est terra qua consistit dos ecclesiæ.* 9 Cra. 329.

In Civil Law. The soil of an inheritance. There were serfs of the glebe, called *glebæ addicti.* Code 11. 47. 7, 21; Nov. 54, c. 1.

GLOSS (Lat. *glossa*). Interpretation; comment; explanation; remark intended to illustrate a subject,—especially the text of an author. See Webster, Dict.

In Civil Law. *Glossæ*, or *glossemata*, were words which needed explanation. Calvinus, Lex. The explanations of such words. Calvinus, Lex. Especially used of the short comments or explanations of the text of the Roman Law, made during the twelfth century by the teachers at the schools of Bologna, etc., who were hence called *glossators*, of which glosses Accursius made a compilation which possesses great authority, called *glossa ordinaria.* These glosses were at first written between the lines of the text (*glossæ interlineares*), afterwards, on the margin, close by and partly under the text (*glossæ marginales*). Cush. Intr. to Rom. Law 130.

GLOSSATOR. A commentator or annotator of the Roman law. One of the authors of the Gloss.

GLOUCESTER, STATUTE OF. An English statute, passed 6 Edw. I., c. 1, A. D. 1278: so called because it was passed at Gloucester. It was the first statute giving to a successful plaintiff "the costs of his writ purchased." There were other statutes made at Gloucester which do not bear this name. See stat. 2 Rich II.; COSTS.

GO. To issue, as applied to the process of a court. 1 W. Bla. 50; 5 Mod. 421; 18 C. B. 35. Not frequent in modern use.

To be discharged from attendance at court. See GO WITHOUT DAY.

In a statute of descents, *to go to* is to vest in.

GO BAIL. To become surety in a bail bond.

GO TO PROTEST. Of negotiable paper, to be protested for non-payment or non-acceptance.

GO WITHOUT DAY. Words used to denote that a party is dismissed the court. He is said to go without day, because there is no day appointed for him to appear again, or because the suit is discontinued.

GOAT, GOTE (Law Lat. *gota*; Germ. *gote*). A canal or sluice for the passage of water. Charter of Roger, Duke de Basingham, *anno* 1220, *in Tabularis S. Bertini*; Du Cange.

A ditch, sluice, or gutter. Cowel, *Gote*; stat. 23 Hen. VIII. c. 5. An engine for draining waters out of the land into the sea, erected and built with doors and perculesses of timber, stone, or brick,—invented first in Lower Germany. Callis, Sewers 66.

GOD AND MY COUNTRY. When a prisoner is arraigned, he is asked, How will you be tried? he answers, *By God and my country.* This practice arose when the prisoner had the right to choose the mode of trial, namely, by ordeal or by jury, and then he elected by *God* or by *his country*, that is, by ordeal or by jury. It is probable that originally it was *By God* or *my country*; for the question asked supposes an option in the prisoner, and the answer is meant to assert his innocence by declining neither sort of trial. 1 Chitty, Cr. Law 416; Barring. Stat. 73, note. See ORDEAL; WAGER OF BATTLE.

GOD BOTE. In Ecclesiastical Law. An ecclesiastical or church fine imposed upon an offender for crimes and offences committed against God.

GOD'S PENNY. In Old English Law. Money given to bind a bargain; earnest-money. So called because such money was anciently given to God,—that is, to the church and the poor.

"All over western Europe the earnest becomes known as the God's penny or Holy Ghost's penny (*denarius Dei*). Sometimes we find that it is to be expended in the purchase of tapers for the patron saint of the town, or in works of mercy. Thus the contract is put under divine protection. In the law merchant as stated by Fleta we seem to see God's penny yet afraid, if we may so speak, to proclaim itself as what it really is, namely, a sufficient vestment for a contract of sale. A few years later Edward I. took the step that remained to be taken, and by his *Corta Mercatrio*, in words which seem to have come from the south of Europe, proclaimed

that among merchants the God's penny binds the contract of sale so that neither party may resile from it. At a later day this new rule passed from the law merchant into the common law." 2 Poll. & Maitl. 207. See DENARIUS DEI; EARNEST.

GOING WITNESS. One who is going out of the jurisdiction of the court, although only into a state or country under the same general sovereignty: as, for example, if he is going from one to another of the United States, or, in Great Britain, from England to Scotland. 2 Dick. Ch. 454. See DEPOSITION; WITNESS.

GOLD. Contracts expressly stipulating for payment in gold and silver dollars can only be satisfied by the payment of coined dollars; Bronson *v.* Rodes, 7 Wall. 229; where it was said: "A contract to pay a certain number of dollars in gold or silver coins is nothing else than an agreement to deliver a certain weight of standard gold to be ascertained by a count of coins, each of which is certified to contain a definite proportion of that weight." This case was followed in 7 *id.* 278; 96 U. S. 619; 162 U. S. 291. In the last case it was said: "This court has held that parties may contract for the payment of an obligation in gold, or any other money or commodity, and it must then be paid in the medium contracted for." It has been pointed out in 29 L. R. A. 593, note, that the rule in Bronson *v.* Rodes has not been affected in any way by the Legal Tender Cases in 12 Wall. 457. In Trebilcock *v.* Wilson, 12 Wall. 687, where a note in dollars was made payable *in specie*, it was held that the designated number of dollars must be paid in so many gold or silver dollars of the coinage of the United States, reversing the supreme court of Iowa, which had held that a tender of greenbacks or United States legal tender notes was sufficient.

In Gregory *v.* Morris, 96 U. S. 619, the party was entitled to recover a certain amount in gold coin; it was held that where the party, with the approbation of the court, takes judgment which might be discharged in currency, it should be entered for a sum in currency equivalent to the specified amount of that coin as bullion. A decision of a state court, which holds a tender of legal tender notes as valid in the payment of a contract payable only in specie, will be reviewed by the supreme court of the United States; 12 Wall. 687. The doctrine of the latter court is therefore binding upon all the state courts.

A contract to pay a certain number of dollars in gold; 4 Colo. 169; a draft for a certain number of gold dollars; 43 N. Y. 209; a note payable "in gold or silver;" 21 Ohio St. 466; a ground rent payable in "gold or silver lawful money of the United States;" 61 Pa. 263; are all enforceable according to their terms. A ground rent payable in "gold or silver money of the United States" must be paid in coin or its equivalent; 61 Pa. 263. In this case Agnew, J., said that the distinction taken in the earlier Pennsylvania cases between contracts for a specific article and contracts for lawful money (coin or currency) had become unimportant since the decision in Bronson *v.* Rodes. In such cases it is held that payment in currency is to be computed upon the value of gold at the time of payment; 4 Colo. 162. Where rent was payable "in current money of the State of New York equal in value to money of Great Britain," it was held that if payment was made in legal tender notes, the amount paid must equal the value of the stipulated amount of coin; 65 Barb. 392.

Where an act authorized a city to issue negotiable bonds, it was held to authorize the issue of bonds payble in gold coin; 87 Ala. 240; s. c. 4 L. R. A. 742; so of bonds "payable in gold coin of the present standard weight and fineness;" 60 Fed. Rep. 961. To the same effect, 3 Dill. 195; but, *contra*, of levee bonds which were issued payable "in gold coin," under an act which authorized the levee board to borrow money and issue its bonds therefor; 66 Miss. 298. But this judgment was reversed by the supreme court of the United States (162 U. S. 291), which held: That the inquiry as to the medium in which the bonds were payable raised a federal question and that the bonds were legally saleable in the money of the United States, whatever its description, and not in any particular kind of money, and that they were not void because of a want of power to issue them. Field, J., concurring, said that no transaction of commerce or business, etc., that is not immoral in its character, and which is not in its manifest purpose detrimental to society, can be declared invalid because made payable in gold coin or currency when that is established or recognized by the government.

An injunction will not lie to restrain the issue of municipal bonds payable "in gold or lawful money of the United States, at the option of the holder;" 96 Ga. 312. But where a statute authorized the issue of bonds payable "in gold coin or lawful money of the United States," an issue of bonds payable in gold coin of the United States of the present standard of weight and fineness was held invalid; 29 L. R. A. (Cal.) 512.

In the absence of stipulation in the contract, a right to demand payment in coin will not be implied, although it appear that payment in coin was the only method of payment recognized by law when the contract was entered into and that the parties no doubt expected that payment would be made in coin; 22 Wall. 105. So when the consideration in a note was a loan of gold and silver and there was no stipulation to pay in such money; 25 Cal. 502.

An insurance company in an action against an agent who had collected premiums in gold; 104 Mass. 192; and a hotel guest in an action against an innkeeper to recover for gold coin left at the inn for safe keeping; 46 N. Y. 291, are entitled to judgment in gold coin. In an action against an express company for failure to deliver gold coin which it received for transportation, judgment was entered in currency notes for the amount of the gold coin with the pre-

mium on gold added with interest from the date of demand; 98 Mass. 550. Where a person deposited both coin and treasury notes in a bank in 1861, it was held that the bank need not pay him in coin unless there was an express agreement to that effect; 5 Wall. 663.

GOLDSMITH'S NOTES. In English Law. Banker's notes: so called because the trades of banker and goldsmith were originally joined. Chitty, Bills 423.

GOOD AND LAWFUL MEN. Those qualified to serve on juries; that is, those of full age, citizens, not infamous or *non compos mentis;* and they must be resident in the county where the venue is laid. Bacon, Abr. *Juries* (A); Cro. Eliz. 654; Co. 3d Inst. 30; 2 Rolle 82; Cam. & N. 38.

GOOD AND VALID. Legally firm: *e. g.* a good title. Adequate; responsible: *e. g.* his security is good for the amount of the debt. Webst. A note satisfies a warranty of it as a "good" note if the makers are able to pay it, and liable to do so on proper legal diligence being used against them. 26 Vt. 406.

GOOD BEHAVIOR. Conduct authorized by law. Surety of good behavior may be demanded from any person who is justly suspected, upon sufficient grounds, of intending to commit a crime or misdemeanor. Surety for good behavior is somewhat similar to surety of the peace, but the recognizance is more easily forfeited, and it ought to be demanded with greater caution; 1 Binn. 98, n; 14 Viner, Abr. 21; Dane, Abr. As to what is a breach of good behavior, see 2 Mart. La. N. S. 683; Hawk. Pl. Cr. b. 1, c. 61, s. 6; 1 Chitty, Pr. 676.

See SURETY OF THE PEACE.

A judge holding office for life also holds it during good behavior, *dum se bene gesserit.*

GOOD CONSIDERATION. See CONSIDERATION.

GOOD FAITH. An honest intention to abstain from taking any unconscientious advantage of another, even though the forms or technicalities of law, together with an absence of all information or belief of facts which would render the transaction unconscientious. 2 S. Dak. 334. See 84 Ill. 588; 65 *id.* 200; 46 Ala. 73; 17 Hun 442.

That honesty of intention and freedom from knowledge, of circumstances which ought to put him on inquiry, which protects a purchaser, holder, or creditor from being implicated in an effort by one with whom he is dealing to defraud some party in interest. 111 U. S. 80. Good faith, in a statute regulating chattel mortgages, and declaring unrecorded mortgages to be invalid as against purchasers and mortgagees in good faith, means such as parted with something of value, or otherwise altered their position irretrievably, on the strength of the apparent ownership, and without notice. Good faith in this connection means actual reliance upon the ownership of the vendor or mortgagor, because without notice of the incumbrance. 21 N. J. Eq. 536.

Good faith is presumed in favor of the holder of negotiable paper; 93 U. S. 94; 94 *id.* 754; 3 N. Y. Sup. Ct. 360; it is a presumption of law; 116 U. S. 609; and outweighs a presumption of payment; 107 Ind. 442; and such holder takes the paper free from any infirmity in its origin except such as make it void for illegality of consideration or want of capacity in the maker; 141 Mass. 296; 96 U. S. 51. While the presumption of law is sufficient in the absence of evidence, if the good faith of a party is put in issue by his adversary, he has a right to give affirmative evidence of it; 97 U. S. 272; as, where his ownership of negotiable paper is put in issue he may prove he became the owner in good faith; 105 U. S. 728. A person to whom the want of good faith is imputed in a statement shown to have been made by him may be asked if he believed this statement to be correct; 27 N. Y. 282. After proof of circumstances relied on as showing want of good faith by putting a person on inquiry, he may explain them by showing the reasons why he did not pursue the inquiry; 54 N. Y. 288; and after stating the explanation received upon inquiry he may testify that he was satisfied with it; 73 N. Y. 236. Where the knowledge of the third person is in issue proof of general reputation is sometimes competent as tending to show reasonable ground of belief or suspicion; 69 Mass. 594; 6 N. Y. Sup. Ct. 446; 66 Barb. 205. Good faith is not disproved by a forgotten conversation; 29 Hun 214.

One who has purchased for value and without notice, or his transferee, is termed a holder in good faith; 94 U. S. 432.

Trustees and persons acting in a fiduciary capacity are held to the utmost good faith. See TRUST; TRUSTEE; FIDUCIARY.

So long as the parent, in correcting his child, acts in good faith and without malice the criminal law will not interfere with him, however severe and unmerited the punishment, unless it produces permanent injury; Bish. New Cr. L. § 881; 95 N. C. § 88. See FATHER.

GOOD MORAL CHARACTER. The naturalization laws require that in order to be admitted to citizenship the applicant must, during his residence in the United States since his declaration of intention, have "behaved as a man of good moral character"; U. S. Rev. Stat. § 2165.

What is a good moral character may vary in some respects in different times and places, but "it would seem that whatever is forbidden by the law of the land ought to be considered for the time being immoral within the purview of this statute;" 5 Sawy. 195. Accordingly a person who commits perjury is not a man of good moral character, and is therefore not entitled to naturalization; *id.* But a distinction is drawn between acts which are *mala in se* and those which are *mala prohibita;* and it is said that a single act of the former

grade is sufficient to establish immoral character, but only habitual acts of the latter character; *id.* It has been held that an alien who lives in a state of polygamy or believes that it may be rightfully practised in defiance of the laws to the contrary, is not a person of good moral character entitled to naturalization; Ex parte Douglass, cited in 2 Bright. Fed. Dig. 25, from 5 West. Jur. 171.

Under the English excise laws it was held that the mere fact that a man lived in a state of concubinage was not such an absence of good character as would justify his conviction under the excise law for making and using a certificate of good character knowing it to be false; 16 C. B. N. S. 584. "Good or bad character does not depend on what a man knows of himself; it means his general reputation in the estimation of his neighbors; . . . the fact of a man's living with a woman without marrying her may possibly admit of some palliating circumstances;" *id.*

The question what is a good moral character under the Pennsylvania license law of 1887 has recently been considered and passed upon by a divided court, the applicant for renewal having received his license upon stipulation not to apply again. It was held by Sulzberger, J., that the act "is not to be understood as setting up the highest ethical character. It means good moral character as it is used among men in the ordinary business of life, not that high type which ought to form the ideal of every virtuous person." McMichael, J., said: "I cannot consider a citizen of the United States one of good moral character who voluntarily files a stipulation that he will not apply again for the succeeding year before this court, and in violation of that agreement does make an application for a license. . . . But when a man has made a promise last year not to apply for a license this year, and has come into court with an application for a license in violation of that promise, my judgment and my judicial opinion is that he is not a man of good moral character as contemplated by the Act of Assembly." An appeal is now pending and undecided. Appeal of Donoghue. Superior Court, Pa. Oct. 3, 1897.

GOOD REPUTE. An expression synonymous with and meaning only "of good reputation." 18 S. W. Rep. (Mo.) 924.

GOOD TITLE. Such a title as a court of chancery would adopt as a sufficient ground for compelling specific performance, and such a title as would be a good answer to an action of ejectment by any claimant. 6 Exch. 873. See 23 Barb. 370.

GOOD WILL. The benefit which arises from the establishment of particular trades or occupations. The advantage or benefit which is acquired by an establishment, beyond the mere value of the capital, stocks, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers, on account of its local position, or common celebrity, or reputation for skill or affluence or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities, or prejudices. Story, Partn. § 99; 30 Cent. L. J. 155. See 1 Hoffm. 68; 16 Am. Jur. 87; 22 Beav. 84; 60 Pa. 161; 5 Russ. 29; 10 So. Rep. (La.) 616.

The advantages which may inure to the purchaser from holding himself out to the public as succeeding to an enterprise which has been identified in the past with the name and repute of his predecessor. 47 Fed Rep. 465.

"The term good will can hardly be said to have any precise signification. It is generally used to denote the benefit arising from connection and reputation; and its value is what can be got for the chance of being able to keep that connection and improve it. Upon the sale of an established business its good will has a marketable value, whether the business is that of a professional man or of any other person. But it is plain that good will has no meaning except in connection with a continuing business; it may have no value except in connection with a particular house, and it may be so inseparably connected with it as to pass with it, under a will, or deed, without being specially mentioned." Lindl. Partn., Wentworth's ed. 440.

"The good will . . . is nothing more than the probability that the old customers will resort to the old place." Per Eldon, C., in 17 Ves. 335; but this is said to be too narrow a definition by Wood, V. C., who said that the term meant every advantage . . . that has been acquired by the old firm in carrying on its business, whether connected with the premises in which the business was previously carried on, or with the name of the late firm, or with any other matter carrying with it the benefit of the late business. Johns. (Eng. Ch.) 174.

The point of the opinion of Lord Eldon, so much referred to, was that there is no implied covenant or promise on the part of the vendor or assignor of the good will of a business, not to set up the same trade, in opposition to the purchaser, in the neighborhood; accordingly an injunction to prevent him from doing so was refused; 17 Ves. 335; Colly. Partn. 174. Since this case the English decisions, after passing through a period of vacillation, seemed recently to have established the implied contract of one who simply sells the business and good will upon a much more substantial basis. It was held by Lord Romilly in Labouchere *v.* Dawson that an outgoing partner may not solicit the old customers privately by letter or by a travelling agent if he has sold the good will to his former partners. This went upon the principle that a grantor may not derogate from his grant. This was considered to have gone beyond any previous case and was overruled in Pearson *v.* Pearson, 27 Ch. D. 145, where Cotton, L. J., said: "It is admitted that a person who has sold the

good will of his business may set up a similar business next door and say that he is the person that carried on the old business, yet such proceedings manifestly tend to prevent the old customers going to the old place." See 74 L. T. 343. Between the rendering of these judgments Jessel, M. R., had enjoined the solicitation of old customers but not the dealing with them; 14 Ch. D. 603; in that case good will is defined as "the formation of that connection which has made the value of the thing that the late firm sold," and is frequently the only thing saleable. This definition was quoted with approval by Lord Herschell in Trego *v.* Hunt, *infra*. Another decision of Jessel, M. R., restraining a former partner from dealing with old customers was reversed by the court of appeal, but the order in this case, restraining the solicitation, was not appealed from; the court said that "to enjoin a man against dealing with people whom he has not solicited is not only to enjoin him, but to enjoin them, for it prevents them from having the liberty which anybody in the country might have of dealing with whom they like;" 15 Ch. D. 306. But the court of appeal, affirming the same judge, held that on the compulsory sale of a good will in bankruptcy proceedings, the bankrupt would not be restrained from solicitation. All the decisions based upon Labouchere *v.* Dawson were overturned by the case in 27 Ch. D. 145, which was followed by 44 Ch. D. 616. But in the recent case of Trego *v.* Hunt, [1896] App. Cas. 7, reversing [1895] 1 Ch. 462, the later decisions were overruled and the doctrine of Labouchere *v.* Dawson, was approved. There the good will remained with the old concern and the outgoing partner who had sold it to his former partner employed a clerk in the firm to keep the names and addresses of the firm's customers so that he might solicit their business on his own account. This the house of lords restrained him from doing. Lord MacNaghten designated the good will as "the very sap and life of the business, without which the business would yield little or no fruit," the result "of the reputation and connection of the firm which may have been built up by years of honest work or gained by lavish expenditure of money."

The vendor or retiring partner "may not sell the custom and steal away the customers. It is not an honest thing to pocket the price and then to recapture the subject of sale, to decoy it away or call it back before the purchaser has had time to attach it to himself and make it his very own." But "he may do everything that a stranger in the ordinary course of business would be in a position to do. He may set up where he will. He may push his wares as much as he pleases." In the same case it was said by Lord Davy, "that the idea of good will and what is comprised in the sale of business has silently been developed and grown since the days of Lord Eldon."

In this country the expressions of the courts as to what is the precise effect of a sale of good will, without restrictive covenants, vary as much as might be expected from the indefinable nature of the subject. The opinion of Lord Eldon has been, in the main, very closely followed, though often criticised in both countries. Such a sale has been said to carry with it only the probability that the business will continue in the future as in the past; 33 Cal. 620; or the favor which the management has won from the public and the possibility that the customers will continue their patronage; 50 Mich. 401; and commend it to others; 54 *id.* 215. A recent writer concludes, that it amounts to nothing more than the right to succeed to the business and carry it on as a successor to the old concern; 33 Am. L. Reg. N. S. 217; and a recent federal decision terms it, "those advantages which may inure to the purchaser from holding himself out to the public as succeeding to an enterprise which has been identified in the past with the name and the repute of his predecessors;" 47 Fed. Rep. 467, affirmed 55 *id.* 895. The principle of Labouchere *v.* Dawson that the vendor would not be permitted to solicit trade from the customers of the old business was maintained in this country in cases prior to the English decisions; 1 Pars. Eq. Cas. (Pa.) 476; 14 Allen 211; 36 Ohio St. 261; nor has he the right to hold himself out as the successor of the old firm or as continuing its business; 60 Pa. 458; 113 Mass. 175; 47 Fed. Rep. 465; affirmed, 55 *id.* 895; 44 N. H. 335; 3 L. T. N. S. 447; 11 *id.* 299; but he may set up a similar business; 35 La. Ann. 60; 32 N. W. Rep. (Wis.) 551; 143 Mass. 592; 3 Brewst. Pa. 133; 5 Allen 345; 2 Tenn. Ch. 347; 128 N. Y. 650 (but in this case there was no conveyance of the good will in terms). See 129 *id.* 156. The vendor may bind himself not to engage in the same business within a limited time or distance, by express covenant, which, if reasonable, is valid. See RESTRAINT OF TRADE.

The question has been much discussed whether good will is an incident of the business, of the premises, or of the person. It has been held to be personal and not local; 21 La. Ann. 391; 25 L. J. N. S. 194; but it is said to be the general rule that the good will is an incident of the premises; 60 Pa. 161; 84 N. Y. 556; 35 La. Ann. 60; where a widow carried on the business of a licensed victualler on leased premises and assigned all her goods, stock in trade, etc., without mentioning the good will, in trust prior to her second marriage, the good will passed by the assignment as an incident to the stock and license, and not to the husband with the premises; 6 Beav. 269. It is said by the United States supreme court, that good will is only an incident, as connected with a going concern, of business having locality or name, and is not susceptible of being disposed of independently; 149 U. S. 436. See 36 Fed. Rep. 722.

As between partners, it has been held that the good will of a partnership trade

survives; 5 Ves. 539; but this appears to be doubtful; 15 Ves. 227; and is not in accord with modern authorities; 27 Beav. 446; *id.* 236; 28 *id.* 453. A distinction in this respect has been suggested between commercial and professional partnerships; 3 Madd. 79; 2 De G. & J. 626; but see 14 Am. L. Reg. N. S. 10, where the distinction is said to be untenable. It has been held that the firm name constitutes a part of the good will of a partnership; Johns. (Eng. Ch.) 174; 6 Hare 325; *contra*, 19 How Pr. 14. Where a partner sells out his share in a going concern, he is presumed to include the good will; Johns. (Eng. Ch.) 174; see 46 Ill. App. 188; 128 U. S. 514; and he cannot use the firm name in a business of like character carried on by him in the vicinity; 33 N. E. Rep. (Ohio) 88; or a name so similar to that of the first as to mislead and draw off business; 54 Mich. 215. When a partnership is dissolved by death, bankruptcy, or otherwise, the good will is an asset of the firm, and should be sold and the proceeds distributed among the partners; 15 Ves. 218; 1 Pars. Eq. Cas. (Pa.) 270; Lindl. Partn. Wentworth's ed. 443. On the death of a partner the good will does not go to the survivor, unless by express agreement; 22 Beav. 84; 26 L. J. N. S. 391. It has been held, however, that on the dissolution of a partnership by the death of one of its members, the surviving partners may carry on the same line of business, at the same place, without liability to account to the legal representative of the deceased partner for the good will of the firm, in the absence of their own agreement to the contrary; 37 Neb. 153. The dissolution of the firm during the life time of all the partners gives each of them the right to use the firm name; 34 Beav. 566; *contra*, 4 Sandf. Ch. 379. See 19 Alb. L. J. 502; 13 Cent. L. J. 161. The good will of a trade or business is a valuable right of property; 38 Cal. 450; 10 Exch. 147; it is an asset of the business; 17 Neb. 137; or of a decedent; 21 La. Ann. 391; but it does not include the use of the name of a deceased person; 8 N. Y. Supp. 652. It may be bequeathed by will; 27 Beav. 446. It may be sold like other personal property; see 3 Mer. 452; 1 J. & W. 589; 1 V. & B. 505; 17 Ves. 346; 2 Madd. 220; 2 B. & Ad. 341; 4 *id.* 592, 596; 5 Russ. 29; 2 Watts 111; 1 S. & S. 74; 75 Ia. 173; 62 Pa. 81. The right to use a name on a medicine may be assigned to an outgoing partner or to a successor in business, as an incident to its good will; 139 U. S. 540. In the United States the subject of good will has in the original technical sense less relative prominence than in England, but the subject has developed very great importance in connection with the use of trademarks and trade names, which titles see.

A good will may be mortgaged, assigned, or taken in execution, in connection with the business; *id.*; 39 L. J. Ch. N. S. 79; but not if dependent on the ability and skill of the proprietor; 25 Ch. D. 472. The vendor of a business and good will who stipulates against carrying on the business in the same place, may be enjoined from doing so as the agent of another; 88 Me. 357. The purchaser who finds there is no good will is without remedy unless he can show fraudulent representation or suppression of fact by the vendor; 7 Misc. Rep. 484.

The purchaser of a good will and firm name is entitled to receive letters and telegrams addressed to it and to the advantage of business propositions from customers of the old firm contained in them; 27 S. W. Rep. (Ky.) 985.

The measure of damages for the breach of a contract of sale of good will is the loss suffered by the vendee, not the profits made by the vendor; 110 Cal. 150.

See, generally, 14 Am. L. Reg. N. S. 1, 329, 649, 713; 33 *id.* 216; 30 Cent. L. J. 155; 34 Sol. J. 294; Lindl. Partn. Wentworth's ed. 440–9; Allan, Law of Goodwill.

GOODS. In Contracts. The term goods is not so wide as chattels, for it applies to inanimate objects, and does not include animals or chattels real, as a lease for years of house or land, which chattels does include. Co. Litt. 118; 1 Russ. 376.

Goods will not include fixtures; 2 Mass. 495; 4 J. B. Moore 73; a subscription for stock; 77 Md. 92; or teams and wagons, notes and accounts due; 55 Ia. 520. In a more limited sense, goods is used for articles of merchandise; 2 Bla. Com. 389. It has been held in Massachusetts that promissory notes were within the term goods in the Statute of Frauds; 3 Metc. Mass. 365; but see 24 N. H. 484; 4 Dudl. 28; so stock or shares of an incorporated company; 20 Pick. 9; 3 H. & J. 38; 15 Conn. 400; so, in some cases, bank notes and coin; 2 Stor. 52; 5 Mas. 537; 12 Wend. 486. The word "goods" is always used to designate wares, commodities, and personal chattels; the word effects is the equivalent of the word movables; 83 Pa. 126.

In Wills. In wills goods is *nomen generalissimum*, and, if there is nothing to limit it, will comprehend all the personal estate of the testator, as stocks, bonds, notes, money, plate, furniture, etc.; 1 Atk. 180; 1 P. Wms. 267; 1 Bro. C. C. 128; 4 Russ. 370; Wms. Ex. 1014; 1 Rop. Leg. 250; but in general it will be limited by the context of the will; see 2 Belt, Suppl. Ves. 287; 1 Ves. 63; 2 Dall. 142; Sugd. Vend. 493. See 1 Jarm. Wills 751; and the titles BIENS, CHATTELS; FURNITURE.

GOODS AND CHATTELS. In Contracts. A term which includes not only personal property in possession, but choses in action and chattels real, as a lease for years of house or land, or emblements. 12 Co. 1; 1 Atk. 182; Co. Litt. 118; 1 Russ. 376; see 31 Gratt. 131; it includes railroad ties; 39 Minn. 145.

A merchant's stock in trade is "goods and chattels permanently located," provided such goods and chattels are taxable in the city or county where they are so located; 28 Atl. Rep. (Md.) 284.

In Criminal Law. Choses in action, as bank notes, mortgage deeds, and money, do not fall within the technical definition of "goods and chattels." And if described in an indictment as goods and chattels, these words may be rejected as surplusage; 4 Gray 416; 3 Cox, Cr. Cas. 460; 1 Den. Cr. Cas. 450; 1 Dearsl. & B. 426; 2 Zabr. 207; 1 Leach 241, 4th ed. 468. See 5 Mas. 537.

In Wills. If unrestrained, these words will pass all personal property; Wms. Ex. 1014 Am. notes. See 1 Jarm. Wills 751; Add. Contr. 31, 201, 912; Beach, Wills 470.

GOODS SOLD AND DELIVERED. A phrase used to designate the action of assumpsit brought when the sale and delivery of goods furnish the cause.

A sale, delivery, and the value of the goods must be proved. See ASSUMPSIT.

GOODS, WARES, AND MERCHANDISE. A phrase used in the Statute of Frauds. Fixtures do not come within it; 1 Cr. M. & R. 275. Growing crops of potatoes, corn, turnips, and other annual crops, are within it; 8 D. & R. 314; 10 B. & C. 446; 4 M. & W. 347; *contra*, 2 Taunt. 38. See Addison, Contr. 31; Blackb. § 4, 5; 2 Dana 206; 2 Rawle 161; 5 B. & C. 829; 10 Ad. & E. 753. As to when growing crops are part of the realty and when personal property, see 1 Washb. R. P. 3. A contract for the sale of apples, peaches, and blackberries which might be raised during certain years, are chattels personal and not within the statute; 37 Mo. App. 56. Promissory notes and shares in an incorporated company, and, in some cases, money and bank-notes, have been held within it; see 2 Pars. Contr. 330; and so have a bond and mortgage; 55 N. J. Law 168; 29 Mo. App. 206; the term "merchandise" as used in the revised statutes of the United States includes goods, wares, and chattels of every description capable of being imported; R. S. § 2766. See 109 Mo. 78; GOODS AND CHATTELS.

GORGE. A defile between hills or mountains, that is a narrow throat or outlet from a region of country. 25 Kan. 214.

GOUT. In Medical Jurisprudence. A nutritional disorder associated with an excessive formation of uric acid, and characterized by attacks of acute inflammation of the joints, by the gradual deposit of urate of sodium in and about the joints, and by the occurrence of irregular constitutional symptoms. Osler, Practice of Med.

In case of insurance on lives, when there is warranty of health, it seems that a man subject to the gout is capable of being insured, if he has no sickness at the time to make it an unequal contract; 2 Park, Ins. 650.

GOVERNMENT (Lat. *gubernaculum*, a rudder. The Romans compared the state to a vessel, and applied the term *gubernator*, helmsman, to the leader or actual ruler of a state. From the Latin, this word has passed into most of the modern European languages). That institution or aggregate of institutions by which a state makes and carries out those rules of action which are necessary to enable men to live in a social state, or which are imposed upon the people forming a state.

We understand, in modern political science, by *state*, in its widest sense, an independent society, acknowledging no superior, and by the term *government*, that institution or aggregate of institutions by which that society makes and carries out those rules of action which are necessary to enable men to live in a social state, or which are imposed upon the people forming that society by those who possess the power or authority of prescribing them. Government is the aggregate of authorities which rule a society. By *administration*, again, we understand in modern times, and especially in more or less free countries, the aggregate of those persons in whose hands the reins of government are for the time-being (the chief ministers or heads of departments). But the terms state, government, and administration are not always used in their strictness. The government of a state being its most prominent feature, which is most readily perceived, government has frequently been used for state; and the publicists of the last century almost always used the term government, or form of government, when they discussed the different political societies or states. On the other hand, government is often used, to this day, for administration, in the sense in which it has been explained. We shall give in this article a classification of all governments and political societies which have existed and exist to this day.

Governments, or the authorities of societies, are, like societies themselves, grown institutions. See INSTITUTION.

They are never actually created by agreement or compact. Even where portions of government are formed by agreement, as, for instance, when a certain family is called to rule over a country, the contracting parties must previously be conscious of having authority to do so. As society originates with the family, so does authority or government. Nowhere do men exist without authority among them, even though it were but in its mere incipiency. Men are forced into this state of things by the fundamental law that with them, and with them alone of all mammals, the period of dependence of the young upon its parents outlasts by many years the period of lactation; so that, during this period of post-lactational dependence, time and opportunity are given for the development of affection and the habit of obedience on the one hand, and of affection and authority on the other, as well as of mutual dependence. The family is a society, and expands into clusters of families, into tribes and larger societies, collecting into communities, always carrying the habit and necessity of authority and mutual support along with them. As men advance, the great and pervading law of mutual dependence shows itself more and more clearly, and acts more and more intensely. Man is eminently a social being, not only as to an instinctive love of aggregation, not only as to material necessity and security, but also as to mental and affectional development, and not only as to a given number of existing beings, or what we will call as to *extent*, but also as to *descent* of generation after generation, or, as we may call it, transmission. Society, and its government along with it, are continuous. Government exists and continues among men, and laws have authority for generations which neither made them nor had any direct representation in making them, because the necessity of government—necessary according to the nature of social man and to his wants—is a continuous necessity. But the family is not only the institution from which once, at a distant period, society, authority, government arose. The family increases in importance, distinctness, and intensity of action as man advances, and continues to develop authority, obedience, affection, and social adhesiveness, and thus acts with reference to the state as the feeder acts with reference to the canal; the state originates daily anew in the family.

Although man is an eminently social being, he is also individual, morally, intellectually, and physically; and though his individuality may endure even beyond this life, he is compelled, by his physical con-

dition, to appropriate and to produce, and thus to imprint his individuality upon the material world around, to create property. But man is not only an appropriating and producing, he is also an exchanging being. He always exchanges and always intercommunicates. This constant intertwining of man's individualism and socialism creates mutual claims of protection, rights, the necessity of rules, of laws: in one word, as individuals and as natural members of society, men produce and require government. No society, no cluster of men, no individuals banded together even for a temporary purpose, can exist without some sort of government instantly springing up. Government is natural to men and characteristic. No animals have a government; no authority exists among them; instinct and physical submission alone exist among them. Man alone has laws which ought to be obeyed but may be disobeyed. Expansion, accumulation, development, progress, relapses, disintegration, violence, error, superstition, the necessity of intercommunication, wealth and poverty, peculiar disposition, temperament, configuration of the country, traditional types, pride and avarice, knowledge and ignorance, sagacity of individuals, taste, activity and sluggishness, noble or criminal bias, position, both geographical and chronological,—all that affects numbers of men affects their governments, and an endless variety of governments and political societies has been the consequence; but, whatever form of government may present itself to us, the fundamental idea, however rudely conceived, is always the protection of society and its members, security of property and person, the administration of justice therefor, and the united efforts of society to furnish the means to authority to carry out its objects,—contribution, which, viewed as imposed by authority, is taxation. Those bands of robbers which occasionally have risen in disintegrating societies, as in India, and who merely robbed and devastated, avowing that they did not mean to administer justice or protect the people, form no exception, although the extent of their soldiery and the periodicity of their raids caused them to be called governments. What little of government continued to exist was still the remnant of the communal government of the oppressed hamlets; while the robbers themselves could not exist without a government among themselves.

Aristotle classified governments according to the seat of supreme power, and he has been generally followed down to very recent times. Accordingly, we had Monarchy, that government in which the supreme power is vested in one man, to which was added, at a later period, the idea of hereditariness. Aristocracy, the government in which the supreme power is vested in the *aristoi*, which does not mean, in this case, the *best*, but the excelling ones, the prominent, *i. e.* by property and influence. Privilege is its characteristic. Its corresponding degenerate government is the Oligarchy (from *oligos*, little, few), that government in which supreme power is exercised by a few privileged ones, who generally have arrogated the power. Democracy, that government in which supreme power is vested in the people at large. Equality is one of its characteristics. Its degenerate correspondent is the ochlocracy (from *ochlos*, the rabble), for which at present the barbarous term mobocracy is frequently used.

But this classification was insufficient even at the time of Aristotle, when, for instance, theocracies existed; nor is the seat o supreme power the only characteristic, nor, in all respects, by any means the chief characteristic. A royal government, for instance, may be less absolute than a republican government. In order to group together the governments and political societies which have existed and are still existing, with philosophical discrimination, we must pay attention to the chief-power-holder (whether he be one or whether there are many), to the pervading spirit of the administration or wielding of the power, to the characteristics of the society or the influencing interests of the same, to the limitation or entirety of public power, to the peculiar relations of the citizen to the state. Indeed, every principle, relation, or condition characteristically influencing or shaping society or government in particular may furnish us with a proper division. We propose, then, the following

Grouping of Political Societies and Governments.

I. According to the supreme power-holder or the placing of supreme power, whether really or nominally so.

The power-holder may be one, a few, many, or all; and we have, accordingly:

A. *Principalities*, that is, states the rulers of which are set apart from the ruled, or inherently differ from the ruled, as in the case of the theocracy.
  1. *Monarchy.*
    a. Patriarchy.
    b. Chieftain government (as our Indians).
    c. Sacerdotal monarchy (as the States of the Church; former sovereign bishoprics).
    d. Kingdom, or Principality proper.
    e. Theocracy (Jehovah was the chief magistrate of the Israelitic state).
  2. *Dyarchy.* It exists in Siam, and existed occasionally in the Roman empire; not in Sparta, because Sparta was a republic, although her two hereditary generals were called kings.

B. *Republic.*
  1. Aristocracy.
    a. Aristocracy proper.
      aa. Aristocracies which are democracies within the body of aristocrats (as former Polish government).
      bb. Organic internal government (as Venice formerly).
    b. Oligarchy.
    c. Sacerdotal republic, or Hierarchy.
    d. Plutocracy; if, indeed, we adopt this term from antiquity for a government in which it is the principle that the possessors of great wealth constitute the body of aristocrats.
  2. Democracy.
    a. Democracy proper.
    b. Ochlocracy (Mob-rule), mob meaning unorganized multitude.

II. According to the unity of public power, or its division and limitation.

A. Unrestricted power, or absolutism.
  1. According to the form of government.
    a. Absolute monarchy, or despotism.
    b. Absolute aristocracy (Venice); absolute sacerdotal aristocracy, etc. etc. etc.
    c. Absolute democracy (the government of the Agora, or market democracy).
  2. According to the organization of the administration.
    a. Centralized absolutism. Centralism, called bureaucracy when carried on by writing: at least, bureaucracy has very rarely existed, if ever, without centralism.
    b. Provincial (satraps, pashas, proconsuls).

B. According to divisions of public power.
  1. Governments in which the three great functions of public power are separate, viz., the legislative, executive, judiciary. If a distinct term contradistinguished to centralism be wanted, we might call these cooperative governments.
  2. Governments in which these branches are not strictly separate, as, for instance, in our government, but which are nevertheless not centralized governments; as Republican Rome, Athens, and several modern kingdoms.

C. Institutional government.
  1. Institutional government comprehending the whole, or constitutional government.
    a. Deputative government.
    b. Representative government.
      aa. Bicameral.
      bb. Unicameral.
  2. Local self-government. See V. We do not believe that any substantial self-government can exist without an institutional character and subordinate self-governments. It can exist only under an institutional government (see Lieber's Civil Liberty and Self-Government, under "Institution").

D. Whether the state is the substantive or the means, or whether the principle of socialism or individualism preponderates.
  1. Socialism, that state of society in which the socialist principle prevails, or in which government considers itself the substantive: the ancient states absorbing the individual or making citizenship the highest phase of humanity; absolutism of Louis

XIV. Indeed, all modern absolutism is socialistic.

2. Individualism, that system in which the state remains acknowledged a means, and the individual the substantive; where primary claims, that is, rights, are felt to exist, for the obtaining and protection of which the government is established,—the government, or even society, which must not attempt to absorb the individual. The individual is immortal, and will be of another world; the state is neither.

III. According to the descent or transfer of supreme power.

A. Hereditary governments.
Monarchies.
Aristocracies.
Hierarchies, etc.

B. Elective.
Monarchies.
Aristocracies.
Hierarchies.

C. Hereditary—elective—governments, the rulers of which are chosen from a certain family or tribe.

D. Governments in which the chief magistrate or monarch has the right to appoint the successor; as occasionally the Roman emperors, the Chinese, the Russian, in theory, Bonaparte when consul for life.

IV. According to the origin of supreme power, real or theoretical.

A. According to the primordial character of power.

1. Based on *jus divinum*.

a. Monarchies.

b. Communism, which rests its claims on a *jus divinum* or extra-political claim of society.

c. Democracies, when proclaiming that the people, because the people, can do what they list, even against the law; as the Athenians once declared it, and Napoleon III. when he desired to be elected president a second time against the constitution.

2. Based on the sovereignty of the people.

a. Establishing an institutional government, as with us.

b. Establishing absolutism (the Bonaparte sovereignty).

B. Delegated power.

1. Chartered governments.

a. Chartered city governments.

b. Chartered companies, as the reform great East India Company.

c. Proprietary governments.

2. Vice-Royalties; as Egypt, and, formerly, Algiers.

3. Colonial government with constitution and high amount of self-government,—a government of great importance in modern history.

V. Constitutions. (To avoid too many sub-divisions, this subject has been treated here separately. See II.)

Constitutions, the fundamental laws on which governments rest, and which determine the relation in which the citizen stands to the government, as well as each portion of the government to the whole, and which therefore give feature to the political society, may be:

A. As to their origin.

1. Accumulative: as the constitutions of England or Republican Rome.

2. Enacted constitutions (generally, but not philosophically, called written constitutions).

a. Octroyed constitutions (as the French, by Louis XVIII.).

b. Enacted by the people, as our constitutions. ["We the people charter governments; formerly governments chartered the liberties of the people."]

3. Pacts between two parties, contracts, as Magna Charta, and most charters in the Middle Ages. The medieval rule was that as much freedom was enjoyed as it was possible to conquer,—*expugnare* in the true sense.

B. As to extent or uniformity.

1. Broadcast over the land. We may call them national constitutions, popular constitutions, constitutions for the whole state.

2. Special charters. Chartered, accumulated and varying franchises, medieval character.

(See article Constitution in the Encyclopædia Americana.)

VI. As to the extent and comprehension of the chief government.

A. Military governments.

1. Commercial government; one of the first in Asia, and that into which Asiatic society relapses, as the only remaining element, when barbarous conquerors destroy all bonds which can be torn by them.

2. Tribal government.

a. Stationary.

b. Nomadic. We mention the nomadic government under the tribal government, because no other government has been nomadic, except the patriarchal government, which indeed is the incipiency of the tribal government.

3. City government (that is, city-states; as all free states of antiquity, and as the Hanseatic governments in modern times).

4. Government of the Medieval Orders extending over portions of societies far apart; as the Templars, Teutonic Knights, Knights of St. John, Political societies without necessary territory, although they had always landed property.

5. National states; that is, populous political societies spreading over an extensive and cohesive territory beyond the limits of a city.

B. Confederacies.

1. As to admission of members, or extension.

a. Closed, as the Amphictyonic council, Germany.

b. Open, as ours.

2. As to the federal character, or the character of the members, as states.

a. Leagues.

aa. Tribal confederacies; frequently observed in Asia; generally of a loose character.

bb. City leagues; as the Hanseatic League, the Lombard League.

cc. Congress of deputies, voting by states and according to instruction; as the Netherlands republic and our Articles of Confederation, Germanic Confederation.

dd. Present "state system of Europe" (with constant congresses, if we may call this "system," a federative government in its incipiency.)

b. Confederacies proper, with national congress.

aa. With *ecclesiæ* or democratic congress (Achæan League).

bb. With representative national congress, as ours.

C. Mere agglomerations of one ruler.

1. As the early Asiatic monarchies, or Turkey.

2. Several crowns on one head; as Austria, Sweden, Denmark.

VII. As to the construction of society, the title of property and allegiance.

A. As to the classes of society.

1. Castes, hereditarily dividing the whole population, according to occupations and privileges. India, ancient Egypt.

2. Special castes.

a. Government with privileged classes or caste; nobility.

b. Government with degraded or oppressed caste; slavery.

c. Governments founded on equality of citizens (the uniform tendency of modern civilization).

B. As to property and production.

1. Communism.

2. Individualism.

C. As to allegiance.

1. Plain, direct; as in unitary governments.

2. Varied; as in national confederacies.

3. Graduated or *encapsulated;* as in the feudal system, or as in the case with the serf.

D. Governments are occasionally called according to the prevailing interest or classes; as

Military states; for instance, Prussia under Frederick II.
Maritime state.
Commercial.
Agricultural.
Manufacturing.
Ecclesiastical, etc.

VIII. According to simplicity or complexity, as in all other spheres, we have—
A. Simple governments (formerly called *pure*; as pure democracy).
B. Complex governments, formerly called mixed. All organism is complex.

See STATE; FEDERAL GOVERNMENT; EXECUTIVE POWER; JUDICIAL POWER; LEGISLATIVE POWER; UNITED STATES OF AMERICA, and the titles concerning the several states and countries.

GRACE, DAYS OF. See DAYS OF GRACE.

GRADE. Used in reference to streets: (1) The line of the street's inclination from the horizontal; (2) a part of a street inclined from the horizontal. Cent. Dict. That is, it sometimes signifies the line established to guide future construction, and at other times, the street wrought to the line; 56 Ark. 28.

Grades of crime, in legal parlance, are always spoken of and understood as higher or lower in grade, or degree, according to the measure of punishment attached and meted out on conviction, and the consequences resulting to the party convicted; 61 Barb. 619.

GRADE CROSSING. A place where one highway crosses another: in particular, a place where a railroad is crossed at grade by a public or private road, or by another railroad. The term is most frequently used with reference to the crossing of a public highway by a railroad.

At such a crossing it is the duty of the railroad company to construct and maintain safe and proper crossings; and it is liable for all injuries resulting from a failure to perform this duty; 91 Ind. 119; 42 Ia. 234; 80 Ky. 147; 36 Ohio St. 436; 56 Pa. 280; but the most numerous class of cases relating to grade crossings, arises from accidents to persons who are using the crossing, caused by the operation of trains thereon.

The rule that the roadbed and track of a railroad company are its private property, and that one who gets thereon does so at his own peril, does not apply to a highway crossing; 20 So. Rep. (Fla.) 558. At such a place the company hold its roadbed, subject to the right of the public to cross it; and that circumstance creates mutual rights and obligations. Both parties must use ordinary care in the exercise of their own rights. Theoretically, the rights of the company and a person who intends to cross are equal; practically, the more onerous duty of avoiding danger rests upon the latter, on account of the difficulty in stopping a train in rapid motion. But this fact, on the other hand, imposes upon the railroad company the duty of using every practicable agency consistent with the operation of its trains, to give due warning of their approach; 94 U. S. 165; 72 Ill. 235; 70 Ga. 261; 82 Ind. 435; 79 Ky. 442; 65 Md. 502; 58 N. Y. 451; 65 Pa. 269. Thus, the whistle must be sounded on approaching a crossing; 94 U. S. 161; 109 N. C. 472; 30 Pa. 454; and the better view is that watchmen should be stationed at every much-used crossing; 94 U. S. 161. But this rule is not uniformly held; and some courts have decided that the railroad company, unless required by statute, is under no obligation to give warning; 22 Minn. 165; 114 Mass. 350. This duty is now, however, generally prescribed by statute; and a failure to discharge it is in such a case always evidence of negligence, though not conclusive; 72 N. Y. 26; 34 S. C. 444; 90 Tenn. 144; 24 Ga. 75; 129 Mass. 310; 61 Ia. 452; 65 Ga. 120; 123 N. Y. 496; 125 N. Y. 715; 109 N. C. 472; 64 N. H. 323. As to the duty of the railway in the operation of its line at grade crossings, see Patterson, Ry. Acc. L. §§ 155, 172.

The railroad company is not alone bound to the exercise of care in approaching a crossing. A traveller who intends to cross is also bound to use ordinary prudence, by which is to be understood such as is fairly commensurate with the risk. He must, therefore, look for an approaching train, if he has a fair view of the track; and if his view is obstructed, he must also listen. If he does not do so, and is injured, he cannot recover; but if he does, and is nevertheless injured by the negligence of the company, the latter is liable to him; 110 Ill. 114; 49 Ia. 469; 31 La. Ann. 490; 67 Nev. 100; 143 Ind. 524; 39 Md. 574; 105 Mass. 203; 129 Mass. 440; 46 Minn. 220; 52 Mass. 808; 76 Mo. 138; 42 N. J. L. 180; 58 N. Y. 451; 92 N. Y. 658; 75 N. Y. 437; 24 Ohio St. 419; 73 Pa. 504; 81 *id.* 274; 6 Heisk. 174; 41 Wis. 44. It is not necessary to leave to the jury whether a prudent man would look and listen before attempting to cross a railroad track. It is the duty of the court to declare that a failure to do so is negligence; 75 Fed. Rep. 644; it is a conclusion of law; 61 Ark. 549; 43 N. E. Rep. (Ind.) 1019; 14 C. C. A. 555; s. c. 67 Fed. Rep. 591; 54 *id.* (C. C. A.) 301.

One, who, on approaching a double-track railroad, looked to the north, and seeing no train, concentrated his attention on a switch-engine on the nearer track for a minute and a half, and then, without looking again to the north, started across and was struck by a train coming from that direction on the further track, was held guilty of negligence; 75 Fed. Rep. 644. See 159 U. S. 603; 3 App. D. C. 101; 14 C. C. A. 394; s. c. 67 Fed. Rep. 277. It is held in Pennsylvania that a traveller is required to *stop*, look, and listen for an approaching train; 73 Pa. 504; 90 Pa. 323; 97 *id.* 91; 102 *id.* 425. But this rule does not prevail in other courts, and in a recent Pennsylvania case it is said that without relaxing the rule just stated, "yet when the facts are not clear and simple, and where the existence of contributory negligence depends upon infer-

ences to be drawn from the evidence, the question must go to the jury for decision;" 179 Pa. 227.

There are three very well-recognized exceptions to the rule which requires a traveller to look and listen for approaching trains. These are thus classified in a Rhode Island case; 14 R. I. 102: (1) When the view of the track is obstructed, and hence the injured party, not being able to see, is obliged to act upon his judgment at the time; 94 U. S. 161; 159 *id.* 603; L. R. 3 C. P. 368; 3 App. Cas. 1155; 57 Me. 117; 118 Mass. 431; 35 Pa. 60; (2) where the injured person is a passenger going to, or alighting from, a train, under the implied invitation and assurance of the company that he may cross the track in safety; L. 104 Mass. 157; 105 Mass. 203; 26 N. J. Eq. 474; 84 N. Y. 241; and (3) when the direct act of some agent of the company has put the person off his guard and induced him to cross the track without precautions; *e. g.* when the flagman beckons to him to cross; 29 Ia. 55; 10 Allen 368; 29 N. Y. 383. To these may be added cases where the traveller (as might happen to a stranger on a dark night) is ignorant of the nearness of the railroad, and when the driver of a horse, which becomes suddenly frightened, is obliged to choose between the risk of an upset or a collision. See Patterson, Ry. Acc. L. §§ 173–183, where the cases on the subject of contributory negligence at grade-crossings are collected.

It is also the general rule outside of Pennsylvania, that if the company maintains safety-gates at a crossing, which are closed at the approach of a train, a traveller who sees them standing open has the right to presume upon the implied invitation to cross; and may do so without looking and listening; 13 Wall. 270; 81 Cal. 326; 104 Mass. 108; 120 Mass. 257; 115 *id.* 190; 87 Ill. 401; 30 Minn. 482; 14 Nev. 351, 376; 40 N. J. L. 189; 78 N. Y. 518; 79 N. Y. 72; 24 Ohio St. 654; 48 Wis. 603.

The fact that one's sight or hearing is defective does not exonerate him from the exercise of due care, but rather raises the standard to be observed by him. The employes of the company have a right to presume that his sight and hearing are normal; and he must observe all the added precautions necessary to make him as safe as if his faculties were normal. If he does not, he is guilty of contributory negligence; 28 La. An. 320; 72 Mo. 168; 6 Oreg. 417.

As to the power of the states to require railroad companies to change, alter, or abolish grade crossings, see 4 Thomp. Corp. § 5505; POLICE POWER. As to signals at crossings; 37 Am. Rep. 443; as to care at crossings; 26 *id.* 207.

See CROSSING; RAILROAD; NEGLIGENCE; HIGHWAY; STREETS.

GRADUATE. One who has taken a degree in a college or university. It is said to be a word of elastic meaning, involving infinite variety in the methods and standards of graduation which may be adopted; 40 La. Ann. 463.

GRADUS (Lat. a step). A measure of space. Vicat, Voc. Jur. A degree of relationship (*distantia cognatorum*). Heineccius, Elem. Jur. Civ. § 153; Bract. fol. 134, 374; Fleta, lib. 6, c. 2, § 1, lib. 4, c. 17, § 4.

A step or degree generally; e. g. *gradus honorum*, degrees of honor. Vicat, Voc. Jur. A pulpit; a year; a generation. Du Cange.

A port; any place where a vessel can be brought to land. Du Cange.

GRAFFER (Fr. *greffier*, a clerk, or prothonotary). A notary or scrivener. See stat. 5 Hen. VIII. c. 1.

GRAFFIUM. A register; a leger-book or cartulary of deeds and evidences. 1 Annal. Eccles. Menevensio, apud Angl. Sacr. 653.

GRAFIO. A baron, inferior to a count. 1 Marten, Anced. Collect. 13. A fiscal judge. An advocate. Gregor. Turon, l. 1, *de Mirac.* c. 33; Spelman, Gloss.; Cowel. For various derivations, see Du Cange.

GRAFT. In Equity. A term used to designate the right of a mortgagee in premises to which the mortgagor at the time of making the mortgage had an imperfect title, but afterwards obtained a good title. In this case the new title is considered a *graft* into the old stock, enuring to the benefit of the mortgagee, and arising in consideration of the former title; 1 Ball & B. 40, 46, 57; 1 Pow. Mort. 190. See 9 Mass. 34. "It is well settled that when a mortgage of land is made, purporting to convey the land in fee, any title afterward acquired by the mortgagor will feed the mortgage and enure to the benefit of the mortgagee." 1 Pingree, Mort. § 304; 76 Am. Dec. 449; 57 Cal. 507; 67 *id.* 275. And this is so where the title was in the government when the mortgage was made and a patent afterwards issued to the mortgagor; 1 Pingree, Mort. § 304; 71 Wis. 279. See 4 Wall. 232; 21 How. 228. But it is the prevailing doctrine that in the absence of statutory enactment there must be a covenant of warranty or something tantamount to it, to give this effect to the mortgage; 86 Mich. 382; 90 Ala. 178; 47 Ark. 111. See 1 Pingree, Mort. §§ 696–706. The purchase of a paramount title by a purchaser from the mortgagor does not inure to the benefit of the mortgagee; *id.* § 1012; and in some cases the mortgagee may be estopped to assert the after-acquired title of the mortgagor against an innocent purchaser; *id.*; 52 Pa. 359. The same principle has obtained by legislative enactment in Louisiana. If a person contracting an obligation towards another, says the Civil Code, art. 3271, grants a mortgage on property of which he is not then the owner, this mortgage shall be valid if the debtor should ever require the ownership of the property, by whatever right. This principle is also adopted by statute in other states, as Arkansas; Mansf. Dig. § 642; and California; Civ. Code § 2930. See MORTGAGE.

GRAIN. The twenty-fourth part of a pennyweight.

For scientific purposes the grain only is used, and sets of weights are constructed in decimal progression, from ten thousand grains to one-hundreth of a grain.

Wheat, rye, barley, or Indian corn sown in the ground. It may include millet and oats; 34 Ga. 455; 29 N. J. L. 357; flaxseed; 55 Ia. 323; peas; 2 Strobh. 474; sugar cane seed; 34 Ga. 455. See AWAY-GOING CROP.

GRAINAGE. In English Law. The name of an ancient duty collected in London, consisting of one-twentieth part of the salt imported into that city.

GRAMME. The French unit of weight. The gramme is the weight of a cubic centimetre of distilled water at the temperature of 4° C. It is equal to 15.4341 grains troy, or 5.6481 drachms avoirdupois.

GRAND ASSIZE. An extraordinary trial by jury, instituted by Henry II., by way of alternative offered to the choice of the tenant or defendant in a writ of right, instead of the barbarous custom of trial by battel. For this purpose a writ *de magna assiza eliganda* was directed to the sheriff to return four knights, who were to choose twelve other knights to be joined with themselves; and these sixteen formed the grand assize, or great jury, to try the right between the parties; 3 Bla. Com. 351. Abolished by 3 and 4 Wm. IV. c. 42.

A later work says: "It is abundantly clear that, whatever may have been the practice at a later time, the grand assize was a body of twelve, not of sixteen, knights; in other words, the four electors took no part in the verdict." 2 Poll. & Maitl. 618, n. 3.

Although the jury were theoretically to speak only about matter of fact, the principle was long latent and tacit. "The recognitors in a grand assize were called upon to say whether the demandant had greater right than the tenant, and in so doing they had an opportunity of giving effect of law. . . . We must not suppose that in such a case they followed the ruling of the justices;" *id.* 627.

The assize of novel disseisin, the requirement of a royal writ to compel a man to answer for his free tenement, and the grand assize, are considered by the writers last quoted, to have been fashioned at the same time to uphold three principles founded upon the idea of the sacredness of a freehold and intended to assure the royal protection of possession. "No one is to be disseised of his free tenement unjustly and without a judgment, . . . (nor) even by a judgment unless he has been summoned to answer by a royal writ; no one is to be forced to defend his seisin of a free tenement by battel. The ordinance that instituted the grand assize was a one-sided measure, a protection of possessors. The claimant had to offer battel; the possessor, if he pleased, might refuse battel and put himself upon the grand assize;" 1 *id.* 136. As to its place in the history of possessory actions. See 2 *id.* 62.

GRAND BILL OF SALE. In English Law. The name of an instrument used for the transfer of a ship while she is at sea. 7 Mart. La. 318; 3 Kent. 133. See BILL OF SALE.

GRAND CAPE. In English Law. A writ judicial which lieth when a man has brought a *præcipe quod reddat*, of a thing that toucheth plea of lands, and the tenant makes default on the day given him in the writ original, then this writ shall go for the king, to take the land into the king's hands, and if he comes not at the day given him by the *grand cape*, he has lost his lands. Old N. B. fol. 161, 162; Regist. Judic. fol. 2 *b*; Brac. lib. 5, tr. 3, cap. 1, nu. 4, 5, 6. So called because its Latin form began with the word *cape*, "take thou," and because it had more words than the *petit cape*, or because *petit cape* summons to answer for default only. *Petit cape* issues after appearance to the original writ, *grand magnum cape* before. These writs have long been abolished. In Glanvill's day three successive summons preceded the *cape*. See 2 Poll. & Maitl. 590.

GRAND COUTUMIER. Two collections of laws bore this title. One, also called the Coutumier of France, is a collection of the customs, usages, and forms of practice which had been used from time immemorial in France; the other, called the Coutumier de Normandie (which indeed, with some alterations, made a part of the former), was composed, about the fourteenth of Henry III., A. D. 1229, and is a collection of the Norman laws, not as they stood at the conquest of England by William the Conqueror, but some time afterwards, and contains many provisions probably borrowed from the old English or Saxon laws. Hale, Hist. Com. Law c. 6. The work was reprinted in 1881 with notes by William L. De Gruchy. The Channel Islands are still for the most part governed by the ducal customs of Normandy; 1 Steph. Com. 100.

GRAND DAYS. In English Practice. Those days in the term which are solemnly kept in the inns of court and chancery, viz.: Candlemas-day in Hilary Term, Ascension-day in Easter Term, St. John the Baptist's day in Trinity Term, and All Saints' day in Michælmas Term, which are *dies non juridici*, or no days in court, and are set apart for festivity. Jacob, Law Dic.

All this is now altered: the grand days, which are different for each term of court, are those days in each term in which a more splendid dinner than ordinary is provided in the hall; Moz. & W.

GRAND DISTRESS (Lat. *magna districtio*). An ancient kind of distress, more extensive than the writs of *grand* and *petit cape*, extending to all the goods and chattels of the party distrained within the county. T. L.; Cowel. The writ lay in real actions, and was so called on account of its quality and great extent. It lay in two cases, either when the tenant or defendant was attached, and did not appear, but made default; or when the tenant or defendant had once appeared, and afterwards made default. Fleta lib. 2, c. 69; Cowell; Holthouse.

GRAND JURY. In Practice. A body of men, consisting at common law of not less than twelve nor more than twenty-four, respectively returned by the sheriff of every county to every session of the peace,

oyer and terminer, and general gaol delivery, to whom indictments are preferred. 4 Bl. Com. 302; 1 Chitty, Cr. Law 310, 311; 1 Jur. Soc. Papers; 31 Fla. 340, 356.

There is reason to believe that this institution existed among the Saxons; Crabb, Eng. Law 35. By the constitution of Clarendon, enacted 10 Hen. II. (A. D. 1164), it is provided that "if such men were suspected whom none wished or dared to accuse, the sheriff, being thereto required by the bishop, should swear twelve men of the neighborhood, or village, to declare the truth" respecting such supposed crime, the jurors being summoned as witnesses or accusers rather than judges. It seems to be pretty certain that this statute either established grand juries, if this institution did not exist before, or reorganized them if they already existed; 1 Spence, Eq. Jur. 63. But a later work (passing over the question of the relation of the old Frankish inquest to the initiation of criminal proceedings by presentment by indictment) says of the accusing jury of the time of Henry II: "The ancestors of our 'grand jurors' are from the first neither exactly accusers, nor exactly witnesses; they are to give voice to common repute." 2 Poll. & Maitl. 639; 1 *id.* 130; 2 *id.* 644; and the conclusion reached is, "a great deal yet remained to be done before that process of 'indictment by a 'grand jury' and trial by a 'petty jury' with which we are all familiar would have been established. The details of this process will never be known until large piles of records have been systematically perused. This task we must leave for the historian of the fourteenth century. Apparently the change was intimately connected with the discontinuance of those cumbrous old eyres which brought 'the whole county' and every hundred and vill in it before the eyes of the justices;" 2 *id.* 646.

Organization. Where the common law prevails, unmodified by statutory or constitutional provisions, the law requires that twenty-four citizens shall be summoned to attend as grand jurors; but in practice not more than twenty-three are sworn, because of the inconvenience which might arise of having twelve, who are sufficient to find a true bill, opposed to another twelve who might be against it; 2 Hale, Pl. Cr. 161; 1 Bish. Cr. Proc. 854; 6 Ad. &. El. 236; 2 Caines 98. There is no distinction between the qualification of grand and petit jurors; 35 S. C. 334.

In the United States the number is a matter of local regulation, and while in the main the common-law system has been continued, there is in this country a growing disposition to reduce the number of jurors by statute where it was practicable, and by constitutional provision where that was held to be necessary. It is beyond the present purpose to state in detail all the changes, or to do more than to indicate the existence of a prevailing tendency to simplify the proceedings, which, however, is coupled with a great respect for the grand jury as one of the common-law institutions protected by constitutional guaranty. For the regulations in force at any particular time in the several states, reference should be had to the local law.

The question has been much discussed whether in states having constitutional provisions for indictment by a grand jury a legislative change in the number required to find an indictment at common law is permissible. In several states this question has been answered in the negative where the constitutional provision specified "indictment by grand jury;" at least so far as to forbid a change making less than twelve sufficient to find an indictment; 107 N. C. 913; 31 Fla. 255, 340; 16 Wis. 334. See 25 Ga. 220. But the provision of the federal constitution securing the "due process of law" does not prevent the states from varying the common-law rule as to a grand jury; 85 Va. 702; 13 Col. 155; or even from dispensing with it; 110 U. S. 516. Where the state constitution prescribes a number it is obligatory; 34 S. W. Rep. (Tex.) 120; but where the grand jury consisted of less than the required number but as many jurors concurred as were necessary to find an indictment it was sufficient; 56 N. W. Rep. (Ia.) 545; and where the requisite number do concur, the fact that the panel was not full, either by reason of the discharge, or improper excusing of one or more members, or any like cause, does not invalidate an indictment; 25 Tex. App. 293, 314; 22 *id.* 572; 77 Ia. 417; 46 Fed. Rep. 381; 69 Ga. 11; 60 Vt. 142; 89 Ill. 571; 19 Wis. 563; 68 Ala. 92. A discharge of a juror is presumed to be proper; 54 Ark. 611; 4 Ind. 193; but if improper and void it does not affect the legal organization; 19 Tex. App. 95. It will be presumed that a grand jury was legally organized; 34 La. Ann. 216; 3 Colo. 325; and where the court has power to fill up the panel it will be presumed to have been rightly done; 129 Ill. 290. It has been held that when, on calling the grand jury, some of them fail to appear, the court may orally direct the sheriff to fill the vacancy without issuing a precept; 53 Ia. 84, 154; in other states a new *venire facias* is necessary; 63 Ala. 163; 20 N. J. L. 218. The power to excuse grand jurors confers upon the court, by implication, the power to fill the vacancy; 129 Ind. 290. If more are present than the statute permits the indictment is bad; 34 Miss. 614; 1 Utah 226; 92 Ky. 605; 2 Pears. Pa. 461, 466. A constitutional provision fixing the number of the panel and prescribing how many must concur is held to be self-executing; 18 S. W. Rep. (Ky.) 528; 9 Mont. 167.

Constitutional and statutory provision. In Indiana, Illinois, Iowa, Nebraska, Oregon, and Colorado, the constitution gives the legislature authority to make laws dispensing with a grand jury in any case. And in Alabama and Mississippi there is provision for other process in criminal cases. In Nebraska, the legislature may provide for holding persons to answer for criminal offences on the information of a public prosecutor. In a majority of the states there is an adherence to twelve as the number required to concur in finding an indictment, although in many of these less than twenty-three may be summoned, the change being in some cases by statute and in others by constitutional provision. Of these states, the required number is thirteen to eighteen in Alabama, Mississippi, and Tennessee; see 15 Miss. 58; sixteen in Arkansas and Louisiana; see 28 La. Ann. 187; sixteen to twenty-three in Wisconsin; eighteen in South Carolina and Vermont; see 11

Rich. 581; 35 S. C. 344; nineteen in California, but seventeen have been held sufficient; 6 Cal. 214; see 92 Cal. 239; seventeen to twenty-three in Arizona; thirteen to twenty-three in Rhode Island. In Montana, Idaho, and Oregon the number is seven, of whom five must concur; and in Colorado, Georgia, Kentucky, Missouri, and Texas, the number is twelve, of whom nine must concur; in Virginia, it is nine to twelve, of whom seven must concur; in Florida twelve to fifteen, of whom eight must concur; and in Indiana six, of whom five must concur; while in Iowa there is a provision for from five to fifteen according to the population of the county, with a corresponding variation in the number for concurrence. In Utah fifteen were held sufficient; 98 U. S. 145; and see 1 Utah 11. In some cases when twenty-three were required, the provision was held to be directory merely; 2 Cush. 149.

Objections. An objection must be properly made as to time and manner; 140 U. S. 575; 176 Pa. 167; 55 Md. 345; 6 Ohio 435; 67 Mo. 488; 2 Ad. & El. 236; 1 Nev. &. P. 187. A person summoned to testify before the grand jury *de facto* cannot question its organization; 91 Cal. 545. An objection to the competency of a grand juror must be raised before the general issue; 30 Ohio St. 542; s. c. 27 Am. Rep. 478; Whart. Cr. Pl. 350. It has been held that an objection comes too late after the jury has been empanelled and sworn; 9 Mass. 110; 3 Wend. 314; but on this point the authorities are conflicting; see *contra*, 12 R. I. 492; s. c. 34 Am. Rep. 704, n. The proper method of taking objection to the organization of a grand jury is by plea in abatement; 19 Ala. 240; 106 Ind. 386; 13 Ark. 96; 2 Lea 29; and not by demurrer; 2 Stew. 388; 1 Okla. 252; or motion to quash; 73 N. C. 437; 3 Wyo. 140; 6 Black. 248; or motion in arrest of judgment; 5 Ala. 72; or collaterally on *habeas corpus;* 28 Fla. 371; 87 Wis. 340. A plea in abatement must specify the objection with particularity; 86 Mo. 371; 89 Va. 136; 14 Wis. 394; 15 Ill. 511; 34 Kan. 256; 12 Neb. 61. If a method of objection is prescribed by a statute it must be followed strictly; 96 N. Y. 149; 51 Ala. 18; 33 Tex. 570; 86 Ind. 400; 17 Ohio St. 583.

Federal courts may, on their own motion, enforce other objections to grand jurors than those prescribed by state statute; 69 Fed. Rep. 973.

See an elaborate note upon the organization of grand jury in which are collected the cases relating to defects of every kind in the summoning, organization, and proceedings of grand jury; 27 L. R. A. 776; and one on the qualification of grand jurors; 28 *id.* 195; as to the number of grand jurors necessary or proper to act and the constitutional and statutory provisions relating thereto in states which have changed the common-law rule, see 27 *id.* 846; and as to the number necessary to concur in finding an indictment; 28 *id.* 33.

Proceedings. Being called into the jury-box, they are usually permitted to select a foreman, whom the court appoints; but the court may exercise the right to nominate one for them.

The foreman then takes the following oath or affirmation, namely: "You, A. B., as foreman of this inquest for the body of the ——, of ——, do swear (or affirm) that you will diligently inquire, and true presentment make of all such articles, matters, and things as shall be given you in charge, or otherwise come to your knowledge, touching the present service; the commonwealth's counsel, your fellows', and your own, you shall keep secret; you shall present no one for envy, hatred, or malice; nor shall you leave any one unpresented for fear, favor, affection, hope of reward or gain, but shall present all things truly, as they come to your knowledge, according to the best of your understanding. So help you God." It will be perceived that this oath contains the substance of the duties of the grand jury. The foreman having been sworn or affirmed, the other grand jurors are sworn or affirmed according to this formula:—"You and each of you do swear (or affirm) that the same oath (or affirmation) which your foreman has taken on his part, you and every one of you shall well and truly observe on your part." In Massachusetts it is not necessary to show that those affirming had conscientious scruples about taking the oath; 7 Gray 492; 9 Mass. 107; but in New Jersey it was originally held that it would be necessary to show this or the indictment would be invalid; 6 N. J. L. 405; 9 *id.* 305; 7 *id.* 432; but since then by the N. J. Crim. Code § 53, it is provided that objection to the indictment for form or substance shall be by demurrer or motion to quash before the jury are sworn in and not after, and an objection to affirmance not made as so provided will not avail.

On being sworn or affirmed, and having received the charge of the court, the grand jury are organized, and may proceed to transact the business which may be laid before them; 2 Burr. 1088; Bacon, Abr. *Juries*, A. See 12 Tex. 210. The grand jury constitute a regular body until discharged by the court, or by operation of law, as where they cannot continue, by virtue of an act of assembly, beyond a certain day. But although they have been formally discharged by the court, if they have not separated, they may be called back and fresh bills be submitted to them; 9 C. & P. 43. When properly organized, in some states, it meets and adjourns upon its own motion, and it may lawfully proceed in the performance of its duties whether the court is in session or not, until the final adjournment of the court; 39 Ill. App. 481. In other states it is always discharged from time to time by the court, to which it reports at each session. The grand juries in the federal courts usually meet and adjourn on their own motion.

The jurisdiction of the grand jury is coextensive with that of the court for which they inquire, both as to the offences triable there and the territory over which such court has jurisdiction.

The mode of doing business. The foreman acts as president, and the jury usually appoint one of their number to perform the duties of secretary. No records are to be kept of the acts of the grand jury, except for their own use, because their proceedings are to be secret. Bills of indictment against offenders are then supplied by the attorney-general, or other officer representing government. See 11 Ind. 473; Hempst. 176; 2 Blatchf. 435. On these bills are indorsed

the names of the witnesses by whose testimony they are supported. The jury are also required to make true presentment of all such matters as have otherwise come to their knowledge. These presentments, which are technically so called, are, in practice, usually made at the close of the session of the grand jury, and include offences of which they had personal knowledge: they should name the authors of the offences, with a view to indictment. The witnesses in support of a bill are to be examined in all cases under oath, even when members of the jury itself testify,—as they may do.

When the number required by law (*supra*) concur in finding a true bill, the foreman must write on the back of the indictment, "A true bill," sign his name as foreman, and date the time of finding. On the contrary, where there is not sufficient evidence to authorize the finding of the bill, the jury return that they are ignorant whether the person accused committed the offence charged in the bill, which is expressed by the foreman indorsing on the bill, "Ignoramus," "Not a true bill," or similar words, signing his name as before, and dating the indorsement. The grand jury cannot find a bill, true for part, and false for part; 1 Russ. Cr., Sharsw. ed. 430.

A grand jury cannot indict without a previous prosecution before a magistrate; except in offences of public notoriety, such as are within their own knowledge, or are given them in charge by the court, or are sent to them by the prosecuting officer of the commonwealth; Whart. Cr. Pl. & Pr. § 338; 67 Pa. 30.

As to the witnesses, and the power of the jury over them. The jury examine all the witnesses in support of the bill, or enough of them to satisfy themselves of the propriety of putting the accused on trial, but none in favor of the accused. The jury are the sole judges of the credit and confidence to which a witness before them is entitled. It is decided that when a witness, duly summoned, appears before the grand jury, but refuses to be sworn, and behaves in a disrespectful manner towards the jury, they may lawfully require the officer in attendance upon them to take the witness before the court, in order to obtain its aid and direction in the matter; 8 Cush. 338; 14 Ala. N. S. 450. Such a refusal, it seems, is considered a contempt; 14 Ala. N. S. 450; the disobedience of this order of the court constituting the contempt; 17 Colo. 252; but the governor of a state is exempt from the powers of *subpœna*, and this immunity extends to his official subordinates; 81 Pa. 433. A person having knowledge of a crime has the right to go before the grand jury, and disclose his knowledge, without being summoned; 45 La. Ann. 1164.

As to the competency of evidence before grand jury see 28 L. R. A. 318; and as to the sufficiency of evidence to sustain indictment; *id.* 324; as to improper influence or interference with a grand jury; *id.* 367.

Of the secrecy to be observed. This extends to the vote given in any case, to the evidence delivered by witnesses, and to the communications of the jurors to each other. The disclosure of these facts, unless under the sanction of law, would render the imprudent juror who should make them public liable to punishment. Giving intelligence to a defendant that a bill has been found against him, to enable him to escape, is so obviously wrong that no one can for a moment doubt its being criminal. The grand juror who should be guilty of this offence might, upon conviction, be fined and imprisoned. One who stealthily listens to a grand jury while in the performance of their duties commits the offence of eavesdropping; 3 Head 299. The duration of the secrecy depends upon the particular circumstances of each case; 20 Mo. 326. In a case, for example, where a witness swears to a fact in open court, on the trial, directly in opposition to what he swore before the grand jury, there can be no doubt that the injunction of secrecy, as far as regards this evidence, would be at an end, and the grand jurors might be sworn to testify what this witness swore to in the grand jury's room, in order that the witness might be prosecuted for perjury; 3 Russ. Cr., Sharsw. ed. 520; 4 Me. 439; 1 Bish. Cr. Proc. 857; 92 Ky. 120; 77 Md. 110; 65 Mass. 137. A member of the grand jury may testify as to how the jury acquired knowledge of an alleged offence; 126 Pa. 531; 157 *id.* 611; but see *contra*, 2 Halst. 347; 1 C. & K. 519. It has been held that the foreman of a grand jury may be called as a witness concerning an admission of gaming made by defendant when testifying before the grand jury concerning another offence, since the statute enjoining secrecy as to proceedings before the grand jury is intended only for the protection of the jurors and of the public; 8 Utah 21.

A grand juror is not competent to testify in a civil case as to the statements of a witness before the grand jury; 61 N. W. Rep. (Minn.) 138. It is not error to reject evidence of grand jurors disclosing testimony given before the grand jury; 105 Mo. 24. As to grand jurors as witnesses under statutory provisions, see 12 Crim. L. Mag. 583. Statements of the prosecuting officer as to what occurred in the grand jury room are inadmissible; 115 Mo. 480. The fact that a stenographer, at the request of the prosecuting attorney, attended before the grand jury and took the testimony of the witnesses, is no ground for quashing the indictment; 5 Ind. App. 356; the presence of the state's attorney while inquiry is being made by the grand jury is not objectionable; 45 Ill. App. 110; but the presence of a private prosecutor is ground for reversal of a judgment of conviction; 70 Miss. 595.

The privilege given by the fifth amendment to the constitution, that no person shall be compelled in any criminal case to be a witness against himself, extends to a proceeding before a grand jury; 142 U. S. 547. See INDICTMENT; PRESENTMENT; CHARGE; INFORMATION.

GRAND LARCENY. In Criminal Law. By the English law simple larceny was divided into grand and petit: the former was committed by the stealing of property exceeding twelve pence in value; the latter, when the property was of the value of twelve pence or under; Stat. West. 1 (3 Edw. I.), c. 15. This distinction was abolished in England by 7 & 8 Geo. IV. c. 29, and is recognized in only a few of the United States. Grand larceny was a capital offence, but clergyable unless attended with certain aggravations. Petty larceny was punishable with whipping, "or some such corporal punishment less than death;" and, being a felony, it was subject to forfeiture, whether upon conviction or flight. See 1 Bish. Cr. L. § 679; LARCENY.

GRAND SERJEANTY. See SERGEANTY.

GRANDCHILDREN. The children of one's children. Sometimes these may claim bequests given in a will to children; though in general they can make no such claim; 6 Co. 16.

The term grandchildren has been held to include great-grandchildren; 2 Eden 194; but *contra*, 3 Barb. Ch. 488, 505; 3 N. Y. 538.

See CHILD; CONSTRUCTION.

GRANDFATHER. The father of one's father or mother. The father's father is called the paternal grandfather; the mother's father is the maternal grandfather.

GRANDMOTHER. The mother of one's father or mother. The father's mother is called the paternal grandmother; the mother's mother is the maternal grandmother.

GRANGE. A farm furnished with barns, granaries, stables, and all conveniences for husbandry. Co. Litt. 5 a.

A combination, society, or association of farmers for the promotion of the interests of agriculture, by abolishing the restraints and burdens imposed on it by railway and other companies, and by getting rid of the system of middlemen or agents between the producer and the consumer. Encyc. Dic.

The members of such associations are called grangers, from which was derived the name, applied to certain leading cases, of granger cases, which see.

GRANGER CASES. A name applied to six cases decided by the supreme court of the United States in 1876, which are reported in 94 U. S. 113, 155, 165, 179, 180, 181, those most frequently cited being Munn *v.* Illinois, and C. B. & Q. R. Co. *v.* Iowa. They are so called because they arose out of an agitation commenced by the grangers which resulted in the enactment of statutes for the regulation of the tolls and charges of common carriers, warehousemen, and the proprietors of elevators. The enforcement of these acts was resisted and their constitutionality questioned. The supreme court affirmed the common-law doctrine that private property appropriated by the owner to a public use is thereby subjected to public regulation. They also held that the right of regulation was not restrained by the prohibition of the fourteenth amendment of the federal constitution against the taking by the states of private property without due process of law. A text writer, who was at that time a member of the court, says of these cases: "But these decisions left undecided the question how far this legislative power of regulation belonged to the States, and how far it was in the congress of the United States"; Miller, Const. U. S. 397.

As to what are public uses see EMINENT DOMAIN.

GRANT. A generic term applicable to all transfers of real property. 3 Washb. R. P. 181, 353.

A transfer by deed of that which cannot be passed by livery. Wms. R. P. 147, 149.

An act evidenced by letters patent under the great seal, granting something from the king to a subject. Cruise, Dig. tit. 33, 34.

A technical term made use of in deeds of conveyance of lands to import a transfer. 3 Washb. R. P. 378; Devl. Deeds 12; 84 Tex. 107.

"This word is taken largely where anything is granted or passed from one (the grantor) to another (the grantee). And in this sense it doth comprehend feoffment, bargains and sales, gifts, leases, charges, and the like; for he that doth give or sell doth grant also. . . . And so some grants are of the land or soil itself; and some are of some profit to be taken out of, or from the soil, as rent, common, etc.; and some are of goods and chattels; and some are of other things, as authorities, elections, etc."; Shepp. Touchst. 228.

The term grant was anciently and in strictness of usage applied to denote the conveyance of incorporeal rights, and it is the appropriate word for that purpose. Such rights are said to lie in grant, and not in livery; for, existing only in idea, in contemplation of law, they cannot be transferred by livery of possession. Of course at common law, a conveyance in writing was necessary; hence they were said to lie in grant, and to pass by the delivery of the deed. By the act of 8 & 9 Vict. c. 106, § 2, and also by statute in some states, as New York, Maine, and Massachusetts, all corporeal hereditaments are said to lie in grant as well as in livery. See 40 N. Y. 140; 59 Me. 160. Grant is now therefore both sufficient, and technically proper, as a word of conveyance of a freehold estate, and in the largest sense the term comprehends everything that is granted or passed from one to another, and is now applied to every species of property. But although the proper technical word, its employment is not absolutely necessary, and it has been held that other words indicating an intention to grant will answer the purpose; Wms. R. P. 6th Am. ed 201; 5 T. R. 124; 5 B. & C. 101. As to the effect of the word grant in conveyances an how far any covenant is implied therefrom see COVENANT.

Grant was one of the usual words in a

feoffment; and a grant differed but little from a feoffment except in the subject-matter; for the operative words used in grants are *dedi et concessi*, "have given and granted." But the simple deed of grant has superseded the ancient feoffment, leases, and releases which were used to convey freehold estates in possession. See, generally, 1 Dav. Conv. 73; 2 *id.* 76.

The word is also applied in the case of copyholds to indicate the acceptance by the lord of a person as tenant. It is termed an *ordinary grant* when the tenant is admitted in pursuance of a surrender by the preceding tenant; and *voluntary grant* when the land is in possession of the lord discharged from all rights of any tenant, or as it is termed "in hand;" in that case the lord regrants the land to the new tenant to be holden by copy of court roll.

A *grant of personalty* is a method of transferring personal property, distinguished from a gift, which is always gratuitous, by being founded upon some consideration or equivalent. Such grants are divided as to their subject-matter into grants of chattels real, which includes leases, assignments, and surrenders of leases, and grants of chattels personal, which consist of transfer of the right and possession of them whereby one renounces and the other acquires all title and interest therein. 2 Sharsw. Bla. Com. 440, and see also *id.* notes 1, 2, and 3. Such a grant may be by parol; 3 M. & S. 7; but they are usually by assignment or bill of sale in writing. The proper legal designation of such a grant is an "assignment" or bargain or sale; 2 Steph. Com. 102.

Office grant applies to conveyances made by some officer of the law to effect certain purposes where the owner is either unwilling or unable to execute the requisite deeds to pass the title.

Among the modes of conveyance included under office grant are levies and sales to satisfy execution creditors, sales by order or decree of a court of chancery, sales by order or license of court, sales for non-payment of taxes and the like. See Blackw. Tax Title, *passim;* 3 Washb. R. P. 208.

Private grant is a grant by the deed of a private person. See DEED.

Public grant is the mode and act of creating a title in an individual to lands which had previously belonged to the government.

The public lands of the United States and of the various states have been to a great extent conveyed by deeds or patents issued in virtue of general laws; but many specific grants have also been made, and were the usual method of transfer during the colonial period. See 3 Washb. R. P. 181; 8 Wheat. 543; 6 Pet. 548; 16 *id.* 367. See LAND GRANT.

Uninterrupted possession of land for a period of twenty years or upward, has been often held to raise a presumption of a grant from the state; 4 Harr. (Del.) 521; 20 Ga. 467; 4 Dev. & B. L. 241; 6 Pet. 498; 3 Head 432; 85 Tex. 357; 66 Hun 633; 27 S. W. Rep. (Mo.) 409.

By the word grant, in a treaty, is meant not only a formal grant, but any concession, warrant, order, or permission to survey, possess, or settle, whether written or parol, express, or presumed from possession. Such a grant may be made by law, as well as by patent pursuant to a law; 12 Pet. 410. See 9 Ad. & E. 532; 5 Mass. 472; 9 Pick. 80; TREATY.

The term grant is applied in Scotland to original disposition of land, as when a lord grants land to his tenants; and to gratuitous deeds; in the latter case the donor is said to *grant the deed*, an expression unknown in English law; Moz. & W.

The term grant is also applied to the creation or transfer by the government of such rights as pensions, patents, charters, and franchises. See Chit Prerog. 384; and also these several titles.

The word grant is also sometimes used with reference to the allowance of probate, and the issue of letters testamentary, and of administration, as to which see the several titles relating thereto.

GRANT AND DEMISE. In a lease for years these words create an implied warranty of title and a covenant for quiet enjoyment; 92 U. S. 107. See COVENANT.

GRANT, BARGAIN AND SELL. Words used in instruments of conveyance of real estate. See CONSTRUCTION. From these words, in many states, is implied a covenant of seisin. See COVENANT.

GRANTEE. He to whom a grant is made.

GRANTOR. He by whom a grant is made.

GRANTZ. In Old English Law. Grandees or noblemen. Jac. L. Dict.

GRASS. See EMBLEMENTS.

GRASS WEEK. Rogation week. A term anciently used in the inns of court and chancery.

GRASSHEARTH. In Old English Law. The name of an ancient customary service of tenants' doing one day's work for their landlord.

GRASSON, or GRASSUM. A fine paid upon the transfer of a copyhold estate.

GRATIFICATION. A reward given voluntarily for some service or benefit rendered, without being requested so to do, either expressly or by implication.

GRATIS (Lat.). Without reward or consideration.

When a bailee undertakes to perform some act or work *gratis*, he is answerable for his gross ngligence if any loss should be sustained in consequence of it; but a distinction exists between non-feasance and misfeasance,—between a total omission to do an act which one gratuitously promises to do, and a culpable negligence in the execution of it: in the latter case he is responsible, while in the former he would not, in

general, be bound to perform his contract; 4 Johns. 84; 5 Term 143; 2 Ld. Raym. 913.

An appearance gratis is one entered without service of process.

GRATIS DICTUM (Lat.). A saying not required; a statement voluntarily made without necessity.

Mere naked assertions, though known to be false, are not the ground of action, as between vendor and vendee. Thus it is not actionable for a vendor of real estate to affirm falsely to the vendee that his estate is worth so much, that he gave so much for it, etc. But fraudulent misrepresentations of particulars in relation to the estate, inducing the buyer to forbear inquiries he would otherwise have made, are not *gratis dicta;* 6 Metc. Mass. 246.

GRATUITOUS. Without valuable or legal consideration. A term applied to deeds of conveyance.

In Old English Law. Voluntary; without force, fear, or favor. Bract. fols. 11, 17.

GRATUITOUS BAILMENT. See BAILMENT.

GRATUITOUS CONTRACT. In Civil Law. One the object of which is for the benefit of the person with whom it is made, without any profit, received or promised, as a consideration for it: as, for example, a gift. It is sometimes called a contract of beneficence. It is the result of a classification of contracts, in relation to the motive for making them, under which they are termed either gratuitous or onerous. A contract is onerous when a party is required by its terms or nature to do or give something as a consideration. Howe, Studies in the Civil Law 107.

GRATUITOUS DEED. One made without consideration. 2 Steph. Com. 47.

GRATUITY. See BONUS; BOUNTY.

GRAVA. In English Law. A grove; a small wood; a coppice or thicket. Co. Litt. 4 *b*.

A thick wood of high trees. Blount.

GRAVAMEN (Lat.). The grievance complained of; the substantial cause of the action. See Greenl. Ev. § 66. The part of a charge which weighs most heavily against the accused. In England, the word is specially applied to grievance complained of by the clergy to the archbishop and bishops in convocation; Phill. Eccl. 1944.

GRAVATIO. An accusation or impeachment. Leg. Ethel. c. 19.

GRAVE. A place where a dead body is interred.

The violation of the grave, by taking up the dead body, or stealing the coffin or grave clothes, is a misdemeanor at common law; 1 Russ. Cr. 414; 6 Sawy. 442; and has been made the subject of statutory enactment in some of the states. See 2 Bish. Cr. L. § 1188; Dearsl. & B. 169; 19 Pick. 304; 4 Blackf. 328; DEAD BODY.

When a body has once been buried, no one has the right to remove it without the consent of the owner of the grave, or leave of the proper ecclesiastical, municipal, or judicial authority; 130 Mass. 423; 42 Pa. 293.

A singular case, illustrative of this subject, occurred in Louisiana. A son, who inherited a large estate from his mother, buried her with all her jewels, worth two thousand dollars: he then made a sale of all he inherited from his mother for thirty thousand dollars. After this, a thief broke the grave and stole the jewels, which, after his conviction, were left with the clerk of the court, to be delivered to the owner. The son claimed them, and so did the purchaser of the inheritance: it was held that the jewels, although buried with the mother, belonged to the son, and that they passed to the purchaser by a sale of the whole inheritance; 6 Rob. La. 488. See 23 Ir. L. T. 405; CEMETERY; DEAD BODY.

GRAVIS. Grievous; great. *Ad grave damnum*, to the grievous damage. 11 Coke 40.

GRAVIUS. A graf; a chief magistrate or officer. A term derived from the more ancient "*grafio*" and used in combination with various other words as an official title in Germany; as Margravius, Rheingravius, Landgravius, etc. Spel. Gloss.

GRAY'S INN. See INNS OF COURT.

GREAT BODILY INJURY. In an instruction as to the danger one must reasonably have apprehended before he may take life the words "great bodily injury are equivalent to enormous injury," "enormous bodily injury" and "dreadful injury." 47 N. W. Rep. (Ia.) 867.

GREAT BRITAIN. See UNITED KINGDOM OF GREAT BRITAIN AND IRELAND.

GREAT CHARTER. See MAGNA CHARTA.

GREAT LAKES. A name commonly used to designate the five great lakes, viz., Superior, Michigan, Huron, Ontario, and Erie.

The open waters of the Great Lakes are "high seas" within the meaning of the Revised Statutes; 150 U. S. 249. It had been held otherwise in 32 Fed. Rep. 406. The common-law doctrine, as to the dominion, sovereignty, and ownership of lands under tide waters on the borders of the sea applies equally to the lands beneath the navigable waters of the Great Lakes; 146 U. S. 387. See ADMIRALTY; LAKE.

GREAT LAW, THE, or "The Body of Laws of the Province of Pennsylvania and Territories thereunto belonging, Past at an Assembly held at Chester, *alias* Upland, the 7th day of the tenth month, called December, 1682."

This was the first code of laws established in Pennsylvania, and is justly celebrated for the provision in its first chapter for liberty of conscience. See Linn's Charter and

Laws of Pennsylvania (Harrisburg, 1879), pp. 107, 478, etc.

GREAT SEAL. A seal by virtue of which a great part of the royal authority is exercised. The office of the lord chancellor, or lord keeper, is created by the delivery of the great seal into his custody. There is one great seal for all public acts of state which concern the United Kingdom. The seal of the United States, or of a state, used in the execution of commissions and other public documents is usually termed the great seal of the United States, or of the state, as the case may be.

GREAT TITHES. In Ecclesiastical Law. The more valuable tithes: as, corn, hay, and wood. 3 Burn, Eccl. Law 680, 681; 3 Steph. Com. 127. See TITHE.

GREE. Satisfaction for an offence committed or injury done. Cowel.

GREECE. A kingdom of Europe. The present hereditary constitutional monarchy exists under a constitution framed by a national assembly, elected in December, 1863, and adopted October 29, 1864. The king whose title is King of the Hellenes, was elected by National Assembly in March, 1863. The entire legislative power is vested in the Boulé, or chamber of deputies now consisting of two hundred and seven members elected by the people, by ballot, for a term of four years; the number of members varies with the population. There must be an attendance of at least one-half of the members to give legality to the proceedings, and no bill can become law without the consent of an absolute majority of members. The assembly has no power to alter the constitution itself. The chamber of deputies meets, on ordinary occasions, on November 1, of every year. The executive power is vested in the king and the ministers at the head of the following departments, who are responsible for the acts of his majesty: ministry of the interior, finance, justice, education, and ecclesiastical affairs, war, marine, and foreign affairs. There is also a deliberative council of state, whose members are named by the crown, and hold office for two years. There must not be less than fifteen, nor more than twenty-five. To this council must be sent all bills from the chamber of deputies, and returned with observations or amendments within ten days; but this term may be prolonged for fifteen days more. If no report is then made, the deputies may pass the law and send it up to the king. The education of the people is undertaken at the public cost; offices of state and positions of distinction are open to all.

The supreme court of justice is called as in ancient Athens the Areopagus. Besides this, there are four courts of appeal, one in each "monarchy," sixteen courts of first instance in the chief towns, the court of assizes, and one hundred and seventy-five justice-of-the-peace courts. There is a complete code of laws which is substantially the Roman law and the administration of justice is almost identical with the French system. Capital punishment is imposed for certain offences, the guillotine being the instrument of execution. The Greek judges enjoy a well-earned reputation for independence and strict uprightness.

GREEN CLOTH. An English board or court of justice, composed of the lord steward and inferior officers, and held in the royal household; so named from the cloth upon the board at which it was held.

GREEN SILVER. A feudal custom in the manor of Writtel, in Essex, where every tenant whose front door opens to Greenbury shall pay a half-penny yearly to the lord, by the name of "green silver" or "rent." Cowel.

GREEN WAX. In English Law. The name of the estreats of fines, issues, and amercements in the exchequer, delivered to the sheriff under the seal of that court, which is made with green wax.

GREENBACK. This term is the ordinary and almost exclusive name popularly applied to some United States Treasury issues, and is not applied to any other species of money; 23 Ind. 21; but this term alone is not a proper denomination for these notes; 61 Ala. 282. See LEGAL TENDER.

GREENHEW. In Forest Law. The same as Vert. (*q. v.*). *Termes de la Ley.*

GREFFIERS. In French Law. Registrars, or clerks of the courts. They are officials attached to the courts to assist the judges in keeping the minutes, writing out judgments, orders, and other decisions given by the tribunals, and deliver copies thereof to the applicants.

GREGORIAN CODE. See CODE.

GREGORIAN EPOCH. The time from which the Gregorian calendar or computation dates; i. e. from the year 1582.

GREMIO. In Spanish Law. The union of merchants, artisans, laborers, or other persons who follow the same pursuits and are governed by the same regulations. The word *guild*, in English, has nearly the same signification.

GREMIUM (Lat.). Bosom. Ainsworth, Dict. *De gremio mittere*, to send from their bosom; used of one sent by an ecclesiastical corporation or body. *A latere mittere*, to send from his side, or one sent by an individual: as, a legate sent by the pope. Du Cange. In English law, an inheritance is said to be *in gremio legis*, in the bosom or under the protection of the law, when it is in abeyance. See IN NUBIBUS.

GRENVILLE ACT. The statute 10 Geo. III. c. 16, by which the jurisdiction over parliamentary election petitions was transferred from the whole house of commons to select committees. Repealed by 9 Geo. IV. c. 22.

GRESSUME (variously spelled *Gressame*, *Gressum*, *Grossome;* Scotch, *grassum*).

In Old English Law. A fine due from a copyholder on the death of his lord. Plowd. fol. 271, 285; 1 Stra. 654. Cowel derives it from *gersum*.

In Scotland. *Grassum* is a fine paid for the making or renewing of a lease. Paterson.

GRETNA GREEN. A farmsteading near the village of Springfield, Dumfriesshire, Scotland, eight miles northwest of Carlisle. Cent. Dict. The name was afterward applied to the village which became notorious for the celebration of irregular marriages. By the law of Scotland nothing was required to constitute a marriage but the mutual declaration of the parties in the presence of witnesses—a ceremony which could be performed instantly, and it was immaterial whether or not the parties were minors. These conditions afforded an easy method of evading the Marriage Act, 26 Geo. II. c. 33, which required the publication of banns or a license. By act 19 & 20 Vict. c. 96, § 1, no irregular marriage in Scotland is now valid unless one of the parties had at the date thereof his or her usual place of residence there, or had lived in Scotland for twenty-one days next preceding such marriage.

GREVA. In old records. The seashore, sand, or beach. 2 Mon. Angl. 625; Cowel.

GREVE. A word of power or authority. Cowel.

GRIEVED. Aggrieved. 3 East 22.

GRITH. Peace; protection. *Termes de la Ley.*

GRITHBRECH (Sax. *grith*, peace, and *brych*, breaking). Breach of the king's peace, as opposed to *frithbrech*, a breach of the nation's peace with other nations. Leges Hen. I. c. 36; Chart. Willielm, Conq. Eccles. S. Pauli in Hist. ejusd. fol. 90.

GRITHSTOLE. A place of sanctuary. Cowel.

GROCER. In Old English Law. A merchant or trader who engrossed all vendible merchandise; an engrosser (*q. v.*). St. 37 Edw. III. c. 5.

GROCERIES. Articles of provision; the wares of a grocer; general supplies for table and household use.

Shovels, pails, and buckets have been held not to be groceries, although usually kept in a country grocery shop; 113 Mass. 335. It is a question of fact whether wines and liquors are groceries; 12 Mich. 135. A grocery has been held to be an "offensive trade or calling" within a prohibition of use of a dwelling-house; 101 Mass. 531. Groceries kept as part of the stock, by a merchant, are not "provisions found on hand for family use," within the meaning of an exemption law; 73 Mo. 575. See PROVISIONS.

GROOM OF THE STOLE. In England an officer of the royal household who has charge of the king's wardrobe.

GROOM PORTER. An officer belonging to the royal household. Jacob.

GRONNA. A bog; a deep hollow or pit. Cowel. A deep pit or place where turfs are dug for fuel. Hoved. 438.

GROSS. Absolute, entire. A thing in gross exists in its own right, and not as an appendage to another thing. See IN GROSS.

GROSS ADVENTURE. In Maritime Law. A maritime or bottomry loan. It is so called because the lender exposes his money to the perils of the sea, and contributes to the gross or general average. Pothier; Pardessus, Dr. Com.

GROSS AVERAGE. In Maritime Law. That kind of average which falls on the ship, cargo, and freight, and is distinguished from particular average. See AVERAGE.

GROSS NEGLIGENCE. The omission of that care which even inattentive and thoughtless men never fail to take of their own property. Jones, Bailm.; 23 Conn. 437; 3 Hurlst. & C. 337.

Such as evidences wilfulness; such a gross want of care and regard for the right of others as to justify the presumption of wilfulness or wantonness; 2 Thomp. Neg. 1264, § 52; such as implies a disregard of consequences or a willingness to inflict injury; Deering, Neg. § 29; 139 Ill. 596.

Lata culpa, or, as the Roman lawyers most accurately called it, *dolo proxima*, is, in practice, considered as equivalent to *dolus*, or fraud itself. It must not be confounded, however, with fraud; for it may exist consistently with good faith and honesty of intention, according to common-law authorities; 32 Vt. 652; Shearm. & Red. Neg. § 3; Webb, Poll. Torts 538, n.

The distinction between degrees of negligence is not very sharply drawn in the later cases. See BAILMENT; NEGLIGENCE.

The intentional failure to perform a manifest duty, in reckless disregard of the consequences as affecting the life or property of another; a thoughtless disregard of consequences without the exertion of any effort to avoid them. 21 S. W. Rep. (Tex.) 775; 87 Mich. 400. It has been held to have no legal significance which imports other than a want of due care; 13 So. Rep. (Ala.) 80.

GROSS WEIGHT. The total weight of goods or merchandise, with the chests, bags, and the like, from which are to be deducted tare and tret.

GROSSE AVANTURE (Fr.). **In French Marine Law.** The contract of bottomry. Ord. Mar. liv. 3, tit. 5.

GROSSE BOIS. Timber. Cowel.

GROSSEMENT (L. Fr.). Largely; greatly. *Grossement encinte* or *ensient.* Big with child: in the last stage of pregnancy. Plowd. 76.

GROSSOME. In Old English Law. A fine paid for a lease. Corrupted from *gersum*. Plowd. fol. 270, 285; Cowel.

GROUND. Land; soil; earth. See LAND.

It may include an improved town lot; 76 Pa. 378.

GROUND ANNUAL. In Scotch Law. An annual rent of two kinds; *first*, the feu-duties payable to the lords of erection and their successors; *second*, the rents reserved for building-lots in a city, where *sub-feus* are prohibited. This rent is in the nature of a perpetual annuity. Bell, Dict.; Erskine, Inst. 11. 3. 52.

GROUND LANDLORD. The grantor of an estate on which a ground-rent is reserved.

GROUND OF ACTION. The foundation, basis, or data, upon which a cause of action rests. See 24 Com. 33.

GROUND RENT. A rent reserved to himself and his heirs, by the grantor of land in fee-simple, out of the land conveyed. See 9 Watts 262; 8 W. & S. 185; 2 Am. L. Reg. 577.

In Pennsylvania, it is real estate, and in cases of intestacy goes to the heir; 14 Pa. 444. See 147 id. 319. The interest of the owner of the rent is an estate altogether distinct and of a very different nature from that which the owner of the land has in the land itself. Each is the owner of a fee-simple estate. The one has an estate of inheritance in the rent, and the other has an estate of inheritance in the land out of which the rent issues. The one is an incorporeal inheritance in fee, and the other is a corporeal inheritance in fee; Irwin *v.* Bank of United States, 1 Pa. 349, per Kennedy, J.; 47 Md. 300. So, the owner of the rent is not liable for any part of the taxes assessed upon the owner of the land out of which the rent issues; 1 Whart. 72; 4 Watts 98. Being real estate, it is bound by a judgment, and may be mortgaged like other real estate. It is a rent-service; 1 Whart. 337.

A ground-rent, being a rent-service, is, of course, subject to all the incidents of such a rent. Thus, it is distrainable of *common right*, that is, by the common law; Co. Litt. 142 *a*; 9 Watts 262. So, also, it may be apportioned; 1 Whart. 337; 58 Md. 323; 56 *id.* 51. And this sometimes takes place by operation of law, as when the owner of the rent purchases part of the land; in which case the rent is apportioned, and extinguished *pro tanto;* Littleton 222. And the reason of the extinguishment is that a *rent-service* is given as a return for the possession of the land. Thus, upon the enjoyment of the lands depends the obligation to pay the rent; and if the owner of the rent purchases part of the land, the tenant, no longer enjoying that portion, is not liable to pay rent for it, and so much of the rent as issued out of that portion is, consequently, extinguished. See 2 Bla. Com. 41; 1 Whart. 235, 352; 3 *id.* 197, 365.

At law, the legal ownership of these two estates—that in the rent and that in the land out of which it issues—can coexist only while they are held by different persons or in different rights; for the moment they unite in one person in the same right, the rent is merged and extinguished; 2 Binn. 142; 6 Whart. 382; 5 Watts 457. But if the one estate or intestate be legal and the other equitable, there is no merger; 6 Whart. 283. In equity, however, this doctrine of merger is subject to very great qualification. A merger is not favored in equity; and the doctrine there is that although in some cases, where the legal estates unite in the same person in the same right, a merger will take place *against* the intention of the party whose interests are united (see 3 Whart. 421, and cases there cited), yet, as a general rule, the *intention*, actual or presumed, of such party will govern; and where no intention is expressed, if it appears most for his advantage that a merger should not take place, such will be presumed to have been his intention; and that it is only in cases where it is perfectly indifferent to the party thus interested that, in equity, a merger occurs; 5 Watts 457; 8 *id.* 146; 4 Whart. 421; 6 *id.* 283; 1 W. & S. 487.

A ground-rent being a freehold estate, created by deed and perpetual by the terms of its creation, no mere lapse of time without demand of payment raises, at common law, a presumption that the estate has been released; 1 Whart. 229. But this is otherwise in Pennsylvania now, by act of April 27, 1855, sec. 7, P. L. 369, whereby a presumption of a release or extinguishment is created where no payment, claim, or demand is made for the rent, nor any declaration or acknowledgment of its existence made by the owner of the premises subject to the rent, for the period of twenty-one years. This applies to the estate in the rent, and comprehends the future payments. And this act makes no exception in behalf of persons under disability when the title accrues, nor of persons taking as heirs at law or distributees; where a life tenant in ground rent released the same absolutely, as against the remainderman the limitation commenced to run from the date on which the first payment thereafter became due and unpaid, rather than at the death of the life tenant; 152 Pa. 258. It has been held that this act, affecting the remedy merely, is not unconstitutional as impairing the obligation of a contract; Biddle *v.* Hooven, 120 Pa. 221. But this case is criticised and the Pennsylvania cases reviewed in 34 Am. L. Reg. N. S. 557. But independently of this act of assembly, *arrearages* of rent which had fallen due twenty years before commencement of suit might be presumed to have been paid; 1 Whart. 229. These *arrearages* are a lien upon the land out of which the rent issues; but, as a general rule, the lien is discharged by a judicial sale of the land, and attaches to the fund raised by the sale. See 2 Binn. 146; 3 W. & S. 9; 4 Whart. 516; 2 Watts 378; 1 Pa. 349.

Ground rents in Pennsylvania were formerly made irredeemable, usually after the lapse of a certain period after their creation. But now the creation of such is forbidden by statute. Act of 22 April, 1850. But this does not prohibit the reservation of ground-rents redeemable only on the death of a person in whom a life interest in the rents is vested; 11 W. N. Cas. (Pa.) 11. The Act of April 15, 1869, providing for the extinguishment of irredeemable ground-rents, theretofore created, by legal proceedings instituted by the owner of the land, without the consent of the owner of the ground-rent, was declared unconstitutional; 67 Pa. 479.

As ground-rent deeds are usually drawn, the owner of the rent has three remedies for the recovery of the arrearages, viz., by action (of debt or covenant; but debt is now seldom employed), distress, and (for want of sufficient distress) the right to re-enter and hold the land as of the grantor's former estate. See 2 Am. L. Reg. 577; 3 *id.* 65; Cadw. Gr. Rents; Mitch. R. P.

GROUNDAGE. In Maritime Law. The consideration paid for standing a ship in a port. Jacob, Law Dict.

GROWING CROPS. Growing crops of grain, potatoes, turnips, and all annual crops raised by the cultivation of man, are in certain cases personal chattels, and in others, part of the realty. A crop is to be considered as growing from the time the seed is put in the ground, at which time the seed is no longer a chattel, but becomes part of the realty, and passes with a sale of it; 69 Ala. 435. If planted by the owner of the land, they are a part of the realty, but may by sale become personal chattels, if they are fit for harvest, and the sale contemplates their being cut and carried off, and not a right in the vendee to enter and cultivate. So even with trees; 4 Metc. Mass. 580; 9 B. & C. 561; 7 N. H. 522; 11 Co. 50. The distinction has been made that growing crops of grain and annual productions raised by cultivation and the industry of man are personal chattels; while trees, fruit, or grass and other natural products of the earth are parcel of the land; 1 Denio 550. But if the owner in fee conveys land before the crop is severed, the crop passes with the land as appertaining to it; 41 Ill. 466; 33 Pa. 254; 9 Rob. (La.) 256; and the same rule applies to foreclosure sales; 8 Wend. 584; 29 Pa. 68; 42 N. Y. 150. See 20 Am. L. Reg. 615, n. But before the foreclosure sale is confirmed, the purchaser has no title, with right to possession in the crops growing on the land at the time of sale, that will entitle him to maintain replevin therefor after they have been severed by the person in possession; 46 Wis. 301. Though growing crops, unless reserved, pass under a conveyance of the land, they are subject to levy and sale the same as other personal property; 47 Minn. 525. If a tenant, who holds for a certain time, plant annual crops, or even trees in a nursery for the purposes of transplantation and sale, they are personal chattels when fit for harvest; 1 Metc. Mass. 27, 313; 4 Taunt. 316, per Heath, J. If planted by a tenant for an uncertain period, they are regarded, whether mature or not, in many respects as personal property, but liable to become part of the realty if the tenant voluntarily abandons or forfeits possession of the premises; 5 Co. 116 *a*; 5 Halst. 128; Co. Litt. 55; 2 Johns 418, 421, n. See 2 Dana 206; 2 Rawle 161; 1 Washb. R. P. 3.

See as to validity and effect of mortgages on crops planted and unplanted, MORTGAGE.

Between the lessor of lands and his lessee on shares, growing crops are personal property, and they may be sold by parol as against a subsequent grantee, especially where the latter has notice of such sale; 39 Ill. App. 404. The grantor of farm lands may reserve the growing crops by oral agreement; 36 N. E. Rep. (Ind.) 914.

The measure of damages for the destruction of a crop planted, but not yet up, is the rental value of the land and the cost of the seed and labor; but when the crop is somewhat matured, so that the product can be fairly determined, the value thereof when destroyed is the measure of damages; 43 Ill. App. 108. See 56 Ark. 612; 57 *id.* 513. Where a crop is lost through the wrongful act of another, the measure of damages is the market value of the crop less the cost of producing, harvesting, and marketing it; 8 Wash. 337; 4 Tex. Civ. App. 550. See 25 S. W. Rep. (Tex.) 1023.

GROWTH HALFPENNY. A rate paid in some places for the tithe of every fat beast, ox, or other unfruitful cattle. Clayt. 92.

GRUARII. The principal officers of a forest.

GUADIA. A pledge; a custom. Spel. Gloss; Calv. Lex.

GUARANTEE. He to whom a guaranty is made. Also, to make oneself responsible for the obligation of another.

The guarantee is entitled to receive payment, in the first place, from the debtor, and, secondly, from the guarantor. He must be careful not to give time, beyond that stipulated in the original agreement, to the debtor, without the consent of the guarantor. The guarantee should, at the instance of the guarantor, bring an action against the principal for the recovery of the debt; 2 Johns. Ch. 554; 17 Johns. 384; 8 S. & R. 116; 10 *id.* 33; 2 Bro. Ch. 579, 582; 2 Ves. 542. But the mere omission of the guarantee to sue the principal debtor will not, in general, discharge the guarantor; 8 S. & R. 112; 6 Binn. 292. See GUARANTEE.

GUARANTOR. He who makes a guaranty.

GUARANTY. An undertaking to answer for another's liability, and collateral thereto. A collateral undertaking to pay the debt of another in case he does not pay it. Shaw, C. J., 24 Pick. 252.

A provision to answer for the payment

of some debt, or the performance of some duty in the case of the failure of some person who, in the first instance, is liable for such payment or performance; 60 N. Y. 438; Bayl. Sur. & Guar. 2.

A promise to answer for the debt, default, or miscarriage of another person; 94 Cal. 96. See 72 Ill. 13.

It is distinguished from suretyship in being a secondary, while that is a primary, obligation; or, as sometimes defined, guaranty is an undertaking that the debtor shall pay; suretyship, that the debt shall be paid. Or again, a contract of suretyship creates a liability for the performance of the act in question at the proper time, while the contract of guaranty creates a liability for the ability of the debtor to perform the act; Bayl. Sur. & Guar. 3. Guaranty is an engagement to pay on a debtor's insolvency, if due diligence be used to obtain payment; 52 Pa. 440.

The undertaking is essentially in the alternative. A guarantor cannot be sued as a promisor, as the surety may; his contract must be specially set forth. A guarantor warrants the solvency of the promisor, which an indorser does not; 8 Pick. 423.

The distinction between suretyship and guaranty has been expressed as follows: A surety is usually bound with his principal by the same instrument, executed at the same time, and on the same consideration. He is an original promisor and debtor from the beginning, and is held, ordinarily, to know every default of his principal. Usually, he will not be discharged, either by the mere indulgence of the creditor to the principal, or by want of notice of the default of the principal, no matter how much he may be injured thereby. On the other hand, the contract of the guarantor is his own separate undertaking, in which the principal does not join. It is usually entered into before or after that of the principal, and is often supported on a separate consideration from that supporting the contract of the principal. The original contract of his principal is not his contract, and he is not bound to take notice of its non-performance. He is often discharged by the mere indulgence of the creditor to the principal, and is usually not liable unless notified of the default of the principal. Brandt, Sur. & Guar. § 1. See also, 52 Pa. 438, 525; 87 Ind. 560; 63 Ala. 419; 135 N. Y. 423. A written guaranty which fails to show on its face the person to whom the guaranty is made is void; 17 N. Y. Supp. 509; and where a contract contains no guaranty, parol evidence of one is inadmissible; 146 U. S. 42.

At common law, a guaranty could be made by parol; but by the Statute of Frauds, 29 Car. II. c. 3, re-enacted almost in terms in the several states, it is provided that "No action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, . . . unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized."

While, under this statute "no action shall be brought" on a contract not in writing, etc., yet such a contract may be enforced by a court against an attorney, by summary proceedings; 1 Cr. & J. 374.

"Any special promise" in the act does not apply to promises implied in law; Brandt, Sur. & Guar. § 53.

The following classes of promises have been held not within the statute, and valid though made by parol.

First, where there is a liability pre-existent to the new promise.

1. Where the principal debtor is discharged by the new promise being made; 3 Bingh. N. C. 889; 28 Vt. 135; 8 Gray 233; 1 Q. B. 933; 8 Johns. 376; 13 Md. 131; Bro. Stat. Fr. §§ 166, 193; and an entry of such discharge in the creditor's books is sufficient proof; 3 Hill, S. C. 41. This may be done by agreement to that effect; 1 Allen 405; by novation, by substitution, or by discharge under final process; 1 B. & Ald. 297; 18 S. W. Rep. (Tex.) 646; but mere forbearance, or an agreement to forbear pressing the claim, is not enough; 1 Sm. L. Cas. 387; 6 Vt. 666.

2. Where the principal obligation is void or not enforceable when the new promise is made, and this is contemplated by the parties. But if not so contemplated, then the new promise is void; Burge, Surety 10; 1 Burr. 373. But see, on this point, 17 Md. 283; 13 Johns. 175; 6 Ga. 14.

3. So where the promise does not refer to the particular debt, or where this is unascertained; 1 Wils. 305.

In these three classes the principal obligation ceases to exist after the new promise is made.

4. Where the promisor undertakes for his own debt. But the mere fact that he is indebted will not suffice, unless his promise refers to that debt; nor is it sufficient if he subsequently becomes indebted on his own account, if not indebted when he promises, or if it is then contingent; 4 Hill, N. Y. 211. See 82 Tex. 255. The provision of the statute does not apply whenever the main purpose of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, although it may be in form a promise to pay the debt of another; 141 U. S. 479. So, if the vendee of land promise to pay the purchase-money on a debt due by the vendor; 82 Tex. 255.

5. Where the new promise is in consideration of property placed by the debtor in the promisor's hands; 1 Gray 391; 41 Me. 559; 23 Cal. 187; 72 Ill. 442. And where the new promise is made in a transaction which is in substance a sale to the promisor; Brandt, Sur. & Guar. § 65.

6. Where the promise does not relate to the promisor's property, but to that of the debtor in the hands of the promisor.

7. Where the promise is made to the

debtor, not the creditor; because this is not the debt of "another" than the promisee; 1 Gray 76; 11 Ad. & E. 438.

8. Where the creditor surrenders a lien against the debtor or on his property, which the promisor acquires or is benefited by; Fell, Guar. c. 2; Brandt, Sur. & Guar. §§ 63, 64; 7 Johns. 463; 2 B. & Ald. 613; 21 N. Y. 442; but not so where the surrender of the lien does not benefit the promisor; 3 Metc. Mass. 396; 21 N. Y. 412; 3 Esp. 86.

In the five last classes, the principal debt may still subsist concurrently with the new promise, and the creditor will have a double remedy; but the fulfilment of the new promise will discharge the principal debt, because he can have but one satisfaction. The repeated dicta, that if the principal debt subsists, the promise is collateral and within the statute, are not sustainable; 30 Vt. 641. But the general doctrine now is that the transaction must amount to a purchase, the engagement for the debt being the consideration therefor, in whole or in part; 1 Gray 391; 5 Cush. 488.

Where one owes a debt to another, and promises to pay his debt to a creditor of such other party, the promise is not within the statute: 5 Greenl. 81; 3 B. & C. 842.

Second, if the new promise is for a liability then first incurred, it is original, if exclusive credit is given to the promisor; 5 Allen 370; 13 Gray 613; 28 Conn. 544; Browne, Stat. Fr. § 195. Whether exclusive credit is so given is a question of fact for the jury; 7 Gill 7. Merely charging the debtor on a book-account is not conclusive.

Whether promises merely to indemnify come within the statute is not wholly settled; Browne, Stat. Fr. § 158; Brandt, Sur. & Guar. §§ 59, 61. In many cases they are held to be original promises, and not within the statute; 15 Johns. 425; 4 Wend. 657. But few of the cases, however, have been decided solely on this ground, most of them falling within the classes of original promises before specified. On principle, such contracts seem within the statute if there is a liability on the part of any third person to the promisee. If not, these promises would be original under class seven, above. Where the indemnity is against the promisor's own default, he is already liable without his promise to indemnify; and to make the promise collateral would make the statute a covert fraud; 10 Ad. & E. 453; 1 Gray 391; 10 Johns. 242; 1 Ga. 294; 5 B. Monr. 382; 20 Vt. 205; 10 N. H. 175; 1 Conn. 519; 5 Me. 504. The weight of American authority is said to be in favor of applying the statute to cases of indemnity; Brandt, Sur. & Guar. § 59, n. When the promise to indemnify is in fact a promise to pay the debt of another it is within the statute. See 21 N. Y. 412. A promise to indemnify another against loss in becoming surety on a replevin bond is within the statute; 12 Ohio St. 219. So on a bond for stay of execution; 111 Pa. 471. But a promise to indemnify one if he will become bail in a criminal case has been held not within the statute; 4 B. & S. 414; 119 Ind. 85.

Third, guaranties may be given for liabilities thereafter to be incurred, and will attach when the liability actually accrues. In this class the promise will be original, and not within the statute, if credit is given to the promisor exclusively; 2 Term 80; 1 Cowp. 227. See 40 Ill. App. 275. But where the future obligation is contingent merely, the new promise is held not within the statute, on the ground that there is no principal liability when the collateral one is incurred; Browne, Stat. Fr. § 196. But this doctrine is questionable if the agreement distinctly contemplates the contingency; 1 Cra. C. C. 77; 5 Hill, N. Y. 483. An offer to guarantee must be accepted within a reasonable time; but no notice of acceptance is required if property has been delivered under the guaranty; 8 Gray 211; 2 Mich. 511; 54 Fed. Rep. 846; 104 U. S. 159.

"A contract of guaranty, like every other contract, can only be made by the mutual assent of the parties. If the guaranty is signed by the guarantor, at the request of the other party, or if the latter's agreement to accept is contemporaneous with the guaranty; or if the receipt from him of a valuable consideration, however small, is acknowledged in the guaranty, the mutual assent is proved, and the delivery of the guaranty to him or for his use completes the contract. But if the guaranty is signed by the guarantor, without any previous request of the other party, and in his absence, for no consideration moving between them, except future advances to be made to the principal debtor, the guaranty is in legal effect an offer or proposal on the part of the guarantor, needing an acceptance by the other party to complete the contract;" 115 U. S. 524. See 34 Am. L. Reg. & Rev. 257.

The agreement of a *del credere* agent to pay for goods sold by him is not within the statute; 23 Vt. 720; 14 N. Y. 267.

The form of the writing is not material; it may consist of one or more writings (provided they refer to each other on their face; 27 Mo. 388; 11 East 142; but see 14 How. 446); in such case it is enough if one be signed; 11 East 142. A minute of a vote of a corporation is sufficient; 14 Allen 407.

There is a conflict of authority as to whether the consideration need appear in the writing. It was finally settled in England that it must; 5 East 10; 4 B. & Ald. 595; but this is now changed by statute 19 & 20 Vict. The cases are reviewed in Brandt, Sur. & Guar. § 82. A seal imports a consideration; *id.* As to the signature of the party to be charged, a seal alone is generally held sufficient; Stra. 764; so is a mark; 49 Barb. 62; 2 M. & S. 286; and a signature by the initials only; 1 Den. 471; 9 Allen 474; and a signature on a telegram: 35 Barb. 463. The signature need not be at the foot of the writing; 2 M. & W. 653.

Guaranty may be made for the tort as well as the contract of another, and then comes under the term miscarriage in the

statute; 2 B. & Ald. 613; 2 Day 457; 1 Wils. 305; 9 Cow. 154; 14 Pick. 174.

All guaranties need a consideration to support them, none being presumed as in case of promissory notes. A guaranty of the payment of a negotiable promissory note, written by a third person upon a note before its delivery, need express no consideration, even where the law requires the consideration of the guaranty to be expressed in writing; but the consideration which the note upon its face implies to have passed between the original parties is sufficient; 149 U. S. 298. Forbearance to sue is good consideration; Cro. Jac. 683; Browne, Stat. Fr. § 190; 4 Johns. 257; 6 Conn. 81; 27 L. J. Exch. 130; 21 Fed. Rep. 836; 77 Ind. 1. Where the guaranty is contemporaneous with the principal obligation, it shares the consideration of the latter; 8 Johns. 29; 1 Paine 580; 2 Pet. 170; 3 Mich. 396; 36 N. H. 73.

A guaranty may be for a single act, or may be continuous. The cases are conflicting, as the question is purely one of the intention of the particular contract; Brandt, Sur. & Guar. 156. The tendency in this country is said to be against construing guarantees as continuing, unless the intention of the parties is so clear as not to admit of a reasonable doubt; Bayl. Sur. & Guar. 7, citing 33 Ohio St. 177; s. c. 30 Am. R. 572; Lent *v.* Padleford, 2 Am. Lead. Cas. 141; 24 Wend. 82; 145 Ill. 488. If the object be to give a standing credit to be used from time to time, either indefinitely or for a fixed period, the liability is continuing; 40 Ill. App. 383; 3 Ind. App. 1; but if no time is fixed and nothing indicates the continuance of the obligation, the presumption is in favor of a limited liability as to time; Bayl. Sur. & Guar. 7; 62 Barb. 351. A guaranty of any bills of account for goods sold another to a certain amount is a continuing guaranty; 40 Ill. App. 383. A sealed continuing guaranty is revoked by the death of the guarantor; 22 W.N.C. (Pa.) 457.

The authorities are not agreed as to the negotiability of a guaranty. It is held that a guaranty which is a separate and distinct instrument is not negotiable separately; 3 W. & S. 272; 4 Chandl. 151; 14 Vt. 233; 31 Me. 536; 31 Barb. 92; 21 Pick. 140. The right of the acceptor of a bill, to the benefit of a guaranty given to him, is not transferable to a holder of the bill, unless it was given for the purpose of being exhibited to other parties; 3 Ch. App. 756. But if a guaranty is on a negotiable note, it is negotiable with the note; and if the note is to bearer, the guaranty has been held to be negotiable in itself; 24 Wend. 456; 6 Humphr. 261. But an equitable interest passes by transfer, and the assignee may sue in the name of the assignor; 12 S. & R. 100; 20 Vt. 506. It has been held that no suit can be maintained upon a guaranty except by the person with whom it was made; Bayl. Sur. & Guar. 14; 8 Watts 361; but it has also been held that a guaranty of a note may be sued on by any person who advances money on it, but that it is not negotiable unless made upon the note the payment of which it guarantees; Bayl. Sur. & Guar. 15; 26 Wend. 425.

It is held that a guaranty is not enforceable by others than those to whom it is directed; 3 McLean 279; 1 Gray 317; 6 Watts 182; 10 Ala. N. S. 793; although they advance goods thereon; 4 Cra. 224.

In one case it was held that the guarantor was not bound where the guaranty was addressed to two and acted on by one of them only; 3 Tex. 199. It was held, also, that the guaranty was not enforceable by the survivor of two to whom it was addressed, for causes occurring since the decease of the other; 7 Term 254.

In the case of promissory notes, a distinction has sometimes been made between a guaranty of payment and a guaranty of collectibility; the latter requiring that the holder shall diligently prosecute the principal debtor without avail; 4 Wis. 190; 25 Conn. 576; 6 Barb. 547; 26 Me. 358; 4 Conn. 527; 48 Minn. 207.

It has in some cases been held that an indorsement in blank on a promissory note by a stranger to the note was *prima facie* a guaranty; 37 Ill. App. 616. A second acceptance on a bill of exchange may amount to a guaranty; 2 Camp. 447.

A guarantor is discharged by a material alteration in the contract without his consent. Brandt, Sur. & Guar. § 378; 137 N. Y. 307; 85 Ia. 617. Modification of a contract made by the contractor and the owner will not release the guarantor, if they are such as are permitted by the terms of the contract; 155 Pa. 36. See SURETYSHIP.

The guarantor may also be discharged by the neglect of the creditor in pursuing the principal debtor. The same strictness as to demand and notice is not necessary to charge a guarantor as is required to charge an indorser; but in the case of a guarantied note the demand on the maker must be made in a reasonable time, and if he is solvent at the time of the maturity of the note, and remains so for such reasonable time afterwards, the guarantor does not become liable for his subsequent insolvency; 2 H. Bla. 612; 18 Pick. 534. Notice of non-payment must also be given to the guarantor; 2 Ohio 430; but where the name of the guarantor of a promissory note does not appear on the note, such notice is not necessary unless damage is sustained thereby, and in such case the guarantor is discharged only to the extent of such damage; 12 Pet. 497. One who guarantees that another will pay promptly for goods to be purchased is not liable where the purchaser becomes insolvent after the guaranty is given, and the seller gives the guarantor no notice of the purchaser's failure to pay; 145 Ill. 488. A presentment for payment is now decided not to be necessary in order to charge one who guarantees the due payment of a bill or note; 5 M. & G. 559. It is not necessary that an action should be brought against the principal debtor; 7 Pet. 113. See, also, 2 Watts 128; 11 Wend. 629

From the close connection of guaranty with suretyship, it is convenient to consider many of the principles common to both under the head of suretyship, which article see.

Where an innocent person acts upon a guaranty, the execution of which was procured by misrepresentation, the burden devolves upon the guarantor to show that he was free from negligence; the rule in such cases being the same with respect to the execution of guaranties as to that of negotiable instruments; 17 N. Y. Supp. 764.

Whether a guaranty is absolute or special is a question of fact; 37 Ill. App. 616.

Where the guaranty of a written contract is executed on the same paper, notice of acceptance by the person for whose benefit it is made, is unnecessary; 130 Ind. 194. See SURETYSHIP.

It is not within the general scope of a partner's authority to give guaranties in the name of the firm; Wood's Byles, Bills 48; 35 Minn. 229. And an officer of a company cannot bind it as surety or guarantor; 91 Pa. 367.

Consult Fell on Guaranty; Burge; Theobald; Putman on Suretyship; Browne; Reed, on Statute of Frauds; Addison; Chitty; Parsons; Story on Contracts. Brandt, Suretyship & Guaranty.

See, generally, SURETYSHIP.

GUARDAGE. The condition of one who is under a guardian. A state of wardship.

GUARDIAN. One who legally has the care and management of the person, or the estate, or both, of a child during his minority. Reeve, Dom. Rel. 311.

The term Guardian has been held to be synonymous with "next friend"; 30 Fla. 210.

A person having the control of the property of a minor without that of his person is known in the civil law, as well as in some of the states of the United States, by the name of curator. 1 Leç. él. du Droit Civ. Rom. 241. The guardian of the person is called "tutor." Tiff. Pers. & Dom. Rel. 295.

Guardian by chancery. This guardianship, although unknown at the common law, is well established in practice now. It grew up in the time of William III., and had its foundation in the royal prerogative of the king as *parens patriæ*. 2 Fonbl. Eq. 246.

This power the sovereign is presumed to have delegated to the chancellor; 10 Ves. 63; 2 P. Wms. 118; Reeve, Dom. Rel. 317. By virtue of it, the chancellor appoints a guardian where there is none, and exercises a superintending control over all guardians, however appointed, removing them for misconduct and appointing others in their stead; Co. Litt. 89; 1 P. Wms. 703; 1 Ves. 160; 2 Kent 227. But only, it is said, where the minor has property; Tiffany, Dom. Rel. 300; 2 Russ. 1, 20.

An infant with property becomes a ward of court (1) if an action is commenced in his name; (2) if an order is made on petition or summons for the appointment of a guardian; if an order is made in like manner for maintenance; (4) if a fund belonging to an infant is paid into court under the acts for the relief of trustees; Brett, L. Cas. Mod. Eq. 95. See Simpson, Inf. 2d. ed. 241; 1 Sharsw. Bla. Com. 462 note 8.

This power, in the United States, resides in courts of equity; 1 Johns. Ch. 99; 2 *id.* 439; 139 Ind. 268; but more commonly by statute in probate or surrogate courts; 2 Kent 226; 30 Miss. 458; 3 Bradf. Surr. 133.

Guardian by nature is the father, and, on his death, the mother; 2 Kent 220; 2 Root 320; 2 Wend. 158; 4 Mass. 675.

This guardianship, by the common law, extends only to the person, and the subject of it is the heir apparent, and not the other children,—not even the daughter when there are no sons; for they are but presumptive heirs only, since their right may be defeated by the birth of a son after their father's decease. But as all the children male and female equally inherit with us, this guardianship extends to all the children, as an inherent right in their parents during their minority; 2 Kent 220. In default of both parents, the natural guardian is the grandfather or grandmother, or next of kin; 114 U. S. 218; 60 N. W. Rep. (Ia.) 614.

The mother of a bastard child is its natural guardian; 6 Blackf. 357; 2 Mass. 109; but not by the common law; Reeve, Dom. Rel. 314, note. The power of a natural guardian over the person of his ward is perhaps better explained by reference to the relation of parent and child. See DOMICIL. It is well settled that the court of chancery may, for just cause, interpose and control the authority and discretion of the parent in the education and care of his child; 8 Paige, Ch. 47; 10 Ves. 52.

A guardian by nature is not entitled to the control of his ward's personal property; 34 Ala. N. S. 15, 565; 1 P. Wms. 285; 6 Conn. 474; 7 Wend. 354; 3 Pick. 213; 95 Ill. 519; unless by statute. See 19 Mo. 345; 110 U. S. 42. The father must support his ward; 2 Bradf. Surr. 341. But where his means are limited, the court will grant an allowance out of his child's estate; *id.*; 1 Bro. Ch. 387. But the mother, if guardian, is not obliged to support her child if it has sufficient estate of its own; nor is she entitled, like the father, when guardian, to its services, unless she is compelled to maintain it. But where the mother, who is guardian of her son, engages board for him, she incurs liability personally and not as guardian; 5 Ind. App. 204.

A father as guardian by nature has no right to the real or personal estate of his child; that right, whenever he has it, must be as a guardian in socage, or by some statutory provision; 15 Wend. 631.

Guardian by nurture. This guardianship belonged to the father, then to the mother.

The subject of it extended to the younger children, not the heirs apparent. In this

country it does not exist, or, rather, it is merged in the higher and more durable guardianship by nature, because all the children are heirs, and, therefore, the subject of that guardianship; 2 Kent 221; Reeve, Dom. Rel. 315; 6 Ga. 401. It extended to the person only; 6 Conn. 494; 40 L. & Eq. 109; and terminated at the age of fourteen; 1 Bla. Com. 461.

Guardian in socage. This guardianship arose when socage lands descended to an infant under fourteen years of age; at which period it ceased if another guardian was appointed, otherwise it continued; 5 Johns. 66.

The person entitled to it by common law was the next of kin, who could not by any possibility inherit the estate; 1 Bla. Com. 461. If the lands descended from a paternal relative, the mother or next of kin on her part was the guardian; if from a maternal relative the father, or next of kin on his part was; 2 Wend. 153. Although recognized in New York, it was never common in the United States; 5 Johns. 66; 7 *id.* 157; because, by the statutes of descents generally in force in this country, those who are next of kin may eventually inherit. Wherever it has been recognized, it has been in a form differing materially from its character at common law; 15 Wend. 631. Such guardian was also guardian of the person of his ward as well as his real estate; Co. Litt. 87, 89. Although it did not arise unless the infant was seized of lands held in socage, yet when it did arise it extended to hereditaments which do not lie in tenure and to the ward's personal estate. See Hargrave's note 67 to Co. Litt. This guardian could lease his ward's estate and maintain ejectment against a disseisor in his own name; 2 Bacon, Abr. 683. A guardian in socage cannot be removed from office, but the ward may supersede him at the age of fourteen, by a guardian of his own choice; Co. Litt. 89. In New York guardians in socage have neither common law nor statutory right to control the personal estate of the wards; 138 N. Y. 333.

There was anciently a guardianship by chivalry at the common law, where lands came to an infant by descent which were holden by knight-service; Co. Litt. 88, 11, note. That tenure being abolished by statute Car. II., the guardianship has ceased to exist in England, and has never had any existence in the United States.

Guardians by statute are of two kinds: *first*, those appointed by deed or will; *second*, those appointed by court in pursuance of some statute.

Testamentary guardians are appointed by the deed or last will of the father; 88 Ga. 722; and they supersede the claims of all other guardians, and have control of the person and the real and personal estate of the child till he arrives at full age.

This power of appointment was given to the father by the stat. 12 Car. II. c. 24, which has been pretty extensively adopted in this country, though in some states the appointment is limited to will. Under it, the father might thus dispose of his children, born and unborn; 7 Ves. 315; but not of his grandchildren; 5 Johns. 278. Nor does it matter whether the father is a minor or not; 2 Kent 225. It continues during the minority of a male ward, both as to his estate and person, notwithstanding his marriage; Reeve, Dom. Rel. 328; 2 Kent 224; 4 Johns. Ch. 380. There seems to be some doubt as to whether marriage would determine it over a female ward; 2 Kent 224. It is more reasonable that it should, inasmuch as the husband acquires in law a right to the control of his wife's person. But it would seem that a person marrying a testamentary guardian is not entitled to the money of the ward; 12 Ill. 431. In England and most of the United States a mother cannot appoint a testamentary guardian, nor can a putative father, nor a person *in loco parentis;* 1 Bla. Com. 462, n.; but by statute in Illinois she may make an appointment, if the father has not done so, provided she be not remarried after his death; 2 Kent 225. In New York, the consent of the mother is required to a testamentary appointment by the father; Schoul. Dom. Rel. 400. A man cannot by law appoint his son testamentary guardian for the children of the latter; 79 Ga. 397.

Guardians appointed by court. The greater number of guardians among us, by far, are those appointed by court, in conformity with statutes which regulate their powers and duties. In the absence of special provisions, their rights and duties are governed by the general law on the subject of guardian and ward.

Appointment of guardians. All guardians of infants specially appointed must be appointed by the infant's parent; or by the infant himself; or by a court of competent jurisdiction.

After the age of fourteen, the ward is entitled to choose a guardian, at common law, and generally by statute; Reeve, Dom. Rel. 320; 15 Ala. N. S. 687; 30 Miss. 458; 11 Jur. 114. His choice is subject, however, to the rejection of the court for good reason, when he is entitled to choose again; 14 Ga. 594. So guardianship by the sole appointment of the infant cannot now be said to exist. If the court appoint one before the age of choice, the infant may appear and choose one at that age, without any notice to the guardian appointed; 30 Miss. 458; 15 Ala. N. S. 687; 50 Ga. 332; 38 Conn. 304. But if none be chosen, then the old one acts. It seems that in Indiana the old one can be removed only for cause shown; in which case, of course, he is entitled to notice; 8 Ind. 307. See 96 Pa. 243. As to the method of appointment by the Ward see 1 Sharsw. Bla. Com. 462, note 8. A probate, surrogate, or county court has no power to appoint, unless the minor resides in the same county; 2 Bradf. Surr. 214; 7 Ga. 362; 9 Tex. 109; 16 Ala. N. S. 759; 27 Mo. 280; 45 Mo. App. 415; but where the ward is a nonresident, guardian-

ship is frequently recognized for the collection and preservation of his estate in the jurisdiction, and in such cases, the court where the property is situated will appoint a guardian, the existence of the property determining the jurisdiction ; 4 Allen 466; 27 E. L. & Eq. 249. Persons residing out of the jurisdiction will not usually be appointed guardians ; but this rule is not invariable, except in those states which require resident guardians by statute ; Schoul. Dom. Rel. 419.

It has been a subject of much doubt whether a married woman may be a guardian ; while there are cases which sustain their acts while acting as guardians, clear precedents for their actual appointment are wanting. See 2 Dougl. 433. It has been held, however, that a married woman may be co-guardian with a man, though her sole appointment is improper ; L. R. 1 Ch. 387. See 29 Miss. 195 ; 1 Paige 488 ; 19 Ind. 88. A single woman by her marriage loses her guardianship, it would seem ; but she may be reappointed ; 2 Kent 225, n. *b* ; 2 Dougl. 433. It seems probable that recent statutes relating to the rights of married women will modify these cases. Where there is a valid guardianship unrevoked, the appointment of another is void ; 23 Miss. 550.

The court has jurisdiction to interfere with and remove the guardian of a child who has no property, on proof of misconduct of the guardian towards the child or on proof that it is for the welfare of the child that the guardian should be removed ; [1893] 1 Ch. 143.

Powers and liabilities of guardians. The relation of a guardian to his ward is that of a trustee in equity, and bailee at law ; 2 Md. 111. It is a trust which he cannot assign ; 1 Pars. Contr. 116. He will not be allowed to reap any benefit from his ward's estate ; 2 Comyns 230, except for his legal compensation or commission ; but must account for all profits, which the ward may elect to take or charge interest on the capital used by him ; 17 Ala. N. S. 306 ; he cannot purchase lands belonging to him ; 54 Ark. 627. He can invest the money of his ward in real estate only by order of court ; 3 Ind. 320 ; 3 Yerg. 336 ; 21 Miss. 9 , 38 Me. 47 ; 56 N. W. Rep. (S. Dak.) 82 ; 56 Fed. Rep. 699. And he cannot convert real estate into personalty without a similar order ; Field, Inf. 109 ; 25 Mo. 548 ; 4 Jones 15 ; 16 B. Monr. 289 ; 1 Rawle 293 ; 1 Ohio 232 ; 1 Dutch. 121 ; 2 Kent 230. The law does not favor the conversion of the real estate of minors ; 14 Pa. 372 ; but if it be clearly to the interest of a minor that his real estate be sold and converted into money, the court will award an order of sale, notwithstanding that in the event of his death during minority, the proceeds would go to other parties than those to whom the land would have descended had it not been converted ; 6 Phila. 157. The rule is different in England ; there land converted into money, or money into land, retains its character of land or money, as the case may be, during the nonage of the minor ; 6 Ves. 6 ; 11 Ill. 278. They cannot bind their wards by contracts as to the proportion of the claims against the estate each shall bear ; 2 Colo. App. 306.

He may lease the land of his ward ; 1 Pars. Contr. 114 ; 2 Mass. 56 ; but if the lease extends beyond the minority of the ward, the latter may avoid it on coming of age ; 1 Johns. Ch. 561 ; 10 Yerg. 160 ; 2 Wils. 129 ; 5 Halst. 133. He may sell his ward's personalty without order of court ; 27 Ala. N. S. 198 ; 19 Mo. 345 ; 152 U. S. 499 ; and dispose of and manage it as he pleases ; 2 Pick. 243. He is required to put the money out at interest, or show that he was unable to do this ; 21 Miss. 9 ; 2 Wend. 424 ; 1 Pick. 527 ; 7 W. & S. 48 ; 13 E. L. & Eq. 140 ; 92 Mich. 275 ; 39 Ill. App. 382. And in the absence of evidence to the contrary, it will be presumed that a guardian might have kept funds of his ward at interest ; 39 Ill. App. 382. If he spends more than the interest and profits of the estate in the maintenance and education of the ward without permission of the court, he may be held liable for the principal thus consumed ; 1 S. & M. 545 ; 26 Miss. 393 ; 6 B. Monr. 1292 ; 2 Strobh. 40 ; 2 Sneed 520 ; 99 N. C. 118.

If he erects buildings on his ward's estate out of his own money, without order of court, he will not be allowed any compensation ; 11 Barb. 22 ; 11 Pa. 326 ; 23 Miss. 189 ; 17 Or. 115. He is not chargeable with the services of his wards if for their own benefit he requires them to work for him ; 12 Gratt. 608. A married woman guardian can convey the real estate of her ward without her husband joining ; 2 Dougl. 433. On marriage of a female minor in Mississippi, her husband, although a minor, is entitled to receive her estate from her guardian ; 3 Miss. 893. A guardian who deposited the moneys of his ward, as guardian, in a bank that was solvent, with his sureties was held not liable for loss upon the failure of the bank ; 144 Pa. 499.

Joint guardians may sue together on account of any joint transaction founded on their relation to the ward, even after the relation ceases ; 4 Pick. 283 ; see 101 Mass. 592 ; and where one guardian consents to his co-guardian's misapplication of funds, he is liable ; 11 S. & R. 66 ; 18 Pa. 175. Guardians like other trustees—executors and administrators excepted—may portion out the management of the property to suit their respective taste and qualifications, while neither parts irrevocably with the control of the whole ; and in such case each is chargeable with no more than what he received, unless unwarrantable negligence in superintending the others' acts can be shown ; 8 W. &. S. 143 ; and the discharge of one who has received no part of the estate relieves him from liability ; 33 Pa. 466.

Contracts between guardian and ward immediately after the latter has attained his majority are unfavorably regarded by the courts, and will be set aside where they redound to the profit of the guardian ; Bisp. Eq. 234 ; 4 S. & R. 114 ; 8 Md. 230 ; 28 Miss. 737 ; 14 B. Monr. 638 ; 12 Barb. 84 ;

10 Ala. N. S. 400. Neither is he allowed to purchase at the sale of his ward's property; 2 Jones, Eq. 285; 22 Barb. 167; 54 Ark. 627. But the better opinion is that such sale is not void, but voidable only; 2 Gray 141; 10 Humphr. 275. He is not allowed, without permission of court under some statute authority, to remove his ward's property out of the state; 24 Ala. N. S. 486; 45 La. Ann. 1062. He cannot release a debt due his ward; 1 J. J. Marsh. 441; 11 Mo. 649; although he may submit a claim to arbitration; 22 Miss. 118; 11 Me. 326; 6 Pick. 269; Dy. 216; but he cannot do so when he is interested adversely to them in the subject-matter of the arbitration; 86 Tex. 172. He may collect or compromise and release debts due to the ward, subject to the liability to be called to account for his acts; 152 U. S. 499. He cannot by his own contract bind the person or estate of his ward; 1 Pick. 314; nor avoid a beneficial contract made by his ward; 13 Mass. 237; Co. Litt. 17 *b*, 89 *a*. He becomes liable for negligence for failure to sue on a note due his ward's estate until the parties thereto are insolvent; 113 N. C. 102.

He is entitled to the care and custody of the person of his ward; 7 Humphr. 111; 4 Bradf. Surr. 221; even against parents in England; L. R. 8 Q. B. 153; but latterly, the wishes and best interests of the child will be consulted; 41 Ind. 92; 50 Mich. 261. If a female ward marry, the guardianship terminates both as to her person and property. It has been thought to continue over her property if she marries a minor. If a male ward marries, the guardianship continues as to his estate, though it has been held otherwise as to his person. If he marries a female minor, it is said that his guardian will also be entitled to her property; Reeve, Dom. Rel. 328; 2 Kent 226.

A guardian may change the residence of his ward from one county to another in the same state. But it seems that the new county may appoint another guardian; 4 Bradf. Surr. 221. Whether he has the right to remove his ward into a foreign jurisdiction has been a disputed question; Field, Inf. 114. In England, a guardian, being a parent, can change the child's domicil; 10 Cl. & F. 42; otherwise probably if the guardian be not a parent; Tiffany, Dom. Rel. 317. A natural guardian may change the domicil of his ward; 60 N. W. Rep. (Ia.) 614. So held of a paternal grandfather, as guardian; *id.* Guardians who are not natural guardians can change the municipal domicil of a ward, in the same state; Tiff. Dom. Rel. 317; but not to another state; 146 Pa. 585; 112 U. S. 472; but see 52 Barb. 294; 3 MacArth. 95. By the common law, his authority both over the person and property of his ward was strictly local; 1 Johns. Ch. 156; 1 N. H. 193; 12 Wheat. 169; 10 Miss. 532. And this is the view maintained in most of the states. See Story, Confl. Laws § 540. But see, on this question, 5 Paige, Ch. 596; 8 Ala. N. S. 789; 18 *id.* 34; 11 Ired. 36; 9 Md. 227; 3 Mer. 67; 5 Pick. 20; DOMICIL.

The court of chancery may interfere to prevent a guardian from attempting an important change in the religious impressions of a ward if upon examination such change seems dangerous and improper; 8 D. M. & G. 760. See Brett, L. Cas. Mod. Eq, 90 and note.

Nor can a guardian in one state maintain an action in another for any claim in which his ward is interested; 11 Ala. N. S. 343; 18 Miss. 529; see 31 Barb. 304; 36 Miss. 69; 30 Conn. 508; Story, Confl. Laws § 499; a guardian appointed in one state has no authority in another, except by comity, but the modern tendency is to support the authority of the guardian appointed in the domicil; 103 U. S. 6, 13; L. R. 2 Eq. 704. He cannot waive the rights of his ward,—not even by neglect or omission; 2 Vern. 368; 14 Ill. 417. No guardian, except a father, is bound to maintain his ward at his own expense. But it is his duty to maintain and educate the ward, in a suitable manner from the income of the ward's estate; 48 Me. 279; 101 Mich. 313. It is discretionary with a court whether to allow a father anything out of his child's estate for his education and maintenance; Reeve, Dom. Rel. 324; 6 Ind. 66.

Rights and liabilities of wards. A ward owes obedience to his guardian, which a court will aid the guardian in enforcing; 3 Atk. 721; 7 Kulp 66. The general rule is that the ward's contracts are voidable; 13 Mass. 237; yet there are some contracts so clearly prejudicial that they have been held absolutely void: such as contracts of suretyship; 4 Conn. 376.

A ward cannot marry without the consent of his or her guardian; Reeve, Dom. Rel. 327. And any one marrying or aiding in the marriage of a ward without such consent is guilty of contempt of court; 2 P. Wms. 562; 3 *id.* 116; but this whole subject is peculiar to the laws of England and has no application in the United States; Schoul. Dom. Rel. 517. Infants are liable for their torts in the same manner as persons of full age; 5 Hill, N. Y. 391; 3 Wend. 391; 9 N. H. 441. A ward is entitled to his own earnings; 1 Bouvier, Inst. 349. He attains his majority the day before the twenty-first anniversary of his birthday; 3 Harring. 557; 4 Dana 597; 1 Salk. 44. He can sue in court only by his guardian or *prochein ami;* 4 Bla. Com. 464. He could not bring an action at law against his guardian, but might file a bill in equity calling him to account; 2 Vern. 342; 3 P. Wms. 119; 3 Atk. 25; 1 Ves. 91; 92 Tenn. 459. Minors who are kept occupied by their tutor, to teach them habits of industry, cannot exact compensation of him; 45 La. Ann. 134. By the practice in chancery, he was allowed one year to examine the accounts of his guardian after coming of age; 7 Paige 46. See 73 Hun 532; 86 Wis. 99. The statute of limitations will not run against him during the guardianship; 34 Ala. N. S. 15. But see LIMITATIONS.

Sale of infant's lands. It is probable that the English court of chancery did not have the inherent original power to order

the sale of minors' lands; 2 Ves. 23; 1 Moll. 525. But, with the acquiescence of parliament, it claims and exercises that right for the purpose of maintaining and educating the ward. This power is not conceded as belonging to our courts of chancery in this country by virtue of their equity jurisdiction, nor to our probate courts as custodians of minors; 6 Hill 415; 2 Kent 229, n. *a*. It must be derived from some statute authority; 27 Ala. N. S. 198; 7 Johns. Ch. 154; 2 Pick. 243; Ambl. 419. There being no inherent authority in a guardian by virtue of his office to convey lands of his wards, a deed by him will not, in the absence of evidence of sharing his authority, convey any title; 69 Tex. 27.

It has been a much-disputed question whether an infant's lands can be sold by special act of the legislature. On the ground that the state is the supreme guardian of infants, this power of the legislature has been sustained where the object was the education and support of the infant; 29 Miss. 146; 5 Ill. 127; 20 Wend. 365; 8 Blackf. 10; 16 Mass. 326. See 103 U. S. 613; 56 Mo. 211. So it has been sustained where the sale was merely advantageous to his interest; 11 Gill & J. 87; 14 S. & R. 435. There has been some opposition on the ground that it is an encroachment on the judiciary; 4 N. H. 565, 575; 10 Yerg. 59. Such sales have been sustained where the object was to liquidate the ancestor's debts; 4 T. B. Monr. 95. This has been considered questionable in the extreme; 10 Am. Jur. 297; 10 Yerg. 59; *contra*, 16 Ill. 548. It has also been exercised in the case of idiots and lunatics, and sustained on the same reasons as in the case of infants; 7 Metc. 388.

A ward's title to land passes by his guardian's deed therefor, and not by the confirmation of the sale by the court; 97 Cal. 360.

By statute, we have also guardians for the insane and for spendthrifts; 2 Barb. 153; 8 Ala. N. S. 796; 18 Me. 384; 8 N. H. 539; 19 Pick. 506. This guardian is sometimes designated as the committee; Schoul. Dom. Rel. 389.

A guardian to a lunatic cannot be appointed till after a writ *de lunatico inquirendo;* 21 Ala. N. S. 504. An order removing a guardian is equivalent to an order to pay over the money in his hands to his successor; 9 Mo. 225, 227. In some states the court is authorized to revoke for non-residence of the guardian; *id.*

GUARDIAN AD LITEM. A guardian appointed to represent the ward in legal proceedings to which he is a party defendant.

The appointment of such is incident to the power of every court to try a case; 2 Cow. 430; and the power is then confined to the particular case at bar; Co. Litt. 89, n. 16. His duty is to manage the interest of the infant when sued. In criminal cases no guardian is appointed: the court acts as guardian; Reeve, Dom. Rel. 318; Field, Inf. 163. A guardian *ad litem* cannot be appointed till the infant has been brought before the court in some of the modes prescribed by law; 16 Ala. N. S. 509; 1 Swan 75; 2 B. Monr. 453. See 86 Ky. 198. Such guardian cannot waive service of process; 2 Ind. 74; and his powers are not limited to defence, objection, and opposition merely, but he may file a cross bill to protect the infant's interest involved in the litigation, and appeal from a decree dismissing the same; 45 Ill. App. 17. The writ and declaration in actions at law against infants are to be made out as in ordinary cases. In English practice where the defendant neglects to appear, or appears otherwise than by guardian, the plaintiff may apply for and obtain a summons calling on him to appear by guardian within a given time; otherwise the plaintiff may be at liberty to proceed as in other cases, having had a nominal guardian assigned to the infant; Macphers. Inf. 359. A like rule prevails in New York and other states; 6 Cow. 50; 12 N. H. 515; Schoul. Dom. Rel. 596.

The omission to appoint a guardian *ad litem* does not render the judgment void, but only voidable; 8 Metc. 196. See 39 Kan. 548. It will be presumed, where the chancellor received the answer of a person as guardian *ad litem*, that he was regularly appointed, although it does not appear of record; 19 Miss. 418; 98 Mich. 493. See 2 Swan 197. It is error to decree the sale of a decedent's property on the petition of the representatives, without the previous appointment of a guardian *ad litem* for the infant heirs; 16 Ala. N. S. 41. Where the general guardian petitions for a sale of his ward's lands, the court must appoint a guardian *ad litem;* 18 B. Monr. 779; 21 Ala. N. S. 363; 30 Miss. 258; 1 Ohio St. 544; but this is not necessary where the application is for leave to invest money of the ward in land; 79 Ga. 753.

It seems that a guardian *ad litem* can elect whether to come into hotch-pot; 15 Ala. 85. An appearance of the minor in court is not necessary for the appointment of a guardian to manage his interest in the suit; 11 E. L. & Eq. 156; 15 *id.* 317. If an infant comes of age pending the suit, he can assert his rights at once for himself, and if he does not he cannot generally complain of the acts of his guardian *ad litem;* 1 Metc. (Ky.) 602; 50 Me. 62; 48 Wisc. 89.

The appointment of a guardian *ad litem* is valid, although the infant has not been regularly served with process, but has only accepted service thereof; 97 N. C. 21. The rule that a next friend or guardian *ad litem* cannot by admissions or stipulation, surrender the rights of the infant, does not prevent a guardian *ad litem* or *prochein ami* from assenting to such arrangements as will facilitate the determination of the case in which the rights of the infant are involved; 134 U. S. 650. A married woman cannot be a guardian *ad litem* or next friend; 34 Ch. D. 435.

GUARDIAN, or WARDEN, OF THE CINQUE PORTS. A magistrate

who has the jurisdiction of the ports or havens which are called the "Cinque Ports" (*q. v.*). This office was first created in England in imitation of the Roman policy, to strengthen the sea-coasts against enemies, etc.

GUARDIAN OF THE SPIRITUALITIES. The person to whom the spiritual jurisdiction of any diocese is committed during the vacancy of the see.

GUARDIAN OF THE TEMPORALITIES. The person to whose custody a vacant see or abbey was committed by the crown.

GUARDIANSHIP. The power or protective authority given by law, and imposed on an individual who is free and in the enjoyment of his rights, over one whose weakness on account of his age renders him unable to protect himself.

GUARDIANUS. A guardian, warder, or keeper. Spel. Gloss.

GUARENTIGIO. In Spanish Law. A term applicable to the contract or writing by which courts of justice are empowered to execute and carry into effect a contract in the same manner as if it were decreed by the court after the usual legal formalities. This clause, though formerly inserted in contracts of sale, etc., stipulating the payment of a sum of money, is at present usually omitted, as courts of justice ordinarily compel the parties to execute all contracts made, by authentic acts, that is, acts passed before a notary, in the presence of two witnesses.

GUARNIMENTUM. In old European Law. A provision of necessary things. Spel. Gloss.

GUASTALD. One who had the custody of the royal mansions.

GUERPI, GUERPY (L. Fr.). Abandoned; left; deserted; Britt. c. 33.

GUERRA, GUERRE. War. Spel. Gloss.

GUERRILA PARTY (Span. *guerra*, war; *guerrilla*, a little war).

In Military Law. Self-constituted bodies of armed men, in times of war, who form no integral part of the organized army, do not stand on the regular pay-roll of the army, or are not paid at all, take up arms and lay them down at intervals, and carry on petty war, chiefly by raids, extortion, destruction, and massacre. Lieber, Guerr. Part. 18. See Halleck, Int. Law 386; Wools. Int. Law 299.

Partisan, free-corps, and guerrilla are terms resembling each other considerably in signification; and, indeed, partisan and guerrilla are frequently used in the same sense. See Halleck, Int. Law 386.

Partisan corps and free-corps both denote bodies detached from the main army; but the former term refers to the action of the troop, the latter to the composition. The partisan leader commands a corps whose object is to injure the enemy by action separate from that of his own main army; the partisan acts chiefly upon the enemy's lines of connection and communication, and outside of or beyond the lines of operation of his own army, in the rear and on the flanks of the enemy. But he is part and parcel of the army, and, as such, considered entitled to the privileges of the law of war so long as he does not transgress it. Free-corps, on the other hand, are troops not belonging to the regular army, consisting of volunteers generally raised by individuals authorized to do so by the government, used for petty war, and not incorporated with the *ordre de bataille*. The men composing these corps are entitled to the benefit of the laws of war, under the same limitations as the partisan corps.

Guerrilla-men, when captured in fair fight and open warfare, should be treated as the regular partisan is, until special crimes, such as murder, or the killing of prisoners, or the sacking of places, are proved upon them.

The law of war, however, would not extend a similar favor to small bodies of armed country people near the lines, whose very smallness shows that they must resort to occasional fighting and the occasional assuming of peaceful habits and brigandage; Lieber, Guerr. Part. 20.

GUEST. A traveller who stays at an inn or tavern with the consent of the keeper. Bacon, Abr. *Inns*, C 5; 8 Co. 32; Story, Bailm. § 477. It is not now deemed essential that a person should have come from a distance to constitute him a guest; 63 Wis. 6; 35 Conn. 183.

And if, after taking lodgings at an inn, he leaves his horse there and goes elsewhere to lodge, he is still to be considered a guest; 26 Vt. 316; but not if he merely leaves goods for keeping which the landlord receives no compensation; 1 Salk. 388; 3 Ld. Raym. 866; Cro. Jac. 188. And where one leaves his horse with an innkeeper with no intention of stopping at the inn himself, he is not a guest of the inn, and the liability of the landlord is simply that of an ordinary bailee for hire; 68 Md. 489; 33 N. Y. 577. The length of time a man is at an inn makes no difference, whether he stays a day, a week, or a month, or longer, or only for temporary refreshments, so always that, though not strictly *transiens*, he retains his character as a traveller; 5 Term 273; 5 Barb. 560. But if a person comes upon a special contract to board at an inn, he is not, in the sense of the law, a guest, but a boarder; Bacon, Abr. *Inns*, C 5; Story, Bailm. § 477; Wand. Inns 64; but this is a question of fact to be determined by a jury; 33 Wis. 118; 98 Cal. 678. The payment of a stipulated sum per week does not of itself change the relation of a party from that of a guest to that of a lodger; 7 Cush. 417; 33 Cal. 557; 98 *id.* 678; 20 Alb. L. J. 64. The relation exists where one who keeps a house for the entertainment of all who choose to

visit it, extends a general invitation to the public to become guests, although the house is situated on enclosed grounds; 93 Cal. 253. See BAILEE; INNKEEPER; BOARDER.

GUEST-TAKER. See AGISTER.

GUET. In French Law. Watch. Ord. Mar. liv. 4, tit. 6.

GUIA. In Spanish Law. A right of way for narrow carts. White, New Recop. 1, 2, c. 6.

GUIDAGE. In English Law. A reward for safe conduct, through a strange land or unknown country. Cowel. The office of guiding of travellers through dangerous or unknown ways. 2 Inst. 526.

GUIDON DE LA MER. The name of a treatise on maritime law, written in Rouen in Normandy in 1671, as is supposed. It was received on the continent of Europe almost as equal in authority to one of the ancient codes of maritime law. The author of this work is unknown. This tract or treatise is contained in the "*Collection de Lois maritimes*," by J. M. Pardessus, vol. 2, p. 371 *et seq.*

GUILD, GILD. A brotherhood or company governed by certain rules and orders made among themselves by king's license; a corporation, especially for purposes of commerce; so called because on entering the *guild* the members pay an assessment or tax (*gild*) towards defraying its charges. T. L.; Du Cange. A guild held generally more or less property in common,—often a hall, called a *guild-hall*, for the purposes of the association. The name of *guild* was not, however, confined to mercantile companies, but was applied also to religious, municipal, and other corporations. A mercantile meeting of a guild was called a *guild merchant*.

A fridborg (*q. v.*), that is, among the Saxons, ten families' mutual pledges for each other to the king. Spelman. See 3 Steph. Com. 31; Turner's Hist. Ang.Sax. v. iii. p.98.

The earliest corporations in Scotland were not for trading but to perpetuate some public service; and they took their rise from Papal bulls, royal charters, etc., or frequently such charter was presumed; Ersk. Pr. 311.

GUILD RENTS. Rents payable to the crown by any guild, or such as formerly belonged to religious guilds, and came to the crown on the dissolution of the monasteries. Toml.

GUILD HALL (Law Lat. *gildhalla*, variously spelled *ghildhalla*, *guihalla*, *guihaula*; from Sax. *gild*, payment, company, and *halla*, hall). A place in which are exposed goods for sale. Charter of Count of Flanders; Hist. Guinensi, 202, 203; Du Cange. The hall of a guild or corporation. Du Cange; Spelman: *e. g.*, *Gildhalla Teutonicorum*. The chief hall of the city of London, where the mayor and commonalty hold their meetings. The hall of the merchants of the Hanseatic League in London, otherwise called the "Stilyard." *Id.*

GUILDHALL SITTINGS. The sittings held in the Guildhall of the city of London for city of London cases.

GUINEA. A coin issued by the English mint during the time of Wm. IV. These coins were called in. The word now means only the sum of £1. 1s.

GUILLOTINE. An apparatus for beheading criminals with a single blow, used in some countries, as France and Greece, for capital punishment. A form of it was in use in the middle ages, but, being improved by Dr. Guillotin at the time of the French Revolution, it received its present name. Cent. Dict.

GUILT. In Criminal Law. That which renders criminal and liable to punishment.

That disposition to violate the law, which has manifested itself by some act already done. The opposite of innocence. See Rutherf. Inst. b. 1, c. 18, s. 10.

In general, every one is presumed innocent until guilt has been proved; but in some cases the presumption of guilt overthrows that of innocence; as, for example, where a party destroys evidence to which the opposite party is entitled. The spoliation of papers material to show the neutral character of a vessel furnishes strong presumption against the neutrality of the ship; 2 Wheat. 227.

GUILTY. The state or condition of a person who has committed a crime, misdemeanor, or offence.

This word implies a malicious intent, and can only be applied to something universally allowed to be a crime. Cowp. 275.

In Pleading. A plea by which a defendant who is charged with a crime, misdemeanor, or tort admits or confesses it. In criminal proceedings, when the accused is arraigned, the clerk asks him, "How say you, A. B., are you guilty or not guilty?" His answer, which is given *ore tenus*, is called his plea; and when he admits the charge in the indictment, he answers or pleads *guilty*; otherwise, *not guilty*. See CULPRIT.

GULE OF AUGUST. The first of August, being the day of *St. Peter ad Vincula*. T. L.

GULES. The heraldic name of the color usually called "red." The word is derived from the Arabic word "gule," a rose, and was probably introduced by the Crusaders. Gules is denoted in engravings by numerous perpendicular lines. Heralds who blazoned by plants and jewels called it "Mars" and "ruby;" Wharton.

GWABR MERCHED. Maid's fee. A British word signifying a customary fine payable to lords of some manors on marriage of tenant's daughter, or otherwise on her incontinence. Cowel, *Marchet*.

GWALSTOW. A place of execution. Cowel.

GYLTWITE OR GUILTWIT (Sax.). Compensation for fraud or trespass. Grant of King Edgar, anno 964; Cowel.

H.

H. The eighth letter of the alphabet See ABBREVIATIONS.

HABE OR HAVE (Lat.). Sometimes used in the titles of the codes of Theodosius and Justinian for *Ave* (hail). Calv. Lex.; Spel. Gloss.

HABEAS CORPORA JURATORUM (Lat. that you have the bodies). **In English Practice.** A writ issued out of the common pleas, commanding the sheriff to compel the appearance of a jury in a cause between the parties. It answered the same purpose as a *distringas juratores* in the king's bench. See 3 Bla. Com. 354. It is abolished by the Common-law Procedure Act.

HABEAS CORPUS (Lat. that you have the body). A writ directed to the person detaining another and commanding him to produce the body of the prisoner at a certain time and place, with the day and cause of his caption and detention, to do, submit to, and receive whatsoever the court or judge awarding the writ shall consider in that behalf.

This is the most famous writ in the law; and, having for many centuries been employed to remove illegal restraint upon personal liberty, no matter by what power imposed, it is often called the great writ of liberty. It takes its name from the characteristic words it contained when the process and records of the English courts were written in Latin:

Præcipimus tibi quod CORPUS *A B in custodia vestra detentum, ut dicitur, una cum causa captionis et detentionis suæ, quocunque nomine idem A B censeatur in eadem,* HABEAS *coram nobis apud Westm. &c. ad subjiciendum et recipiendum ea quæ curia nostra de eo ad tunc et ibidem ordinari contigerit in hac parte, etc.*

There were several other writs which contained the words *habeas corpus;* but they were distinguished from this and from one another by the specific terms declaring the object of the writ, which terms are still retained in the nomenclature of writs: as, *habeas corpus ad respondendum, ad testificandum, ad satisfaciendum, ad prosequendum,* and *ad faciendum et recipiendum, ad deliberandum et recipiendum.*

This writ was in like manner designated as *habeas corpus ad subjiciendum et recipiendum;* but, having acquired in public esteem a marked importance by reason of the nobler uses to which it has been devoted, it has so far appropriated the generic term to itself that it is now, by way of eminence, commonly called The Writ of Habeas Corpus.

The date of its origin cannot now be ascertained. Traces of its existence are found in the Year Book 48 Ed. III. 22; and it appears to have been familiar to, and well understood by, the judges in the reign of Henry VI. In its early history it appears to have been used as a means of relief from private restraint. The earliest precedents where it was used *against the crown* are in the reign of Henry VII. Afterwards the use of it became more frequent, and in the time of Charles I. it was held an admitted constitutional remedy; Hurd, Hab. Corp. 145; Church, Hab. Corp. 3. In writing of procedure in the thirteenth century the recent work which throws so much new light upon the early history of English law, says: "Those famous words *habeas corpus* are making their way into divers writs, but for any habitual use of them for the purpose of investigating the cause of imprisonment we must wait until a later time." There is also a reference to what is termed the use of *habeas corpus* as "at one time a part of the ordinary mesne process in a personal action," also referred to as "the Bractonian process which inserts a *habeas corpus* between attachment and distress," which (*habeas corpus*) a little later seems to disappear. No other allusion is made to the subject; 2 Poll. & Maitl. 584, 591.

A still later writer who is as earnest in tracing the fountains of English law to a Roman source, as the writers last quoted are indisposed to do so, says on the subject:

"The presence in the Pandects of every important doctrine of *habeas corpus* is an interesting fact, and suggests that the proceeding probably came to England, as it did to Spain, from the Roman law. There is no evidence, so far as I have been able to discover, that the process was of British or Teutonic origin. It is fully described in the forty-third book of the Pandects. The first text is the line from the 'Perpetual Edicts,' '*ait prætor: quem liberum dolo malo retines, exhibeas.*' 'The prætor declares: produce the freeman whom you unlawfully detain.' The writ was called the interdict or order '*de homine libero exhibendo.*' After quoting this article of the Edict, the compilers of the Pandects introduced the commentary of Ulpian to the extent of perhaps two pages of a modern law book, and the leading rules which he derives from the text are law, I believe, to-day in England and America. Thus he says:—

"'This writ is devised for the preservation of liberty to the end that no one shall detain a free person.'

"'The word freeman includes every freeman, infant or adult, male or female, one or many, whether *sui juris*, or under the power of another. For we only consider this: Is the person free?'

'He who does not know that a freeman is detained in his house is not in bad faith; but as soon as he is advised of the fact he becomes in bad faith.'

"'The prætor says *exhibeas* (produce, exhibit). To exhibit a person is to produce him publicly, so that he can be seen and handled.'

"'This writ may be applied for by any person; for no one is forbidden to act in favor of liberty.'

"'And to this commentary of Ulpian the compilers also add some extracts from Venuleius, who, among other things says:

"'A person ought not to be detained in bad faith for any time; and so no delay should be granted to the person who thus detains him.' In other words, a writ of *habeas corpus* should be returnable and heard instanter.

"It seems certain that this writ might have been applied for in Britain during the four centuries of Roman occupation, at least when not suspended by a condition of martial law; and after the restoration of the Christian Church in the seventh century, and the occupation of judicial positions by bishops and other learned clerics, familiar with such procedure, it is not unreasonable to assume that it was revived and took its place in English law." Howe, Studies in the Civil Law 54.

After the use of the writ became more common, abuses crept into the practice, which in some measure impaired the usefulness of the writ. The party imprisoning was at liberty to delay his obedience to the first writ, and might wait till a second and third were issued before he produced the party; and many other vexatious shifts were practised to detain state prisoners in custody; 3 Bla. Com. 135.

Greater promptitude in its execution was required to render the writ efficacious. The subject was accordingly brought forward in parliament in 1668, and renewed from time to time until 1679, when the celebrated Habeas Corpus Act of 31 Car. II. was passed. The passage of this act has been made the theme of the highest praise and congratulation by British authors, and is even said to have "extinguished all the resources of oppression;" Hurd, Hab. Corp. 93; Church, Hab. Corp. 37.

This act being limited to cases of commitments for "criminal or supposed criminal matters," every other species of restraint of personal liberty was left to the ordinary remedy at common law; but, doubts being entertained as to the extent of the jurisdiction of the judge to inquire into the truth of the return to the writ in such cases, an attempt was made, in 1757, in the house of lords, to render the jurisdiction more remedial. It was opposed by Lord Mansfield

as unnecessary, and failed, for the time, of success. It was subsequently renewed, however; and the act of 56 Geo. III. c. 100 supplies, in England, all the needed legislation in cases not embraced by the act of 31 Car. II; Hurd, Hab. Corp.

The English colonists in America regarded the privilege of the writ as one of the "dearest birthrights of Britons;" and sufficient indications exist that it was frequently resorted to. The denial of it in Massachusetts by Judge Dudley in 1689 to Rev. John Wise, imprisoned for resisting the collection of an oppressive and illegal tax, was made the subject of a civil action against the judge, and was, moreover, denounced, as one of the grievances of the people, in a pamphlet published in 1689 on the authority of "the gentlemen, merchants, and inhabitants of Boston and the country adjacent." In New York in 1707 it served to effect the release of the Presbyterian ministers Makemie and Hampton from an illegal warrant of arrest issued by the governor, Cornbury, for preaching the gospel without license. In New Jersey in 1710 the assembly denounced one of the judges for refusing the writ to Thomas Gordon, which, they said, was the "undoubted right and great privilege of the subject." In South Carolina in 1692 the assembly adopted the act of 31 Car. II. This act was extended to Virginia by Queen Anne early in her reign, while in the assembly of Maryland in 1725 the benefit of its provisions was claimed, independent of royal favor, as the "birthright of the inhabitants." The refusal of parliament in 1774 to extend the law of *habeas corpus* to Canada was denounced by the continental congress in September of that year as oppressive, and was subsequently recounted in the Declaration of Independence as one of the manifestations on the part of the British government of tyranny over the colonies; Hurd, Hab. Corp. 109-120.

It is provided in art. i. sec. 9, § 2 of the constitution of the United States that "The privilege of the writ of habeas corpus shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it."

Similar provisions are found in the constitutions of most of the states. In Virginia, Vermont, Louisiana, and North Carolina, however, it is forbidden to suspend the privilege of the writ in any case; but in the constitution of Maryland, the writ is not mentioned. In Massachusetts the suspension cannot exceed twelve months, and in New Hampshire, three months. In Florida the governor is authorized to suspend the writ in case of insurrection or rebellion.

In 1861, C. J. Taney decided in the U. S. circuit court of Maryland, that congress alone possessed the power under the constitution to suspend the writ; 9 Am. L. Reg. 524; Taney 246; this view was also taken by other courts; 16 Wis. 360; 44 Barb. 98; 21 Ind. 370; *contra*, 5 Blatchf. 63. In the beginning of the war of the rebellion, President Lincoln suspended the privilege of the writ of *habeas corpus* on his own authority, and without the sanction of an act of congress. He was supported in his opinion of his right to suspend by some of the legal writers of the time, notably by Horace Binney of Philadelphia; but the better opinion has always been that this suspension without the sanction of congress was unconstitutional. For the history of this controversy see 3 Political Science Quarterly 454; 5 Am. Lawyer 169. The privilege of the writ is, however, necessarily suspended whenever martial law is declared in force; for martial law suspends all civil process. A prisoner of war, therefore, or one held by military arrest under the law martial, is not a subject for the *habeas corpus* writ; 1 Bish. Cr. L. § 63. See MARTIAL LAW. Nor is a prisoner in the military or naval service whose offence is properly cognizable before a court martial; 158 U. S. 109. Congress, by act of March 3, 1863, 12 Stat. L. 755, authorized the president to suspend the privilege of the writ throughout the whole or any part of the United States, whenever in his judgment the public safety might require it, during the rebellion. Under the provisions of this act, a partial suspension took place, but it was held that the suspension of the privilege of the writ does not suspend the writ itself. The writ issues as a matter of course; and on the return made to it the court decides whether the party applying is denied the right of proceeding any further with it; 4 Wall. 115. Nor does the suspension of the writ legalize a wrongful arrest and imprisonment; it deprives the person thus arrested of the means of procuring his liberty, but does not exempt the person making the illegal arrest from liability for damages, nor from criminal prosecution; 21 Ind. 472; *contra*, 1 Pacific L. Mag. 360; 1 Bishop, New Crim. L. § 64.

The power has never been exercised by the legislature of any of the states, except that of Massachusetts, which, on the occasion of "Shay's Rebellion," suspended the privilege of the writ from November, 1786, to July, 1787. And in the Confederate States, the privilege was suspended during the war of the rebellion; 2 Winston 143; 27 Tex. 705.

Congress has prescribed the jurisdiction of the federal courts under the writ; but, never having particularly prescribed the mode of procedure, they have substantially followed in that respect the rules of the common law.

In most of the states statutes have been passed, not only providing what courts or officers may issue the writ, but, to a considerable extent, regulating the practice under it; yet in all of them the proceeding retains its old distinctive feature and merit, —that of a summary appeal for immediate deliverance from illegal imprisonment.

Jurisdiction of state courts. The states, being in all respects, except as to the powers delegated in the federal constitution, sovereign political communities, are limited, as to their judicial power, only by that instrument; and they, accordingly, at will, create, apportion, and limit the jurisdiction of their respective courts over the writ of *habeas corpus*, as well as other legal process, subject only to such constitutional restriction; Church, Hab. Corp. 67.

The restrictions in the federal constitution on this subject are necessarily implied from the express grants of judicial power therein to the federal courts in certain cases specified in art. iii. sec. 2, and in which the decision of the supreme court of the United States is paramount over that of all other courts and conclusive upon the parties.

Jurisdiction of the federal courts. This is prescribed by several acts of congress. By the 14th sec. of the Judiciary Act of

September 24, 1789, 1 Stat. L. 81, it is provided that the supreme, circuit, and district courts may issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the principles and usages of law; and that either of the justices of the supreme court, as well as judges of the district courts, may grant writs of *habeas corpus* for the purpose of inquiring into the cause of commitment; "provided, that writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify."

By the seventh section of the "Act further to provide for the collection of duties or imposts," passed March 2, 1833, 4 Stat. L. 634, the jurisdiction of the justices of the supreme court and judges of the district courts is extended to "all cases of a prisoner or prisoners in jail or confinement, where he or they shall be committed or confined on or by any authority or law for any act done or omitted to be done, in pursuance of a law of the United States, or any order, process, or decree of any judge or court thereof." The federal courts may grant the writ to inquire into the cause of restraint of any person in jail under the authority of a state in violation of the constitution or of a law or treaty of the United States, but except in cases of peculiar urgency they will not discharge the prisoner in advance of a final hearing of his cause in the courts of the state, and even after such final determination in those courts will generally leave the petitioner to his remedy by writ of error from this court; 160 U. S. 231. See also 155 U. S. 89. This decision was rendered necessary by the practice of using the writ of *habeas corpus* as a means to take an appeal from state tribunals to the supreme court of the United States for the purpose of delaying the trial or execution of criminals, and the evil of it has been well set forth by Hon. Seymour D. Thompson in 30 Am. Law Rev. 289, 290.

By the "Act to provide further remedial justice in the courts of the United States," passed August 29, 1842, 5 Stat. L. 539, the jurisdiction of the justices and judges aforesaid is further extended "to all cases of any prisoner or prisoners in jail or confinement, when he, she, or they, being subjects or citizens of a foreign state, and domiciled therein, shall be committed or confined or in custody under or by any authority or law, or process founded thereon, of the United States, or of any of them, for or on account of any act done or omitted under any alleged right, title, or authority, privilege, protection, or exemption set up or claimed under the commission or order or sanction of any foreign state or sovereignty, the validity and effect whereof depend upon the law of nations, or under color thereof."

By the third section of the "Act for the government and regulation of seamen in the merchant service," passed July 20, 1790, 1 Stat. L. 131, it is provided that refractory seamen in certain cases shall not be discharged on *habeas corpus* or otherwise.

By an act approved February 6, 1867, it is provided that when, in any suit begun in a state court and removed to the circuit court of the United States, the defendant is in actual custody under state process, the clerk of the circuit court shall issue a writ of *habeas corpus cum causa* to the marshal to take the prisoner into custody to be dealt with in said circuit court according to its rules of law and order; R. S. § 642.

By act of congress, May 3, 1885, an appeal may be taken from the judgment of the United States circuit courts in *habeas corpus* cases to the supreme court. Since the passage of this act it has been generally held that the supreme court will not issue the writ where it may be done as well in the proper Circuit Court, unless there are special circumstances making action by the supreme court expedient or necessary; 119 U. S. 584; 137 U. S. 63. The writ will not be issued when it appears by the petition that the question has already been decided against the petitioner by another judge in the same court; 45 Fed. Rep. 241. In cases where the right of appeal seems inadequate by reason of its delay, the court may hold the person entitled to the writ as a means of speedy determination of the question; 40 Fed. Rep. 399. In 128 U. S. 395, a judge of the supreme court refused to grant the writ in chambers to the captain of a steamer committed under the laws of Pennsylvania for selling liquor on the steamer without license on the ground that the federal question if any could be raised by writ of error.

Federal courts cannot grant the writ upon a petition that the person is held under the *capias* of a state court issued upon a judgment that has been vacated; 39 Fed. Rep. 869. A district court cannot, by issuing a writ, declare a judgment of a state criminal court a nullity where such court had full jurisdiction over the crime; 43 Fed. Rep. 661. But the writ can be issued to test the question as to the arrest and imprisonment of a supposed fugitive from justice on the charge of a different offence from that for which he was extradited; 45 Fed. Rep. 471. See also 43 Fed. Rep. 517. In general the writ may be issued by federal courts in every case where a party is restrained of his liberty without due process of law in the territorial jurisdiction of such courts; 40 Fed. Rep. 66; 135 U. S. 1. The granting of the writ is within the discretion of the court and will not be reversed unless an abuse thereof be shown; 33 Fed. Rep. 117. But where the petitioner had been convicted on the indictment of a grand jury impanelled by a court without authority, it was held that the writ became a writ of right and the court having power to issue it could not exercise sound discretion against issuing it; 40 Fed. Rep. 66. A medical director in the navy notified by the secretary of the navy that he was un-

der arrest and should confine himself to the city of Washington is not under such restraint as to sustain the writ; 114 U. S. 564.

The writ does not issue as a matter of course from the federal courts and the petition must show a *prima facie* right thereto; 52 Fed. Rep. 795; 51 *id.* 434; 49 *id.* 238. And only in rare cases will federal courts discharge prisoners held under process of state courts; 79 Fed. Rep. 305, 308. See 30 Am. L. Reg. 209.

The supreme court issues the writ by virtue of its appellate jurisdiction; 4 Cra. 75; 108 U. S. 552; and it will not grant it at the instance of the subject of a foreign government to obtain the custody of a minor child detained by a citizen of one of the states; for that would be the exercise of original jurisdiction; 2 How. 65. An appeal lies to the supreme court from a final order of the supreme court of the Territory of New Mexico ordering a writ of *habeas corpus* to be discharged; 164 U. S. 612.

It will grant it on the application of one committed for trial in the circuit court on a criminal charge; 4 Cra. 75; 3 Dall. 17; and where the petitioner is committed on an insufficient warrant; 3 Cra. 448; and where he is detained by the marshal on a *capias ad satisfaciendum* after the return-day of the writ; 7 Pet. 568; also for the purpose of inquiring into the cause of the restraint of the liberty of prisoners in jail under or by color of the authority of the United States, and all persons who are in custody in violation of the constitution or laws of the United States; 128 U. S. 289. An alien immigrant may have a writ to test the lawfulness of his restraint from landing by a federal office; 142 U. S. 651.

None of the courts of the United States have authority to grant the writ for the purpose of inquiring into the cause of commitment, where the prisoner is imprisoned under process issued from the state courts, excepting where he is denied, or cannot enforce, in the judicial tribunals of the state, any right secured to him by any law providing for the equal civil rights of citizens of the United States; R. S. § 641; 2 Woods 342. It was refused by the supreme court where the party for whose benefit the application was made had been convicted in a state court of levying war against the state; 3 How. 103. Federal courts will proceed with great caution upon applications for writ of *habeas corpus* in behalf of a person imprisoned under process of the state courts, and, when practicable, will investigate the questions raised before issuing the writ; 49 Fed. Rep. 238. See also paper by Seymour D. Thompson on the abuse and too rigorous use of the writ of *habeas corpus* by the federal judges; 6 Rep. Am. Bar. Assoc. 243.

It was refused by the circuit court where the petitioner, a secretary attached to the Spanish legation, was confined under criminal process issued under the authority of the state of Pennsylvania; 1 Wash. C. C. 232; also where the petitioner, a British seaman, was arrested under the authority of an act of the legislature of the state of South Carolina, which was held to conflict with the constitution of the United States; 2 Wheel. Cr. Cas. 56.

It will be granted, however, where the imprisonment, although by a state officer, is under or by color of the authority of the United States, as where the prisoner was arrested under a governor's warrant as a fugitive from justice of another state, requisition having been regularly made; 3 McLean 121; or where extradited under a treaty with a foreign country upon the charge of a certain offence for which he was afterwards tried and acquitted, and immediately thereafter he was arrested under a charge entirely separate and distinct from the former one; 39 Fed. Rep. 204. It will also be granted where U. S. Marshals or their deputies are arrested by state authority for using force or threats in executing process of the federal courts; 47 Fed. Rep. 802; but see 51 *id.* 277. Federal judges should grant writs to persons imprisoned for any act done in pursuance of a law of the United States; 135 U. S. 1.

The power of the federal courts to issue the writ is confined to cases in which the prisoner is in custody under or by order of the authority of the United States, or is committed for trial before some court thereof, or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the constitution, or of a law or treaty of the United States, or being a subject or citizen of a foreign state, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations; or where it is necessary to bring the prisoner into court to testify; R. S. § 753.

If it appears from the petition itself that the applicant for the writ of *habeas corpus* is not entitled thereto, the writ need not be awarded; 128 U. S. 289; 52 Fed. Rep. 795. The writ cannot be made to perform the office of a writ of error to review the decision of a committing magistrate in extradition proceedings; 161 U. S. 502. Nor will the writ lie, except in rare and exceptional cases, where there is a remedy by writ of errror or appeal; 159 U. S. 95. The writ may be issued to determine the right to the custody of an infant as between parents who are living apart; 42 Fed. Rep. 113.

Proper use of the writ. The true use of the writ is to cause a legal inquiry into the cause of imprisonment, and to procure the release of the prisoner where that is found to be illegal.

If the imprisonment be claimed by virtue of legal process, the validity and present force of such process are the only subjects of investigation; 5 Hill 164; 4 Barb. 31; 4 Harr. Del. 575.

But such process cannot, in this proceed-

ing, be invalidated by errors which only render it irregular. The defects, to entitle the prisoner to be discharged, must be such as to render the process void; for the writ of *habeas corpus* is not, and cannot perform the office of, a writ of error; 3 Vt. 114; 4 Day 436; 3 Hawks 25; 2 La. 422, 587; 2 Park. Cr. Cas. 650; 1 Hill, N. Y. 154; 4 C. & P. 415; 7 Ohio St. 81; 81 Wis. 158; 25 Fla. 214; 16 Or. 33; 131 U. S. 267; 133 *id.* 333; 148 *id.* 162; 150 *id.* 637; 51 Fed. Rep. 434; 118 Mo. 377; but will only be issued if applied for to relieve from imprisonment under the order or sentence of some inferior federal court, when such court has acted without jurisdiction, or has exceeded its jurisdiction, and its order is for that reason void; 4 U. S. App. 73.

Although the writ of *habeas corpus* does not lie for the determination of mere errors where a conviction has been had and the commitment thereunder is in due form, yet if the court had no jurisdiction of the offence charged, or if it affirmatively appears by the record that the prisoner was tried and sentenced for the commission of an act which under the law constitutes no crime, the judgment is void and the prisoner should be discharged; 73 Cal. 120, 365; 127 U. S. 731; 131 *id.* 176; 19 Nev. 178; 79 Ga. 785.

It cannot be used to oust another competent and acting jurisdiction, or to divert or defeat the course of justice therein; 5 Ark. 424; 1 Ill. 198; 1 Md. Ch. Dec. 351; 19 Ala. N. S. 438; 2 Wheat. 532; 3 Yerg. 167; 1 Edw. Ch. 551; 1 Harr. Del. 392; 6 Miss. 80; 1 Curt. 178; 2 Green, N. J. 312; 4 M'Cord 233; 1 Watts 66; 7 Cush. 285; 8 Ohio St. 599; 139 U. S. 449. It was not intended by congress that the federal courts should, by writs of *habeas corpus*, obstruct the ordinary administration of the criminal laws of the states through their own tribunals; 140 U. S. 278; 142 *id.* 155.

The only ground on which a court, without some special statute authorizing it, will give relief on *habeas corpus* to a prisoner under conviction and sentence of another court, is the want of jurisdiction in such court over the person or the cause, or some other matter rendering its proceedings void; 149 U. S. 70; 134 *id.* 136; 131 *id.* 176.

The writ is also employed to recover the custody of a person where the applicant has a legal right thereto: as, the husband for his wife, the parent for his child, the guardian for his ward, and the master for his apprentice; 35 W. Va. 698; 35 Fed. Rep. 354; [1892] App. Cas. 326. But in such cases, as the just object of the proceeding is rather to remove illegal restraint than to enforce specifically the claims of private custody, the alleged prisoner, if an adult of sound mind, is generally permitted to go at large; if an infant of sufficient age and discretion, it is usually permitted to elect in whose custody it will remain, provided that it does not elect an injurious or improper custody; and if of tender years, without such discretion, the court determines its custody according to what the true interests and welfare of the child may at the time require; Hurd, Hab. Corp. 450.

Application for the writ. This may be made by the prisoner, or by any one on his behalf, where for any reason he is unable to make it.

It is usually made by petition in writing, verified by affidavit, stating that the petitioner is unlawfully detained, etc., and, where the imprisonment is under legal process, a copy thereof, if attainable, should be presented with the petition; for where the prisoner is under sentence on conviction for crime, or in execution on civil process, or committed for treason or felony plainly expressed in the warrant, he is not, in most of the states, entitled to the writ; Hurd, Hab. Corp. 209; Church, Hab. Corp. 91. The application must set forth the facts concerning the detention of the party restrained, in whose custody he is detained, and by virtue of what authority, if known; 131 U. S. 280.

Where, with ample opportunity to do so, an accused did not apply for the writ of *habeas corpus* until after the jury had been sworn and his trial begun in a state court, the federal court will not interpose at that stage of the cause; 146 U. S. 183.

The return. The person to whom the writ is directed is required to produce the body of the prisoner forthwith before the court or officer therein named, and to show the cause of the caption and detention; 5 Term 89; 2 South. 545. The return must specify the true cause of the detention; and the party imprisoned may deny any of the facts set forth in the return, or may allege other facts that may be material in the case, so that the facts may be ascertained and the matter disposed of as law and justice require; 131 U. S. 280. No evidence is necessary to support the return, as it imports verity until impeached; 137 U. S. 86.

If the writ be returned without the body, the return must show that the prisoner is not in the possession, custody, or power of the party making the return, or that the prisoner cannot, without serious danger to his life, be produced; and any evasion on this point will be dealt with summarily by attachment; 5 Term 89; 10 Johns. 328; 1 Dudl. 46; 5 Cra. 622.

Where the detention is claimed under legal process, a copy of it is attached to the return. Where the detention is under a claim of private custody, all the facts relied on to justify the restraint are set forth in the return.

The hearing. The questions arising upon the return or otherwise in the proceeding, whether of fact or of law, are determined by the court or judge, and not by a jury; Hurd, Hab. Corp. 299.

The evidence on the hearing is such as is allowed in other summary proceedings in which the strictness exacted on the trial in civil actions or criminal prosecutions is somewhat relaxed, the practice sometimes permitting affidavits to be read where there has been no opportunity for cross-examination; but the introduction of such evidence

rests in the sound discretion of the court; Archb. Cr. Pl. & Pr. 204; Coxe 403; Sandf. 701; 20 How. S. Tr. 1376; 1 Burr's Trial 97. The court is not concluded by the finding of a committing magistrate, but may go behind his order of commitment, and by certiorari look into the evidence before him; 5 Blatchf. 303; 32 Pa. 520. See 49 Fed. Rep. 569.

Pending the hearing the court may commit the prisoner for safekeeping from day to day, until the decision of the case; 14 How. 134; Bac. Abr. *Habeas Corpus* (B 13); 5 Mod. 22.

If the imprisonment be illegal, it is the duty of the court to discharge the prisoner from that imprisonment; but if the court or officer hearing the *habeas corpus* be invested with the powers of an examining and committing magistrate in the particular case, and the evidence taken before the court, or regularly certified to it in the *habeas corpus* proceeding, so far implicate the prisoner in the commission of crime as to justify his being held for trial, it is usual for the court, in default of bail, to commit him as upon an original examination; 3 East 157; 16 Pa. 575; 2 Cra. C. C. 612; 5 Cow. 12. Where a prisoner is held under a valid sentence and commitment, the illegality of a second sentence will not be inquired into as *habeas corpus* till the term under the first sentence has expired; 17 Nev. 139.

If the prisoner is not discharged or committed *de novo*, he must be remanded, or, in a proper case, let to bail; and all offences are bailable prior to the conviction of the offender, except "capital offences when the proof is evident or presumption great;" Hurd, Hab. Corp. 430.

Recommitment after discharge. The act of 31 Car. II. prohibited, under the penalty of five hundred pounds, the reimprisoning for the same offence of any person set at large on *habeas corpus*, except by the legal order and process of such court wherein such prisoner was bound by recognizance to appear, or other court having jurisdiction of the cause. Somewhat similar provisions are found in the statutes of many of the states. But these provisions are not held to prevent the subsequent arrest of the prisoner on other and more perfect process, although relating to the same criminal act; 9 Pet. 704; 2 Miss. 163.

HABEAS CORPUS ACTS. See HABEAS CORPUS.

HABEAS CORPUS AD DELIBERANDUM ET RECIPIENDUM (Lat.). A writ which is issued to remove, for trial, a person confined in one county to the county or place where the offence of which he is accused was committed. Bac. Abr. *Habeas Corpus*, A; 1 Chitty, Cr. L. 132. Thus, it has been granted to remove a person in custody for contempt to take his trial for perjury in another county; 1 Tyrwh. 185.

HABEAS CORPUS AD FACIENDUM ET RECIPIENDUM (Lat.). A writ usually issued in civil cases to remove an action from an inferior court, where the defendant is sued and imprisoned, to some superior court which has jurisdiction over the matter, in order that the cause may be determined there. This writ is commonly called *habeas corpus cum causa*, because it commands the judges of the inferior court to return the day and cause of the caption and detainer of the prisoner; Bac. Abr. *Habeas Corpus*, A; 3 Bla. Com. 130; Tidd, Pr. 296.

This writ may also be issued at the instance of the bail of the defendant, to bring him up to be surrendered in their discharge, whether he is in custody on a civil suit or on a criminal accusation; Tidd, Pr. 298; 1 Chitty, Cr. L. 132.

HABEAS CORPUS AD PROSEQUENDUM (Lat.). A writ which issues when it is necessary to remove a prisoner in order to *prosecute* in the proper jurisdiction wherein the fact was committed. 3 Bla. Com. 130.

HABEAS CORPUS AD RESPONDENDUM (Lat.). A writ which is usually employed in civil cases to remove a person out of the custody of one court into that of another, in order that he may be sued and answer the action in the latter. 2 Mod. 198; 3 Bla. Com. 129; Tidd, Pr. 300.

This writ lies also to bring up a person in confinement to answer a criminal charge: thus, the court issued it to the warden of the fleet, to take the body of the prisoner confined there before a magistrate to be examined respecting a change of felony or misdemeanor; 5 B. & Ald. 730.

But it was refused to bring up the body of a prisoner under sentence for a felony, for the purpose of having him tried for a previous felony.

HABEAS CORPUS AD SATISFACIENDUM (Lat.). A writ which is issued to bring a prisoner from the prison of one court into that of another, in order to charge him in execution upon a judgment of the last court. 3 Bla. Com. 130; Tidd, Pr. 301.

HABEAS CORPUS AD SUBJICIENDUM. See HABEAS CORPUS.

HABEAS CORPUS AD TESTIFICANDUM (Lat.). A writ which lies to bring up a prisoner detained in any jail or prison, to give evidence before any court of competent jurisdiction. Tidd, Pr. 739; 3 Bla. Com. 130; 20 Iowa 372; 91 Mo. 250; 3 Burr. 1440; Whart. Cr. Ev. § 351.

The allowance of this writ resting in the discretion of the court, it will be refused if the application appear to be in bad faith or a *mere contrivance;* 3 Burr. 1440.

It was refused to bring up a prisoner of war; 2 Dougl. 419; or a prisoner in custody for high treason; Peake, Add. Cas. 21.

It would of course be refused where it appear from the application that the prisoner was under sentence for crime which rendered him incompetent as a witness.

The application for the writ is made upon affidavit, stating the nature of the suit and the materiality of the testimony, together with the general circumstances of restraint which render the writ necessary; Cowp. 672; 2 Cow. & H. Notes to Phill. Ev. 658.

HABEAS CORPUS CUM CAUSA. See HABEAS CORPUS AD FACIENDUM ET RECIPIENDUM.

HABENDUM (Lat.). **In Conveyancing.** The clause usually following the granting part of the premises of a deed, which defines the extent of the ownership in the thing granted to be held and enjoyed by grantee. 3 Washb. R. P. 436.

It commences with the words "to have and to hold," *habendum et tenendum*. It is not an essential part of a deed, but serves to qualify, define, or control it; Co. Litt. 6 *a*, 299; 4 Kent 468; 8 Mass. 162, 174; and may be rejected if clearly repugnant to the rest of the deed; Shepp. Touchst. 102; Skinn. 543. See, generally, 3 Washb. R. P. 436; 4 Kent 468; 4 Greenl. Cruise, Dig. 273; Elph. Deeds 217.

HABENTES HOMINES (Lat.). Rich men. Du Cange.

HABENTIA. Wealth; Riches. Mon. Ang. t. 1. 100.

HABERE (Lat.). To have. It is said to designate the right, while *tenere* (to hold) signifies the possession, and *possidere* (to possess) includes both. Calv. Lex.

HABERE FACIAS POSSESSIONEM (Lat.). **In Practice.** A writ of execution in the action of ejectment; originally to recover possession of a chattel interest in real estate.

The sheriff is commanded by this writ that, without delay, he cause the plaintiff to have possession of the land in dispute which is therein described: a *fi. fa.* or *ca. sa.* for costs may be included in the writ. The duty of the sheriff in the execution and return of that part of the writ is the same as on a common *fi. fa.* or *ca. sa.* The sheriff is to execute this writ by delivering a full and actual possession of the premises to the plaintiff. For this purpose, he may break an outer or inner door of the house; and, should he be violently opposed, he may raise the *posse comitatus;* 5 Co. 91 *b*; 1 Leon. 145.

The name of this writ is abbreviated *hab. fac. poss.* See 10 Viner, Abr. 14; Tidd, Pr. 1081; 2 Arch. Pr. 58; 3 Bla. Com. 412.

HABERE FACIAS SEISINAM (Lat.). **In Practice.** The name of a writ of execution, used in most real actions, by which the sheriff is directed that he cause the demandant to have seisin of the lands which he has recovered. 3 Bouvier, Inst. n. 3374. It lay to recover possession of the freehold, while to recover a chattel interest in real estate the *habere facias possessionem* was the appropriate writ. It was practically abolished in England by the Common Law Procedure Acts of 1852 and 1860, but is still known in some of the states in connection with the action of dower.

This writ may be taken out at any time within a year and a day after judgment. It is to be executed nearly in the same manner as the writ of *habere facias possessionem*, and for this purpose the officer may break open the outer door of a house to deliver seisin to the demandant; 5 Co. 91 *b*; Com. Dig. *Execution*, E. The name of this writ is abbreviated *hab. fac. seis.*

HABERE FACIAS VISUM (Lat.). **In Practice.** The name of a writ which lay when a view is to be taken of lands and tenements. Fitzh. N. B. Index, *View.*

HABERE LICERE. See SALE.

HABERGEON. A diminutive of hauberk, a short coat of mail without sleeves. Blount.

HABERJECTO. A cloth of mixed color. Magna charta, c. 26.

HABETO TIBI RES TUAS. Have or take thy property to thyself. A phrase used in connection with the Roman law of divorce. Calv. Lex. Where a marriage in one of their modes, by which the wife passed *in manum viri*, was dissolved by divorce, the husband had to restore the *dos*, as in case of the wife's death, unless her misconduct was the cause; Sand. Just. 152.

HABILIS (Lat.). Fit; suitable; 1 Sharsw. Bla. Com. 436. Active; useful (of a servant). Du Cange. Proved; authentic (of Book of Saints). Du Cange. Fixed; stable (of authority of the king). Du Cange.

HABIT. A disposition or condition of the body or mind acquired by custom or a frequent repetition of the same act. See 2 Mart. La. N. S. 622; 18 Pa. 172; 5 Gray 851. The customary conduct, to pursue which one has acquired a tendency, from frequent repetition of the same acts. 105 U. S. 354.

The *habit of dealing* has always an important bearing upon the construction of commercial contracts. A ratification will be inferred from the *mere habit of dealing* between the parties: as if a broker has been accustomed to settle losses on policies in a particular manner, without any objection being made, or with the silent approbation of his principal, and he should afterwards settle other policies in the same manner, to which no objection should be made within a reasonable time, a just presumption would arise of an implied ratification: for, if the principal did not agree to such settlement, he should have declared his dissent. See USAGE.

The habit of an animal is, in its nature, a continuous fact, to be shown by proof of successive acts of a similar kind; 131 U. S. 22.

HABIT AND REPUTE. Applied in Scotch law to a general understanding and

belief of something's having happened: *e. g.* marriage may be constituted by *habit and repute;* Bell, Dict.

HABITABLE REPAIR. Such a state of repair that leased premises may be occupied, not only with safety, but with reasonable comfort. 2 Mood. & R. 186.

HABITANCY. See INHABITANT.

HABITANT. A resident; an inhabitant (*q. v.*). A native of Canada of French descent, particularly of the peasant or farming class; a tenant who kept hearth and home on the seigniory.

HABITATION (Lat. *Habitatio*). **In Civil Law.** The right of a person to live in the house of another without prejudice to the property.

It differed from a usufruct in this, that the usufructuary might apply the house to any purpose,—as of a store or manufactory; whereas the party having the right of habitation could only use it for the residence of himself and family; 1 Bro. Civ. Law 184; Domat, l. 1, t. 11, s. 2, n. 7.

In Estate. A dwelling-house; a home stall. 2 Bla. Com. 4; 4 *id.* 220.

HABITUAL CRIMINALS ACT. The stat. 32 & 33 Vict. c. 99. Its object was to give the police greater control over convicted criminals at large, and to provide for the registration of criminals. Now repealed and other provisions substituted for it, by the Prevention of Crime Act, 34 & 35 Vict. c. 112. Moz. & W.

In Massachusetts it is held that the state habitual criminal act is not contrary to the United States constitution prohibiting *ex post facto* laws; 155 Mass. 163; 158 *id.* 598.

HABITUAL DRUNKARD. A person given to inebriety or the excessive use of intoxicating drink, who has lost the power or the will, by frequent indulgence, to control his appetite for it. 18 Pa. 172; 5 Gray 85. One who has the habit of indulging in intoxicating drinks so firmly fixed that he becomes drunk whenever the temptation is presented by his being near where liquor is sold. 35 Mich. 210. The custom or habit of getting drunk; the constant indulgence in such stimulants as wine, brandy, and whisky, whereby intoxication is produced; not the ordinary use, but the habitual use of them; the habit should be actual and confirmed, but need not be continuous, or even of daily occurrence; 9 So. Rep. (La.) 750. If there is a fixed habit of drinking to excess, so as to disqualify a person from attending to his business during the principal portion of the time usually devoted to business, it is habitual intemperance; 19 Cal. 267; but see 53 Ia. 511.

Habitual drunkenness of a husband does not entitle the wife to a divorce; L. R. 1 P. & M. 46; *contra*, 1 Bish. Mar. Div. & Sep. 1781. The fact that a man has had delirium tremens once does not prove, as a matter of law, that he is habitually intemperate, so as to contradict his representation to the contrary; 122 U. S. 501.

By the laws of some states, such persons are classed with idiots, lunatics, etc., in regard to the care of property; and in some, they are liable to punishment. See 8 N. Y. 388; Crabbe 558; 6 Wash. 271. See Rogers, Drinks, etc.; DRUNKENNESS; DELIRIUM TREMENS; INTOXICATION.

HABITUALLY. Customarily; by frequent practice or use. It does not mean entirely or exclusively; 91 Cal. 274.

HABLE. A seaport; a harbor; a naval station. Stat. 27 Hen. VI. c. 3.

HACIENDA. In Spanish Law. A generic term, applicable to the mass of the property belonging to a state, and the administration of the same. Also a private estate or plantation.

As a science, it is defined by Dr. Jose Canga Argüells, in his "Diccionario de Hacienda," to be that part of civil economy which teaches how to aggrandize a nation by the useful employment of its wealth.

A royal estate. Newman & B. Dict.

HACKNEY CARRIAGES. Carriages plying for hire in the street. The driver is liable for negligently losing baggage; 2 C. 13, 877; 33 How. Pr. 481. They are usually regulated in large cities by statute or ordinance; 17 & 18 Vict. c. 86; 122 Mass. 60.

HADBOTE. In English Law. A recompense or amends made for violence offered to a person in holy orders.

HADD. A boundary or limit. A statutory punishment defined by law, and not arbitrary. Moz. & W.

HADERUNGA. Hatred; ill-will; prejudice. Spelman.

HADGONEL. A tax or mulct. Jacob.

HAEC EST CONVENTIO (Lat.). This is an agreement. Words with which agreements anciently commenced. Yearb. H. 6 Edw. II. 191.

HAEC EST FINALIS CONCORDIA (L. Lat.). This is the final agreement. The words with which the foot of a fine commenced. 2 Bl. Com. 351.

HÆREDA. The name, under the Gothic constitutions, of the hundred court (*q. v.*). 3 Bla. Com. 35; 3 Steph. Com. 281, 282, n. (*q.*).

HÆREDE ABDUCTO. An ancient writ that lay for the lord, who, having by right the wardship of his tenant under age, could not obtain access to his person, by reason of the ward having been carried away by another person. Old. Nat. Brev. 93; Cowel.

HÆREDE DELIBERANDO ALTERI QUI HABET CUSTODIAM TERRÆ. An ancient writ, directed to the sheriff, requiring him to command one

who had taken away an heir under age, being his ward, to deliver him to the person whose ward he was by reason of his land. Reg. Orig. 161.

HÆREDE RAPTO. An ancient writ that lay for the ravishment of the lord's ward. Reg. Orig. 163.

HÆREDES. Heirs. Plural of *Hæres*, which see, together with titles immediately following it.

HÆREDIPETA (Law Lat.). **In Old English Law.** The next heir to lands. Laws of Hen. I.; Du Cange. And who seeks to be made heir (*qui cupit hæreditatem*). Concil. Compostel. anno 1114 can. 18, inter Hispan. t. 3, p. 324; Du Cange.

HÆREDITAS (Lat. from *hæres*). **In Civil Law.** "*Nihil aliud est hæreditas, quam successio in universum jus, quod defunctus habuit.*" *Inheritance* is nothing else than succession to every right which the deceased possessed. Dig. 50. 17; 50. 16; 5. 2; Mack. C. L. § 605; Bracton 62 *b*. See HÆRES.

In Old English Law. An estate transmissible by descent; an inheritance. Marten, Anecd. Collect. t. 3, p. 269; Co. Litt. 9.

HÆREDITAS DAMNOSA. A burdensome inheritance. See DAMNOSA HÆREDITAS.

HÆREDITAS JACENS (Lat.). **In Civil Law.** A prostrate inheritance. The inheritance left to a voluntary heir was so called so long as he had not manifested, either expressly or by silence, his acceptance or refusal of the inheritance, which, by a fiction of law, was said to sustain the person (*sustinere personam*) of the deceased, and not of the heir. Mack. C. L. § 685 *a*. An estate with no heir or legatee to take. Code, 10. 10., 1; Howe, Stud. Civ. L. 68.

In English Law. An estate in abeyance; that is, after the ancestor's death and before assumption of heir. Co. Litt. 342 *b*. An inheritance without legal owner, and therefore open to the first occupant. 2 Bla. Com. 259.

HÆREDITAS LUCTUOSA. The succession of parents to the estate of deceased children. 4 Kent 397. It was called a mournful inheritance because out of the ordinary and natural course of mortality. It was sometimes termed *tristis successio*.

HÆRES. In Roman Law. One who succeeds to the rights and occupies the place of a deceased person, being appointed by the will of the decedent. It is to be observed that the Roman *hæres* had not the slightest resemblance to the English *heir*. He corresponded in character and duties almost exactly with the *executor* under the English law.

The institution of the *hæres* was the essential characteristic of a *testament*: if this was not done, the instrument was called a *codicillus*. Mack. C. L. §§ 632, 650.

Who might not be instituted. Certain persons were not permitted to be instituted in this capacity: such as, persons not Roman citizens, slaves of such persons, persons not in being at the death of the testator, and corporations, unless especially privileged. Also, the emperor could not be made *hæres* with the condition that he should prosecute a suit of the testator against a subject. Nor could a second husband or wife be instituted *hæres* to a greater portion of the estate than was left to that child of the first marriage which received least by the will. So, a widow who married before the expiration of her year of mourning could not institute her second husband as *hæres* to more than a third of her estate. And a man who had legitimate children could not institute as *hæredes* a concubine and her children to more than a twelfth of his estate, nor the mother alone to more than one-twenty-fourth; Mack. C. L. § 651.

The institution of the *hæres* might be *absolute* or *conditional*. But the condition, to be valid, must be *suspensive* (condition precedent, see CONDITION), *possible*, and *lawful*. If, however, this rule was infringed, certain conditions, as the *resolutive* (condition subsequent, see CONDITION), the *impossible*, and the *immoral* or *indecent*, were held nugatory, while others invalidated the appointment of the *hæres*,—as the *preposterous* and *captatory*, *i. e.* the appointment of a *hæres* on condition that the appointee should, in turn, institute the testator or some other person *hæres* in his testament. In regard to limitations of time, they must, to be valid, commence *ex die incerto*. A condition that A should become *hæres* after a *certain* day, or that he should be *hæres* up to a day whether *certain* or *uncertain*, was nugatory. The testator might assign his reasons for the institution of a particular *hæres*, but a mistake in the facts upon which those reasons were based did not, in general, affect the validity of the appointment. The institution might be accompanied with a direction that the *hæres* should apply the inheritance either wholly or in part to a specified purpose, which he was bound to comply with in case he accepted the inheritance, unless it was physically impossible to do so, or unless the *hæres* himself was the only person affected by such directions. The *hæres* might be instituted either *simply*, without any interest in the estate, or with a fixed share therein, or with regard to some particular thing; Mack. C. L. § 653. It was customary, in order to provide against a failure to accept on the part of the direct *hæres*, to substitute one or more *hæredes* to him. This substitution might be made in various forms; but the result was the same in all,—that if the first of the direct *hæredes* failed to accept the inheritance, whether from indisposition, permanent incapacity, or from dying before the testator, the substitute stood in his stead. There might be several degrees of substitutes, each ready to act in case of the failure of all the preceding; and the rule was *substitutus substituto est substitutus instituto*: which meant that on a failure of all the intermediate substitutes, the lowest in rank succeeded to the position of the instituted *hæres*. This was called *substitutio vulgaris*. There was another, the *substitutio pupillaris*, which was nothing more than the appointment, by the testator, of a *hæres* to a minor child under his authority,—which appointment was good in case the child died after the testator, and still a minor. It was, in fact, making a testament for such minor—an act which he could not perform for himself; Mack. C. L. §§ 668, 669.

Persons entitled to the inheritance. Though, generally speaking, the testator might institute as *hæres* any person whatever not within the exceptions above mentioned, yet his relatives, within certain limits, were considered as peculiarly entitled to the office, and if he instituted any one else they could not be entirely excluded, but were admitted to a share of the inheritance, which share, called *portio legitima*, or *pars legitima*, was fixed by law. The rules in regard to the persons entitled to this share of the estate, and its amount, are very intricate, and too voluminous to be introduced here. They may be found in Mackeldey, §§ 654-657. Among those entitled to the *pars legitima*, the immediate ascendants and descendants of the testator were peculiarly distinguished in this, that they must be mentioned in the testament, either by being formally instituted as *hæredes*, or by being formally excluded, while the other relatives so entitled might receive their shares as a legacy, or in any other way, without being formally instituted. From this necessity of mentioning this class of relatives, they were called *successores necessarii*.

Acquisition of the inheritance. Except in the case of a slave of the testator (*hæres necessarius*), or a person under his authority (*potestas*) at his death (*hæres suus et necessarius*), the institution of a person as *hæres* did not oblige him to accept the office. A formal acceptance was requisite in the case of all other persons than the two classes just mentioned, whence such persons were called *hæredes voluntarii*, and in opposition to the *sui hæredes*, *extranei hæredes*. This acceptance might be *express* (*aditio hæreditatis*), or *tacit*, *i. e.* by performing some act in relation to the inheritance which admitted of no other construction than that the person named as *hæres* intended to accept the office. The refusal of the office, if express, was called *repudiatio*; if tacit, through the neglect of the *hæres* to make use of his rights within a suitable period, it was called *omissio hæreditatis*. The acceptance could not be coupled with a condition; and a refusal was final and irrevocable; Mack. C. L. §§ 681–683.

Rights and liabilities of the hæres. The fundamental idea of the office is that as regards the estate the *hæres* and the testator form but a single person. Hence it follows that the private estate of the *hæres* and the estate of the testator are united (*confusio bonorum defuncti et hæredis*); the *hæres* acquires all rights of property, and becomes liable to all demands, except those purely personal, to which the testator was entitled and subject, and is, consequently, responsible for all the debts of the deceased, even if the estate left by the latter is not sufficient to pay them. He must, moreover, recognize as binding upon him all acts of the testator relating to the estate. He is bound to obey the directions of the will, especially to perform the trusts and pay the legacies imposed upon him, yet this only so far as the residue of the estate, after liquidating the debts, enables him to do so.

These were the strict rules of the law; but two modes, the *spatium deliberandi* and the *beneficium inventarii*, were in course of time contrived for relieving the *hæres* from the risk of loss by an acceptance of the office.

The *spatium deliberandi* was a period of delay granted to the *hæres*, upon application to the magistrate, in order that he might investigate the condition of the estate before deciding whether to accept or reject the office. If the *hæres* was pressed by the other *hæredes*, or by the creditors of the estate, to decide whether to accept or reject the office he must decide immediately, or apply for the *spatium deliberandi*, which when allowed by the emperor continued for a year, and when by a judge, for nine months, from the day of its allowance. If the *hæres* had not decided at the expiration of this period, he was held to have accepted. If he was not pressed to a decision by the other *hæredes* or by the creditors, he was allowed a year from the day he was notified of the inheritance having been conferred upon him, to deliberate whether to accept or not. If, after deliberating for the allotted period, he should accept the inheritance, he became responsible for the debts of the testator, without regard to whether the estate was sufficient or not to pay them.

The *beneficium inventarii* was an extension to all *hæredes* of the privilege belonging to soldiers not to be responsible for the debts beyond the assets. This privilege to the *hæres* was conditional upon his commencing an inventory within thirty days and completing it within sixty from the time he became notified of his appointment. The inventory must be prepared in the presence of a notary, and must be signed by the *hæres*, with a declaration that it included the whole estate, etc., to which fact he might be obliged to make oath. He then became liable only to the extent of the assets. He was allowed, before paying the debts, to deduct the expenses of the funeral, of establishing the testament, and of making the inventory. He could not be forced to pay debts or legacies during the preparation of the inventory, and afterwards he paid the claimants in full in the order in which they presented themselves, and when the assets were exhausted could not be required to pay any more. His own claims against the estate might be paid first, and his debts to the estate were part of the assets. If he neglected to prepare the inventory within the legal period, he forfeited the privileges of it; which also was the case if he applied for the *spatium deliberandi*; so that he must choose between the two.

The creditors and legatees of the testator were allowed the *beneficium separationis*, by which, when the *hæres* was deeply in debt, and, by reason of the *confusio bonorum defuncti et hæredis*, they were in danger of losing their claims, they were permitted to have a separation of the assets from the private estate of the *hæres*. Application for this privilege must have been made within five years from the acceptance of the inheritance; but it would not be granted if the creditors of the testator had in any way recognized the *hæres* as their debtor. If it was granted, they were in general restricted to the assets for payment of their claims, and the private estate of the *hæres* was discharged. If the assets were not exhausted in satisfying the creditors and legatees of the testator, the creditors of *hæres* might come in upon the balance; but these latter were not entitled to the *beneficium separationis*.

The *hæres* might transmit the inheritance by will; but, in general, he could not do so till after acceptance. To this, however, there were numerous exceptions.

The *remedies of the hæres* are too intimately connected with the general system of Roman jurisprudence to be capable of a brief explanation. See Mack. C. L. §§ 692, 693; Dig. 5. 3; Cod. 3. 31; Gaius, iv. § 144, etc.; Maine, Anc. Law.

Cohæredes. When several *hæredes* have accepted a joint inheritance, each, *ipso jure*, becomes entitled to a proportional share in the assets, and liable to a proportional share of the debts, though the testator may, if he choose, direct otherwise, and they may also agree otherwise among themselves: but in both these cases the creditors are not affected, and may pursue each *hæres* to the extent of his legal share of liability, and no further.

One of the *cohæredes* has a right to compel a partition of the assets and liabilities, subject, however, to an agreement among themselves, or a direction by the testator, that the inheritance shall remain undivided for a time; Mack. C. L. §§ 694, 695.

HÆRES ASTRARIUS. In Old English Law. An heir in actual possession of the house of his ancestor. Bract. 85, 267 *b*.

HÆRES DE FACTO. An heir, made so by reason of the disseisin or other wrongful act of his ancestor. An heir in fact in contradistinction to an heir *de jure*.

HÆRES EX ASSE. In Civil Law. Sole heir. In inheritances and other money matters where a division was made the *as* (a unit) with its parts, was used to designate the portions, thus: *Hæres ex asse*, heir to the whole; *hæres ex semisse*, heir to one-half; *hæres ex dodrante*, heir to three-fourths; and so, *hæres ex besse*, *triente*, *quadrante*, *sextante*, etc.

HÆRES EXTRANEUS (Lat.). In Civil Law. An extraneous or foreign heir, that is one who is not a child or slave of the testator. Those only could be extraneous heirs who had a capacity of accepting the inheritance both at the time of making the will and at the death of the testator. Halifax, Anal. b. 11, c. 6, § 38.

HÆRES FACTUS (Lat.). An heir appointed by will. This expression is applicable in the Roman law and systems founded on it, but not in the English common law; Moz. & W.

HÆRES FIDEI-COMMISSARIUS (Lat.). See FIDEI COMMISSUM.

HÆRES FIDUCIARIUS (Lat.). See FIDEI COMMISSUM.

HÆRES LEGITIMUS (Lat.). A lawful heir, being a legitimate child of parents who were married.

HÆRES NATUS (Lat.). An heir who is such by birth or descent. This is the only form of heirship recognized in the English law; Wms. R. P., 6th Am. ed. 96.

HÆRES NECESSARIUS (Lat.). **In Civil Law.** A necessary heir, *i. e.* a slave instituted heir. He was so-called because whether he wished it or not, on the death of the testator he became instantly free and necessarily heir. A person suspecting that he was insolvent usually made a slave his heir so that his goods would be sold, if that were necessary, in the name of this heir and not as those of the testator. Inst. 2. 19. 1; *id.* 1. 6. 1; Sand. Introd. § 76.

HÆRES PROXIMUS (Lat.). The child or descendant of the deceased. Dalr. Feud. 110.

HÆRES RECTUS (Lat.). **In Old English Law.** A right heir. Fleta, l. 6, c. 1, § 11.

HÆRES REMOTIOR (Lat.). A more remote heir. A kinsman, not a child or descendant.

HÆRES SUUS (Lat.). **In Civil Law.** One's own heir; the natural heir of the decedent; his lineal descendants. Persons who were in the power of the testator but became *sui juris* at his death. Inst. 2. 13; *id.* 3. 1. 4. 5.

HÆRES SUUS ET NECESSARIUS (Lat.). **In Civil Law.** An heir by relationship and necessity. The descendants of an ancestor in direct line were so-called, *sui*, denoting the relationship, and *necessarii*, the necessity of law which made them heirs without their election, and whether the ancestor died testate or intestate. Halifax, Anal. b. 11, c. 6, § 38; Mack. Civ. L. § 681; Inst. 2. 19. 2.

HÆRETARE. To give a right of inheritance or make a donation hereditary to the grantee and his heirs. Cowel.

HÆRETICO COMBURENDO. A writ for the burning of heretics last executed in the ninth year of James I., and abolished in 1677. See DE HÆRETICO COMBURENDO.

HAFNE. A haven or port. Cowel.

HAFNE COURTS (*hafne*, Dan. a haven, or port). Haven courts; courts anciently held in certain ports in England. Spelman, Gloss.

HAG. A division of a coppice or wood on which timber was cut annually by the proprietor. Ersk. Pr. 222.

HAGA. A house in a city or borough. Scott.

HAGIA. A hedge. Mon. Angl. tome 2, 273.

HAGNE. A little hand-gun. Stat. 33 Hen. VIII. c. 6.

HAGNEBUT. A hand-gun larger than the hagne. Stat. 2 & 3 Edw. VI. c. 14; 4 & 5 P. & M. c. 2.

HAIA. An enclosed park. Cowel.

HAIEBOTE. A permission to take thorns, etc., to repair hedges. Blount.

HAILL. Whole. All and haill are common words in Scotch conveyances. 1 Bell, App. Cas. 499.

HAILWORKFOLK. Holy work folk. Persons who held lands of which the tenure was the service of defending or repairing some church or monument.

HAIMHALDARE. In Old Scotch Law. To seek restitution of one's own goods and gear and bring the same home again. Skene de Verb. Sign.

HAIMSUCKEN. See HAMESUCKEN.

HAIR. A capillary outgrowth from the skin. It has been held not to include the bristles of animals; 13 Blatch. 251.

HAKETON. A military coat of defence.

HAKH. Truth; the true God; a just or legal prescriptive right or claim; a perquisite claimable under established usage by village officers. Wilson, Gloss. Ind.

HAKHDAR. The holder of a right. Moz. & W. See HAKH.

HALAKAR. The realization of the revenue. Wilson, Gloss. Ind.; Moz. & W.

HALF-BLOOD. A term denoting the degree of relationship which exists between those who have one parent only in common.

By the English common law, one related to an intestate of the half-blood only could never inherit, upon the presumption that he is not of the blood of the original purchaser; but this rule has been greatly modified by the 3 & 4 Will. IV. c. 106.

In this country, the common-law principle on this subject may be considered as not ordinarily in force, though in many states some distinction is still preserved between the whole and the half-blood; 4 Kent 403, n.; 2 Yerg. 115; 1 M'Cord 456; 31 Pa. 289; Dane, Abr. Index; Reeves, *descents*, *passim*; 2 Washb. R. P. 411. See DESCENT AND DISTRIBUTION.

HALF-BROTHER, HALF-SISTER. Persons who have the same father, but different mothers; or the same mother, but different fathers.

HALF-CENT. A copper coin of the United States, of the value of one two-hundredth part of a dollar, or five mills, and of the weight of ninety-four grains. The first half-cents were issued in 1793, the last in 1857.

HALF-DEFENCE. See DEFENCE.

HALF-DIME. A silver coin of the United States, of the value of five cents, or the one-twentieth part of a dollar.

It weighs nineteen grains and two-tenths of a grain,—equal to four-hundredths of an ounce Troy,—and is of the fineness of nine hundred thousandths; nine hundred parts being pure silver, and one hundred parts

copper. The fineness of the coin is prescribed by the 8th section of the general mint law, passed Jan. 18, 1837; 5 Stat. L. 137. The weight of the coin is fixed by the 1st section of the act of Feb. 21, 1853; 10 Stat. L. 160. The second section of this last-cited act directs that silver coins issued in conformity to that act shall be a legal tender in payment of debts for all sums not exceeding five dollars. This provision applies to the half-dollar and all silver coins below that denomination. The first coinage of half-dimes was in 1793. A few half "dismes," with a likeness of Mrs. Washington, the wife of the president, upon the obverse of the coin, were issued in 1792; but they were not of the regular coinage.

By act of 9 June, 1879, 21 Stat. L. 7 (Rev. Stat. 1 Supp. 488), silver coin of smaller denominations than one dollar shall be a legal tender in all sums not exceeding ten dollars. The coining of the half-dime was abolished by act of 12 Feb. 1873, c. 131, s. 16. Its place was supplied by a five-cent piece composed of three-fourths copper and one-fourth nickel, of the weight of seventy-seven and sixteen-hundredths grains troy. The minor coins, viz., the five, three, two, and one cent pieces, are a legal tender for any amount not exceeding twenty-five cents in any one payment.

HALF-DOLLAR. A silver coin of the United States, of half the value of the dollar or unit, and to contain one hundred and eighty-five grains and ten-sixteenth parts of a grain of pure, or two hundred and eight grains of standard, silver. Act of April 2, 1792. 1 Stat. L. 348. Under the provisions of this law, the fineness of the silver coins of the United States was 892.4 thousandths of pure silver.

The weight and fineness of the silver coins were somewhat changed by the act of Jan. 18, 1837, 5 Stat. L. 137; the weight of the half-dollar being by this act fixed at two hundred and six and one-quarter grains, and the fineness at nine hundred thousandths; conforming, in respect to fineness with the coinage of France and most other nations.

The weight of the half-dollar was reduced by the provisions of the act of February 21, 1853, 10 Stat. L. 160, to one hundred and ninety-two grains.

The half-dollars coined under the acts of 1792 and 1837 (as above) were a legal tender at their nominal value in payment of debts to any amount. Those coined since the act of February 21, 1853, were, under it, a legal tender in payment of debts for all sums not exceeding five dollars. Sec. 2. The silver coins struck in the year 1853, under this last-cited act, may be distinguished from the others of that year by the arrow-heads on the right and left of the date of the piece. In 1854, and subsequent years, the arrow-heads are omitted.

By the act of 12 Feb. 1873, c. 131, s. 15, the weight of the half-dollar shall be twelve and one-half grams (192.9 grains), and by act of June 9, 1879, Rev. Stat. 1 Supp. 488, it is a legal tender for sums not exceeding ten dollars. The same act enables the holder of any silver coins of a smaller denomination than one dollar, to exchange them in sums of twenty dollars, or any multiple thereof, at the U. S. Treasury, for lawful money of the United States.

HALF-EAGLE. A gold coin of the United States, of the value of five dollaas.

The weight of the piece is 129 grains (act, June 28, 1834) of standard fineness, namely, nine hundred thousandths of pure gold, and one hundred of alloy of silver and copper: "provided that the silver do not exceed one-half of the whole alloy." Act of Jan. 18, 1837, 5 Stat. L. 136. For the proportion of alloy in gold coins of the United States since 1853, see EAGLE.

For all sums whatever the half-eagle was a legal tender of payment of five dollars. It is now a legal tender to any amount, when not below the standard weight, and then in proportion to its actual weight. Act of February 12, 1873.

HALF ENDEAL or HALFEN DEAL. A moiety or half of a thing.

HALF-KINEG. In Saxon Law. Half-King. A title accorded to aldermen of all England. Crabb. Eng. L. 28; Spel. Glos.

HALF-MARK. A noble; six shillings, eight pence.

HALF-PROOF. In Civil Law. That which is insufficient as the foundation of a sentence or decree, although in itself entitled to some credit. Vicat, *Probatio.*

HALF-SEAL. A seal used in the English chancery for the sealing of commissions to delegates appointed upon any appeal, either in ecclesiastical or marine causes. 8 Eliz. c. 3.

HALF-TIMER. In England a child employed in a factory who, under the factory act of 1878, must give one school attendance on each work-day when employed on the morning and afternoon set, or two attendances on each non-working day, if employed on the alternate day system. "Experience has established the fact, that in proportion to the hours spent in school, these 'half-timers' make more rapid progress than the whole-day scholars: at the same time, whether they are designed to be factory workers for life or not, they are acquiring habits of industry and manual dexterity which are of essential use in any future employment." See Int. Cyc. Tit. Factory Acts. Education.

HALF-TONGUE. A jury half of one *tongue* or nationality and half of another. Vide *De medietate linguæ*, Jacob, Law Dict.

HALF-YEAR. In the computation of time a half year consists of one hundred and eighty-two days. Cro. Jac. 166; Co. Litt. 135 *b*; N. Y. Rev. Stat. part 1, c. 19, t. 1, § 3.

HALI. A man employed in ploughing. Wilson, Gloss. Ind.; Moz. & W.

HALIMAS. In English Law. The feast of all-Saints, on November 1. One of the cross-quarters of the year was computed from Halimas to Candlemas. Whart.

HALIMOTE. See HALMOTE.

HALL. A public building used either for the meetings of corporations, courts, or employed to some public uses : as, the city hall, the town hall. Formerly this word denoted the chief mansion or habitation.

HALL-MARK. An official stamp affixed by the goldsmiths upon articles made of gold or silver as an evidence of genuineness, and hence used to signify any mark of genuineness. "The power of free alienation is the 'hall-mark' of a fee-simple absolute." Rand. Em. Dom. § 206.

HALLAGE. A toll or license fee on goods vended in a hall. Jac. L. Dict. ; 6 Co. 62.

A toll due to the lord of a market or fair, on commodities vended in the common hall. Cowel.

HALLAZCO. In Spanish Law. The finding and taking possession of something which previously had no owner, and which thus becomes the property of the first occupant. Las Partidas, 3. 5. 28, 5. 48. 49, 5. 20. 50.

HALLUCINATION. In Medical Jurisprudence. The perception by any of the senses of an object which has no existence. The conscious recognition of a sensation of sight, hearing, feeling, taste, or smell which is not due to any impulse received by the perceptive apparatus from without, but arises within the perceptive apparatus itself. A false *perception* in contradistinction to a *delusion* or false belief. Wood, Am. Text-Book of Med.

An error, a blunder, a mistake, a fallacy ; and when used in describing the condition of a person, does not necessarily carry an imputation of insanity. 64 Vt. 233.

An instance is given of a temporary hallucination in the celebrated Ben Jonson, the poet. He told a friend of his that he had spent many a night in looking at his great toe, about which he had seen Turks and Tartars, Romans and Carthaginians, fight, in his imagination. 1 Collin. Lun. 34. If, instead of being temporary, this affection of his mind had been permanent, he would doubtless have been considered insane. See, on the subject of spectral illusions, Hibber, Alderson, and Farrar's Essays ; Scott on Demonology, etc. ; 3 Bostock, Physiology 91, 161 ; 1 Esquirol, *Maladies Mentales* 159. See INSANITY.

HALMOTE or HALIMOTE. A court baron (*q. v.*). It was sometimes used to designate a convention of citizens in their public hall and was also called folkmote and hallmote. The word halimote rather signifies the lord's court or a court baron held in a manor in which the differences between the tenants were determined. Cunn. L. Dict. ; Cowel.

"Furthermore," it is said, "it seems to have been a common practice for a wealthy abbey to keep a court, known as a *halimote*, on each of its manors, while in addition to these manorial courts it kept a central court, a *libera curia* for all its greater freehold tenants. And we may now and again meet with courts which are distinctly called courts of honors. The rule then was not merely this, that the lord of a manor may hold a court for the manor ; but rather this, that a lord may hold a court for his tenants." 1 Poll. & Maitl. 573.

HALYWERCFOLK. Those who held by the service of guarding and repairing a church or sepulchre, and were excused from feudal services. Hist. Dunelm. apud Whartoni Ang. Sax. pt. 1, p. 749. Especially in the county of Durham, those who held by service of defending the corpse of St. Cuthbert. Jacob, Law Dict.

HAM. A place of dwelling ; a home-close ; a little narrow meadow. Blount. A house or little village. Cowel.

HAMA. A hook ; an engine with which a house on fire is pulled down. Yel. 60. A piece of land.

HAMBLING or HAMELING. Expeditation (*q. v.*).

HAMEL, HAMELETA, or HAMLETA. A hamlet.

HAMESUCKEN. In Scotch Law. The crime of hamesucken consists in "the felonious seeking and invasion of a person in his dwelling-house." 1 Hume 312 ; Burnett 86 ; Allison, Cr. Law of Scotl. 199. By some authorities the word is written Hamesecken ; Cowel ; 4 Bla. Com. 223.

The mere breaking into a house, without personal violence, does not constitute the offence, nor does the violence without an entry with intent to commit an assault. It is the combination of both which completes the crime, and the injury to the person must be of a grievous character. The punishment of hamesucken, in aggravated cases of injury, is death ; in cases of inferior atrocity, an arbitrary punishment ; Alison, Cr. Law of Scotl. ch. 6 ; Erskine, Inst. 4. 9. 23.

This term was formerly used in England instead of the now modern term *burglary* ; 4 Bla. Com. 223.

But in Hale's Pleas of the Crown it is said, "The common genus of offences that comes under the name of *hamesucken* is that which is usually called house-breaking ; which sometimes comes under the common appellation of *burglary*, whether committed in the day or night to the intent to commit felony : so that house-breaking of this kind is of two natures." 1 Hale, Pl. Cr. 547 ; 22 Pick. 4.

HAMFARE. This word by some is said to signify the freedom of a man's house ; but Cowel seems to think that it signifies the breach of peace in a house. Holthouse.

HAMLET. A small village ; a part or member of a vill. It is the diminutive of *ham*, a village. Cowel.

HAMMA. A close joining to a house ; a croft ; a little meadow. Cowel.

HAMMER. Used in connection with auction sales ; as *to bring or come to the hammer*, to sell or be sold at auction. Cent. Dict.

HAMSOCUE (Saxon from *ham*, house, *sockue*, liberty, immunity. The word is variously spelled *hamsoca*, *hamsocua*, *hamsoken*, *haimsuken*, *hamesaken*). The right of security and privacy in a man's house. Du Cange. The breach of this privilege by a forcible entry of a house is breach of the peace ; Anc. Laws & Inst. of Eng. Gloss. ; Du Cange ; Bracton, lib. 3, tr. 2, c. 2, § 3. The right to entertain jurisdiction of the offence. Spelman ; Du Cange. Immunity from punishment for such offence. *id.* ; Fleta, lib. 1, c. 47, § 18. An insult offered in one's own house (*insultus factus in domo*). Brompton, p. 957 ; Du Cange.

HANAPER. A hamper or basket in which were kept the writs of the court of chancery relating to the business of a subject, and their returns ; 5 & 6 Vict. c. 113 ; 10 Ric. II. c. 1 ; equivalent to the Roman *fiscus*. According to Spelman, the fees accruing on writs, etc., were there kept ; Du Cange ; 3 Bla. Com. 49. The office where it was kept was called the *Hanaper office*.

HAND. A measure of length, four inches long : used in ascertaining the height of horses.

In legal parlance, handwriting or written signature, as " witness my hand," etc. ; 18 Colo. 538 ; 10 Mod. 103.

HAND-BILL. A written or printed notice displayed to inform those concerned of something to be done.

HAND-BOROW (from hand, and Saxon *borow*, a pledge). Nine of a decennary or friborg (*q. v.*) were so called, being inferior to the tenth or *head borow*,—a *decenna* or *friborga* being ten freemen or *frankpledges*, who were mutually sureties for each other to the king for any damage. Du Cange, *Friborg*, *Head-borow*.

HAND DOWN. To announce or file an opinion in a cause. Used originally and properly of the opinions of appellate courts transmitted to the court below ; but in later usage the term is employed more generally, but inaccurately, with reference to any decision by a court upon a case or point reserved for consideration.

HAND-FASTING. Betrothment.

HAND-GRITH. Peace or protection given by the king with his own hand used in the laws of Henry I. Tomlin ; Cowel ; Moz. & W. ; Stat. Hen. I. c. 13.

HAND-HABEND. In Saxon Law. One having a thing in his hand ; that is, a thief found having the stolen goods in his possession,—*latro manifestus* of the civil law. See Laws of Hen. I. c. 59 ; Laws of Athelstane § 6 ; Fleta, lib. 1, c. 38, § 1 ; Britton p. 72 ; Du Cange, *Handhabenda*.

Jurisdiction to try such thief. *Id.*

HAND MONEY. Earnest (*q. v.*) when it is in cash.

HANDSALE. Anciently, among all the northern nations, shaking of hands was held necessary to bind a bargain,—a custom still retained in verbal contracts : a sale thus made was called *handsale*, *venditio per mutuam manuum complexionem*. In process of time the same word was used to signify the price or earnest which was given immediately after the shaking of hands, or instead thereof. In some parts of the country it is usual to speak of hand-money as the part of the consideration paid or to be paid at the execution of a contract of sale. See 2 Bla. Com. 448 ; Heineccius, *de Antiquo Jure Germanico*, lib. 2, § 335 ; Toullier, liv. 3, t. 3, c. 2, n. 33 ; EARNEST.

HANDSEL. Earnest ; handsale (*q.v.*).

HANDWRITING. Anything written by a person. The manner in which a person writes, including the formation of the characters, the separation of the words, and other features distinguishing the written matter, as a mechanical result, from the writing of other persons.

That branch of the law of evidence which treats of handwriting is largely concerned with the determination of the genuineness or falsity of signatures. As to what constitutes a writing, generally, see that title, and, as to writing as required by the statutes of wills, see WILL.

With respect to proof of handwriting a signature by a person unable to write, or, as it has been held, by one who can write, may be by mark, which is proved as the handwriting would be in case of a written signature. See MARK. The law of evidence as to handwriting applies also where it is in a disguised hand ; 4 Esp. 117 ; 5 Cush. 295 ; 9 Conn. 55 ; or when a cipher is used ; 135 Mass. 533.

One's own testimony is not the best evidence on this subject, and the writer need not be called ; 2 Camp. 508 ; 1 Hawks 190 ; 49 N. J. L. 26. See 67 Barb. 124. Whether it is evidence at all is a question confused by the general disqualification of parties who were naturally in most cases those to whom the question would arise, and it has been of late assumed by many writers that since the statutes allowing parties to be witnesses they may be such, for this as well as any other purpose. See 5 Mass. 261 ; 5 Ohio 5 ; s. c. 22 Am. Dec. 767, with note citing cases. The handwriting of attesting witnesses after thirty years need not be proved ; Stark. Ev. Sharsw. ed. 521 ; so also of unattested documents taken from proper depositaries ; 7 East 279 : 62 Me. 414. The extrajudicial admissions of a party as to his handwriting are evidence to prove the same, though not of a very satisfactory nature ; Whart. Ev. 705.

It is said that a witness has three means of becoming acquainted with a person's handwriting : (1) by seeing him write ; (2) by having seen his writing ; and (3) by a comparison of the writing in question with other writings shown to be genuine ; Best, Ev. § 233 ; Steph. Ev. Art. 51.

As to the first, it is generally held that it

is enough that the witness has seen the party write only once; 22 Gratt. 405; 17 N. H. 71; 135 Mass. 533; 26 Pa. 388; 8 C. & P. 380; 104 Ill. 327; 142 *id.* 453; 42 Mich. 473. The contrary, however, was held in one case, in which it was said:

"It is not enough that he (the witness) had seen the person, as is the proof of this case, write but once, and then under circumstances showing that the attention of the witness was not specially directed to the peculiarities of the penmanship;" 1 Bond 51.

Any person who has seen one write and has acquired a standard in his own mind of the general character of the writing is competent to testify as to his belief of the genuineness of a writing; 45 La. Ann. 207. Merely seeing the party write his surname once was held insufficient to warrant testifying to the full signature; 2 Stark. 164; but seeing the surname written several times was sufficient; Mood. & M. 39. See 1 Disney 539; 8 Gill 77. It is sufficient although the witness never saw the person write before the date of the paper in question; 10 Cush. 453; or although he had not seen him write for many years before the trial; 8 Gill 87 (three years); *id.* 18 (six years); 8 Scott 384 (ten years); 25 How. St. Tr. 71 (nineteen years); but not that he has seen writing that is done with reference to his testifying at the trial either at or before it; 90 Pa. 89; 16 N. J. L. 267; with this exception the circumstances under which the witness has seen the party write affect his credit, not his competency; Jones, Ev. § 559; 54 N. Y. 398; 26 Pa. 388; 135 Mass. 533.

As to the second method it is not necessary that the witness has seen the party write, as such personal acquaintance may be acquired by having seen papers purporting to be genuine and which have been acknowledged to be such by the writer; 49 Minn. 420; 38 S. C. 385; 5 Tex. Civ. App. 575; 54 N. Y. 398; 17 Pa. 514; 45 Ill. App. 462; but this is not always sufficient; 108 Mass. 344. The witness is qualified, as such, by knowledge derived from correspondence, including letters received from a person in answer to those written and addressed to him; 3 Allen 598; 62 Ga. 100; 103 Ind. 419; 41 Miss. 216; 39 Neb. 660; 83 Ala. 351; 1 Cra. 491; 25 Pa. 133; 46 Mich. 482; 21 Wend. 557; 5 A. & E. 740; but the mere receipt of letters is insufficient to prove that they were written by the person purporting to sign them; 124 Ind. 495; there must be a ratification or recognition; 21 Wend. 557; 113 Mass. 274; 46 Vt. 228; 40 Ill. 346; 59 Tex. 411; *contra*, 2 C. & K. 744; 2 C. & P. 21; but such knowledge may be gained in the ordinary course of business, as by seeing documents written by the person; 27 Gratt. 313; 8 Hun 175; 28 Ill. App. 445; and only seeing letters addressed to strangers purporting to be those of the person in question; 113 Mass. 275; 28 Pa. 318. Such knowledge may be that of a clerk who sees correspondence or documents; 12 Wall. 317; 2 Johns. Ch. 211; 2 Metc. 522; 5 C. & P. 213; 10 Mo. 597; a clerk in a bank; 56 Wis. 156; 35 Ala. 370; a servant who has taken his master's letters to the post; 5 A. & E. 740; or a public officer who has seen many official documents filed in his office, signed by a justice, may prove his signature; 47 Cal. 294; 2 Metc. 522; 12 Wall. 317. The weight of the testimony will depend on the means of knowledge; 37 Fed. Rep. 331. The witness must have an opinion; 38 Ill. 363; and may give it if the handwriting is disguised; 5 Cush. 301; s. c. 32 Am. Dec. 711; 36 N. H. 182; but positive knowledge or certainty is not necessary; 8 Ves. 474; 80 Ia. 180; 32 N. Y. 669; 116 Mo. 605; he need not swear to belief, an opinion is sufficient; 25 Pa. 133; 38 Ill. 363; Whart. Ev. § 709. A witness has been permitted to testify that the signature was like the writing of the party whose signature it is alleged to be; 4 Esp. 37.

The witness in such cases need not be an expert; 72 Ala. 19; 5 Tex. Civ. App. 575; or familiar with the person's handwriting generally if he is so with the signature; 105 Mass. 62; as, *e. g.* he may prove the signature of a firm, when unacquainted with the handwriting of any partner; where he testifies that in his opinion, the handwriting was the same as that of many notes he had presented to the firm, and which had been paid by them; 10 Ired. 385.

A signature upon an ancient writing may be proved by a witness who has become familiar with it by the inspection of other authentic ancient documents on which the same signature appeared; 8 Wend. 426; 15 *id.* 111. If a witness says that he knows a party's handwriting, he is *prima facie* competent to testify with respect to it and, if not cross-examined, his knowledge is taken to be admitted; 8 Watts 485; 17 Pick. 490; 5 McLean 186; *contra*, 8 Ill. 644; 17 Ohio 16; he may be cross-examimed as to the extent of his knowledge; 56 Md. 439; which goes to the weight of his testimony; 72 Ala. 79. But if want of knowledge appear; 46 Vt. 228; 38 Kan. 691; 3 Humph. 367; or his testimony is insufficient; 2 Cra. 253; 27 Tex. 345; 30 N. J. L. 387; 3 V. & B. 172; it may be rejected. But see 66 Pa. 253. A witness may testify as to handwriting who cannot read or write himself; 132 Mass. 105.

A witness may be asked if he would act upon the signature which he testifies to as genuine; 147 U. S. 150; *contra*, 44 N. Y. 514; his knowledge cannot be tested by irrelevant papers; 13 Gray 525; 11 A. & E. 322; 91 Mo. 399; 104 Ill. 327; 44 N. Y. 514. But see 2 M. & R. 536; 14 Me. 478; 41 Ala. 626; 1 Whart. Ev. § 10. But he may refresh his memory by reference to papers from which his knowledge is derived; 4 Cra. 312; 66 Md. 113; 26 Pa. 388; 42 Mich. 113; 6 Rand. 316.

The third method of proving handwriting is what is termed comparison. It is defined to be a mode of deducing evidence of the authenticity of a written instrument, by showing the likeness of the handwriting to that of another instrument proved to be that of the party whom it is sought to establish

as the author of the instrument in question. 1 Greenl. Ev. § 578.

Another much cited definition is "when other witnesses have proved the paper to be the handwriting of a party, and then the witness on the stand is desired to take the two papers in hand, compare them, and say whether or not they are the same handwriting; the witness collects all his knowledge from comparison only; he knows nothing of himself; he has not seen the party write nor held any correspondence with him;" Duncan, J., 6 S. & R. 571.

But more briefly, though with great precision, Starkie says: "By comparison is meant a comparison by the juxtaposition of two writings in order, by such comparison, to ascertain whether both were written by the same person." Stark. Ev. Metc. ed. pt. 4, 654.

Scarcely any title of the law, certainly none in the law of evidence, has given rise to more discussion in England and in this country and the "confusion, obscurity, and contradiction" which is to be observed in the cases quite justifies the criticism of Woodward, J., in 43 Pa. 9, that much of the difficulty of the subject has arisen from the failure of judges to observe the essential rule "that terms be first correctly defined and then always used in the defined sense." A very pregnant cause of the confusion was the failure to preserve the distinction between comparison properly defined and the use of admittedly genuine signatures merely to enable a witness to refresh the memory as to his ideal standard formed by previous knowledge of the handwriting of the person whose signature was in issue. The latter process is in no sense a proper application of the term comparison as understood in the law of evidence, though often so used by judges. It is true as said by Patteson, J., in Doe *v.* Suckermore, 5 A. & E. 703 (and repeated in almost the same words by Judge Woodward in the case just cited), that all evidence of handwriting, except in the single instance where the witness saw the document written, is in its nature, comparison of hands. It is the belief which the witness entertains, upon comparing the writing in question with the exemplar in his mind derived from some previous knowledge. This language aptly expresses the idea which was in the mind of its author, but it has been quoted time and again by judges who apparently did not have clearly in mind the distinction which it was intended to emphasize and has contributed, perhaps, not a little to the continued misuse of the word comparison in this connection. Where a witness testifies from the comparison (used in what might be termed the colloquial sense referred to by Justice Patteson) of the writing in question with a mental standard derived from previous knowledge of the handwriting, he is simply stating his opinion, not in the sense of opinion evidence, but based upon his own knowledge. When a witness examines the writing in question and, placing it in juxtaposition with other writings proved to be genuine, having no previous knowledge, and testifies to his belief from the similitude, or want of it, it is properly and technically, evidence by comparison of hands. This distinction is stated with precision in some very early cases; Peake, N. P. 20; 21 How. St. Tr. 810; Rex. *v.* Tanyd, cited McNally, Ev. 409. It is in this latter technical sense that the phrase comparison of hands is here used and the cases properly relating to the subject apply to the two questions: (1) whether such comparison may be made by the jury, genuine writings, otherwise irrelevant, being admitted for that purpose; (2) whether it may be made by expert witnesses and their conclusions proved for the information of the jury.

Such evidence was admissible in the Roman law; 1 Whart. Ev. § 711, citing De Prob. de Lit. Comp. L. 20, c. iv. 21; Nov. 49, cap. 2; and also under the Code Napoleon, by three sworn experts appointed by the court, or agreed upon, and the writings must be executed before a notary or admitted; Gen. Code Proc. pt. 1, l. 2, tit. 10, s. 200.

At common law the genuineness of a contested writing could not be proved by comparison, by a witness, of such writing with other writings acknowledged to be genuine; 1 Cr. & J. 47; 1 Nev. & P. 1; 7 C. & P. 548, 595; 1 Mood. & R. 133; 5 A. & E. 703. It was otherwise in the ecclesiastical courts; *id.*; 1 Phil. 78. See 2 Addams 53, 79, 91, note *a;* 1 *id.* 162, 214, 216.

Ancient writings could be proved by comparison; 14 East 327, n. a; 7 East 279, 282; Mood. & R. 141; 10 Cl. & F. 193; 2 H. L. Cas. 534, 557. The right of the jury to make comparisons, though denied by Lord Kenyon when the jurors were illiterate; Peake, N. P. C. 20; was allowed by him when the jury were considered competent; *id.* 27; and it was afterwards fully established; 1 Cr. & J. 47; 1 N. & P. 1; 4 C. & P. 267. Comparison by experts, after some fluctuation, it was settled could not be made; 5 C. & P. 196; 5 B. & A. 330; 5 A. & E. 703.

It had required infinite discussion to settle the rule of these cases. Something called comparison was known in very early cases; 10 How. St. Tr. 312; 12 *id.* 183, 306; 12 Mod. 72; but at this period the terms comparison of hand and similitude of hands were used to describe every method of the proof of writing except by one who had seen the document written. It is therefore necessary that the cases should be critically reviewed with reference to the varied meaning with which these terms were employed at different periods. This work has been very well done by Professor John H. Wigmore in 30 Am. L. Rev. 481. The conclusion reached is thus stated:— "(1) That the classes of witnesses who may testify to handwriting have increased in number by successive enlargements; (2) that the whole meaning of 'comparison of hands' has changed; (3) that the mere process of juxtaposition *coram judicio*, whether for witness or for the jury, was historically

orthodox and unquestionable; and (4) that the opposite fates, at common law, of juxtaposition by experts and juxtaposition by jury—exclusion for the former but sanction (limited) for the latter—were due simply to the fact that the former had never been attempted till the 1800s and was merely prevented from coming into existence, while the latter had always existed and was thus able to survive the attempts on its life." The entire article should be referred to in any examination of this subject, as, on the whole, throwing new light upon it from a point of view not elsewhere so well treated. It may be added that the historical development of the English rule has not lost its importance by reason of its being superseded in England by statute. It is of primary importance in considering the decisions in those American jurisdictions which adhere to the old rule, and scarcely less so in properly estimating those in the jurisdictions which have abandoned it. See *infra*.

The question was set at rest by 17 & 18 Vict. c. 125, s. 27, authorizing comparison with a writing proved to the satisfaction of the judge to be genuine to be made by witnesses, and such writings to be submitted to the court and jury as evidence of the genuineness, or otherwise, of the writing in dispute. Under this act the jury may make comparison with papers relevant or not; 1 F. & F. 270; 2 *id.* 24; 4 *id.* 490. The court must determine the genuineness of the document offered for comparison and its decision is appealable; 30 L. T. 223.

The rule of the English courts (prior to this statute) forbidding the admission of documents irrelevant to the matter in issue for the sole purpose of comparison is known as the English rule, and is so referred to by American courts, including those which have and those which have not adopted it.

The objections to permitting comparison of the disputed paper with others conceded to be genuine but admitted for the sole purpose of comparison, which led to the adoption of the English rule, have been thus summarized: "First, that the writings offered for the purpose of comparison with the documents in question might be spurious, and consequently that, before any comparison betwen them and it could be instituted, a collateral issue must be tried to determine their genuineness. Nor is this all,—if it were competent to prove the genuineness of the main document by comparison with others, it must be equally so to prove that of the latter by comparison with fresh ones; and so the inquiry might go on *ad infinitum*, to the great distraction of the attention of the jury and delay in the administration of justice. Secondly, that the specimens might not be fairly selected. Thirdly, that the persons composing the jury might be unable to read, and consequently be unable to institute such comparison." Best, Ev. § 238.

The rule is followed, generally, by the federal courts. It is specifically adopted by the supreme court; 91 U. S. 270; 125 *id.* 397; 151 *id.* 303; 6 Pet. 763. In the circuit and district court while the rule of the supreme court is generally followed; 56 Fed. Rep. 384; there is opportunity for some variation, growing out of the frequent necessity in those courts for the administration of local law. Comparison was allowed by both jury and experts in 12 Blatchf. 390; 31 Fed. Rep. 19; 32 *id.* 198, *contra*, 10 *id.* 469. No comparison was permitted by experts in 1 Baldw. 49; 1 Wash. C. C. 1; 4 *id.* 729; but it was allowed by the jury with papers otherwise in evidence; 3 Wall. Jr. 88, 115; and with papers offered for comparison, merely; 1 Gall. 170. In the fourth circuit the supreme court rule was directly followed; 29 Fed. Rep. 247; and that of course is to be considered the rule of the federal courts unless the case is controlled by local law.

Many of the state courts have also followed the old English rule, and while permitting comparison by the jury, with papers in evidence in the case, they exclude irrelevant papers; 72 Ala. 79; 84 *id.* 53; 96 *id.* 357; 11 So. Rep. (Ala.) 365; 32 Ark. 337; 5 Col. 340; 40 Ill. 346; 64 *id.* 356; 142 *id.* 302 (*contra*, 46 Ill. App. 598; see 31 *id.* 592; 144 Ill. 652; 147 *id.* 652); 13 B. Monr. 257 (see also 83 Ky. 259); 11 Md. 148; 56 *id.* 439 (a genuine and disputed signature on the same page are not subject to comparison by the jury; 14 *id.* 566); 42 Mich. 473; 67 *id.* 222 (but in a later case irrelevant papers were admitted which had been shown to the party, denying the signature in dispute, on cross-examination; the court expressly stating that the case was different; 69 Mich. 287); 3 Mont. 262; 1 Pac. Rep. (N. Mex.) 170; 1 N. Dak. 30; 2 R. I. 319; 10 W. Va. 49; 28 Tex. 211; 67 *id.* 567; 69 *id.* 700; 82 *id.* 259; but papers otherwise in the case must be admitted or proved to be genuine; 47 *id.* 503; 29 W. Va. 147.

In some if not all of the states in which the subject is now regulated by statute the prior decisions were in support of this rule; 5 Houst. 220; 5 Neb. 247 (see 31 *id.* 124); 75 N. Y. 288; 95 *id.* 73; 2 Heisk. 206; 3 Baxt. 42 (but where no objection was interposed signatures admitted to be genuine were given to the jury for comparison; 90 Tenn. 167); 32 Wis. 34.

In some states the decisions indicate a tendency to allow comparison by the jury and experts where the genuineness is not denied or is conceded or the party is estopped to deny it. In Missouri earlier decisions excluded irrelevant papers but permitted comparison both by jury and experts with papers otherwise in the case; 29 Mo. 386; 83 *id.* 693; and later ones permitted it with other papers as to which no collateral issue could be raised, as if the genuineness was proved or the party was estopped to deny it or if they belonged to the witness who was acquainted with the handwriting in dispute; 15 Mo. App. 460; 67 Mo. 380 (and see 91 Mo. 399); and in North Carolina comparison by the jury was not permitted even with papers in the case; 1 Ired 16; 3 Jones 407; 101 N. C. 119; but it has been allowed

by experts with papers admitted to be genuine and otherwise in evidence; 76 *id.* 142; and see 113 *id.* 688.

In Indiana the decisions are conflicting but comparisons are allowed, in most cases both by jury and experts, if the paper is genuine, otherwise by experts alone; 32 Ind. 472; 43 *id.* 381; 46 *id.* 38. See 60 *id.* 241; 66 *id.* 123; 78 *id.* 64. The later cases allowed comparison by experts as well as by the jury; 103 Ind. 14; 126 *id.* 106.

In many states comparison is permitted with genuine documents, without respect to relevancy; and usually when it is allowed at all it may be made by experts as well as by the jury.

There has, however, been some indisposition to permit experts to make the comparison. It has been permitted by the jury and experts; 1 Root 308; 9 Conn. 55; 10 Kan. 335; 47 *id.* 242; 17 Pick. 490; 35 Minn. 425; Wright 293; 36 Ohio St. 195; 8 Utah 11; in some cases it has been allowed by the jury; 14 Me. 482; 143 Mass. 23; 5 Vt. 532; 39 *id.* 225; 58 N. H. 156; and in others by experts; 52 Me. 9; 116 Mass. 331; 50 Miss. 24; 53 N. H. 452; 54 *id.* 456 (after much fluctuation); 82 Va. 1; 80 Cal. 82; but it was not permitted with a press copy of a disputed writing, though *semble* that the original might have been used; 66 Cal. 525. The signatures used for comparison must be genuine; 36 Conn. 218.

In Pennsylvania and South Carolina until the late statute of the former state, *infra*, the decisions were substantially in accord. When there was conflicting direct evidence, only the jury might make comparison with papers duly proved; 10 S. & R. 110; 3 Watts 321; 82 Pa. 211; 96 *id.* 489; 155 *id.* 453; 1 McMull. 120; 2 McCord 516; 3 Brev. 51. The evidence of genuineness of a paper offered for comparison must be conclusive; 6 Whart. 284; 93 Pa. 123; and comparison could only be made by witnesses acquainted with the party's writing; 1 S. & R. 333; 28 Pa. 318. In criminal cases expert testimony is allowed; Pennsylvania act of 1860, March 31, § 55, P. L. 284.

A recent statute of Pennsylvania (1895, May 15, P. L. 69), codifying the law on this subject, enacts, (1) That the opinion of those acquainted with the handwriting of the supposed writer, and of experts, shall be deemed relevant; (2) That experts may compare the disputed writing with others admitted or proved to the judge's satisfaction to be genuine; (3) That experts may be required by counsel to state in full the ground of their opinions; (4) That the question shall still be one entirely for the jury; and (5) That the act shall apply to all courts and all persons having authority to receive evidence.

In several states, including some in which the courts had adhered to the English rule, the question has been settled by statute permitting the comparison of handwriting. Among the states which have legislated upon the subject are California, Delaware, Georgia, Iowa, Louisiana, Nebraska, New Jersey, New York, Tennessee, Wisconsin, and Pennsylvania as above stated. The most common form of such statutes is to authorize comparison of a disputed writing with any writing proved to the court to be genuine, to be made by a witness and to permit the submission of such writings and evidence of witnesses respecting the same, to the court and jury as evidence of the genuineness or otherwise of the writing in dispute. The tendency in the United States is in the direction of the rule established under these statutes. It is not within the present purpose to state all the decisions or to indicate the exact condition of the law in the several states. For any special case recourse should be had to the decisions and statutes of the particular state.

Under a statute providing that "evidence respecting the handwriting may also be given by comparison, made by a witness skilled in such matters, or the jury, with writings admitted or treated as genuine, by the party against whom the evidence is offered" papers not otherwise competent are admissible for the purpose of enabling the jury to make a comparison; 147 U. S. 150; 56 Fed. Rep. 384.

Prior to the statute of 17 and 18 Vict. already cited, the English rule as to comparison was subject to certain exceptions which have been said to be as well settled as the rule itself; Bradley, J., in 91 U. S. 270; one of these was the admission of ancient writings; see *supra;* the other is that if a paper admitted to be in the handwriting of the person in question is in evidence for some other purpose in the cause, the signature in question may be compared with it by the jury. This is a settled rule of the American courts, including those which adhere to the English rule against comparison as well as those which, either under statute or decision, admit it; *id.*; 75 N. Y. 288; 113 N. C. 688; 126 Ind. 106; 144 Ill. 652; 72 Mich. 265; 90 Ia. 673; 56 Fed. Rep. 384; 125 U. S. 397, 414; 151 *id.* 303; 157 *id.* 127.

A writing specially prepared for the purpose of comparison is inadmissible on a question of genuineness; 151 U. S. 303. A party cannot himself write specimens for the instruction of witnesses; Whart. Ev. § 715; nor can he make test writings to be used for a comparison of hands; 110 Mass. 155; 128 *id.* 46; 64 Cal. 334; 151 U. S. 303.

In England, by statute, a person whose handwriting is in dispute, may be called upon by the judge to write in his presence, and such writing may be compared with the writing in question; Whart. Ev. § 706. See 4 F. & F. 490; 45 Me. 534, *contra*, 62 Conn. 515.

On cross-examination, other writings not in the case may be shown to the witness, and he may be asked whether they are in the handwriting of the party in question; if so declared by the witness, they may be shown not to be genuine and given to the jury for comparison; Whart. Ev. § 710; see 11 Ad. & E. 322.

Experts may be permitted to testify as to

whether handwriting is natural or feigned; Tayl. Ev. 1209, 1590; 43 Pa. 9; 69 *id.* 225; 116 Mass. 331; 37 Miss. 461; as to the nature of the ink used; 30 N. Y. 385; 34 Pa. 365; whether the whole of an instrument was written by the same person, at the same time, and with the same pen and ink; 34 Pa. 365; 11 Gray 250; 90 Mich. 112; whether the figures in a check have been altered; 18 Ind. 329; see 7 Abb. (N. Y.) N. Cas. 113; 32 N. J. Eq. 819; 77 Pa. 20; 62 Ga. 100; 61 Ala. 33; 47 Wis. 530; 39 Md. 36.

An expert witness need not be a professional; 18 S. C. 506; a merchant and dealer in commercial paper is by his vocation qualified to some extent to testify as to the genuineness of a signature to a note; 45 Mo. App. 346. But the value of expert testimony as to handwriting, is to be determined by his opportunity and circumstances. If an illiterate man seldom brought by his business into familiarity with handwriting, his opinion is entitled to much less weight than if educated and accustomed to correspondence, and seeing people write; 37 Fed. Rep. 331.

The jury are not bound by expert evidence further than it accords with their own opinions or than they think it is to be credited; 31 *id.* 19; proof of a genuine signature to a document whose authenticity is denied casts upon the opposite party the burden of showing that the writing above the signature was forged; 150 U. S. 312.

On a question of the genuineness of the signatures of makers of an accommodation note, testimony of an expert that the ordinary handwriting of the nominal payee, as shown in letters, was such as to convince him that the payee could not successfully imitate the handwriting of one of the witnesses as easily as that of one of the makers of the note, though possibly irrelevant, is unimportant and its admission is not ground for reversal; 147 U. S. 150.

Forgeries of handwriting, and paper and ink to imitate various degrees of age, are so skilfully made, that examination and comparison, even by so-called experts, in the way heretofore usual in courts of justice, are often inadequate and misleading. A scientific use of the microscope, photography, and chemical agents, will generally prove a much surer means of discovering truth. See at large on this branch of the subject, Dr. Frazer's valuable Manual of the Study of Documents. See, generally, works on Evidence; Hogan, on Disputed Handwriting; 16 Am. L. Rev. 569; 17 *id.* 21; 10 Cent. L. J. 121, 141; 12 *id.* 507; 32 *id.* 531; 15 Can. L. J. 149, 181; 17 Myers, Fed. Dec. 369; 20 Weekly L. B. 350; 29 Sol. J. 584; 18 Am. L. Reg. 273; 21 *id.* 425, 489; 6 Am. St. Rep. 177; 9 *id.* 29; 27 Am. L. Reg. 273; EXPERT; OPINION.

HANGING. Death by the halter, or the suspending of a criminal, condemned to suffer death, by the neck, until life is extinct. A mode of capital punishment.

In Utah a person convicted of a capital crime has a right of election between hanging and shooting; Comp. L. § 5131. See CRIMES; CAPITAL PUNISHMENT; EXECUTION.

In Old English Law. Pending, as hanging the process. Co. Litt. 13a, 266a. Remaining undetermined. 1 Show. 77.

HANGING IN CHAINS. An ancient practice of hanging a murderer, after execution, upon a gibbet, in chains, near the place where the murder was committed. Abolished by 4 & 5 Will. IV. c. 26.

HANGMAN. An executioner. The name usually given to a man employed by the sheriff to put a man to death, according to law, in pursuance of a judgment of a competent court and lawful warrant.

HANGWITE (from Saxon *hangian*, to hang, and *wite*, fine). Fine, in Saxon law, for illegal hanging of a thief, or for allowing him to escape. Immunity from such fine. Du Cange.

HANIG. Some customary labor to be performed. Holthouse.

HANSE. A commercial confederacy for the good ordering and protection of the commerce of its members. An imposition upon merchandise. Du Cange, *Hansa.*

HANSE TOWNS. A number of towns in Europe which joined in a league for mutual protection of commerce as early as the twelfth century.

Amsterdam and Bremen were the first two that formed it, and they were joined by others in Germany, Holland, England, France, Italy, and Spain, numbering ninety at one time. They made war and peace to protect their commerce, and held countries in sovereignty, as a united commonwealth. They had a common treasury at Lubeck, and power to call an assembly as often as they chose. For purposes of jurisdiction, they were divided into four colleges or provinces. Great privileges were granted them by Louis VI. of France and succeeding monarchs. One of their principal magazines was at London. Their power became so great as to excite the jealousy of surrounding nations, who forced the towns within their jurisdiction which belonged to the league to renounce it. Their number and power became thus gradually reduced, beginning from the middle of the fifteenth century; and the last general assembly, representing six cities, was held in Lübeck in 1669. Of the last three remaining cities, Hamburg and Bremen were incorporated into the German Zoll-Verein in 1888, and Lübeck some years previously, and are now, in substance, free cities or states constituting part of the German Empire. See Zimmern, The Hansa Towns. See CODE.

HANSGRAVE. The head officer of a company or corporation.

HANTELODE (German *hant*, a bond, and load, laid.). An arrest. Du Cange; Toml.; Moz. & W.; Holthouse.

HAP. To catch. Thus "hap the rent," "hap the deep-poll," were formerly used. Tech. Dict.

HAPPINESS. The "pursuit of happiness," as used in the Declaration of Independence, is said to be the right to pursue any lawful business or vocation, in any manner not inconsistent with the equal rights of others, which may increase one's prosperity, or develop one's faculties, so as to give to one his highest enjoyment. 111 U. S. 757.

HAQUE. In Old Statutes. A hand-gun, about three-quarters of a yard long.

HARACIUM. In English Law. A stud of horses and mares kept for breeding. Spel. Glos.

HARBINGER. An officer of the king's household. Toml.

HARBOR (Sax. *here-berga*, station for an army). A place where ships may ride with safety; any navigable water protected by the surrounding country; a haven. It is public property.

Harbor is to be distinguished from "port," which has a reference to the delivery of cargo. See 7 M. & G. 870; 9 Metc. 371-377; 2 B. & Ald. 460. Thus, we have the "said *harbor*, basin, and docks of the *port* of Hull." 2 B. & Ald. 60. But they are generally used as synonymous. Webster, Dict.

In the United States the control of harbors and regulation of dock lines and the like is exercised by the states, although under the power to regulate commerce the federal government annually expends large sums of money in the improvement of navigation in harbors as well as other navigable waters.

A state may enact police regulations for the conduct of shipping in any of its harbors; 7 Cow. 351; Cooley, Const. Lim. 730; and congress has full power to make regulations on the same subject; 12 How. 299; 21 Ind. 450; 2 Wall. 450; 36 N. Y. 292. A statute passed for the protection of a harbor, which forbids the removal of stone, gravel, and sand from the beach, is constitutional; 11 Metc. 55; and the United States has the authority to make a contract for the removal of rock from a harbor; 134 N. Y. 156.

New harbor lines may be established without further legislative authority, and such establishment is a practical discontinuance of the old lines; 60 Conn. 278. The state board of harbor commissioners has power to establish harbor lines in front of towns; 4 Wash. 6; and an act which provides for the disestablishment of such lines is contrary to the state constitution and void; 13 Wash. 65; such an act on the part of such commissioners does not deprive a riparian owner of the right of access to his land, but merely determines the line to which he may fill without encroaching on public rights; 18 R. I. 504. The mere establishment of general harbor lines by such commissioners is not of itself an injury or a taking of the property and cannot be enjoined; 152 U. S. 59; 5 Del. Ch. 433. The authority to make improvements in harbors implies the power to employ all necessary means thereto; 44 Pac. Rep. (Cal.) 238.

In England, as well as Scotland, the right to erect and hold ports and havens is vested in the crown; though a subject may have such right by charter, grant, or prescription, but in all cases charged with the right of the public to use it. In England such grantee is bound to repair, but in Scotland only to the extent of the dues received.

The insufficiency of the common-law power led to an extended course of legislation for the control of ports and harbors, through what is known in Great Britain as the *harbor authority*, which is vested in commissioners or bodies corporate or otherwise. Such bodies are charged with the duty of general supervision of the construction, extension, improvement, and lighting of the harbor and collection of dues therefrom. The general consolidation act of 10 Vict. c. 271, defined these duties and powers in detail as did the general act of 24 & 25 Vict. c. 47, supplemented by various local acts.

In Torts. To receive clandestinely or without lawful authority a person for the purpose of so concealing him that another having a right to the lawful custody of such person shall be deprived of the same. 2 Wall. Jr. 317. See 5 How. 215; 3 McLean 631. For example, the harboring of a wife or an apprentice in order to deprive the husband or the master of them; or, in a less technical sense, it is the reception of persons improperly; Poll. Torts 275; 10 N. H. 247; 5 Ill. 498.

It may be aptly used to describe the furnishing of shelter, lodging, or food clandestinely or with concealment, and under certain circumstances, may be equally applicable to those acts divested of any accompanying secrecy; 55 Fed. Rep. 415.

The harboring of such persons will subject the harborer to an action for the injury; but, in order to put him completely in the wrong, a demand should be made for their restoration, for in cases where the harborer has not committed any other wrong than merely receiving the plaintiff's wife, child, or apprentice, he may be under no obligation to return them without a demand; 1 Chit. Pr. 564; 2 No. C. Law Rep. 249; 5 How. 215, 227. See ENTICE.

HARD CASES. A phrase used to indicate decisions which, to meet a case of hardship to a party, are not entirely consonant with the true principle of the law. It is said of such: Hard cases make bad law. Hard cases must not make bad equity more than bad law; 6 Ia. 279.

HARD LABOR. In those states where the penitentiary system has been adopted, convicts who are to be imprisoned, as part of their punishment, are sentenced to perform *hard labor*. This labor is not greater than many freemen perform voluntarily, and the quantity required to be performed is not at all unreasonable. In the penitentiaries of Pennsylvania it consists in being employed in weaving, shoemaking, and such like employment.

Hard labor was first introduced in English prisons in 1706. By the Prison Act of 1865, it is divided into two classes, one for males above sixteen years old the other for males below that age and females; Moz. & W.

HARDHEIDIS. In old Scotch Law. Lions; coins formerly of the value of half pence. 1 Pitc. Crim. Tr. pt. 1. 64, note.

HARDSHIP. See HARD CASES.

HARIOT. The same as heriot (*q. v.*). Cowel; *Termes de la Ley.* Sometimes spelled Harriott; Wms. Seis. 203.

HARMONIZE. Though not strictly synonymous with the word "reconcile," it is not improperly used by a court in instructing the jury that it is their duty to "harmonize" conflicting evidence if possible. 3 S. Dak. 134.

HARNASCA. Defensive armor; harness. Spel. Glos.

HARNESS. The defensive armor of a soldier or knight. All warlike instruments. Hoved. 725. In modern poetical sense a suit of armor. The term is sometimes used to denote the trappings of a war-horse.

Harness was the early name for body armor of all kinds. Modern writers have tried to discriminate between harness as the armor of the eleventh, twelfth, and thirteenth centuries, and armor as confined to the plate suits of the fourteenth and fifteenth centuries; but armor is the modern English word for defensive garments of all sorts, and *harness* in this sense, is a poetical archaism. Cent. Dict.

The tackle or furniture of a ship.

HARO, HARRON. An outcry, or hue and cry, after felons and malefactors. Cowel. The original of the *clamour de haro* comes from the Normans. Moz. & W.

HART. A stag or male deer of the forest five years old complete.

HARTER ACT. An act of congress of February 13, 1893, 2 Supp. R. S. 81, which provides that—"If the owner . . . shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agents or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation, or in the management of said vessel."

Under this act it has been held that due diligence is not satisfied by the mere appointment of competent persons to repair. Due diligence in repair and equipment must be exercised in fact; 68 Fed. Rep. 919; 69 *id.* 470; 74 *id.* 253. See SHIPPING.

HASP AND STAPLE. A mode of entry in Scotland by which a bailee declared a person heir on evidence brought before himself, at the same time delivering the property over to him by the *hasp and staple* of the door, which was the symbol of possession. Bell; Ersk. Pr. 433.

HASPA. In Old English Law. A name anciently given to the hasp of a door, which was often used in giving livery of seisin of premises which included a house.

HASTA (Lat.). A spear which in Roman law was the sign of an auction sale. *Hastea subjiceie*, to put under the spear, like the modern phrase put under the hammer signified put up at auction. Calv. Lex.

In feudal law it was the symbol of the investiture of a fee. Lib. Feud. 2, 2.

HAT MONEY. In Maritime Law. Primage: a small duty paid to the captain and mariners of a ship.

HAUBER. A great baron or lord. Spel. Gloss.

HAUGH, or HOUGH. Low-lying rich lands, lands which are occasionally overflowed. Encyc. Dict.

HAUL. In an indictment for larceny this word is a sufficient substitute for carry, in the statutory phrase steal, take and carry away, being in the sense used equivalent to it. 108 Ind. 171.

HAUR. In the laws of William the Conqueror, hatred. Toml.

HAUSTUS (Lat. from *haurire*, to draw).

In Civil Law. The right of drawing water, and the right of way to the place of drawing. L. 1, D. *de Servit. Præd. Rustic.*; Fleta, l. 4, c. 27, § 9.

HAUT CHEMIN (L. Fr.). Highway. Yearb. M. 4 Hen. VI. 4.

HAUT ESTRET (L. Fr.). High street; highway. Yearb. P. 11 Hen. VI. 2.

HAUTHONER. A man armed with a coat of mail. Jac. L. Dict.

HAVE. See HABENDUM; HABE.

HAVEN. A place calculated for the reception of ships, and so situated, in regard to the surrounding land, that the vessel may ride at anchor in it in safety. Hale, *de Port. Mar.* c. 2; Chitty, Com. Law 2; 15 East 304, 305. See CREEK; PORT; HARBOR; ARM OF THE SEA.

HAW. A small parcel of land so called in Kent; houses. Cowel.

HAWAII. A group of islands in the Pacific Ocean about one thousand five hundred miles from the western coast of California. A republic was proclaimed and a new constitution promulgated July 4, 1894, succeeding a provisional government formed in January, 1893. The constitution provides for a president who is elected for six years and a cabinet of four members, a council of state of fifteen members, and a house of representatives of fifteen members. Justice is administered by a supreme court sitting in Honolulu with a chief justice and two associate justices. There are also circuit and district judges as prescribed by the legislature. The common law is administered as in England and the United States and the judicial decisions of those countries are of authority in the same way as those of each country are referred to in the other.

A treaty for the annexation of Hawaii to the United States has recently been negotiated and submitted to the United States Senate for its approval.

HAWBERK or HAWBERT. A shirt of mail. Moz. & W. See FIEF D'HAUBERK.

HAWGH or HOWGH. A valley. Co. Litt. 5 *b*.

HAWKER. An itinerant or travelling trader, who carries goods about in order to sell them, and who actually sells them to purchasers, in contradistinction to a trader who has goods for sale and sells them in a fixed place of business. Superadded to this, though perhaps not essential, is generally understood one who not only carries goods for sale, but seeks for purchasers, either by outcry, which some lexicographers conceive as intimated by the derivation of the word, or by attracting notice and attention to them, as goods for sale, by an actual exhibition or exposure of them by placards or labels, or by a conventional signal, like the sound of a horn for the sale of fish; 12 Cush. 495. To prevent imposition, hawkers are generally required to take out licenses, under regulations established by the local laws of the states. See 46 Minn. 435; and these laws have generally been held to be constitutional; 117 Pa. 207; 116 Mass. 254; 51 Ala. 52; 57 Ind. 74; PEDDLER. One who goes about a village carrying samples and taking orders for a non-resident firm is not a hawker or peddler; 135 Ill. 36. It is termed *Hawking*. See 107 Ind. 505.

See 7 Lawy. Rep. Ann. 667, note.

HAY. In a bequest, "Hay" in a barn is included in the words "All the household furniture and other property in and about the buildings." 63 Me. 350.

HAYBOTE (from *haye*, hedge, and *bote*, compensation). Hedgebote: one of the estovers allowed a tenant for life or for years; namely, material to repair hedges or fences, or to make necessary farming utensils. 2 Bla. Com. 35; 1 Washb. R. P. 99.

HAYWARD (from *haye*, hedge, and *ward*, keeping). **In Old English Law.** An officer appointed in the lord's court to keep a common herd of cattle of a town: so called because he was to see that they did not break or injure the hedges of inclosed grounds. His duty was also to impound trespassing cattle, and to guard against pound-breaches. Kitch. 46; Cowel.

HAZAR-ZAMIN. A bail or surety for the personal attendance of another. Moz. & W.

HAZARD. An unlawful game of dice. *Hazardor*. One who plays at it. Jac. L. Dict.

HAZARDOUS. Risky; perilous; involving hazard or special danger. See next title.

HAZARDOUS CONTRACT. A contract in which the performance of that which is one of its objects depends on an uncertain event. La. Civ. Code, art. 1769. See 1 J. J. Marsh. 596; 3 *id.* 84; MARITIME LOAN.

In a fire insurance policy, the terms "hazardous," "extra hazardous," "specially hazardous," and "not hazardous," are well understood technical terms, having distinct meanings. A policy covering only goods "hazardous" and "not hazardous" cannot be made to cover goods or merchandise "extra hazardous" or "specially hazardous;" 38 N. Y. 364.

On the other hand, it has been held that "hazardous" and "extra hazardous" are terms having no technical meaning, but are to be taken in their popular sense of dangerous and extra dangerous; 50 Minn. 409. See RISKS AND PERILS.

HE. Properly a pronoun of the masculine gender, but usually construed in statutes to include both sexes and corporations. Where in a written instrument, a person, whose name was designated by an initial is referred to as "he," it is not conclusive that such person is a man, but the contrary may be shown by parol; 71 Cal. 38. See HIS.

HEAD. The principal source of a stream. Webst. Dict. The head of a creek will be taken to mean the head of its longest branch, unless there be forcible evidence of common reputation to the contrary; 2 Bibb 112.

The principal person or chief of any organization, corporation, or firm.

HEAD OF A FAMILY. Householder, one who provides for a family. 19 Wend. 476. There must be the relation of father and child, or husband and wife; 3 Humph. 216; 17 Ala. N. S. 486; *contra*, 20 Mo. 75; 41 Ga. 153. The father being dead, the mother is the head of the family; 62 Pa. 475. See 16 Mass. 135; 45 Ga. 153; 2 How. 581. See FAMILY; HOMESTEAD.

HEAD-COURT. Courts formerly held in Scotland yearly by sheriffs, stewarts, and barons who had certain civil and criminal jurisdiction prior to 20 Geo. II. c. 50, by which the obligation of the vassals to attend these courts was abolished. Ersk. Prin. 34–40.

HEAD-LAND. In Old English Law. A narrow piece of unploughed land left at the end of a ploughed field for the turning of the plough. Called, also, *butt*. Kennett, Paroch. Antiq. 587; 2 Leon. 70, case 93; 1 Litt. 13.

HEAD MONEY. A name popularly applied to a tax on aliens landing in the United States under U. S. Rev. Stat. 1 Supp. 370. Such tax by a state is unconstitutional; 92 U. S. 259; but as a federal regulation of commerce it is valid; 112 *id.* 580. See IMMIGRATION.

HEAD-NOTE. The syllabus of a reported case.

HEAD-PENCE. An exaction of 40*d*. or more, collected by the sheriff of Northumberland from the people of that county twice in every seven years, without account to the king. Abolished by 23 Hen. VI. c. 6, in 1444. Cowel.

HEAD-SILVER. A name sometimes given to a Common Fine (*q. v.*). Also said to be a fine of £40 levied by the sheriff upon the inhabitants of Northumberland, twice in seven years.

HEADBOROUGH. In English Law. An officer who was formerly the chief officer in a borough, who is now subordinate to the constable. Originally the chief of the tithing, or frank pledge. St. Armand, Leg. Power of Eng. 88. See DECENNARY.

HEAFODWEARD. A service rendered by a thane or a geneath or villein, the precise nature of which is unknown. Anc. Eng. Inst.

HEALSFANG (from Germ. *hals*, neck, *fangen*, to catch). A sort of pillory, by which the head of the culprit was caught between two boards, as feet are caught in a pair of stocks.

"The fine which every man would have to pay in commutation of this punishment, had it been in use,"—for it was very early disused, no mention of it occurring in the laws of the Saxon kings. Anc. Laws & Inst. of Eng. Gloss; Spelman, Gloss.

HEALGEMOTE. Halimote (*q. v.*).

HEALTH. Freedom from pain or sickness; the most perfect state of animal life. It may be defined as the natural agreement and concordant disposition of the parts of the living body.

Public health is an object of the utmost importance, and has attracted the attention of the national and state legislatures.

By the act of Congress of the 25th of February, 1799, it is enacted: *sect.* 1. That the quarantines and other restraints, which shall be established by the laws of any state, respecting any vessels arriving in or bound to any port or district thereof, whether coming from a foreign port or some other port of the United States, shall be observed and enforced by all officers of the United States in such place; *sect.* 4. In times of contagion the collectors of the revenue may remove, under the provisions of the act, into another district; *sect.* 5. The judge of any district court may, when a contagious disorder prevails in his district, cause the removal of persons confined in prison under the laws of the United States, into another district; *sect.* 6. In case of the prevalence of a contagious disease at the seat of government, the president of the United States may direct the removal of any or all public offices to a place of safety; *sect.* 7. In case of such contagious disease at the seat of government, the chief justice, or, in case of his death or inability, the senior associate justice, of the supreme court of the United States, may issue his warrant to the marshal of the district court within which the supreme court is by law to be holden, directing him to adjourn the said session of the said court to such other place within the same or adjoining district as he may deem convenient. And the district judges, under the same circumstances, have the same power to adjourn to some other part of their several districts.

By the act of March 3, 1879, ch. 202, § 1, R. S. Suppl. 480, enforced by subsequent acts, a National Board of Health was established, to consist of seven members appointed by the president, and of four members detailed from the departments, whose duties shall be to obtain information upon all matters affecting the public health, to advise the heads of departments and state executives, to make necessary investigations at any places in the United States, or at foreign ports, and to make rules guarding against the introduction of contagious diseases into the country, and their spread from state to state. See 143 U. S. 578.

The protection of cattle from contagious diseases has received legislative attention in some of the states. In Pennsylvania, the governor may make proclamation whenever pleuro-pneumonia exists among the cattle in any county, and adopt means, such as the quarantining of affected places, to prevent its spread; act May 1, 1879. The introduction of cattle into Virginia, between March 10, and October 10, without careful inspection, is forbidden; act April 2, 1879.

Closely connected with the subject of *health* is the adulteration of food. See ADULTERATION. The English Sale of Food and Drugs Act (38 & 39 Vict. c. 63, § 6) provides that "no person shall sell to the prejudice of the purchaser any article of food" not of the quality demanded, and authorizes the appointment of a public analyst with power to examine and certify samples of food, drinks, and drugs; L. R. 4 Q. B. D. 253; L. R. 3 Ex. D. 176. A state analyst with similar powers has been appointed in most states. This is a more practical measure than has been attempted in the previous legislation throughout the country, where the mode of detection and proof have been left to the operation of general rules.

In Scotland the care of the public health is vested in the county council acting through the district committee. These authorities are charged with the regulation of sewerage, privies, scavenging, nuisances, lodging-houses and cellar dwellings, and with the prevention of infection. Earsk. Pr. 619; Act 1867, § 94; 52 Vict. c. 50.

Public policy requires that health officers be undisturbed in the exercise of their powers, unless clearly transcending their authority; 3 Paige 218; 1 Dill. § 369; but in so acting such officers must not interfere with the natural right of individuals; 21 Vt. 13; 67 *id.* 502; the people "shall be secure in their persons and homes from unreasonable searches and seizures"; 10 Phila. 94; 40 N. J. Eq. 325. See 146 N. Y. 68, which case, overruling 32 N. Y. 317, held that health officers may not quarantine persons refusing to be vaccinated when small-pox is imminent. A board of health is not a natural or an artificial person, and cannot sue or be sued; 2 Lack. Leg. N. (Pa.) 181. A court of chancery can only interfere with the trustees of a sanitary district where such trustees have acted in violation of the law or in a fraudulent manner; 58 Ill. App. 306.

Offences against the provisions of the health laws are generally punished by fine and imprisonment. They are offences against public health, punishable by the common law by fine and imprisonment, such, for example, as selling unwholesome provisions. 4 Bla. Com. 162; 2 East, Pl. Cr. 822; 6 *id.* 133; 3 Maule & S. 10; 4 Campb. 10.

Mandamus will issue to compel a board of health to award compensation to one whose property it has occupied or destroyed to prevent the spread of contagious disease, when such board of health has refused so to do; 67 N. W. Rep. (Mich.) 1094.

Injuries to the health of particular individuals are, in general, remedied by an action on the case, or perhaps, in some instances, for breach of contract, and may be also by abatement, in some cases of nuisance. See 4 Bla. Com. 197; 81 Ky. 171; 26 Mo. App. 253; Billings; Parker & Worthington, Pub. Health; Upton, Health Stat.; NUISANCE; ABATEMENT; QUARANTINE; CONTAGIOUS DISEASES; VACCINATION.

HEALTH OFFICER. The name of an officer invested with power to enforce the health laws. The powers and duties of health officers are regulated by local laws.

HEALTHY. Free from disease or bodily ailment or from a state of the system susceptible or liable to disease or bodily ailment. 13 Ired. 357.

HEARING. In Chancery Practice. The trial of a chancery suit. 24 Wis. 165 ; 112 Mass. 339.

The hearing is conducted as follows. When the cause is called on in court, the pleadings on each side are opened in a brief manner to the court by the junior counsel for the plaintiff ; after which the plaintiff's leading counsel states the plaintiff's case and the points in issue, and submits to the court his arguments upon them. Then the depositions (if any) of the plaintiff's witnesses, and such parts of the defendant's answer as support the plaintiff's case, are read by the plaintiff's solicitor ; after which the rest of the plaintiff's counsel address the court. Then the same course of proceedings is observed on the other side, excepting that no part of the defendant's answer can be read in his favor if it be replied to. The leading counsel for the plaintiff is then heard in reply ; after which the court pronounces the decrees. 14 Viner, Abr. 233 ; Com. Dig. *Chancery*, (T 1, 2, 3) ; Daniell, Chanc. Pract.

In Criminal Law. The examination of a prisoner charged with a crime or misdemeanor, and of the witnesses for the accused. See EXAMINATION.

HEARSAY EVIDENCE. That kind of evidence which does not derive its value solely from the credit to be given to the witness himself, but rests also, in part on the veracity and competency of some other person. 1 Phill. Ev. 185.

Hearsay evidence is incompetent to establish any specific fact, which fact is in its nature susceptible of being proved by witnesses who speak from their own knowledge ; this species of testimony supposes some better which might be adduced in a particular case and its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practiced under its cover combine to support the rule that it is inadmissible ; 110 U. S. 581 ; 7 Cra. 295.

The term applies to written as well as oral matter ; but the writing or words are not necessarily hearsay, because those of a person not under oath. Thus, *information* on which one has acted ; 2 B. & Ad. 845 ; 9 Johns. 45 ; the *conversation* of a person suspected of insanity ; 3 Hagg. Eccl. 574 ; 2 Ad. & E. 3 ; 7 *id.* 313 ; see 51 Kan. 720 ; 24 S. W. Rep. (Tex.) 894 ; *replies* to inquiries ; 8 Bing. 320 ; 5 Mass. 444 ; 11 Wend. 110 ; 1 Conn. 387 ; 29 Ga. 718 ; *general reputation ;* 2 Esp. 482 ; 33 Ala. N. S. 425 ; 87 Mich. 69 ; *expressions of feeling ;* 8 Bing. 376 ; 8 Watts 355 ; 4 M'Cord 38 ; 18 Ohio 99 ; 7 Cush. 581 ; 1 Head 373 ; see 45 Me. 392 ; *general repute* in the family, in questions of pedigree ; 13 Ves. 140, 514 ; 2 C. & K. 701 ; 4 Rand. 607 ; 3 Dev. & B. 91 ; 18 Johns. 37 ; 2 Conn. 347 ; 6 Cal. 197 ; 4 N. H. 371 ; 1 How. 231 ; 155 Mass. 461 ; see 84 Ky. 403 ; 28 Vt. 416 ; a great variety of declarations ; see DECLARATION ; EVIDENCE ; *entries* made by third persons in the discharge of official duties ; 3 B. & Ad. 890 ; 4 Q. B. 132 ; and see 8 Wheat. 326 ; 15 Mass. 380 ; 6 Cow. 162 ; 16 S. & R. 89 ; 4 Mart. La. N. S. 383 ; 12 Vt. 178 ; 15 Conn. 206 ; *entries* in the party's shopbook ; 9 S. & R. 285 ; 4 Mass. 455 ; 2 M'Cord 328 ; 1 Halst. 95 ; 1 Ia. 53 ; 1 Greenl. Ev. § 119 ; Tayl. Ev. 620 ; or *other books* kept in the regular course of business ; 10 Ad. & E. 598 ; 8 Wheat. 320 ; 15 Mass. 380 ; 20 Johns. 168 ; 15 Conn. 206 ; *indorsements* of partial payments ; 2 Campb. 321 ; 4 Pick. 110 ; 17 Johns. 182 ; 2 M'Cord 418 ; declarations as to *boundaries ;* 125 U. S. 321 ; have been held admissible as original evidence under the circumstances, and for particular purposes. One may testify to his own age, where it is shown that his father and mother are dead ; 49 Kan. 730 ; 53 N. W. Rep. (Minn.) 541 ; 108 N. C. 747. See as to age, 11 Cent. L. J. 401.

As a general rule, hearsay reports of a transaction, whether oral or written, are not admissible as evidence ; 1 Greenl. Ev. § 124 ; 9 Ind. 572 ; 5 Iowa 532 ; 14 La. Ann. 830 ; 6 Wis. 63 ; 68 Hun 412 ; 97 Ala. 639 ; 5 C. C. App. 220 ; 6 *id.* 428 ; 86 Ky. 605 ; 77 Ga. 563. The rule applies to evidence given under oath in a cause between other litigating parties ; 1 East 373 ; 3 Term 77 ; 7 Cra. 296.

At one time in England it was held on the authority of Luttarell *v.* Reynell, 1 Mod. 282, that hearsay evidence of a witness' previous declarations might be admitted to confirm his testimony by showing that he "was constant to himself" ; but this theory of confirming a sworn statement by declarations not under oath was abandoned in England ; Buller, J., in 3 Doug. 242 ; and (except in a few cases which followed the earlier English case) repudiated in the United States ; Stark. Ev. Sharsw. ed. 253, n. 2 ; 12 Am. L. Reg. 1, where the cases are collected.

Matters relating to public interest, as, for example, a claim to a ferry or highway, may be proved by hearsay testimony ; 1 Stark. Ev. 195 ; 6 M. & W. 234 ; 1 M. & S. 679 ; 19 Conn. 250 ; but the matter in controversy must be of public interest ; 2 B. & Ad. 245 ; 29 Barb. 593 ; 14 Md. 398 ; 6 Jones, N. C. 459 ; the declarations must be those of persons supposed to be dead ; 11 Price 162 ; 1 C. & K. 58 ; 12 Vt. 178 ; and must have been made before controversy arose ; 13 Ves. 514 ; 3 Campb. 444 ; 4 *id.* 417. See 103 N. C. 203. The rule extends to deeds, leases, and other private documents ; 10 B. & C. 17 ; 1 M. & S. 77 ; maps ; 2 Moore & P. 525 ; 19 Conn. 250 ; and verdicts ; 1 East 355 ; 9 Bingh. 465 ; 10 Ad. & E. 151 ; 7 C. & P. 181. Testimony based on daily market reports from a commercial center comes from a public authentic source and is not hearsay ; 5 Tex. Civ. App. 186.

Ancient documents purporting to be a part of the *res gestæ* are also admissible, although the parties to the suit are not bound ; 5 Term 413, n. ; 5 Price 312 ; 4 Pick. 160. See 2 C. & P. 440 ; 3 Johns. Cas. 283 ; 1 H. & J. 174 ; 4 Denio 201. So also declarations

which form part of the *res gestæ*, which explain and give character to what was done at the time are not liable to the objection that they are hearsay; Stark. Ev. Sharwood's ed. 53, note 1, 89, note 1, where the cases illustrating this branch of the subject are collected and classified by the American editor.

When two persons not speaking a common language voluntarily agree on a third to interpret between them, the latter is to be regarded as the agent of each to translate and communicate what he says to the other, and such communication to the interpreter is not hearsay, and the party to whom it is made may testify to it; 50 Minn. 91; 51 Ia. 25; the weight only of such being affected thereby and not its competency; 157 Mass. 393.

See Works on Evidence: Stark. Ev. Sharsw. ed. 43–66, 185–191; 3 Sm. L. Cas. 9th Am. ed. 1768; 37 Alb. L. J. 130; 29 Sol. J. 181; 5 L. Q. Rev. 265; and as to corroboration, 12 Am. L. Reg. 1; DECLARATION; DYING DECLARATIONS; EVIDENCE; PEDIGREE; RES GESTÆ.

HEARTH-MONEY. A tax, granted by 13 & 14 Car. II. c. 10, abolished 1 Will. & Mary, St. 1, c. 10, of two shillings on every hearth or stove in England and Wales. Jacob, Law Dict. Commonly called *chimney-money*. *Id.*

HEARTH-SILVER. A sort of *modus* for tithes, viz.: a prescription for cutting down and using for fuel the tithe of wood. 2 Burn, Eccl. Law 304.

HEAT OF PASSION. This does not mean passion or anger which comes from an old grudge, or no immediate cause or provocation; but passion or anger suddenly aroused at the time by some immediate and reasonable provocation, by words or acts of one at the time. 106 Mo. 198.

HEBBERMAN. An unlawful fisher in the Thames below London bridge; so called because they generally fished at *ebbing tide* or *water*. 4 Hen. VII. c. 15; Jacob, Law Dict.

HEBBERTHEF. The privilege of having goods of a thief and trial of him within such a liberty. Cartular, S. Edmundi MS. 163; Cowel.

HEBBING-WEARS. A device for catching fish in ebbing water. Stat. 23 Hen. VIII. c. 5.

HEBDOMAD. A week; a space of seven days.

HEBDOMADIUS. A week's man; a canon, or prebendary in a cathedral church, who has the care of the choir and the officers belonging to it, for his own week. Cowel.

HECCAGIUM. Rent paid to the lord for liberty to use engines called hecks. Toml.

HEDA. A small haven, wharf, or landing-place.

HEDAGIUM (Sax. *heda*, *hitha*, port). A toll or custom paid at the *hith* or wharf, for landing goods, etc., from which an exemption was granted by the king to some particular persons and societies. Cartular. Abbatiæ de Redinges; Cowel.

HEDGE-BOTE. Wood used for repairing hedges or fences. 2 Bla. Com. 35; 16 Johns. 15; HAYBOTE.

HEDGE-PRIEST. A hedge-parson; specifically, in Ireland, formerly, a priest who has been admitted to orders directly from a hedge-school, without preparation in theological studies at a regular college. Cent. Dict.

HEGEMONY. The leadership of one among several independent confederate states.

HEGIRA. The epoch or account of time used by the Arabians and the Turks, who begin the Mohammedan era and computation from the day that Mahomet was compelled to escape from Mecca to Medina which happened on the night of Thursday, July 15th, A. D. 622, under the reign of the Emperor Heraclius. Townsend, Dict. Dates; Wilson, Gloss. The era begins July 16th. The word is sometimes spelled Hejira but the former is the ordinary usage. It is derived from *hijrah*, in one form or another, an oriental term denoting flight, departure.

HEIFER. A young cow which has not had a calf. A beast of this kind two years and a half old was held to be improperly described in the indictment as a cow; 2 East, Pl. Cr. 616; 1 Leach 105.

HEIR. At Common Law. He who is born or begotten in lawful wedlock, and upon whom the law casts the estate in lands, tenements, or hereditaments immediately upon the death of his ancestor. Thus, the word does not strictly apply to personal estate. Wms. Per. Pr.

Ordinarily used to designate those persons who answer this description at the death of the testator. In its strict and technical import applies to the person or persons appointed by law to succeed to the estate in case of intestacy. 2 Bla. Com. 201; 52 Ill. 62; 139 *id.* 433; 37 S. C. 255.

The term heir has a very different signification at common law from what it has in those states and countries which have adopted the civil law. In the latter, the term applies to all persons who are called to the succession, whether by the act of the party or by operation of law. The person who is created universal successor by a will is called the testamentary heir; and the next of kin by blood is, in cases of intestacy, called the heir-at-law, or heir by intestacy. The executor of the common law is in many respects not unlike the testamentary heir of the civil law. Again, the administrator in many respects corresponds with the heir by intestacy. By the common law, executors—unless expressly authorized by the will—and administrators have no right except to the personal estate of the deceased; whereas the heir by the civil law is authorized to administer both the personal and real estate. 1 Brown, Civ. Law 344; Story, Confl. Laws § 508.

No person is heir of a living person. A person occupying a relation which may be

that of heirship is, however, called heir apparent or heir presumptive; 2 Bla. Com. 208; and the word heir may be used in a contract to designate the representative of a living person; 9 Conn. 272. A monster cannot be heir; Co. Litt. 7 *b*; nor at common law could a bastard; 2 Kent 208. See BASTARD; DESCENT AND DISTRIBUTION.

In the word heirs is comprehended heirs of heirs *in infinitum;* Co. Litt. 7 *b*, 9 *a*; Wood, Inst. 69. The words "heir" and "heirs" are interchangeable, and embrace all legally entitled to partake of the inheritance; 83 Va. 724.

According to many authorities, heir may be *nomen collectivum*, as well in a deed as in a will, and operate in both in the same manner as the word heirs; 1 Rolle, Abr. 253; Ambl. 453; Cro. Eliz. 313; 1 Burr. 38. But see 2 Prest. Est. 9, 10. In wills, in order to effectuate the intention of the testator, the word heirs is sometimes construed to mean the next of kin; 1 Jac. & W. 388; 51 N. J. Eq. 1; and statutory next of kin; 41 L. T. Rep. N. S. 209; 2 Hawks 472; the word "heir" can be construed as "distributees" or "representatives"; 84 Penn. 245; and children; Ambl. 273; 36 S. C. 38; 87 Ga. 239; 91 Tenn. 119; 62 N. H. 558; 117 Ind. 308; it can be construed to mean "heirs of his body"; 75 Md. 141; and grand-children; 81 Va. 40. Under the term "heirs-at-law" a widow has been allowed to share; 158 Mass. 392; 63 Ind. 72; but see 137 N. Y. 106. See 12 Lawy. Rep. Ann. 721; 13 *id.* 46; Jarm. Wills 905.

In a bequest of personalty the word "heirs" is used to mean those entitled under the statute of distribution in case of intestacy; 136 Pa. 153.

In Civil Law. He who succeeds to the rights and occupies the place of a deceased person. See the following titles, and HÆRES.

HEIR AT LAW. He who, after his ancestor dies intestate, has a right to all lands, tenements, and hereditaments which belonged to him or of which he was seised. The same as heir general.

In its general definition heir at law is not limited to children; it may be and is often used, in cases where there are no children; it includes parents, brothers, sisters, etc.; 7 U. S. App. 63.

HEIR APPARENT. One who has an indefeasible right to the inheritance, provided he outlive the ancestor. 2 Bla. Com. 208.

HEIRS, BENEFICIARY. In Civil Law. Those who have accepted the succession under the benefit of an inventory regularly made. La. Civ. Code, art. 879. If the heir apprehend that the succession will be burdened with debts beyond its value, he accepts with benefit of inventory, and in that case he is responsible only for the value of the succession.

HEIR, COLLATERAL. One who is not of the direct line of the deceased, but comes from a collateral line: as, a brother, sister, an uncle and aunt, a nephew, niece, or cousin, of the deceased.

HEIR, CONVENTIONAL. In Civil Law. One who takes a succession by virtue of a contract—for example, a marriage contract—which entitles the heir to the succession.

HEIR, FORCED. One who cannot be disinherited. See FORCED HEIRS.

HEIR, GENERAL. Heir at common law.

HEIR, IRREGULAR. In Louisiana. One who is neither testamentary nor legal heir, and who has been established by law to take the succession. See La. Civ. Code, art. 874. When the deceased has left neither lawful descendants, nor ascendants, nor collateral relations, the law calls to his inheritance either the surviving husband or wife, or his or her natural children, or the state; *id.* art. 911. This is called an irregular succession.

HEIR, LEGAL. In Civil Law. A legal heir is one who is of the same blood as the deceased and who takes the succession by force of law. This is different from a testamentary or conventional heir, who takes the succession in virtue of the disposition of man. See La. Civ. Code, art. 873, 875; Dict de Jurisp. *Héritier légitime.* There are three classes of legal heirs, to wit: the children and other lawful descendants, the fathers and mothers and other lawful ascendants, and the collateral kindred. La. Civ. Code, art. 883. See Howe, Stud. Civ. L. 229.

HEIR-LOOM. Chattels which, contrary to the nature of chattels, descend to the heir along with the inheritance, and do not pass to the executor.

This word seems to be compounded of *heir* and *loom*, that is, a frame, viz. to weave in. Some derive the word loom from the Saxon *loma*, or *geloma*, which signifies utensils or vessels generally. However this may be, the word *loom*, by time, is drawn to a more general signification than it bore at the first, comprehending all implements of household, as tables, presses, cupboards, bedsteads, wainscots, and which, by the custom of some countries, having belonged to a house, are never inventoried after the decease of the owner as chattels, but accrue to the heir with the house itself. Minshew; 2 Poll. & Maitl. 361.

Charters, deeds, and other evidences of the title of the land, together with the box or chest in which they are contained, the keys of a house, and fish in a fish-pond, are heirlooms. Co. Litt. 3 *a*, 185 *b*; 7 Co. 17 *b*, Cro. Eliz. 372; Brooke, Abr. *Charters*, pl. 13; 2 Bla. Com. 427; 14 Viner, Abr. 291; Darl. P. P. 16.

Diamonds bequeathed to one "as head of the family" and directed "to be deemed heirlooms in the family" are held in trust for the legatee and his successors; 23 W. R. 592; chattels bequeathed upon trust to permit the same to go and be enjoyed by the person possessed of the title, in the nature of heirlooms, vest absolutely in the first

taker; 23 Ch. D. 158; and to the testator's nephew to go to and be held as heirlooms by him and his eldest son on his decease, is held to create an executory trust with a life interest in the first taker; L. R. 6 Eq. 540. An election, by one who takes heirlooms under a deed of trust, to take under a will did not operate as a forfeiture of the heirlooms as the interest in them was unassignable; 31 Ch. D. 466.

HEIR PRESUMPTIVE. One, who, in the present circumstances, would be entitled to the inheritance, but whose rights may be defeated by the contingency of some nearer heir being born. 2 Bla. Com. 208. In Louisiana, the presumptive heir is he who is the nearest relation of the deceased capable of inheriting. This quality is given to him before the decease of the person from whom he is to inherit, as well as after the opening of the succession, until he has accepted or renounced it; La. Civ. Code, art. 876.

HEIR, TESTAMENTARY. In Civil Law. One who is constituted heir by testament executed in the form prescribed by law. He is so called to distinguish him from the legal heirs, who are called to the succession by the law; and from conventional heirs, who are so constituted by a contract *inter vivos*. See HÆRES FACTUS; DEVISEE.

HEIR, UNCONDITIONAL. In Louisiana. One who inherits without any reservation, or without making an inventory, whether the acceptance be express or tacit. La. Civ. Code, art. 878.

HEIRESS. A female heir to a person having an estate of inheritance. When there are more than one, they are called *co-heiresses*, or *co-heirs*.

HEIRSHIP MOVABLES. In Scotch Law. The movables which go to the heir, and not to the executor, that the land may not go to the heir completely dismantled, such as the best of furniture, horses, cows, etc., but not fungibles. Hope, Minor Pr. 538; Erskine, Inst. 3. 8. 13–17; Bell, Dict.

HELL. The name given to a place under the exchequer chamber, where the king's debtors were confined. Rich. Dict.

HELM. A tiller; the handle or wheel of a ship; a defensive covering for the head; a helmet; thatch or straw.

HELOWE-WALL. The end-wall covering and defending the rest of the building. Paroch. Antiq. 573.

HELSING. A Saxon brass coin, of the value of an English half-penny.

HEMOLDBORH, or HELMELBORCH. A title to possession. The admission of this old Norse term into the laws of the Conqueror is difficult to be accounted for; it is not found in any Anglo-Saxon law extant. Whart.

HENCHMAN. A footman; one who holds himself at the bidding of another.

HENEDPENNY. A customary payment of money instead of hens at Christmas; a composition of eggs. Cow. Dic.

HENFARE. A fine for flight on account of murder. Domesd.

HENGEN. A prison for persons condemned to hard labor. Anc. Inst. Eng.

HENGHEN (*ergastulum*). **In Saxon Law.** A prison, or house of correction. Anc. Laws & Inst. of Engl. Gloss.

HENGWYTE. In Old English Law. An acquittance from a fine for hanging a thief. Fleta, lib. 1, c. 47, § 817.

HEORDFESTE. The master of a family; from the Saxon *hearth faest*, fixed to the house or hearth. Moz. & W.

HEORDPENNY. Peter-pence. Cow. Dic.

HEORDWERCK. In Saxon Law. The service of herdsmen, done at the will of their lord.

HEPTARCHY. The name of the kingdom or government established by the Saxons on their establishment in Britain: so called because it was composed of *seven* kingdoms, namely, Kent, Essex, Sussex, Wessex, East Anglia, Mercia, and Northumberland.

HER. In an indictment for rape the use of this word is sufficient to show that the person alluded to is a female; 54 Ark. 660; but it has been held that in a written instrument the use of the pronoun "his" to designate a person therein named is not conclusive that such person is a male, and parol evidence will be admitted to show that such person is a female; 71 Cal. 38.

HERALD (from French *hérault*). An officer whose business it is to register genealogies, adjust ensigns armorial, regulate funerals and coronations, and, anciently, to carry messages between princes and proclaim war and peace.

In England, there are three chief heralds, called *kings-at-arms*, of whom *Garter* is the principal, instituted by king Henry V., whose office is to attend the knights of the Garter at their solemnities, and to marshal the funerals of the nobility. The next is *Clarencieux*, instituted by Edward IV., after he became duke of Clarence, and whose proper office is to arrange the funerals of all the lesser nobility, knights, and squires on the south side of Trent. The third *Norroy* (*north roy*), who has the like office on the north side of Trent. There are, also, six inferior heralds, who were created to attend dukes or great lords in their military expeditions. The office, however, has grown much into disuse,—so much falsity and confusion having crept into their records that they are no longer received in evidence in any court of justice. This difficulty was attempted to be remedied by a standing order of the house of lords, which requires *Garter* to deliver to that house an exact pedigree of each peer and his family on the day of his first admission; 3 Bla. Com. 105; Encyc. Brit.

HERALDRY. (1) The science of heralds; (2) an old and obsolete abuse of buying and selling precedence in the paper of

causes for hearing. 2 North's Life of Lord-Keeper Guilford, 2d ed. 86.

HERALDS' COLLEGE. In 1450, the heralds' in England were collected into a college by Richard II. The earl marshal of England was chief of the college, and under him were three kings-at-arms (styled Garter, Clarencieux, Norroy), six heralds-at-arms (styled of York, Lancaster, Chester, Windsor, Richmond, and Somerset), and four pursuivants-at-arms (styled Blue Mantle, Rouge croix, Rouge dragon, and Portcullis). This organization still continues. Encyc. Brit.

HERBAGE. In English Law. An easement which consists in the right to pasture cattle on another's ground. A right to herbage does not include a right to cut grass, or dig potatoes, or pick apples; 4 N. H. 303.

HERBAGIUM AUTERIUS. The first cutting of hay or grass, as distinguished from the aftermath. Paroch. Antiq. 459.

HERBERGAGIUM. Lodgings to receive guests in the way of hospitality. Cowel.

HERBERGARE. To harbor; to entertain.

HERBERGATUS. Spent in an inn. Cowel.

HERBERY, or HERBURY. An inn. Cowel.

HERCE, or HERCIA. A harrow. Fleta, lib. 2, c. 77.

HERCIARE. To harrow. 4 Inst. 270.

HERCIATURE. In Old English Law. Harrowing; work with a harrow. Fleta, lib. 2, c. 82, § 2.

HERCISCUNDA. In Civil Law. To be divided. *Familia herciscunda*, an inheritance to be divided. *Actio familiæ herciscundæ*, an action for dividing an inheritance. *Erciscunda* is more commonly used in the civil law. Dig. 10, 2; Inst. 3 28, 4.

HERD-WERCK. Customary uncertain services as herdsmen, shepherds, etc. Anno 1166, Regist. Ecclesiæ Christi Cant. MS.; Cowel.

HEREAFTER. Used as an adverb, it does not necessarily refer to unlimited time; it is not a synonym for "forever." It rather indicates the direction in time merely to which the context refers, and is limited by it. 50 N. J. Eq. 640.

HEREBANNUM. Calling out the army by proclamation. A fine paid by freemen for not attending the army. A tax for the support of the army. Du Cange.

HEBOTE. The king's edict commanding his subjects into the field. Moz. & W.; Cowel.

HEREDAD. In Spanish Law. A portion of land that is cultivated. Formerly it meant a farm, *haciendo de campo*, real estate.

HEREDAD YACENTE (From Lat. "hereditas jacens," *q. v.*). **In Spanish Law.** An inheritance not yet entered upon or appropriated. White, New Recop. *b*, 2, tit. 19, c. 2, § 8.

HEREDERO. In Spanish Law. Heir; he who, by legal or testamentary disposition, succeeds to the property of a deceased person. "*Hæres censeatur cum defuncto una eademque persona.*" Las Partidas, 7. 9. 13.

HEREDITAGIUM. In Sicillian and Neapolitan Law. That which is held by hereditary right; the same *hereditamentum* (*hereditament*) in English Law. Spel. Gloss.

HEREDITAMENTS. Things capable of being inherited, be it corporeal or incorporeal, real, personal, or mixed, and including not only lands and everything thereon, but also heir-looms, and certain furniture which, by custom, may descend to the heir together with the land. Co. Litt. 5 *b*; 2 Bla. Com. 17; Chal. R. P. 43; 23 Barb. 338; 84 Iowa 407. By this term such things are denoted as may be the subject-matter of inheritance, but not the inheritance itself; it cannot, therefore, by its own intrinsic force, enlarge an estate *prima facie* a life estate, into a fee; 2 B. & P. 251; 8 Term 503.

HEREDITARY. That which is the subject of inheritance.

HEREDITARY RIGHT TO THE CROWN. The crown of England, by the positive constitution of the kingdom, has ever been descendible, and so continues, in a course peculiar to itself, yet subject to limitation by parliament; but, notwithstanding such limitation, the crown retains its descendible quality, and becomes hereditary in the prince to whom it is limited. 1 Bla. Com. c. 3.

HEREFARE (Sax.). A going into or with an army; a going out to war (*profectio militaris*); an expedition. Cowel; Spel. Gloss.

HEREGEAT. A heriot (*q. v.*).

HEREGELD. A tribute or a tax levied for the maintenance of an army. Moz. & W.; Spel. Gloss.

HERENACH. An arch-deacon. Cowel.

HERES. See HÆRES.

HERESCHIP. In Old Scotch Law. Theft or robbery. Pitc. Crim. Tr. pt. 2, pp. 26, 89.

HERESLITA, HERESSA, HERESSIZ. A hired soldier who departs without license. 4 Inst. 128.

HERESY. An offence which consists not in a total denial of Christianity, but of some of its essential doctrines, publicly and obstinately avowed. What in old times used to be adjudged heresy was left to the determination of the ecclesiastical judge; and the statute 2 Hen. 4, c. 15, defines heretics as teachers of erroneous opinions, contrary to the faith and blessed determinations of the holy church. Various laws have been passed before and after the reformation explaining wholly or partially what is meant by heresy. Heresy is now subject only to ecclesiastical correction, by virtue of Stat. 29 Car. 2, c. 9; 4 Bl. Com. 44; 4 Steph. Com. 203. See EXCOMMUNICATION.

HERETOCH. A general, leader, or commander, also a baron of the realm. Du Fresne.

HERETOFORE. Time past in distinction from time present and time future. 40 Conn. 156.

HERETUM. In Old Records. A court or yard for drawing up guards or military retinue. Cowel.; Jac. L. Dict.

HEREZELD. In Scotch Law. A gift or present made or left by a tenant to his lord as a token of reverence. Skene.

HERGE. In Saxon Law. Offenders who joined in a body of more than thirty-five to commit depredation.

HERIGALDS. In Old English Law. A sort of garment. Cowel.

HERIOT. In English Law. A customary tribute of goods and chattels, payable to the lord of the fee on the decease of the owner of the land. If a man fell before his lord in battle, no heriot was demanded; 1 Poll. & Maitl. 293.

Heriot service is such as is due upon a special reservation in the grant or lease of lands, and therefore amounts to little more than a mere rent. Heriot custom arises upon no special reservation whatsoever, but depends merely upon immemorial usage and custom. See 2 Bla. Com. 97. 422; Comyns, Dig. *Copyhold* (K 18); Bacon, Abr.; 2 Saund.; 1 Vern. 441.

HERISCHILD. A species of English military service.

HERISCHULDÆ. A fine for disobedience to proclamation of warfare. Skene.

HERISCINDIUM. A division of household goods. Blount.

HERISLET. Laying down of arms. Blount. Desertion from the army. Spel. Gloss.

HERISTALL. A castle; the station of an army; the place where a camp is pitched. Spel. Gloss.

HERITABLE. See INHERITANCE.

HERITABLE BOND. In Scotch Law. See BOND.

HERITABLE JURISDICTION. In Scotch Law. Grants of criminal jurisdiction made to great families for the better execution of justice. Abolished by 20 Geo. II. c. 43. Bell, Dict.

HERITABLE OBLIGATION. One whose rights and duties descend to the heir, so far as the heir accepts the succession. Howe, Stud. Civ. L. 133.

HERITABLE RIGHTS. In Scotch Law. Rights which go to the heir; generally, all rights in or connected with lands. Bell, Dict. *Heritable.*

HERITABLE SECURITY. Security constituted by heritable property. Encyc. Dict.

HERITAGE. In Civil Law. Every species of immovable which can be the subject of property: such as lands, houses, orchards, woods, marshes, ponds, etc., in whatever mode they may have been acquired, either by descent or purchase. 3 Toullier 472. See Co. Litt. s. 731.

HERITOR. In Scotch Law. A proprietor of land. 1 Kames, Eq. Prin.

HERMANDAD (called also, *Santa Hermandad*). **In Spanish Law.** A fraternity formed among different towns and villages to prevent the commission of crimes, and to prevent the abuses and vexations to which they were subjected by men in power.

To carry into effect the object of this association, each village and town elected two *alcaldes*,— one by the nobility and the other by the community at large. These had under their order inferior officers, formed into companies, called *cuad villeros*. Their duty was to arrest delinquents and bring them before the *alcaldes*, when they were tried substantially in the ordinary form. This tribunal, established during the anarchy prevailing in feudal times, continued to maintain its organization in Spain for centuries; and various laws determining its jurisdiction and mode of proceeding were enacted by Ferdinand and Isabella and subsequent monarchs. Nov. Recop. tit. 35, b. 12, § 7. The abuses introduced in the exercise of the functions of the tribunals caused their abolition, and the *santas hermandades* of Ciudad Rodrigo, Talavera, and Toledo, the last remnants of these anomalous jurisdictions, were abolished by the law of the 7th May, 1835.

HERMAPHRODITES. Persons who have in the sexual organs the appearance of both sexes. They are adjudged to belong to that sex which prevails in them; Co., Litt. 2. 7; Domat, Lois Civ. liv. 1, t. 2, s. 1, n. 9.

The sexual characteristics in the human species are widely separated, and the two sexes are very rarely united in the same individual; there are a few cases on record, however, in which both ovaries and testicles were present. In one there were two ovaries, a rudimentary uterus, and a single testicle containing spermatozoa. Am. Text Book of Gynæcology. Cases of malformation are occasionally found, in which it is very difficult to decide to which sex the person belongs. See 2 Med. Exam. 314; 1 Briand, Med. Leg. c. 2, art. 2, § 2, n. 2; Guy Med. Jur. 42, 47; 1 Beck, Med. Jur. 11th

ed. 164 *et seq.*; Wharton & S. Med. Jur. § 408 *et seq.*

HERMENEUTICS (Greek, ἑρμηνεύω, to interpret). The art and science, or body of rules, of truthful interpretation. It has been used chiefly by theologians; but Zachariæ, in "An Essay on General Legal Hermeneutics" (Versuch einer allg. Hermeneûtik des Rechts), and Dr. Lieber, in his work on Legal and Political Hermeneutics, also makes use of it. See INTEPRETATION; CONSTRUCTION.

HERMER. A great lord. Jacob.

HERMOGENIAN CODE. See CODE.

HERNESCUS. A heron. Cowel.

HERNESIUM, or HERNASIUM. Household goods; implements of trade or husbandry; the rigging or tackle of a ship. Cowel.

HEROUDES. Heralds. Du Cange.

HERPEX. A harrow. Spel. Gloss.

HERPICATIO. In Old English Law. A day's work with a harrow. Spel. Gloss.

HERRING SILVER. This was a composition in money for the custom of supplying herrings for the provision of a religious house. Whart.

HERSHIP. The crime, in Scotland, of carrying off cattle by force; it is described as "the masterful driving off of cattle from a proprietor's grounds." Bell; Moz. & W.

HERUS. A master. *Servus facit ut herus det*, the servant does (the work), in order that the master may give (him the wages agreed on). *Herus dat ut servus faciat*, the master gives (or agrees to give, the wages), in consideration of, or with a view to, the servant's doing (the work). 2 Bla. Com. 445.

HESIA. An easement. Du Cange.

HEST CORN. Corn or grain given or devoted to religious persons or purposes. Cowel; 2 Mon. Ang. 367 *b*.

HESTA or HESTHA. A small loaf of bread.

HIDAGE. In Old English Law. A tax levied, in emergencies, on every *hide* of *land*; the exemption from such tax. Bract. lib. 2, c. 56. It was payable sometimes in money, sometimes in ships or military equipments; *e. g.* in the year 994, when the Danes landed in England, every three hundred hides furnished a ship to king Ethelred, and every eight hides one pack and one saddle. Jacob, Law Dict.

HIDALGO (spelled, also, *Hijodalgo*). **In Spanish Law.** He who, by blood and lineage, belongs to a distinguished family, or is noble by descent. Las Partidas 2. 12. 3.

HIDE (from Sax. *hyden*, to cover; so, Lat. *tectum*, from *tegere*). **In Old English Law.** A building with a roof; a house.

As much land as might be ploughed with one plough. The amount was probably determined by usage of the locality; some make it sixty, others eighty, others ninety-six, others one hundred or one hundred and twenty, acres. Co. Litt. 5; 1 Plowd. 167; Shepp. Touchst. 93; Du Cange.

A hide was anciently employed as a unit of taxation. 1 Poll. & Maitl. 347, such tax being called *hidegild*.

As much land as was necessary to support a *hide*, or mansion-house. Co. Litt. 69 *a*; Spelman, Gloss; Du Cange, *Hida*; 1 Introd. to Domesday 145. At present the quantity is one hundred acres. Anc. Laws & Inst. of Engl. Gloss.

HIDE AND GAIN. In English Law. A term anciently applied to arable land. Co. Litt. 85 *b*.

HIDE LANDS. In Old English Law. Lands appertaining to a *hide*, or mansion. See HIDE.

HIDEL. In Old English Law. A place of protection; a sanctuary. St. 1 Hen. VII. cc. 5, 6; Cowel.

HIDGILD, or HIDEGILD. A sum of money paid by a villein or servant to save himself from whipping. Fleta, l. 1, c. 47, § 20.

HIERARCHY. Originally, government by a body of priests. Stubbs, Const. Hist. § 376. Now, the body of officers in any church or ecclesiastical institution, considered as forming an ascending series of ranks or degrees of power and authority, with the correlative subjection, each to the one next above.

HIGH BAILIFF. An officer attached to an English county court. His duties are to attend the court when sitting; to serve summons; and to execute orders, warrants, writs, etc. Stats. 9 & 10 Vict. c. 95, § 33; Poll. C. C. Pr. 16. He also has similar duties under the bankruptcy jurisdiction of the county courts. Bankruptcy Rules 1870, 58.

HIGH COMMISSION COURT. In English Law. An ecclesiastical court of very extensive jurisdiction, for the vindication of the peace and dignity of the church, by reforming, ordering, and correcting the ecclesiastical state and persons, and all manner of errors, heresies, schisms, abuses, offences, contempts, and enormities.

It was erected by stat. 1 Eliz. c. 1, and abolished by 16 Car. II. c. 11.

HIGH COURT OF ADMIRALTY. See ADMIRALTY.

HIGH COURT OF CHANCERY. See CHANCERY.

HIGH COURT OF DELEGATES. **In English Law.** See COURT OF DELEGATES.

HIGH COURT OF JUSTICE. See JUDICATURE ACTS.

HIGH COURT OF JUSTICIARY. See COURT OF JUSTICIARY.

HIGH COURT OF PARLIAMENT. **In English Law.** The English Parliament, as composed of the house of peers and house of commons.

The house of lords sitting in its judicial capacity.

This term is applied to parliament by most of the law writers. Thus, parliament is said by Blackstone to be the supreme court of the kingdom, not only for the making but also for the execution of the laws; 4 Bla. Com. 259. Lord Coke and Lord Hale also apply the term "court" to the whole parliament; and see Finch, Law 233; Fleta, lib. 2, c. 2. But, from the fact that in general judicial proceedings the house of commons takes no part, but only in the trial of impeachments, and then only as prosecutor, and from the fact that the house of commons disclaimed possession of judicial powers at the deposition of Richard II., and the twelve judges made a similar decision in 1 Hen. VII., the propriety of this use of the term has been questioned: Bla. Com. Warren, Abr. 215. The propriety of its application would seem to be derived from the claim of parliament to be considered as the successor of the *aula regis*, which was a judicial as well as a legislative body, and, if the succession is established, would be applicable although the judicial power may have been granted to the various courts. See COURTS; HOUSE OF LORDS; IMPEACHMENT.

HIGH CRIMES AND MISDEMEANORS. The constitution of the U. S. provides that the president, vice-president, and all civil officers of the U. S. shall be removed from office on impeachment for treason, bribery, and other high crimes and misdemeanors. This does not apply to senators and members of congress, but does to U. S. circuit and district judges; Blount's Trial 102; Peck's Trial; 10 Law Trials; Chase's Trial; 11 *id.* See 6 Conn. 417. See IMPEACHMENT.

HIGH SEAS. The uninclosed waters of the ocean, and also those waters on the seacoast which are without the boundaries of low-water mark. 1 Gall. 624; 5 Mas. C. C. 290; 1 Bla. Com. 110; Bened. Adm.; 2 Hagg. Adm. 398.

The act of congress of April 30, 1790, s. 8, enacts that if any person shall commit upon the *high seas*, or in any river, haven, basin, or bay, out of the jurisdiction of any particular state, murder, etc., which if committed within the body of a county would, by the laws of the United States, be punishable with death, every such offender, being thereof convicted, shall suffer death; and the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular state, shall be in the district where the offender is apprehended, or into which he may first be brought. See 4 Dall. 426; 3 Wash. C. C. 515; 1 Mas. 147; 1 Gall. 624; 4 Blatchf. 420.

It was held in 32 Fed. Rep. 406 that the Great Lakes are not high seas, and that these words have been employed from time immemorial to designate the ocean below low-water mark, and have rarely if ever been applied to interior or land-locked waters of any kind; but the supreme court of the United States has held otherwise, saying that this term is also applicable to the open, unenclosed waters of the Great Lakes; 150 U. S. 249. See FAUCES TERRÆ; GREAT LAKES.

HIGH TREASON. **In English Law.** Treason against the king, in contradistinction from petit treason, which is the treason of a servant towards his master, a wife towards her husband, a secular or religious man towards his prelate. See PETIT TREASON; TREASON.

HIGH-WATER MARK. That part of the shore of the sea to which the waves ordinarily reach when the tide is at its highest. 6 Mass. 435; 1 Pick. 180; 1 Halst. 1; 1 Russ. Cr. 107; 2 East, Pl. Cr. 803.

Wherever the presence of the water is so common as to mark on the soil a character, in respect to vegetation, distinct from that of the banks; it does not include low lands which, though subject to periodical overflow, are valuable for agricultural purposes. 58 N. W. Rep. (Minn.) 295. See SEA-SHORE; TIDE.

HIGHWAY. A passage, road, or street which every citizen has a right to use. 3 Kent 432; 3 Yeates 421.

The term *highway* is the generic name for all kinds of public ways, whether they be carriage-ways, bridle-ways, foot-ways, bridges, turnpike roads, railroads, canals, ferries, or navigable rivers; 6 Mod. 255; Ang. Highw. c. 1; 3 Kent 432. A *cul de sac* is also a highway; 11 East 375, note; 18 Q. B. 870; 8 Allen 242; 24 N. Y. 559 (overruling 23 Barb. 103); 87 Ill. 189; s. c. 29 Am. Rep. 49; 60 N. W. Rep. (Mich.) 1048; but an alley would not be; 32 Mich. 111; 90 Mich. 104.

Highways are created either by legislative authority, by dedication, or by necessity.

First, by legislative authority. In England, the laying out of highways is regulated by act of parliament; in this country, by general statutes, differing in different states. In England, the uniform practice is to provide a compensation to the owner of the land taken for highways. In the act authorizing the taking, in the United States, such a provision must be made, or the act will be void under the clause in the federal and in the several state constitutions that "private property shall not be taken for public use without just compensation." The amount of such compensation may be determined either by a jury or by commissioners, as shall be prescribed by law; 1 Bla. Com. 139; Ang. Highw. c. 2; Thomp. Highw. 233; 8 Price 535; 18 Pick. 511; 25 Wend. 462; 21 N. H. 358; Baldw. 222; 3 Watts 292; 16 N. Y. 97; 14 Wisc. 609. In case the statute makes no provision for indemnity for land to be taken, an injunction may be obtained to prevent the taking; 3

Paige, Ch. 45; 2 Johns. Ch. 162; 9 Ind. 433; 34 Me. 247; see 132 Ind. 4; or an action at law may be maintained after the damage has been committed; 5 Cow. 165; 16 Conn. 98; and cases cited above.

See 32 Amer. & Eng. Corp. Cas. 88; EMINENT DOMAIN.

Second, by dedication, which title see.

Third, by necessity. If a highway be impassable, from being out of repair or otherwise, the public have a right to pass in another line, and, for this purpose, to go on the adjoining ground, even when sown with grain and enclosed with a fence; but they must do no unnecessary damage; Cro. Car. 366; 7 Cush. 408; 2 Show. 28; 7 Barb. 309. This right, however, is only temporary and gives the public no permanent easement; 44 N. H. 628.

A highway is simply an easement or servitude, carrying with it, as its incidents, the right to use the soil for the purposes of repair and improvement; and, in cities, for the more general purposes of sewerage, the distribution of light and water, and the furtherance of public morality, health, trade, and convenience. The owner of the land over which it passes retains the fee and all rights of property not incompatible with the public enjoyment, such as the right to the herbage, the trees and fruit growing thereon, or minerals below, and may work a mine, sink a drain or cellar, or carry water in pipes beneath it, or sell the soil if it be done without injury to the highway; 4 Viner, Abr. 502; Com. Dig. *Chemin* (A 2); Ang. Highw. c. 7; 1 N. H. 16; 1 Sumn. 21; 3 Rawle 495; 10 Pet. 25; 6 Mass. 454; 15 Johns. 447; 31 N. Y. 151; 34 Vt. 336; 28 Conn. 165; 83 Me. 508; 88 Va. 985; 45 La. Ann. 426; 37 N. E. Rep. (Ohio) 710; [1893] 1 Q. B. 142; 40 Minn. 337; 164 Mass. 350; but see 125 N. Y. 164; 25 Pac. Rep. (Kan.) 894. The title to a spring within the right of way of a turnpike company is in the owner, who may use the water as he pleases, and the turnpike company has no easement in such spring; 172 Pa. 460. The owner may maintain ejectment for encroachments on the highway or an assize if disseized of it; 3 Kent 432; Adams, Eject. 19; 9 S. & R. 26; 1 Conn. 135; 2 Sm. Lead. Cas. 141; 35 S. W. Rep. (Mo.) 581; or trespass against one who builds on it; 2 Johns. 357; or who digs up and removes the soil; 12 Wend. 98; [1893] 1 Q. B. 142; or cuts down trees growing thereon; 1 N. H. 16; or damages them in putting up telephone wires; 2 Can. S. C. R. 276; 37 N. E. Rep. (Ohio) 710; or who stops upon it for the purpose of using abusive or insulting language; 11 Barb. 390. A landowner has the right to the lateral support of the soil in the adjoining street, and a city is liable for any damage occasioned by removing this lateral support in grading the street; 40 Minn. 389. A steam railroad used for the purposes of transporting persons, and property upon a highway is an additional servitude for which an abutting owner is entitled to compensation; 2 E. D. Sm. 97; 3 Hill 567; 4 Zabr. 592; 16 Miss. 649; 38 Mich. 62; 67 Ill. 444; 4 Cush. 63; and so with any railroad which carries both passengers and freight, irrespective of the method of propulsion; 28 Minn. 373. See 41 Cal. 256; 52 Ind. 428; 48 *id.* 178; 66 Miss. 279; 46 Ia. 366; 47 Mich. 393. As to a railway for passengers only the question depends upon the character and extent of the use, and not upon the motive power; 35 Minn. 112; 79 Me. 363; 41 Fed. Rep. 556; 87 Mich. 361; 27 N. Y. 188; 21 Ill. 516; but when such a road seriously interferes with the rights of an abutting owner, it is held an additional servitude. This rule applies to an elevated railroad, which is considered an obstruction to the easement of air and light and the easement of access; 104 N. Y. 268; 90 *id.* 122; 91 *id.* 148; 106 N. Y. 147; 43 Ohio St. 190; and to any railroad which causes changes of grade in the street; 59 Cal. 290; 7 Barb. 508; 17 Neb. 548; 83 Ill. 535; 6 Pac. Rep. (Cal.) 325; 22 Minn. 527; 121 Mass. 241; 33 Ind. 435; but only in states which so provide by their constitutions or by statutes; 1 Pick. 418; 6 Ind. 237; 79 *id.* 491; 26 Ark. 276. Where the horse is the motive power of a passenger railway on a street or highway, and the grade is unchanged, no new servitude is imposed; 78 Ind. 261; an electric railway is held to come within this rule; 5 Dist. Rep. Pa. 18; 8 Ohio Cir. Ct. Rep. 535; 167 Pa. 62; 30 Atl. Rep. (N. J.) 351; 93 Tenn. 492; 32 Conn. 579; 52 Md. 242; 27 Wis. 194; 85 Mich. 634; 139 Pa. 419; and a cable road; 32 Fed. Rep. 270; 121 N. Y. 536, reversing 56 Hun 537; *contra*, 1 N. Y. Supp. 197; the erection of poles and stringing of wires by a telephone company is not an additional servitude; 63 N. W. Rep. (Minn.) 111 (*contra*, 49 Fed. Rep. 113); nor by an electric light company; 54 Hun 469. But the occupation of a country road by an electric light company constitutes an additional servitude; 39 N. Y. Supp. 522; or by a telegraph company; 143 N. Y. 133; or by an electric railway company; 167 Pa. 62; or a gas company; 62 N. Y. 386. See POLES; WIRES. As to other uses of city streets and compensation to abutters for damages resulting therefrom, see EMINENT DOMAIN.

The owners on the opposite sides *prima facie* own respectively to the centre line of the street; 33 Pa. 124; 86 Hun 424; 17 N. J. Eq. 75. And a grant of land "by," or "on," or "along" a highway carries, by presumption, the fee to the centre line, if the grantor own so far, though this presumption may be rebutted by words showing an intention to exclude the highway, such as, "by the side of," "by the margin of," or other equivalent expressions; Ang. Highw. § 315; 11 Me. 463; 4 Day 228; 13 N. H. 381; 8 Metc. 266; 2 R. I. 508; 60 N. Y. 609; 5 Whart. 18. But, while in most of the states this is the rule, there are exceptions as, in Kansas and Nebraska, where the fee of highways is vested in the county; 25 Pac. Rep. (Kan.) 894; 46 N. W. Rep. (Neb.) 627; and in New York city where by act of 1813 the fee is vested in the municipality in trust for the public; 27 N. Y. 188; 45 *id.* 732; 68 *id.* 593; 125 *id.* 164; and

in Illinois, in the municipality in trust for the public; 75 Ill. 301; 11 *id.* 554; 67 *id.* 439; and it is held that even where the abutting owner does not own the fee in the highway, he has special easements therein not enjoyed by the public, as those of light, air, and access; 36 Hun 427; 34 *id.* 121; 9 *id.* 246; 4 Paige 510; 102 Ill. 64; 21 Fed. Rep. 309; 7 Wall. 272; 7 Col. 113; 39 Ohio St. 333; 41 Hun 117; 44 N. J. Eq. 120; 106 Ind. 29. See FRONTAGE. Where the fee of a highway is in the adjoining owner, it reverts to him upon a discontinuance, vacation, or abandonment; 8 Bosw. 372; 4 Mass. 429; 110 Pa. 370; 36 Barb. 136; 10 Pet. 26; 15 Johns. 447; 28 Kan. 470. But in Illinois it is held that such land reverts to the original owner and not to the abutter who acquires title to it after the establishment of the way; 75 Ill. 301.

In England, the inhabitants of the several parishes are *prima facie* bound to repair all highways lying within them, unless by prescription or otherwise they can throw the burden upon particular persons; Shelf. Highw. 44; 5 Burr. 1700; 12 Mod. 409. In this country, the English parochial system being unknown, this feature of the common law does not prevail. The liability to repair is here determined by statute, and, in most of the states, devolves upon the towns, or other local municipalities; 8 Barb. 645; 13 Pick. 343; 1 Humphr. 217; 125 Pa. 24; 74 Iowa 644. The liability being thus created, its measure is likewise to be ascertained by statute, the criterion being, generally, safety and convenience for travel, having reference to the natural characteristics of the road and the public needs; Ang. Highw. § 259; 2 W. & M. 337; 19 Vt. 470; 4 Cush. 307, 365; 14 Me. 198. For neglect to repair, the parish in England, and in this country the town or body chargeable, is indictable as for a nuisance; 2 Wms. Saund. 158, n. 4; 28 N. H. 195; Ang. Highw. § 275; and, in many states, is made liable, by statute, to an action on the case for damages in favor of any person who may have suffered special injury by reason of such neglect; 17 How. 161; 3 Cush. 174; 22 Pa. 384; 31 Me. 299; Ang. Highw. § 286; 83 Va. 355; 71 Tex. 280. But to make a county liable, the defect in the highway must have been the sole cause of the injury; 81 W. Va. 477. Contributory negligence defeats recovery for injuries caused by a defective highway; 29 S. C. 140; 97 Mo. 151; 31 W. Va. 477; 77 Ga. 288. The duty of repair may, in this country, rest on an individual to the exclusion of the town; 23 Wend. 446; or on a corporation who, in pursuance of their charter, build a road, and levy tolls for the expense of maintaining it; 7 Conn. 86. The taking of toll is *prima facie* evidence of the duty; 1 Hawks 451.

In Pennsylvania any one or more taxpayers in a township or road district may, upon proper proceedings, and giving a bond, acquire a right to make, repair, etc., all the roads, and thereupon be free from road taxes for a year; act of June 12, 1893.

Any act or obstruction which incommodes or impedes the lawful use of a highway by the public, except such as arises by necessity from unloading wagons, putting up buildings, etc., is a common-law nuisance; 4 Steph. Com. 294; 1 Hawk. Pl. Cr. c. 76; Ang. Highw. § 345; 1 Denio 524; 8 Ohio St. 358; 29 Am. L. Reg. 342; 145 Pa. 453; 23 Atl. Rep. (Pa.) 1115; 43 Pac. Rep. (Cal.) 196; 46 Ill. App. 67. A fruit stand on a city street is an obstruction; 6 Gill 425; 73 Ind. 185. The drawing large crowds before a shop window; 1 S. & R. 219; the stopping teams or vehicles for such a time or at such a place as unreasonably to interfere with public travel; 3 Campb. 226; 54 Md. 148; 39 Ohio St. 333; 85 N. C. 522; (but a reasonable necessity will justify a temporary obstruction; 72 Wis. 199); collecting a noisy and disorderly crowd by music or speaking; 19 Pa. 412; 64 N. H. 48; conducting an execution sale on the street; 13 S. & R. 403; are nuisances and may be abated by any one whose passage is thereby obstructed; 3 Steph. Com. 5; 5 Co. 101; 10 Mass. 70; 18 Wis. 265; or the person causing or maintaining the same may be indicted; 1 Hawk. Pl. Cr. c. 76; Thomp. Highw. 305; 2 Saund. 158, note; 7 Hill, N. Y. 575; 13 Metc. Mass. 115; 2 R. I. 493; 29 Am. L. Reg. 342; or may be sued for damages in an action on the case by any one specially injured thereby; Co. Litt. 56 *a*; 1 Binn. 463; 7 Cow. 609; 19 Pick. 147; 6 Oreg. 378; s. c. 25 Am. Rep. 531, and note; 2 Ill. 229; 53 Barb. 629; 5 Blackf. 35; and a court of equity will take jurisdiction of a civil action to abate and enjoin the maintenance of an obstruction to a highway which is a public nuisance; 47 N. W. Rep. (Minn.) 255. At common law the public have no right to pasture cattle on the highways; 2 H. Bla. 527; 16 Mass. 33; 5 Wis. 27.

Disobedience of a city ordinance forbidding the leaving of horses unhitched on the street of a city is negligence, for which the employer of the driver must answer in damages to a person sustaining injuries therefrom; 8 Houst. 562.

The legislature has power to authorize certain obstructions which would otherwise be a public nuisance, such as the laying of railroad tracks or bridging of streams or constructing sewers, etc., or laying gas and water pipes; 14 Gray 93; 12 Ia. 246; 65 Mo. 325; 16 N. Y. 97; 31 Wis. 316; 57 Me. 481; 34 Mich. 462; 68 N. Y. 71.

It is the duty of travellers upon highways, for the purpose of avoiding collision and accident, to observe due care in accommodating themselves to each other. To observe this purpose, it is the rule in England, that, in meeting, each party shall bear or keep to the left; and in this country, to the right; 2 Steph. N. P. 984; Story, Bailm. § 599; Thomp. Highw. 384; 2 Dowl. &. R. 255; 158 Mass. 46. This rule, however, may and ought to be varied, where its observance would defeat its purpose; 8 C. & P. 103; 12 Metc. 415; 23 Pa. 196. The rule does not apply to equestrians and foot-passengers; 24 Wend. 465; 2 D. Chipm. 128; 8 C. & P. 373, 691; 2 Misc. Rep. 238; but

it has been held to apply to bicyclists; 32 Atl. Rep. (Pa.) 652. It is another rule that travellers shall drive only at a moderate rate of speed, furious driving on a thronged thoroughfare being an indictable offence at common law; 1 Pet. 590; 13 *id.* 181; 8 C. & P. 694. In case of injury by reason of the non-observance of these rules or of other negligence, as by the use of unsuitable carriages or harness, or horses imperfectly trained, the injured party is entitled to recover his damages in an action on the case against the culpable party, unless the injury be in part attributable to his own neglect; Ang. Highw. § 345; 1 Pick. 345; 11 East 60; 63 Conn. 150; 5 W. & S. 544; 5 C. & P. 379; 19 Wend. 399. The legislature has complete power to regulate the highways in a state, and may prescribe what vehicles may be used on them with a view to the safety of the passengers over them and the preservation of the roads; 97 N. C. 477; it may regulate the improvement for the public good of highways, whether on land or by water, subject to the right of congress to interpose when such highways are the means of interstate and foreign commerce; 119 U. S. 543. See Thompson; Pope, Highw.; Elliott, Roads & Streets; Booth, Street Ry.; 24 Alb. L. J. 464; 33 Amer. & Eng. Corp. Cas. 469.

And see BICYCLE; BRIDGE; TURNPIKE; RAILROAD; CANAL; FERRY; GRADE CROSSING; RIVER; STREET; WAY; NEGLIGENCE; NAVIGABLE WATERS.

HIGHWAYMAN. A robber on the highway.

HIGLER. In English Law. A person who carries from door to door, and sells by retail, small articles of provisions, and the like.

HIGUELA. In Spanish Law. The written acknowledgment given by each of the heirs of a deceased person, showing the effects he has received from the succession.

HIIS TESTIBUS. Words formerly used in deeds, signifying these being witness. They have been disused since Henry VIII. Co. Litt.; Cowel.

HIJRA. Flight; departure. Given by some authorities for Hegira (*q. v.*). Moz. & W.

HILARY TERM. In English Law. A term of court, beginning on the 11th and ending on the 31st of January in each year. Superseded (1875) by Hilary Sittings, which begin January 11th and end on the Wednesday before Easter. See TERM.

HINDENI HOMINES. A society of men in the Saxon times. Toml.

HINDER AND DELAY. A phrase used to signify an act amounting to an attempt to defraud rather than a successful fraud. To put some obstacle in the path of, or interpose some time unjustifiably, before a creditor can realize what is owed out of his debtor's property. 42 N. Y. Super. Ct. 63; 74 N. Y. 597. The question of fraudulent intent is one of fact; 9 Col. 8. The word "hinder" is not synonymous with "delay"; 68 Mo. 435.

HINDU LAW. The system of native law prevailing among the Gentoos, and administered by the government of British India.

In all the arrangements for the administration of justice in India, made by the British government and the East India Company, the principle of reserving to the native inhabitants the continuance of their own laws and usages within certain limits has been uniformly recognized. The laws of the Hindus and Mohammedans have thus been brought into notice in England, and are occasionally referred to by writers on English and American law. The native works upon these subjects are very numerous. The chief English republications of the Hindu law are, Colebrooke's Digest of Hindu Law, London 1801; Sir Wm. Jones's Institutes of Hindu Law, London, 1797. For a fuller account of the Hindu Law, and of the original Digests and Commentaries, see Morley's Law of India, London, 1858, and Macnaghten's Principles of Hindu and Mohammedan Law, London, 1860. The principal English republications of the Mohammedan Law are Hamilton's Hedaya, London, 1791; Baillie's Digest, Calcutta, 1805; *Précis de Jurisprudencè mussulmane selon le Rite malikite*, Paris, 1848; and the treatises on Succession and Inheritance translated by Sir William Jones. See, also, Norton's Cases on Hindu Law of Inheritance; Rattigan, Hindu Law. An approved outline of both systems is Macnaghten's Principles of Hindu and Mohammedan Law; also contained in the "Principles and Precedents" of the same law previously published by the same author.

HINE or HIND. A servant, or one of the family, but more properly a servant at husbandry; and he that oversees the rest is called the *master hine*. Cowel; Moz. & W.

HINE-FARE. The loss or departure of a servant from his master. Domesd.

HINEGELD. A ransom for an offence committed by a servant. Cowel.

HIPOTECA. In Spanish Law. A mortgage of real property. Johnson, Civ. Law of Spain, 156 [149]; White, New Recop. b. 2, tit. 7.

HIRE. A bailment in which compensation is to be given for the use of a thing, or for labor and services about it. 2 Kent 456; Story, Bailm. § 359. The divisions of this species of contract are denoted by Latin names.

Locatio operis faciendi is the hire of labor and work to be done or care and attention to be bestowed on the goods let by the hirer, for a compensation.

Locatio operis mercium vehendarum is the hire of the carriage of goods from one place to another, for a compensation. Jones, Bailm. 85, 86, 90, 103, 118; 2 Kent 456.

Locatio rei or *locatio conductio rei* is the bailment of a thing to be used by the hirer for a compensation to be paid by him.

This contract is voluntary, and founded in consent; it involves mutual and reciprocal obligations; and it is for mutual benefit. In some respects it bears a strong resemblance to the contract of sale; the principal difference between them being that in cases of sale the owner parts with the whole proprietary interest in the thing, and in cases of hire the owner parts with

possession only for a temporary purpose. In a sale, the thing itself is the object of the contract; in hiring, the use of the thing is its object; Vinnius, lib. 3, tit. 25, *in pr.*; Pothier, *Louage*, nn. 2–4; Jones, Bailm. 86; Story, Bailm. § 371. See Edwards, Jones, Story, Schouler, Bailments; Parsons, Story, Contracts; 2 Kent 456; BAILMENT.

HIRE-PURCHASE. See SALE.

HIRER. He who hires. See 18 S. W. Rep. (Tex.) 578; BAILMENT.

HIRST or HURST. **In Old English Law.** A wood. Domesd; Co. Litt. 4 *b*.

HIS. A demise by A to B for the term of "his" natural life may enure as a demise either for the life of A or that of B according to circumstances; 2 Nev. and M. 838.

In a policy of insurance the word "his" instead of "their" as descriptive of the property of the assured, does not render the policy void, if the assured has an insurable interest, although the interest may be qualified or defeasible or even an equitable interest; 10 Pick. 40; 29 Conn. 10; 16 Wend. 385; 122 Mass. 94; but where the policy expressly requires that a statement be made whether the insured owns the sole interest in the premises, the use of the word "his" instead of "their" amounts to a misrepresentation, if the insured is not the sole owner; 68 Mo. 127. REPRESENTATION.

The ninth clause of the thirty-ninth section of the bankruptcy act does not apply to an accommodation indorser of negotiable paper whose indorsement is in no way connected with the business of the indorser, as such paper is not "his" commercial paper within the meaning of said clause; 2 Dill. 533.

HIS EXCELLENCY. A title given by the constitution of Massachusetts to the governor of that commonwealth. Mass. Const. part 2, c. 2, s. 1, art. 1. This title is customarily given to the governors of the other states, whether or not it be the official designation in their constitutions and laws.

HIS HONOR. A title given by the constitution of Massachusetts to the lieutenant governor of that commonwealth. Mass. Const. part 2, c. 2, s. 2, art. 1. It is also customarily given to some inferior magistrates, as the mayor of a city.

HISSA. A lot or portion; a share of revenue or rent. Wilson's Gloss. Ind.

HIWISC. A hide of land.

HLAFORDSWICE (Sax. *hlaford*, lord, literally bread-giver, and *wice*). **In Old English Law.** Betraying one's lord; treason. Crabb, Hist. Eng. Law 59, 301.

HLASOCNA. The benefit of the law. Du Cange; Toml.

HLOTH (Sax.). An unlawful company. Moz. and W.

HLOTHBOTE (Sax. *hloth*, company, and *bote*, compensation). **In Old English Law.** Fine for presence at an illegal assembly. Du Cange, *Hlotbota*.

HOCK-TUESDAY MONEY. A duty given to the landlord, that his tenants and bondmen might solemnize the day on which the English mastered the Danes, being the second Tuesday after Easter week. Cowel.

HODGE-PODGE ACT. A name given to a legislative act which embraces many subjects. Such acts, besides being evident proofs of the ignorance of the makers of them, or of their want of good faith, are calculated to create a confusion which is highly prejudicial to the interests of justice. Instances of this wretched legislation are everywhere to be found. See Barrington, Stat. 449. In Pennsylvania, and in other states, bills, except general appropriation bills, can contain but one subject, which must be expressed in the title. Const. of Penn. art. 3, sec. 3.

HOE. An implement for loosening the earth after digging the same. It is *per se* a deadly weapon; 113 Ill. 38.

HOG. This word may include a sow; 2 S. C. 21; a pig; 60 Ala. 60; 58 *id.* 355; and may refer to the dead as well as the living animal; 7 Ind. 195; 55 Ala. 140; 16 Fla. 564; and it is synonymous with swine; 10 Tex. App. 177.

HOGA. **In Old English Law.** A hill or mountain. Domesday.

HOGGUS OR HOGICTUS. A hog or swine. Cowel.

HOGHENHYNE (from Sax. *hogh*, house, and *hine*, servant). A domestic servant. Among the Saxons, a stranger guest was, the first night of his stay, called *uncuth*, or unknown; the second, *gust*, guest; the third, *hoghenhyne*; and the entertainer was responsible for his acts as for those of his own servant. Bract. 124 *b*; Du Cange, *Agenhine*; Spelman, Gloss. *Homehine*.

HOGSHEAD. A liquid measure, containing half a pipe; the fourth part of a tun, or sixty-three gallons.

HOLD. A technical word in a deed introducing with "to have" the clause which expresses the tenure by which the grantee is to have the land. The clause which commences with these words is called the *tenendum*. See TENENDUM; HABENDUM.

For the distinction between the power to hold and the power to purchase, see 7 S. & R. 313; 14 Pet. 122.

To decide, to adjudge, to decree: as, the court in that case *held* that the husband was not liable for the contract of the wife, made without his express or implied authority.

To bind under a contract: as, the obligor is *held* and firmly bound.

In the constitution of the United States

it is provided that no person *held* to service or labor in one state under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on the claim of the party to whom such service or labor may be due. Art. iv. sec. ii. § 3. The main purpose of this provision in the constitution no longer exists, through the abolition of slavery; but it includes apprentices; 1 Am. L. Reg. 654. See FUGITIVE SLAVE.

HOLD PLEAS. To hear or try causes. 3 Bla. Com. 35, 298.

HOLDER. The holder of a bill of exchange is the person who is legally in the possession of it, either by indorsement or delivery, or both, and entitled to receive payment either from the drawee or acceptor, and is considered as an assignee. 4 Dall. 53. And one who indorses a promissory note for collection, as an agent, will be considered the holder for the purpose of transmitting notices; 20 Johns. 372; 2 Hall N. Y. 112; 6 How. 248. No one but the holder can maintain an action on a bill of exchange; Byles, Bills 2. See BILL OF EXCHANGE.

HOLDING OVER. The act of keeping possession by the tenant, without the consent of the landlord, of premises which the latter, or those under whom he claims, had leased to the former, after the term has expired.

When a proper notice has been given, this injury is remedied by ejectment, or, under local regulations, by summary proceedings. See 4 Rawle 123; 2 Bla. Com. 150; 3 *id.* 210; Woodf. L. & T. 788. A tenant enters on another term by holding over, notwithstanding his inability to move on the day the term ended; 133 N. Y. 287; 88 Ga. 610. If a lessee for years holds over, the landowner has the legal option to treat him as a trespasser or as a tenant for another year; 91 Mich. 590; 38 W. Va. 607; 8 Misc. Rep. 430; and the law presumes this holding to be upon the terms of the original demise; 38 W. Va. 607. See 49 Mo. App. 631; LANDLORD AND TENANT; FORCIBLE ENTRY AND DETAINER.

The term is also applied to the retaining possession of a public office by an incumbent, after his term has expired, which is not always unlawful, as such action is sometimes authorized by statute or common law, to prevent an interregnum.

HOLIDAY. A religious festival; a day set apart for commemorating some important event in history; a day of exemption from labor. Webster, Dict. (Webster applies *holyday* especially to a religious, *holiday* to a secular festival.) In England they are either by act of legislation, or by ancient usage, and are now regulated by the Bank Holiday Act of 1871, extended by the act 38 Vict. c. 13. Fasts and thanksgiving days are also occasionally appointed by the crown. See Wharton, Dict.; 2 Burn, Eccl. Law 308.

In the United States there are no established holidays of a religious character having a legal status without legislation, and the lack of precision in the earlier statutes on the subject has given rise to much confusion and a great variety of definition. It has been said that a legal holiday is, *ex vi termini, dies non juridicus;* 38 Wis. 673; but this case does not warrant so broad a statement; 29 Am. L. Reg. 139. One thing which seems to be absolutely settled is that a legal holiday does not have the legal relations of Sunday, which was clothed with the idea of sanctity and is in its very nature *dies non juridicus.* Legal holidays are, however, merely the creation of statute law, and the lack of uniformity in the statutes of the several states makes the term itself very difficult of exact definition. The various definitions of the term holiday are collected in an article on the subject in 29 Am. L. Reg. 137, the writer of which thus states the conclusion reached after a critical examination of them: "Legal holidays as distinguished from the first day of the week are those days which are set apart by statute or by executive authority for fasting and prayer, or those given over to religious observance and amusements, or for political, moral or social, duties or anniversaries, or merely for popular recreation and amusement under such penalties and prohibitions alone as are expressed in positive legislative enactments."

The earlier statutes in the United States had for their object, mainly, the regulation of commercial paper falling due on days which were by general consent observed as holidays. Under such statutes it is simply provided that such paper payable upon the day named shall be due and payable on the day before or the day after. The difference in the statute law of several states as to this point is stated *infra.* As in the statutes, the day is specified and they are construed with exactness, there is little in the way of decision on this subject. It has been held that usage at a bank known to the parties to a note is sufficient to make a holiday such as to change the day for demanding payment, at least so far as to authorize a tender by the endorser on the following day; 3 Pick. 414. In most of the states it is the rule, and such is the general commercial usage, to allow only two days of grace where the third would fall on a holiday, and to authorize demand of payment and protest on the day next preceding it. The question when a note falling due on a legal holiday which happens to be Sunday is legally payable is to be determined as in the case of any other note falling due on Sunday. This is so by general usage without special provision by statute, though in some states there is such provision, as in Georgia; Code § 2783. In New Jersey a note falling due on the 30th of May, Decoration Day, when Sunday, cannot be presented and protested for nonpayment until the following Tuesday; 43 N. J. Law 299. Where paper is drawn without grace, payment may not be de-

manded until the next day; 49 N. Y. 269; as is the case with respect to Sunday; 20 Wend. 205; 2 Conn. 69; in the last case the distinction is thus well put by Swift, C. J.: "The same custom of merchants which has indulged three days of grace after a note is due, if that day, the last day of grace, is not Sunday, allows but two, where it is Sunday; and, it being an indulgence, it is perfectly consistent to require payment on the second day of grace to avoid giving four days of grace; but this is a very different thing from requiring a note to be paid before it is due."

The rule of commercial paper as affected by holidays has been applied for the sake of uniformity to other maturing contracts; 39 Wis. 533. In somes states, as California, the Dakotas, Idaho, and Massachusetts, the statutes extend the time for the performance of all contracts, except works of charity or necessity, to the next following day; but in Kentucky it was held that there being nothing in the statute prohibiting business transactions on a holiday, the performance of a contract was required according to its terms; 85 Ky. 88; and this, it has been said, is the reasonable and logical view, the doctrine of the Wisconsin case being probably founded upon the confusion of holidays with Sundays; 29 Am. L. Reg. 153.

Judicial proceedings are usually invalid on holidays, and in most of the state statutes such proceedings are expressly prohibited, but a mere statutory provision requiring that public offices be closed does not prevent the sitting of courts or the discharge of judicial duties by judges; 47 Hun 129; which are valid unless prohibited by a statute; 19 Fla. 54.

The following acts have been held valid when wholly or partially done upon a holiday; a sheriff's sale; 65 Tex. 111; a criminal examination on which a commitment was based; 29 Mich. 175; giving a case to the jury in a trial for murder; 32 Minn. 118; or trying a murder case; 12 Tex. App. 496; the conclusion of such trial and the conviction of the prisoner; 104 N. C. 743; 84 Ala. 432; entering a judgment by a justice of the peace; 19 Mo. App. 41; 92 Tenn. 476; commencing a criminal trial; 9 Tex. App. 179; hearing a civil case; 63 Tex. 162; service of process; 20 Abb. N. C. 14; 50 Hun 105; 56 *id.* 423; notice of days of election; 17 Ore. 564; return of process; 37 N. J. Eq. 339; 38 *id.* 420; which see as to legal proceedings, and see also 5 Paige 541; service of a statement for a new trial; 44 Pac. Rep. (Cal.) 1074; service of an order for payment of money; 39 N. Y. Supp. 686; a judgment by confession; 45 Ill. App. 326; and the entry of an appeal; 8 Pa. Co. Ct. Rep. 65. In Pennsylvania the supreme court will hear arguments on a legal holiday; 17 W. N. C. Pa. 502.

The following acts have been held invalid: the appointment of justices to hear the disclosure of an insolvent debtor; 78 Me. 580; entering judgment by default; Abb. Pr. 411; entering a judgment (where the statute prescribed that the day should be for all purposes whatever considered as the first day of the week); 8 Ohio C. C. 489. As to judgment, see 14 Alb. L. J. 153; verdict, 4 Cent. L. J. 156.

With respect to ministerial acts the question may arise whether attendance of the officer and the performance of the duty is required, and this is to be settled entirely by the language of the statute. With respect to the validity of such acts performed on a holiday, unless expressly made void by statute, the general rule is that an officer may act. This is held even where the statute expressly prohibits the transaction of judicial business, so an order of attachment past due is ministerial business, and may be issued where such a statute exists; 36 Neb. 720. Acts which have been held ministerial are, taking a judgment; 7 Biss. 455; the entry of a judgment on a warrant of attorney; 1 Pa. Co. Ct. Rep. 562; a sale for taxes; 104 Ind. 459; the issuing of a summons by a justice of the peace; 61 Wis. 414; 47 Mich. 614; but where the statute prohibits judicial business a trial and judgment would not be valid; 38 *id.* 673; 32 *id.* 89; and it has been held that a sheriff's sale was not void because made on a holiday and, if confirmed, the title would not be endangered, but that it was not a proper day and that, upon exception, the sale would have been set aside; 1 Pa. Co. Ct. Rep. 567.

In the absence of statutory requisitions it was held that a school should be allowed the legal holidays without deduction of salary to the teachers; 39 Mich. 484.

The taking of an acknowledgment or deposition is usually held valid if performed upon a legal holiday, as being not a judicial act but private business; 30 Ark. 612; 73 Wis. 548; 41 Minn. 269.

Under a statute excluding from computation of time for serving papers Sunday, or a holiday, Saturday, which is made a half-holiday, is excluded; 19 Abb. N. C. 267; 20 *id.* 11.

An act making Saturday afternoon a legal half-holiday so far as regards the transaction of business in the public offices does not apply to proceedings by a municipal common council, and an ordinance passed on Saturday afternoon is valid; 55 N. J. L. 245.

Acts designating holidays for the presentment and payment of commercial paper and regulating the same constitute them each, for that purpose only, and not within an act prohibiting the sale of liquor on legal holidays; 39 N. E. Rep. (Ind.) 51. An act providing that such holiday shall be considered the same as Sunday, and an act forbidding the holding of courts on Sunday, and one forbidding service of process on February 22d do not invalidate a sale on that day under a power in a deed of trust; 112 Mo. 171.

Under a statute providing that no court shall be open or transact any business on any legal holiday, unless it be to instruct or discharge a jury, or receive a verdict

and render judgment thereon, an assignment for the benefit of creditors was not avoided by the fact that the assignee's bond was approved by a court commissioner on a legal holiday, though that be considered a judicial act; 44 N. W. Rep. (Wis.) 643. See as to business in court, 8 West. L. J. 452. Under a rule of reference fixing Decoration Day as the day for choosing arbitrators, the defendant could not be required to attend on a legal holiday and the proceedings were void; 9 Pa. Co. Ct. Rep. 207.

See, generally, a very full note and collection of statutes and authorities; 29 Am. L. Reg. N. S. 137; 19 L. R. A. 316; 4 Am. & Eng. Corp. Cas. 347; 7 So. L. Rev. 697.

The legal holidays in the several states and territories are here given as provided at the time this title goes to press, but as the statutes differ materially they should be referred to as to particular cases: Independence day (July 4), Thanksgiving day, and Christmas day are observed in all the states and territories; *New Year's day*, in all except Massachusetts, New Hampshire, and Rhode Island. *Washington's birthday*, in all except Iowa, Nebraska, and New Mexico. *Decoration day* in all except Alabama, Arkansas, Florida, Georgia, Louisiana, Massachusetts, Mississippi, North Carolina, South Carolina, and Virginia. *Labor day* is observed on the first Monday in September in all except California, Louisiana, Vermont, Mississippi, Arkansas, Nevada, West Virginia, North Carolina, and New Mexico, and Indian Territory, the first two states having appointed a different date, which see *infra*, and the others having no statutory provisions regarding the day. The following states in addition to the holidays enumerated observe the following, *Alabama*, Mardi Gras, Good Friday, Memorial day, (Apr. 26). *Arizona*, Arbor day, first Friday after Feb. 1, election day (first Tuesday after first Monday in November). *California*, State admission day (September 9), Labor day (first Monday in October), election day (first Tuesday after first Monday in November). *Connecticut*, Good Friday. *Colorado*, election day (first Tuesday after first Monday in November), and any day appointed by the president or governor as a day of thanksgiving, fast, or other religious observance. *District of Columbia*, Inauguration day. *Florida*, Lee's birthday (January 19), Davis' birthday (June 3), Memorial day (April 26), election day (first Tuesday after the first Monday in November and first Tuesday in October). *Georgia*, Lee's birthday, Memorial day, (April 26). *Idaho*, Arbor day (May 7), election day (first Tuesday after first Monday in November), and any day appointed by the president or governor or any municipal authority as a day of thanksgiving, fast, or other religious observance. *Illinois*, Lincoln's birthday (February 12), election day (first Tuesday after first Monday in November and also in Chicago, first Monday in April). *Indiana*, election day (first Tuesday after first Monday in November). *Indian Territory*, any day appointed by the president or governor as a day of thanksgiving, fast, or other religious observance. *Iowa*, Any day appointed by the president or governor as a day of thanksgiving fast or other religious observance. *Louisiana*. Anniversary of the Battle of New Orleans (January 8), Mardi Gras, Good Friday, All Saints day (November 1), Labor day (November 5). *Maine*, Fast day (usually appointed on Thursday in April). *Maryland*, Good Friday, Battle of North Point (September 12), election day (first Tuesday after first Monday in November). *Massachusetts*, Battle of Lexington (April 19), Battle of Bunker Hill (June 17). *Missouri*, election day (first Tuesday after first Monday in November). *Minnesota*, Lincoln's birthday (February 12), Good Friday, election day (first Tuesday after first Monday in November), and the forenoon of every day on which any election is held. *Montana*, Arbor day (second Tuesday in May), election day (first Tuesday after first Monday in November). *Nebraska*, Arbor day (April 22). *New Hampshire*, Fast day appointed by the governor, election day (first Tuesday after first Monday in November). *New Jersey*, Lincoln's birthday, election day (first Tuesday after first Monday in November), and any day appointed by the president or governor as a day of thanksgiving, fast, or other religious observance. *New York*, Lincoln's birthday, election day, and any day appointed by the president or governor as a day of thanksgiving, fast, or other religious observance. *North Carolina*, Lee's birthday (January 19), Memorial day (May 10), Anniversary of the signing of the Mechlenberg declaration of independence (May 20). *North Dakota*, election day, and any day appointed by the president or governor as a day of thanksgiving, fast, or other religious observance. *Oklahoma*, any day the president may appoint as a day of thanksgiving, fast, or other religious observance. *Oregon*, election day and any day appointed by the president or governor as a day of thanksgiving, fast, or other religious observance. *Pennsylvania*, Lincoln's birthday, Good Friday, election days, (third Tuesday of February, and first Tuesday after first Monday in November), any day appointed by the president or governor as a day of thanksgiving, fast, or other religious observance. *Rhode Island*, Arbor day (appointed by the governor), election day (first Tuesday after first Monday in November, also first Tuesday in April). *South Carolina*, election day. *South Dakota*, same as *North Dakota*. *Tennessee*, Good Friday, election day (first Tuesday after first Monday in November, and also first Tuesday in August). *Texas*, Anniversary of Texas Independence (March 2), Battle of San Jacinto (April 12), election day. *Utah*, Arbor day (April 15), Pioneer day (July 24), any fast or thanksgiving day appointed by the president or governor. *Vermont*, Fast day, appointed by the governor, Memorial day (May 10). *Virginia*, Lee's birthday (January 19), and any day appointed by the president or governor as a day of thanksgiving, fast, or other religious observance. *Washington*, Lincoln's birthday (February 12), election day. *West Virginia*, election day. *Wisconsin*, election day, and Thanksgiving. *Wyoming*, Arbor day (appointed by the governor), election day. When a holiday falls on Sunday it is transferred to the following Monday throughout the States, except in Arizona and Arkansas.

Saturday is a holiday after twelve o'clock noon all the year round and throughout the state in Connecticut, District of Columbia, Massachusetts, Michigan, New Jersey, New York, Rhode Island, Virginia, and Ontario, and in cities of 100,000, and over, in Colorado, Louisiana, Missouri. In Delaware, Wilmington all the year and in New Castle County from June 1, to September 30. In California, San Francisco. In Iowa, Des Moines, in Illinois, Chicago, Maine, Portland, only from June to September. In Ohio cities of 50,000 and over; in South Carolina, Charleston; In Minnesota, Montana, Nebraska, New Hampshire, Texas, Washington, and Wisconsin this holiday is observed by custom only. Pennsylvania throughout the state from June 15 to September 15.

When a note falls due on Sunday, or a statutory holiday, it is usually considered due on the preceding day unless otherwise provided by statute. The following states have so provided: Alabama Arizona, Connecticut, California, District of Columbia, Idaho, Illinois, Louisiana, Massachusetts, Missouri, Michigan, Montana, Nebraska, New Jersey, New York, North Dakota, Oregon, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Vermont, Virginia, and Wisconsin, as have Quebec and Ontario. In Indian Territory and New Mexico it is unsettled as to whether notes due on a holiday are payable the day before or the day after.

HOLOGRAFO. In Spanish Law. Olographi. A term applicable to the paper, document, disposition, and more particularly to the last will of a person, which in order to be valid must be wholly written, signed, and dated by the testator. "*Holographum, apud Testum, appellatur testamentum, quod totum manu testatoris scriptum est et subsignatum.*"

HOLOGRAPH. What is written with one's own hand. See OLOGRAPH.

HOLY ORDERS. In Ecclesiastical Law. The orders or dignities of the church. Those within holy orders are archbishops, bishops, priests, and deacons. The form of ordination in England must be according

to the form in the Book of Common Prayer. Besides these orders, the church of Rome had five others, viz.: subdeacons, acolytes, exorcists, readers, and ostiaries. 2 Burn, Eccl. Law 39.

HOMAGE (anciently *hominium*, from *homo*). A mere acknowledgment of tenure made by a tenant by knight-service upon investiture, in the following form:—

The tenant in fee or fee-tail that holds by homage shall kneel upon both his knees, ungirded, and the lord shall sit and hold both the hands of his tenant between his hands, and the tenant shall say, "I become your man (*homo*) from this day forward of life, and member, of earthly honor, and to you shall be faithful and true, and shall bear to you faith for the lands that I claim to hold of you, saving that faith that I owe to our lord the king;" and then the lord so sitting shall kiss him. The kiss is indispensable (except sometimes in the case of a woman. Du Cange). After this the oath of fealty (*q.v.*) is taken; but this may be taken by the steward, homage only to the lord. *Termes de la Ley.* This species of homage was called *homagium planum* or *simplex*, 1 Bla. Com. 367, to distinguish it from *homagium ligium*, or liege homage, which included fealty and the services incident. Du Cange; Spelman, Gloss.

Liege homage was that homage in which allegiance was sworn without any reservation, and was, therefore, due only to the sovereign; and, as it came in time to be exacted without any actual holding from him, it sunk into the oath of allegiance. *Termes de la Ley.*

The obligation of homage is mutual, binding the lord to protection of the vassal, as well as the vassal to fidelity. Fleta, lib. 3, c. 16.

HOMAGE ANCESTRAL. Homage was so called where time out of mind a man and his ancestors had held by homage; and in this case the lord who had received the homage was bound to acquit the tenant of all services to superior lords, and, if vouched, to warrant his title. If the tenant by homage ancestral aliened in fee, his alienee held by homage, but not by homage ancestral. *Termes de la Ley;* 2 Bla. Com. 300.

HOMAGE JURY. The jury of a lord's court, or court baron: so called because generally composed of those who owed homage to the lord, or the *pares curiæ.* Kitchen; 2 Bla. Com. 54, 366.

HOMAGER. One that is bound to do homage to another. Jacob, Law Dict.

HOMAGIO RESPECTUANDO. A writ to the escheator commanding him to deliver seisin of land to the heir of full age, notwithstanding his homage not done which ought to be performed before the heir had livery, except there fall out some reasonable cause to hinder him. *Termes de la Ley.*

HOMAGIUM LIGIUM. See HOMAGE.

HOMAGIUM PLANUM. See HOMAGE.

HOMAGIUM REDDERE. The renunciation of homage, as when a vassal made a final declaration of defying his lord, of which there was a set form and method prescribed by the feudal law. Jac. L. Dict.

HOMBRE BUENO. In Spanish Law. The ordinary judge of a district.

Hence, when the law declares that a contract, or some other act, is to be conformable to the will of the *hombre bueno*, it means that it is to be decided by the ordinary judge. Las Partidas 7. 34. 31.

In matters of conciliation, it applies to the two persons, one chosen by each party, to assist the constitutional alcalde in forming his judgment of reconciliation. Art. 1, chap. 3, decree of 9th October, 1812.

Arbitrators chosen by litigants to determine their differences.

Persons competent to give testimony in a cause. L. 1. t. 8. b. 2, *Fuero Real.*

HOME. That place or country in which one in fact resides with the intention of residence, or in which he has so resided, and with regard to which he retains either residence or the intention of residence. Dicey, Confl. L. 81.

"'Home' and 'domicil' do not correspond, yet 'home' is the fundamental idea of 'domicil.' The law takes the conception of 'home,' and moulding it by means of certain fictions and technical rules to suit its own requirements, calls it 'domicil.' Or perhaps this may be best expressed by slightly altering Westlake's statement, 'Domicil is, then, the legal conception of residence,' etc., and saying, 'Domicil is, then, the legal conception of home.' 'Domicil' expresses the legal relation existing between a person and the place where he has, in contemplation of law, his permanent home." Jac. Dom. c. 3, § 72.

In Massachusetts a person having a dwelling-house in each of two towns of the state may have his home in one town for the purposes of taxation, although he spends the greater portion of the year in the other, and is there on the first of May; 124 Mass. 132. In this case domicil for taxation and home are treated as synonymous; *id.* 145; 12 Cush. 49; 23 Pick. 170.

The principal place of abode of a man and his family, when it is only a temporary abode, is not his home in the sense here required; 124 Mass. 147.

Dwelling-place, or home, means some permanent abode or residence, with intention to remain; and it is not synonymous with domicil, as used in international law, but has a more restricted meaning; 19 Me. 293.

A home and dwelling-place do not, necessarily, continue until another is acquired; it may be abandoned, and the individual cease to have any home; *id.* One who abandons his home or dwelling-house, with or without design of acquiring one else-

where, has no home by construction, in the place abandoned ; *id.*

This case was disapproved and it was held that the town domicil, not being used in a statute (under construction) to indicate a particular status as to habitation can only be used properly as synonymous with the town residence, dwelling-place, or home ; 43 Me. 406. See DOMICIL ; HOMESTEAD ; FAMILY.

HOME PORT. Any port within a state in which the owner of a ship resides.

The question as to what constitutes a foreign port has usually arisen respecting the claims of material-men for supplies furnished to the master, and in this respect it has been held that the home port of a vessel does not necessarily imply the limits of the state in which her owner resides ; 9 Wheat. 401 ; *contra*, 1 Blatchf. & H. 66 ; where Charleston, S. C., was held a foreign port in respect to New York.

In England by the Mercantile Law Amendment Act it is provided that every port within the United Kingdom of Great Britain and Ireland, the Islands of Man, Guernsey, Jersey, Alderney, and Stark, and the islands adjacent to any one of them, being part of the dominions of Her Majesty, shall be deemed a home port ; 19 and 20 Vict. c. 97. See BOTTOMRY ; PORT.

HOMESTALL. The mansion-house.

HOMESTEAD. The home place—the place where the home is. It is the home—the house and the adjoining land—where the head of the family dwells—the home farm. 36 N. H. 166.

The place of a home or house ; that part of a man's landed property which is about and contiguous to his dwelling-house ; the land, or town, or city lot, upon which the family residence is situated. 24 Ark. 158 ; 55 *id.* 303 ; 47 Kan. 580.

The term necessarily includes the idea of a residence ; 24 Tex. 224. It must be the owner's place of residence—the place where he lives ; 23 Tex. 502.

The homestead laws of various states are constitutional or statutory provisions for the exemption of a certain amount or value of real estate occupied by a debtor as his homestead from a forced sale for the payment of his debts. In some cases restraints are placed upon the alienation by the owner of his property, and in some cases the exempt property, upon the death of the owner, descends to the widow and minor children, free from liability for his debts. They are of a comparatively recent origin ; 51 N. H. 261 ; but are now said to exist in all but seven states ; Thomp. Hom. & Ex. Their policy has been eulogized in many decided cases. See 4 Cal. 26 ; 1 Iowa 439 ; 18 Tex. 415 ; Thomp. Hom. & Ex. § 1.

Homestead acts have generally received a liberal construction ; 45 Miss. 182 ; 36 Vt. 271 ; 46 N. H. 43, *contra*, 28 La. Ann. 594, 665 ; 3 Minn. 53. They cannot be considered as in derogation of the common law, inasmuch as, at common law, real estate was not liable to execution for the payment of debts ; Thomp. Hom. & Ex. § 4 ; 7 Mont. 206 ; but see 16 Minn. 161 ; 7 Mich. 501 ; 3 Ia. 287. Exemption laws giving a right to a homestead are for protection of the citizens of the state only ; 87 Tenn. 78 ; 98 N. C. 304 ; 98 *id.* 462.

In some states there is a money limit put to the homestead ; in others a limit of the quantity of land exempted. The value, under the statute, is the value at the time the homestead is designated ; 42 Tex. 199 ; *contra*, 37 Cal. 180. The courts cannot exempt money instead of land ; 7 Mich. 500 ; but see 37 Cal. 180, where it was held that if the homestead exceeded the constitutional limit of value, and enough of it could not be separated and subjected to execution to reduce the value to that limit, the property would be sold and the constitutional amount set apart to the debtor. But where it can be separated, it will be, although it is within the same enclosure and used in connection with the dwelling for the use of the family ; 39 Ill. App. 330. In 60 Mo. 308, it was held that the law confers a homestead right only in land and not in the proceeds of the sale of land.

The owner of an undivided interest in land is not entitled to a homestead exemption therein ; 3 Lea 76 ; 30 La. Ann. 1130 (*contra*, 55 Miss. 89 ; 73 Tex. 210) ; so where land is held by the parties as partners ; 5 Sawy. 843. A learned author gives as the conclusive test of a homestead—"that the *form*, *physical characteristics*, and *geography* of the premises must be such as, when taken in connection with their *use* by the owner, and their *value* when the statute creates a limit as to value, will convey notice to persons of ordinary prudence who deal with him that they are his homestead." Thomp. Hom. & Ex. § 104, citing 21 Wall. 481, 42 Tex. 195, 44 *id.* 597, as sustaining this doctrine.

"The courts have generally held that the mere fact that the debtor carries on his business upon his homestead premises or rents out a portion thereof, as in case of one who keeps a country tavern ; 16 Cal. 181 ; or uses the lower part of his dwelling for business purposes ; 22 Mich. 260 ; or who, living in town, keeps boarders and lodgers ; 1 Nev. 607 ; or one who lets rooms in his dwelling to tenants ; 11 Allen 194 ; or who rents out part for a store and uses another part for a printing office ; 10 Minn. 154 ; does not deprive it of its homestead character." Thomp. Hom. & Ex. § 120 ; nor does he, where he leases the greater part of his house to be used as a boarding-house, he retaining several rooms in which he and his family lived ; 94 Cal. 291. A building may not be used exclusively as a residence and yet retain the character of a homestead ; 80 Wis. 474. A store ; 58 Ill. 425 ; or mill ; 2 Woods 657 (*per* Bradley, J.) ; situated on the homestead lot ; a smithshop separated from it by a highway ; 42 Vt. 27 ; a brewery in which the debtor lives with his family ; 2 Dill. 339 ; a lawyer's office in a separate block ; 19 Tex. 371 ; and a garden adjoining the dwelling ; 76 Cal. 315 ; a business block,

partly a residence; 3 Okla. 80; part storeroom and part dwelling; 44 Neb. 269; have been included within the rule. A house built in the business part of the town and used principally as a store-building, though the owner sleeps in a small back room and takes his meals elsewhere, is not a homestead; 95 Ala. 96. And in Iowa a building occupied at once for a dwelling and for business purposes may be divided horizontally and the business part sold in execution; 4 Ia. 368; but see, *contra*, Thomp. Hom. & Ex. § 134, n.; 9 Wis. 70; "and in other states a homestead cannot be reserved in tenements and separate buildings occupied by tenements, although upon the enclosure whereon is situated the debtor's dwelling;" Thomp. Hom. & Ex. § 120; 36 N. H. 158; 33 Cal. 220; 16 Wis. 114. Nor can a person have two homesteads at the same time; 62 Mich. 373; 74 Cal. 266; 69 Tex. 248. Where land was occupied by a tenant at the time of levy and execution, the levy is not void as on a homestead because the owner intended at some future time to occupy it as a house; 92 Mich. 427.

In Illinois it is said that the homestead laws are not to be taken only to save a mere shelter for the debtor and his family, but to give him the full enjoyment of the entire lot of ground exempted, to be used either in the cultivation of it, or in the erection and use of buildings on it, either for his own business or for deriving income in the way of rent; 74 Ill. 206; and the homestead right may be conveyed separately from the fee; 144 Ill. App. 645.

There is a conflict of decision as to whether a tract of land detached from the one on which the homestead dwelling-house is built, but used by the debtor in connection with it, is exempt. The opinion supported by the weight of authority is that it is not; Thomp. Hom. & Ex. § 145; 36 Ia. 394; 15 Minn. 116; 16 Gray 146; 15 Wis. 635; 47 Kan. 580; 55 Ark. 303; 83 Ala. 159; *contra*, 69 N. C. 289; 33 Tex. 212; 84 *id.* 398; 62 Mo. 498; 56 Miss. 30. A homestead may be designated in an undivided interest in lands; 1 Kan. App. 599; but not in partnership real estate; 64 N. W. Rep. (Mich.) 334; or by a co-tenant in lands held in common; 110 Cal. 198; or by a remainderman, though after the estate vests in possession it may be held as a homestead against a judgment creditor; 115 N. C. 426; s. c. 26 L. R. A. 814. It may be claimed in lands situated in different counties; 116 N. C. 520.

A homestead law, so far as it attempts to withdraw from the reach of creditors property which would have been within their reach under the laws in force at the time the debt was contracted, is unconstitutional; 15 Wall. 610, reversing s. c. 44 Ga. 353; 6 Baxt. 225.

Provisions exist in most of the states forbidding the alienation of the property designated as a homestead, except when the deed is joined in by the wife. 81 Tex. 317; 97 N. C. 344. In others the payment of purchase money can be secured by a mortgage; so may the payment of purchase money and money borrowed for improvements on the property. Where the existence of a homestead is made to depend upon a selection by the debtor, the latter may alien the property at any time prior to such selection, by the usual formalities; 2 Mich. 465. The purchaser in good faith of a homestead succeeds to the debtor's rights and will be protected against his creditors; 11 Ill. App. 27. A homestead right is not forfeited by a conveyance of land with the intent to defraud creditors; 98 N. C. 190; 87 Ky. 554; 40 Minn. 193; 29 S. C. 175.

Homesteads may be designated by one of three ways:—1, by a public notice of record; 2, by visible occupancy and use; 3, by the actual setting apart of the homestead under the direction of a court of justice; Thomp. Hom. & Ex. § 230. Statutory provisions, if they exist, must be followed. In the absence of a statutory provision, filing a declaration of intention to designate a certain property as a homestead has no legal effect; 4 Cal. 23. The right to a homestead existing at the time the statute is passed is not affected by a declaration under the statute; 47 La. 563. As to construction of declarations and what is sufficient, see 93 Ga. 819; 105 Cal. 95. A declaration enures to the benefit of the wife whether she knows of it or not; 108 *id.*; 214; and a wife may make a declaration; 96 Ga. 338. As to the designation of a homestead by occupancy, "it may be laid down as the prevalent doctrine that actual residence by the *head of the family* prior to the contraction of the debt, etc., he occupying it as a home and with the intention of dedicating it to the uses of a residence for his family, will be sufficient to impress upon the premises so occupied the character of a homestead." Thomp. Hom. & Ex. § 260. This designation will be sufficient to preserve the homestead character for the benefit of the widow and minor children; 29 Ark. 280. In order to give the character of a homestead, the purchase must always be with the intent of present, and not simply future, occupancy; 21 Kan. 533; 72 Tex. 491; 71 Mich. 150. And temporary absence of the owner will not divest him of the right to the same; 48 Kan. 16; 55 Ark. 55. Actual occupancy is necessary; 47 Ia. 414; 20 S. W. Rep. (Tex.) 48; 21 S. W. Rep. (Ark.) 34; 107 Ala. 465; but one occupying a house with persons whom he is under no obligation to support, is not a householder within the homestead act; 159 Ill. 148. When one occupies a homestead but has a fixed intention of occupying and holding other lands as such and is prevented by death, the latter will be treated as his homestead; 72 Miss. 361.

Of the debts for which a homestead is liable, the first is taxes; 96 Ga. 220. An assessment for municipal improvements is not a "tax" within the provision of a state constitution permitting a homestead to be subjected to a forced sale for taxes; 88

Tex. 458, overruling 58 *id.* 549. This view is said to be supported by an almost unbroken line of decisions; 4 Ballard's Ann. of R. P. § 346, note; 3 *id.* § 720. A homestead may be sold on a judgment for alimony; 59 Minn. 347.

Homesteads have also been held liable to an equitable lien for materials furnished for their improvement; 105 Ala. 933; to prior liens on the land; 56 Kan. 170; or contracts existing when the statue is enacted; 93 Ga. 540; 62 Minn. 380. When the statute makes it liable to debts existing at the time of its purchase this includes renewal of prior notes; 67 Vt. 128; s. c. 27 L. R. A. 303.

When the exemption does not apply to a debt contracted for the purchase of the homestead, it has been held that the homestead cannot be sold to pay money borrowed from a third person to pay off that debt; 94 Tenn. 232; 50 Ill. 500; 52 Kan. 126; *Contra;* 32 S. W. Rep. (Ky.) 679. There is however, a conflict of authority on this point from which it is said to be impossible to extract any consistent rule. See Thomp. Hom. & Ex. §§ 338–347; Waples, Hom. & Ex. 337–346; 99 Am. Dec. 571 note.

Money due on an insurance policy upon homestead property is not subject to garnishment; 88 Tex. 218; 83 Ia. 342; 50 Cal. 101; 48 N. Y. 188; 29 Vt. 289; 29 Minn. 309; 31 Ark. 652; 5 S. W. Rep. (Ky.) 193.

The right of exemption is lost by the unequivocal abandonment of the homestead by the owner, with the intention of no longer treating it as his place of residence; Thomp. Hom. & Ex. § 263, citing 37 Tex. 572; 69 *id.* 248; Waples, Hom. & Ex. 558; 4 N. H. 51. A lease of land for more than a year, and a residence elsewhere, was held to forfeit the homestead; 59 Ala. 566; also the owner's removal from the state; 87 Ga. 761; 91 *id.* 367; 101 N. C. 311. The building situated on the homestead loses its exemption from seizure and sale upon being segregated from the homestead property; 33 Ark. 303; 55 *id.* 126.

To establish an abandonment there must be a removal with the intention of not returning; 44 Neb. 269; but when removal for a temporary purpose is permitted by statute, it must be for a fixed and temporary purpose or for a temporary reason; 89 Wis. 558. To leave a homestead farm and move in town to become a merchant, intending to return "if he quit business," was an abandonment; 60 Ark. 262. See also 67 Ala. 558; 75 Mo. 559. Leaving a tenant at will in possession is not abandonment; 32 S. W. Rep. (Ky.) 1084; nor is storing goods in the house and sleeping in it at times, the wife being insane; *id.* 291. An abandonment does not relate back so as to give validity to a void prior sale of the homestead under an execution; 10 Wash. 379.

It has been held that the homestead may be abandoned by a husband's conveyance and the removal to another place against the desire of the wife; 88 Tex. 421; 14 Cal. 507; Thomp. Hom. & Ex. § 276; *contra,* 95 Ga. 415. See ABANDONMENT.

A deed or mortgage of a homestead must be the joint conveyance of the husband and wife; 109 Cal. 165; 63 N. W. Rep. (Ia.) 333. A mere release of dower by the wife is not sufficient; 60 Ark. 269; nor an execution by the husband under a power of attorney from the wife; 54 Kan. 442. And a conveyance by the claimant to his or her wife or husband, not subscribed or acknowledged by the latter is a nullity; 159 Ill. 93. Even when the wife is insane, a conveyance by the husband is void; 18 So. Rep. (Ala.) 315; 61 Ia. 160; 35 Neb. 829; and so also where the wife is living apart from her husband; 72 Wis. 553; 47 Kan. 587; 29 Ark. 280; 95 N. C. 281. See 65 Am. Dec. 481.

This right of exemption depends upon the construction of statutes in various states. The decisions are, therefore, far from harmonious. The subject has been fully and very ably treated in Judge Thompson's work frequently cited above. See also 36 Am. Rep. 728; 10 Am. L. Reg. N. S. 1, 137; *id.* 641, 705 (by Judge Dillon). See FAMILY; EXEMPTION; MANOR; MANSION.

Every person who is the head of a family, or is over 21 years of age and is a citizen, or has declared his intention to become such, also soldiers, seamen, and members of the marine corps, including officers, who have served in the rebellion for ninety days, and remained loyal to the government, may take up a quarter section or less of unappropriated public lands, as a homestead; R. S. § 2289 *et seq.*

HOMICIDE (Lat. *homo,* a man, *cedere,* to kill). The killing any human creature. 4 Bla. Com. 177.

Excusable homicide is that which takes place under such circumstances of accident or necessity that the party cannot strictly be said to have committed the act wilfully and intentionally, and whereby he is relieved from the penalty annexed to the commission of a felonious homicide.

Felonious homicide is that committed wilfully under such circumstances as to render it punishable.

Justifiable homicide is that committed with full intent, but under such circumstances of duty as to render the act one proper to be performed.

According to Blackstone, 4 Com. 177, homicide is the killing of any human creature. This is the most extensive sense of this word, in which the intention is not considered. But in a more limited sense, it is always understood that the killing is by human agency; and Hawkins defines it to be the killing of a man by a man. 1 Hawk. Pl. Cr. c. 8, § 2. See Dalloz, Dict.; 5 Cush. 303. Homicide may perhaps be described to be the destruction of the life of one human being, either by himself or by the act, procurement, or culpable omission of another. When the death has been intentionally caused by the deceased him-

self, the offender is called *felo de se;* when it is caused by another, it is justifiable, excusable, or felonious homicide.

The distinction between justifiable and excusable homicide is that in the former the killing takes place without any manner of fault on the part of the slayer; in the latter there is some slight fault, or at any rate the absence of any duty rendering the act a proper one to be performed, although the blame is so slight as not to render the party punishable. The distinction is very frequently disregarded, and would seem to be of little practical utility; See 2 Bish. Cr. Law § 617. But between justifiable or excusable and felonious homicide the distinction, it will be evident, is of great importance. 1 East, Pl. Cr. 260, gives the following example: "If a person driving a carriage happen to kill another, if he saw or had timely notice of the mischief likely to ensue, and yet wilfully drove on, it will be *murder;* if he might have seen the danger, but did not look before him, it will be *manslaughter;* but if the accident happened in such a manner that no want of due care could be imputed to the driver, it will be accidental death and excusable homicide." See 4 Bla. Com. 176; Rosc. Cr. Ev. 580; Cl. Cr. L. 131.

There must be a person in actual existence; 6 C. & P. 349; 7 *id.* 814, 850; 9 *id.* 25; 24 S. W. Rep. (Tex.) 285; but the destruction of human life at any period after birth is homicide, however near it may be to extinction from any other cause; 2 C. & K. 784; 2 Bish. Cr. Law § 632; but a child in the act of being born would not be included; 5 C. & P. 539; and the death must have occurred within a year and a day from the time the injury was received; 1 Dev. 139; 6 Cal. 210; 41 Tex. 496; 66 Mo. 125; 101 Mass. 6. It is not necessary that the injury inflicted was the sole cause of the death, provided it contributed mediately or immediately in a degree sufficient for the law's notice; 38 La. Ann. 797; 2 Bish. Cr. Law §§ 637, 638; 10 Nev. 106. A person illegally arrested may use such force as is necessary to regain his liberty, and should there be reasonable ground to believe that the officer making the arrest intends shooting the prisoner to prevent his escape, such prisoner may shoot the officer in self-defence; 29 S. W. Rep. (Tex.) 1074. So where one is assaulted and there is reasonable ground for him to fear loss of his life, or great bodily harm, he is not obliged to retreat nor consider whether he may so act in safety, but he is entitled to stand his ground and meet any attack made upon him with a deadly weapon, even if in so doing he cause the death of his assailant; 15 Sup. Ct. Rep. 962; 40 N. E. Rep. (Ind.) 745. The person killed, to constitute the homicide felonious, must have been entitled to his existence. Thus, a soldier of the enemy in time of war has no right to his life, but may be killed. A criminal sentenced to be hanged has no right to his life; but no person can take it but the authorized officer, in the prescribed manner. See MURDER; MANSLAUGHTER; SELF-DEFENCE; ADEQUATE CAUSE.

HOMINE CAPTO IN WITHERNAM. See DE HOMINE CAPTO IN WITHERNAM.

HOMINE ELIGENDO (Lat.). **In English Law.** A writ directed to a corporation, requiring the members to make choice of a new man, to keep the one part of a seal appointed for statutes merchant. Tech. Dict. Reg. Orig.

HOMINE REPLEGIANDO. Se DE HOMINE REPLEGIANDO.

HOMINES (Lat.). **In Feudal Law.** Men; feudatory tenants who claimed a privilege of having their causes, etc., tried only in their lord's court. Paroch. Antiq. 15.

HOMINES LIGII. In Feudal Law. Liege men; feudal tenants or vassals, especially those who held immediately of the sovereign. 1 Bla. Com. 367.

HOMIPLAGIUM. In Old English Law. The maiming of a man. Blount.

HOMMES DE FIEF (Fr.). **In Feudal Law.** Men of the fief; feudal tenants; the peers of the lord's court. Montesq., *Esprit des Lois*, liv. 28, c. 27.

HOMMES FEODAUX (Fr.). **In Feudal Law.** Feudal tenants; the same with *hommes de fief* (*q. v.*). Montesq., *Esprit des Lois*, liv. 28, c. 36.

HOMO (Lat.). A human being, whether male or female. Co. 2d Inst. 45.

In Feudal Law. A vassal; one who, having received a feud, is bound to do homage and military service for his land; variously called *vassalus, vassus, miles, cliens, feodalis, tenens per servitium militare,* sometimes *baro,* and most frequently *leudes.* Spelman, Gloss. *Homo* is sometimes also used for a tenant by socage, and sometimes for any dependent. A *homo* claimed the privilege of having his cause and person tried only in the court of his lord. Kennett, Paroch. Antiq. 152.

Homo chartularius. A slave manumitted by charter. *Homo commendatus.* In feudal law. One who surrendered himself into the power of another for the sake of protection or support. See COMMENDATION. *Homo ecclesiasticus.* A church vassal; one who was bound to serve a church, especially to do service of an agricultural character. Spel. Gloss. *Homo exercitalis.* A man of the army (exercitus); a soldier. *Homo-feodalis.* A vassal or tenant; one who held a fee (*feodum*), or part of a fee. Spel. Gloss. *Homo fiscalis, or fiscalinus.* A servant or vassal belonging to the treasury or fiscus. *Homo francus.* In old English law. A freeman. A Frenchman. *Homo ingenuus.* A free man. A free and lawful man. A yeoman. *Homo liber.* A freeman. *Homo ligius.* A liege man; a subject; a king's vassal. The vassal of a subject. *Homo novus.* In feudal law. A new tenant or vassal; one who was invested with a new fee. Spel. Gloss. *Homo pertinens.* In feudal law. A feudal bondman or vassal, one who belonged to the soil (*qui glebæ adscribitur*). *Homo regius.* A king's vassal. *Homo Romanus.* A Roman. An appellation given to the old inhabitants of Gaul and other Roman provinces, and retained in the law of the barbarous nations. Spel. Gloss. *Homo trium litterarum.* A man of three letters; that is

the three letters, "f," "u," "r;" the Latin word *fur* meaning "thief."

HOMOLOGACION. In Spanish Law. The tacit consent and approval, inferred by law from the omission of the parties, for the space of ten days, to complain of the sentences of arbitrators, appointment of syndics, or assignees, of insolvents, settlements of successions, etc. Also, the approval given by the judge of certain acts and agreements for the purpose of rendering them more binding and executory. Escriche.

HOMOLOGATION. In Civil Law. Approbation; confirmation by a court of justice; a judgment which orders the execution of some act: as, the approbation of an award and ordering execution on the same. Merlin, Répert.; La. Civ. Code; Dig. 4. 8; 7 Toullier, n. 224. See L. R. 3 App. Cas. 1026. To homologate is to say the like, *similiter dicere*. 9 Mart. La. 324.

A judgment homologating, as far as not opposed, the account of distribution of a syndic, is *res judicata*, except as to opponents, whether the account was correct or not; 14 So. Rep. (La.) 90.

In Scotch Law. An act by which a person approves a deed, so as to make it binding on him, though in itself defective. Erskine, Inst. 3. 3. 47; 2 Bligh. 197; 1 Bell, Com. 144.

HOND HABEND. See HAND HABEND.

HONOR. In English Law. The seigniory of a lord paramount. 2 Bla. Com. 91.

In Common Law. To accept a bill of exchange; to pay a bill accepted, or a promissory note, on the day it becomes due. 7 Taunt. 164; 1 Term 172.

HONORABLE. A title of distinction or respect.

In England it is given to the younger sons of earls, to the children of viscounts and barons, to persons occupying official places of trust and honor, and to the house of commons as a body. In the United States it is usually given to persons who hold or have held positions of importance under the national or state government.

HONORARIUM. Something given in gratitude for services rendered.

A voluntary donation in consideration of services which admit of no compensation in money; in particular to advocates at law, deemed to practice for honor or influence and not for fees. 14 Ga. 89.

It is so far of the nature of a gift that it cannot be sued for; 5 S. & R. 412; 1 Chitty, Bailm. 38; 2 Atk. 332; 3 Bla. Com. 28. Of this character are in England, the professional fees of barristers and of physicians. The same rule once prevailed in Pennsylvania, but was afterwards rejected; 19 Pa. 95; and now prevails in New Jersey; 3 Green 35; and to some extent in the federal courts, as applied to counsel in the special sense of the term; Weeks, Atty. 548; 2 Cra. C. C. 144. In many states the contrary rule has been expressly laid down; 10 Tex. 81; 6 Fla. 214; 14 Mo. 54; 26 Wend. 452 (a full discussion by Walworth, C.); 1 Pick. 415. The payment of the fees of English solicitors, attorneys, and proctors is provided for by statute and rules of court. See Weeks, Atty. 536. See 3 Sharsw. Bla. Com. 28.

HONORARY CANONS. Those without emolument. 3 & 4 Vict. c. 113, § 23.

HONORARY FEUDS. Titles of nobility which were not of a divisable nature, but could only be inherited by the eldest son in exclusion of the rest. 2 Bla. Com. 56; Wright, Tenures 32.

HONORARY SERVICES. Services by which lands in grand serjeantry were held: such as, to hold the king's banner, or to hold his head in the ship which carried him from Dover to Whitsand, etc. 2 Sharsw. Bla. Com. 73, and note.

HOO. A hill. Co. Litt. 5 *b*.

HOOK. The verb "to hook" may not be equivalent to "to steal." 7 Blackf. 117.

HOPCON. A valley. Cowel.

HOPE. A valley. Co. Litt. 5 *b*.

HORA AURORÆ. The morning bell.

HORÆ JUDICIÆ (Lat.). Hours judicial, or those in which judges sit in court. In Fortesque's time, these were from 8 to 11 A. M., and the courts of law were not open in the afternoon. Co. Litt. 135 *a*; Co. 2d Inst. 246; Fortesque 51, p. 120, note.

HORDA. In old records a cow in calf.

HORDERA. A treasurer. Du Cange.

HORDERIUM. A hoard, treasury, or repository. Cowel.

HORDEUM PALMALE. Beer barley. Cowel.

HORN TENURE. Tenure by winding a horn on approach of an enemy, called tenure by *cornage*. If lands were held by this tenure of the king, it was grand serjeantry; if of a private person, knight-service. Many anciently so held their lands towards the Picts' Wall. Co. Litt. § 156; Camd. Britan. 609.

HORNBOOK. A book containing the first principles of any science or branch of knowledge; a primer.

Horn book law. The elementary or rudimentary law.

HORNGELD. A forest tax paid for horned beasts, also an acquittance thereof, which was granted by the king unto such as he thought good. Cowel; Toml.

HORNING. In Scotch Law. A process issuing on a decree of court of sessions,

or of an inferior court, by which the debtor is charged to perform, in terms of his obligation, or on failure made liable to *caption*, that is, imprisonment. Bell, Dict. *Horning Letters of; Diligence.* The name comes from the ancient custom of proclaiming letters of horning not obeyed, and declaring the recusant a rebel, with three blasts of a horn, called putting him to the horn. 1 Ross, Lect. 258, 303.

HORREUM. A place for keeping grain, a storehouse. Calvinus, Lex; Bract. fol. 48.

HORS DE SON FEE (Fr. out of his fee).

In Old English Law. A plea to an action brought by one who claimed to be lord for rent-services as issuing out of his land, by which the defendant asserted that the land in question was out of the fee of the demandant. 9 Co. 30; 2 Mod. 104.

HORS WEALH. In Old English Law. The wealh, or Briton who had the care of the king's horses.

HORS WEARD. In Old English Law. A service or *corvée*, consisting in watching the horses of the lord. Anc. Inst. Eng.

HORSE. Until a horse has attained the age of four years he is called a colt. 1 Russ. & R. 416. This word is sometimes used as a generic name for all animals of the horse kind; 44 Ga. 263; 3 Brev. 9. See Yelv. 67 *a*; 84 N. C. 226.

It is also used to include every description of the male, as gelding or stallion, in contradistinction to the female; 38 Tex. 555. In a statute giving a remedy against railroad companies for injuries to horses and cattle, it includes mules; 50 Ill. 184; 47 *id.* 462. The exemption of a horse from execution has been held to include whatever is essential to his enjoyment, as shoes and saddle; 21 Tex. 449; and it may include an ass or a jackass; 2 Heisk. 222; 47 Ill. 463; but not a stallion not kept for farm work; 38 Cal. 383.

HORSE GUARDS. The name applied to the public office in Whitehall appropriated to the departments under the general-commanding-in-chief. The term is also used conventionally to signify the military authorities at the head of army affairs, in contradistinction to the civil chief, the secretary of state for war.

HORSE RACE. Any race in which any horse, mare, or gelding is run or made to run in competition with any other horse, mare, or gelding or against time, for any prize of what nature or kind soever, or for any bet or wager made or to be made in respect to any such horse, mare, or gelding or the riders thereof, and at which more than twenty persons are present. Stat. 42 & 43 Vict. c. 18, s. 1.

The first statute regarding horse-racing was passed in 1664, entitled an act against deceitful, disorderly, and excessive gaming; but this act being found insufficient to prevent the abuses at which it was directed, the statute 9 Anne, c. 14, was passed in 1710, reciting that all mortgages and instruments, where the consideration was money won by gaming or betting, or the repayment of money lent at such gaming and betting, should be void; and that the loser of ten pounds or upward on such gaming or betting might, within three months, sue and recover back treble the value of his losses; and that any person winning ten pounds or upwards might be indicted and, on conviction, forfeit five times the value so won, and if won by cheating, the winner should be deemed infamous, and suffer such corporal punishment as in cases of wilful perjury. This act, being only directed to races at which betting of ten pounds or over was indulged, increased the number at which the limit was below that amount to such an extent that it was found necessary to restrict still further the practice, and in 1740 and 1745 the acts 13 Geo. II. c. 19 and 18 Geo. II. c. 34 went into effect. The latter, as an encouragement to breeders, legalized those races at which the stakes amounted to fifty pounds, and also made a distinction between matches and races. So much of the acts 16 Car. II. c. 7 and 9 Anne, c. 14 as rendered void any note, bill or mortgage given for a gambling contract was repealed during the reign of William IV. and they were amended so as to make such instruments not void, but given for an illegal consideration; 5 & 6 Will. IV. c. 41. This statute is still in force. The acts 3 & 4 Vict. c. 5 and 8 & 9 Vict. c. 109 repealed the former acts of 16 Car. II. c. 7, and all of 9 Anne, c. 14 that had not already been altered by 5 & 6 Will. IV. c. 41. The act 17 & 18 Vict. c. 38 was supplementary to 8 & 9 Vict. c. 109, as were also 37 Vict. c. 15 and 42 & 43 Vict. c. 18, and 55 Vict. c. 9.

Contributions or subscriptions towards any plate, prize, or sum of money to be awarded to the winner of any lawful horse race are not unlawful and do not constitute a wager; 1 Q. B. D. 189; [1895] 1 Q. B. 698; but a match between two horses, for a sum of money contributed by their respective owners, although legal, is a void contract within the statute 8 & 9 Vict. c. 109; and money in the hands of a stakeholder or loser cannot be recovered by the winner in an action at law; 1 C. P. D. 573; and see 2 Ex. D. 442 (overruling 5 C. B. 831); 5 App. Cas. 342 approving 2 Ex. D. 442.

The stakeholder is bound to retain the money in his hands until it is clearly decided which party is entitled to it; 2 M. & W. 369; but he is merely a stakeholder, and has no right to the stakes until he actually receives them in his hands; 5 C. & P. 147. Where the race has not been, and cannot be, run, the position of the stakeholder is that of a debtor to each party for the amount contributed by each, and a specific demand of the stake from him is unnecessary; but where there is a possibility that the race may still be run and decided, each party must make a specific demand of his stake from the stakeholder before he can recover from him; 28 L. J. Q. B. 126. In a lawful horse race, the payment of entrance money to the stakeholder constitutes a legal contract, and such money cannot be recovered back unless there is a mutual rescission of the contract; 2 M. & W. 369. See also 25 L. J. Ex. 169. As to the recovery back of money paid to a stakeholder pending the result of an illegal contest, it has been held that it may be recovered before the contest takes place, but not afterwards; 8 B. & C. 226; 46 N. W. Rep. (Neb.) 161; but the former case, although regarded as an authority;

5 H. & N. 928; 1 Q. B. D. 193; [1895] 1 Q. B. 698; 110 Cal. 159; has been doubted; 14 M. & W. 712; and held irreconcilable with the statute; 9 Ir. C. L. R. 13. In Diggle *v.* Higgs, 2 Ex. D. 442, the court say "what legal right there may be to recover back money, paid under such a contract, the statute leaves it untouched." In the United States it is held that the depositor may revoke the stakeholder's authority to pay over the stakes and bring an action against him for its recovery; 9 Col. 212; and if, after the receipt of such notice, the stakeholder pay over the money to the winner, he is liable to the depositor; 48 Mo. App. 48; 110 Cal. 159.

If the owner of a horse entered for a race is aware of its disqualification he may recover his money back before the race, but not afterwards: 2 C. & P. 608.

Money expended by one part owner of a race horse for the common benefit of another owner and himself, with the understanding that the owners are to share alike in the winnings of such horse, is recoverable (from the second owner), to the amount of one-half the sum expended where the horse loses the race; 26 L. J. C. P. 181.

In this country the decisions as to whether horse racing constitutes gaming within the statutes are not uniform. It has been held, to be gaming or a gambling device; 33 Ala. 428; 23 Ark. 726; 30 *id.* 428; 2 Coldw. 235; 9 Col. 214; 8 Blackf. 332; 2 Bush 263; 4 Harr. Del. 554; 69 Ga. 609; 7 Cow. 252; 1 Den. 170; 23 Ill. 493; 51 *id.* 184; 9 Ind. 35; 1 Allen 563; 51 Mich. 212; 16 Minn. 299; 39 *id.* 153; 4 Mo. 536; 31 *id.* 35; 13 Johns. 88; 43 Tex. 654; 18 Me. 337; 1 Head 154; 2 Swan 279; *contra*, 8 Gratt. 592; 46 Mo. 375; 31 Md. 35.

Racing a horse on or along a public road, though no bet has been offered on the result of such race, has been held an indictable offence; 7 Humph. 502; and the fact that a charter has been granted for a race-course will not authorize betting thereon; 2 Bush 263. To trot a horse in another state for a wager or for stakes is not *prima facie* illegal in that state; 81 N. Y. 539. In many of the states, however, the times at, and seasons in, which horse-racing may be indulged are regulated by statutes which tax and license the racing associations. The trotting for a purse or premium contributed or subscribed by other persons is not trotting for a wager; 67 Vt. 586; 46 N. E. Rep. (N. Y.) 296, affg. 39 N. Y. Supp. 865; 81 N. Y. 532; 57 Ia. 481; 13 Or. 135; 71 Wis. 296; 63 Ind. 58; but see 35 N. Y. Supp. 245; 94 Pa. 132; 24 Mich. 441.

Pools on horse races are games within the statute against gaming; 51 Mich. 203; 154, Ill. 284; 164 Mass. 203; *contra*, 63 Md. 242; and the rule applies to pools sold in one state on a race to be run in another; 8 Lea 411; 92 Tenn. 275; 24 S. E. Rep. (Va.) 930; but not where only the orders for bets were taken and transmitted by telegraph, as it was held that the actual betting was done out of the state; 17 S. E. Rep. (Va.) 546; 89 Va. 878.

The general rule against betting on horse races applies to all betting wherever done; 49 N. J. L. 463; and all pooling schemes are within the statute; 79 Ky. 618; but in some states betting or pool-selling with reference to races run on a licensed track are excepted from the statutory prohibition; 1 Humph. 384; 7 *id.* 501; 2 Coldw. 235; 2 Swan 279; but not otherwise; 92 Tenn. 275.

One who keeps a room as a resort for persons who bet on horse races is guilty of keeping a disorderly house; 23 Atl. Rep. (N. J.) 581; so where one maintains a partly enclosed place for the purpose of making books and selling pools; 154 Ill. 284.

Blackboards, sheets, manifold books, and policy slips for placing bets on horse races are gambling devices; 160 Mass. 310; 39 Minn. 153; *contra*, 93 Mich. 631.

Although the business of pool selling is illegal, the crime of embezzlement may be committed by the agent who receives the money, in appropriating it to his own use; 80 Mo. 358.

Money lent for the purpose of betting on a gambling device cannot be recovered; 24 N. E. Rep. (Ill.) 867; nor can a note given for money lent for such a purpose; 43 N. H. 497; and see 1 Flip. 410. In the District of Columbia, it is *held* that the Statute 9 Anne, c. 14, s. 1, *supra*, is still in force and that all notes given for gambling contracts are void, even in the hands of a *bona fide* purchaser; 21 D. C. 88; *contra*, 43 Ala. 512. A promissory note given for an interest in a race horse is not void; 62 Ill. App. 650. See Byles, Bills 141; Oliphant, Horses 307; 2 McClain, Cr. L. § 1297 GAMING; GAMING HOUSE; LOTTERY; WAGER; STAKEHOLDER; BETTING.

HORTUS (Lat.). **In the Civil Law.** A garden. Dig. 32. 91. 5.

HOSPITAL. An institution for the reception and care of sick, wounded, infirm, or aged persons; generally incorporated, and then of the class of corporations called "eleemosynary" or "charitable." See CHARITABLE USES; CHARITIES.

HOSPITALLERS. The knights of a religious order, so called because they built a hospital at Jerusalem, wherein pilgrims were received. All their lands and goods in England were given to the sovereign by 32 Hen. VIII. c. 24.

HOSPITATOR (Lat.). A host or entertainer.

Hospitator communis. An innkeeper. 8 Co. 32.

Hospitator Magnus. The marshal of a camp.

HOSPITIA. Inns. *Hospitia communia*, common inns. Reg. Orig. 105.

Hospitia curiæ, inns of the court. *Hospitia cancellariæ*, inns of chancery. Crabb, Eng. Law 428; 4 Reeve, Hist. Eng. Law 102.

HOSPITICIDE. One who kills his guest or host.

HOSPITIUM. An inn; a household.

HOSPODAR. A Turkish governor in Moldavia or Wallachia.

HOSTAGE. A person delivered into the possession of a public enemy in the time of war, as a security for the performance of a contract entered into between the belligerents.

Hostages were frequently given as a security for the payment of a ransom-bill; and if they died their death did not discharge the contract; 3 Burr. 1734; 1 Kent 103; Dane, Abr. Index.

HOSTELER. An innkeeper. Now applied, under the form ostler, to those who look to a guest's horses. Cowel.

HOSTELLAGIUM. In English Law. A right reserved to the lords to be lodged and entertained in the houses of their tenants.

HOSTES. Enemies. *Hostes humani generis*, enemies of the human race; *i. e.* pirates.

HOSTIA. In Old Records. The hostbread, or consecrated wafer, in the eucharist. Cowel.

HOSTILARIA, HOSPITALARIA. A place or room in religious houses used for the reception of guests and strangers.

HOSTILE. When applied to the possession of an occupant of real estate holding adversely it is not to be construed as showing ill-will, or that he is an enemy of the person holding the legal title; but it means an occupant who holds and is in possession as owner, and therefore against all other claimants of the land. 33 Neb. 861.

HOSTILE EMBARGO. One laid upon the vessels of an actual or prospective enemy. See EMBARGO.

HOSTILE WITNESS. A witness who manifests so much hostility or prejudice under examination in chief that the party who has called him, or his representative, is allowed to cross-examine him, *i. e.* to treat him as though he had been called by the opposite party. Whart. See WITNESS.

HOSTILITY. A state of open enmity; open war. Wolff, *Droit de la Nat.* § 1119.

Permanent hostility exists when the individual is a citizen or subject of the government at war.

Temporary hostility exists when the individual happens to be domiciliated or resident in the country of one of the belligerents; in this latter case the individual may throw off the national character he has thus acquired by residence, when he puts himself in motion, *bona fide*, to quit the country *sine animo revertendi*; 3 C. Rob. 12; 3 Wheat. 14. See ENEMY; DOMICIL.

HOT WATER ORDEAL. See ORDEAL.

HOTCHPOT (spelled, also, *hodgepodge*, *hotch-potch*). The blending and mixing property belonging to different persons, in order to divide it equally. 2 Bla. Com. 190.

The bringing together all the personal estate of the deceased, with the advancements he has made to his children, in order that the same may be divided agreeably to the provisions of the statute for the distribution of intestates' estates.

In bringing an advancement into hotchpot, the donee is not required to account for the profits of the thing given: for example, he is not required to bring into hotchpot the produce of negroes, nor the interest of money. The property must be accounted for at its value when given; 1 Wash. Va. 224; 17 Mass. 358; 3 Pick. 450; 2 Des. 127; 3 Rand. 117, 559. See ADVANCEMENT.

HOTEL. See INNKEEPER; BOARDER; GUEST.

HOUR. The twenty-fourth part of a natural day; the space of sixty minutes of time. Co. Litt. 135.

HOUSE. A place for the habitation and dwelling of man.

A collection of persons; an institution; a commercial firm; a family.

In a grant or demise of a house, the curtilage and garden will pass, even without the words "with the appurtenances" being added; Cro. Eliz. 89; 3 Leon. 214; 1 Plowd. 171; 2 Wms. Saund. 401, n. 2; 4 Pa. 93; 113 Mo. 27. In a grant or demise of a house with the appurtenances, no more will pass although other lands have been occupied with the house; 1 P. Wms. 603; Cro. Jac. 526; 2 Co. 32; Co. Litt. 5 *d*, 36 *a*, *b*; 2 Wms. Saund. 401, n. 2.

If a house, originally entire, be divided into several apartments, with an outer door to each apartment, and no communication with each other subsists, in such case the several apartments are considered as distinct houses; 6 Mod. 214; Woodf. L. & T. 178.

A church is a "house" within a statute prescribing a street line for houses; L. R. 15 Eq. 159; a smoke house is a house; 37 Tex. 412; but a theatre is not a house; 14 M. & W. 181.

As to what the term includes in cases of arson and burglary, see ARSON; BURGLARY; DWELLING-HOUSE; FLAT; APARTMENT. See, also, ARREST.

HOUSE-BOTE. An allowance of necessary timber out of the landlord's woods for the repairing and support of a house or tenement. This belongs of common right to any lessee for years or for life. Housebote is said to be of two kinds, *estoverium ædificandi et ardendi*. Co. Litt. 41 b.

HOUSE-DUTY. A tax on inhabited houses imposed by 14 and 15 Vict. c. 36, in lieu of window-duty, which was abolished.

HOUSE OF COMMONS. One of the constituent houses of the English parliament.

It is composed of the representatives elected by the people, as distinguished from the house of lords, which is composed of the nobility. It consists of six hundred and seventy members; four hundred and ninety-five from England and Wales, seventy-two from Scotland, and one hundred and three from Ireland. See PARLIAMENT; HIGH COURT OF PARLIAMENT.

HOUSE OF CORRECTION. A place for the imprisonment of those who have committed crimes of lesser magnitude.

HOUSE OF ILL-FAME. In Criminal Law. A house resorted to for the purpose of prostitution and lewdness. 5 Ired. 603.

A disorderly house need not be a dwelling house. "However lexicographers may define the word 'house,' it is clear the legislature has used it as generic, and has applied it to nearly all kinds of buildings;" 36 Conn. 77. A flat boat, floating on a river, with a cabin on it, with men and women eating, sleeping, and living on it, may be such; 35 Ia. 199; so also a tent, of which it has been said, "such structures are more apt to become disorderly nuisances than houses of brick or stone, owing to the facility with which noises made within could be heard from without;" 2 Tex. App. 222. So it has been held of one room of a steamship, though the latter is not an inn; 118 Mass. 456.

Keeping a house of ill-fame is an offence at common law; 3 Pick. 26; 17 *id.* 80; 1 Russ. Cr. 322; 1 Bish. Cr. L. 1082. So the letting of a house to a woman of ill-fame, knowing her to be such, with the intent that it shall be used for purposes of prostitution, is an indictable offence at common law; 3 Pick. 26; 11 Cush. 600. And it is no defence that the landlord did not know the character of the tenant; 96 Ala. 1. If a lodger lets her room for the purpose of indiscriminate prostitution, she is guilty of keeping a house of ill-fame, as much as if she were the proprietor of the whole house; 2 Raym. 1197; 15 R. I. 24. A married woman who lives apart from her husband may be indicted alone, and punished, for keeping a house of ill-fame; 1 Metc. Mass. 151. See 11 Mo. 27; 10 Mod. 63. The house need not be kept for lucre, to constitute the offence; 21 N. H. 345; 2 Gray 357; 18 Vt. 70. See 17 Pick. 80; 6 Gill 425; 4 Ia. 541; 2 B. Monr. 417.

It is not necessary, in order to sustain a charge of keeping such a house, that the indecency, disorder, or misconduct should be patent from the outside; L. R. 1 C. C. R. 21; and it has been said evidence of its general reputation as a house of ill-fame is admissible; 2 Cra. C. C. 675; 79 Ia. 742; 105 Ind. 271; 61 Cal. 380; Dudley 346; 20 Ont. 489; *contra*, 32 Md. 231; 45 N. H. 466; 1 S. & R. 341; 24 How. Pr. 276; 4 Cra. C. C. 338; 39 Ia. 379; 64 Me. 523; but evidence of the reputation of the women frequenting the house and the character of their conversation and acts in and about it is admissible; *id.*; 7 Gray 328; 1 Allen 8. Wharton says: "It has been ruled, though on questionable authority, that the 'ill-fame,' or bad repute, may be proved"; 2 Whart. Cr. L. 10th ed. § 1452; but the doubt cast by this language on the cases referred to is not warranted by the cases, a long list of which, in addition to those above cited, may be found in a note to the section quoted. And indeed the same author in another work says: "On indictments, however, for keeping *houses of ill-fame*, when such is the statutory term describing the offence, the ill-fame or bad reputation of the house may be put in evidence. The bad reputation of the visitors is, in any view, competent evidence. But of a *disorderly house* the reputation is inadmissible, being secondary evidence of disorder, which is susceptible of immediate proof;" Whart. Cr. Ev. 9th ed. § 261. On indictment for keeping a house of ill-fame the reputation of the house as such must be proved; 17 Conn. 467; 38 *id.* 523; but it must be "ill-repute in the vicinity. . . . Rumors at a distance do not make up reputation"; 79 Mich. 110. But the reputation where admitted at all must be connected in time with the person who is now the proprietor; 22 Tex. App. 639. It is not necessary to prove who frequents the house; it is enough to show that unknown persons were there behaving as charged; 1 Term 748. Contracts of lease of such a house, or to furnish goods for the purposes of the business, if made with knowledge of the use intended, are illegal and void; L. R. 1 Eq. 626; and see L. R. 4 Q. B. 309; L. R. 1 Ex. 213. See BAWDY HOUSE; BROTHEL; DISORDERLY HOUSE.

HOUSE OF LORDS. One of the constituent houses of the English parliament.

It is at present composed of twenty-six lords spiritual (bishops and archbishops), and five hundred and thirty-four lords temporal; but the number is liable to vary. See PARLIAMENT; HIGH COURT OF PARLIAMENT.

HOUSE OF REFUGE. A prison for juvenile delinquents. See 55 Am. Rep. 456–62.

HOUSE OF REPRESENTATIVES. The name given to the more numerous branch of the federal congress, and of the legislatures of several of the states of the United States.

The constitution of the United States, art. 1. s. 2, § 1, provides that the "house of representatives shall be composed of members chosen every second year by the people of the several states; and the electors of each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature." No person can be a representative until he shall have attained the age of twenty-five and has been seven years a citizen of the United States, and unless he is at the time of his election an inhabitant of the state in which

he is chosen; U. S. Const. art. I. sec. 2, § 2. A representative cannot hold any office under the United States; art. I. s. 6, § 2; nor can any religious test be required of him; art. VI. § 3; nor is any property qualification imposed upon him. Representatives are apportioned (Amend. XIV. sec. 2) among the several states according to their respective numbers, excluding Indians not taxed; with a proviso, that, if the right to vote for state or U. S. officers is denied to any male inhabitants of a state, of 21 years of age and citizens of the United States, except for participation in rebellion or other crime, the representation in such state shall be proportionately reduced. The number of representatives shall not exceed one for every thirty thousand, but each state shall have at least one representative; U. S. Const. art. I. sec. 1. A reapportionment among the states is made every tenth year. Under the act of Feb. 7, 1891 (26 Stat. L. 735), it consists of 356 members, which is based upon the census of 1890. The house of representatives has the exclusive right of originating bills for raising revenues, but the senate may concur with amendments, U. S. Const. I. sec. 7; Story on Const. 571. See CONGRESS; QUORUM; SPEAKER; MAJORITY.

HOUSAGE. A fee paid by a carrier for housing goods. Toml.

HOUSEBREAKING. In Criminal Law. The breaking and entering the dwelling house of another by night or by day, with intent to commit some felony within the same, whether such felonious intent is executed or not. Housebreaking by night is burglary. Cl. Cr. L. 237.

This crime is of a local character, and the evidence respecting the place must correspond with the allegation in the indictment. An indictment for housebreaking must allege the ownership of the house; 31 W. Va. 355. See BURGLARY; BREAKING.

HOUSEHOLD. Those who dwell under the same roof and constitute a family. Webst. But it is not necessary that they should be under a roof, or that the father of the family be with it, if the mother and children keep together so as to constitute a family; 18 Johns. 402.

Belonging to the house and family; domestic. Webster, Dict.

HOUSEHOLD FURNITURE. By this expression, in wills, all personal chattels will pass that may contribute to the use or convenience of the household or the ornament of the house: as, plate linen, china, both useful and ornamental, and pictures. 2 Wms. Exec. 1185; 1 Rop. Leg. 273. But goods or plate in the hands of testator in the way of his trade will not pass, nor books, nor wines; 1 Jarm. Wills. 591, 596, notes; 1 Ves. Sen. 97; 2 Will. Ex. 1017; 1 Johns. Ch. 329.

But books and wines have been held, on the other hand, to pass in a bequest, where the testator had made them part of the household furniture by his use of them; 1 Robt. 21; see 2 Am. L. Reg. N. S. 489; 33 Me. 535; 60 Pa. 220; and so has plate; 3 Ves. 313; 29 Beav. 573; bronzes, statuary, pictures; 124 Mass. 228. See FIXTURES; FURNITURE.

HOUSEHOLD GOODS. In a will this expression will pass everything of a permanant nature (that is, articles of household which are not consumed in their enjoyment) that were used or purchased, or otherwise acquired by the testator, for his house, but not goods in the way of his trade. Plate will pass by this term, but not articles of consumption found in the house, as malt, hops, or victuals, nor guns and pistols, if used in hunting or sport, and not for defence of house. A clock in the house, if not fixed to it, will pass; 1 Jarm. Wills 589; 1 Rop. Leg. 253; 2 Will. Exec. 464. See 2 Munf. 234; 33 Me. 535.

HOUSEHOLD STUFF. Words sometimes used in a will. Plate will pass under the term; 2 Freem. 64; but not apparel, books, cattle, victuals, and choses in action, which do not fall within the natural meaning of the word, unless there be an intention manifest that they should pass; 15 Ves. 319. Goods, as seven hundred beds in possession of testator for purposes of trade, do not pass under the term "utensils of household stuff;" 2 P. Wms. 302. In general, "household stuff" will pass all articles which may be used for the convenience of the house; Swinb. Wills 484. See FIXTURES; HOUSEHOLD FURNITURE.

HOUSEHOLDER. Master or chief of a family; one who keeps house with his family. Webst. But a man who has absconded from the state, and left his wife and children remaining together as a family, was for their benefit held to be a householder; 18 Johns. 402; 19 Wend. 475.

A keeper of a tavern or boarding-house, or a master or mistress of a dwelling-house; 11 N. Y. Leg. Obs. 248. A person having and providing for a household. The character is not lost by a temporary cessation from housekeeping; 14 Barb. 456; 19 Wend. 475; 51 How. Pr. 45. For purposes of bail, one who rents and occupies part of a building as an office has been held a householder; 33 How. Pr. 323. See 3 Code R. 17; 37 Ala. 103; 52 *id.* 161; 1 Q. B. 72; 59 How. Pr. 71.

HOUSEKEEPER. One who occupies a house.

A person who, under a lease, occupies every room in the house except one, which is reserved for his landlord, who pays all the taxes, is not a housekeeper; 1 Chitty, Bail. 502. Nor is a person a housekeeper who takes a house which he afterwards underlets to another, whom the landlord refuses to accept as his tenant: in this case the undertenant paid the taxes, and let to the tenant the first floor of the house, and the rent was paid for the whole house to the tenant, who paid it to the landlord; *id.* note.

In order to make the party a housekeeper, he must be in actual possession of

the house; 1 Chitty, Bail. 288; and must occupy a whole house. See 1 B. & C. 178; 2 Term 406; 3 Petersd. Abr. 103, note; 2 Mart. La. 313. See HOUSEHOLDER.

HOVEL. A place used by husbandmen to set their ploughs, carts and other farming utensils, out of the rain and sun. Law. Lat. Dict. A shed; a cottage; a mean house.

HOWE. In Old English Law. A hill. Co. Litt. 5 *b*.

HOUGH. A valley. Co. Litt. 5 *b*.

HOY. A small vessel usually rigged as a sloop, and employed in conveying passengers and goods from place to place on the sea coast. Webster.

HOYMAN. The master or captain of a hoy.

Hoymen are liable as common carriers; Story, Bailm. § 496.

HUDE-GELD. In Old English Law. A compensation for an assault (*transgressio illata*) upon a trespassing servant (*servus*). Supposed to be a mistake or misprint in Fleta for *hinegeld*. Fleta, lib. 1, c. 47, § 20. Also, the price of one's skin, or the money paid by a servant to save himself from a whipping. Du Cange.

HUE AND CRY. In Old English Law. A pursuit of one who had committed felony, by the highway.

The meaning of hue is said to be *shout*, from the Saxon *huer;* but this word also means *to foot*, and it may be reasonably questioned whether the term may not be *up foot and cry*, in other words, run and cry after the felon. We have a mention of hue and cry as early as Edward I.; and by the Statute of Winchester, 13 Edw. 1., "immediately upon robberies and felonies committed, fresh suit shall be made from town to town, and county to county, by horsemen and footmen, to the seaside. The constable (the person being described, etc.) is to call upon the parishioners to assist him in the pursuit in his precinct; and to give notice to the next constable, who is to do the same as the first, etc. If the county will not answer the bodies of the offenders, the whole hundred shall be answerable for the robberies there committed, etc." A person engaged in the hue and cry apprehending a felon was, on the felon's conviction, entitled to forty pounds, on a certificate of the judge or justice before whom there was conviction, as well as to the felon's horse, furniture, arms, money, and other goods taken with him, subject to the rights of other persons therein; Wood, Inst. 370. See 2 Hale, Pl. Cr. 100.

HUEBRA. In Spanish Law. An acre of land, or as much as can be ploughed in a day by two oxen. 2 White, Recop. 49.

HUISSERIUM. A ship used to transport horses. Also termed "*uffer*."

HUISSIER. An usher of the court. An officer who serves process.

In France, an officer of this name performs many of the duties of an English sheriff or constable. In Canada there may be many huissiers in each county, whose acts are independent of each other, while there can be but one sheriff, who is presumed cognizant of the acts of his subordinates. The French huissier certifies his process; the Canadian merely serves what is put into his hands.

HULKA. A hulk, or small vessel. Cowel.

HULLUS. A hill. Cowel; 2 Mon. Angl. 292.

HUMAGIUM. A moist place. Mon. Angl.

HUNDRED. In English Law. A division of a county, which some make to have originally consisted of one hundred hides of land, others of ten *tithings*, or one hundred free families. See 60 Conn. 124.

It differed in size in different parts of England; 1 Steph. Com. 122. In many cases, when an offence is committed within a hundred, the inhabitants are liable to make good the damage if they do not produce the offender. See 12 East 244.

This system was probably introduced by Alfred (though mentioned in the Pœnitentiæ of Egbert, where it seems to be the addition of a later age), being borrowed from the continent, where it was known to the Franks, under the name *centena*, in the sixth century. See Charlemagne Capit. l. 3, c. 10; 1 Poll. & Maitl. 543.

It had a court attached to it, called the hundred court, or hundred lagh, like a court baron, except in its larger territorial jurisdiction. It was governed by the hundredary (*hundredarius*); 9 Co. 25. The jurisdiction of this court has devolved upon the county courts. Jacob, Law Dict.; Du Cange. Hundred-penny was a tax collected from the hundred by its lord or by the sheriff. Hundred-fetena signified the dwellers in the hundred; Charta Edg. Reg. Mon. Angl. to. 1, p. 16. In Delaware the subdivisions of a county are called hundreds. They correspond to towns in New England, townships in Pennsylvania, parishes in Louisiana, and the like.

HUNDRED COURT. An inferior court, long obsolete, and practically abolished by the County Courts Act of 1867, sec. 28, whose jurisdiction extended to the whole territory embraced in a hundred. They were courts not of record; the freeholders were the judges; they were held before the stewart of the manor as register; and they resembled courts baron in all respects except in their territorial jurisdiction; 3 Bla. Com. 34, 35.

HUNDRED-FECTA. The performance of suit and service at the hundred courts.

HUNDRED-FETENA. Dwellers or inhabitants of a hundred.

HUNDRED GEMOTE. An assembly among the Saxons of the freeholders of a hundred.

It met twelve times in the year, originally; though subsequently its meetings became less frequent.

It had an extensive jurisdiction, both civil and criminal, and was the predecessor of the county court and sheriff's tourn, and possessed very similar powers; Spelman, Gloss. *Hundredum;* 1 Reeve, Hist. Eng. Law 7.

HUNDRED LAGH (Sax.). Liability to attend the hundred court. Spelman, Gloss. See Cowel; Blount.

HUNDRED-PENNY. The *hundred-feh*, or tax collected by the sheriff or lord of a hundred.

HUNDREDARIUS. The chief officer of a hundred. Cowel.

HUNDREDARY (*hundredarius*). The chief magistrate of a hundred. Du Cange.

HUNDREDES EARLDOR, or HUNDREDEDES MAN. The presiding officer in the hundred-court. Anc. Inst. Eng.

HUNDREDORS. The inhabitants of a hundred, who, by several statutes, are held to be liable, in the cases therein specified, to make good the loss sustained by persons within the hundred by robbery or other violence, therein also specified. The principal of these statutes are 13 Edw. I. st. 2, c. 1, s. 4; 28 Edw. III. c. 11; 27 Eliz. c. 13; 29 Car. II. c. 7; 8 Geo. II. c. 16; 22 Geo. II. c. 24.

Persons serving on juries, or fit to be empanelled thereon, dwelling within the hundred where the land in question lies. 35 Hen. VIII. c. 6. And some such were necessarily on every panel till the 4 & 5 Anne, c. 16. 4 Steph. Com. 370. One that had the jurisdiction of the hundred. The bailiff of the hundred. Horne, Mirr. of Just. lib. 1; Jacob, Law Dict.

HUNG. Sometimes applied to a jury which fails to agree upon a verdict. Anderson, L. Dict.

HUNGER. The desire to eat. Hunger is no excuse for larceny; 1 Hale, Pl. Cr. 54; 4 Bla. Com. 31. As to death from hunger, see DEATH.

HUNTING. The act of pursuing and taking wild animals; the chase.

The chase gives a kind of title by occupancy by which the hunter acquires a right or property in the game which he captures. In the United States the right of hunting is universal, and limited only so far as to exclude hunters from committing injuries to private property or to the public—as, by shooting on public roads —or from trespassing. See FERÆ NATURÆ; OCCUPANCY.

HURDEREFERST. A domestic; one of a family.

HURDLE. In English Law. A species of sledge, used to draw traitors to execution.

HURST, HYRST, HERST, or HIRST. A wood or grove of trees. Co. Litt. 4 *b*.

HUSBAND. A married man; a man who has a wife.

His obligations at common law. He was bound to receive his wife at his home, and to furnish her with all the necessaries and conveniences which his fortune and his rank enabled him to do, and which her situation required; 9 C. & P. 643; 1 Hurl. & N. 641; 33 Minn. 348; but this did not include such luxuries as, according to her fancies, she deemed necessaries; 76 Ia. 638. He was required to fulfil toward her his marital promise of fidelity, and could, therefore, have no carnal connection with any other woman without a violation of his obligations. See ADULTERY; CRIM. CON.; DIVORCE. As he was bound to govern his house properly, he was liable for its misgovernment, and he could be punished for keeping a disorderly house, even where his wife had the principal agency. See BAWDY HOUSE; DISORDERLY HOUSE; HOUSE OF ILL-FAME. He was liable for her torts; 11 Gray 437; 112 Mass. 287; 5 Car. & P. 484; 115 Mo. 1; 44 Ill. 42; 26 Ohio St. 9; Add. Pa. 13; 21 Ind. 427; 48 Me. 348; 58 Mo. 361; 49 N. H. 314; 37 Vt. 448; 8 Minn. 236; 64 N. W. Rep. (Minn.) 912; 101 Mass. 344; and for her crimes, if committed in his presence, except treason and murder where they were jointly liable; 15 Ohio 72; 94 Ala. 31; 10 South 506; 74 Ia. 589; see 10 Mass. 154; 111 N. Y. 401; 45 La. Ann. 1221; but he may introduce evidence to rebut the presumption of coercion; 74 Ia. 589; and he should not be joined for trespass committed by her in the management of her separate estate; 135 N. Y. 201. He was liable for his wife's debts incurred before coverture; 1 P. Wms. 462, 469; 47 N. Y. 351; 41 Vt. 311; 19 Wis. 333; 13 Mass. 384; 38 Ga. 255; 13 Ind. 44; 10 B. Monr. 411; 89 Va. 786; provided they were recovered from him during their joint lives; *id.*; and this rule applies where the husband was an infant; 9 Wend. 238; 7 Metc. 164; 25 Vt. 220; and, generally, for such as were contracted by her after coverture, for necessaries, or by his authority, express or implied, and for her funeral expenses; 12 C. B. 344; 1 H. Bla. 90; 98 Mass. 538; 41 Mich. 596. See DEAD BODY.

His rights. Being the head of the family, the husband had the right to establish himself wherever he pleased, and in this he could not be controlled by his wife; 63 Pa. 450; 10 Rich. Eq. 163; 29 N. J. Eq. 96; 87 Ill. 250; 11 Fost. 11. See DOMICIL. He was entitled to all her earnings; 2 Man. & G. 172; 1 Salk. 114; 7 Pick. 65; 77 Ill. 155; 46 *id.* 18; 23 Me. 305; 94 U. S. 580; 51 Ind. 61; 2 J. J. Marsh. 82; 32 Miss. 279; 15 N. J. Eq. 478; 68 Pa. 421; 64 N. Y. 589; and formerly he might use such gentle force to restrain her of her liberty as might seem necessary; 2 Kent 181; 1 Strange 678; but this is now otherwise; 1 Q. B. D. 671; although it has been held that he may restrain her from committing a crime; 1 Grant, Cas. 389; or from interfering with the exercise of his parental control over his children; 42 Tex. 221. He also had the right to moderately chastise her; 1 Bla. Com. 445; 1 Phil. N. C. 453; but this is no longer recognized, and any chastisement inflicted on the wife renders him guilty of assault and battery; 108 Mass. 458; 1 Swab.

& T. 601; 2 Paige 501; [1891] 1 Q. B. 671; 67 Me. 304; 8 N. H. 307; and excessive cruelty or frequent repetition of slight abuses is in many states a ground of divorce. See DIVORCE; CRUELTY.

As to the rights of husband and wife in property owned either jointly or separately, and as to their respective rights in suits both by and against either party, see MARRIED WOMAN. See also COMMUNITY; DESCENT AND DISTRIBUTION; TRUST.

HUSBAND LAND. In Old Scotch Law. A piece of land containing about six acres. Skene.

HUSBAND OF A SHIP. See SHIP'S HUSBAND.

HUSBANDMAN. See FARMER.

HUSBRECE. Housebreaking; burglary.

HUSCARLE. A menial servant. Domesd.

HUSFASTNE. He that holdeth house and land. *Termes de la Ley;* Cowel.

HUSGABLE. House rent or house tax. Toml.

HUSH MONEY. A colloquial expression to designate a bribe to hinder information; pay to secure silence. See BLACKMAIL.

HUSTINGS. In English Law. The name of a court held before the lord mayor and aldermen of London: it was the principal and supreme court of that city. See Co. 2d Inst. 327; St. Armand, Hist. Essay on the Legisl. Power of England 75.

The place of meeting to choose a member of parliament.

The term is used in Canadian as well as English law. Formerly the manner of conducting an election in Canada and England for a member of the legislative body was substantially as follows. Upon warrant from the proper officer, a writ issued from the clerk of the crown in chancery, directed to the sheriff, registrar, or other returning officer of the electoral division. He thereupon issued and posted in public places a proclamation appointing a day, place, and hour for his holding an election, and also fixing a day when a poll would be opened, if one were demanded and granted. The first day was called nomination day. On this day he proceeded to the hustings, which were in the open air and accessible to all the voters, proclaimed the purpose of the election, and called upon the electors present to name the person they required to represent them. The electors then made a show of hands, which might result in an election, or a poll might be demanded by a candidate or by any elector. On such demand, a poll was opened in each township, ward, or parish of the election district, at the places prescribed by statute. Now, however, by statute 35 & 36 Vict. c. 33, the votes are given by ballot in accordance with certain fixed rules.

It is also applied to a local court in Virginia. Va. Code, 1887, § 3072; 6 Gratt. 696.

HUTESIUM ET CLAMOR. Hue and cry (*q. v.*).

HYDROMETER. An instrument for measuring the density of fluids: being immersed in fluids, as in water, brine, beer, brandy, etc., it determines the proportion of their density, or their specific gravity, and thence their quality. See Act of Congr. Jan. 12, 1825, 3 Story, Laws 1976.

HYPNOTISM. Artificial catalepsy; induced somnambulism; a method of artificially inducing sleep; artificial somnambulism.

The following summary of the physical manifestations accompanying hypnotism, is given in the International Cyclopædia:

"This is a term invented by the late Mr. Braid, of Manchester, to designate certain phenomena of the nervous system which in many respects resemble those which are induced by animal magnetism, but which clearly arise from the physical and psychical condition of the patient, and not from any emanation proceeding from others. The following are the directions of Mr. Braid, for inducing the phenomena, and especially the peculiar sleep-like condition of hypnotism. Take a silver lancet-case, or other bright object, and hold it between the fingers of the left hand, about a foot from the eyes of the person experimented on, in such a position above the forehead as to produce the greatest strain on the eyes compatible with a steady fixed stare at the object. The patient must be directed to rivet his mind on the object at which he is gazing. His pupils will first contract, but soon dilate considerably; and if they are well dilated, the first and second fingers of the operator's right hand, extended and a little separated, are carried from the object towards the eyes; the eyelids will most probably close with a vibratory motion. After 10 or 15 seconds have elapsed, it will be found that the patient retains his arms and legs in any position in which the operator places them. It will also be found that all the special senses, excepting sight, are at first extremely exalted, as also are the muscular sense, and the sensibility of heat and cold; but after a time the exaltation of function is followed by a state of depression far greater than the torpor of natural sleep. The patient is now thoroughly hypnotized. The rigidity of the muscles and the profound torpor of the nervous system may be instantly removed and an opposite condition induced by directing a current of air against the muscles which we wish to render limber, or the organ we wish to excite to action; and then by mere repose the senses will speedily regain their original condition. If a current of air directed against the face is not sufficient to arouse the patient, pressure and friction should be applied to the eyelids, and the arm or leg sharply struck with an open hand.

"From the careful analysis of a large number of experiments Mr. Braid is led to the conclusion that by a continual fixation of the mental and visual eye upon an object, with absolute repose of body and general quietude, a feeling of stupor supervenes, which renders the patient liable to be readily affected in the manner already described. As the experiment succeeds with the blind, he considers that it is not so much the optic, as the sentient, motor, and sympathetic nerves, and the mind through which the impression is made. See Tuke's *Sleep-walking and Hypnotism* (1884).

"Many of the minor operations of surgery have been performed on patients in the hypnotized state without pain, and hypnotism has been successfully employed as a therapeutic agent in numerous forms of disease, especially such as have their seat in the nervous system. An interesting memoir *On Hypnotic Therapeutics* was published by Mr. Braid in the 17th volume of *The Monthly Journal of Medical Science* (1853)." Int. Cyc. *sub v.*

A committee of the British Medical Association made a report to the annual meeting in 1892, in the course of which they say:

"Test experiments which have been carried out by members of the committee have shown that this

condition is attended by mental and physical phenomena, and that these differ widely in different cases.

"Among the mental phenomena are altered consciousness, temporary limitation of the will power, increased receptivity of suggestion from without, sometimes to the extent of producing passing delusions, illusions, and hallucinations, an exalted condition of the attention and post-hypnotic suggestions.

"Among the physical phenomena are vascular changes (such as flushings of the face and altered pulse rate), deepening of the respirations, increased frequency of deglutition, slight muscular tremors, inability to control suggested movements, altered muscular sense, anæsthesia, modified power of muscular contraction, catalepsy, and rigidity, often intense. It must, however, be understood that all these mental and physical phenomena are rarely present in any one case. The committee takes this opportunity of pointing out that the term hypnotism is somewhat misleading, inasmuch as sleep, as ordinarily understood, is not necessarily present. The committee are of opinion that, as a therapeutic agent, hypnotism is frequently effective in relieving pain, procuring sleep, and alleviating many functional ailments. As to its permanent efficacy in the treatment of drunkenness, the evidence before the committee is encouraging, but not conclusive."

In the trial of Czynski, referred to *infra*, some interesting opinions were expressed by the scientific experts. Dr. Fuchs of Bonn gave his opinion of hypnotism in general, and his view was a total denial of its power. He does not consider it an instrument by which the human will can be controlled in a permanent or irresistible way. Nobody would succeed in inducing one who simulates disease to relinquish simulation. Of course witnessing the exhibitions of practitioners, the impression is made that their orders are implicitly obeyed. His conviction was that all the subjects practiced on were stupid people. They are under no other compulsion than the desire to make themselves interesting, or from some inducement to do the practitioner a favor. Hypnotism will not succeed with any person who has the feeling of serious responsibility. He has the conviction that all the instances of hypnotism which he had seen were only a farce. And this opinion was given after seeing experiments of such men as Luys and Charcot. Dr. Grashey, of Munich, thus defined hypnotic influence and suggestion. "Suggestion means to suggest to somebody a certain thought, to persuade him that a certain idea transferred is his own. Suggestions play a great rôle in the intellectual life of men, and especially in education. Children have no independent judgment and rapidly adopt the thoughts suggested to them by their parents, teachers, and friends. But suggestive effect is due not merely to words, but also to example. A person can be suggested to go to sleep. Such a sleep, induced by suggestion, is called hypnosis, and the inducement of hypnosis is called hypnotism. The person who hypnotizes another is called a hypnotizer. Hypnosis, or sleep induced by suggestion, has the peculiarity that the subject remains in mental rapport with the hypnotizer, who can suggest or transfer thoughts to the hypnotized person, and then the latter can offer less resistance than in a wakeful state. Hypnosis has also the peculiarity that it can be produced easier and easier as the operation is repeated . . . According to my conception the grown man can be held devoid of his free will irresponsible then only when the action is exclusively or predominantly the product of abnormal or diseased factors, abnormal or diseased illusions, abnormal or diseased feelings, disposition, and will impulses . . . If, however, as it is generally assured, the suggestibility increases with every new production of hypnosis, the will power, as against the will of the hypnotizer, decreases by degrees, and the interference with the freedom of the subject will increase as well as the restriction of the power of will . . . And thus we see a hypnotizer attain finally such power over his subject that a single word, a single look, may put him to sleep . . . Not only in regard to the time of going to sleep, of the beginning of hypnosis, is the person hypnotized dependent upon the hypnotizer, but also in regard to thoughts and feelings. A thought which is slightly opposed during the first condition of hypnosis in a less degree than in the normal condition will meet with less opposition as the hypnotizing progress is continued; sentiments and dispositions which were but slightly indicated during the first operation will grow, become stronger and more intense as the process is repeated.

"Again a hypnotizer who has gained a certain power over an individual by a repetition of hypnotic procedures can suggest successfully a thought or a sentiment which in the commencement would hardly have been received, and thus the hypnotized individual falls into a condition of subserviency in ideas and sentiments at the cost of his own freedom of will;" 14 Med. Leg. J. 159–162.

The principal legal interest in the subject of hypnotism arises out of the question, whether, and if so to what extent, crime may be induced by hypnotic suggestion, or the will of the hypnotic subject sufficiently controlled to enable the hypnotizer to obtain the unconscious execution of papers such as wills or promises to pay money, without knowledge or consciousness on the part of the subject. Though the existence of this force cannot be questioned, it has been the subject of extended discussion, much of which is unprofitable and often based upon newspaper reports of legal proceedings which have proved to be entirely untrustworthy. The sensational character of much that has been written on the subject, even in influential legal journals, has tended to obscure the questions which really require consideration both by courts and by the legislature. These questions are carefully considered in an article on Hypnotism and the Law in 13 Med. Leg. J. 47, one on the same subject, 95 L. T. 500, and another on Hypnotism in the Criminal Courts, 13 Med. Leg. J. 351. The first article is based mainly on the answers received from leading scientists to four questions as follows:—(1) Can crime be committed by the hypnotizer, the subject being the unconscious and innocent agent and instrument? (2) If the subject is unconscious, and even unwilling, has the hypnotizer such power and domination over the hypnotized as would control action to the extent of the commission of a crime? (3) Is it certain or possible to remove by hypnotic suggestion from the mind of the subject all memory of acts or occurrences which happen in the hypnotic state? (4) Would it be possible for a hypnotizer so to control a hypnotized subject as, for example, to make him sign (*a*) a will in the presence of third persons, declare it to be his will, and request them to sign their names as witnesses, without subsequent consciousness of the occurrence; (*b*) or a note of hand or a check?

The answers to these questions show a very decided difference of opinion among American scientific men who have given special attention to the subject, and the same difference appears to exist in a marked degree in European thought. It is impossible as yet to state any satisfactory conclusion from this diversity of opinion, and there has as yet been no recognition of the subject by the courts, notwithstanding the amount of discussion in the press,—much of it thoughtless and unprofitable,—of cases popularly, though erroneously, supposed to touch the question of the procurement of crime by hypnotic suggestion. In spite of this difference, however, and leaving the questions above quoted to be

answered by further investigations, so far as they may be, there is a practical question much mooted as to the necessity or propriety of any recognition of hypnotism by the law and of its legal regulation, at least to the extent of forbidding public exhibitions of it, or its use except by those skilled in the science to which it may be a legitimate adjunct; and even as to whether its use by physicians and surgeons may not be a proper subject of legal regulation. Another question raised is whether hypnotism is a justifiable inquisitorial agent. Such use of it is said to be permitted under the law of Holland; 95 L. T. 500; and it is quite possible that in countries accustomed to the inquisitorial character of investigations of crime, as in continental Europe, it may be thought proper. It may be assumed that it would be so entirely foreign to American and English ideas as to be unlikely to receive serious consideration in either country.

The consensus of medical opinion would seem to be in favor of regulation. The committee of the British Medical Association, in the report above quoted, stated that they had "satisfied themselves of the genuineness of the hypnotic state," and that dangers may arise in its use "from want of knowledge, carelessness, or intentional abuse, or from too continuous repetition of suggestions in unsuitable cases." And the conclusion was that, when used for therapeutic purposes, it should be confined to qualified medical men, and under no circumstances employed for female patients except in the presence of a relative or a person of their own sex. The report also expressed strong disapproval of public exhibitions of hypnotic phenomena, and a hope that some legal restrictions may be put upon them; 11 Med. Leg. J. 73. A report of a similar committee of the American Medico-Legal Society suggested the legal questions involved in the subject of Hypnotism and evoked a general discussion which may be found in 8 Med. Leg. J. 263, 353; 13 *id.* 47, 351. These references are valuable only to direct the inquirer to the variety and contrariety of opinion upon the subject. One of the best considered discussions from a legal point of view will be found in the paper on the forensic aspect of hypnotism in 3 Am. Lawy. 534, in which the writer, after carefully considering the cases with which hypnotism has been connected in the popular mind, reaches the conclusion that it has no place in the law. He contends that the person hypnotized cannot be compelled to commit an act which is repugnant and offensive to his sense of morality or, as in case of signing a will, opposed to his instinct of self-preservation, although, under its influence, he may do many things inconsistent with his reason. This writer further considers that the mind of the patient while in a hypnotic state is clear as to what he is doing and his acts are performed in pursuance merely of a desire to please the hypnotizer. The restriction of its use to physicians is disapproved on the ground that, as a class, medical practitioners are not more familiar with its use than are any other class of scientists, and it would be unsafe for the legislature to assume the existence of a monopoly of virtue among medical men.

A very decided inclination towards the views thus summarized will be found among legal minds directed to the subject, as also a very weighty, if not the preponderance of, scientific opinion. The view that the commission of crime cannot be procured by hypnotic suggestion unless in the case of a person whose moral character is such that he might do the act in a normal state, will be found well reasoned and stated in a paper on Hypnotism and Crime; 13 Med. Leg. J. 240, to which reference may be made for authorities and opinions of great value. Dr. Cocke, an investigator of recognized authority, concludes that there are few cases in which the hypnotized subject will not refuse to do a wrong act or to submit to a wrong, no matter if it be suggested; 18 Crim. L. Mag. 100.

Considering the vast amount of discussion which this subject has evoked, it is surprising to find upon how slight a basis of actual legal proceedings it rests. Cases seriously discussed are found upon examination to have no connection with the subject.

Two cases in Europe have been much commented on in connection with hypnotism. The first of these, the Bompard case, excited such wide attention that the main facts of it are generally understood and the details of it were much confused by the theatrical accessories to the trial in the French courts. The effort was made to show that a murder was the result of hypnotic suggestion, and it is believed to be the general impression of those who have examined the case that that was, to a greater or less extent, an element in the crime. The character of the trial, however, greatly lessens its value as a factor in reaching conclusions either valuable or accurate. There was also so wide a difference of opinion among the experts that it has been very truly remarked: "This trial does not, therefore, clear the air of the difficulties of the medico-legal inquiry, whether crime can be committed by the suggestion of the hypnotizer, of which the subject is the innocent and also unconscious actor;" *id.* 353. For report of the case see Jurid. Rev. Jan. 1890; see also Int. Cyc. N. Y. 1893, p. 763. Considerable research has failed to discover any other case involving the direct question.

The Czynski case, at Munich, seems to be the only authentic one in which a conviction of hypnotism was really secured. The prisoner was charged with having had recourse to hypnotic suggestions in order to win the affections of a woman of high social position and to obtain her consent to live with him in illicit intercourse, and, subsequently, after he had subjected her to his will, to inveigle her into a false marriage performed by a friend of the prisoner who personated a priest. The accused had given

public exhibitions of his hypnotic powers in Dresden and claimed to be able to treat maladies by touching with his hands the parts of the body affected while the patient was in a hypnotized state. His arrest and trial in 1894 created a profound sensation throughout Europe. He was convicted and sentenced to three years' imprisonment. For a full report of the trial, see 14 Med. Leg. J. 150.

The Kansas case of State *v.* Gray was reported and extensively commented upon by the newspaper press and some influential legal journals (51 Alb. L. J. 87 and 3 Am Lawy. 3) as having turned upon the ground of hypnotic influence, but this was clearly a misrepresentation, the actual decision being that one who aids, abets, counsels, or assists in the commission of a crime is equally guilty as one who actually commits the same; 39 Pac. Rep. 1050. One of the journals cited *supra* in a subsequent issue corrected its error as to the facts of that case and published a letter from the trial judges which states that, "The question of hypnotism was never raised, never insisted upon, either in the evidence, the arguments, or the instructions," and "the only reference, either direct or remote, during the whole trial that was made to the question of hypnotism," was the remark of counsel for the defence to the jury that "we might almost say that Gray possessed a hypnotic power over McDonald." McDonald as principal and Gray as accessory, being charged with murder, upon a severance, the latter was tried first and convicted and afterwards the former was acquitted on the ground of self-defense; 3 Am. Lawy. 45; 13 Med. Leg. J. 51.

The case of Hayward, tried at Minneapolis for the murder of Katherine Ging, and afterwards hanged, and the case at Eau Claire, Wisconsin, in which a young man named Pickens was charged with hypnotizing two young girls, have both been shown to have no connection with hypnotism; 18 Crim. L. Mag. 100. The facts of both cases may be found in 13 Med. Leg. J. 241.

In a California case of a woman on trial for murder, in whose behalf it was alleged that she was hypnotized by her husband, it was held that evidence that she was told by her husband to commit the act does not tend to show that she was hypnotized, and does not render admissible evidence of the effect of hypnotism on persons subject to its influence; 105 Cal. 166.

Notwithstanding the drift of opinion indicated above there are writers of authority on medico-legal subjects who think differently. In discussing the possibility of rape committed upon a person in the hypnotic state, a late work, after alluding to the lack of attention given to hypnotism in England and America, continues: "Like other theories and investigations received at first with ridicule, hypnotism has been placed on a sure scientific basis, thanks to the labor of Charcot and his successors. It has found a place in French, Austrian, and Hungarian law, and must, sooner or later, creep into the Anglo-Saxon. The great French experts in legal medicine, so far as we know, without an exception (Tardieu, Devergie, Brouardel, Vibert, Tourdes, Tourette) recognize the possibility that the will may be entirely abolished under hypnotic influence." It is further asserted that the crime mentioned is not frequent, but that it undoubtedly exists in a small number of authentic cases. See 2 Witth. & Beck. Med. Jur. 452, where these cases are narrated, and the authorities given. It will be found that they are all open to the criticism and doubt which affect the question of rape on a sleeping woman, and which are inherent in the nature of the crime. In addition to the authorities herein cited see also 2 Ham. Leg. Med. 212; Tourette, *Hypnotisme au Point de Vue Médico-Légal; Etude Méd. Lég. sur les Attentats au Mœurs;* N. Y. Med. J., Jan. 26, 1895; Gould, Illustr. Dict. Med. *sub. v.*; Contemp. Rev. Oct. 1890, "Hypnotism and Crime"; Moll, Hypnotism; Dessoir, *Bibliographie des modernen Hypnotismus.*

HYPOBOLUM (Lat.). **In Civil Law.** The bequest or legacy given by the husband to his wife, above her dowry. Tech. Dict.

HYPOTHECATION. A right which a creditor has over a thing belonging to another, and which consists in a power to cause it to be sold, in order to be paid his claim out of the proceeds.

There are two species of hypothecation, one called pledge, *pignus*, and the other properly denominated hypothecation. Pledge is that species of hypothecation which is contracted by the delivery by the debtor to the creditor of the thing hypothecated. Hypothecation, properly so called, is that which is contracted without delivery of the thing hypothecated; 2 Bell, Com. 25.

In the common law, cases of hypothecation, in the strict sense of the civil law, that is of a pledge of a chattel without possession by the pledgee, are scarcely to be found; cases of bottomry bonds and claims for seamen's wages against ships are the nearest approach to it; but these are liens and privileges, rather than hypothecations; Story, Bailm. § 288. It seems that chattels not in existence, though they cannot be pledged, can be hypothecated, so that the lien will attach as soon as the chattel has been produced; 14 Pick. 497.

In Scotland *hypothec* is the landlord's right, independently of any stipulation, over the crop and stocking of his tenant, giving the landlord a security over the crop of each year for the rent of that year; Bell.

Conventional hypothecations are those which arise by agreement of the parties. Dig. 20. 1. 5.

General hypothecations are those by which the debtor hypothecates to his creditors all his estate which he has or may have.

Legal hypothecations are those which

arise without any contract therefor between the parties, expressed or implied.

Special hypothecations are hypothecations of a particular estate.

Tacit hypothecations are such as the law gives in certain cases, without the consent of the parties, to secure the creditor. They are a species of legal hypothecation.

Thus, the public treasury has a lien over the property of public debtors; Code, 8. 15. 1. The landlord has a lien on the goods in the house leased, for the payment of his rent; Dig. 20. 2. 2; Code 8. 15. 7. The builder has a lien, for his bill, on the house he has built; Dig. 20. 1. The pupil has a lien on the property of the curator for the balance of his account; Dig. 46. 6. 22; Code, 5. 37. 20. There is hypothecation of the goods of a testator for the security of the legacy: Code 6. 43. 1.

See, generally, Pothier, de l'Hyp.; Pothier, Mar. Contr. 145, n. 26; Merlin, Répert.; 2 Brown, Civ. Law 195; Abbott, Shipping; Parsons, Mar. Law; 42 Tex. 244; 24 Ark. 27.

HYPOTHEQUE. In French Law. Hypothecation; the right acquired by the creditor over the immovable property which has been assigned to him by his debtor as security for his debt, although he be not placed in possession of it.

It thus corresponds to the mortgage of real property in English law, and is a real charge, following the property into whosesoever hands it comes. It may be *légale*, as in the case of the charge which the state has over the lands of its accountants, or which a married woman has over those of her husband; *judiciaire*, when it is the result of a judgment of a court of justice; and *conventionelle*, when it is the result of an agreement of the parties; Brown.

HYPOTHETICAL QUESTION. A question put to an expert witness containing a recital of facts assumed to have been proved or proof of which is offered in the case, and requiring the opinion of the witness thereon.

It must present fairly the state of facts which the counsel claims to have proved or which the testimony of the witnesses tends to prove; 49 N. Y. 42; 83 *id.* 358; 90 *id.* 640; 97 *id.* 501; 66 Ind. 94; 70 *id.* 15; 118 *id.* 42; 104 *id.* 409; 34 Minn. 430; 38 *id.* 511; 112 Mass. 470; 152 *id.* 589; 48 Vt. 335; 87 Ga. 69; 72 Ia. 84; 74 *id.* 352; 65 Miss. 204; 68 *id.* 233; 30 Fla. 41; 10 Or. 448; 32 Ill. App. 463; 48 Mo. 291; 31 W. Va. 659; 35 *id.* 682; 66 Md. 419; 75 Tex. 667; 42 Mich. 206; 88 *id.* 567; 63 Wis. 664; 76 Cal. 328; and such state of facts must be relevant to the issue; 97 N. Y. 501; 138 *id.* 423; 35 Vt. 398; 28 Ohio St. 547; 63 Conn. 393; 64 Fed. Rep. 689. The question must contain all the facts proved when it was put; 2 Misc. Rep. 335; 62 Mo. App. 563; and the witness will not be allowed to answer a question which excludes from his consideration testimony which is essential to the formation of an intelligent opinion concerning the matter; 80 Wis. 523; 55 Mo. App. 540; but the authorities as to this point are conflicting, as it has been held that a question should not be rejected because it does not include all the facts in the case; 135 Ind. 254; 63 Conn. 393; unless it thereby fails to present the case fairly; 63 Conn. 393. A question put to an expert witness calling for his opinion may refer him to the testimony in the case if he has heard it, instead of stating the facts which the answer tends to prove, but in such a case the witness must assume the testimony to be true; 43 Minn. 279; 12 Misc. Rep. 13; and it has been held that he may not base his opinion on the testimony but must confine himself to the hypothetical statement; 57 Hun 123, 586; 136 N. Y. 1. The witness may not assume for himself from the testimony the facts on which he bases his opinion without informing the jury what he supposes the facts to be; 15 N. Y. Supp. 176; he may, however, include as a basis of his opinion, facts known to be true as well as those stated in the question; 75 Tex. 501; 90 Wis. 405.

The truth of the facts assumed by the question is, in doubtful cases, a question for the jury, and if they find that the assumed facts are not proved, they should disregard the opinions based on such hypothetical questions, and the court will so instruct them; 64 Mich. 148; 69 *id.* 400; but the court is not required to submit the matter to the jury unless there is some substantial evidence tending to establish the hypothesis; 70 Ind. 15. If there is no testimony in the case tending to prove the facts assumed in the question, it is improper; the facts must be proved or proof of them must be offered; 69 Mich. 400; 64 *id.* 148; 52 Me. 304; 39 Iowa 615; 115 Pa. 599; 28 Ohio St. 547; 63 Wis. 664; 65 Miss. 204; 107 Ill. 365.

The length of the question is to be regulated, largely, by the discretion of the trial judge; 120 U. S. 73; it has been held an error to permit it to be so long and complicated as to confuse the witness or baffle his memory; 53 Mich. 531; 107 Ill. 365; but to obviate this difficulty the court may require the question to be reduced to writing; 88 Mich. 598. If unfair and misleading, hypothetical cases assumed in framing questions are to be considered in determining whether or not a fair trial has been had; 32 Ill. App. 463; but it cannot be expected that the interrogatory will include the proofs or theory of the adversary, since this would require a party to assume the truth of that which he generally denies; 96 Ind. 550. Hypothetical questions cannot be asked of an ordinary observer; 40 Pa. 199; 46 Mo. 224; 14 Gray 335; 53 Miss. 367; 117 Mass. 143; 27 Conn. 192. And, as to this, a professional man, in a matter of which he has not made special study is regarded as an ordinary observer; 64 Barb. 364.

See Jones; Chambers; Greenleaf, Evidence; EXPERT; OPINION; EVIDENCE.

HYPOTHETICAL YEARLY TENANCY. The basis in England of rating lands and hereditaments to the poor-rate, and to other rates and taxes that are expressed to be leviable or assessable in like manner as the poor-rate.

HYSTEROTOMY. The cæsarian operation.

HYTHE. A port, wharf, or small haven used for the purpose of embarking or landing merchandise. Blount.

I.

I. O. U. In Common Law. A memorandum of debt in use among merchants and others. It is not a promissory note, as it contains no direct promise to pay ; 4 C. & P. 324 ; 1 Mann. & G. 46 ; 1 C. B. 543 ; Pars. Bills & Notes ; but if words are superadded to the acknowledgment from which an intention to accompany it with an engagement to pay may be gathered, it will be construed as a promissory note ; 1 Dan. Neg. Inst. 33 ; if it contains an agreement that it is to be paid on a given day it is a promissory note ; Byles, Bills 19. It is evidence of an account stated but not of money lent ; 16 M. & W. 449. A due bill has been held to be a promissory note ; 7 Mo. 42, 569 ; 6 Dana 341. A due bill to bearer without specifying the date of payment is a promissory note payable immediately ; 29 Barb. 80. An I. O. U. not addressed to any one will be evidence for the plaintiff if produced by him ; 16 M. & W. 449 ; 1 M. & G. 46.

IBERNAGIUM. The season for sowing winter corn. Curt. Antiq. MSS.

IBIDEM (Lat.). The same. The same book or place. The same subject. See ABBREVIATIONS, *Ib.*, *Id.*

ICE. Ice formed in a stream not navigable is part of the realty, and belongs to the owner of the bed of the stream, who has a right to prevent its removal ; 33 Ind. 402 ; 34 Conn. 462 ; 80 Wis. 531 ; 101 Ill. 46 ; but see, *contra*, 41 Mich. 318, where it is said that the ephemeral character of ice renders it incapable of any permanent or beneficial use as part of the soil, and therefore a sale of ice already formed, as a distinct commodity, should be held a sale of personalty whether in the water or out of the water. See, also, 32 Am. Rep. 160, note ; 32 Am. L. Reg. 166. Riparian owners on navigable streams have no title to the ice which forms on such streams, as an incident to their ownership of the bank ; and if a statute gives them title to the ice opposite their property, and prescribes a remedy for invasion of their rights therein, that remedy is exclusive ; 11 Misc. Rep. 197. The right of taking ice either for use or sale from a pond which is a public water, is a public right which may be exercised by any citizen who can obtain access to the pond without trespassing on the lands of other persons, or unreasonably interfering with their rights ; 7 Allen 158 ; 121 Mass. 539 ; 26 Kan. 682. A landowner cannot cut ice for sale from a pond situated on his land, where its removal works an actual injury to one having a pondage right therein ; 62 Conn. 398 ; but the owner of land abutting on a millpond may take ice from the pond if it does not interfere with the use of the mill ; 42 Neb. 238. Ice in an ice-house is a subject of larceny, but before being gathered it is not, being part of the pond or river ; 3 Hill 395 ; 6 *id.* 144. See Bish. N. Cr. L. § 765, n. 2.

See, generally, as to ice and the property therein, 32 Am. L. Reg. N. S. 66 ; 27 *id.* 231, 240 ; 30 Cent. L. J. 6 ; 37 *id.* 357 ; 3 Alb. L. J. 386 ; 48 *id.* 504.

ICENI. The ancient name for the people of Suffolk, Norfolk, Cambridgeshire, Huntingdonshire.

ICONA. A figure or representation of a thing. Du Cange.

ICTUS. In Old English Law. A stroke or blow from a club or stone ; a bruise, contusion, or swelling produced by a blow from a club or stone, as distinguished from "*plaga*" (a wound). Fleta, lib. 1, c. 41, 3.

ICTUS ORBIS (Lat.). **In Medical Jurisprudence.** A maim, a bruise, or swelling ; any hurt without cutting the skin.

When the skin is cut, the injury is called a wound. Bracton, lib. 2, tr. 2, c. 5 and 24.

Ictus is often used by medical authors in the sense of *percussus*. It is applied to the pulsation of the arteries, to any external lesion of the body produced by violence ; also, to the wound inflicted by a scorpion or venomous reptile. *Orbis* is used in the sense of circle, circuit, rotundity. It is applied, also, to the eyeballs : *oculi dicuntur orbes.* Castelli, Lex. Med.

ID EST (Lat.). That is. Commonly abbreviated *i. e.*

IDAHO. One of the states of the United States.

It was a part of the Louisiana purchase but was included in the portion affected by the joint occupation of the United States and Great Britain under the treaty of 1818 which was terminated in 1846. It was a part of the Oregon territory organized under act of August 14, 1848, and afterwards of the territory of Washington organized under act of March 2, 1853 ; it was organized as a separate territory under its present name by act of March 3, 1863. It then included Montana and part of Wyoming, which were

afterward separately organized, and the present boundaries of Idaho were settled by act of July 25, 1868, setting apart Wyoming as a territory. Under a constitution adopted August 6, and ratified November 2, 1889, it was admitted as a state July 3, 1890; U. S. Rev. Stat. 1. Supp. 754.

LEGISLATIVE POWER. The legislature consists of a senate of eighteen members and a house of representatives of thirty-six members, both elected for two years. The members may be increased and apportioned by the legislature, but not to exceed twenty-four senators and sixty representatives. The sessions are biennial, on the first Monday after January 1st. Special and local laws are prohibited in a great variety of enumerated cases covering practically the entire range of subjects liable to be so dealt with; Const. Art. III.

EXECUTIVE POWER. The executive department consists of a governor, lieutenant-governor, secretary of state, state auditor, state treasurer, attorney-general and superintendent of public instruction, each elected for two years, and vested with the usual powers of such officers. The governor, secretary of state, and attorney general constitute a board of pardons, but the governor may grant reprieves until the next session of the board, which must then act on the case; Const. Art. IV. A district attorney is elected in each judicial district for four years.

JUDICIAL POWER. This is vested in a supreme court, district, and probate courts and justices of the peace.

The *supreme court* has original jurisdiction to issue writs of mandamus, certiorari, prohibition, and habeas corpus, and such others as are necessarily incident to its appellate jurisdiction. The latter includes the review in all cases, properly removed to it, of final decisions of the district courts or the judges thereof.

The *districts courts* have original jurisdiction of cases at law and in equity, and such appellate jurisdiction as is conferred by law; Const. Art. V. It has jurisdiction by statute in civil actions in which the subject of litigation is not capable of pecuniary estimation, or in which it may be so estimated which involve title or possession of real estate, legality of taxes, fines, etc., or where the value of property is over one hundred dollars; also of all special proceedings, the writs of mandate, review, prohibition, habeas corpus, and those required for the due exercise of their powers; also of the trial of all indictments. They have also an appellate jurisdiction in cases from the probate or justices' courts; Rev. Stat. § 3830.

There are five district judges who arrange their own terms and hold the courts semi-annually at the several county seats; Const. Art. V. § 11.

The *probate courts* have jurisdiction of all probate matters, civil causes where the amount does not exceed five hundred dollars, and, concurrently with the justices of the peace, of criminal matters. These courts are held in each county on the fourth Monday of each month for probate business, and for all other business are always open; Const. Art. V. § 20; Rev. Stat. § 3841.

Justices of the peace have civil jurisdiction in cases where the amount claimed does not exceed three hundred dollars, and in which title or possession of real estate is not in issue. They have also criminal jurisdiction of petit larceny, breakers of the peace, riots, affrays, assaults and battery, wilful injury to property and misdemeanors when the fine is not over one hundred dollars, or the imprisonment does not exceed six months, or both. These courts are always open; Rev. Stat. § 3851–4.

The distinctions between actions at law and suits in equity, and the forms thereof, are prohibited, and there is one form of action, denominated a civil action, for enforcement of private rights or redress of private wrongs; and all actions prosecuted by the state for public offences are termed criminal actions. Feigned actions are prohibited. Const. Art. V. § 1. See LOUISIANA; OREGON; WASHINGTON; MONTANA; WYOMING.

IDEM (Lat.). The same. According to Lord Coke, "*idem*" has two significations, *sc. idem syllabis seu verbis* (the same in syllables or words), and *idem re et sensu*, (the same in substance and in sense). 10 Coke 124 *a*.

IDEM PER IDEM. The same for the same. An illustration of a kind that really adds no additional element to consideration of the question.

IDEM SONANS (Lat.). Having the same sound.

In indictments and pleadings, when a name which it is material to state is wrongly spelled, yet if it be *idem sonans* with that proved, it is sufficient. The following have been held to be *idem sonans*, Segrave for Seagrave; 2 Stra. 889; Whyneard for Winyard; Russ. & R. 412; Benedetto for Benneditto; 2 Taunt. 401; Keen for Keene; Thach. Cr. Cas. 67; Deadema for Diadema; 2 Ired. N. C. 346; Hutson for Hudson; 7 Mo. 142; Coonrad for Conrad; 8 Miss. 291; Gibney for Giboney; 81 Tex. 422; Allen for Allain; 144 Ill. 32; Emerly for Emley; 1 Tex. Civ. App. 695; Johnston for Johnson; 50 Kan. 420; Busse for Bosse; 86 Tex. 336; Chambles for Chambless; 28 Ala. 53; Conly for Conolly; 2 Greene (Iowa) 88; Usrey for Usury; 10 Ala. 370; Faust for Foust; 163 U. S. 452; Bubb for Bopp; 39 Pa. 429; Heckman for Hackman; 88 *id.* 120; Shaffer for Shafer; 29 Kan. 337; Woolley for Wolley; 21 Ark. 462; Penryn for Pennyrine; 14 Md. 121; Barbra for Barbara; 52 Kan. 35; Isreal B. for Israel B.; 32 Tex. Cr. Rep. 637; Alwin for Alvin; 50 Ill. App. 202; Helmer for Hillmer; 34 Tex. Cr. Rep. 415; July for Julia; *id.* 1; Elliott for Ellett; 85 Tenn. 171; Chegawgequay for Chegawgoquay; 75 Mich. 289; Kealiher, Keoliher, Kelliher, Kellier, Keolhier, Kelhier, all sufficient for Kealiher; 81 Me. 531; Luckenbough for Luckenbach; 78 Ia. 101; Rooks for Rux; 83 Ala. 79. The rule seems to be that if names may be sounded alike without doing violence to the power of letters found in the various orthography, the variance is immaterial; 27 Tex. App. 30; 1 Whart. Cr. L. 309; 1 Bish. Cr. Proc. § 688; 28 Am. Rep. 435. Whether or not the names are *idem sonantia* was held a question for the jury, where the name was laid Darius C (pronounced in Dorset dialect D'rius) and it was in fact Trius; 2 Den. Cr. Cas. 231; 3 Russ. Cr. Sharsw. ed. 317. See 6 Ala. N. S. 679; 147 Mass. 414. In the following cases the variances there mentioned were declared to be fatal; McCarn for McCann; Russ. & R. 351; Shakspeare for Shakepear; 10 East 83; Calver for Calvert and Day for Dax; 2 Cr. & M. 189; Moores for Mohr; 55 Mo. App. 325; Mulette for Merlette; 100 Ala. 42; Siemson for Simonson; 21 S. W. Rep. (Mo.) 510; Bart for Bartholomew; 29 Ill. 508; Comyns for Cummins; 24 Ill. 602; Grautis for Gerardus; 4 Cow. 148; Henry for Harry; 21 Ill. 535; Jeffery for Jeffries; 1 Hempst. 299; Byerly for Byrly; Baldw. 83.

The same principle applies to words as well as names, and a verdict is not vitiated by misspelling if the words are *idem sonans*, as mrder for murder, turn for term, too for two; but a verdict for damages was void when given for *impunitive* damages, or

when a burglar was found guilty of *bergellery*, or where the defendant was found *guity* instead of guilty, there being no such words as the last three in English ; 2 Tex. App. 487 ; *id.* 504 ; 4 *id.* 527 ; 36 Tex. 152.

See, generally, 3 Chitty, Pr. 231, 232 ; 4 Term 611 ; 3 B. & P. 559 ; 3 Campb. 29 ; 6 M. & S. 45 ; 2 N. H. 557 ; 7 S. & R. 479 ; 3 Cai. 219 ; 1 Wash. C. C. 285 ; 4 Cow. 148 ; 3 Stark. Ev. § 1678 ; 4 U. S. App. 524 ; 143 Ill. 634 ; 24 Alb. L. J. 444 ; 27 Am. St. Rep. 785 ; 13 L. R. A. 541 ; Harris, Identification, Ch. III.

IDENTITATE NOMINIS (Lat.). **In English Law.** The name of a writ which lay for a person taken upon a capias or exigent, and committed to prison, for another man of the same name : this writ directs the sheriff to inquire whether he be the person against whom the action was brought, and if not, then to discharge him ; Fitzh. N. B. 267. In practice, a party in this condition would be relieved by *habeas corpus*.

IDENTITY. Sameness. Identity of persons is a phrase applied especially to those cases in which the issue before the jury is, whether a man be the same person with one previously convicted or attainted. 4 Bla. Com. 396 ; 4 Steph. Com. 468.

In cases of larceny the question of the identity of property is for the jury and a verdict will be set aside where the court said in the charge that one of the stolen " bills was positively identified ; " 17 Wis. 675. The question of identity of a prisoner as well as of property may arise. In a case of larceny of a hog the question of identity both of prisoner and hog was submitted to the jury ; 1 Tex. App. 628 ; and evidence of a confession given by a fellow-prisoner of the accused (who had conversed with him through soil pipes in the gaol) that he recognized him by his voice was allowed to go to the jury on the question of identity ; 76 Pa. 319. As to the modes of identifying different kinds of personal property, see Harris, Identification, Ch. XIII. And as to the different kinds of evidence resorted to for proving the identity of a prisoner, see *id.* Ch. IV. In cases of larceny, trover, and replevin, the things in question must be identified ; 4 Bla. Com. 396. So, too, the identity of articles taken or injured must be proved in all indictments where taking property is the gist of the offence, and in actions of tort for damage to specific property. See 2 Crim. Law Mag. 287 ; 34 La. Ann. 1082. Many other cases occur in which identity must be proved in regard either to persons or things. One case in which such questions arise under chattel mortgages, in which this identification need be such only as would enable identification by a third person aided by inquiry, and not such as would enable a stranger to select it ; Jones, Chat. Mortg. § 54 ; 24 Ia. 323 ; 74 Ind. 495 ; 66 Ala. 258 ; 7 Ohio St. 194 ; 13 Gray 517. The question is sometimes one of great practical difficulty, as in case of the death of strangers, reappearance after a long absence, and the like. See Ryan, Med. Jur. 301 ; 1 Beck, Med. Jur. 509 ; 1 Hall, Am. L. J. 70 ; 6 C. & P. 677 ; 1 Cr. & M. 730 ; 53 Ga. 496 ; 1 Hagg. Cons. 180 ; Shelf. Marr. & D. 226 ; Best, Pres. App. Case 4 ; 88 Ill. 498 ; Wills, Circ. Ev. 143 ; 4 Bla. Com. 396 ; 4 Steph. Com. 468 ; Harris, Identif.

Identity of the name of a grantor or grantee is *prima facie* evidence of identity of the person ; 35 Neb. 587 ; and a conveyance by a grantee of the same name as the holder of the title is presumably sufficient ; 78 Ia. 499 ; even where the names are not identical in spelling, as Savery and Savory ; 80 Tex. 120 ; 15 Daly 479. These cases apply a general principle, that a presumption of identity of persons arises from identity of name, and the former is recognized as *prima facie* evidence of the latter in a great variety of cases ; 108 U. S. 47 ; 87 Mo. 197, 642 ; 4 Q. B. 626 ; 9 Cow. 140 ; 18 N. Y. 86 ; 75 Cal. 240 ; 46 Mich. 320 ; 78 Me. 176 ; 29 Vt. 179 ; 83 Ala. 528 ; 76 Tex. 1 ; *contra*, 9 M. & W. 75 ; 1 Dana 155 ; 2 R. I. 319 ; 5 Ia. 486 ; 29 N. H. 420. But it has been held that it is a question for the jury to determine the identity of a grantor with the former grantee ; 28 Cal. 221 ; or that a person pleading former conviction is the same party ; 39 Me. 154 ; or that a person bearing the name of a deceased is one of his heirs ; 6 Jones, L. 528. The identity of a family name and initials raises no presumption of identity ; 27 Mich. 489. As between father and son of the same name it is presumed that the former is intended if there is no distinguishing mark ; 10 Paige 170 ; Hob. 330 ; 90 Ill. 612 ; 1 Stark. 106 ; 9 N. H. 519.

As to the effect of variation in names with respect to records as notice, see 4 L. R. A. 122 ; 9 *id.* 471 ; 12 *id.* 58. And as to names in a record index, see 14 *id.* 393.

IDEO (Lat.). Therefore. Calv. Lex.

IDEO CONSIDERATUM EST. Therefore it is considered. See CONSIDERATUM EST PER CURIAM.

IDEOT. An old form for idiot (*q. v.*).

IDES (Lat.). **In Civil Law.** A day in the month from which the computation of days was made.

The divisions of months adopted among the Romans were as follows : The calends occurred on the first day of every month, and were distinguished by adding the name of the month : as, *calendis Januarii*, the first of January. The *nones* occurred on the fifth of each month, with the exception of March, July, October, and May, in which months they occurred on the seventh. The *ides* occurred always on the ninth day after the *nones*, thus dividing the month equally. In fact the *ides* would seem to have been the primal division, occurring in the middle of the month, nearly. Other days than the three designated were indicated by the number of days which would elapse before the next succeeding point of division. Thus, the second of April is the *quarto nonas Aprilis ;* the second of March, the *sexto nonas Martii ;* the eighth of March, *octavius idus Martii ;* the eighth of April, *sextus idus Aprilis ;* the sixteenth of March, *decimus septimus calendis Aprilis*.

This system is still used in some chanceries in Europe ; and we therefore give the following

Table of the Calends, Nones, and Ides.

	Jan., Aug. Dec., 31 days.	March, May, July, Oct., 31 days.	April, June, Sept. Nov., 30 days.	Feb. 23, bissextile, 29 days.
1	Calendis	Calendis	Calendis	Calendis
2	4 Nonas	6 Nonas	4 Nonas	4 Nonas
3	3 Nonas	5 Nonas	3 Nonas	3 Nonas
4	Prid. Non.	4 Nonas	Prid. Non.	Prid. Non.
5	Nonis	3 Nonas	Nonis	Nonis
6	8 Idus	Prid. Non.	8 Idus	8 Idus
7	7 Idus	Nonis	7 Idus	7 Idus
8	6 Idus	8 Idus	6 Idus	6 Idus
9	5 Idus	7 Idus	5 Idus	5 Idus
10	4 Idus	6 Idus	4 Idus	4 Idus
11	3 Idus	5 Idus	3 Idus	3 Idus
12	Prid. Idus	4 Idus	Prid. Idus	Prid. Idus
13	Idibus	3 Idus	Idibus	Idibus
14	19 Cal.	Prid. Idus.	18 Cal.	16 Cal.
15	18 Cal.	Idibus	17 Cal.	15 Cal.
16	17 Cal.	17 Cal.	16 Cal.	14 Cal.
17	16 Cal.	16 Cal.	15 Cal.	13 Cal.
18	15 Cal.	15 Cal.	14 Cal.	12 Cal.
19	14 Cal.	14 Cal.	13 Cal.	11 Cal.
20	13 Cal.	13 Cal.	12 Cal.	10 Cal.
21	12 Cal.	12 Cal.	11 Cal.	9 Cal.
22	11 Cal.	11 Cal.	10 Cal.	8 Cal.
23	10 Cal.	10 Cal.	9 Cal.	7 Cal.
24	9 Cal.	9 Cal.	8 Cal.	6 Cal. [1]
25	8 Cal.	8 Cal.	7 Cal.	5 Cal.
26	7 Cal.	7 Cal.	6 Cal.	4 Cal.
27	6 Cal.	6 Cal.	5 Cal.	3 Cal.
28	5 Cal.	5 Cal.	4 Cal.	Prid. Cal.
29	4 Cal.	4 Cal.	3 Cal.	
30	3 Cal.	3 Cal.	Prid. Cal.	
31	Prid. Cal.	Prid. Cal.		

[1] If February is bissextile, *Sexto Calendas* (6 Cal.) is counted twice, viz., for the 24th and 25th of the month. Hence the word *bissextile*.

IDIOCHIRA (from Gr. *ἰδιος*, private, and *χειρ*, hand). **In Civil Law.** An instrument privately executed, as distinguished from one publicly executed. Vicat, Voc. Jur.

IDIOCY. In Medical Jurisprudence. Mental deficiency of varying grades down to extreme stupidity resulting from imperfect development or disease of the nervous centers either *prenatal* or occurring before the evolution of the mental faculties in childhood. Brush in *Cyclopædia of Diseases of Children.* A condition of defective brain-development. See 3 Witth. & Beck. Med. Jur. 364 *et seq.*; 2 Ham. Leg. Med. 80 *et seq.*

It always implies some defect or disease of the brain, which is generally smaller than the standard size and irregular in its shape and proportions. Hydrocephalus is an occasional cause of idiocy. The senses are very imperfect at best, and one or more are often entirely wanting. None can articulate more than a few words; while many utter only cries or muttered sounds. Some make known their wants by signs or sounds which are intelligible to those who have charge of them. The head, the features, the expression, the movements,—all convey the idea of extreme mental deficiency. The reflective faculties are entirely wanting, whereby they are utterly incapable of any effort of reasoning. The perceptive faculties exist in a very limited degree, and hence they are rendered capable of being improved somewhat by education, and redeemed, in some measure, from their brutish condition. They have been led into habits of propriety and decency, have been taught some of the elements of learning, and have learned some of the coarser industrial occupations. The moral sentiments, such as self-esteem, love of approbation, veneration, benevolence, are not unfrequently manifested; while some propensities, such as cunning, destructiveness, sexual impulse, are particularly active.

In some parts of Europe a form of idiocy prevails endemically, called cretinism. It is associated with disease or defective development of other organs besides the head. Cretins are short in stature, their limbs are attenuated, the belly tumid, and the neck thick. The muscular system is feeble, and their voluntary movements restrained and undecided. The power of language is very imperfect, if not entirely wanting. In the least degraded forms of this disease the perceptive powers may be somewhat developed, and the individual may evince some talent at music or construction. In Switzerland they make parts of watches. Cretinism like idiocy is frequently congenital, and its causation is very obscure.

Both idiocy and cretinism exhibit various degrees of mental deficiency, but they never approximate to any description of men supposed to be rational, nor can any amount of education efface the chasm which separates them from their better-endowed fellow-men. The older law-writers, whose observation of mental manifestations was not very profound, thought it necessary to have some test of idiocy; and accordingly, Fitzherbert says, if he have sufficient understanding to know and understand his letters, and to read by teaching or information, he is not an idiot. Natura Brevium 583. Again, he says, a man is not an idiot if he hath any glimmering of reason, so that he can tell his parents, his age, or the like common matters. The inference was, no doubt, that such a man is responsible for his criminal acts. At the present day, such an idea would not be entertained for a moment, nor are we aware of any case on record of an idiot suffering capital punishment. See INSANITY; DEMENTIA; IMBECILITY.

IDIOT. A person who has been without understanding from his nativity, and whom the law, therefore, presumes never likely to attain any. Shelf. Lun. 2; 3 Witth. & Beck. Med. Jur. 371.

It is an imbecility or sterility of mind, and not a perversion of the understanding; Chitty, Med. Jur. 327, note *s*, 345; 1 Rus. Cr. 6; Bacon, Abr. *Idiot* (A); Brooke, Abr.; Co. Litt. 246, 247; 3 Mod. 44; 1 Vern. 16; 4 Co. 126; 1 Bla. Com. 302; Tayl. Med. Jur. 688. When a man cannot count or number twenty, nor tell his father's or mother's name, nor how old he is, having been frequently told of it, it is a fair presumption that he is devoid of understanding; Fitzh. N. B. 233. See 1 Dow, P. Cas. N. S. 392; 3 Bligh, N. S. 1. Persons born deaf, dumb, and blind were presumed to be idiots; for, the senses being the only inlets of knowledge, and these, the most important of them, being closed, all ideas and associations belonging to them are totally excluded from their minds; Co. Litt. 42; Shelf. Lun. 3. See 118 Mo. 127. But this is a mere presumption, which, like most others, may be rebutted; and doubtless a person born deaf, dumb, and blind, who could be taught to read and write, would not be considered an idiot. A remarkable instance of such a one may be found in the person of Laura Bridgman, who was taught how to converse, and even to write. See Locke, Hum. Und. b. 2, c. 11, §§ 12, 13; Ayliffe, Pand. 234; 4 Comyns, Dig. 610; 8 *id.* 644. See DEAF AND DUMB; DEAF, DUMB AND BLIND; IDIOCY.

Idiots are incapable of committing crimes, or entering into contracts. They cannot, of course, make a will; but they may acquire property by descent.

IDIOTA. In the Civil Law. An unlearned, illiterate, or simple person. Calv. Lex. A private man; one not in office.

In Common Law. An idiot or fool.

IDIOTA INQUIRENDO, WRIT DE. This is the name of an old writ which directs the sheriff to enquire whether a man be an idiot or not. The inquisition is to be made by a jury of twelve men. Fitzh. N. B. 232.

IDONEUM SE FACERE. IDONEARE SE. To purge one's self by oath of a crime of which one is accused.

IDONEUS (Lat.). Sufficient; fit; adequate. He is said to be *idoneus homo* who hath these three things, honesty, knowledge, and civility; and if an officer, etc., be not *idoneus*, he may be discharged; 8 Co. 41. If a clerk presented to a living is not *persona idonea*, which includes ability in learning, honesty of conversation, etc., the bishop may refuse him. And to a *quare impedit* brought thereon, "*in literatura minus sufficiens* is a good plea, without setting forth the particular kind of learning;" 5 Co. 58; 6 *id.* 49 *b*; Co. 2d Inst. 631; 3 Lev. 311; 1 Show. 88; Wood, Inst. 32.

So of things: *idonea quantitas;* Calvinus, Lex.; *idonea paries*, a wall sufficient or able to bear the weight.

In Civil Law. Rich; solvent: *e. g. idoneus tutor, idoneus debitor.* Calvinus, Lex.

IFUNGIA. The finest white bread, formerly called "cocked bread." Blount.

IGLISE (L. Fr.). A church. Kelham. Another form of "*eglise.*"

IGNIS JUDICIUM (Lat.). **In Old English Law.** The judicial trial by fire.

IGNITEGIUM. The curfew (*q. v.*). Cowel.

IGNOMINY. Public disgrace; infamy; reproach; dishonor. Ignominy is the opposite of esteem. Wolff § 145. See 38 Ia. 220.

IGNORAMUS (Lat. we are ignorant or uninformed). **In Practice.** The word which is written on a bill by a grand jury when they find that there is not sufficient evidence to authorize their finding it a true bill. They are said to ignore the bill, which is also said to be *thrown out.* The proceedings being now in English, the grand jury indorse on the bill, *Not found, No bill*, or, *No true bill.* 4 Bla. Com. 305.

IGNORANCE. The lack of knowledge.

Ignorance is distinguishable from error. Ignorance is want of knowledge; error is the nonconformity or opposition of ideas to the truth. Considered as a motive of actions, ignorance differs but little from error. They are generally found together, and what is said of one is said of both.

Essential ignorance is ignorance in relation to some essential circumstance so intimately connected with the matter in question, and which so influences the parties that it induces them to act in the business; Pothier, Vente, nn. 3, 4; 2 Kent 367.

Non-essential or accidental ignorance is that which has not of itself any necessary connection with the business in question, and which is not the true consideration for entering into the contract.

Ignorance of fact is the want of knowledge as to the fact in question; as if a man marry a married woman, supposing her unmarried; 11 Allen 23.

It is not yet fully settled, at least in this country, whether a person who does a criminal act, supposing it to be lawful through ignorance of fact, can properly be convicted; 12 Am. L. Rev. 469. Such a conviction was held proper; 11 Allen 23 (where a man was convicted of adultery, in innocently marrying a woman whose husband was living); 114 Mass. 566; 103 *id.* 444; 98 *id.* 6; 124 *id.* 324; 69 Ill. 601; 24 Wis. 60; 56 Mo. 546; *contra*, 53 Ga. 229; 24 Ind. 113; 30 Ohio St. 382. See 62 Ala. 141; 46 Ind. 459. The doctrine was adhered to in a late Massachusetts case, where a belief that the husband was dead was held no defence in a prosecution for bigamy; 163 Mass. 453. The opposite conclusion was reached in England by nine out of fourteen judges; 23 Q. B. D. 168. The Massachusetts court took issue directly with the English case. Mr. Bishop severely criticises the Massachusetts doctrine and, reviewing the authorities, strongly approved the English rule; 1 Bish. N. Cr. L. § 303 *a*, note. Nevertheless, it is generally well established that ignorance of facts is a defence, where a knowledge of certain facts is essential to an offence, but no defence where a statute makes an act indictable, irrespective of guilty knowledge. Thus there can be no conviction of murder, larceny, or burglary, without proof of the intention, *mens rea*, to commit these crimes; but where selling liquor to minors is by statute indictable, the mistaken belief that the vendee is of full age, is no defence; 98 Mass. 6; 158 *id.* 499; see 19 Alb. L. J. 84; 1 Whar. Cr. L. § 88; 2 *id.* § 1704; 23 S. W. Rep. (Tex.) 427; 37 W. Va. 1; 127 Pa. 330; but see 116 Ind. 495; 71 Mich. 548. Nor is it any defence that the party selling intoxicating liquor did not know that it was intoxicating; 52 Kan. 69; 148 Mass. 428; 66 Miss. 502.

Ignorance of a fact extrinsic and not essential to a contract, but which, if known, might have influenced the actions of a party to the contract, is not such a mistake as will authorize equitable relief; 132 U. S. 318. Nor is ignorance of facts a sufficient ground for equitable relief, if it appear that the requisite knowledge might have been obtained by reasonable diligence; 99 U. S. 35, 47.

See Brett, L. Cas. Mod. Eq. 84; MISTAKE.

Ignorance of the laws of a foreign government, or of another state, is ignorance of fact; 9 Pick. 112, where there will be found a discussion of the difference between ignorance of law and ignorance of fact. See also *Clef des Lois Rom. Fait.*

Ignorance of law consists of the want of knowledge of those laws which it is our duty to understand, and which every man is presumed to know.

The principle that ignorance of the law is no defence, *ignorantia legis neminem ex-*

cusat, is generally recognized. It was a maxim of the Roman law, in which this case was put, to illustrate the distinction between ignorance of law and fact:—If the heir is ignorant of the death of his ancestor, he is ignorant of a fact; but if, being aware of his death, and of his own relationship, he is, nevertheless, ignorant that certain rights have thereby become vested in himself, he is ignorant of the law; D. 22. 6. 1. See 1 Spence, Eq. Jur. 632. The English rule is that every man is presumed to know the law, subject to certain qualifications with respect to questions of doubtful construction, practice, and the like; Broom, Leg. Max. 8th Am. ed. 254; 6 Cl. & Fin. 911; 11 Exch. 849. In a later case it was held that the court will only relieve against a payment of money under mistake of law, if there be some equitable ground which renders it inequitable that the party who received the money should retain it; 3 Ch. D. 351. This case is said by Brett to "contain probably the best statement . . . of the principles upon which the courts proceed in relieving or declining to relieve on the ground of mistake of law;" L. Cas. Mod. Eq. 80. The case itself proceeded upon the ground that an erroneous construction of an instrument was a mistake of law, and it was so held in several cases; 4 Ch. D. 389; *id.* 693; L. R. 14 Eq. 85; 6 H. L. Cas. 798, 811; but for a *dictum*, *contra*, see L. R. 6 H. L. 223, 234; and see also 42 Ch. D. 98; [1893] 1 Ch. 101, 111. The same general rule is recognized by American courts, though earlier cases indicate hesitation on the part of the courts before it was definitely settled. It was said in an early case that whether money paid through ignorance of the law can be recovered back, is a question much vexed and involved in no inconsiderable perplexity; 9 Pick. 112; and that when one makes a promise as an "expression of an opinion of what he should be obliged to allow, rather than of what he was willing to allow, and being under a mistake of his right, he is not bound by it;" 1 Binn. 27, 37. But it may be considered as well established that money paid with full knowledge of all the facts and circumstances cannot be recovered back upon the ground that the party supposed he was bound in law to pay it, when in truth he was not; 9 Cow. 674, 681; 74 Pa. 371; 90 Ind. 244; 50 Ga. 304 (practically overruling 7 *id.* 64 and 31 *id.* 117); 35 N. J. L. 290; 46 Ark. 167; 15 Minn. 35; 46 Mo. 200; 16 Cal. 143; 1 Or. 292; *contra*, 2 Metcalfe (Ky.); and a person cannot be permitted to disavow or avoid the operation of an agreement entered into with a full knowledge of the facts, on the ground of ignorance of the legal consequences which flow from those facts; 1 Johns. Ch. 512, 516. See 1 Atk. 591; 1 V. & B. 23, 30; 1 Ch. Cas. 84; 2 Vern. 243; 18 S. E. Rep. (Va.) 285; 77 Ga. 340. Ignorance of one's legal right does not take a case out of the rule of equitable estoppel where one encourages a purchaser to take land from one having a color of title when otherwise he would be entitled to interpose an equitable bar to the latter's legal title; 6 *id.* 166.

It has been said that whatever rule may prevail elsewhere, in the equity courts of the United States, there is no relief from a mistake of law alone; 30 Fed. Rep. 466; 1 Pet. 15; 12 *id.* 55; 91 U. S. 50, 51; 97 *id.* 185; 99 *id.* 46. But there is to be found by careful reading of the Federal cases the same disposition apparent in English cases, to avoid the establishment of an inflexible rule which shall preclude relief if there be any other circumstances or any feature of the case itself to warrant it. In the familiar case of Hunt v. Rousmanier, 2 Mas. 244, 8 Wheat. 174, 1 Pet. 1, the United States supreme court said, where an instrument is executed by the parties, which contains a mistake of the draughtsman either of fact or law it may be reformed but not when it was executed in the form agreed upon under a misapprehension of the law as to its nature or effect: that a mistake of law is not a ground for reforming a deed and the exceptions are both few and peculiar, but it was not the intention to lay down a rule that there might not be relief against a plain mistake arising from ignorance of law; and in a later case the court quoted this expression with approval and also the declaration from 1 Sto. Eq. Jur. Redf. ed. § 138 *e*, that established misapprehension of the law does afford a basis for relief resting on discretion and to be exercised only in flagrant and unquestionable cases; 98 U. S. 85, 91.

In some cases the laches of the other party affects the liability of one who promises under a mistake of law, as, when one, through a mistake of the law, as an endorser of a bill of exchange, acknowledges himself under an obligation which the law will not impose on him, as payment after failure of the holder to give seasonable notice of protest for non-acceptance, he shall not be bound thereby; 7 Mass. 452, 488. See also 12 East 38; 2 J. & W. 263; 3 B. & C. 280; the operation of the rule is adjusted to the equitable conditions existing as between the parties. "If a man has actually paid what the law would not have compelled him to pay, but what in equity and conscience he ought, he cannot recover it back; [1 Wend. 355; 18 Cal. 265; 17 N. H. 573; 50 Me. 130]; but where money is paid under a mistake, which there was no ground to claim in conscience, the party may recover it back;" 1 Term 285; 15 Am. Rep. 171, 184.

The subject may be well summed up by the collation of two or three cases which show the substantial uniformity of the application of the doctrine. "The maxim *ignorantia legis neminem excusat* is not universally applicable, but only when damages have been inflicted or crimes committed. It is true that the law will not permit the excuse of ignorance of the law to be pleaded for the purpose of exempting persons from damages for breach of contract, or from punishment for crimes committed by them, but on other occasions and for other pur-

poses, it is evident that the fact that such ignorance existed will sometimes be recognized so as to affect a judicial decision;" 44 N. J. L. 244; and "there is no maxim which says that for all intents and purposes a person must be taken to know the legal consequences of his acts;" Lush., J., in L. R. 3 Q. B. 639; "it would be too much to impute knowledge of this rule of equity" (the doctrine of election); Westbury, Ld. Ch., in 11 H. L. Cas. 602.

Ignorance was held no defence in the case of a woman convicted of illegal voting, who set up a defence that she believed she had a legal right to vote; 11 Blatch. 200, 374; 57 Barb. 625; so in an indictment for adultery, where defendant erroneously believed she had been legally divorced; 65 Me. 30; so in the conviction of a man for polygamy, who, knowing that his wife was living, married again in Utah, and set up the Mormon doctrine as a defence; 98 U. S. 145. It was held not a defence that the defendant believed that, by reason of the absence of the first wife, the marriage was void and that he was released from it, as that was a mistake of law; 32 Tex. Cr. Rep. 214. A Jew may be indicted under a state law, for working on Sunday; 122 Mass. 40; so where one shoots another through criminal negligence, his ignorance of the law can form no basis for acquittal; 36 Pac. Rep. (Cal.) 13.

An elector's ignorance of a law disqualifying a candidate at an election does not make his vote a nullity; he must have knowledge both of the law and the fact which constitutes the disqualification; 50 N. Y. 463; L. R. 3 Q. B. 629.

Involuntary ignorance is that which does not proceed from choice, and which cannot be overcome by the use of any means of knowledge known to a person and within his power: as, the ignorance of a law which has not yet been promulgated.

Voluntary ignorance exists when a party might, by taking reasonable pains, have acquired the necessary knowledge. For example, every man might acquire a knowledge of the laws which have been promulgated; Doctor & Stud. 1, 46; Plowd. 343.

See, generally, 3 Smith, L. Cas. 9th Am. ed. 1712; Terry, Pr. Ang. Am. L. §§ 252–5; Broom, Leg. Max. 8th Am. ed. 253 (where there will be found a discriminating discussion of the subject); Eden, Inf. 7; 1 Fonbl. Eq. b. 1, c. 2, § 7, n. *v*; Bisph. Eq. 187; Merlin, Répert.; Savigny, Droit Rom. App. VIII. 387; 1 Bro. C. C. 92; 14 Johns. 501; 12 Am. L. Rev. 471; 4 So. L. J. N. S. 153; 10 Am. Dec. 323; 37 W. Va. 715; 28 N. J. L. 274; 76 Va. 315; 62 Wis. 332; MISTAKE.

IGNORANTIO ELENCHI. An overlooking of the adversary's counter position in an argument.

IGNORE. To be ignorant of. Webster, Dict. To pass over as if not in existence. A grand jury is said to ignore a bill when they do not find the evidence such as to induce them to make a presentment. Brande.

IKBAL. Acceptance (of a bond, etc.). Wilson's Gloss. Ind.

IKBAL DAWA. Confession of judgment. Wilson's Gloss. Ind.

IKRAH. Compulsion; especially constraint exercised by one person over another to do an illegal act, or to act contrary to his inclination. Wilson's Gloss. Ind.

IKRAR. Agreement, assent, or ratification. Wilson's Gloss. Ind.

IKRAR NAMA. A deed of assent and acknowledgment. Wilson's Gloss. Ind.

ILL. In Old Pleading. Bad; defective in law; null; naught; the opposite of good or valid.

ILL-FAME. A technical expression, which not only means bad character as generally understood, but applies to every person, whatever may be his conduct and character in life, who visits bawdy-houses, gaming-houses, and other places which are of ill-fame. 2 Hill, N. Y. 558; 17 Pick. 80; 1 Hagg. Eccl. 720, 767; 1 Hagg. Cons. 302; 2 Greenl. Ev. § 44.

The common interpretation of the term "house of ill-fame" is as a mere synonym for "bawdy-house," having no reference to the fame of the place. Yet, in evidence, some courts allow proof of the fact to be aided by the fame; 1 Bish. Cr. L. § 1088. See DISORDERLY HOUSE; HOUSE OF ILL-FAME.

ILLATA ET INVECTA. Things brought into the house for use by the tenants were so called, and were liable to the *jus hypothecæ* of Roman law, just as they are to the landlord's right of distress at common law.

ILLEGAL. Contrary to law; unlawful.

ILLEGAL CONDITIONS. All conditions that are impossible, or contrary to law, immoral, or repugnant to the nature of the transaction. See CONDITION.

ILLEGAL CONSIDERATION. See CONSIDERATION.

ILLEGAL CONTRACT. See CONSIDERATION; CONTRACT; UNLAWFUL AGREEMENT; VOID; VOIDABLE.

ILLEGAL TRADE. That which is carried on in violation of law, municipal or international. See ILLICIT.

ILLEGALITY. That which is contrary to the principles of law, as contradistinguished from mere rules of procedure. It denotes a complete defect in the proceedings. 2 Tex. App. 74; 1 Abb. Pr. N. S. 432; 2 Halst. 203.

ILLEGITIMACY. The *status* of a child born of parents not legally married at the time of birth. Moz. & W.

ILLEGITIMATE. That which is contrary to law; it is usually applied to children born out of lawful wedlock. 25 Alb. L. J. 131. See BASTARD.

ILLEVIABLE. A debt or duty that cannot or ought not to be levied. *Nihil* set upon a debt is a mark for *illeviable*.

ILLICENCIATUS. In Old English Law. Without license. Fleta, lib. 3, c. 5. 12.

ILLICIT. What is unlawful; what is forbidden by the law.

This word is frequently used in policies of insurance, where the assured warrants against illicit trade. By illicit trade is understood that "which is made unlawful by the laws of the country to which the object is bound." It is distinguished from "contraband trade," though sometimes used interchangeably with it. 1 Pars. Mar. Ins. 614. The assured, having entered into this warranty, is required to do no act which will expose the vessel to be legally condemned; 2 La. 337, 338. See INSURANCE; WARRANTY.

ILLICITE. Unlawfully.

This word has a technical meaning, and is requisite in an indictment where the act charged is unlawful: as, in the case of a riot; 2 Hawk. Pl. Cr. 25, § 96.

ILLICITUM COLLEGIUM. An unlawful corporation.

ILLINOIS. One of the states of the United States, being the twenty-eighth admitted to the Union.

Civil government was organized under the jurisdiction of the United States, by the ordinance of the Continental Congress, in 1787, the present state being then a part of the northwestern territory. In 1800 that territory was divided, and a territorial government was created in the Indiana territory, including this present state. In 1809 the territory of Illinois was created, and continued under the same ordinance and the laws of the Indiana territory. For a fuller statement of the territorial history, see OHIO.

In 1818 Illinois formed a constitution and was admitted into the Union. A second constitution went into operation April 1, 1848; and a third, now the fundamental law of the state, August 8, 1870.

LEGISLATIVE POWER.—This is exercised by a senate and house of representatives, which constitute the general assembly.

The *senate* is composed of fifty-one members elected by the people of the senatorial districts (which are determined by apportionment every ten years beginning with 1871) for the term of four years. The senators at the first session were divided into two classes, so that one class are elected every two years.

The *house* consists of three times the number of the members of the senate, three representatives being elected in each senatorial district; the term of office two years. Minority representation is adopted in the election of representatives.

The constitution forbids the state or any county, city, town, township, or other municipality ever to become responsible for the liabilities, or extend its credit in aid, of any corporation, association, or individual; § 20, 76 Ill. 432; 82 *id.* 593; 83 *id.* 302.

Special or local legislation is substantially prohibited; § 22; 69 Ill. 595; 84 *id.* 590; 78 *id.* 335.

EXECUTIVE POWER.—The executive department consists of a governor, lieutenant-governor, secretary of state, auditor of public accounts, treasurer, superintendent of public instruction, and attorney-general, each holding office for a term of four years, except the treasurer who holds for two years, and cannot be his own successor; Art. 5, §§ 1–2.

The officers of the executive department have the powers and duties usually incident to their offices respectively; §§ 5–21.

JUDICIAL POWER.—The judiciary system is in the main elective. The judicial powers are vested in one supreme court, appellate courts, circuit courts, county courts, probate courts, justices of the peace, police magistrates, and in certain courts created by law in and for cities and incorporated towns (art. 6, § 1).

The *supreme court* consists of seven judges, and has original jurisdiction in cases relating to the revenue, in mandamus and *habeas corpus* and appellate jurisdiction in other cases. One of the judges is chief justice; four constitute a quorum, and the concurrence of four is necessary to every decision; §§ 2–5.

There are four inferior *appellate courts* called the appellate courts of their respective districts. Each appellate court is held by three judges of the circuit courts, who are assigned by the supreme court. The concurrence of two of the judges is necessary to every decision.

These courts exercise appellate jurisdiction only. They have jurisdiction of appeals and writs of error from the circuit, county, and city courts in law and chancery cases, other than criminal cases above a misdemeanor, and those involving a franchise, or freehold, or the validity of a statute in which cases the appeal is directly to the supreme court. The decisions of these courts are final where the amount involved does not exceed $1,000, unless in the opinion of the majority of the court the principles of law involved are of such importance as to require to be passed upon by the supreme court, in which case the proper certificate is made in that court. The opinions of the appellate courts are not of binding authority in any cause or proceeding other than that in which they may be given; Art. 6, § 11; Laws 1885, 65; Myers, R. S. 399–403.

Circuit Courts.—The state is divided into thirteen circuits, for each of which not exceeding four judges may be elected by the qualified voters of the circuits, to hold office for six years. Circuit courts have original jurisdiction of all causes in law and equity, and such appellate jurisdiction as is provided by law. They hold two or more terms each year in every county. Art. 6, §§ 12–17; Bradwell, Laws 1877, pp. 78–79.

County Courts.—A county court is held in each county, consisting of one judge elected by the people for the term of four years. They are courts of record, and have original jurisdiction in all matters of probate, settlement of estates of deceased persons, appointment of guardians and conservators, and settlement of their accounts, in matters relating to apprentices, and in proceedings for the collection of taxes. They have concurrent jurisdiction with the circuit courts in all that class of cases wherein justices of the peace have jurisdiction where the amount of value involved does not exceed $1000. Art. 6, §§ 18–19; Bradwell's Laws 1877, p. 81; 69 Ill. 641.

City Courts.—City courts may be established in all cities having a population of three thousand and over. They are courts of record, and have concurrent jurisdiction with the circuit courts within the city in which they may be, in all civil cases, and in criminal cases (except treason and murder); also in appeals from justices of the peace in their respective cities. The term of office of the judges is four years. Rev. Stat. 1874, ch. 37, §§ 191-212; Bradwell, Laws 1877, p. 88; Br. Laws 1879, p. 40; 78 Ill. 218. See Laws 1889, p. 104.

Justices of the Peace.—In each township or election precinct may be elected from two to five justices of the peace, whose term of office is four years. They have jurisdiction in their respective counties where the amount claimed does not exceed $200, as provided by statute. Rev. Stat. 1874, ch. 79, §§ 13 and 14; and in criminal cases; Rev. Stat. 1874, ch. 38, §§ 319–371; 69 Ill. 371.

For Cook county, and all counties containing 100,000 population and over, there are special constitutional and statutory provisions concerning the judiciary.

Jurisprudence.—The common law of England, so far as applicable and of a general nature, including the British statutes prior to 4 Jac. I. with a few certain exceptions, and which are of a general nature, is the rule of decision, and of full force until repealed by legislative authority. Rev. Stat. 1874, ch. 28.

ILLITERATE. Unacquainted with letters.

When an ignorant man, unable to read,

signs a deed or agreement, or makes his mark instead of a signature, and he alleges and can prove that it was falsely read to him, he is not bound by it, in consequence of the fraud. And the same effect would result if the deed or agreement were falsely read to a blind man who could have read it before he lost his sight, or to a foreigner who did not understand the language. For a plea of "laymen and unlettered," see 4 Rawle 85, 94, 95.

To induce an illiterate man, by false representations and false reading, to sign a note for a greater amount than that agreed on, is indictable as a cheat; 1 Yerg. 76. See, generally, 2 Nel. Abr. 946; 2 Co. 3; 11 *id.* 28; F. Moore 148; 2 Bish. Cr. L. § 156.

ILLNESS. Pregnancy may create an illness within the meaning of 11 & 12 Vict. c. 42, § 17. so as to give the presiding judge discretionary power to admit in evidence upon a criminal trial the deposition of a witness, duly taken, who, owing to pregnancy is proved to be unable to travel; 3 Q. B. D. 426.

ILLOCABLE. Not capable of being let out or hired.

ILLUD (Lat.). That.

ILLUSION. A term loosely applied to both delusions and hallucinations, but more frequently to the latter (*q. v.*). By some it is restricted to the perception of objects in characters which they do not possess.

The patient is deceived by the false appearance of things, and his reason is not sufficiently active and powerful to correct the error; and this last particular is what distinguishes the sane from the insane. Illusions are not unfrequent in a state of health, but reason corrects the errors and dissipates them. A square tower seen from a distance may appear round, but on approaching it the error is corrected. A distant mountain may be taken for a cloud, but as we approach we discover the truth. To a person in the cabin of a vessel under sail, the shore appears to move; but reflection and a closer examination soon destroy this illusion. An insane individual is mistaken in the qualities, connections, and causes of the impressions he actually receives, and he forms wrong judgments as to his internal and external sensations; and his reason does not correct the error; 1 Beck, Med. Jur. 538; Tayl. Med. Jur. 683; Esquirol, *Maladies Mentales*, prém. partie, iii., tome 1, p. 202; *Dict. des Sciences Médicales*, *Hallucination*, tome 20, p. 64. See HALLUCINATION.

ILLUSORY APPOINTMENT. Such an appointment or disposition of property under a power as is merely nominal and not substantial.

Illusory appointments are void in equity; Sugd. Pow. 489; 1 Vern. 67; 1 Term 438, note; 4 Ves. 785; 16 *id.* 26; 1 Taunt 289. The rule at common law was, to require some allotment, however small, to each person, where the power was given to appoint to and among several persons; but the rule in equity requires a real substantial portion to each, a mere nominal allotment being deemed fraudulent and illusive; 4 Kent 342; 5 Fla. 52; 2 Stockt. Ch. 164.

In England equity jurisdiction on this point was ended by the statute 1 Wm. IV. c. 46, which declares that no appointment shall be impeached in equity, on the ground that it was unsubstantial, illusory, or nominal; but the entire exclusion of any object of a power not in terms exclusive was illegal, notwithstanding that act, until 1874. In that year the statute 37 and 38 Vict. c. 37 was passed, providing that, under a power to appoint among certain persons, appointments may be made excluding one or more objects of the power; Moz. & W. Dict.

IMAGINE. In English Law. In cases of treason the law makes it a crime to imagine the death of the king. In order to complete the offence, there must, however, be an overt act,—the terms *compassing* and *imagining* being synonymous. It has been justly remarked that the words to compass and imagine are too vague for a statute whose penalty affects the life of a subject. Barrington, Stat. 243. See FICTION.

IMBARGO. Obsolete for embargo (*q. v.*).

IMBASING OF MONEY. Mixing the species with an alloy below the standard of sterling, which the king by his prerogative may do. Toml.

IMBECILITY. In Medical Jurisprudence. A form of mental disease consisting in mental deficiency, either congenital or resulting from an obstacle to the developmnet of the faculties supervening in infancy. Idiocy.

Generally, it is manifested both in the intellectual and moral faculties; but occasionally it is limited to the latter, the former being but little, if at all, below the ordinary standard. Hence it is distinguished into intellectual and moral. In the former there are seldom any of the repulsive features of idiocy, the head, face, limbs, and movements, being scarcely distinguishable, at first sight, from those of the race at large. The senses are not manifestly deficient, nor the power of articulation; though the use of language may be very limited. The perceptive faculties exhibit some activity; and thus the more obvious qualities of things are observed and remembered. Simple industrial operations are well performed, and, generally, whatever requires but little intelligence is readily accomplished. Occasionally a solitary faculty is prominently, even wonderfully, developed,—the person excelling, for instance, in music, in arithmetical calculations, or mechanical skill, far beyond the ordinary measure. For any process of reasoning, or any general observation or abstract ideas, imbeciles are totally incompetent. Of law, justice, morality, property, they have but a very imperfect notion. Some of the affective faculties are usually active, particularly those which lead to evil habits, thieving, incendiarism, drunkenness, homicide, assaults on women.

The kind of mental defect here mentioned is universal in imbecility, but it exists in different degrees in different individuals, some being hardly distinguishable, at first sight, from ordinary men of feeble endowments, while others encroach upon the line which separates them from idiocy; Tayl. Jur. 689.

The various grades of imbecility, however interesting in a philosophical point of view, are not very closely considered by courts. They are governed in criminal cases solely by their tests of responsibility, and in civil cases by the amount of capacity in connection with the act in question, or the abstract question of soundness or unsoundness.

Touching the question of responsibility, the law makes no distinction between imbecility and insanity. See 1 C. & K. 129.

In civil cases, the effect of imbecility is differently estimated. In cases involving

the validity of the contracts of imbecile persons, courts have declined to gauge the measure of their intellects, the only question with them being one of soundness or unsoundness, and "no distinction being made between important and common affairs, large or small property;" 4 Dane, Abr. 561. See 4 Cow. 207. Courts of equity, also, have declined to invalidate the contracts of imbeciles, except on the ground of fraud; 1 Story, Eq. Jur. § 238. Of late years, however, courts have been governed by other considerations. If the contract were for necessaries, or showed no mark of fraud or unfair advantage, or if the other party, acting in good faith and ignorant of the other's mental infirmity, cannot be put *in statu quo*, the contract has been held to be valid; Chitty, Contr. 112; Story, Contr. § 27; Poll. Contr. 88; 4 Exch. 17.

The same principles have governed the courts in cases involving the validity of the marriage contract. If suitable to the condition and circumstances of the party, and manifestly tending to his benefit, it has been confirmed, notwithstanding a considerable degree of incompetency. If, on the other hand, it has been procured by improper influences, manifestly for the advantage of the other party, it has been invalidated; 1 Hagg. 355; Ray, Med. Jur. 100. The law has always showed more favor to the wills of imbeciles than to their contracts. "If a man be of a mean understanding, neither of the wise sort nor of the foolish, but indifferent, as it were, betwixt a wise man and a fool,—yea, though he rather inclined to the foolish sort, so that for his dull capacity he might worthily be called *grossum caput*, a dull pate, or a dunce,—such a one is not prohibited to make a testament;" Swinb. Wills, part 2, s. 4. Whether the testament be established or not, depends upon the circumstances of the case; and the English ecclesiastical courts have always assumed a great deal of liberty in their construction of these circumstances. The general principle is that if the will exhibits a wise and prudent disposition of property, and is unquestionably the will of the testator, and not another's, it should be established, in the face of no inconsiderable deficiency; 1 Hagg. 384. Very different views prevailed in a celebrated case in New York; Stewart *v.* Lispenard, 26 Wend. 256. The mental capacity must be equal to the act; and if that fact be established, and no unfair advantage have been taken of the mental deficiency, the will, the marriage, the contract, or whatever it may be, is held to be valid.

The term moral imbecility is applied to a class of persons who, without any considerable, or even appreciable, deficiency of intellect, seem to have never been endowed with the higher moral sentiments. They are unable to appreciate fully the distinctions of right and wrong, and, according to their several opportunities and tastes, they indulge in mischief as if by an instinct of their nature. To vice and crime they have an irresistible proclivity, though able to discourse on the beauties of virtue and the claims of moral obligation. While young, many of them manifest a cruel and quarrelsome disposition, which leads them to torture brutes and bully their companions. They set all law and admonition at defiance, and become a pest and a terror to the neighborhood. It is worthy of notice, because the fact throws much light on the nature of this condition, that a very large proportion of this class of persons labor under some organic defect. They are scrofulous, rickety, or epileptic, or, if not obviously suffering from these diseases themselves, they are born of parents who did. Their progenitors may have been insane, or eccentric, or highly nervous, and this morbid peculiarity has become, unquestionably, by hereditary transmission, the efficient cause of the moral defect under consideration. Thus lamentably constituted, wanting in one of the essential elements of moral responsibility, they are certainly not fit objects of punishment; for though they may recognize the distinctions of right and wrong in the abstract, yet they have been denied by nature those facilities which prompt men more happily endowed to pursue the one and avoid the other. In practice, however, they have been regarded with no favor by the courts; Ray, Med. Jur. 112. See INSANITY; DEMENTIA.

IMBLADARE. To plant or sow grain. Bract. fol. 176 *b*.

IMBRACERY. See EMBRACERY.

IMBROCUS. A gutter; a brook; a water passage. Cowel.

IMMATERIAL. Unnecessary or non-essential; impertinent (*q.v.*); indecisive.

IMMATERIAL AVERMENT. In Pleading. A statement of unnecessary particulars in connection with, and as descriptive of, what is material. Gould, Pl. c. 3, § 186. Such averments must, however, be proved as laid, it is said; Dougl. 665; though not if they may be struck out without striking out at the same time the cause of action, and when there is no variance; Gould, Pl. c. 3, § 188. See 1 Chitty, Pl. 282.

IMMATERIAL ISSUE. In Pleading. An issue taken upon some collateral matter, the decision of which will not settle the question in dispute between the parties in action. For example, if, in an action of debt on bond, conditioned for the payment of ten dollars and fifty cents at a certain day, the defendant pleads the payment of ten dollars according to the form of the condition, and the plaintiff, instead of demurring, tenders issue upon the payment, it is manifest that, whether this issue be found for the plaintiff or the defendant, it will remain equally uncertain whether the plaintiff is entitled to maintain his action, or not; for, in an action for the penalty of a bond, conditioned to pay a certain sum, the only material question is whether the exact sum were

paid or not, and the question of payment of a part is a question quite beside the legal merits; Hob. 113; 5 Taunt. 386; Cro. Jac. 585; 2 Wms. Saund. 319 *b*. A repleader will be ordered when an immaterial issue is reached, either before or after verdict; 2 Wms. Saund. 319 *b*, note; 1 Rolle, Abr. 86; Cro. Jac. 585. See REPLEADER.

IMMEDIATE. *As to time.* Present; without delay or postponement. Strictly it implies not deferred by any lapse of time, but as usually employed, it is rather within reasonable time having due regard to the nature and circumstances of the case. This word and immediately (*q. v.*) are of no very definite signification and are much subject to the context. In legal proceedings they do not impart the exclusion of any interval of time; 31 N. J. L. 313. As to immediate delivery, see 36 N. J. L. 148. "Immediate" notice may be construed as meaning "reasonable notice;" 27 S. W. Rep. (Mo.) 436. See 7 Cent. L. J. 15, 73.

As to place, etc. Not separated by any intervening space, cause, right, object, or relation. See 2 Lev. 77; 7 Mann. & G. 493; 29 Pa. 198; 43 Wis. 316, 479; IMMEDIATELY; FORTHWITH.

As to descent. Judge Story says it may be mediate or immediate with respect to the estate or right, or with respect to the pedigree or degrees of consanguinity; 6 Pet. 112.

IMMEDIATELY. The words "forthwith" and "immediately" have the same meaning. They are stronger than the expression "within a reasonable time," and imply prompt, vigorous action, without any delay, and whether there has been such action is a question of fact, having regard to the circumstances of the particular case; 4 Q. B. Div. 471. See 4 Yo. & Colly. Ch. 511; 8 M. & W. 281.

IMMEMORIAL POSSESSION. In Louisiana. Possession of which no man living has seen the beginning, and the existence of which he has learned from his elders. 2 Mart. La. 214; 7 La. 46; 3 Toullier p. 410; Poth. *Contr. de Société*, n. 244.

IMMEMORIAL USAGE. Prescription; custom which has existed so long that the memory of man runneth not to the contrary.

IMMEUBLES. In French Law. Immovables. They derive their character as such (1) from their own nature as lands, etc.; (2) from their destination, as animals or implements furnished to a tenant by his landlord; and (3) by the object to which they are annexed.

IMMIGRATION. The removing into one place from another. It differs from emigration, which is the moving from one place into another.

By an act of congress, passed August 3, 1882, it was provided that there should be collected "a duty of fifty cents for each and every passenger, not a citizen of the United States, who shall come by steam or sail vessel from a foreign port to any port within the United States . . . The money thus collected shall be paid into the United States treasury, and shall constitute a fund to be called the immigrant fund, and shall be used, under the direction of the secretary of the treasury, to defray the expense of regulating immigration under this act and for the care of immigrants arriving in the United States." This has been termed the head-money tax. This act of congress is similar in its essential features to statutes enacted by many states of the Union for the protection of their own citizens, and for the good of the immigrants who land at seaports within their borders. A statute of New York, covering this ground was, however, held void as infringing upon the ground of national legislation; 92 U. S. 259, 273, and 107 *id.* 59. The question arose under the act of congress in the supreme court of the United States in what were called the head-money cases; 112 *id.* 580; and that act was held valid. See POLICE POWER.

The immigration of the Chinese has been and continues to be the subject of important legislation. The act of congress of March 3, 1875, Rev. Stat. §§ 2158–2164, prohibits any vessels being built or registered in the United States for the purpose of procuring from any port the subjects of China, Japan, or any other oriental country, known as "coolies," to be transported to any foreign place, to be disposed of or sold as servants or apprentices; § 2158. Vessels so employed shall be forfeited; § 2159. Building, fitting out, or otherwise preparing or navigating vessels for such trade, is punishable by fine and imprisonment; §§ 2160, 2161. But this act does not interfere with voluntary immigration; § 2162; and no tax shall be enforced by any state, upon any person immigrating thereto from a foreign country, which is not equally imposed upon every person immigrating thereto, from any other foreign country; § 2164. The immigration of convicts and women for purposes of prostitution is also prohibited; Supplement to Rev. Stat. p. 181, §§ 3 & 5; 18 Stat. L. 477; 53 Fed. Rep. 1001; also alien laborers; 23 Stat. L. 332; and also all Chinese laborers, whether under contract or not; 25 Stat. L. 476, 504.

The act which provides for the exclusion from admission of certain classes of aliens, and which makes the decision of the inspectors of immigration adverse to the right of any alien to land, final and conclusive unless appeal is taken to the superintendent of immigration, is a constitutional exercise of the power of congress; 142 U. S. 651.

The government of the United States, through the action of the legislative department, can exclude aliens from its territory, although no actual hostilities exist with the nation of which the aliens are subjects; 130 U. S. 581. See ALIEN; CHINESE; DEPORTATION.

IMMISCERE (Lat.). **In Civil Law.** To put or let into, as a beam into a wall. Calv. Lex.

In Old English Law. To turn cattle out on a common. Fleta, lib. 4, c. 20, § 7.

IMMOBILIS (Lat.). Immovable. *Immobilia*, or *res immobiles*, immovables (*q. v.*).

IMMORAL CONSIDERATION. One contrary to good morals, and therefore invalid. Contracts based upon an immoral consideration are generally void; Poll. Con. 286. An agreement in consideration of future illicit cohabitation between the parties; 3 Burr. 1568; 1 Esp. 13; 1 B. & P. 340 & 341; an agreement for the value of libellous and immoral pictures, 4 Esp. 97, or for printing a libel, 2 Stark. 107, or for an immoral wager, Chitty, Contr. 156; cannot, therefore, be enforced. For whatever arises from an immoral or illegal consideration is void; *quid turpi ex causa promissum est non valet;* Inst. 3. 20. 24.

It is a general rule that whenever an agreement appears to be illegal, immoral, or against public policy, a court of justice leaves the parties where it finds them; when the agreement has been executed, the court will not rescind it; when executory, the court will not help the execution; 4 Ohio 419; 4 Johns. 419; 11 *id.* 388; 12 *id.* 303; 19 *id.* 341; 3 Cow. 213; 2 Wils. 341. See CONSIDERATION.

IMMORALITY. That which is *contra bonos mores.*

In England, it is not punishable, in some cases, at the common law, on account of the ecclesiastical jurisdictions: *e. g.* adultery. But except in cases belonging to the ecclesiastical courts, the court of king's bench is the *custos morum*, and may punish *delicta contra bonos mores;* 3 Burr. 1438; 1 W. Blackst. 94; 2 Stra. 788.

IMMOVABLES. In Civil Law. Property which, from its nature, destination, or the object to which it is applied, cannot move itself or be removed. Pothier, *des Choses*, § 1; *Clef des Lois Rom. Immeubles.*

IMMUNITY. An exemption from serving in an office, or performing duties which the law generally requires other citizens to perform. See Dig. lib. 50. t. 6; 1 Chitty, Cr. Law 821; 4 H. & M'H. 341.

IMPAIRING THE OBLIGATION OF CONTRACTS. By Article First, Section 10, Clause 1, of the Constitution of the United States "No state shall pass . . . any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts."

There has been much discussion as to the reasons which led the Convention of 1787 to insert this clause in the constitution. They seem to have intended that it should prevent the states from passing stay laws and bankrupt laws (Bradley, J., 99 U. S. 745), and other acts which would interfere with private contracts or engagements previously formed. Stay laws to prevent the collection of debts had been passed in many of the states, especially in the South. In the Dartmouth College case, 4 Wheat. 518, Chief Justice Marshall said that he thought it more than possible that the convention had not intended by the clause to preserve the integrity of the charters of corporations. But in Pennsylvania the legislature had revoked the charter of the College of Philadelphia and virtually confiscated its property by taking it away from its trustees and giving it to another set of trustees who were of the political party which controlled the legislature. The same legislature had annulled the charter of the Bank of North America to which it was hostile, and would have succeeded in wrecking it, if the bank had not had another charter from congress, and soon after obtained one from the state of Delaware. These acts of spoliation alarmed all men of property, and James Wilson, a Pennsylvania member of the convention, who had been interested in both the bank and the college, was most active in procuring the adoption of the clause. Fisher's "Pennsylvania: Colony and Commonwealth" 375, 383; Fisher's "Evolution of the Constitution" 262; Shirley's "Dartmouth College Case" 213, 220; Alfred Russell's Address before Grafton and Coos Bar Association of New Hampshire, 1895 (reprinted Am. Law Rev. vol. 30, p. 321).

This article of the constitution forbids only the states to pass laws impairing the obligation of contracts, and there is no express provision prohibiting congress from passing such laws. It would seem, moreover, as some have argued, that there is an implied power in congress to pass such laws, for we find in the constitution a number of general prohibitions in which both congress and the states are prohibited from passing bills of attainder and *ex post facto* laws; 1 Pet. 22. The omission of the prohibition in one case and the expression of it in the other might seem to imply that the power to pass laws impairing the obligation of contracts remained in congress; and congress is expressly given power to pass bankrupt laws which impair the obligation of contracts between debtors and creditors; 4 Wheat. 122; and, under the decisions of the supreme court, congress may issue notes as legal tender in satisfaction of antecedently contracted debts. But the general exercise of such a power by congress has been said to be contrary to the first principles of the social compact and to every principle of sound legislation: Federalist No. 44. Bradley, J., in a dissenting opinion in the Sinking-Fund Cases, 99 U. S. 746, took the same view of the origin of this provision, and said further that it fully explained the fact that no such inhibition was laid upon the national legislature, and he was further of opinion that the absence of such inhibition furnished no ground of argument in favor of the proposition that congress can pass arbitrary and despotic laws with regard to contracts any more than with regard to any other subject-matter of legislation.

The provision of the constitution is, however, not applicable to laws enacted by

the states before the first Wednesday in March, 1789; 5 Wheat. 420.

All contracts, whether executed or executory, express or implied, are within the prohibition; 6 Cranch 135; 7 *id.* 164; 8 Wheat. 1; 109 U. S. 285; 15 Wall. 300; 116 U. S. 131; and also judgments founded upon contracts; 103 U. S. 358; 105 *id.* 228, 733. A state law annulling private conveyances is also within the prohibition, as are laws repealing grants and corporate franchises; 3 Hill, N. Y. 531; 1 Pick. 224; 2 Yerg. 534; 13 Miss. 112; 9 C. R. A. 43, 292; 2 Pet. 657; 4 Wheat. 656; 6 How. 301.

A state constitution is not a contract, the obligation of which the state is prohibited by the federal constitution from impairing; 121 U. S. 282; nor is a judgment for a tort; 109 U. S. 285; 131 U. S. 405. But the prohibition applies to state constitutions as well as to the laws of a state; 10 Wall. 511; 115 U. S. 650; 116 *id.* 631; and to a decision of a state court altering a former construction of a law, subsequently to which construction the contract was made. The prohibition does not apply to judicial decisions or the acts of state tribunals or officers under statutes in force at the time of making the contract; 163 U. S. 273; citing 121 *id.* 358; 150 *id.* 18; 159 *id.* 103. "The sound and the true rule is that, if the contract, when made, was valid by the laws of the state, as then expounded by all the departments of its government and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent act of the legislature of the state, or decision of its courts, altering the construction of the law." Taney, C. J., in 16 How. 432; approved in Gelpcke *v.* Dubuque, 1 Wall. 175. See, also, *id.* 678; 101 U. S. 677; 105 *id.* 728.

The judgment of a state court declaring a contract invalid does not impair the obligation of the contract, unless such judgment gives effect to some provision of the state constitution, or some act which is claimed by the unsuccessful party to impair the obligation of the contract in question; 121 U. S. 388. In such cases, the supreme court of the United States does not accept as conclusive the judgment of the state court as to the non-impairment of the contract; 101 U. S. 791; 109 *id.* 244.

An act may regulate or limit existing remedies on a contract, provided it leaves a substantial remedy in force; for instance, by providing that service of process may be made on any officer or agent of a corporation; 95 U. S. 168; an act may abolish imprisonment for debt as a remedy for breach of contract; 103 U. S. 714; may invalidate technically defective mortgages; 108 U. S. 477; and conveyances by *femes covert;* 23 Wall. 137; grant new trials; 11 How. 202; repeal usury laws, though if not repealed they would have rendered a contract void; 108 U. S. 143; may reduce the period of limitation for bringing suits if it leaves a reasonable period for suits for breaches of existing contracts; 104 U. S. 660; require the recording of existing mortgages, if it allow a reasonable time before the act takes effect; 108 U. S. 514; may provide for the reorganization of an insolvent corporation, and that creditors who have notice and do not dissent, shall be bound thereby; 109 U. S. 401.

An act is invalid which, after a contract is made, changes the measure of damages to be recovered for a breach; 115 U. S. 566; also, which imposes as a condition precedent to enforcing a right that the plaintiff shall prove that he never aided the rebellion against the United States; 16 Wall. 234. So is an act which, after a judgment has been enrolled, materially increases the debtor's exemption; 15 Wall. 610; and an act which, after the execution of a mortgage, increases the period of redemption after foreclosure; 24 How. 461; and an act which forbids a sale on the foreclosure of a mortgage at which less than two-thirds of the appraised value of the mortgage premises is realized; 1 How. 311.

The law, as declared by a decision of the supreme court, when not a construction of a statute, does not enter into contracts made thereafter, and the subsequent reversal of the decision does not, therefore, impair the obligation of contracts; 121 U. S. 388; 159 *id.* 103. See 2 Hare, Am. Const. L. 726.

Contracts to which a state is a party are within the protection of this constitutional prohibition; 6 Cra. 87; and a provision in a charter of a toll bridge company that it shall not be lawful for any person to erect another bridge within a specified distance of the bridge authorized by said charter constitutes a contract which binds the state not to authorize the construction of such other bridge; 3 Wall. 51. A contract between a state and a party, whereby he is to perform certain duties for a specified period for a stipulated compensation, is within the protection of the constitution; 103 U. S. 5. It being held that where a state descends from the plane of its sovereignty, it is regarded, *pro hac vice*, as a private person itself and is bound accordingly.

A state is bound by its grants of franchises and exclusive privileges, such as the privilege of supplying a municipality with water; 115 U. S. 674; or gas; *id.* 650, 683. A state is bound by the issue of bonds and coupons under the terms of an act which provided that such coupons should be receivable for taxes, etc., and a subsequent act which forbids the receipt of these coupons for taxes is a violation of the contract and void as against coupon-holders; 114 U. S. 270; 116 *id.* 572; 121 *id.* 105.

A state, when it borrows money and promises to pay it with interest, cannot, by its own ordinance, relieve itself from performing to the letter all that it has expressly promised to its creditors; 96 U. S. 433. But with regard to grants, this clause of the constitution was not intended to control the exercise of the ordinary functions of government. It was not intended to apply to public property, to the discharge of public duties, to the exercise or possession of

public rights, or to any changes or qualifications in these which the legislature of a state may at any time deem expedient; 1 Ohio St. 603, 609, 657; 5 Me. 339; 13 Ill. 27; 13 Ired. 175; 1 Green, N. J. 553; 1 Dougl. Mich. 225; 17 Conn. 79; 6 S. & R. 322; 13 Pa. 133; 1 H. & J. 236; 6 How. 548; 1 Sumn. 277. See 4 Wheat. 427; 19 Pa. 258; 4 N. Y. 419; 3 How. 133.

One of the first applications of the doctrine of the impairment of contracts was to the charter of a corporation in the Dartmouth College case; 4 Wheat. 518; which held that the charter was a contract the obligation of which could not afterwards be impaired by the legislature without the corporation's consent. Since then charters of incorporation which are granted for the private benefit or purposes of the corporation have always been held to be contracts between the legislature and the corporation, having for their consideration or liability the duties which the corporation assumes by accepting them; Cooley, Const. Lim. 279; Moraw. Priv. Corp. 1044; Hare, Am. Const. L. 421, 527; 146 U. S. 258. To guard against the danger which the growth of great corporations, under the protection of this principle, has developed, the new constitutions of many of the states forbid the granting of corporate powers except subject to amendment and repeal. Provisions of this sort have become so general that the effect of the doctrine that a state cannot pass an act impairing the obligation of a contract has been largely modified. The decisions of the supreme court of the United States have also worked further modifications. The first was in the famous Charles River Bridge case in 1837, 11 Pet. 420, where the court held that when the legislature had chartered a bridge company with the right to take tolls there was no implied contract that they would not charter another company to build a bridge alongside of the first which would in effect destroy the profits of the first by competition. The next modification was in the Granger cases in 1876; 94 U. S. 113 to 187; which held that the regulation by the legislature of the rates to be charged by railroads and elevators was not an impairment of the obligation of a contract. See also 143 U. S. 339. This doctrine having been carried to great lengths in allowing the legislature to regulate the rates to be charged, the supreme court has now modified the doctrine by declaring that the power to regulate is not a power to destroy, and that a legislature, under the pretence of regulating fares and freights, cannot require a railroad to carry persons and property without profit; 164 U. S. 578, 593.

On the general subject of the power of the legislature under its right reserved to alter, amend, and repeal, see 109 Mass. 103; 63 Me. 569; 41 Ia. 297; 9 R. I. 194; Cooley, Const. Lim. 279, note; Moraw. Priv. Corp. 1093; 146 U. S. 258; 138 *id.* 287.

In general, only contracts are embraced in this provision which respect property or some object of value and confer rights which can be asserted in a court of justice. Debts are not property. A non-resident creditor of a state cannot be said to be, by virtue of a debt which it owes him, a holder of property within its limits; 96 U. S. 432.

The following acts have been held void as impairing the obligation of a contract: The Insolvent Act of 1812 of Pennsylvania, so far as it attempted to discharge the contract; 6 Wheat. 131; the Insolvent Law of Indiana affecting debts to citizens of other states; 5 How. 295; the Act of Maryland of 1841 taxing stockholders in banks impaired the obligation in the Act of 1821 organizing banks; 3 How. 133; the Act of Ohio of 1851, taxing the state bank; 16 How. 369; General Tax Law of North Carolina as applied to a railroad whose charter exempted it from taxation; 13 Wall. 264; the same in South Carolina; 16 Wall. 244; the same in New Jersey; 95 U. S. 104; the same in Illinois as applied to the charter of a university; 99 U. S. 309; the same in Louisiana applied to the charter of an asylum; 105 U. S. 362; the Act of Illinois of 1841 restricting mortgage sales impaired the obligation of a mortgage contract; 1 How. 311; the Acts of Arkansas withholding assets of state banks from creditors impaired contracts with creditors; 15 How. 304; the Act of New York of 1855 authorizing a bridge to be built impaired the obligation in a charter to another company; 3 Wall. 51; the Act of Georgia of 1868 exempting property from execution impaired the obligation of a prior judgment; 13 Wall. 646; the same in Georgia; 15 Wall. 610; the same in North Carolina; 96 U. S. 595; the Act of Virginia of 1876 as to the deduction of taxes from coupons on state bonds impaired the obligation to the state bondholders under the Funding Act of 1871; 102 U. S. 672; the Ordinance of New Orleans of 1881 authorizing a light company to furnish New Orleans with gas impaired the obligation to another company under another act; 115 U. S. 550; so in Kentucky; 115 U. S. 683.

Grants of exclusive privileges by state governments are subject to the exercise of the right of eminent domain by the state. The legislature has full authority to exercise an unlimited power as to the management, employment, and use of the eminent domain of the state, and to make all provisions necessary to the exercise of this right or power, but no authority whatever to give it away or take it out of the people directly or indirectly; 6 How. 532; 20 Johns. 75; 17 Conn. 61; 23 Pick. 360; 15 Vt. 745; 8 N. H. 398; 8 Dana 289; 9 Ga. 517; 84 Va. 271. See EMINENT DOMAIN; FRANCHISES.

The power of one legislature to exempt altogether from taxation certain lands or property, and in this way to bind subsequent legislatures and take from the people one of their sovereign rights, may, where a consideration has been given, be considered now as distinctly settled by the supreme court of the United States, though not without remonstrance on the part of

state courts; and the abandonment of this taxing power is not to be presumed where the deliberate purpose of the state does not appear; 4 Pet. 514; 3 How. 133; 4 Mass. 305; 2 Hill, N. Y. 353; 10 N. H. 138; 5 Gill 231; 13 Vt. 525; 30 Pa. 442; 1 Ohio St. 563, 591, 603; 7 Cra. 164; 10 Conn. 495; 8 Wall. 430; 20 *id.* 36. See 143 U. S. 192; 143 *id.* 1; 37 Fed. Rep. 24; 86 Tenn. 614. The grant of the power of taxation by the legislature to a municipal corporation is not a contract, but is subject to revocation, modification, and control by the legislature; 139 U. S. 189.

In relation to marriage and divorce, it is now settled that this clause does not operate. The obligation of the marriage contract is created by the public law, subject to the public will, and to that of the parties; 7 Dana 181; 125 U. S. 190; 1 Bish. Mar. & D. § 9. The prevailing doctrine seems to be that the legislature has complete control of the subject of granting divorces, unless restrained by the constitution of the state; but in a majority of the states the constitutions contain this prohibition; Cooley, Const. Lim. 133; and there the jurisdiction in matters of divorce is confined exclusively to the judicial tribunals, under the limitations prescribed by law; 2 Kent 106. But where the legislature has power to act, its reasons cannot be inquired into; marriage is not a contract but a *status;* the parties cannot have vested rights of property in a domestic relation; therefore the legislative act does not come under condemnation as depriving parties of rights contrary to the law of the land; 8 Conn. 541; Cooley, Const. Lim. 112.

In relation to bankruptcy and insolvency, the constitution, art. 1, § 8, cl. 4, gives to congress the power of making a bankrupt law. But it seems to be settled that this power is not exclusive; because the several states may also make distinct bankrupt laws,—though they have generally been called *insolvency* laws,—which will only be superseded when congress chooses to exercise its power by passing a bankruptcy law; 4 Wheat. 122; 12 *id.* 213; 13 Mass. 1. See 3 Wash. C. C. 313; Bish. Insolv. Debt. 59.

Exemption from *arrest* affects only the remedy, an exemption from attachment of the property, or a subjection of it to a stay law or appraisement law, impairs the obligation of the contract. Such a statute can only be enforced as to contracts made subsequently to the law; 1 How. 311; 8 Wheat. 1, 75; see 9 Pet. 359; 4 Wall. 535; 96 U. S. 69; but a law abolishing distress for rent has been held to be applicable to cases in force at its passage; 14 N. Y. 22. With regard to exemption from arrest the supreme court holds that in modes of proceeding and forms to enforce the contract the legislature has the control, and may enlarge, limit, or alter them, provided it does not deny a remedy, or so embarrass it with conditions or restrictions as seriously to impair the value of the right; 103 U. S. 720. See 135 U. S. 662. Whatever belongs, merely, to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of a contract; 134 U. S. 515.

It is admitted that a state may make partial exemptions of property, as of furniture, food, apparel, or even a homestead; 1 Denio 128; 1 N. Y. 129; 2 Dougl. Mich. 38; 4 W & S. 218; 17 Miss. 310. A homestead exemption may be made applicable to previously existing contracts; 66 N. C. 164; *contra*, 22 Gratt. 266; 6 Baxt. 225. But a law preventing all legal remedy upon a contract would be void; 13 Wall. 662; 1 S. C. N. S. 63; 15 Wall. 610. An act providing that dower or right of dower shall not be subject to seizure or execution for the husband's debts during his lifetime, cannot affect the rights of creditors whose claims arose before the passage of the act; 109 N. C. 685. See 101 *id.* 382.

Nothing in the constitution prevents a state from passing a valid statute to divest rights which have been vested by law in an individual, provided it does not impair the obligation of a contract; 3 Dall. 386; 2 Pet. 412; 8 *id.* 89; 5 Barb. 48; 9 Gill 299; 1 Md. Ch. Dec. 66. See 54 Fed. Rep. 660; 129 U. S. 36; 134 *id.* 296. This inhibition in the constitution is wholly prospective, and the states may legislate as to contracts thereafter made as they see fit; 96 U. S. 603; 128 U. S. 489; 121 *id.* 388; 145 *id.* 454.

Insolvent laws are valid which are in the nature of a *cessio bonorum*, leaving the debt still existing, or which provide for the discharge of the debt, but refer only to subsequent contracts, or which merely modify or affect the remedy, as by exempting the person from arrest, but still leave means of enforcing. But a law exempting the person from arrest and the goods from attachment on mesne process or execution would be void, as against the constitution of the United States; 6 How. 328; 16 Johns. 233; 6 Pick. 440; 9 Conn. 314; 1 Ohio 236; 9 Barb. 382; 4 Gilm. 221; 13 B. Monr. 285; the right of antecedent creditors are protected by the constitution; 129 U. S. 36. The state insolvent laws in practice operate in favor of the citizens of the particular state only, as to other citizens of the same state, and not against citizens of other states, unless they have assented to the relief or discharge of the debtor expressly, or by some equivalent act, as by becoming a party to the process against him under the law, taking a dividend, and the like; 1 Gall. 371; 3 Mas. 88; 5 Mass. 509; 13 *id.* 18, 19; 2 Blackf. 366; 3 Pet. 41; but the mere circumstance that the contract is made payable in the state where the insolvent law exists will not render such contract subject to be discharged under the law; 1 Wall. 223, 234; 4 *id.* 409.

Some states refuse to aid a citizen of another state in enforcing a debt against a citizen of their own state, when the debt was discharged by their insolvent law. In such cases the creditor must resort to the court of the United States within the state;

1 Gall. 168; 8 Pick. 194; 2 Blackf. 394; Baldw. 293; 9 N. H. 478. See INSOLVENT LAWS.

A statute of limitation does not impair the obligation of a contract, or deprive one of property without due process of law, unless, in its application to an existing right of action, it unreasonably limits the opportunity to enforce that right by suit; 137 U. S. 245; 137 *id.* 258, note; 135 *id.* 662.

The law of place acts upon a contract, and governs its construction, validity, and obligation, but constitutes no part of it. The law explains the stipulations of parties, but never supersedes or varies them.

This is very different from supposing that every law is applicable to the subject-matter, as statutes of limitation and insolvency, or enters into and becomes a part of the contract. This can neither be drawn from the terms of the contract, nor presumed to be contemplated by the parties.

There is a broad distinction taken as to the obligation of a contract and the remedy upon it. The abolition of all remedies by a law operating *in præsenti* is, of course, an impairing of the obligation of the contract. But it is admitted that the legislature may vary the nature and extent of remedies, as well as the times and modes in which these remedies may be pursued, and bar suits not brought within such times as may be prescribed. A reasonable time within which rights are to be enforced must be given by laws which bar certain suits; 3 Pet. 290; 1 How. 311; 2 Gall. 141; 8 Mass. 430; 1 Blackf. 33; 14 Me. 344; 7 Ga. 163; 21 Miss. 335; 1 Hill, S. C. 328; 7 B. Monr. 162; 9 Barb. 489.

The meaning of obligation is important with regard to the distinction taken between the laws existing at the time the contract is entered into and those which are enacted afterwards. The former are said to have been in contemplation of the parties, and so far entered into their contract. The latter are said to impair, provided they affect the contract at all. See cases *supra*.

The weight of authority is that this clause of the constitution, like that which relates to the regulation of commerce by the congress of the United States, does not limit the power of a state to enact general police regulations for the preservation of public health and morals; 8 How. 163; 1 Ohio St. 15; 12 Pick. 194; 7 Cow. 349, 535; 27 Vt. 149; 17 Colo. 376. See 8 Mo. 607, 697; 3 Harr. Del. 442; 5 How. 504; 7 *id.* 283; 11 Pet. 102. See, generally, Story, Const. § 1368; Sergeant, Const. Law 356; Hare, Am. Const. L. 768; Rawle, Const.; Dane, Abr. Index; 10 Am. Jur. 273; 2 Pa. 22; 150 *id.* 245; 16 Miss. 9; 3 Rich. S. C. 389; 8 Wheat. 1; 8 Ark. 150; 4 Fla. 23; 4 La. Ann. 94; 2 Dougl. Mich. 197; 10 N. Y. 281; 111 *id.* 132; 2 Gray 43; 3 Mart. La. 588; 26 Me. 191; 142 U. S. 79; 127 Ill. 240; 2 Pars. Contr. 509; Shirley, Dartmouth College Case; Cooley, Const. Lim. 279; Patterson, Fed. Restr. on State Action; RATES; GROUND RENT; INSOLVENCY.

IMPALARE. To impound. Du Cange.

IMPANEL. **In Practice.** To write the names of jurors on a *panel* (*q. v.*), which is a schedule or list, in England of parchment: this is done by the sheriff, or other officer lawfully authorized.

In American practice, the word is used of a jury drawn for trial of a particular cause by the clerk, as well as of the general list of jurors returned by the sheriff. Grah. Pr. 275. See 1 Archb. Pr. 365; 3 Bla. Com. 354; 7 How. Pr. 441. Strictly speaking and at common law, juries are impanelled when the jurymen are selected and ready to be sworn; 55 Fed. Rep. 928.

IMPARGANCUTUM. The right to impound cattle.

IMPARLANCE (from Fr. *parler*, to speak).

In Pleading and Practice. Time given by the court to either party to answer the pleading of his opponent: as, either to plead, reply, rejoin, etc.

It is said to be nothing else but the continuance of the cause till a further day; Bacon, Abr. *Pleas* (C). In this sense imparlances are no longer allowed in English practice; 3 Chitty, Gen. Pr. 700; Andr. Steph. Pl. 162.

Time to plead. This is the common signification of the word; 2 Wms. Saund. 1, n. 2; 2 Show. 310; Barnes 346; Laws, Civ. Pl. 93. In this sense imparlances are not recognized in American law, the common practice being for the defendant to enter an appearance, when the cause stands continued, until a fixed time has elapsed within which he may file his plea. In the act of congress of May 19, 1828, § 2, the word imparlance was originally used for "stay of execution," but the latter phrase has been substituted for it; Rev. Stat. § 988. See CONTINUANCE.

A general imparlance is the entry of a general prayer and allowance of time to plead till the next term, without reserving to the defendant the benefit of any exception; so that after such an imparlance the defendant cannot object to the jurisdiction of the court, or plead any matter in abatement. This kind of imparlance is always from one term to another.

A general special imparlance contains a saving of all exceptions whatsoever, so that the defendant after this may plead not only in abatement, but he may also plead a plea which affects the jurisdiction of the court, as privilege. He cannot, however, plead a tender, and that he was always ready to pay, because by craving time he admits that he is not ready, and so falsifies his plea; Tidd, Pr. 418.

A special imparlance reserves to the defendant all exception to the writ, bill, or count: and therefore after it the defendant may plead in abatement, though not to the jurisdiction of the court.

See Comyns, Dig. *Abatement* (I) 19, 20, 21, *Pleader* (D); 1 Chitty, Pl. 420; 1 Sell. Pr. 265; Bacon, Abr. *Pleas* (C).

IMPARSONEE. A clergyman who by induction (*q. v.*) is in possession of a benefice. He is then termed *persona impersonata*—a parson imparsonee. 1 Bla. Com. 391; Co. Litt. 300.

IMPARTIALLY. See FAITHFULLY.

IMPEACHMENT. A written accusation usually by the house of representatives of a state or of the United States to the senate of the state or of the United States against an officer.

The constitution declares that the house of representatives shall have the sole power of impeachment; art. 1, s. 2, cl. 5; and that the senate shall have the sole power to try all impeachments; art. 1, s. 3, cl. 6.

The persons liable to impeachment are the president, vice-president, and all civil officers of the United States; art. 2, s. 4. A question arose upon an impeachment before the senate, in 1799, whether a senator was a civil officer of the United States within the purview of this section of the constitution; and it was decided by the senate, by a vote of fourteen against eleven, that he was not; Senate Jour. Jan. 10, 1799; Story, Const. § 791; Rawle, Const. 213; Von Holst Con. Hist. 160. See UNITED STATES COURTS.

The offences for which a guilty officer may be impeached are treason, bribery, and other high crimes and misdemeanors; art. 2, s. 4. The constitution defines the crime of treason; art. 3, s. 3. Recourse must be had to the common law for a definition of bribery. Not having particularly mentioned what is to be understood by "other high crimes and misdemeanors," resort, it is presumed, must be had to parliamentary practice and the common law in order to ascertain what they are; Story, Const. § 795. It it said that impeachment may be brought to bear on any offense against the constitution or the laws which is deserving of punishment in this manner or is of such a character as to render the officer unfit to hold his office. It is primarily directed against official misconduct, and is not restricted to political crimes alone. The decision rests really with the senate; Black, Const. L. 121, The guilt of the accused must be established beyond a reasonable doubt; 37 Neb. 96.

The mode of proceeding in the institution and trial of impeachments is as follows: When a person who may be legally impeached has been guilty, or is supposed to have been guilty, of some malversation in office, a resolution is generally brought forward by a member of the house of representatives, either to accuse the party, or for a committee of inquiry. If the committee report adversely to the party accused, they give a statement of the charges and recommend that he be impeached. When the resolution is adopted by the house, a committee is appointed to impeach the party at the bar of the senate, and to state that the articles of impeachment against him will be exhibited in due time and made good before the senate, and to demand that the senate take order for the appearance of the party to answer to the impeachment. The house then agree upon the articles of impeachment, and they are presented to the senate by a committee appointed by the house to prosecute the impeachment. The senate then issues process, summoning the party to appear at a given day before them, to answer to the articles. The process is served by the sergeant-at-arms of the senate, and a return is made of it to the senate under oath. On the return-day of the process, the senate resolves itself into a court of impeachment, and the senators are sworn to do justice according to the constitution and laws. The person impeached is called to answer, and either appears or does not appear. If he does not appear, his default is recorded, and the senate may proceed *ex parte*. If he does appear, either by himself or attorney, the parties are required to form an issue, and a time is then assigned for the trial. The final decision is given by yeas and nays; but no person can be convicted without the concurrence of two-thirds of the members present; Const. art. 1, s. 2, cl. 6. See "Chase's Trial," and "Trial of Judge Peck;" also proceedings against Judge Humphreys, June 26, 1862, Congress. Globe, pt. 4, 3d sess., 32d Congress, pp. 2942–2953; and Trial of President Johnson, March 5, 1868, Congress. Globe, pt. 5, supplement, 40th Congress, 2d sess.; Lecture by Prof. Theo. W. Dwight, before Columbia Coll. Law School, 6 Am. Law Reg. 257; Article by Judge Lawrence, of Ohio, same volume, p. 641.

When the president is tried, the chief justice presides. The judgment, in cases of impeachment, does not extend further than to removal from office and disqualification to hold and enjoy any office of honor, trust, or profit under the United States. Disqualification, as a punishment, is discretionary with the senate; Black, Const. L. 122. The party impeached remains liable to trial and punishment according to law. See UNITED STATES COURTS. Proceedings on impeachments under the state constitutions are somewhat similar.

In England, the articles of impeachment are a kind of indictment found by the house of commons, and tried by the house of lords. It has always been settled that a peer could be impeached for any crime. It was formerly believed that a commoner could only be impeached for high misdemeanors, not for capital offences; 4 Bla. Com. 260; but it seems now settled they may be impeached for high treason; May's Parl. Prac. Ch. 23. Impeachments have been very rare in England in modern times.

In Evidence. An allegation, supported by proof, that a witness who has been examined is unworthy of credit.

Every witness is liable to be impeached as to his character for truth; and, if his general character is good, he is presumed at all times to be ready to support it; 49 Ill. 299. See 97 Ala. 14.

It is not admissible to impeach a defendant's testimony by showing that at a former trial for a like offence, he raised a similar issue and was contradicted; 155 Mass. 168. An accused person who testifies in his own behalf, is subject to impeachment, as other witnesses, by evidence of previous contradictory statements; 98 Ala. 169; 86 Tenn. 259. A witness cannot be impeached by the contradiction of immaterial statements; 58 Ark. 125; nor can he be as to collateral and irrelevant matter on which he was cross-examined; 66 Miss. 196; 75 Cal. 108; 76 Ia. 67; 39 Kan. 115; 97 N. C. 443; 69 Tex. 730; 61 Vt. 53; 32 W. Va. 177. Statements out of court inconsistent with those made by a witness in court are admissible to impeach him, where the proper foundation has been laid; 97 Mo. 165; 77 Ga. 781; 23 Neb. 683; 40 Minn. 65, 77; 74 Ia. 623; 86 Ala. 110; 25 Tex. App. 686. In order to impeach a witness by showing his contradictory statements on other occasions, his attention must be first called to the time, place, and circumstances of the statements, whether they are in writing or were made orally; 137 U. S. 507; 132 *id.* 394.

IMPEACHMENT OF WASTE. A restraint from committing waste upon lands or tenements; or, a demand of compensation for waste done by a tenant who has but a particular estate in the land granted, and, therefore, no right to commit waste.

All tenants for life or any less estate are liable to be impeached for waste, unless they hold *without impeachment of waste;* in the latter case they may commit waste without being questioned, or any demand for compensation for the waste done; 11 Co. 82. See WASTE.

IMPECHIARE. To impeach, accuse, or prosecute for felony or treason. Cowel.

IMPEDIATUS. Disabled from mischief by expeditation (*q. v.*). Cowel.

IMPEDIENS. One who hinders; the defendant or deforciant in a fine. Cowel; Blount.

IMPEDIMENTO. In Spanish Law. A prohibition to contract marriage, established by law between certain persons.

The disabilities arising from this clause are twofold, viz.:—

Impedimento Dirimente. Such disabilities as render the marriage null, although contracted with the usual legal solemnities. The disabilities arising from this source are enumerated in the following Latin verses:—

"Error, conditio, votum, cognatio, crimen,
Cultus disparitas, vis, ordo, ligamen, honestas,
Si sis affinis, si forte coire nequibis,
Si parochi et duplicis desit præsentia testis,
Raptave sit mulier, nec parti reddita tutæ,
Hæc facienda vetant connubia, facta retractant."

Among these impediments, some are *absolute*, others *relative*. The former cannot be cured, and render the marriage radically null; others may be removed by previous dispensation.

In Spain, marriage is regarded in the twofold aspect of a civil and a religious contract. Hence the disabilities are of two kinds, viz.: those created by the local law and those imposed by the church.

In the earlier ages of the church, the emperors prohibited certain marriages: thus, Theodosius the Great forbade marriages between cousins-german; Justinian, between spiritual relations; Valentinian, Valens, Theodosius, and Arcadius, between persons of different religions.

The Catholic church adopted and extended the disabilities thus created, and by the third canon at the twenty-fourth session of the Council of Trent, the church reserved to itself the power of dispensation. As the Council of Trent did not determine, being divided, who had the power of granting dispensation, it is accorded in Italy to the pope, and in France and Spain, with few exceptions, to the bishops. The dispositions of the Council of Trent being in force in Spain (see Schmidt, Civ. Law of Spain, p. 6, note *a*), the ecclesiastical authority is alone invested with this power in Spain.

For the cases in which it may be granted, see Schmidt, Civ. Law c. 2, s. 14.

Impedimento, Impediente, or *Prohibitivo.*—Such disabilities as impede the contracting of a marriage, but do not annul it when contracted.

Anciently, the impediments expressed in the following Latin verses were of this nature:—

"Incestus, raptus, sponsalia, mors muliebris,
Susceptus propriæ sobolis, mors presbyterialis,
Vel si pœniteat solemniter, aut monialem
Accipiat quisquam, votum simplex, catechismus,
Ecclesiæ vetitum, nec non tempus feriarum,
Impediunt fieri, permittunt facta temeri."

For the effects of these impediments, see Escriche, Dict. Raz. *Impedimente Prohibitivo.*

IMPEDIMENTS. Legal hindrances to making contracts. Some of these impediments are minority, want of reason, coverture, and the like. See CONTRACT; INCAPACITY.

In Civil Law. Bars to marriage.

Absolute impediments are those which prevent the person subject to them from marrying at all, without either the nullity of marriage or its being punishable.

Dirimant impediments are those which render a marriage void: as, where one of the contracting parties is already married to another person.

Prohibitive impediments are those which do not render the marriage null, but subject the parties to a punishment.

Relative impediments are those which regard only certain persons with regard to each other: as, the marriage of a brother to a sister.

IMPENSÆ (Lat.). **In Civil Law.** Expense; outlay. Divided into *necessariæ*, for necessity, *utiles*, for use, and *voluptuariæ*, for luxury; Dig. 79. 6. 14; Voc. Jur.

IMPERATIVE. Mandatory as opposed to directory, as used of a statute (*q. v.*).

IMPERATOR. Emperor. The title of the Emperor in Rome and used also for the Kings of England in charters before the conquest. 1 Bla. Com. 242.

IMPERFECT OBLIGATIONS. Those which are not, in view of the law, of binding force.

IMPERFECT RIGHTS. See RIGHTS.

IMPERFECT TRUST. An executory trust (*q. v.*).

IMPERITIA. Want of skill.

IMPERIUM. The right to command, which includes the right to employ the force of the state to enforce the laws: this

is one of the principal attributes of the power of the executive. 1 Toullier, n. 58.

IMPERSONALITAS. Impersonality. An expression used where no particular person is referred to, as where the words *ut dicitur* are used. Co. Litt. 352 *b*.

IMPERTINENT (Lat. *in*, not, *pertinens*, pertaining or relating to).

In Pleading. In Equity. A term applied to matters introduced into a bill, answer, or other proceeding in a suit which are not properly before the court for decision at that particular stage of the suit. 1 Sumn. 506; 3 Stor. 13; 1 Paige, Ch. 555; 5 Blackf. 439; 15 Fed. Rep. 561. Impertinent matter is not necessarily scandalous; but all scandalous matter is impertinent.

The rule against admitting impertinent matter is designed to prevent oppression, not to become oppressive; 1 T. & R. 489; 6 Beav. 444; 27 N. H. 38. No matter is to be deemed impertinent which is material in establishing the rights of the parties or ascertaining the relief to be granted; 3 Paige, Ch. 606; 12 Beav. 44; 10 Sim. 345; 13 *id.* 583.

A pleading may be referred to a master to have impertinent matter expunged at the cost of the offending party; Story, Eq. Pl. § 266; 19 Me. 214; 4 Hen. & M. 414; 2 Hayw. 407; 4 C. E. Gr. 343; but a bill may not be after the defendant has answered; Coop. Eq. Pl. 19. In England, the practice of excepting to bills, answers, and other proceedings for impertinence has been abolished. The 27th Equity Rule of the United States courts requires that exceptions for scandal or impertinence shall point out the exceptionable matter with certainty; 6 Paige 288; 1 Dan. Ch. Pr. *343, n., *350, n.

At Law. A term applied to matter not necessary to constitute the cause of action or ground of defence; 5 East 275; 2 Mass. 283. It constitutes surplusage, which see.

In Practice. A term applied to evidence of facts which do not belong to the matter in question. That which is immaterial is, in general, impertinent, and that which is material is not, in general, impertinent. 1 M'C. & Y. 337. Impertinent matter in the interrogatories to witnesses or their answers, in equity, will be expunged after reference to a master at the cost of the offending party; 2 Y. & C. 445.

IMPESCARE. To impeach or accuse. *Impescatus*, impeached. Jac.; Blount.

IMPETITIO VASTI. Impeachment of waste, which title see.

IMPETRATION. The obtaining any thing by prayer or petition. In the ancient English statutes it signifies a pre-obtaining of church benefices in England from the church of Rome which belonged to the gift of the king or other lay patrons.

IMPIER. Umpire (*q. v.*).

IMPIERMENT. Impairing or prejudicing. Jac. L. Dict.

IMPIGNORATA. Pledged; given in pledge (*pignori data*); mortgaged. A term applied in Bracton to land. Bract. fol. 20.

IMPIGNORATION. The act of pawning or pledging.

IMPLACITARE (Lat.). To implead; to sue.

IMPLEAD. In Practice. To sue or prosecute by due course of law. 9 Watts 47.

IMPLEMENTS (Lat. *impleo*, to fill). Such things as are used or *employed* for a trade, or furniture of a house. 11 Metc. 82.

Whatever may supply wants: particularly applied to tools, utensils, vessels, instruments of labor: as, the *implements* of trade or of husbandry. Webster, Dict.; 23 Iowa 359; 6 Gray 298; or a music teacher's piano; 69 Ill. 338. The word does not include horses or other animals; 11 Met. 79; 5 Ark. 41; 44 Conn. 93.

IMPLICATA (Lat.). Small adventures for which the freight contracted for is to be received although the cargo may be lost. Targa, c. 34; Emerigon, Mar. Loans § 5.

IMPLICATION. An inference of something not directly declared, but arising from what is admitted or expressed. See Contract; Deed; Easement; Way; Will.

IMPLIED. This word is used in law as contrasted with "express;" *i. e.*, where the intention in regard to the subject-matter is not manifested by explicit and direct words, but is gathered by implication or necessary deduction from the circumstances, the general language, or the conduct of the parties.

IMPLIED ABROGATION. See Abrogation.

IMPLIED ASSUMPSIT. See Assumpsit.

IMPLIED COLOR. See Color.

IMPLIED CONSENT. See Consent.

IMPLIED CONSIDERATION. One that is implied by law, or presumed to exist in contradistinction to an expressed consideration (*q. v.*). In a case of a sealed instrument or negotiable paper the consideration is presumed. See Consideration.

IMPLIED CONTRACT. See Contract.

IMPLIED COVENANT. See Covenant.

IMPLIED MALICE. See Malice.

IMPLIED TRUST. See Trust.

IMPLIED USES. See Resulting Use; Use.

IMPLIED WARRANTY. See Caveat Emptor; Sale; Warranty.

IMPORTATION. In Common Law. The act of bringing goods and merchandise into the United States from a foreign country. 5 Cra. 368 ; 9 *id.* 104, 120 ; 2 M. & G. 155, note *a*.

To prevent the mischievous interference of the several states with the national commerce, the constitution of the United States, art. I. s. 10, provides as follows : " No state shall, without the consent of congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws ; and the net produce of all duties and imposts laid by any state on imports or exports shall be for the use of the treasury of the United States ; and all such laws shall be subject to the revision and control of congress ; " Story, Const. § 1616. Under this section it has been held that a state law imposing a license tax on importers of foreign liquors was unconstitutional ; 12 Wheat. 419. See 5 How. 504 ; 7 *id.* 283 ; 12 *id.* 299 ; 11 Pet. 102. As was a state law imposing a tax on the tonnage of vessels entering her ports ; 94 U. S. 238. But a state tax on the gross receipts of a railroad company, where freights are received partly from another state, is not a tax on imports ; 8 Wall. 123 ; 15 *id.* 284. An importation is not complete, within the revenue laws, until a voluntary arrival within some port of entry ; 9 Cra. 104 ; 13 Pet. 486 ; 4 Wash. C. C. 158 ; 1 Gall. 203 ; but see 1 Pet. C. C. 256 ; and the duties accrue at the time of such arrival ; 1 Deady 124 ; but the importation, as between the importer and the government, is not complete as long as the goods remain in the custody of the officers of the customs, and until delivered to the importer, they are subject to any duties on imports which congress may see fit to impose ; 2 Cliff. 512. See EXPORTATION.

IMPORTED. This word, in general, has the same meaning in the tariff laws that its etymology shows, *im porto*, to bear ; to carry. To " import " is to bear or carry into. An " imported " article is one brought or carried into a country from abroad. 49 Fed. Rep. 99. See IMPORTS ; IMPOSTS.

IMPORTS. Goods or other property imported or brought into the country from foreign territory. Story, Const. § 949. See U. S. Const. art. 1, § 8 ; 1, § 10 ; 7 How. 477 ; 9 *id.* 619 ; 8 Wall. 110, 123.

Imports cease to be " imported articles " within the constitution, after the packages are broken up, or, after the first wholesale disposition of them ; 1 Dev. & B. L. 19 ; but imported goods, after having been sold by the importer, are subject to state taxation, even though still in the original packages ; 5 Wall. 479. See ORIGINAL PACKAGE. Persons cannot be considered imports ; 4 Metc. 282.

IMPORTUNITY. Urgent solicitation, with troublesome frequency and pertinacity.

Wills and devises are sometimes set aside in consequence of the importunity of those who have procured them. Whenever the importunity is such as to deprive the devisor of the freedom of his will, the devise becomes fraudulent and void ; Dane, Abr. c. 127, a. 14, s. 5, 6, 7 ; 2 Phill. Eccl. 551.

IMPOSITIONS. Imposts, taxes, or contributions. See 104 Mass. 470.

IMPOSSIBILITY. A thing which under the law or according to the due course of nature cannot be done or performed.

Impossibility of performance is an important head of the law of contract, and the questions arising as to its effect may be affected by the classification to which the impossibility is assigned, the time at which it arises, and whether it affects the promise or the consideration for it.

There may be an impossibility *of fact*, existing in the nature of things, or arising out of the circumstances of the case or a legal impossibility created *by law*.

Of the first kind there may be a contradiction in the contract resulting from promises *inconsistent* with each other when made. There may also be a *physical* impossibility as when the thing contracted for is against the course of nature. Of the latter class examples are suggested of an agreement " to make two spheres of the same substance, but one twice the size of the other of which the greater should fall twice as fast as the smaller when they were both dropped from a height ; or to construct a perpetual motion ; " the former having been considered an elementary fact before Galileo's experiment and the latter being still attempted, though as yet unsuccessfully. Wald, Pol. Cont. 350.

A physical impossibility may be either *absolute*, which means impossible in any case, as if one should contract to reach the moon ; or *relative*, as to make a payment to one who is dead. Of this kind is what is termed *practical* impossibility, as when a ship is so injured that it cannot be repaired except at an excessive or unreasonable cost ; in this case it is treated as a total loss, being physically but not practically possible to repair. Certain accidents occurring from death, tempests, and the like are characterized by the phrase " impossibility arising by the act of God " (*q. v.*).

A contract or condition, the performance of which is made impossible by a rule of law, is termed a *legal* impossibility ; as if one should give a bond to secure a simple contract with a collateral agreement that there should be no merger of the contract debt. A *logical* impossibility exists when the agreement is inconsistent with the nature of the transaction, as where a gift is made to one expressly for his own benefit with a condition that he immediately transfer it to a third person.

The impossibility may exist at the time of making the agreement, in which case it is said to be *original ;* or it may be caused by matter arising *ex post facto*, as where the party to be benefited dies after the contract to be executed though before the performance. Such *subsequent* impossibility may be caused by the act of the party making the promise or the party to be benefited, or of a stranger, as a public enemy (*q. v.*), or by the act of God (*q. v.*).

An agreement to perform an impossibility whether in law or in fact is void ; Wald, Pol. Cont. 352 ; Leake, Cont. 358 ; 3 Add. Cont. 8th Am. ed. 1196 ; Harr. Cont. 34, 174. See L. R. 5 C. P. 577. There may, however, be the liability in damages for the breach of an unqualified undertaking to perform an impossibility ; *id.* ; 149 U. S. 1 ; the real question in such a case is the exist-

ence of the liability; *id.*; 2 Q. B. 680; it is a question of construction, whether the language of the contract is to be treated as not applying to a situation which renders its literal performance impossible; Harr. Cont. 176. A contract to perform a notorious impossibility known to the parties to be such at the time of making the contract is void; 15 M. & W. 253; L. R. 6 Q. B. 124; L. R. 5 C. P. 577; if the impossibility has arisen after the making of the contract, although without any fault of the covenantor, he is not discharged from liability under it; 160 U. S. 514; an impossibility is no defence if occasioned by the act of a stranger; 2 Ld. Raym. 1164; 2 El. & Bl. 688; or of alien enemies; Aleyn 26. Where, in an action of breach of promise of marriage, a plea that consummation had become impossible by reason of bodily disease endangering the life of the defendant was held by four judges to three in the Exchequer chamber to be no defence, the court of the queen's bench having been equally divided; El. Bl. & El. 748, 29 L. J. Q. B. 45; but of this case it is said that "it is so much against the tendency of the latter cases that it is of little or no authority beyond the point actually decided;" Wald, Poll. Cont. 378; and in an American case upon analogous facts the court approved the criticism upon the English case and refused to follow it. The cases upon this subject are necessarily of infinite variety, as is natural where the question is so largely one of construction. To examine them in detail would be impossible within the scope of this title, but they will be found collected and classified in the various works on contracts. See Wald, Pol. Cont. ch. vii.; 3 Add. Cont. 8th Am. ed. 1196; Leake, ch. iii. sec. iii.; Harr. Cont. ch. v. sec. 2; 16 Cent. L. J. 105; Keener, Quasi-Cont. ch. iv. sec. iii.; CONTRACT; UNLAWFUL AGREEMENT; CONDITION; PERFORMANCE.

IMPOSSIBLE CONTRACT. One which the law will not hold binding upon the parties because of the natural or legal impossibility of the performance by one party of that which is the consideration for the promise of the other. 7 Wait, Act. & D. 124. See IMPOSSIBILITY.

IMPOSTS. Taxes, duties, or impositions. A duty on imported goods or merchandise. Federalist, no. 30; Elliott, Deb. 289; Story, Const. § 949; Cooley, Tax. 3.

The Constitution of the United States gives congress power "to lay and collect taxes, duties, excises, and imposts," and prohibits the states from laying "any imposts or duties on exports or imports" without the consent of congress; U. S. Const. art. 1, § 8, n. 1; art. 1, § 10, n. 2. See Bacon, Abr. *Smuggling;* Davis, Imp.; Co. 2d Inst. 62; Dig. 165, n.; 7 Wall. 433; 9 Rob. (La.) 324.

IMPOTENCE. In Medical Jurisprudence. Inability on the part of the male organ of copulation to perform its proper function. Impotence applies only to disorders affecting the function of the organ of copulation, while *sterility* applies only to lack of fertility in the reproductive elements of either sex. Dennis, System of Surgery.

Impotence may be considered as incurable, curable, accidental, or temporary. Absolute or incurable impotence is that for which there is no known relief, principally originating in some malformation or defect of the genital organs. Its existence or non-existence is not to be determined by mere anatomical appearances, and the mere fact of age alone is never sufficient to imply absence of the procreative power; 2 Withh. & Beck. 396. It may also be the result of infirmity rather than of age or deformity, as the effect of vicious habits; *id.* 398.

Ability to procreate is not the test; it is enough if the parties are able to have sexual intercourse; 18 Kan. 371; 5 Paige 554; 3 Phill. Ecc. 325; and impotency arising after the marriage does not avoid it; 30 L. J. Prob. Mat. & Adm. 73. Unless otherwise by statute, impotence renders a marriage voidable, not void; L. R. 1 Ex. 246; 24 N. J. Eq. 19.

It has been held that, in a divorce case, an examination may be ordered of a defendant alleged to be impotent; 47 Ia. 376–83; 29 Kan. 466, 474. See also 19 Cent. L. J. 144–48 and 2 Bish. M. & D. § 590, and cases cited in both.

Impotence is a statutory ground of divorce in most states, and in some courts it is held that jurisdiction of suits for nullity, is impliedly conferred with jurisdiction in divorce; Tiffany, Pers. & Dom. Rel. 39. See 35 Vt. 365; 33 Md. 401. Where this defect existed at the time of the marriage and was incurable, by the ecclesiastical law and the law of several of the American states, the marriage may be declared void *ab initio;* Comyns, Dig. *Baron and Femme* (C 3); Bacon, Abr. *Marriage, etc.* (E 3); 1 Bla. Com. 440; 1 Beck, Med. Jur. 67; Code, 5. 17. 10; 5 Paige, Ch. 554; 25 N. H. 267; but see Hopk. Ch. 557. Impotency arising from idiocy intervening after the marriage is no ground for divorce in Vermont; 2 Atk. 188; see Merlin, Rep. *impuissance.* But it seems the party naturally impotent cannot allege that fact for the purpose of obtaining a divorce; 3 Phill. Eccl. 147; 1 Eng. Eccl. 184. See 2 Phill. Eccl. 10; 3 *id.* 325; 1 Eng. Eccl. 408; 1 Chitty, Med. Jur. 377; Ryan, Med. Jur. 95–111; Bish. Marr. & D.; 1 Bla. Com. 440; 1 Hagg. 725. See, as to the signs of impotence, 1 Briand, Méd. Leg. c. 2, art. 2, § 2, n. 1; *Dictionnaire des Sciences medicales*, art. *Impuissance;* and generally, Trebuchet, *Jur. de la Méd.* 100; 1 State Tr. 315; 8 *id.* App. no. 1, p. 23; 3 Phill. 147; 1 Hagg. Eccl. 523; Foderé, Méd. Lég. § 237.

IMPOTENTIAM, PROPERTY PROPTER. A qualified property, which may subsist in animals *feræ naturæ*, on account of their inability, as where hawks, herons, or other birds build in a person's trees, or coneys, etc., make their nests or

burrows in a person's land, and have young there, such person has a qualified property in them till they can fly or run away, and then such property expires. 2 Steph. Com. 7th ed. 8.

IMPOUND. To place in a pound goods or cattle distrained or astray. 3 Bla. Com. 12; 126 Mass. 364. Also, to retain in the custody of the law. A suspicious instrument produced at a trial is said to be impounded, when it is ordered by the court to be retained, in case criminal proceedings should be taken.

IMPRESCRIPTIBILITY. The state of being incapable of prescription.

A property which is held in trust is imprescriptible: that is, the trustee cannot acquire a title to it by prescription; nor can the borrower of a thing get a right to it by any lapse of time, unless he claims an adverse right to it during the time required by law.

IMPRESCRIPTIBLE RIGHTS. Such as a person may use or not, at pleasure, since they cannot be lost to him by the claims of another founded on prescription.

IMPRESSION. A case involving a new state of facts or a question yet undetermined and therefore without precedent is usually termed a "case of first impression."

IMPRESSMENT. The arresting and retaining mariners for the king's service. 1 Bla. Com.420; 3 Steph. Com. 594.

It was "the mode formerly resorted to of manning the British navy. The practice had not only the sanction of custom, but the force of law, for many acts of parliament, from the reign of Philip and Mary to that of George III., had been passed to regulate the system of impressment. Impressment consisted in seizing by force, for service in the royal navy, seamen, river-watermen, and at times landsmen, when state emergencies rendered them necessary. An armed party of reliable men, commanded by officers, usually proceeded to such houses in the seaport towns as were supposed to be the resort of the seafaring population, laid violent hands on all eligible men and conveyed them forcibly to the ships of war in the harbor. As it was not in the nature of sailors to yield without a struggle, many terrible fights took place between the press-gangs and their intended victims—combats in which lives were often lost. In point of justice there is little, if anything, to be said for impressment, which had not even the merit of an impartial selection from the whole available population;" Int. Cyc.

IMPREST MONEY. Money paid on enlisting or impressing soldiers or sailors.

In Old English Law. Money given out for a certain purpose to be afterwards accounted for. Money advanced by the crown to be employed for its own purpose in connection with the government, as in the case of secret service money. See Man. Exch. Pr. 17; 13 Eliz. c. 4; 1 Mad. Exch. c. 10, 13, p. 387; 6 Price 424 *a*; and Public Revenues Acts of New Zealand.

IMPRETIABILIS (Lat.). Beyond price; invaluable.

IMPRIMATUR (Lat.). A license or allowance to one to print.

At one time, before a book could be printed in England, it was requisite that a permission should be obtained: that permission was called an *imprimatur*. In some countries where the press is liable to censorship, an *imprimatur* is required.

IMPRIMERE. To press upon; to impress or press; to imprint or print.

IMPRIMERY. In some of the ancient English statutes this word is used to signify a printing office; the art of printing; a print or impression.

IMPRIMIS (Lat.). In the first place. It is commonly used to denote the first clause in an instrument, especially in wills, *item* being used to denote the subsequent clauses. This is also its classical and literal meaning. Ainsworth, Dict. See Fleta, lib. 2, c. 54. *Imprimitus* and *imprimum* also occur. Du Cange; Prec. Ch. 430; Cases *temp.* Talb. 110; 6 Madd. 31; Magna Cart. 9 Hen. III.; 2 Anc. Laws & Inst. of Eng. The use of *imprimis* does not import a precedence of the bequest to which it is prefixed; 59 Me. 325; 1 Rop. Leg. 426.

IMPRISON. To confine; to put in prison; to detain in custody.

IMPRISONMENT. The restraint of a man's liberty.

The restraint of a person contrary to his will. Co. 2d Inst. 589; Bald. 239, 600.

It may be in a place made use of for purposes of imprisonment generally, or in one used only on the particular occasion, or by words and an array of force, without bolts or bars, in any locality whatever; 9 N. H. 491; 7 Humphr. 43; 13 Ark. 43; Webb, Poll. Torts 259; 1 W. Bla. 19; 7 Q. B. 742; but it cannot be applied to the detention of a youth in a reform school; 52 N. W. Rep. (Minn.) 935. A forcible detention in the street, or the touching of a person by a peace-officer by way of arrest, are also imprisonments; Bac. Abr. *Trespass* (D. 3); 1 Esp. 431, 526; 3 Harr. (Del.) 416. See 7 Humphr. 43; 26 How. Pr. 84. It is not necessary to touch the person, but it is enough if he is within the power of the officer and submits; 100 Mass. 79. Forcibly taking a person in an omnibus across a city; 92 Mich. 498; or where a person is constantly guarded by detectives so that he is at no time free to come and go as he pleases, but his movements are at all times subject to the control and direction of those who have him in charge; 36 Fed. Rep. 252; constitute imprisonment. It has been decided that lifting up a person in his chair and carrying him out of the room in which he was sitting with others, and excluding him from the room, was not an imprisonment; 1 Chitty, Pr. 48; and the merely giving charge of a person to a peace-officer, not followed by any actual apprehension of the person, does not amount to an imprisonment, though the party, to avoid it, next day attend at a police court; 3 B. & P. 211; 1 C. & P. 153; and if, in consequence of a message from a sheriff's

officer holding a writ, the defendant execute and send him a bail bond, such submission to the process will not constitute an arrest; 6 B. & C. 528; D. & R. 233. No other warrant is necessary for the detention of a prisoner than a certified copy of the judgment against him; 32 Cal. 48; or of the precept on which the arrest was made; 9 N. H. 185.

It is not error in a judgment in a criminal case, to make one term of imprisonment commence where another terminates; 153 U. S. 308.

See, FALSE IMPRISONMENT; ARREST; INFAMY; FELONY; ACCUMULATIVE SENTENCES; PERSONAL LIBERTY.

IMPRISTI. Followers; partisans; adherents; supporters. Those who take the part of or side with another in attack or defence.

IMPROBATION. In Scotch Law. An act by which falsehood and forgery are proved. Erskine, Inst. 4. 119; Stair, Inst. 4. 20.

The setting aside of deeds or other writings *prima facie* probative, on the ground of falsehood or forgery. Bell, Dict.

Under the Scotch division of action into ordinary and rescissory the latter are further divided into (1) actions of proper improbations; (2) actions of reduction-improbation; (3) action of simple reduction.

Proper improbations are brought for declaring writings false or forged. The proof in this proceeding is either direct by the testimony of the writer and the instrumentory witnesses, or indirect from circumstances or instringent arguments. If one of two instrumentory witnesses supports the writing and the other does not, the writing is nulled; but the user will not be subjected to the payment of falsehood being supported by one witness. Where witnesses test the deed without knowing the grantor and seeing him subscribe, or hearing him own his subscription, the deed is not only improbative but such witnesses are declared accessory to forgery; Ersk. Pr. iv. I. 5, iv. iv. 37.

Reduction-improbation is an action whereby a person who may be hurt or affected by a writing, insists on its production in court in order to have it set aside or its effects ascertained under the certification if the writing, if not produced, shall be declared false and forged. This certification is a fiction of law, introduced that the production of the writing may be effectually forced; and therefore it acts only in the effects of the pursuer; so that the writing, though declared false, continues in full force in all questions with third party; *id.* iv. 1. 5.

In simple reduction the certification is only temporary, the effect though not the form being to declare the writings null until within the period allowed with opening up decrees in absence, or on default they be produced; so that they recover their full force after production, even against the pursuer himself; *id.* iv. 1. 8. The most usual grounds of reduction of writings are, the want of the requisite solemnities; or that the grantor was minor; or interdicted; or inhibited; or, formerly, that he signed the deed on his death-bed; or, both formerly and now, that he was compelled or frightened into it; or was circumvented; or that he granted it in prejudice of his lawful creditors;" *id.* iv. 1. 9.

IMPROPER. Not suitable; unfit; not suited to the character, time, and place. 48 N. H. 196.

IMPROPER FEUD. "Under the title of improper or derivative feuds were comprised all such as do not fall within the other descriptions; such, for instance, as were originally bartered and sold to the feudatory for a price; such as were held upon base or less honorable service, or upon a rent, in lieu of military services; such as were in themselves, alienable, without mutual license; and such as might descend indifferently either to males or females. But, where a difference was not expressed in the creation, such new created feuds did in all respects follow the nature of an original, genuine, and proper feud." 1 Bla. Com. 58. See FEUDUM.

IMPROPER NAVIGATION. The navigation of a ship without due care and skill. It includes anything wrongly done with a ship, or any part of it, in the course of the voyage; L. R. 6 C. P. 563.

IMPROPRIATION. In Ecclesiastical Law. The act of employing the revenues of a church living to one's own use: it is also a parsonage or ecclesiastical living in the hands of a layman, or which descends by inheritance. Techn. Dict.

The transfer to a layman of a benefice to which the cure of souls is annexed with an obligation to provide with a performance of the spiritual duties attached to the benefice is said to be nearly the same as an appropriation. Holth. Before the Reformation the terms were used without a very clear distinction, and appropriations by spiritual persons and incorporation were termed impropriation. Later the use of the latter word was restricted by Spelman and others to appropriation by laymen. Moz. & W.

The distinction is thus clearly stated: The practice of *impropriation* differs from the somewhat similar but more ancient usage of *appropriation*, inasmuch as the latter supposes the revenues of the appropriated benefice to be transferred to ecclesiastical or quasi-ecclesiastical persons or bodies, as to a certain dignitary in a convent, a college, a hospital; while impropriation applies that the temporalities of the benefice are enjoyed by a layman; the name, according to Spelman, being given in consequence of their thus being *improperly* applied, diverted from their legitimate use. The practice of impropriation, and still more that of appropriation, as in the case of monasteries, etc., and other religious houses, prevailed extensively in England before the Reformation; and on the suppression of the monasteries, all such rights were (by 27 Henry VIII. c. 28, and 31 Henry VIII. c. 13) vested in the crown, and were by the crown freely transferred to laymen, to whose heirs have thus descended, not only the right to the tithes, but also in many cases the entire property of rectories. The spiritual duties of such rectories are discharged by a clergyman, who is called a vicar, and who receives a certain portion of the emoluments of the living, generally consisting of a part of the glebe-land of the parsonage, together with what are called the "small tithes" of the parish. Int. Cyc.

The word impropriation is said to be derived from *in proprietatem*, because the living is held as a lay property. Phill. Ecc. L. 275.

An *impropriate* rector was the term applied to a lay rector as opposed to a spiritual rector; and tithes in the hands of a lay owner were called *impropriate* tithes, as those in the hands of a spiritual owner were termed *appropriate* tithes.

See 1 Bla. Com. 384; 2 Steph. Com. 678; Brown, Dict.; APPROPRIATION.

IMPROVE. To cultivate; to reclaim. 4 Cow. 190.

"Improved" land may mean simply land "occupied;" it is not a precise technical word; 8 Allen 213; it includes ground appropriated for a railroad; 68 Pa. 396.

Land on which there are three dwelling-houses, besides suitable farm buildings, which has been farmed for the last twenty years, and from which, in the last eighteen years, there has been received $12,000 in

rents, besides a share of the landlord in the growing crops, is not "unimproved real estate," as that phrase is used in a will; 173 Pa. 320; and the fact that the property was bought by the testator for the purpose of being cut into city lots, and sold as such, does not render it "unimproved" land; *id.*

In Scotch Law. To impeach as false or forged. To improve a lease means to grant a lease of unusual duration, to encourage a tenant, when the soil is exhausted, etc. Bell, Dict.; Stair, Inst. 676.

IMPROVEMENT. An amelioration in the condition of real or personal property effected by the expenditure of labor or money for the purpose of rendering it useful for other purposes than those for which it was originally used, or more useful for the same purposes. It includes repairs or addition to buildings, and the erection of fences, barns, etc.; 70 Pa. 98; 16 How. Pr. 220; 10 So. Rep. (Ala.) 157; 1 Cush. 93; 78 N. Y. 1, 581; or a windmill; 49 Kan. 434.

As between the rightful owner of lands and an occupant who in good faith has put on improvements, the land *with its improvements* belongs to the rightful owner of the land, without compensation for the increased value at common law; 8 Wheat. 1; 1 Dana 481; 3 Ohio St. 463; 4 McLean 489; 5 Johns. 272; 2 Paine 74; 66 Miss. 21; 7 Ind. App. 561; though the rule may be otherwise in equity; 3 Atk. 134; 3 Sneed 228; 1 Yerg. 360; 24 Vt. 560; 2 Johns. Cas. 441; 133 U. S. 553; see 133 *id.* 21; and by statute in some of the states; 10 Cush. 451; 2 N. H. 115; 20 Vt. 614; 13 Ala. N. S. 31; 9 Me. 62; 13 Ohio 308; 9 Ill. 87; 9 Ga. 133; 12 B. Monr. 195; 16 La. 423; 3 Cal. 69; 1 Zabr. 248; 38 Minn. 433; 37 Fed. Rep. 756; and their value may be offset to an action for mesne profits at common law; 2 Wash. C. C. 165; 4 Cow. 168; 4 Dev. N. C. 95; 6 Humphr. 324; 1 Story 478; 2 Greene 151; 3 Ia. 63. See 95 Mich. 619; 153 Pa. 238. A life tenant is not entitled to payment for improvements made by him without the consent of the remaindermen; 127 Pa. 348; 37 Fed. Rep. 756; 40 Minn. 450. In determining the right to recover for improvements placed on land, ordinary repairs necessary for the enjoyment of the object sold cannot be classed as improvements; 41 La. Ann. 6.

As to dower in improvements, see DOWER, and as to improvement in Patent Law, see PATENT.

IMPROVIDENCE. Such want of care and foresight in the management of property as would be likely to render it less valuable and impair the interests of those who may be or become entitled to it. Such is the construction of the word in a statute excluding one found incompetent by reason of improvidence, to perform the duties of an administrator; 1 Barb. Ch. 45. See also 14 N. Y. 449; 4 Redf. 218.

IMPRUAMENTUM. Improvement of land, from *impruare*, to improve it.

IMPUBER (Lat.). **In Civil Law.** One who is more than seven years old, or out of infancy, and who has not attained the age of puberty; that is, if a boy, till he has attained his full age of fourteen years, and if a girl, her full age of twelve years. Domat, *Liv. Prél.* t. 2, s. 2, n. 8.

IMPUNITY. Freedom or safety from punishment. The phrase *impunitive damages* was said to be unintelligible; 36 Tex. 153.

IMPUTATIO. In Civil Law. Legal liability.

IMPUTATION OF PAYMENT. In Civil Law. The application of a payment made by a debtor to his creditor.

The rules covering this subject are thus stated, substantially, in Howe, Studies in the Civil Law, 156:—

1. The *debtor* may apply his payment as he pleases, with the exception that in case of a debt carrying interest it must be first applied to discharging the interest.

2. If the debtor makes no application, the *creditor* may apply the funds by informing the debtor at the time of payment.

3. The *law* imputes in the neglect of the parties to do so, and it will be made by the law in favor of the debtor. It directs that imputation which would have been best for the debtor at the time of payment. Hence it applies the funds to obligations most burdensome to the debtor: *e. g.* to a debt which is not disputed, rather than to one that is; to a debt that is due rather than to one that is not; to one on which the debtor may be arrested, rather than to one on which he cannot; to a debt for which the debtor has given sureties, rather than to one which he owes singly; to a debt for which the debtor is principal obligor, rather than one of which he is merely surety; to a mortgage rather than to an unsecured debt, and to a debt which would render the debtor insolvent if unpaid, rather than to any less important one.

4. Of debts of equal grade, if there be no imputation by the parties, the application will be to that of the longest standing.

5. To debts of the same date, and in other respects equal, the application will be *pro rata*.

6. As to debts bearing interest, the imputation is to interest before principal.

When the creditor is to pay himself out of a fund realized,—for example, from the sale of property pledged,—he should apply the money to the debt secured by the pledge, rather than to some other; to interest before principal; to the debt of the highest rank, rather than to those of lower rank; and if there are several of equal rank then *pro rata*.

Some of these rules have been followed in England and America, some decisions following the exact language of the Roman law. See 1 Sto. Eq. Jur. 13th ed. § 459; but see APPROPRIATION OF PAYMENTS.

In Louisiana the preceding civil law rules are in force. The statutory enactment,

Civ. Code, art. 2159, is a translation of the Code Napoléon, art. 1253–1256, slightly altered. See Pothier, Obl. n. 528, by Evans, and notes. Payment is imputed first to the discharge of interest; 1 Mart. La. N. S. 571; 5 La. Ann. 738. But if the interest was not binding, being usurious, the payment must go to the principal; 2 La. Ann. 363; 5 *id.* 616. The law applies a payment to the most burdensome debt; 10 La. 1, 357; 2 La. Ann. 405, 520. A creditor's receipt is an irrevocable imputation, except in cases of surprise or fraud; 2 La. Ann. 24; 3 *id.* 351, 810. See APPROPRIATION OF PAYMENTS.

IMPUTED NEGLIGENCE. See NEGLIGENCE.

IN. A preposition which is used in real estate law to designate title, seisin, or possession, or when one is said to be "in by lease of his lessor." It may be as an abbreviation of invested or intitled, or of in possession.

IN ACTION. A thing is said to be *in action* when it is not in possession, and for its recovery, the possessor unwilling, an action is necessary. 2 Bla. Com. 396. See CHOSE IN ACTION.

IN ADVERSUM. Where a decree is obtained against one who resists, it is termed "a decree not by consent but *in adversum*. 3 Sto. 318.

IN ÆQUA MANU. In equal hand. Fleta, l. 3, c. 14, § 2.

IN ÆQUALI JURE (Lat.). In equal right. See MAXIMS.

IN ÆQUALI MANU. In equal hand; held indifferently between two parties. Where an instrument was deposited by the parties to it, in the hands of a third person, to hold it under certain conditions or stipulations it was said to be held *in æquali manu*. Reg. Orig. 28.

IN ALIENO SOLO. On another's land. 2 Steph. Com. 20.

IN ALIO LOCO. See CEPIT IN ALIO LOCO.

IN AMITY. The fact that an Indian tribe which committed depredations was carrying on hostilities only to resist the opening of a military road does not permit its being considered a tribe "in amity" with the United States within the meaning of the act of congress of March 3, 1891, concerning a claim for Indian depredations; 161 U. S. 291.

IN APERTA LUCE. In open daylight; in the day-time. 9 Co. 65 *b*.

IN APICIBUS JURIS. Among the subtleties or extreme doctrines of the law. 1 Kames, Eq. 190.

IN ARBITRIUM JUDICIS. At the pleasure of the judge.

IN ARCTA ET SALVA CUSTODIA. In close and safe custody. 3 Bla. Com. 415.

IN ARTICULO. In a moment; immediately. C.1, 34, 2.

IN ARTICULO MORTIS. At the point of death.

IN AUTRE, or AUTER, DROIT (L. Fr.). In another's right. As representing another. An executor, administrator, or trustee sues *in autre droit*.

Where two estates come to one person, so that if in the same right they would merge, if one of them be *in autre droit*, there will be no merger. 2 Bla. Com. 177, but see Sharsw. note 17.

IN BANCO. In banc (*q. v.*).

IN BLANK. Without restriction. Applied to indorsements on promissory notes where no indorsee is named. See INDORSEMENT.

IN BONIS. Among the goods, or property; in actual possession. Inst. 4, 2, 2. *In bonis defuncti*, among the goods of the deceased.

IN CAMERA. A case is said to be heard *in camera* when the doors of the court are closed and only persons concerned in the case are admitted. This is done when the facts are such as to make a private hearing expedient, as in some divorce cases. The term belongs rather to the English law of practice in which the power to grant private hearings in certain cases is established, though there has been a difference of opinion as to its exact limitations.

It was said by Lord Eldon that it was the uniform practice in chancery, as long as the court had existed, in the case of family disputes, on the application of counsel on both sides, to hear the same in the chancellor's private room, and that what was so done was not the act of the judge but of the parties; Coop. *t.* Eldon 106; in a later case, on application for a private hearing relating to the custody of a young lady who was a ward of the court, Lord Brougham directed the case to be heard in private on the assurance of counsel that such course was proper, notwithstanding that one party withheld his consent; 2 Russ. & M. 688; and it is noted that this course was frequently followed by the same judge; *id.* In a patent case, the court being of opinion that the patent was valid, permitted the defendant to state his secret process *in camera;* 24 Ch. D. 156; an application for an injunction to restrain a solicitor from disclosing confidential information was ordered to be heard in private without consent of defendant, upon the statement of plaintiff's counsel that in his opinion a public hearing would defeat the object of the action; 31 Ch. D. 55; 9 Ch. App. 522; but this will not be done without consent of both parties unless it is clear that such would be the result of a public hearing; *id.* Jessell, M. R., considered that a private hearing was not within the power of the court, even by consent, except in cases affecting lunatics, or wards

of court, or where the object of the action would be otherwise defeated, or in those cases where the practice of the old ecclesiastical courts is continued; 4 Ch. D. 173. It has been held that, following that practice, suits for nullity of marriage or judicial separation may be heard *in camera*, but not a petition for dissolution of marriage; L. R. 1 P. & D. 640; this case was put upon the ground that the matter was controlled, to that result, by 20 & 21 Vict. c. 85, § 22; but in a later case there was a distinct disapproval of the limitation, and it was said that as the ecclesiastical courts had the power to hear nullity suits in private when it was desirable for the sake of public decency, the same power must exist in other cases where it was required for the same reason; 1 L. R. 3 P. & M. 230. It is also held that under the present English practice, a law court has power to try a case *in camera*, without a jury, when the parties consent; 53 J. P. 822.

The term *in camera* is not used in American law, but the constitutional provision in most of the state constitutions and in the sixth amendment of the federal constitution, securing the right of a person accused to a speedy and public trial, gives rise to a question of constitutional law entirely different from the question of practice under English law. As to this subject, see OPEN COURT. A hearing *in camera* also differs from one at chambers (*q. v.*); the former being a private hearing by a court and the latter a hearing by a judge not in a regular session of court.

IN CAPITA (Lat.). To or by the heads or polls. Thus, where persons succeed to estates *in capita*, they take each an equal share; so, where a challenge to a jury is *in capita*, it is to the polls, or to the jurors individually, as opposed to a challenge to the array. 3 Bla. Com. 361. *Per capita* is more commonly used in the former instance.

IN CAPITE (Lat.). In chief. A tenant *in capite* was one who held directly of the crown, 2 Bla. Com. 60, whether by knight's service or socage. Chal. R. P. 5. But tenure *in capite* was of two kinds, general and special; the first from the king (*caput regni*), the second from a lord (*caput feudi*). A holding of an honor in the king's lands, but not immediately of him, was yet a holding *in capite;* Kitch. 127; Dy. 44; Fitzh. N. B. 5. Abolished by 12 Car. II. c. 24.

IN CASU PROVISO. In a (or the) case provided. *In tali casu editum et provisum*, in such case made and provided. Touch. Pl. 164, 165.

IN CAUSA. In the cause, as distinguished from *in initialibus* (*q. v.*), a term in Scotch practice. 1 Brown, Ch. 252.

IN CHIEF. Principal; primary; directly obtained. A term applied to the evidence obtained from a witness upon his examination in court by the party producing him, in relation to the matter in issue at the trial. The examination so conducted for this purpose.

Evidence or examination *in chief* is to be distinguished from evidence given on *cross*-examination and from evidence given upon the *voir dire.*

Evidence *in chief* should be confined to such matters as the pleadings and the opening warrant; and a departure from this rule will be sometimes highly inconvenient, if not fatal. Suppose, for example, that two assaults have been committed, one in January and the other in February, and the plaintiff prove his cause of action to have been the assault in January; he cannot abandon that, and afterwards prove another committed in February, unless the pleadings and openings extend to both; 1 Campb. 473. See, also, 6 C. & P. 73; 1 Mood. & R. 282.

This matter, however, is one of practice; and a great variety of rules exist in the different states of the United States, the leading object, however, being in all cases the same,—to prevent the plaintiff from introducing in evidence a different case from the one which he had prepared the defendant to expect from the pleadings.

IN COMMENDAM (Lat.). The state or condition of a church living which is void or vacant, and which is commended to the care of some one. In Louisiana, there is a species of limited partnership called partnership *in commendam.* See COMMENDAM.

IN COMMUNI. In common. Fleta, lib. 3, c. 4, § 2.

IN CONSIDERATIONE EJUS. In his sight or view. 12 Mod. 95.

IN CONSIDERATIONE INDE. In consideration thereof. 3 Salk. 64, pl. 5.

IN CONSIDERATIONE LEGIS. In consideration or contemplation of law; in abeyance. Dyer 102 *b.*

IN CONSIDERATIONE PRÆMISSORUM. In consideration of the premises. 1 Strange 535.

IN CONTINENTI. Immediately; without any interval or intermission. Dig. 44, 5, 1. Sometimes written in one word, "*incontinenti.*"

IN CORPORE. In body or substance; in a material thing or object.

IN CRASTINO. On the morrow. *In crastino Animarum*, on the morrow of All Souls. 1 Bla. Com. 342.

IN CUJUS REI TESTIMONIUM. In testimony whereof; *q. v.*

IN CUSTODIA LEGIS (Lat.). In the custody of the law. In general, when things are *in custodia legis*, they cannot be distrained, nor otherwise interfered with by a private person, or by another officer acting under authority of a different court or jurisdiction; 10 Pet. 400; 20 How. 583,

and cases cited; 75 Md. 445. See CUSTODIA LEGIS.

IN DELICTO. In fault. See IN PARI DELICTO.

IN DIEM. For a day; for the space of a day. Calv. Lex.

IN DOMINICO. In demesne. *In dominico suo ut de feodo*, in his demesne as of fee.

IN DORSO. On the back, from which come indorse, indorsement. 2 Bla. Com. 468. *In dorso recordi*, on the back of the record. 5 Co. 45.

IN DUBIO. In doubt; either in a condition of uncertainty, or in a doubtful case.

IN DUPLO. In double. *Damna in duplo*, double damages. Fleta, 4. 10. 1.

IN EADEM CAUSA. In the same state or condition. Calv. Lex.

IN EMULATIONEM VICINI. In hatred or envy of a neighbor. Where an act is done or action brought, solely to hurt or distress another, it is said to be *in emulationem vicini*. 1 Kames, Eq. 56.

IN EQUITY. In a court of chancery in contra-distinction to a court of law; within the contemplation or purview of equity jurisprudence; according to the doctrine of equity.

IN ESSE (Lat.). In being. In existence. An event which may happen is *in posse;* when it has happened, it is *in esse*. The term is often used of liens or estates. A child in its mother's womb is, for some purposes, regarded as *in esse;* 3 Barb. Ch. 488.

IN EVIDENCE. The proofs in a cause which have been offered and admitted are said to be in evidence.

IN EXCAMBIA. In exchange. The technical and formal words in an old deed of exchange.

IN EXECUTION AND PURSUANCE OF. Words used to express the fact that the instrument is intended to carry into effect some other instrument, as in case of a deed in execution of a power. They are said to be synonymous with "to effect the object of;" 7 Biss. 129.

IN EXITU. In issue. *De materia in exitu*, of the matter in issue. 12 Mod. 372.

IN EXTENSO. Fully; at length; a copy of a document made *verbatim*.

IN EXTREMIS (Lat.). At the very end. In the last moments; on the point of death.

IN FACIE CURIÆ. In the face of the court. Dyer 28.

IN FACIE ECCLESIÆ (Lat.). In the face or presence of the church. A marriage is said to be made *in facie ecclesiæ* when made in a consecrated church or chapel, or by a clerk in orders elsewhere; and one of these two things is necessary to a marriage in England in order to the wife's having dower, unless there be a dispensation or license; 1 Bish. Mar. Div. & Sep. 404, 405. But see 6 & 7 Will. IV. c. 85; 1 Vict. c. 22; 3 & 4 Vict. c. 72. It was anciently the practice to marry at the church-door, and there make a verbal assignment of dower. These verbal assignments, to prevent fraud, were necessarily held valid only when made *in facie et ad ostium ecclesiæ*. See 2 Bla. Com. 103; Taylor, Gloss.

IN FACIENDO (Lat.). In doing. Story, Eq. Jur. § 1308.

IN FACT. Words used in pleading to introduce an amount of fact,—as "the said plaintiff (or defendant) further in fact saith,"—indicating that what follows is a statement of acts of parties as distinguished from a legal conclusion or intendment. The latter in equity pleading, when it may frequently be proper, after a statement of the facts on which the conclusion rests, begins,—"and the defendant is advised that, etc." When pleadings were in Latin the words *in facto* were used, thus *in facto dicit*, he, in fact, says. See 1 Salk. 22 Pl. 1.

IN FAVOREM LIBERTATIS (Lat.). In favor of liberty.

IN FAVOREM VITÆ (Lat.). In favor of life.

IN FEODO. In fee. Bract. f. 207; Fleta, l. 2, c. 64, § 15. *Seisitus in feodo*, seised in fee. *Id.* 8. 7. 1.

IN FIERI (Lat.). In process of completion. A thing is said to rest *in fieri* when it is not yet complete: *e. g.* the records of a court were anciently held to be *in fieri*, or incomplete, till they were recorded on parchment, but now till the giving of judgment, after which they can be amended only during the same term. 2 B. & Ad. 791; 3 Bla. Com. 407. It is also used of contracts.

IN FINE (Lat. At the end). A term used with a citation to denote that it is at the end of the section, chapter, book, law, or paragraph.

IN FORMA PAUPERIS (Lat.). In the character or form of a poor man.

When a person is so poor that he cannot bear the charges of suing at law or in equity, upon making oath that he is not worth five pounds, and bringing a certificate from a counsellor at law that he believes him to have a just cause, he is permitted to sue *in forma pauperis*, in the manner of a pauper; that is, he is allowed to have original writs and subpœnas gratis, and counsel assigned him without fee; 3 Bla. Com. 400. See 3 Johns. Ch. 65; 1 Paige, Ch. 588; 3 *id.* 273; 5 *id.* 58; 2 Moll. 475.

IN FORO. In the forum (*q. v.*; before the tribunal or court.

IN FORO CONSCIENTIÆ (Lat.). Before the tribunal of conscience; conscientiously. The term is applied to moral

obligations as distinct from the obligations which the law enforces. In the sale of property, for example, the concealment of facts by the vendee which may enhance the price is wrong *in foro conscientiæ*, but there is no legal obligation on the part of the vendee to disclose them, and the contract will be good if not vitiated by fraud; Pothier, Vent. part 2, c. 2, n. 233; 2 Wheat. 185, note *v.*

IN FORO CONTENTIOSO. In the tribunal or forum of litigation.

IN FORO ECCLESIASTICO. In an ecclesiastical forum, tribunal, or court. Fleta, l. 2, c. 57, § 14. Early in the reign of Henry III., the Episcopal constitutions were published, forbidding all ecclesiastics to appear as advocates *in foro sæculari*, nor did they long continue to act as judges there, not caring to take the oath of office which was found necessary. 1 Bla. Com. 20.

IN FORO SÆCULARI. In a secular court. See last title; 1 Bla. Com. 20; Fleta 2. 57. 14.

IN FRAUDEM CREDITORUM (Lat.). In fraud of creditors or with an intent to defraud them. Inst. 1. 6. 3.

IN FRAUDEM LEGIS (Lat.). In fraud of the law; contrary to law. Taylor, Gloss. Using process of law for a fraudulent purpose. If a person gets an affidavit of service of declaration in ejectment, and thereupon gets judgment and turns the tenant out, when he has no manner of title in a house, he is liable as a felon, for he used the process of law *in fraudem legis;* 1 Ld. Raym. 276; Sid. 254.

An act done *in fraudem legis* cannot give a right of action in the courts of the country whose laws are evaded; 1 Johns. 433.

IN FULL. Complete, or without abbreviation, *e. g.* a copy of a paper. Of the entire amount due, as used in a receipt for money.

IN FULL LIFE. Neither physically nor civilly dead. The term life alone has also been taken in the same sense, as including natural and civil life: *e. g.* a lease made to a person *during life* is determined by a civil death, but if *during natural life* it would be otherwise. 2 Co. 48. It is a translation of the French phrase *en plein vie.* Law Fr. & L. Lat. Dict.

IN FUTURO. At a future time. The alternative expressions are *in præsenti* and *in esse.* 2 Bla. Com. 166, 175.

IN GENERALI PASSAGIO (L. Lat.). In the general passage; *passagium* being a journey, or, more properly, a voyage, and especially when used alone or with the adjectives *magnum, generale,* etc.,—the journey to Jerusalem of a crusader, especially of a king. 36 Hen. III.; 3 Prynne, Collect. 767; Du Cange.

In generali passagio was an excuse for non-appearance in a suit, which put off the hearing *sine die;* but *in simplici peregrinatione* or *passagio—i. e.* being absent on a private pilgrimage to the Holy Land—put off the hearing for a shorter time. Bracton 338.

IN GENERE (Lat.). In kind; of the same kind. Things which when bailed may be restored *in genere,* as distinguished from those which must be returned *in specie,* or specifically, are called *fungibles.* Kaufman's Mackeldey. Civ. Law § 148, note.

Heineccius, Elem. Jur. Civ. § 619, defines *genus* as what the philosophers call *species,* viz.: a kind. See Dig. 12. 1. 2. 1. See LOAN FOR CONSUMPTION.

IN GREMIO LEGIS (Lat.). In the bosom of the law. This is a figurative expression, by which is meant that the subject is under the protection of the law: as, where the title to land is in abeyance. See GREMIUM; IN NUBIBUS; ABEYANCE.

IN GROSS. At large; not appurtenant or appendant, but annexed to a man's person: *e. g.* common granted to a man and his heirs by deed is common in gross; or common in gross may be claimed by prescriptive right. 2 Bla. Com. 34. See EASEMENT.

IN HAC PARTE. In this behalf; on this part or side.

IN HAEC VERBA. In these words.

IN HOC. In this.

IN IISDEM TERMINIS. In the same terms. 9 East 487.

IN INDIVIDUO. In the distinct individual, specific, or identical form. Sto. Bailm. § 97.

IN INFINITUM. Indefinitely; imports to infinity.

IN INITIALIBUS (Lat.). **In Scotch Law.** In the preliminaries. Before a witness is examined as to the cause in which he is to testify, he must deny bearing malice or ill-will, being instructed what to say, or having been bribed, and these matters are called *initialia testimonii,* and the examination on them is said to be *in initialibus:* it is similar to our *voir dire.* Bell, Dict. *Initialia Testimonii;* Erskine, Inst. p. 451; Halkerston, Tech. Terms.

IN INITIO. At the beginning; in the beginning, as *in initio legis,* at the outset of the suit. Bract. f. 400.

IN INTEGRUM (Lat.). The original condition. See RESTITUTIO IN INTEGRUM. Vicat, Voc. Jur. *integer.*

IN INVITUM (Lat.). Unwillingly. Taylor, Gloss. Against an unwilling party (or one who has not given his consent); by operation of law. Wharton, Dict.

IN IPSIS FAUCIBUS. In the very throat. A vessel just entering a port is said to be *in ipsis faucibus portæ.*

IN ITINERE (Lat.). On a journey; on the way. Justices *in itinere* were justices

in eyre, who went on circuit through the kingdom for the purpose of hearing causes. 3 Bla. Com. 351; Spelman, Gloss. *In itinere* is used in the law of lien, and is there equivalent to *in transitu;* that is, not yet delivered to vendee.

IN JUDGMENT. In a court of justice.

A case is said to be in judgment when it has proceeded so far as that the successful party is entitled to judgment.

In a judgment seat; Lord Hale was characterized "one of the greatest and best men who ever sat in judgment." 1 East 306.

IN JUDICIO (Lat.). In or by a judicial proceeding; in court. *In judicio non creditur nisi juratis,* in judicial proceedings no one is believed unless on oath. Cro. Car. 64. See Bracton, fol. 98 *b*, 106, 287 *b*.

In Civil Law. The proceedings before a prætor, from the bringing the action till issue joined, were said to be *in jure;* but after issue joined, when the cause came before the *judex,* the proceedings were said to be *in judicio.* See JUDEX.

IN JURE (Lat. in law). **In Civil Law.** A phrase which denotes the proceedings in a cause before the prætor, up to the time when it is laid before a *judex;* that is, till issue joined (*litis contestatio*); also, the proceedings in causes tried throughout by the prætor (*cognitiones extraordinariæ*). Vicat, Voc. Jur. *Jus.*

In English Law. In law; rightfully; in right. *In jure, non remota causa, sed proxima, spectatur.*

IN JURE ALTERIUS. In another's right. Hale, Anal. § 26.

IN JURE PROPRIO. In one's right. Hale, Anal. § 26.

IN JUS VOCARE. To call, cite, or summon to court. Inst. 4, 16, 3; Calv. Lex. *In jus vocando,* summoning to court. 3 Bla. Com. 279.

IN KIND. Of the same class, description, or kind of property, as a deposit, mandate, or loan which is said to be returnable in kind where the terms and character of the transaction do not require the return of the identical money, security, or thing, but only its equivalent in amount or kind. See IN GENERE; LOAN FOR CONSUMPTION.

IN LAW. In contemplation of law; implied by law; subsisting by force of law. See IN FACT.

IN LECTO MORTALI. On a deathbed. Fleta, 5, 28, 12.

IN LIMINE (Lat.). In or at the beginning. This phrase is frequently used: as, the courts are anxious to check crimes *in limine.*

IN LITEM (Lat.). For a suit; to the suit. Greenl. Ev. § 348.

IN LOCO. In place; in lieu; instead; in the place or stead. Townsh. Pl. 38.

IN LOCO PARENTIS (Lat.). In the place of a parent: as, the master stands towards his apprentice *in loco parentis.* See APPRENTICESHIP; GUARDIAN.

IN MAJOREM CAUTELAM. For greater security. 1 Stra. 105.

IN MALAM PARTEM. In a bad sense; so as to wear an evil appearance.

IN MEDIAS RES (Lat.). In the middle of things; into the heart of the subject, without preface or introduction.

IN MEDIO. Intermediate.

In Scotch Law. A term denoting a fund in controversy in an action of double or multiple-poinding, which is a species of interpleader resorted to by a debtor distressed or threatened by two or more persons claiming the debt. While the subject in controversy continues *in medio,* any third person who conceives he has right to it may, though he should not be cited as a defender, produce his titles as if he were an original party to the suit, and he will be admitted for his interest in the competition. Ersk. Pr. 4, 1, 30.

IN MERCY. To be in mercy is to be at the discretion of the king, lord, or judge in punishing any offence not directly censured by the law. Thus, to be in the *grievous mercy* of the king is to be in hazard of a great penalty; 11 Hen. VI. c. 6. So, where the plaintiff failed in his suit, he and his pledges were in the mercy of the lord, *pro falso clamore suo.* This is retained nominally on the record; 3 Bla. Com. 376. So the defendant is in mercy if he fail in his defence; *id.* 398. See MERCY.

IN MISERICORDIA (Lat. in mercy). The entry on the record where a party was in mercy was, *Ideo in misericordia,* etc. The phrase was used because the punishment in such cases ought to be moderate. See Magna Cart. c. 14; Bracton, lib. 4, tr. 5, c. 6. Sometimes *misericordia* means the being quit of all amercements (*q. v.*)

IN MITIORI SENSU (Lat. in a milder acceptation).

A phrase denoting a rule of construction formerly adopted in slander suits, the object of which was to construe phrases, if possible, so that they would not support an action. Ingenuity was continually exercised to devise or discover a meaning which by some remote possibility the speaker might have intended; and some ludicrous examples of this ingenuity may be found. To say of a man who was making his livelihood by buying and selling merchandise, "He is a base, broken rascal; he has broken twice, and I'll make him break a third time," was gravely asserted not to be actionable,—"ne poet dar porter action, car poet estre intend de *burstness de belly.*" Latch 114. And to call a man a thief was declared to be no slander, for this reason: "perhaps the speaker might mean he had stolen a lady's heart."

The rule now is to construe words agreeably to the meaning usually attached to them. It was long, however, before this rule, rational as it is, and supported by every legal analogy, prevailed in actions for words, and before the favorite doctrine of construing words in their mildest sense, in direct opposition to the finding of the jury, was finally aban-

doned by the courts. "For some inscrutable reason," said Gibson, J., "the earlier English judges discouraged the action of slander by all sorts of evasions, such as the doctrine of *mitiori sensu*, and by requiring the slanderous charge to have been uttered with the technical precision of an indictment. But, as this discouragement of the remedy by process of law was found inversely to encourage the remedy by battery, it has been gradually falling into disrepute, inasmuch that the precedents in Croke's Reports are beginning to be considered apocryphal." 20 Pa. 132; 7 S. & R. 451; 1 N. & M'C. 217; 2 *id.* 511; 8 Mass. 248; 1 Wash. Va. 152; 1 Kirb. 12; Heard, Lib. & Sl. § 162.

IN MODUM ASSISÆ. In the manner or form of an assize. Bract. fol. 183 *b*. *In modum juratæ*, in manner of a jury. *Id.* fol. 181 *b*.

IN MORA (Lat.). In delay; in default. In the civil law a borrower *in mora* is one who fails to return the thing borrowed at the proper time; Sto. Bailm. § 254. In Scotch law a creditor is *in mora* who has failed in respect to the diligence required in levying an attachment on the property of the debtor. Bell, Dict.

IN MORTUA MANU (Lat. in a dead hand). Property owned by religious societies was said to be held *in mortua manu*, or in mortmain, since religious men were *civiliter mortui*. 1 Bla. Com. 479; Taylor, Gloss.

IN NOMINE DEI, AMEN. In the name of God, Amen. A phrase, anciently used in wills and many other instruments, the translation of which is often used in wills at the present day, but chiefly by ignorant draughtsmen or testators.

IN NOTIS. In the notes.

IN NUBIBUS (Lat.). In the clouds; in abeyance; in custody of law. *In nubibus, in mare, in terra vel, in custodia legis:* in the air, sea, or earth, or in the custody of the law. Taylor, Gloss. In case of abeyance, the inheritance is figuratively said to rest *in nubibus*, or *in gremio legis: e. g.* in case of a grant of life estate to A, and afterwards to heirs of Richard, Richard in this case, being alive, has no heirs until his death, and, consequently, the inheritance is considered as resting *in nubibus*, or in the clouds, till the death of A, when the contingent remainder either vests or is lost and the inheritance goes over. See 2 Sharsw. Bla. Com. 107, n.; 1 Co. 137; ABEYANCE.

IN NULLIUS BONIS. Among the goods or property of no person; belonging to no person, as treasure-trove and wreck were anciently considered.

IN NULLO EST ERRATUM (Lat.). **In Pleading.** A plea to errors assigned on proceedings in error, by which the defendant in error affirms there is no error in the record. As to the effect of such plea, see 1 Ventr. 252; 1 Stra. 684; 9 Mass. 532; 1 Burr. 410; T. Raym. 231. It is a general rule that the plea *in nullo est erratum* confesses the fact assigned for error; Yelv. 57; Dane, Abr. Index; but not a matter assigned contrary to the record; 7 Wend. 55; Bacon, Abr. *Error* (G).

IN ODIUM SPOLIATORIS (Lat.). In hatred of a despoiler. All things are presumed against a despoiler or wrongdoer: *in odium spoliatoris omnia præsumuntur.* See MAXIMS.

If a man wrongfully opened a bundle of papers, sealed and left in his hands, so that he may have altered them or abstracted some, all presumptions will be taken against him in settling an account depending on the papers; 3 Macq. Sc. App. 766; the same rule is applied if one withhold evidence bearing on the case; 1 Stark. 35; 18 Jur. 703; or an agreement with which he is charged; 9 Cl. and Fin. 775. See at large 1 Sm. L. Cas. 9th Am. ed. 638–9; Br. Leg. Max. 8th Am. ed. 938; SPOLIATION.

IN OMNIBUS. In all things; on all points. "A case parallel *in omnibus;*" 10 Mod. 104. A modern phrase to the same effect is "on all fours" (*q. v.*).

IN PACATO SOLO. In a country which is at peace.

IN PACE DEI ET REGIS. In the peace of God and the king. Fleta 1, c. 31, § 6. Formal words in old appeals of murder.

IN PAIS. This phrase, as applied to a legal transaction, primarily means that it has taken place without legal formalities or proceedings. Thus a widow was said to make a request *in pais* for her dower when she simply applied to the heir without issuing a writ; Co. Litt. 32 *b*. So conveyances are divided into those by matter of record and those by matter *in pais*. In some cases, however, "matters *in pais*" are opposed not only to "matters of record," but also to "matters in writing," *i. e.* deeds, as where estoppel by deed is distinguished from estoppel by matter *in pais; id.* 352 *a;* 4 Kent 260.

IN PAPER. **In English Practice.** A term used of a record until its final enrolment on the parchment record. 3 Bla. Com. 406; 10 Mod. 88; 2 Lilly, Abr. 322; 4 Geo. II.

IN PARI CAUSA (Lat.). In an equal cause. It is a rule that when two persons have equal rights in relation to a particular thing, the party in possession is considered as having the better right: *in pari causa possessor potior est.* Dig. 50, 17, 128; 1 Bouvier, Inst. n. 952. See MAXIMS; PRESUMPTION.

IN PARI DELICTO (Lat.). In equal fault; equal in guilt. Neither courts of law nor of equity will interpose to grant relief to the parties, when an illegal agreement has been made and both parties stand *in pari delicto*. The law leaves them where it finds them, according to the maxim, *in pari delicto potior est conditio defendentis* (or, *possidentis*). 15 Kan. 157. See MAXIMS; DELICTUM.

IN PARI MATERIA (Lat.) Upon the same matter or subject. Statutes *in pari materia* are to be construed together; 7 Conn. 456.

IN PATIENDO. In suffering, permitting, or allowing.

IN PECTORE JUDICIS. In the breast of the judge. Latch 180. A term applied to a judgment.

IN PEJOREM PARTEM. In the worst part; on the worst side. Latch 159.

IN PERPETUAM REI MEMORIAM (Lat.). For the perpetual memory or remembrance of a thing. Gilbert, For. Rom. 118.

IN PERPETUUM REI TESTIMONIUM. In perpetual testimony of a matter; for the purpose of declaring and settling a thing forever. 1 Bla. Com. 86.

IN PERSON. A party, plaintiff or defendant, who sues out a writ or other process, or appears to conduct his case in court himself, instead of through a solicitor or counsel, is said to act and appear in person. Any suitor, but one suing *in forma pauperis*, may do this.

IN PERSONAM (Lat.). A remedy where the proceedings are against the person, in contradistinction to those which are against specific things, or *in rem* (*q. v.*).

IN PIOS USUS. For pious uses; for religious purposes. 2 Bla. Com. 505.

IN PLENO COMITATU. In full county court. 3 Bla. Com. 36.

IN PLENO LUMINE. In public; in common knowledge; in the light of day.

IN PLENO VITA. In full life. Yearb. P. 18 Hen. VI. 2.

IN POSSE (Lat.). In possibility; not in actual existence: used in contradistinction to *in esse*.

IN POTESTATE PARENTIS. In the power of a parent. Inst. 1, 8, pr.; *id.* 1, 9; 2 Bla. Com. 498.

IN PRÆMISSORUM FIDEM. In confirmation or attestation of the premises. A notarial phrase.

IN PRÆSENTI (Lat.). At the present time: used in opposition to *in futuro*. A marriage contracted *per verba de præsenti* is good: as, I take Paul to be my husband, is a good marriage; but words *de futuro* would not be sufficient, unless the ceremony was followed by consummation. 4 La. Ann. 347; 6 Binn. 405.

IN PRENDER (L. Fr.). In taking. Such incorporeal hereditaments as a party entitled to them was to take for himself were said to be *in prender*. Such was a right of common. 2 Steph. Com. 15.

IN PRIMIS. In the foremost place. A term used in argument. Usually written *imprimis* (*q. v.*).

IN PRINCIPIO (Lat.). At the beginning. This is frequently used in citations: as, Bacon, Abr. *Legacies, in pr.*

IN PROMPTU. In readiness; at hand. Usually written *impromptu*.

IN PROPRIA PERSONA (Lat.). In his own person; himself: as, the defendant appeared *in propria persona;* the plaintiff argued the cause *in propria persona*. Sometimes abbreviated on the printed court lists, P. P.

IN RE (Lat.). In the matter: as, *in re* A B, in the matter of A B. In the headings of legal reports these words are used more especially to designate proceedings in bankruptcy or insolvency, or the winding up of estates or companies.

IN REBUS (Lat.). In things, cases, or matters.

IN REM (Lat.). A technical term used to designate proceedings or actions instituted *against the thing*, in contradistinction to personal actions, which are said to be *in personam*.

Proceedings *in rem* include not only those instituted to obtain decrees or judgments against property as forfeited in the admiralty or the English exchequer, or as prize, but also suits against property to enforce a lien or privilege in the admiralty courts, and suits to obtain the sentence, judgment, or decree of other courts upon the personal *status* or relations of the party, such as marriage, divorce, bastardy, settlement, or the like. 1 Greenl. Ev. §§ 625, 541; 2 Bish. Mar. Div. & Sep. 14, 24.

Courts of admiralty enforce the performance of a contract, when its performance is secured by a maritime lien or privilege, by seizing into their custody the very subject of hypothecation. In these suits, generally, the parties are not personally bound, and the proceedings are confined to the thing *in specie;* Brown, Civ. & Adm. Law 98. See Bened. Ad. 270, 362; 2 Gall. 200; 3 Term 269.

There are cases, however, where the remedy is either *in personam* or *in rem*. Seamen, for example, may proceed against the ship or freight for their wages, and this is the most expeditious mode; or they may proceed against the master or owners; 4 Burr. 1944; 2 Bro. Civ. & Adm. Law, 396. See, generally, 1 Phill. Ev. 254; 1 Stark. Ev. 228; Dane, Abr.; Serg. Const. Law 202, 212; Pars. Marit. Law; Bened. Adm. 503. No action *in rem* lies for damages incurred by loss of life; 145 U. S. 335. A contract for launching a vessel carried some distance up the beach by a storm, is a maritime contract, for which the vessel is liable *in rem;* 48 Fed. Rep. 569. See ADMIRALTY; BOTTOMRY; LIEN.

IN RENDER. A thing in a manor is said to lie *in render* when it must be rendered or given by the tenant, *e. g.* rent; to lie *in prender*, when it may be taken by the lord or his officer when it chance. West, Symbol. pt. 2, *Fines*, § 126.

IN RERUM NATURA (Lat.). In the nature (or order) of things; in existence. Not *in rerum natura* is a dilatory plea, importing that the plaintiff is a fictitious person.

In Civil Law. A broader term than *in rebus humanis: e. g.* before quickening, an infant is *in rerum natura*, but not *in rebus humanis;* after quickening, he is *in rebus humanis* as well as *in rerum natura*. Calvinus, Lex.

IN SCRINIO JUDICIS. In the writing-case of the judge; among the judge's papers. "That is a thing that rests *in scrinio judicis*, and does not appear in the body of the decree." Hardr. 51.

IN SEPARALI. In several; in severalty. Fleta 2, c. 54, 20.

IN SIMILI MATERIA. Dealing with the same or a kindred subject-matter.

IN SIMPLICI PEREGRINATIONE. In simple pilgrimage. Bract. fol. 338. A phrase in the old law of essoins. See IN GENERALI PASSAGIO.

IN SOLIDUM, IN SOLIDO (Lat.). **In Civil Law.** For the whole; as a whole. An obligation or contract is said to be *in solido* or *in solidum* when each is liable for the whole, but so that a payment by one is payment for all: *i. e.* it is a joint and several contract. 1 W. Bla. 388.

Possession is said to be *in solidum* when it is exclusive. "*Duo in solidum precario habere non magis possunt, quam duo in solidum vi possidere aut clam; nam neque justæ neque injustæ possessiones duæ concurrere possunt.*" Savigny, lib. 3, § 11. The phrase is commonly used in Louisiana.

IN SOLO. In the soil or ground. *In solo alieno*, in another ground. *In solo proprio*, in one's ground. 2 Steph. Com. 20.

IN SPECIE (Lat.). In the same form: *e. g.* a ship is said to no longer exist *in specie* when she no longer exists *as a ship*, but as a mere *congeries* of planks. 8 B. & C. 561; Arnould, Ins. 1012. To decree a thing *in specie* is to decree the performance of that thing *specifically*.

IN STATU QUO (Lat.). In the same situation as; in the same condition as.

IN STIRPES. In the law of descent, according to roots or stocks; by representation as distinguished from succession *per capita*. More commonly written *per stirpes* (*q. v.*).

IN TANTUM. In so much; so much; so far; so greatly. Reg. Orig. 97, 106.

IN TERMINIS TERMINANTIBUS. In terms of determination; exactly in point. 11 Co. 40 *b*. In express or determinate terms. 1 Leon. 93.

IN TERROREM (Lat.). By way of threat, terror, or warning. For example, when a legacy is given to a person upon condition not to dispute the validity or the dispositions in wills and testaments, the conditions are not, in general, obligatory, but only *in terrorem:* if, therefore, there exist *probabilis causa litiganda*, the non-observance of the conditions will not be a forfeiture. 1 Hill, Abr. 253; 3 P. Wms. 344; 1 Atk. 404. But when the acquiescence of the legatee appears to be a material ingredient in the gift, the bequest is only *quousque* the legatee shall refrain from disturbing the will; 2 P. Wms. 52; 2 Ventr. 352. See DURESS.

IN TERROREM POPULI (Lat. to the terror of the people).

A technical phrase necessary in indictments for riots. 4 C. & P. 373.

Lord Holt has given a distinction between those indictments in which the words *in terrorem populi* are essential, and those wherein they may be omitted. He says that, in indictments for that species of riots which consists in going about armed, etc., without committing any act, the words are necessary, because the offence consists in terrifying the public; but in those riots in which an unlawful act is *committed*, the words are useless; 11 Mod. 116; 10 Mass. 518.

IN TESTIMONIUM. In witness or in evidence whereof. The first words of the attestation clause of certain legal instruments.

IN TOTIDEM VERBIS (Lat.). In just so many words: as, the legislature has declared this to be a crime *in totidem verbis*.

IN TOTO (Lat.). In the whole; wholly; completely: as, the award is void *in toto*. In the whole the part is contained; *in toto et pars continetur*. Dig. 50. 17. 123.

IN TRAJECTU. In the passage over; on the voyage over. 3 C. Rob. Adm. 338.

IN TRANSITU (Lat.). During the transit, or removal from one place to another. See STOPPAGE IN TRANSITU.

IN VACUO (Lat. in what is empty). Without concomitants or coherence. Wharton.

IN VADIO (Lat.). In pledge; in gage.

IN VENTRE SA MERE (L. F.). In his mother's womb. It is written indifferently in this form, or *en ventre sa mere* (*q. v.*).

See POSTHUMOUS CHILD; CURTESY; DOWER; INFANT; INJUNCTION.

IN VINCULIS. In chains; in actual custody. Gilb. For. Rom. 97.

Applied also, figuratively, to the condition of a person who is compelled to submit to terms which oppression and his necessities impose on him; 1 Story, Eq. Jur. § 302.

IN VIRIDI OBSERVANTIA. Present to the minds of men, and in full force and operation.

IN WITNESS WHEREOF. These words, which, when conveyancing was in the Latin language, were *in cujus rei testimonium*, are the initial words of the concluding clause in deeds: "In witness whereof the said parties have hereunto set their hands," etc.

INADEQUATE PRICE. A term applied to indicate the want of a sufficient consideration for a thing sold, or such a price as, under ordinary circumstances, would be considered insufficient.

Inadequacy of price is generally connected with fraud, gross misrepresentations, or an intentional concealment of defects in the thing sold. In these cases it is clear that the vendor cannot compel the buyer to fulfil the contract; 1 Bro. P. C. 187; L. R. 12 Eq. 320; 6 Johns. 110; 3 Cra. 270; 6 Yerg. 508; 11 Vt. 315; 1 Metc. Mass. 93; 20 Me. 462; 1 Brown, Ch. 440.

In general, however, inadequacy of price is not sufficient ground to avoid an executed contract, particularly when the property has been sold by auction; 7 Ves. 30, 35, n.; 3 Bro. Ch. 228; 104 Mass. 420; if there is no fraud and the parties deal at arm's length, upon their independent judgment, it will be held good; 19 Ala. 765; 102 Mass. 60; 75 Mo. 681; 31 Fed. Rep. 369. But if an uncertain consideration, as a life annuity, be given for an estate, and the contract be executory, equity, it seems, will enter into the adequacy of the consideration; 7 Bro. P. C. 184; 1 Bro. Ch. 156. See Sugd. Vend. 189; 1 B. & B. 165; 1 M'Cord, Ch. 383; 4 Des. Ch. 651; 97 Mass. 180. And if the price be so grossly inadequate and given under such circumstances as to afford a necessary presumption of fraud or imposition, a court of equity will grant relief; 6 Ga. 515; 49 Miss. 582; 8 B. Monr. 11; 2 Harr. & G. 114; 11 N. H. 9; 1 Metc. Mass. 93; 3 McLean 332; 19 How. 303; 58 Ill. 191; 110 *id.* 390; 20 Fla. 157; 71 Iowa 428; 50 Me. 438; 113 U. S. 89; Story, Eq. Jur. § 244; Leake, Contr. 1150. As to cases of sales of their interests by heirs and reversioners for inadequate price, see CATCHING BARGAIN; EXPECTANCY; See CONSIDERATION; POST OBIT; MACEDONIAN DECREE; JUDICIAL SALE.

INADMISSIBLE. What cannot be received. Parol evidence, for example, is ordinarily inadmissible to contradict a written agreement.

IN ÆDIFICATIO (Lat.). **In Civil Law.** Building on another's land with one's own materials, or on one's own land with another's materials. L. 7, §§ 10, 18, D. *de Acquis. Rer Domin.;* Heineccius, Elem. Jur. Civ. § 363. The word is especially used of a private person's building so as to encroach upon the public land. Calvinus, Lex. The right of possession of the materials yields to the right to what is on the soil. *Id.* See ACCRETION.

INALIENABLE. A word denoting the condition of those things the property in which cannot be lawfully transferred from one person to another. Public highways and rivers are inalienable. There are also many rights which are inalienable, as the rights of liberty or of speech.

INAUGURATION. A word applied by the Romans to the ceremony of dedicating a temple, or raising a man to the priesthood, after the *augurs* had been consulted.

It was afterwards applied to the *installation* of emperors, kings, and prelates, in imitation of the ceremonies of the Romans when they entered the temple of the augurs. It is applied in the United States to the installation of the chief magistrate of the republic, and of the governors of the several states.

INBLAURA. Profit or product of the ground. Cowel.

INBORH. A security, pledge, or hypotheca, consisting of the chattels of a person unable to obtain a personal "borg" or surety.

INCAPACITY. The want of a quality legally to do, give, transmit, or receive something.

In general, the incapacity ceases with the cause which produces it. If the idiot should obtain his senses, or the married woman's husband die, their incapacity would be at an end. See LIMITATIONS, STATUTE OF.

INCASTELLARE. To make a building serve the purpose of a castle. Jacob.

INCAUSTUNO or ENCAUSTUNO. Ink. Fleta, l. 2, c. 27, § 5.

INCENDIARY (Lat. *incendium*, a kindling). One who maliciously and wilfully sets another person's building on fire; one guilty of the crime of arson. See ARSON; BURNING.

INCEPTION. The commencement; the beginning. In making a will, for example, the writing is its inception. 3 Co. 31 *b*; Plowd. 343.

INCERTÆ PERSONÆ. Uncertain persons as posthumous heirs, a corporation, the poor, a juristic person, or persons who cannot be ascertained until after the execution of a will. Sohm. Inst. Rom. L. 104, 458.

INCEST. The carnal copulation of a man and a woman related to each other in any of the degrees within which marriage is prohibited by law. 1 Bish. Marr. & D. 112, 376, 442. It involves the assent of both parties; 39 Mich. 124; but it is held that it may exist as to the man although without the consent of the woman; 53 N. W. Rep. (Ia.) 1090; 99 Cal. 359. It is punished by fine and imprisonment, under the laws of most, if not all, of the states, but seems not at common law to be an indictable offence; 4 Bla. Com. 64; 78 N. C. 469. See 31 Tex. Cr. R. 186.

Preparations for an attempted incestuous marriage have been held not indictable; 14

Cal. 159. A man indicted for rape may be convicted of incest; 2 Met. 193; 1 Bish. Cr. Proc. § 419. See Dane, Abr. Index; 6 Conn. 446; 11 Ga. 53; 1 Park. Cr. 344. See 20 Or. 437. And as to whether the crime is rape or incest may be left to the jury; 96 Mich. 449. Proof of one commission of the offence is sufficient for conviction; 13 S. W. Rep. (Ky.) 360.

INCESTUOSI. Those offspring incestuously begotten. Mack. Rom. L. § 143.

INCH (Lat. *uncia*). A measure of length, containing one-twelfth part of a foot; originally supposed equal to three grains of barley laid end to end.

INCHOATE. That which is not yet completed or finished. Contracts are considered inchoate until they are executed by all the parties. During the husband's life, a wife has an inchoate right of dower; 2 Bla. Com. 130; so with the right of an unborn child to take by descent; 2 Paige, Ch. 35; and a covenant which purports to be tripartite, and is executed by only two of the parties, is incomplete, and no one is bound by it; 2 Halst. 142. See LOCUS PŒNITENTIÆ.

INCIDENT. This term is used both substantively and adjectively of a thing which, either usually or naturally and inseparably depends upon, appertains to, or follows another that is more worthy. For example, rent is usually incident to a reversion. 1 Hill. R. P. 243; while the right of alienation is necessarily incident to a fee-simple at common law, and cannot be separated by a grant; 1 Washb. R. P. 54. So a court baron is inseparably incident to a manor, in England; Kitch. 36; Co. Litt. 151. All nominate contracts and all estates known to common law have certain incidents which they draw with them and which it is not necessary to reserve in words. So the costs incurred in a legal proceeding are said to be incidental thereto. See Jacob, Law Dict.

INCIPITUR (Lat.). **In Practice.** This word, which means "it is begun," signifies the commencement of the entry on the roll on signing judgment, etc. The custom is no longer necessary in England, and was unknown here. But see 3 Steph. Com. 566, n.

INCLOSURE. The extinction of common rights in fields and waste lands. 1 Steph. Com. 655.

The separation and appropriation of land by means of a fence, hedge, etc., together with such fence or hedge. 36 Wis. 44; 34 *id.* 672; 39 Vt. 331; 63 Ind. 530; 8 Hun 269; where, in a will, the executors were directed to inclose with an iron fence meeting-house grounds, schoolhouse grounds, and burial ground, it was held that the intention was clear to inclose each of the grounds on all sides; 112 Pa. 52.

A paper or letter inclosed with another in an envelope.

INCLOSURE ACTS. English statutes regulating the subject of inclosure. The most notable was that of 1801, 41 Geo. III. c. 109.

INCLOSURE COMMISSION ACT, 1845. The statute 8 and 9 Vict. c. 118, establishing a board of commissioners for England and Wales and empowering them, on the application of persons interested to the amount of one-third of the value of the land, and provided the consent of persons interested to the amount of two-thirds of the land and of the lord of the manor (in case the land be waste of a manor) be ultimately obtained, to inquire into the case and to report to parliament as to the expediency of making the inclosure. 1 Steph. Com. 655.

INCLUDE (Lat. *in claudere* to shut in, keep within). In a legacy of "one hundred dollars including money trusteed" at a bank, it was held that the word "including" extended only to a gift of one hundred dollars; 132 Mass. 218; but in a bequest of a sum of money inclusive of a note of the legatee, it was held that the note was included in the legacy; 154 Pa. 340. In a contract to furnish a street paving machine, exclusive of patterns which were to be furnished by defendant, such patterns were found to be defective and incomplete, and on a second bid, where plaintiff agreed for increased cost to build the machine "including revised patterns and drawings," these words where held not to change the contract so as to require the plaintiffs to furnish a machine that would "work satisfactorily, as a machine," but that it only required the parts designed and constructed by them to be suitable for the intended purpose and all the machinery and workmanship to be good; 160 Pa. 317.

INCLUSIVE. Comprehended in computation. In computing time, as ten days from a particular time, the last day is generally to be included and the first excluded. See EXCLUSIVE; TIME; 154 Pa. 340, as to its use in a legacy.

INCOME. The gain which proceeds from property, labor, or business; it is applied particularly to individuals. The income of the state or government is usually called revenue. The word is sometimes considered synonymous with "profits," the gain as between receipts and payments; 4 Hill 23; "rent, and profits," "income," and "net income" of the estate are equivalent expressions; 5 Me. 203; it may mean "money" or the expectation of receiving money; 14 Blatch. 71; 15 Wall 63; and a note is ground for expecting income, and in the sense of a statute taxing incomes the amount thereof is to be returned when paid; *id.* 1. See 14 La. Ann. 815; 30 Barb. 637; 16 Fed. Rep. 14. In the ordinary commercial sense "income" especially when connected with the word "rent," may mean clear or net income. "Produce" or "product" as a substituted word may relieve a will from obscurity; 100 Pa.

481; 44 *id.* 347. In a gift of the income, etc., of shares of stock, it is not synonymous with increase, and while it will include dividends from the stock, will not embrace the sum by which the stock has increased; 62 Conn. 62. As to when dividends are to be considered as income, see 31 A. & E. Corp. Cas. 386, n; 136 Pa. 43; DIVIDEND.

It has been held that a devise of the income of land is in effect the same as a devise of the land itself; 9 Mass. 372; 80 N. Y. 320; 92 Pa. 254; s. c. 2 Am. Prob. Rep. 196; 72 Me. 109; and a gift of the income of a fund is a gift of the fund; 1 Johns. Ch. 494; 32 N. J. Eq. 591; and the income of property is a gift of the property; 53 Conn. 259; 105 Pa. 441; 2 Rop. Leg. 371.

INCOME TAX. See TAX.

INCOMMUNICATION. In Spanish Law. The condition of a prisoner who is not permitted to see or to speak with any person visiting him during his confinement.

A person accused cannot be subjected to this treatment unless it be expressly ordered by the judge, for some grave offence, and it cannot be continued for a longer period than is absolutely necessary. Art. 7. Reglamento de 26 Setiembre, 1835. This precaution is resorted to for the purpose of preventing the accused from knowing beforehand the testimony of the witnesses, or from attempting to corrupt them and concert such measures as will efface the traces of his guilt. As soon, therefore, as the danger of his doing so has ceased, the interdiction ceases likewise. Escriche.

INCOMPATIBILITY. Incapability of existing or being exercised together.

Thus the relations of landlord and of tenant cannot exist in one man at the same time in reference to the same land. Two offices may be incompatible either from their nature or by statutory provisions. See U. S. Const. art. 6, § 3, n. 5, art. 1, § 6, n. 2; 4 S. & R. 277; 17 *id.* 219; 46 How. Pr. 170; 9 S. C. 179; OFFICE.

Incompatibility is ordinarily not a ground for divorce; 12 La. Ann. 882; 6 Am. L. Reg. o. s. 740; 4 Greene 324; though in some states it is. See DIVORCE.

INCOMPETENCY. Lack of ability or fitness to discharge the required duty.

At Common Law. Judges and jurors are said to be incompetent from having an interest in the subject-matter. A judge is also incompetent to give judgment in a matter not within his jurisdiction. See JURISDICTION. With regard to the incompetency of a judge from interest, it is a maxim in the common law that no one should be a judge in his own cause (*aliquis non debet esse judex in propria causa*); Co. Litt. 141 *a*. See 4 Com. Dig. 6; 43 La. Ann. 924; 31 Fla. 594. The greatest delicacy is constantly observed on the part of judges, so that they never act when there is the possibility of doubt whether they can be free from bias; and even a distant degree of relationship has induced a judge to decline to sit; 1 Knapp 376. Where one has acted as counsel, he cannot, subsequently, sit in judgment on the matter in which he has given his advice; 30 Fla. 595; 31 Tex. Cr. R. 449; 111 Mo. 526. The slightest degree of pecuniary interest is considered an insuperable objection. But at common law interest forms the only ground for challenging a judge. It is not a ground of challenge that he has given his opinion before; 2 Binn. 454. See 4 Mod. 226; 13 Mass. 340; Coxe 190; 3 Ohio 289; 3 Cow. 725; 12 Conn. 88; 1 Penning. N. J. 185; 4 Yeates 466; 4 Tex. Civ. App. 648; 69 Tex. 300; 88 Ga. 151; Salk. 396; Bac. Abr. *Courts* (B). In New York it is held that a conviction of larceny, when one of the members of the trial court is related to the prisoner within the sixth degree, is void; 142 N. Y. 130. See JUDGE; JURY; COMPETENCY; INTEREST.

In Evidence. A witness may be at common law incompetent on account of a want of understanding, a defect of religious belief, a conviction of certain crimes, infamy of character, or interest; 1 Phill. Ev. 15. The last ground of incompetency is removed to a considerable degree in most states; and the second is greatly limited in modern practice. See WITNESS.

In French Law. Inability or insufficiency of a judge to try a cause brought before him, proceeding from lack of jurisdiction.

INCONCLUSIVE. Not finally decisive. Inconclusive presumptions are capable of being overcome by opposing proof.

INCONSULTO. In the Civil Law. Unadvisedly; unintentionally. Dig. 28, 4, 1.

INCONTINENCE. Impudicity; indulgence in unlawful carnal connection.

INCORPORATED. See INCORPORATION.

INCORPORATED LAW SOCIETY. A society of attorneys and solicitors whose function it is to carry out the acts of parliament and orders of court with reference to articled clerks; to keep an alphabetical roll of attorneys and solicitors; to issue certificates to persons duly admitted and enrolled, and to exercise a general control over the conduct of solicitors in practice, and to bring cases of misconduct before the judges. 3 Steph. Com. 217.

INCORPORATION. The act of creating a corporation; that which is incorporated. A legal or political body formed by the union of individuals under certain conditions, rules, and laws, and having certain privileges and partial or perpetual succession.

In Civil Law. The union of one domain to another.

INCORPORATION BY REFERENCE. The bringing into one document in legal effect, of the contents of another by referring to the latter in such manner as to adopt it.

INCORPOREAL CHATTELS. The incorporeal rights or interests growing out of personal property, such as copyrights and patent rights, stocks and personal annuities. 2 Sandf. 552, 559; 2 Steph. Com. 9.

INCORPOREAL HEREDITAMENT. Anything, the subject of property, which is inheritable and not tangible or visible. 2 Woodd. Lect. 4. A right issuing out of a thing corporate (whether real or personal) or concerning or annexed to or exercisable within the same. 2 Bla. Com. 20; 80 Wis. 222; 1 Washb. R. P. 10; Chal. R. P. 47; 18 Colo. 298.

Their existence is merely in idea and abstract contemplation, though their effects and profits may be frequently the object of the bodily senses; Co. Litt. 9 *a*; Pothier, *Traité des Choses* § 2. According to Blackstone, there are ten kinds of incorporeal hereditaments: viz. advowsons, tithes, commons, ways, offices, dignities, franchises, corodies, annuities, and rents. 2 Bla. Com. 20. In the United States there are no advowsons, tithes, dignities, nor corodies, commons are rare, offices rare or unknown, and annuities have no necessary connection with land. 3 Kent 402, 454. And there are other incorporeal hereditaments not included in this list, as remainders and reversions dependent on a particular estate of freehold, easements of light, air, etc., and equities of redemption; 1 Washb. R. P. *11.

Incorporeal hereditaments were said *to be in grant;* corporeal, *in livery:* since a simple deed or grant would pass the former, of which livery was impossible, while livery was necessary to a transfer of the latter. But this distinction is now done away with, even in England. See 8 & 9 Vict. c. 106, § 2; 1 Washb. R. P. 10; Will. R. P. 279, 364, 370; 13 Mass. 483.

INCORPOREAL PROPERTY. In Civil Law. That which consists in legal right merely. The same as choses in action at common law.

INCORRIGIBLE. Incapable of being corrected, amended, or improved.

Under the statute 17 Geo. II. c. 5, incorrigible rogues were subjected to two years' imprisonment in the house of correction, and for escaping from confinement therein were made felons and liable to transportation for seven years. A similar breach and escape by a vagabond or rogue constituted him an incorrigible rogue; 4 Bla. Com. 169.

INCORRUPTIBLE. That which cannot be affected by immoral or debasing influences, such as bribery or the hope of gain or advancement.

INCREASE. That which grows out of land or is produced by the cultivation of it. 23 Tex. 27. As to increase of risk in an insurance policy, see RISKS AND PERILS.

INCREASE, COSTS OF. See COSTS DE INCREMENTO; ACCRETION; INCOME; PROFIT.

INCULPATE. To accuse of crime; to impute guilt to; to bring or expose to blame; to censure. Webster.

INCUMBENT. In Ecclesiastical Law. A clerk resident on his benefice with cure: he is so called because he does, or ought to, *bend* the whole of his studies to his duties. In common parlance, it signifies one who is in possession of an office: as, the present incumbent. One does not become the incumbent of an office, until legally authorized to discharge its duties, by receiving his commission and taking the official oath; 11 Ohio St. 46.

INCUMBRANCE. Any right to, or interest in, land which may subsist in third persons, to the diminution of the value of the estate of the tenant, but consistently with the passing of the fee. 2 Greenl. Ev. § 242; 4 Mass. 629; 113 N. Y. 81.

A public highway; 2 Mass. 97; 3 N. H. 335; 10 Conn. 431; 12 La. Ann. 541; 27 Vt. 739; 13 So. Rep. (Ala.) 545; 47 Ill. App. 278 (but see 46 Pa. 232; 16 Ind. 142; 22 Wis. 628; 87 Ala. 220; 58 N. W. Rep. (Ia.) 1081); a private right of way; 15 Pick. 68; 5 Conn. 497; an easement which is open, visible, and well known; 113 N. Y. 81; a claim of dower; 4 Mass. 630; 23 Ala. N. S. 616; though inchoate only; 2 Me. 22; 22 Pick. 447; 3 N. J. 260; an outstanding mortgage; 5 Me. 94; 30 *id.* 392; 133 U. S. 610; (other than one which the covenantee is bound to pay; 2 N. H. 458; 12 Mass. 304; 11 S. & R. 109; 4 Halst. 139; see 88 Mich. 94; 63 Vt. 53); a liability under the tax laws; 30 Vt. 655; 5 Ohio St. 271; 5 Wis. 407; see 148 Mass. 102; (but no tax or assessment can exist so as to be an incumbrance, until the amount is ascertained or determined; 113 N. Y. 644); an attachment resting upon land; 43 Conn. 129; 116 Mass. 392; a condition, the non-performance of which by the grantee may work a forfeiture of the estate; 4 Metc. Mass. 412; a paramount title; 3 Cush. 309; restriction as to the kind of building which may be erected on land; 75 Hun 70; a mechanic's lien; 51 Wis. 293; have been held incumbrances within the meaning of the covenant against incumbrances, contained in conveyances; Warv. Vend. 994. The term does not include a condition on which an estate is held; 3 Gray 515; 6 *id.* 572.

The vendor of real estate is bound in England to disclose incumbrances, and to deliver to the purchaser the instruments by which they were created or on which the defects arise; and the neglect of this is to be considered fraud; Sudg. Vend. 6; 1 Ves. Sen. 96. See 6 Ves. 193; 10 *id.* 470; 1 Sch. & L. 227; 7 S. & R. 73.

The interest on incumbrances is to be kept down by the tenant for life; 1 Washb. R. P. 95, 257, 573; 5 Johns. Ch. 482; 5 Ohio 28; to the extent of rents accruing; 31 E. L. & Eq. 345; Tudor, Lead. Cas. 60; and for any sum paid beyond that he becomes a creditor of the estate; 2 Atk. 463; 1 Bail. Eq. 397.

When the whole incumbrance is removed by a single payment, the share of the tenant for life is the present worth of an annuity for the life of the tenant equal to the annual amount of the interest which he would be obliged to pay; 1 Washb. R. P. 96, 573. The rule applies to estates held in dower; 10 Mass. 315, n.; 10 Paige, Ch. 71, 158; 3 Md. Ch. Dec. 324; 7 H. & J. 367; in curtesy; 1 Washb. R. P. 142; in tail only in special cases; 1 Washb. R. P. 80; Tudor, Lead. Cas. 613; 3 P. Wms. 229. See COVENANT AGAINST INCUMBRANCES.

INCUR. To have liabilities cast upon one by act or operation of law, as distinguished from contract, where the party acts affirmatively. 15 How. Pr. 56.

INDEBITATUS ASSUMPSIT (Lat.). **In Pleading.** That species of action of assumpsit in which the plaintiff alleges, in his declaration, first a debt, and then a promise in consideration of the debt to pay the amount to the plaintiff.

It is so called from the words in which the promise is laid in the Latin form, translated in the modern form, *being indebted he promised.* The promise so laid is generally an implied one only. See 1 Chitty, Pl. 334; Steph. Pl. 318; 4 Co. 92 *b*. This form of action is brought to recover in damages the amount of the debt or demand; upon the trial the jury will, according to evidence, give verdict for whole or part of that sum; 3 Bla. Com. 155; Selw. N. P. 68.

Indebitatus assumpsit is in this distinguished from *debt* and *covenant*, which proceed directly for the debt, damages being given only for the detention of the debt. Debt lies on contracts by specialty as well as by parol, while *indebitatus assumpsit* lies only on parol contracts, whether express or implied; Bro. Act. at Law 317.

For the history of this form of action, see 3 Reeve, Hist. Com. Law; 2 Comyns, Contr. 549; 1 H. Bla. 550; 3 Bla. Com. 154; Yelv. 70; Papers by J. B. Ames, 2 Harv. L. Rev. 1, 53, 377. See ASSUMPSIT.

INDEBITI SOLUTIO (Lat.). **In Civil Law.** The payment to one of what is not due to him. If the payment was made by mistake, the civilians recovered it back by an action called *condictio indebiti*; with us, such money may be recovered by an action of *assumpsit.*

INDEBTEDNESS. The state of being in debt, without regard to the ability or inability of the party to pay the same. See 1 Story, Eq. Jur. 343; 2 Hill, Abr. 421.

But in order to create an indebtedness there must be an actual liability at the time, either to pay then or at a future time. If, for example, a person were to enter and become surety for another, who enters into a rule of reference, he does not thereby become a debtor to the opposite party until the rendition of the judgment on the award; 1 Mass. 134. As to indebtedness of a municipality, see MUNICIPAL CORPORATIONS.

INDECENCY. An act against good behavior and a just delicacy. 2 S. & R. 91.

The law, in general, will repress indecency as being contrary to good morals; but, when the public good requires it, the mere indecency of disclosures does not suffice to exclude them from being given in evidence; Tayl. Ev. 816.

The following are examples of indecency: the exposure by a man of his naked person on a balcony, to public view, or bathing in public; 2 Campb. 89; 3 Day 103; 1 D. & B. 208; 18 Vt. 574; 5 Barb. 203; see 46 N. J. L. 16; or in the house of another in the presence of a young girl; 128 Mass. 52; or the exhibition of bawdy pictures; 2 Chitty, Cr. Law 42; 2 S. & R. 91. This indecency is punishable by indictment. See 1 Kebl. 620; 2 Yerg. 482, 589; 1 Mass. 8; 1 Russ. Cr. 302; 4 Bla. Com. 65, n.; Burn, Just. *Lewdness.* And an ordinance making such exposure an offence without reference to the intent which accompanies the act, is a valid exercise of police power; 93 Mich. 135.

INDECENT ASSAULT. See ASSAULT.

INDECENT EXHIBITION. Any exhibition *contra bonos mores*, as the taking a dead body for the purpose of dissection or public exhibition. 2 T. R. 734.

INDECENT EXPOSURE. See EXPOSURE OF PERSON.

INDECENT LIBERTIES. See ASSAULT.

INDECENT PUBLICATIONS. Statutes forbidding the keeping, exhibiting, or sale of indecent books or pictures, and providing for their destruction, if seized, are within the police power of a state, and are constitutional. Cooley, Const. Lim. 748. See OBSCENITY; MAIL.

INDECIMABLE. Not tithable.

INDEFEASIBLE. That which cannot be defeated or undone. This epithet is usually applied to an estate or right which cannot be defeated.

INDEFENSUS (Lat.). One sued or impleaded who refuses or has nothing to answer.

INDEFINITE FAILURE OF ISSUE. See FAILURE OF ISSUE.

INDEFINITE NUMBER. A number which may be increased or diminished at pleasure.

When a corporation is composed of an indefinite number of persons, any number of them consisting of a majority of those present may do any act, unless it be otherwise regulated by the charter or by-laws.

INDEFINITE PAYMENT. That which a debtor who owes several debts to a creditor makes without making an appropriation: in that case the creditor has a right to make such appropriation.

INDEMNIFY. To secure or save harmless against loss or damage, of a speci-

fied character, which may happen in the future.

To compensate or reimburse one for a loss previously incurred; L. R. 14 Eq. 479. See 14 Minn. 467.

To indemnify is said to be synonymous with "to save harmless." 1 Root 292.

Indemnification is the act of indemnifying or making good a loss. *Indemnificatus*, indemnified. *Indemnis* (formerly *indempnis*), without damage; harmless. *Indemnitor*, one who enters into a contract of indemnity for the benefit of another; *indemnitee*, one who is to be benefited by such a contract.

INDEMNITY. That which is given to a person to prevent his suffering damage. 2 M'Cord 279.

It is a rule established in all just governments that when private property is required for public use, indemnity shall be given by the public to the owner. This is the case in the United States. See EMINENT DOMAIN.

Contracts made for the purpose of indemnifying a person for doing an act for which he could be indicted, or an agreement to compensate a public officer for doing an act which is forbidden by law, or for omitting to do one which the law commands, are absolutely void. But when the agreement with an officer was not to induce him to neglect his duty, but to test a legal right, as to indemnify him for not executing a writ of execution, it was held to be good; 1 Bouvier, Inst. n. 780.

In general, a mere promise of indemnity to a third person is not within the statute of frauds; [1894] 2 Q. B. 885, aff. 8 B. & C. 728; 19 L. R. Eq. 198; 8 T. L. R. 668; 30 S. W. Rep. (Ky.) 406; 145 N. Y. 446; 62 N. W. Rep. (Mich.) 1000; and this rule applies to a promise to indemnify the surety on a liquor-dealer's bond; 64 Conn. 264; to a contract of agency, by which the agent agrees to be responsible for the non-payment of debts which may thereafter become due by others; 69 L. T. N. S. 354; to a promise to indemnify one if he will indorse K.'s notes, so that K. can have them discounted; 145 N. Y. 446; and to a verbal promise of A to B to indemnify him if he will become surety for C for a debt of the latter to D; 41 Neb. 516. But it is held in Illinois, that a guarantee of indemnity to a surety is within the statute; 45 Ill. App. 155; 41 N. E. Rep. (Ill.) 164; aff. 49 Ill. App. 509. See GUARANTY; SURETYSHIP; INSURANCE.

INDEMNITY LANDS. Those lands which are, by the grant in aid of a railroad, allowed to be selected in lieu of parcels lost by previous disposition or reservation for other purposes, and the title to which accrues only from the time of their selection. 117 U. S. 232; 133 *id.* 513.

Title to indemnity lands does not vest in a railroad company until they are actually selected and the selection approved by the secretary of the interior; 141 U. S. 358.

INDENT (Lat. *in*, and *dens*, tooth). To cut in the shape of teeth.

Deeds of *indenture* were anciently written on the same parchment or paper as many times as there were parties to the instrument, the word *chirographum* being written between, and then the several copies cut apart in a *zigzag or notched line* (whence the name), part of the word *chirographum* being on either side of it; and each party kept a copy. The practice now is to cut the top or side of the deed in a waving or notched line; 2 Bla. Com. 295.

To bind by indentures; to apprentice: as, to indent a young man to a shoemaker. Webster, Dict.

In American Law. An indented certificate issued by the government of the United States at the close of the revolution for the principal or interest of the public debt. Ramsay, Hamilton, Webster; Eliot, Funding System 35; 5 McLean 178; Acts of April 30, 1790, sess. 2, c. 9, § 14, and of March 3, 1825, sess. 2, c. 65, § 17. The word is no longer in use in this sense.

INDENTURE. A formal written instrument made between two or more persons in different interests, as opposed to a deed poll, which is one made by a single person, or by several having similar interests.

Its name comes from a practice of *indenting* or scalloping such an instrument on the top or side in a waving line. This is not necessary in England at the present day, by stat. 8 & 9 Vic. c. 106, § 5, but was in Lord Coke's time, when no words of indenture would supply its place; 5 Co. 20. In this country it is a mere formal act, not necessary to the deed's being an indenture. See Bac. Abr. *Leases, etc.* (E 2); Com. Dig. *Fait* (C, and note *d*); Littleton § 370; Co. Litt. 143 *b*, 229 *a*; Cruise, Dig. t. 32, c. 1, s. 24; 2 Bla. Com. 294; 2 Washb. R. P. 587; 1 Steph. Com. 447; Will. R. P. 177. The ancient practice was to deliver as many copies of an instrument as there were parties to it. And as early as King John it became customary to write the copies on the same parchment, with the word *chirographum*, or some other word written between them, and then to cut them apart through such word, leaving part of each letter on either side the line, which was at first straight, afterwards *indented* or notched; 1 Reeve, Hist. Eng. Law 89; Du Cange; 2 Washb. R. P. 587. See INDENT.

INDENTURE OF A FINE. Indentures made and engrossed at the chirographer's office and delivered to the cognizor and the cognizee, usually beginning with the words: "*Hæc est finalis concordia.*" And then reciting the whole proceedings at length. 2 Bla. Com. 351; Moz. & W.

INDEPENDENCE. A state of perfect irresponsibility to any superior. The United States are free and independent of all earthly power.

Independence may be divided into *political* and *natural* independence. By the former is to be understood that we have

contracted no ties except those which flow from the three great natural rights of safety, liberty, and property. The latter consists in the power of being able to enjoy a permanent well-being, whatever may be the disposition of those from whom we call ourselves independent. In that sense a nation may be independent with regard to most people, but not independent of the whole world. See DECLARATION OF INDEPENDENCE.

Questions as to the power of municipalities to appropriate money for the celebration of the anniversary of the Declaration of Independence have arisen. It has been held that no such power exists; 2 Denio 110; 22 Conn. 522; Allen 103.

INDEPENDENT CONTRACTOR. One who, exercising an independent employment, contracts to do a piece of work according to his own methods, and without being subject to the control of his employer, except as to the result of his work. 88 Tenn. 692.

The term is also defined to denote one who has the right to select, employ, and control the action of the workmen; 40 N. Y. Sup. Ct. Rep. 104; 66 Cal. 509; 80 Ill. App. 185; one who is subject to his employer as to the results of his work only. 7 Lea 367.

A still broader definition has been given as follows:—"Where a person is employed to perform a certain kind of work, in the nature of repairs or improvements to a building, by the owner thereof, which requires the exercise of skill and judgment as a mechanic, the execution of which is left entirely to his discretion, without any restriction as to its exercise, and no limitation as to the authority conferred in respect to the same, and no provision is especially made as to the time in which the work is to be done, or as to the payment for the services rendered, and the compensation is dependent upon the value thereof, such person does not occupy the relation of servant under the control of the master, but is an independent contractor." 101 N. Y. 377.

Any one who follows a recognized independent calling has been held to be an independent contractor; as a slater; 71 Me. 318; an architect; 30 Md. 179; a horse trainer; 11 Bradw. 39; a manufacturer of shingles; 46 Wis. 138; a builder; 11 Bush 464; a licensed public carman; 2 Daly 271; or drayman; 2 Mich. 368; or drover; 12 Ad. & El. 737; a plumber; 6 Phila. 256; and a stevedore; 19 Fed. Rep. 926; 88 Pa. 269; 6 L. R. C. P. 24; 11 Hun 354; 29 La. Ann. 791; and the mode of payment and the fact that materials are furnished by the employer have been held to have but little weight in determining whether the employe is an independent contractor or not; 15 Fed. Rep. 875; 61 Miss. 581. The rule is that where a person is under the entire direction and control of another he is to be considered his servant, no matter who pays him; 6 M. & W. 497; 5 B. & C. 560. The test to determine whether one who renders service to another does so as a contractor or not is to ascertain whether he renders the service in the course of an independent occupation representing the will of his employer only as to the result of his work and not as to the means by which it was accomplished; 101 N. Y. 385.

In cases of an independent contract, the employer is not responsible; 3 Gray 349; 103 Mass. 194; 30 Barb. 229; 5 N. Y. 48; 30 Hun 391; 86 Pa. 153; 103 *id.* 32; 25 Ill. 438; 83 *id.* 354; 88 Ala. 591; 39 Ohio St. 466; 66 Cal. 509; 28 La. Ann. 943; 7 H. & N. 826; 4 Exch. 244; 2 C. P. Div. 369; 57 Vt. 252; 19 Neb. 620; 61 Miss. 581; 11 Wis. 180. In 1 Bos. & P. 404, the rule was laid down that not only was the employer liable for the negligence of a contractor, but for that of a servant of a sub-contractor. This decision was followed in some of the earlier English and American cases, but the weight of authority in both countries has overruled it, the question of its authority having been decisively settled in each country, in what have become leading cases; 4 Exch. 244; 3 Gray 349. But see 6 H. & N. 488, and 2 Black 418, with the criticism of these cases in 87 Va. 711.

A like rule governs the question of the liability of the employer and the contractor for the negligence and torts of the sub-contractor or his servants; 7 H. & N. 826; 11 C. B. 867; 2 C. P. Div. 369; 80 Pa. 102; 64 N. Y. 138.

If he undertakes to provide the material, he is liable for an injury caused by his failure to provide it; 5 Bosw. 447; and generally, he is liable if the contract reserves to him such a power of supervision or control of the work as will destroy the free agency of the contractor, whether the supervision be exercised by himself or by persons designated by him; 92 N. Y. 10; 39 Ohio St. 466; 57 Pa. 374; 111 Pa. 316; 30 Wis. 365; 61 Ill. 431; 7 La. Ann. 321; 9 Col. 554; but not if the power of supervision reserved is not such as to interfere with the discretion of the contractor in the manner of executing the work, but is confined to seeing that the intended result is produced; 41 Ill. 502; 124 Ind. 376. A recent case accurately expresses the exact rule as to supervision to be that the employer, through its chief engineer, may reserve the right to criticise the work but not to control it; 87 Va. 711.

The employer will be held liable if the injurious act complained of was contemplated by the contract; 28 Minn. 156; 46 Wis. 138; 26 Ill. App. 263; if the contract work is necessarily dangerous or harmful; 84 Ala. 469; 41 Ohio St. 465; 19 W. Va. 323; 103 Mo. 172; 3 L. R. H. L. 330; and when work is *per se* dangerous and the employer does not stipulate that the contractor shall use proper precautions to avoid injury to others, the employer is liable; 2 Duv. 137; 6 Daly 469; or when the work contracted for becomes or occasions a public nuisance, unless it be due solely to the negligence of the contractor; 44 Ia. 27; 111 Ind. 195; 116 N. Y. 588; 83 Ill. 354; 111 Pa. 316; 112 Mass. 96; or when the con-

tractor is incompetent; 80 Hun 60; 35 N. J. L. 17; and that the employer was ignorant of such incompetency will not excuse him; *id.;* but see 114 Mo. 55; 4 E. D. Smith 281. But it was held that when the defendants employed a carpenter and bridge builder of experience to build a bridge, it was not enough for the plaintiff to show that the work was unskilfully done; it must appear that the defendants were guilty of negligence in selecting him; that they either knew, or with proper diligence ought to have known, his incompetency; and the law presumes they made a proper selection; hence the burden of showing the contrary rests upon those who assert it; 91 Pa. 185, 191.

After acceptance of the contract work, the employer will be liable for an injury caused by a defect in it: 125 Mass. 232; 15 Minn. 304; 118 Pa. 362; 123 *id.* 220; 92 N. Y. 10; 29 Cal. 243; 51 Tex. 503; 18 Kan. 34; and, if ratified by him, for the tortious acts of the contractor; 102 Mass. 211; 81 Ga. 387.

As to the liability of a municipal corporation it has been held that such a corporation cannot rid itself of responsibility for the acts of an independent contractor; 66 N. Y. 181; as he is acting under the authority of the district or city council, and without such authority, he would be a trespasser on the streets; 74 L. T. Rep. 69; and notwithstanding the nature of the work to be performed, it is the duty of the municipality to see that the streets are in a safe condition for travel; 14 Bush 87; 49 Ga. 316; 53 Md. 110; 41 Barb. 381; 2 Mo. App. 571; 9 Humph. 760; *contra*, 46 Pa. 213; or, as recently held in England, so to construct its sewers as not to injure the gas mains or other underground conveniences, and the municipality was held liable even when there was an independent contractor for the injury caused by an explosion in a private house because of an escape of gas from a main broken by the negligence of the contractor; [1896] 1 Q. B. 335.

And this rule is to be applied even though the contractor has stipulated that he will be responsible for all damages that may be caused in the execution of the work; 49 Me. 119; 42 Mo. App. 392; 116 N. Y. 558; 18 Ore. 426; *contra*, 53 Barb. 629. It has been held that where there is a statutory requirement that the contract be given to the lowest bidder, the municipality was not liable; 6 Cal. 528. See 31 Am. L. Reg. N. S. 352; 29 Am. L. Rev. 229; 3 Alb. L. J. 261. See MASTER AND SERVANT; MUNICIPAL CORPORATION; NEGLIGENCE.

INDEPENDENT PROMISES. Those made in a contract or agreement upon which one party has a right of action against the other for any injury sustained by him by reason of a breach of the covenants or promises in his favor, and where an allegation of non-performance of his covenant by the plaintiff is no defence to such action.

When the performance of one depends or is conditional on the prior performance of the other, the agreements or covenants are said to be dependent. 4 Rawle 26; 5 Wend. 496. Where performance of each is dependent or conditional upon performance of the other, they are mutually dependent.

Where there are promises on both sides in an agreement,—executory considerations,—it always becomes a question whether one party is bound to perform his before the opposite party shall be required to perform those on his side. When the agreements are dependent, neither party is bound actually to perform his part of the agreement to entitle him to an action for a breach by the other; it is enough that he was able to perform his part and offered to do so; 14 Conn. 479; 14 Me. 476; 15 La. Ann. 675.

Where the consideration is executory, technically speaking, the promise and not the performance is the consideration, and hence the obligation of one may be independent of the performance of the other. Upon examination and proper construction of mutual promises, it may appear "that the obligation of the one promise is made expressly or impliedly conditional upon the due performance of the other; and then the *performance* of the promise, constituting the executory consideration, is a condition precedent to the liability to perform the other promise; in the latter case the mutual promises are called dependent, and in the former they are called independent." Leake, Cont. 344.

In Jones *v.* Barkley, 2 Dougl. 684, Lord Mansfield thus classified mutual promises: "There are three kinds of covenants. 1. Such as are called mutual and independent, where either party may recover damages from the other for the injury he may have received by a breach of the covenants in his favor, and where it is no excuse for the defendant to allege a breach of the covenants on the part of the plaintiff. 2. There are covenants which are conditions and dependent, in which the performance of one depends on the prior performance of another, and, therefore, till this prior condition is performed, the other party is not liable to an action on his covenants. 3. There is also a third sort of covenants, which are mutual conditions to be performed at the same time; and, in these, if one party was ready, and offered, to perform his part, and the other neglected, or refused, to perform his, he who was ready and offered has fulfilled his engagement, and may maintain an action for the default of the other; though it is not certain that either is obliged to do the first act." In this case, it was clearly laid down that the criterion by which it is determined whether promises are dependent or not, is the intention of the parties, and this is to be determined from the whole contract; *id.;* 2 W. & S. 227; 4 *id.* 527; 13 How. 307; 3 Bing. N. S. 355; 29 L. J. C. P. 253; 30 *id.* 65; or as Lord Kenyon aptly says, "It must depend on the good sense of the case;" 6 Term 570. The rule was clearly

stated in a recent case: "The question whether covenants are dependent or independent must be determined in each case upon the proper construction to be placed on the language employed by the parties to express their agreement. If the language is clear and unambiguous it must be taken according to its plain meaning as expressive of the intention of the parties, and, under settled principles of judicial decision, should not be controlled by the supposed inconvenience or hardship that may follow such construction. If the parties think proper, they may agree that the right of one to maintain an action against another shall be conditional or dependent upon the plaintiff's performance of covenants entered into on his part. On the other hand, they may agree that the performance by one shall be a condition precedent to the performance by the other. The question in each case is, which intent is disclosed by the language employed in the contract;" 153 U. S. 564, 576; and the intention is to be discovered from the order of time in which the acts are to be done, rather than from the construction of the agreement or the arrangement of the words; 4 Wash. C. C. 714; 6 Harr. & J. 85. See also 11 Pick. 151; 2 Cush. 287; 26 Conn. 176; 6 Gray 407.

It is said that the dependency may be expressed or implied, as the condition is expressed or implied, and that the doctrine of implied dependency was introduced by Lord Mansfield, in Kingston *v.* Preston, cited in 2 Dougl. 684, before which, if there was no expressed dependency, a breach by one party was no defence to an action by the other and only gave him a cross-action; Harr. Cont. 153.

What is meant by implied dependency may be briefly stated: From the definition of dependency it is clear that the term is used to describe certain conditions which necessarily belong only to bilateral contracts. As these conditions must originate in the intention of contracting parties, if expressed in the contract, they are governed by the law of conditions generally. In the absence of precise expression, the law imputes an intention, which creates an implied condition. The principles which regulate these conditions constitute the law of implied dependency and they are peculiar to the subject; Langd. Sum. Cont. 134.

The question of dependency is so much a matter of intention that there is much truth in the remark "that arbitrary rules are useless"; Harr. Cont. 153. Nevertheless certain rules of construction have been generally agreed upon and applied in the interpretation of contracts, with respect to this subject.

A note to Pordage *v.* Cole, 1 Wms. Saund. 319, termed by Pollock "the classic on the subject," Poll. Cont. 386, gives the five rules of Mr. Serjeant Williams which are most referred to (Langd. Sel. Cas. Cont. 641, n. 5). These rules are adopted, in a different order, in Leake, Cont. 345–7, and substantially the same general principles have been grouped in four rules; 1 Bouv. Inst. 701; Platt, Cov. 80. These classifications are extremely interesting as affording a good illustration of what is practically an early codification of the principles governing an important branch of the law of contract, and, while the first is accessible, their repetition here is proper, as they must necessarily be referred to in connection with the brief statement which present limitations permit, of the rules of construction generally accepted.

The rules of Mr. Serjeant Williams are: 1. If a day be appointed for payment of money or part of it, or for doing any other act, and the day is to happen, or may happen, before the thing which is the consideration of the money or other act is to be performed, an action may be brought for the money, or for not doing such other act before performance; for it appears that the party relied upon his remedy, and did not intend to make the performance a condition precedent; and so it is where no time is fixed for performance of that which is the consideration or the money or other act. 2. But when a day is appointed for the payment of money, etc., and the day is to happen after the thing which is the consideration of the money, etc., is to be performed, no action can be maintained for the money, etc., before performance. 3. Where a covenant goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant on the part of the defendant without averring performance in the declaration. 4. But where the mutual covenants go to the whole consideration on both sides, they are mutual conditions, and performance must be averred. 5. Where two acts are to be done at the same time, as, where A covenants to convey an estate to B on such a day, and, in consideration thereof B covenants to A a sum of money on the same day, neither can maintain an action without showing performance of, or an offer to perform, his part, though it is not certain which of them is obliged to do the first act; and this particularly applies to all classes of sale. 1 Wms. Saund. 320 *b*.

The rules referred to as given by Bouvier are: When the mutual covenants go the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other.

Where the act of one party must necessarily precede any act of the other, as where one agrees to manufacture an article from materials to be furnished by the other, or to pay for goods on delivery, or to pay money on demand, the covenants are independent, and one act is a condition precedent to the other.

When mutual covenants go only to a part of the consideration on both sides, and when a breach may be paid for in damages, the defendant has a remedy on his covenant, and is not allowed to plead it as a condition precedent.

When a day is appointed for the payment of money, and the day comes before the thing for which the money is to be paid can be done, then, though the agreement is to pay the money before the doing of the thing, yet an action may be brought for the money before the performance; because the agreement is positive that the money shall be paid on that day, and the presumption is that the party intended to rely on his remedy and not on a previous performance. Bouv. Inst. 701.

Benjamin also lays down five rules based on those of Williams, but not following them in detail. The first combines rules 1 and 2; the second, third, and fourth are rules 3, 4, and 5 respectively; and the fifth is a brief statement, substantially, of the rule of intention of Lord Mansfield in Jones *v.* Barkley, which it is said "remains unchanged"; Benj. Sales § 561. For these rules of Benjamin see *id.* § 562.

Dependent promises can only exist as part of the same contract, but more than one contract may be included in one instrument; Harr. Cont. 159; Langd. Sum. Cont. § 115. So, on the other hand, each of two mutual promises may be contained in a separate instrument, each complete in

itself and neither making any reference to the other. In such case, it has been said, there is no doubt that each forms a separate unilateral contract; *id.* § 117.

To be dependent, a simultaneous performance must have been intended; 8 Term 366; 84 Ill. 448; 13 Pick. 281; it is not sufficient that the performance of each promise was intended to be within the same period; 11 H. L. Cas. 337. They must be capable of performance at the same time and place, and involve an exchange of rights; Langd. Sum. Cont. § 133; but if a time is fixed for the performance of one, and not the other, they are dependent; *id.*; 4 H. & N. 500; 7 Term 125.

All the stipulations of a contract should be considered in determining the question of dependency, which may be general,—as to the whole consideration on each side,—or, it may exist only as to two distinct promises. Thus a contract may be partly bilateral and partly unilateral and as to the former part, the promises may be dependent.

A unilateral contract, from its nature, can contain only independent promises.

The conditions which must exist to render implied dependency possible are thus enumerated: "1st. The subject of implied dependency must be a covenant or a promise, as distinguished from a debt. 2dly. The subject of dependency and the thing upon which it depends must be of the same nature, *i. e.* they must both be covenants or both be promises. 3dly. The covenants or the promises must be mutual. 4thly. They must each be a part of the same contract; and it does not follow that they are so because they are made at the same time, or are contained in the same instrument. 5thly. If in writing, they must each be contained in the same instrument, or in different instruments which refer to each other. 6thly. The contract which contains the covenants or the promises must be wholly bilateral, or else it must clearly appear that the covenants or promises in question were given and received in payment for each other. 7thly. The performance of each of the covenants or promises must, it seems, be equally certain in legal contemplation;" Langd. Sum. Cont. § 120.

When the mutual contracts go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other, but where a covenant goes only to a part of the consideration, it is not a condition precedent, but an action lies for the breach of it; 1 H. Bla. 273, note; 2 W. Bla. 1312; 11 Pick. 151; 21 N. Y. 547; 1 Wms. Saund. 320 *e*, rules 3 & 4; 29 L. J. Ex. 73. Professor Langdell goes further and insists that two promises are not mutually dependent unless the performance of one is full payment for the performance of the other; Langd. Sum. Cont. §§ 133, 136; but Professor Harriman considers this "theory of equivalency," though "most ingeniously developed," as not "based on satisfactory authority"; Harr. Cont. 158. This difference of opinion between these able writers on the subject is itself sufficient to show that the point is not definitely settled. Possibly the lack of precise authority upon this single point of a subject, of which the substantial principles have been settled for more than a century, might be considered as fairly indicating that it is more interesting than material,—rather theoretical than practical. See [1894] App. Cas. 266. It should, perhaps, rather be said that differences of opinion (of which another on a very practical point is noted *infra*) between these two writers who have, more than any others, philosophically examined the subject, indicate that the generalizations of Mr. Serjeant Saunders, while containing the essential principles, are to be applied only with some modification to modern conditions. It is therefore essential that the student or practitioner in dealing with particular cases should include in his researches both the ancient learning and the modern investigations which have illuminated the topic. To these it is hoped that this title may furnish a reference,—it is manifestly possible to do little more, in the way of critical examination and comparison of cases.

Where a day is appointed for payment of money or doing any act, and such day must or may happen before the thing which is the consideration of the payment or performance of the other act, is to be made or done, the promises are independent; 6 Term 570; 1 Wms. Saund. 320 *b*, rule 1; 14 Wend. 219; 2 Johns. 272; 5 *id.* 78; 2 Pick. 300; a distinction has been drawn, however, as to whether the time of the latter payment or performance is fixed entirely by reference to the former, and when it is so, the first is a condition precedent; 6 Cow. 296; otherwise, if it is to be determined without reference to the other; 10 A. & E. 50; 10 M. & W. 355; 6 C. B. 103.

It is the second of Serjeant Williams' rules, and the view is supported by Leake (Cont. 346), that if the day appointed is to happen after the act or payment, the promises are dependent; the cases cited being 18 C. B. 673 and 25 L. J. C. P. 254. The view that the last promise to be performed is dependent,—the other not,—is supported by Langdell, Summary of Contracts § 122, on the authority of Grant *v.* Johnson, 1 Seld. 247, which is put directly upon that rule. But Harriman dissents from this view and considers the authority relied upon by Langdell as "unsound in its reasoning," and he subjects it to severe criticism, as the result of what he terms the "peculiar and erroneous doctrine" of the New York courts; Harr. Cont. 154. In this connection it is to be observed also that the rule thus questioned is not included in the fundamental rules of construction set forth in Bouvier's Institutes, citing Platt on Covenants, *supra*.

If two acts are to be done at the same time the promises are mutually dependent; 1 Wms. Saund. 320 *e*, rule 5; 9 C. B. 132; 9 Q. B. 164; but each must be capable of per-

formance concurrently, *i. e.* in a moment of time; the object of both must be an exchange of property or right; and it must be between the immediate parties to the contract and capable of being performed at the same place; Langd. Sum. Cont. § 69; 6 Cow. 296.

In case of contracts for payment of purchase money of land by instalments it is said that the promises to pay those instalments which become due before the date set for the delivery of the deed are absolute and independent, and in no way affected by a failure to deliver the deed at the time specified. But where the deed is to be delivered *simultaneously* with the payment of the last instalment, then on payment of the previous instalments the tender of the deed and the tender of the last instalment become mutual concurrent conditions; 13 Pick. 281; 84 Ill. 448; 5 *id.* 561; 39 *id.* 354; Harr. Cont. 156.

Where a contract is made for the sale of goods to be delivered in instalments each to be paid for on delivery, it was held that the promises were dependent, and the failure to deliver one instalment as stipulated released the other party from the obligation to accept future deliveries; 115 U. S. 188. In this case the supreme court reviewed the English cases and considered the doctrine of Hoare *v.* Rennie, 5 H. & N. 19, as better supported by English authority than Simpson *v.* Crippin, L. R. 8 Q. B. 14, and Brandt *v.* Lawrence, 1 Q. B. Div. 344; the case relied upon to establish this view was Bowes *v.* Shand, 2 App. Cas. 455, and it was considered as not contravened by Mersey Co. *v.* Naylor, 9 App. Cas. 434. See, also, 97 N. Y. 216; 12 R. I. 82; 60 Pa. 182; *contra*, 2 Allen 492; 25 Am. L. Reg. N. S. 59; 21 *id.* 398, n.

See, generally, Leake, Cont. 344–356; Langd. Sum. Cont. 105–147; Harr. Cont. 152, 160; Cutter *v.* Powell, and notes, 2 Sm. L. Cas., 9th Am. ed. 1212; Benj. Sales, Bennett's ed. B. 4, pt. 1, and note; 3 B. & S. 751; 32 L. J. Q. B. 204; 11 H. L. Cas. 337.

INDETERMINATE. That which is uncertain, or not particularly designated: as, if I sell you one hundred bushels of wheat, without stating what wheat. See CONTRACT.

INDIA. A dependency of Great Britain, in Southern Asia. By 21 and 22 Vict. c. 106 (1858), the territories of the Indian Empire were transferred from the East India Company to the British Crown, and its government was settled by the act 32 and 33 Vict. c. 97. The Executive is vested in a governor-general, or viceroy appointed by the crown, who, acting under the powers of state, has power to make laws in the dominion of Indian princes as well as for all persons in British India. He is assisted by a council of seven, consisting of the commander-in-chief and six members appointed by the crown, with a centralized system of governors, etc., for provinces, and commissioners for divisions and districts. The government is carried on by the secretary of state and council of fifteen. Members of council are appointed for ten years by the secretary of state. There are six administrative departments and also a legislative department.

INDIAN. The name of the aboriginal inhabitants of America.

In general, Indians have no political rights in the United States; they cannot vote at the general elections for officers, nor hold office. In New York they are considered as citizens, and not as aliens, owing allegiance to the government and entitled to its protection; 20 Johns. 188, 633. But it was ruled that the Cherokee nation in Georgia was a distinct community; 6 Pet. 515. See 8 Cow. 189; 9 Wheat. 673; 14 Johns. 181, 332; 18 *id.* 506. The title of the Indians to land was that of occupation merely, but could be divested only by purchase or conquest; 2 Humph. 19; 1 Dougl. 546; 2 McLean 412; 8 Wheat. 571; 2 Washb. R. P. 521; 3 Kent 378.

By act of March 3, 1871, no Indian nation or tribe within the United States shall be recognized as an independent nation with whom it may contract by treaty, but prior treaties are not to be thereby impaired.

By act of March 3, 1885, any Indian committing upon the person or property of another Indian or any other person, murder, manslaughter, rape, assault with intent to kill, arson, burglary, or larceny, within any territory and within or without an Indian reservation, is subject to the laws of the territory, and shall be tried in the same manner and be subject to the same penalties as other persons charged with the same crimes; and if such offence be committed within a reservation in a state, he shall be subject to the same laws, etc., as if it were committed within the exclusive jurisdiction of the United States. This act was held constitutional in 118 U. S. 375. See 151 U. S. 577; 81 Fed. Rep. 625.

The crime of murder committed by one Cherokee Indian upon the person of another within the jurisdiction of the Cherokee nation is not an offence against the United States; 163 U. S. 376.

The indictment, the venue of the trial, and the jury on the prosecution of an Indian for murder committed in a territory are to be according to the territorial laws; 130 U. S. 343. See 2 Harv. L. Rev. 169; Rep. Am. Bar Assn. 1891, 261.

The provisions in the treaty of February 4, 1869, with the Bannock Indians, whose reservation was within the limits of what is now the State of Wyoming, that "they shall have the right to hunt upon the unoccupied lands of the United States so long as game may be found thereon," etc., does not give them the right to exercise this privilege within the limits of that state in violation of the laws; 163 U. S. 504.

The act of February 8, 1887, provides for the allotment of lands to Indians in severalty. By it Indians receiving allotments thereby have the benefit of, and are subject to, the laws both civil and criminal of the state or territory in which they reside.

Every Indian born in the United States to whom an allotment shall have been made by this act, or under any law or treaty, and any Indian born within the United States who has voluntarily taken up his residence therein apart from any Indian tribe and adopted the habits of civilized life, is made a citizen of the United States, without impairing his right to tribal property.

An Indian woman who marries a citizen of the United States, voluntarily resides apart from her tribe, and adopts the habits of civilized life, becomes a citizen of the United States and of the state in which she resides; 57 Fed. Rep. 959; but in a few states, marriages between white persons and Indians are forbidden by statute; Tiff. Pers. & Dom. Rel. 26. See CITIZENS; INDIAN TRIBE.

INDIAN DEPREDATIONS ACTS. As early as May 19, 1796, an act was passed by the United States congress, providing an eventual indemnification to citizens of the United States for depredations committed by Indians in taking or destroying their property; 1 St. L. 472. Other acts of a similar character were passed from time to time. By the act of March 3, 1891, congress conferred on the court of claims "jurisdiction and authority to inquire into and finally adjudicate all claims for property of citizens of the United States taken or destroyed by Indians belonging to any band, tribe, or nation in amity with the United States, without just cause or provocation on the part of the owner or agent in charge, and not returned or paid for;" this embraced cases theretofore examined and allowed by the Interior Department, and cases authorized to be examined under the act of congress making appropriations for fulfilling treaty stipulations with various Indian tribes for the year ending June 30, 1886, approved March 3, 1885, and under subsequent acts. See 1 Sup. Rev. Stat. 913.

INDIAN TERRITORY. One of the territories of the United States. It is bounded on the north by the state of Kansas, on the east by the states of Arkansas and Missouri, on the south by the state of Texas, and on the west and north by the territory of Oklahoma. It comprises the Indian reservations of the Quapaw Agency and of the Cherokees, Choctaws, Chickasaws, Creeks, and Seminoles, the five civilized tribes. The constitution and all general laws of the United States which prohibit crimes and misdemeanors in the jurisdiction of the United States, and all laws relating to national banking associations, have the same force and effect in the Indian Territory as elsewhere in the United States. See 1 Sup. R. S. pp. 731–738.

The territory is divided into three judicial districts and has United States district and circuit court and a court of appeals.

The criminal laws of Arkansas are held to be in force, except where the punishment for the same offence has been provided for both by the laws of Arkansas and of the United States, in which case the laws of the United States will govern, and all laws heretofore enacted conferring jurisdiction upon United States courts held in Arkansas, Kansas, and Texas, outside the limits of Indian Territory, as to offences committed in said Indian Territory, are by act of March 1, 1895, repealed. See 2 Sup. R. S. 392–398.

INDIAN TRIBE. A separate and distinct community or body of the aboriginal Indian race of men found in the United States.

Such a tribe, situated within the boundaries of a state, and exercising the powers of government and sovereignty, under the national government, is deemed politically a state,—that is, a distinct political society, capable of self-government; but it is not deemed a foreign state in the sense of the constitution. It is rather a domestic dependent nation. Such a tribe may properly be deemed in a state of pupilage; and its relation to the United States resembles that of a ward to a guardian; 5 Pet. 1, 16; 20 Johns. 193; 3 Kent 308; Story, Const. § 1096; 118 U. S. 384; 4 How. 567; 1 McLean 254; 6 Hill 546; 8 Ala. N. S. 48. "They were and always have been regarded as having a semi-independent position when they preserved their tribal relations; not as states, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the state within whose limits they resided;" 118 U. S. 375. See 163 *id.* 84. Their local self-government is subject to the supreme legislative authority of the United States; 135 U. S. 641.

The United States has power to pass such laws as may be necessary to their full protection and to punish all offences committed against them or by them within their reservation; 151 U. S. 577. No state can, either by its constitution or other legislation, withdraw the Indians within its limits from the operation of the laws of congress regulating trade with them; notwithstanding any rights it may confer on them as electors or citizens; 3 Wall. 407; 5 *id.* 737, 761. See 53 Minn. 354; nor can it authorize leases of Indian lands; 82 Hun 396. Several Indian tribes within the limits of the United States have an organized government. See CHOCTAW NATION; CHICKASAW NATION; CHEROKEE NATION. The pueblo Indians of New Mexico are not an Indian tribe within the meaning of the acts of congress; 94 U. S. 614. The Indians residing in Maine, whose tribal organizations have ceased to exist, are not "Indian Tribes," within the treaty-making power of the federal government; 84 Me. 465. The policy of congress is to vest in the courts of the Cherokee nation jurisdiction of all controversies between Indians, or in which a member of the nation is the only party; 141 U. S. 107. See IN AMITY; INDIAN.

INDIANA. The name of one of the states of the United States.

This state was admitted into the Union by virtue of a resolution of congress, approved December 11, 1816.

The boundaries of the state are defined, and the state has concurrent jurisdiction with the state of Kentucky on the Ohio river, and with the state of Illinois on the Wabash. As to the soil, the southern boundary of Indiana is low-water mark on the Ohio river.

The first constitution of the state was adopted in the year 1816, and has since been superseded by the present constitution, which was adopted in the year 1851.

LEGISLATIVE POWER. This is vested in a general assembly, consisting of a senate and house of representatives. The *senate* is composed of fifty members, elected by the people for the term of four years. The *house of representatives* consists of one hundred members, elected by the people for the term of two years.

The sessions of the general assembly are held biennially, at the capitol of the state, commencing on the Thursday next after the first Monday of January of every odd year, unless a different day or place is appointed by law. But if in the opinion of the governor the public welfare shall require it, he may at any time call a special session.

EXECUTIVE POWER. The *governor* is elected quadrennially, at the annual election in October, to serve for the term of four years. He is not eligible to re-election. He must be at least thirty years of age, have been a citizen of the United States for five years, have resided in the state five years next preceding his election, and must not hold any office under the United States or this state.

The *lieutenant-governor* shall be chosen at every election for a governor, in the same manner, continue in office for the same time, and possess the same qualifications.

A *secretary of state*, an *auditor*, a *treasurer*, and a *superintendent of education* are elected biennially, for the term of two years. They are to perform such duties as may be enjoined by law; and no person is eligible to either of said offices more than four years in any period of six years.

JUDICIAL POWER. The *supreme court* consists of five judges, a majority of whom form a quorum, which shall have jurisdiction co-extensive with the limits of the state in appeals and writs of error, under such regulations and restrictions as may be prescribed by law. It shall also have such original jurisdiction as the general assembly may confer, and upon the decision of every case shall give a statement, in writing, of each question arising in the record of such case, and the decision of the court thereon.

The *appellate court* consists of five judges, and has the exclusive jurisdiction of all appeals from the circuit, superior, and criminal courts, in cases of misdemeanor; certain cases arising before a justice of the peace; actions seeking the recovery of a money judgment only, where the amount in controversy does not exceed $3,500; cases for the recovery of specific personal property; actions between landlord and tenant; appeals from orders allowing or disallowing claims against decedent's estates, and jurisdiction in certain other minor matters. Acts 1891, pp. 39-44; acts 1893, pp. 29-30.

The *circuit courts* shall each consist of one judge. The state shall, from time to time, be divided into judicial circuits. They shall have such civil and criminal jurisdiction as may be prescribed by law.

Tribunals of conciliation may be established, with such powers and duties as shall be prescribed by law, or the powers and duties of the same may be conferred on other courts of justice; but such tribunals, or other courts when sitting as such, shall have no power to render judgment to be obligatory on the parties, unless they voluntarily submit their matters of difference and agree to abide by the judgment of such tribunal or court.

The judges of the supreme court are elected by the qualified voters to serve for a term of seven years. The circuit judges are elected for terms of six years, and the judges of the courts of common pleas, of which there are twenty-one in the state, are elected for terms of four years.

The state is divided into as many districts as there are judges of the supreme court; formed of contiguous territory as nearly equal in population as, without dividing a county, the same can be made. One of said judges shall be elected from each district, and reside therein; but said judge shall be elected by the electors of the state at large.

Justices of the peace, in sufficient numbers, are to be elected for the term of four years in each township. Their courts are courts of record.

Amendments to the constitution of 1851 were submitted to a vote of the people in the spring of 1880, but were decided, on technical grounds, not to have been adopted; 69 Ind. 505; in March, 1881, they were again voted on and adopted. They do not affect the provisions as given above.

INDICARE. In the Civil Law. To show or discover. To fix or tell the price of a thing. Calv. Lex.

INDICATIF. An abolished writ by which a prosecution was in some cases removed from a court-christian to the Queen's Bench. Encyc. Lon.

INDICATION. In the Law of Evidence. A sign or token; a fact pointing to some inference or conclusion. Bur. Circ. Ev. 251, 263.

INDICATIVE EVIDENCE. This is not evidence so called, but the mere suggestion of evidence proper, which may possibly be secured if the suggestion is followed up. Brown.

INDICAVIT. A writ or prohibition that lay for a patron of a church where the clergyman presented by him to a benefice is made defendant in an action of tithes commenced in the ecclesiastical court of another clergyman, where the tithes in question extended to the fourth part of the benefice; for in this case the suit belonged to the king's court (*i. e.* the common law court) by the Stat. Westm. 2, c. 5. Cowel. The person sued might also avail himself of this writ. Toml.

INDICIA (Lat.). Signs; marks. Conjectures which result from circumstances not absolutely certain and necessary, but merely probable, and which may turn out not to be true, though they have the appearance of truth.

The term is much used in the civil law in a sense nearly or entirely synonymous with circumstantial evidence. It denotes facts which give rise to inferences, rather than the inferences themselves. However numerous indicia may be, they only show that a thing may be, not that it has been. An indicium can have effect only when a connection is essentially necessary with the principal. Effects are known by their causes, but only when the effects can arise only from the causes to which they are attributed. When several causes may have produced one and the same effect, it is, therefore, unreasonable to attribute it to any particular one of such causes.

The term is much used in common law of signs or marks of identity: for example, in replevin it is said that property must have *indicia*, or ear-marks, by which to distinguish it from other property of the same kind. So it is much used in the phrase "*indicia* of crime," in a sense similar to that of the civil law.

INDICTABLE. Capable of being indicted; liable to be indicted; as, an *indictable* offender.

That forms a subject or ground of indict-

ment; as, an indictable offence. Encyc. Dict.

INDICTED. Having had an indictment found against him.

INDICTEE. One who is indicted. See INDITEE.

INDICTION. The space of fifteen years.

It was used in dating at Rome and in England. The institution of indiction dates from the time of Constantine I., Sept. 1, or, according to some authorities, Sept. 15, 312; but the first instance of their use is mentioned in the Theodosian Code, under the reign of Constantius II. The papal court adopted computation by indictions about 800, the commencement of the first indiction being referred to Jan. 1, 313. The first year was reckoned the first of the first indiction, and so on till the fifteen years afterwards. The sixteenth year was the first year of the second indiction; the thirty-first year was the first year of the third indiction, etc.

INDICTMENT. In Criminal Practice. A written accusation against one or more persons of a crime or misdemeanor, presented to, and preferred upon oath or affirmation by, a grand jury legally convoked. 4 Bla. Com. 299; Co. Litt. 126; 2 Hale, Pl. Cr. 152; Bac. Abr.; Com. Dig.; 1 Chitty, Cr. Law 168.

An accusation at the suit of the crown, found to be true by the oaths of a grand jury (*q. v.*).

A written accusation of a crime presented upon oath by a grand jury.

The word is said to be derived from the old French word *inditer*, which signifies *to indicate, to show, or point out*. Its object is to indicate the offence charged against the accused. Rey, *des Inst l'Angl.* tome 2, p. 347.

A presentment and indictment differ; 2 Inst. 739; Comb. 225. A presentment is properly that which the grand jurors find and present to the court from their own knowledge or observation. Every indictment which is found by the grand jurors is presented by them to the court; and therefore every indictment is a presentment, but not every presentment is an indictment; 9 Gray 291; Story, Const. § 1784.

The essential requisites of a valid indictment are,—*first*, that the indictment be presented to some court having jurisdiction of the offence stated therein; and the indictment must allege specifically that the crime was committed within its jurisdiction; 22 Neb. 418; 25 Tex. App. 453, 454; 37 W. Va. 812; *second*, that it appear to have been found by the grand jury of the proper county or district; *third*, that the indictment be found a true bill, and signed by the foreman of the grand jury; *fourth*, that it be framed with sufficient certainty; for this purpose the charge must contain a certain description of the crime or misdemeanor of which the defendant is accused, and a statement of the facts by which it is constituted, so as to identify the accusation; Cowp. 682; 2 Hale, Pl. Cr. 167; 4 S. & R. 194; 4 Bla. Com. 301; 4 Cra. 167; 26 Tex. App. 540; it should set out the material facts charged against the accused; 7 Nev. 153; 148 U. S. 197; 124 *id.* 483; but need not specify the statute on which founded; 88 Ga. 584. An indictment may charge a statutory offence in the language of the statute without greater particularity when, by that means, all that is essential to constitute the offence is stated fully and directly, without uncertainty or ambiguity; 17 Or. 358; 100 N. C. 449; 39 Kan. 152; 40 La. Ann. 170; *fifth*, the indictment must be in the English language. But if any document in a foreign language, as a libel, be necessarily introduced, it should be set out in the original tongue, and then translated, showing its application; 6 Term 162.

The formal requisites are,—*first*, the *venue*, which at common law should always be laid in the county where the offence has been committed, although the charge be in its nature transitory, as a battery; Hawk. Pl. Cr. b. 2, c. 25, s. 35. See 74 Cal. 94. The venue is stated in the margin thus: "City and county of ——, to wit." *Second*, the *presentment*, which must be in the present tense, and is usually expressed by the following formula: "the grand inquest of the commonwealth of ——, inquiring for the city and county aforesaid, upon their oaths and affirmations present." See, as to the venue, 1 Ark. 171; 9 Yerg. 357; 6 Metc. 225; 92 Cal. 277. *Third*, the *name and addition of the defendant*; but in case an error has been made in this respect, it is cured by the plea of the defendant; Bac. Abr. *Misnomer* (B), *Indictment* (G 2); 2 Hale, Pl. Cr. 175; 1 Chitty, Pr. 202; Russ. & R. 489. Where the defendant's name is stated differently in different parts of the indictment, it is fatally defective; 21 Tex. App. 348; or where it fails to state his given name, or aver that it is not known, a plea of misnomer in abatement should be sustained; 40 Ill. App. 17; 25 Tex. App. 402; or where it gives a wrong name; 90 Ga. 95. See IDEM SONANS. *Fourth*, the *names of third persons*, when they must be necessarily mentioned in the indictment, should be stated with certainty to a common intent, so as sufficiently to inform the defendant who are his accusers. When, however, the names of third persons cannot be ascertained, it is sufficient, in some cases, to state "a certain person or persons to the jurors aforesaid unknown." 2 East, Pl. Cr. 651, 781; 2 Hale, Pl. Cr. 181; Plowd. 85; 8 C. & P. 773. *Fifth*, the *time* when the offence was committed should, in general, be stated to be on a specific year and day. In some offences, as in perjury, the day must be precisely stated; 2 Wash. C. C. 328; but although it is necessary that a day certain should be laid in the indictment, yet, in general, the prosecutor may give evidence of an offence committed on any other day previous to the finding of the indictment; 5 S. & R. 316. See 11 S. & R. 177; 1 Chitty,

Cr. Law 217, 224; 17 Wend. 475; 2 Dev. 567; 6 Miss. 14; 4 Dana 496; 1 Cam. & N. 369; 1 Hawks 460; 84 Ky. 52; 147 Mass. 539; 30 Tex. App. 480; 131 N. Y. 478; 140 U. S. 118. It is not material, except where time is of the essence of the offence, to charge in an indictment the true day on which an offence was committed, or to prove the day as charged; 97 N. C. 462. *Sixth*, the *offence should be properly described.* This is done by stating the substantial circumstances necessary to show the nature of the crime, and next, the formal allegations and terms of art required by law. Steph. Cr. Proc. 156. An omission of matter of substance in an indictment is not aided or cured by verdict; 124 U. S. 483. An indictment charging a crime "on or about" a certain date is not defective, these words being surplusage, the real date being that specifically charged; 44 La. Ann. 323.

As to the substantial circumstances. The whole of the facts of the case necessary to make it appear judicially to the court that the indictors have gone upon sufficient premises should be set forth; but there should be no unnecessary matter, nor anything which on its face makes the indictment repugnant, inconsistent, or absurd. And if there is no necessary ambiguity, the court is not bound, it has been observed, to create one by reading the indictment in the only way which will make it unintelligible. It is a clear principle that the language of an indictment must be construed by the rules of pleading, and not by the common interpretation of ordinary language; for nothing indeed differs more widely in construction than the same matter when viewed by the rules of pleading and when construed by the language of ordinary life; 16 Q. B. 846; 1 Ad. & E. 448; 2 Hale, Pl. Cr. 183; Bac. Abr. *Indictment* (G 1); Com. Dig. *Indictment* (G 3); 2 Leach 660; 2 Stra. 1226. Averments of matters not material or necessary ingredients in the offence charged may be rejected as surplusage; 51 N. J. L. 259. An indictment is not insufficient by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant; 152 U. S. 211. All indictments ought to charge a man with a particular offence, and not with being an offender in general: to this rule there are some exceptions, as indictments against a common barrator, a common scold, and a keeper of a common bawdy-house; such persons may be indicted by these general words; 1 Chitty, Cr. Law 230, and the authorities there cited. The offence must not be stated in the disjunctive, so as to leave it uncertain on what it is intended to rely as an accusation: as, that the defendant erected *or* caused to be erected a nuisance; 2 Gray 501; 6 D. & R. 143; 2 Stra. 900; 2 Rolle, Abr. 31.

There are certain terms of art used, so appropriated by the law to express the precise idea which it entertains of the offence, that no other terms, however synonymous they may seem, are capable of filling the same office: such, for example, as traitorously (*q. v.*), in treason; feloniously (*q. v.*), in felony; 84 Ky. 354; 112 N. C. 848; 115 Mo. 389; burglariously (*q. v.*), in burglary; maim (*q. v.*), in mayhem, etc.

Seventh, the conclusion of the indictment should conform to the provision of the constitution of the state on the subject, where there is such provision; as in Pennsylvania; Const. art. 5, s. 11, which provides that all "prosecutions shall be carried on in the name and by the authority of the commonwealth of Pennsylvania, and conclude *against the peace and dignity of the same*"; see 35 W. Va. 280; it is not necessary that each count should so conclude; 31 Tex. Cr. R. 294. As to the necessity and propriety of having several counts in an indictment, see 1 Chitty, Cr. Law 248; Steph. Cr. Proc. 153; COUNT; as to joinder of several offences in the same indictment, see 1 Chitty, Cr. Law 253; Archb. Cr. Pl. 60; in one count, see 9 Lawy. Rep. Ann. 182, note. A count in an indictment may refer to allegations in other counts to avoid repetition; 5 Park. Cr. R. 134; 63 Hun 579; 153 U. S. 308. Several defendants may, in some cases, be joined in the same indictment; Archb. Cr. Pl. 59; as where one is charged with assault with intent to kill, and another as accessory before the fact; 65 N. H. 284; 155 Mass. 224.

At common law an indictment cannot be amended by the court. It was said by Lord Mansfield in Rex *v.* Wilkes: "Indictments are found upon the oaths of a jury, and ought only to be amended by themselves;" 4 Burr. 2527. The rule has been continuously adhered to; Hawk. P. C. b. 2, c. 25, § 97; Stark. Cr. Pl. 287; Whart. Cr. Pl. & Pr. § 90; 3 Cush. 279; 3 Hawks 184. "It is a well-settled rule of law that the statute respecting amendments does not extend to indictment;" Shaw, C. J., in 13 Pick. 200; 3 Hawks 184; and "an amendment cannot be allowed even with the consent of the prisoner;" 16 Pick. 120; 4 Park. Cr. Rep. 387. The caption, however, may be amended, being, as it is said, no part of the indictment itself; 2 McCord 301; 42 N. J. L. 504; 5 Wis. 337.

In England the rule forbidding an amendment of an indictment has been changed by stat. 14 and 15 Vict. c. 100. In this country the subject does not rest on the common law, but there is also to be considered the constitutional guaranty to an accused of a trial, "on a presentment or indictment by a grand jury." It was settled by the United States Supreme Court that in the federal courts an indictment cannot be amended by the court, both by reason of the common-law rule and the constitutional provision; 121 U. S. 1. The question whether the rule could be changed by statute was not actually involved, but it would seem to be settled in the negative by the reasoning of the opinion in that case. The question had been considered in some state courts, and it has been held that without amendment of the state constitution, the legislature may authorize amendment

of indictments by the court, not changing the offence; 53 Miss. 403; 55 *id.* 434, 528; in other cases it was held that the legislature might dispense with or regulate matter of form; 29 Mich. 232; 7 Nev. 157; but they could not "dispense with such allegations as are essential to reasonable particularity and certainty in the description of the offence; 45 Ind. 338.

It is said by Bishop that "if a statute should authorize a material amendment to be made in an indictment for an offence which, by the constitution of the state was punishable only by indictment, the statutory direction would be a nullity." Bish. Cr. Proc., 2d ed. § 97; 26 Am. L. Reg. N. S. 446.

An indictment may be quashed at common law for such deficiency in body or caption as will make a judgment given on it against the defendant erroneous, but it is a matter of discretion; Bac. Abr. *Indictment*, K; 1 Chitty, Cr. Law 298; Archb. Cr. Pl. 66.

After verdict in a criminal case, it will be presumed that those facts without proof of which the verdict could not have been found were proved, though they are not distinctly alleged in the indictment; provided it contains terms sufficiently general to comprehend them in reasonable intendment; 1 Den. Cr. Cas. 356; 2 C. & K. 868; 1 Tayl. Ev. § 73; Steph. Cr. Proc. 171. After verdict, defective averments in the second indictment may be cured by reference to sufficient averments in the first count; 2 Den. Cr. Cas. 340. A single good count in an indictment is sufficient to sustain a verdict of guilty and judgment thereon; 53 N. J. L. 601; 94 Ala. 55.

It is not error to join distinct offences in one indictment, in separate counts, against the same person; 155 U. S. 434.

In an indictment for a statutory offence, while it is doubtless true that it is not always sufficient to use simply the language of the statute in describing the offence, yet, if such language is, according to the natural import of the words, fully descriptive of the offence, then it ordinarily is sufficient; 155 U. S. 438.

The fact that a grand jury has ignored an indictment is not a bar to the subsequent finding of a true bill for the same offence; 50 Fed. Rep. 918. The finding of an indictment must appear from the order book of the court in which defendant was indicted; if it does not so appear, a verdict against him will be set aside; 89 Va. 156; 29 Fla. 511. The fact that the foreman of the grand jury in signing his name to the indorsement of "a true bill" used his initials instead of his full Christian name, is not ground for quashing the indictment; 4 Ind. App. 583; 106 Mo. 111. One cannot be convicted of a higher degree of offence than that charged in the indictment; 132 Ind. 427; but there may be a conviction of a lesser offence; 12 So. Rep. (Fla.) 640.

INDICTOR. He who causes another to be indicted. The latter is sometimes called the indictee.

INDIFFERENT. To have no bias or partiality. 7 Conn. 229. A juror, an arbitrator, and a witness ought to be indifferent; and when they are not so they may be challenged. See 9 Conn. 42.

INDIGENA (Lat. from *indu*, old form of *in*, in, and *geno*, *gigno*, to beget). A native; born or bred in the same country or town. Ainsw. A subject born, or naturalized by act of parliament. Opposed to *alienigena*. Rymer, to. 15, p. 37; Co. Litt. 8 *a*.

INDIRECT EVIDENCE. Evidence which does not prove the fact in question, but one from which it may be presumed.

Inferential evidence as to the truth of a disputed fact, not by testimony of any witness to the fact, but by collateral circumstances ascertained by competent means. 1 Stark. Ev. 15; Wills, Circ. Ev. 24; Best, Ev. 21, § 27, note; 1 Greenl. Ev. § 13.

INDITEE (L. Fr.). **In Old English Law.** A person indicted. Mirr. c. 1, § 3; 9 Coke.

INDIVIDUUM (Lat.). **In the Civil Law.** That cannot be divided. Calv. Lex.

INDIVISIBLE. That cannot be separated.

The effect of the breach of a contract depends in a large degree upon whether it is to be regarded as indivisible or divisible; *i. e.* whether it forms a whole, the performance of every part of which is a condition precedent to bind the other party or is composed of several independent parts, the performance of any one of which will bind the other party *pro tanto*. This question is one of construction, and depends on the circumstances of each case; and the only test is whether the whole quantity of the things concerned, or the sum of the acts to be done, is of the essence of the contract. It depends, therefore, in the last resort, simply upon the intention of the parties; 68 Md. 47; 110 N. C. 251. See 9 Q. B. D. 648; 69 N. Y. 348; 151 Pa. 534; 47 N. J. L. 290; 40 N. J. Eq. 612; 115 U. S. 188; 143 Mass. 1; 12 R. I. 82; 102 N. Y. 366.

When a consideration is entire and indivisible, and it is against law, the contract is void *in toto*; 11 Vt. 592; 2 W. & S. 235. When the consideration is divisible, and part of it is illegal, the contract is void only *pro tanto*. In such case, it has been said, the connection between the different contracts is physical, not legal. See, generally, Harriman, Cont. 132–136; 1 Wall. 221.

To ascertain whether a contract is divisible or indivisible is to ascertain whether it may or may not be *enforced in part*, or *paid in part*, without the consent of the other party. See ENTIRETY; INDEPENDENT PROMISES.

INDIVISUM (Lat.). That which two or more persons hold in common without partition; undivided.

INDORSAT. In Old Scotch Law. Indorsed. 2 Pitc. Crim. Tr. 41.

INDORSE. To write on the back. Bills of exchange and promissory notes are indorsed by a party's writing his name on the back. See INDORSEMENT. Writs in Massachusetts are indorsed in some cases by a person's writing his name on the back, in which case he becomes liable to pay the costs of the suit.

INDORSEE. The person or party to whom a bill of exchange is indorsed, or transferred by indorsement. See INDORSEMENT.

INDORSEE IN DUE COURSE. An indorsee in due course is one who, in good faith, in the ordinary course of business, and for value, before its apparent maturity or presumptive dishonor, and without knowledge of its actual dishonor, acquires a negotiable instrument duly indorsed to him, or indorsed generally, or payable to the bearer. Civil Code, Cal. 3123.

INDORSEMENT. In Commercial Law. That which is written on the back of an instrument in writing and which has relation to it.

Writing one's name on the back of a promissory note or other negotiable instrument. 20 Vt. 499.

Written on the back of an original instrument, or on an "allonge" attached thereto, if there be not sufficient space on the original paper. 141 Ill. 461. It need not appear that it was physically impossible to indorse on the instrument. It may be on another paper when necessity or convenience requires it; 16 Wis. 616.

An indorsement is generally made primarily for the purpose of transferring the rights of the holder of the instrument to some other person. It has, however, various results, such as rendering the indorser liable in certain events; and hence an indorsement is sometimes made merely for the purpose of additional security. This is called an accommodation indorsement when done without consideration.

A blank indorsement is one in which the name of the indorser only is written upon the instrument. It is commonly made by writing the name of the indorser on the back; 13 S. & R. 315; but a writing across the face may answer the same purpose; 18 Pick. 63; 16 East 12. Its effect is to make the instrument thereafter payable to bearer; Byles, Bills *151.

A conditional indorsement is one made subject to some condition without the performance of which the instrument will not be or remain valid. 4 Taunt. 30. A bill may be indorsed conditionally, so to impose on the drawee who afterwards accepts a liability to pay the bill to the indorsee or his transferees in a particular event only; Byles, Bills *150. An indorsement on a note, making it payable on a contingency does not affect its negotiability; 15 Wend. 562.

An indorsement in full, or a *special indorsement*, is one in which mention is made of the name of the indorsee. Chitty, Bills 170. The omission of the words "or order" is not material, for the indorsee takes it with all its incidents, including its negotiable quality; Byles, Bills *151. The omission of the words "or order" in a special indorsement will not restrain the negotiability of a bill; 2 Burr. 1216; 1 Stra. 557.

A qualified indorsement is one which restrains, or limits, or qualifies, or enlarges the liability of the indorser, in any manner different from what the law generally imports as his true liability, deducible from the nature of the instrument. Chitty, Bills 261; 7 Taunt. 160. The words commonly used are *sans recours*, without recourse; 2 Mass. 14. An indorsement without recourse, or at the indorsee's "own risk," will not expose the indorser to any liability; 30 Mo. 196; 12 Wis. 639; 2 Allen 434; 46 Pa. 140; 1 Cow. 512. But such an indorsement warrants the genuineness of all prior signatures; 18 Ohio St. 516; that the indorser has title to the note; 6 Leigh 230; that the note is valid between the original parties, and not illegal, or without consideration; 58 Me. 437; 22 Kan. 157; and that the parties were competent to contract; *id.* The assignment without recourse leaves the assignor liable as vendor; 40 Ill. App. 108.

A restrictive indorsement is one which restrains the negotiability of the instrument to a particular person or for a particular purpose; 1 Rob. La. 222. Such are "Pay A. B. or order, for my use," or "for my account," or "only."

By the law merchant, bills and notes payable to order can be transferred only by indorsement; 16 Mass. 314; 73 Ill. 485; 63 Ga. 380; 101 U. S. 68; 17 Fed. Rep. 575; Sto. Prom. N. § 120; 34 Kan. 223. Indorsement is not complete before delivery of the note; 24 Conn. 333; 15 Colo. 445; hence the word *indorsee* in a declaration on a bill imports a delivery; Wood's Byles, Bills § 153.

An instrument promising to pay a sum certain with interest, as per annexed coupons, reciting that note and coupons were secured by mortgage, was negotiable; but an indorsement, "for value received, we hereby assign and transfer the within bond, together with all our interest in, and rights under the same, without recourse," was not a commercial indorsement, but a mere assignment passing an equitable interest subject to the defences of the makers, and the negotiability of the instrument was thereby destroyed, and the subsequent indorsement of the transferee did not make him liable for payment in the absence of any independent contract; 59 Fed. Rep. 853.

When, by such an assignment, the legal title is left in the payee, the equitable interest merely passing to the transferee, it necessarily follows that the negotiable character of the instrument is destroyed; 39 Mich. 171. And a subsequent indorsement by the transferee does not, in the absence of a spe-

cial contract, render him liable ; Dan. Neg. Inst. 666 ; 4 Watts 400 ; 44 Pa. 454 ; 126 *id.* 194. The indorsement of a non-negotiable note without proof of a special contract to become responsible means nothing and creates no liability ; 1 Greene (Ia.) 334 ; Dan. Neg. Inst. 709. See also 6 Kan. 490 ; 52 Mich. 525 ; 71 Mo. 627. The person making such indorsement guaranties the note to be genuine, and that it is what it purports to be ; nothing more. He does not guaranty its payment, although he might do this by independent contract expressed in the contract or otherwise ; 1 Greene (Ia.) 334.

The effect of the indorsement of a negotiable promissory note or bill of exchange is to transfer the property in the note to the person mentioned in the indorsement when it is made in full ; 30 S. C. 356 ; or to any person to whose possession it may lawfully come thereafter even by mere delivery, when it is made in blank, so that the possessor may sue upon it in his own name at law, as well as if he had been named as the payee ; 11 Pet. 80 ; 2 Hill N. Y. 80 ; 34 Neb. 803 ; 1 Misc. Rep. 91 ; 6 C. C. App. 423.

Any person who has possession of the instrument is presumed to be the legal *bona fide* owner for value, until the contrary is shown ; 60 Ill. 289.

The payee of a note can restrain its negotiability, but a subsequent indorser can revive its negotiable quality ; 1 Bay 160.

The parties are presumed to stand to each other in the relations in which their names appear. Where the holder has knowledge, the facts may be shown as between him and the other parties ; 42 N. H. 9.

An indorsement on the last day of grace is good ; 36 N. H. 273 ; *contra*, 11 Gray 38. An indorsement is presumed to be of the same date as the instrument ; 16 Ind. 265 ; 28 Ill. 397 ; or at least to have been made before maturity ; 53 Tex. 136 ; 94 U. S. 753.

An indorsement may be made before the bill or note itself, and so render the indorser liable to all subsequent parties ; Byles, Bills *167 ; 30 Md. 284. A blank indorsement upon a blank piece of paper, with intent to give a person credit, is, in effect, a letter of credit ; if a promissory note is afterwards written on the paper, the indorser cannot object ; Dougl. 496 ; 6 Cra. 142 ; but if the holder had notice of any fraud he cannot fill in the blanks ; 3 Q. B. D. 643.

When the indorsement is made before the note becomes due, the indorsee and all subsequent holders are entitled to recover the face of the note against the maker, without any right on his part to offset claims which he may have against the payee ; or, as it is frequently stated, the indorsee takes it free of all equities between the antecedent parties of which he had no notice ; 8 M. & W. 504 ; 8 Conn. 505 ; 13 Mart. La. 150 ; 16 Pet. 1. The indorser of a promissory note before maturity without recourse is responsible thereon if the note is fraudulent, fictitious, or forged ; 32 Neb. 773.

An indorsement admits the signatures and capacity of every prior party ; Byles, Bills *155.

The blank indorsement of a non-negotiable bill has been held to operate as the drawing of a bill payable to bearer ; 33 L. J. Q. B. 209. The indorsement of a non-negotiable note by a payee operates to assign the payee's rights to the indorser, who takes the former's place ; 33 Wis. 427.

After a bill is due, the indorsee takes it on the credit of the indorser and subject to all equities ; 4 M. & G. 101 ; as was said by Lord Ellenborough, "it comes disgraced to the indorsee ; " 1 Campb. 19. But the maker can only set up such defences as are connected with the note, not those arising out of an independent transaction ; 35 Mo. 99 ; 3 H. & N. 891 ; such as set-off as against the holder ; 15 Ia. 79 ; 10 Exch. 572. It is otherwise as to a check, which may be transferred by indorsement after it is payable ; Byles, Bills *171 ; but taking a check six days old is a circumstance from which the jury may infer fraud ; 9 B. & C. 388. A note payable on demand is not to be taken as overdue without some evidence of demand of payment and refusal ; 4 B. & C. 327 ; although it is several years old and no interest has been paid on it ; Byles, Bills *171 ; a promissory note payable on demand is intended to be a continuing security ; 9 M. & W. 15 ; but it has been held to be overdue and dishonored after a reasonable time ; 2 Mich. 401 ; so after three months ; 41 N. Y. 581 (but see 42 Barb. 50) ; after ten months ; 41 Vt. 24.

A bill or note cannot be indorsed for part of the amount due the holder, as the law will not permit one cause of action to be cut up into several, and such an indorsement is utterly void as such, but when it has been paid in part, it may be indorsed as to the residue ; 36 Tex. 305.

Indorsers, also, unless the indorsement be qualified, become liable to pay the amount demanded by the instrument upon the failure of the principal, the *maker* of a *note*, or the *acceptor* of a *bill*, upon due notification of such failure, to any subsequent indorsee who can legally claim to hold through the particular indorser ; Story, Bills § 224.

The indorsement of a draft to a fictitious indorsee is usually treated as making it payable to bearer ; see FICTITIOUS PAYEE ; 140 N. Y. 556 ; but it is said not to be so unless the maker knows the payee to be fictitious and actually intends the paper to be made payable to a fictitious person ; 36 S. W. Rep. (Tenn.) 387 ; 126 N. Y. 318 ; 46 Ohio St. 512 ; *contra*, 26 Kan. 691.

In most of the cases a person not a party to the instrument who writes his name on the back of it before delivery is in many states considered an original promisor ; 36 Me. 147 ; 9 Mass. 314 ; 30 Mo. 225 ; 14 Tex. 275 ; 20 Vt. 355 ; but in Pennsylvania one who indorses before the payee is not liable to the payee, though he is to a subsequent indorser ; and it cannot be shown by parol that he was a guarantor to the payee ; 59 Pa. 144. The cases on the effect of irregular indorsements are very numerous and con-

flicting in different states. See Wood's Byles, Bills 150, note 7, where they are collected.

A plaintiff, in suing the first indorsee may omit to state in his declaration all the indorsements but the first indorsement in blank, and aver that the first blank indorser indorsed directly to himself; but in such case all the intervening indorsements must be struck out; Byles, Bills *155; 20 La. Ann. 377.

An indorsement by an officer of a corporation, where the fact appears on the instrument, does not render him individually liable; 39 La. Ann. 813.

An indorsement by one of several executors will not transfer the property; 2 C. & K. 37; 9 Mass. 320; *contra*, in case of administrators; 6 J. J. Mar. 446; and see 9 Cow. 34. An executor cannot complete his testator's indorsement by delivering the instrument, which has already been signed by the testator; Wood's Byles, Bills 58; 1 Exch. 32.

By the general law merchant, the indorser of a negotiable instrument is bound instantly, and may be sued after maturity, upon demand and notice of non-payment. But by the statutes of some of the states the maker must first be sued and his property subjected; 1 Col. 385; 54 Ill. 349, 472; 48 Miss. 46.

The effect of acceptance upon a bill is to remove the acceptor to the head of the list as principal, while the drawer takes his place as first indorser.

A recent course of decisions with respect to restrictive indorsement has given rise to much discussion, resulting in so general a change in clearing-house rules as to amount to a revolution in banking methods.

The litigation arising from the relations between a bank, its depositor, and the indorsee of a check or draft commences with the early English case of Price *v.* Neal, followed in England and this country, in which it was held by Lord Mansfield that if the drawee pays a bill which he afterwards finds to be forged, he has no recourse against an innocent indorser; 3 Burr. 1354; nor has a bank which paid a forged check; Taunt. 76; 1 Binn. 27. See also 10 Wheat. 333; 59 Hun 495. The precise principle on which the doctrine of Price *v.* Neal was founded, has been a subject of varying opinion and the different theories concerning it, as also a voluminous citation of the cases, will be found in an article by Professor J. B. Ames in 4 Harv. L. Rev. 297. An extended review and discussion of the cases will also be found in Keener, Quasi-Cont. 154, note 1. While it is true that a bank pays a forged check at its own peril, if the depositor be free from negligence; 126 N. Y. 319; it was held that no title passed through a forged indorsement, and hence payment by a bank made on the faith of it may be recovered from an indorsee even if *bona fide* for value; 1 Hill 290.

A late decision has had a very far-reaching effect with respect to the effect of restrictive indorsements.

What has been characterized as "the doctrine, newly announced by the courts," has been thus stated: "Where a draft is indorsed to a bank *for collection* or *for account* of the indorser, the form of indorsement carries notice to the bank of payment that the bank to whom the paper is thus indorsed is a mere agent of the indorser to collect, having no proprietary interest in the paper; hence if the paper turns out to be forged (*i. e.* raised in amount, or payee's indorsement forged), the agent bank's own indorsement is not a guaranty of genuineness, and it is under no liability to repay the amount collected, after it has paid the same over to its principal." 13 Banking L. J. 75.

The first case was Park National Bank *v.* Seaboard National Bank, 114 N. Y. 28, and this, it was said at a convention of bankers, "proved a revelation to many of us, and pointed out the great danger which lurked in checks and other paper having restrictive indorsements," and the second case, National City Bank of Brooklyn *v.* Westcott, 118 N. Y. 468, was said "to have opened the eyes of banks, heretofore unacquainted with the decision (of the Seaboard Bank case), to the real status of liability in case of restrictive indorsement;" address of S. G. Nelson, 13 Bkg. L. J. 445. The same doctrine was followed in other cases, so that it is fully established in New York and some other states and in the Federal circuit court; 45 Fed. Rep. 337; 70 *id.* 232; 129 N. Y. 647; 70 Mo. 643; 90 Hun 285; 62 N. W. Rep. (Minn.) 327; 17 S. W. Rep. (Mo.) 982; and the basic principle of these decisions was already approved by the United States supreme court, which held that "the words 'for collection' evidently had a meaning. That meaning was intended to limit the effect which would have been given to the indorsement without them, and warned the party that, contrary to the purpose of a general or blank indorsement, this was not intended to transfer the ownership of the note or its proceeds." 1 Wall. 166, 173; which was followed in a case of indorsement "for collection"; 148 U. S. 50; and as to an indorsement "for account," it was said, "It does not purport to transfer the title of the paper, or the ownership of the money when received;" 102 U. S. 658. In one state the contrary view has been taken and the bank of deposit of a draft with a forged indorsement, although a mere "indorsee for collection," was held liable to refund to its correspondent bank which had paid the money; 8 Colo. 49. See 64 Fed. Rep. 703.

The result of the decisions cited was the general adoption of a rule by most of the clearing-house associations, substantially like that of New York, excluding, from the exchanges, paper having a qualified or restricted indorsement, such as "for collection" or "for account of," unless the same was guaranteed. In Chicago such paper was absolutely excluded. The result has been to make the question, what is a restrictive indorsement, one of vital importance

and the judicial opinion is not uniform. The following have been held to be restrictive: "for collection;" 1 Wall. 166, 173; 26 Md. 520; "for account;" 102 U. S. 658; "for my use;" 5 Mass. 543; "credit my account;" 1 Bond 387; "Pay to P. or order only;" 4 Call. 411; "for deposit;" 50 Fed. Rep. 647 (*contra*, 77 Ala. 168); "for deposit to the credit of;" 87 Ga. 45; *contra* (by a divided court), 79 Md. 192; but while the presumption is that it is restrictive, the bank may show by extrinsic evidence that it was not so, either by reason of a special agreement; 50 Fed. Rep. 647; or because the proceeds were passed to the depositor's credit and subject to check before collection; 89 Ga. 108.

Where a bank to which a forged check was sent for collection credited the person sending it with the amount, without actually remitting the money, it could, on discovering the forgery, charge back the amount; 15 So. Rep. (Ala.) 440. See articles critically reviewing the cases, in the latter of which the conclusion is reached that an indorsement for deposit is restrictive; 13 Banking L. J. 361, 429; and see also Norton, Bills & N. 123; Daniel, Neg. Instr. §§ 636–7, 698.

See GUARANTY; BILLS OF EXCHANGE; PROMISSORY NOTES; NEGOTIABILITY.

In Criminal Law. An entry made upon the back of a writ or warrant.

When a warrant for the arrest of a person charged with a crime has been issued by a justice of the peace of one county, which is to be executed in another county, it is necessary, in some states, that it should be indorsed by a justice of the county where it is to be executed: this indorsement is called backing.

INDORSER. The person who makes an indorsement.

The indorser of a bill of exchange, or other negotiable paper, by his indorsement undertakes to be responsible to the holder for the amount of the bill or note, if the latter shall make a legal demand from the payer, and, in default of payment, give proper notice thereof to the indorser. But the indorser may make his indorsement conditional, which will operate as a transfer of the bill if the condition be performed; or he may make it qualified, so that he shall not be responsible on non-payment by the payer; Chitty, Bills 179, 180.

To make an indorser liable on his indorsement to parties subsequent to his own indorsee, the instrument must be commercial paper; for the indorsement of a bond or single bill will not, *per se*, create a responsibility; 13 S. & R. 311. See Story, Bills 202; 11 Pet. 80.

When there are several indorsers, the first in point of time is generally, but not always, first responsible; there may be circumstances which will cast the responsibility, in the first place, as between them, on a subsequent indorsee; 5 Munf. 252; 69 Md. 352; 72 Mich. 393.

The fact that an indorsee, when he puts his name on a draft, did not think it would render him liable as an indorser, will not relieve him; 52 N. W. Rep. (Ia.) 559. Where the owner and holder of a promissory note after maturity sells and indorses the note, signing his name after that of the original payee, he is an indorser and not a joint maker; 44 Kan. 594. See INDORSEMENT.

INDUCEMENT. In Contracts. The benefit which the promisor is to receive from a contract is the inducement for making it.

In Criminal Law. The motive. Confessions are sometimes made by criminals under the influence of promises or threats. When these promises or threats are made by persons in authority, the confessions cannot be received in evidence. See CONFESSION.

In Pleading. The statement of matter which is introductory to the principal subject of the declaration or plea, and which is necessary to explain or elucidate it. Such matter as is not introductory to, or necessary to elucidate the substance or gist of, the declaration, plea, etc., nor collaterally applicable to it, is surplusage.

An inducement is, in general, more a matter of convenience than of necessity, since the same matter may be stated in the body of the declaration; but by its use confusion of statement is avoided; 1 Chitty, Pl. 259.

But in many cases it is necessary to lay a foundation for the action by a statement, by way of inducement, of the extraneous or collateral circumstances which give rise to the plaintiff's claim. For instance, in an action for a nuisance to property in the possession of the plaintiff, the circumstances of his being possessed of the property should be stated as inducement, or by way of introduction to the mention of the nuisance; 1 Chitty, Pl. 292; Steph. Pl. 257; Bac. Abr. *Pleas*, etc. (I 2).

When a formal traverse is adopted, it should be introduced with an inducement, to show that the matter contained in the traverse is material; 1 Chitty, Pl. 38. See TRAVERSE; INNUENDO; COLLOQUIUM.

In an indictment there is a distinction between the allegation of facts constituting the offence, and those which must be averred by way of inducement. In the former case, the circumstances must be set out with particularity; in the latter, a more general allegation is allowed. An "inducement to an offence does not require so much certainty." Com. Dig. *Indictment* (G 5). In an indictment for an escape, "*debito modo commissus*" is enough, without showing by what authority; and even "*commissus*" is sufficient; 1 Ventr. 170. So, in an indictment for disobedience to an order of justices for payment of a church-rate, an averment, by way of inducement, that a rate was duly made as by law required, and afterwards duly allowed, and that the defendant was by it duly rated, was held sufficient, without setting out the facts

which constituted the alleged due rating, etc., although in the statement of the offence itself it would not have been sufficient; 1 Den. Cr. Cas. 222.

INDUCIÆ (Lat.). **In Civil Law.** A truce; cessation from hostilities for a time agreed upon. Also, such agreement itself. Calv. Lex. So in international law; Grotius, *de Jure Bell.* lib. 3, c. 2, § 11; Huber, *Jur. Civit.* p. 743, § 22.

In Old Practice. A delay or indulgence allowed by law. Calvinus, Lex.; Du Cange; Bract. fol. 352 *b*; Fleta, lib. 4, c. 5, § 8. See Bell. Dict.; Burton, Law of Scotl. 561. So used in old maritime law; *e. g.* an *inducice* of twenty days after safe arrival of vessels was allowed in case of bottomry bond, to raise the principal and interest; Locceivus, *de Jure Marit.* lib. 2, c. 6, § 11.

INDUCIÆ LEGALES (Lat.). **In Scotch Law.** The days between the citation of the defendant and the day of appearance; the days between the teste day and day of return of the writ.

INDUCTIO. In the Civil Law. Obliteration, by drawing the pen or *stylus* over the writing. Dig. 28, 4; Calv. Lex.

INDUCTION. In Ecclesiastical Law. The giving a clerk, instituted to a benefice, the actual possession of its temporalities, in the nature of livery of seisin. Ayliffe, Parerg. 299.

INDULGENCE. Forbearance (*q. v.*); delay in enforcing a legal right.

As to the effect on the discharge of a surety of giving indulgence to a debtor, see SURETYSHIP.

INDULTO. In Spanish Law. The condonation or remission of the punishment imposed on a criminal for his offence. L. 1, t. 32, pt. 7. This power is exclusively vested in the king.

The right of exercising this power has been often contested, chiefly as impolitic for the reason set forth in the following Latin verses:—

"Plus sæpe nocet patientia regis
Quam rigor: ille nocet paucis; hæc incitat omnes,
Dum se ferre suos sperant impune reatus."

INDUSTRIAL AND PROVIDENT SOCIETIES. Societies formed in England for carrying on any labor, trade, or handicraft, whether wholesale or retail, including the buying and selling of land, and also (but subject to certain restrictions) the business of banking (I. and P. Soc. Act, 1876, 6). Such a society (which must consist of seven persons at least) when registered under the act becomes a body corporate with limited liability, and with the word "limited" as the last word in its name (*id.* 7, 11), and is regulated by rules providing for the amount of the shares, the holding of meetings, the mode in which the profits are to be applied, etc.; *id.* 9.

INDUSTRIAM, PER (Lat.). A qualified property in animals *feræ naturæ* may be acquired *per industriam*, *i. e.* by a man's reclaiming and making them tame by art, industry, and education; or by so confining them within his own immediate power that they cannot escape and use their natural liberty. 2 Steph. Com. 5.

INEBRIATE. See HABITUAL DRUNKARD.

INEBRIETY. See DIPSOMANIA; DRUNKENNESS.

INELIGIBILITY. The incapacity to be lawfully elected; disqualification to hold an office if elected or appointed to it. 28 Wis. 99.

This incapacity arises from various causes; and a person may be incapable of being elected to one office who may be elected to another: the incapacity may also be perpetual or temporary.

Among perpetual inabilities may be reckoned, the inability of women to be elected to certain public offices; and of a citizen born in a foreign country to be elected president of the United States.

Among the temporary inabilities may be mentioned, the holding of an office declared by law to be incompatible with the one sought; the non-payment of the taxes required by law; the want of certain property qualifications required by the constitution; the want of age, or being too old.

As to the effect on an election of the candidate having the highest number of votes being ineligible, see ELECTION. See also ELIGIBILITY.

IN EST DE JURE (Lat.). It is implied of right or by law.

INEVITABLE ACCIDENT. A term used in the civil law, nearly synonymous with *fortuitous event.* 10 Miss. 572.

Any accident which cannot be foreseen and prevented. Though used as synonymous with *act of God* (*q. v.*), it would seem to have a wider meaning, the *act of God* being any cause which operates without aid or interference from man; 4 Dougl. 287, 290, per Lord Mansfield; 21 Wend. 198; 3 Blackf. 222; 2 Ga. 349; 10 Miss. 572. In Story on Bailments § 489, the two phrases are treated as synonymous, but in a later edition, the editor, Judge Bennett, notes the distinction just mentioned and considers the phrase inevitable accident one of wider significance. See 41 Pa. 379, where this and similar expressions are discussed and distinguished; Webb, Poll. Torts 160.

Inevitable accident is a relative term and must be construed not absolutely but reasonably with regard to the circumstances of each particular case, and where having reference to a collision, it may be regarded as an occurrence which the party charged with the collision could not possibly prevent by the exercise of ordinary care, caution, and maritime skill; 2 Wall. 560; 2 E. L. & E. 559. With reference to this subject Chief Justice Drake said that inevitable accident occurs only when the

disaster happens from natural causes, without negligence or fault on either side; and when both parties have endeavored, by every means in their power, with due care and caution, and with a proper display of nautical skill, to prevent the occurrence of the accident; 12 Ct. Cl. 491; 24 How. 307.

Where a rat made a hole in a box where water was collected in an upper room, so that the water trickled out and flowed on the plaintiff's goods in a lower room; L. R. 6 Ex. 217; where pipes were laid down with plugs, properly made, to prevent the pipes bursting, and a severe frost prevented the plugs from acting and the pipes burst and flooded the plaintiff's cellar; 11 Ex. 781; where a horse took fright without any default in the driver or any known propensity in the animal, and the plaintiff was injured; 3 Esp. 533; where a horse, travelling on the highway, became suddenly frightened at the smell of blood; 30 Wisc. 257; where a horse, being suddenly frightened by a passing vehicle, became unmanageable and injured the plaintiff's horse; 1 Bingh. 13; where a mill dam, properly built, was swept away by a freshet of unprecedented violence; 8 Cow. 175; it was held that no action would lie; otherwise when the falling of the tide caused a vessel to strand, as this could have been foreseen; 42 Cal. 227. A bailee is exempt from liability for loss of the consigned goods arising from inevitable accident; he may, however, enlarge his liability by contract; 150 U. S. 312.

INFALISTATUS. In Old English Law. Exposed upon the sands, or seashore. A species of punisment mentioned in Hengham. Cowel.

INFAMIA (Lat.). Infamy; ignominy or disgrace.

By *infamia juris* is meant infamy established by law as the consequence of crime; *infamia facti* is where the party is supposed to be guilty of such crime, but it had not been judicially proved. 17 Mass. 515, 541.

INFAMIS (Lat.). **In Roman Law.** One who, in consequence of the application of a general rule, and not by virtue of an arbitrary decision of the censors, lost his political rights but preserved his civil rights. Savigny, Droit Rom. § 79.

INFAMOUS CRIME. A crime which works infamy in one who has committed it.

The fifth amendment of the constitution of the United States declares that, with certain exceptions not here material, "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury." A similar provision is contained in many of the state constitutions, although in some later ones there is a tendency to abridge the common-law strictness of requiring indictment by a grand jury.

It is settled that the provision of the federal constitution above quoted restricts only the United States so that a state may authorize an offence—capital or infamous—to be prosecuted by information; 21 La. Ann. 574; this rule of construction has been uniformly applied to the general restrictions contained in the first eight amendments; 7 Pet. 243; 2 Cow. 815; 3 *id.* 686; 12 S. & R. 220; Pom. Const. L. §§ 231–8.

It was said by Mr. Justice Miller, "There has been great difficulty in deciding what was meant a hundred years ago by the phrase infamous crime, which is used in this constitutional amendment. That difficulty is not diminished by the fact of the obscurity of the language itself as construed by what is known of the laws and usages of our ancestors at that time, in connection with the fact that both state and federal legislation in regard to crime may have made that infamous since, which would not have been so considered then;" Miller, Const. U. S. 504. The question was not authoritatively decided by the supreme court until 1885, when in *Ex parte* Wilson the theory that the true test is the nature of the crime, as understood at common law, was distinctly negatived, and it was said by Mr. Justice Gray for the court: "When the accused is in danger of being subjected to an infamous punishment, if convicted, he has the right to insist that he shall not be put upon his trial except on the accusation of a grand jury;" and the fifth amendment, declaring in what cases a grand jury should be necessary, practically affirmed the rule of the common law. This was that informations were not allowed for capital crimes nor for any felony, *i. e.* an offence which caused a forfeiture; 4 Bla. Com. 94, 95, 310; thus the requirement of an indictment depended upon the consequences of the convict, and it was concluded that the constitutional substitution of the words "a capital or otherwise infamous crime" for capital crimes or felonies, "manifestly had in view that rule of the common law, rather than the rule on the very different question of the competency of witnesses. The leading word capital describing the crime by its punishment only, the associated words or otherwise infamous crime must, by an elementary rule of construction, include crimes subject to any infamous punishment, even if they should be held to include also crimes infamous in their nature, independently of the punishment affixed to them."

Having determined that the character of the punishment was to be the criterion applied in such cases, the court discussed the question what punishment would be considered infamous, and carefully confining the decision to the requirements of the case, continued thus: "Deciding nothing beyond what is required by the facts of the case before us, our judgment is that a crime, punishable by imprisonment for a term of years at hard labor, is an infamous crime, within the meaning of the Fifth Amendment of the constitution;" 114 U. S. 417, 426, 429.

This decision was followed by a number of others which adhered to the same doctrine and decided that imprisonment in

a state prison or a penitentiary with or without hard labor was an infamous punishment; 117 U. S. 348; 121 *id.* 1; *id.* 281; 128 *id.* 393; 134 *id.* 160; 135 *id.* 263; 140 *id.* 200.

Before this decision there had been a tendency on the part of the courts towards the doctrine that the question of infamy was to be determined by the nature of the crime and not at all by the character of the punishment.

Prior to the independence of the United States there were understood to be two kinds of infamy,—one based upon the opinion of the people respecting the mode of punishment, and the other having relation to the future credibility of the offender; Eden, Penal L. ch. 75. Because the legal bearing of the subject was mainly if not entirely with respect to the settlement of rules determining what crimes would disqualify the perpetrator from testifying. Accordingly the classification of crimes other than treason or felony, which were held to be infamous, were naturally those the commission of which would tend to cast discredit upon the veracity of the criminal,—denominated generally by the term *crimen falsi*. The manifest purpose of the constitutional provision under consideration was the incorporation into fundamental law of one of the great guarantees of liberty. And it was said by Foster, J., in the Maine supreme judicial court: "A mere reference to the history and adoption of this provision into the federal constitution is sufficient to show that it was not a question of competency or incompetency to testify that the framers of our government were considering, but rather in consequences to the liberty of the individual in securing him against accusation and trial for crimes of great magnitude, without the previous interposition of a grand jury;" 84 Me. 25.

As was said by Shaw, C. J., in an opinion quoted with approval in *Ex parte* Wilson, "The state prison for any term of time is now by law substituted for all the ignominious punishment formerly in use; and, unless this is infamous, then there is now no infamous punishment other than capital."

It is said in a case subsequent to that in which the supreme court settled the principle, under the laws of the United States, an infamous crime is one for which the statutes authorized the courts to award an infamous punishment. Its character as being infamous does not depend on whether the punishment ultimately awarded is an infamous one, but whether it is in the power of the courts to award an infamous punishment, or whether the accused is in danger of being subjected to an infamous punishment; 40 Fed. Rep. 71; 114 U. S. 417; 84 Me. 25.

The authoritative settlement of this question by the supreme court renders it unnecessary to refer to the earlier decisions of the federal courts, which in some cases supported a different view. Many of them are referred to in the opinion of the supreme court, and the theories on which they are based are expressly disapproved. In some of the state courts the same conclusion was reached; 108 N. C. 593; 97 Mo. 668; 84 Me. 25.

It has also been held that a crime to the conviction and punishment of which congress has superadded a disqualification to hold office, is thereby made infamous: 112 U. S. 76; 114 *id.* 417. The course of decisions cited renders the cases as to particular crimes of little value, but of those held to be infamous under the principle stated are, larceny; 3 N. M. 367; 40 Fed. Rep. 71; assault with intent to kill; *id.* 81; selling liquors without paying a revenue tax; 35 *id.* 411; 135 U. S. 263; refusing to register voters; 43 Fed. Rep. 570; counterfeiting United States securities; 114 U. S. 417; embezzlement and making false entries by an officer of a national bank; 128 *id.* 393; 121 *id.* 1; 140 U. S. 200. When a state authorizes prosecution by information, one accused of grand larceny before its admission as a state cannot be so prosecuted; 10 Mont. 537. See 3 Cr. L. Mag. 77; 12 Myer, Fed. Dec. 795; INFAMY; INDICTMENT; INFORMATION.

INFAMY. That state which is produced by the conviction of crime and the loss of honor, which renders the infamous person incompetent as a witness, or juror.

The loss of character or position which results from conviction of certain crimes, and which formerly involved disqualification as a witness and juror.

When a man was convicted of an offence inconsistent with the common principles of honesty and humanity, the law considered his oath of no weight, and excluded his testimony as of too doubtful and suspicious a nature to be admitted in a court of justice to deprive another of life, liberty, or property; Tayl. Ev. 1137; 2 Bulstr. 154; 1 Phill. Ev. 23; Bull. N. P. 291; 67 Pa. 386; 3 Wash. C. C. 99.

The statutory abolition of this disqualification, see *infra*, has rendered the subject obsolete in England; Stark. Ev. (Sharsw. ed.) 118; and equally so in the United States as a question of evidence, but the constitutional guarantee against conviction of an infamous crime, otherwise than by indictment, has to a considerable extent involved the discussion of the common-law definition of such crimes. As to this branch of the subject, see INFAMOUS CRIME.

The crimes which at common law rendered a person incompetent were treason; 5 Mod. 16, 74; felony; 2 Bulstr. 154; Co. Litt. 6; 1 T. Raym. 369; larceny; 62 Ala. 164; even petit larceny at common law; 5 Mod. 75; 71 Ala. 17, 271; but not if reduced to a misdemeanor; 80 Va. 287; 3 Tex. App. 114; receiving stolen goods; 7 Metc. 500; 5 Cush. 287; see 3 Clark 290; all offences founded in fraud, and which come within the general notion of the *crimen falsi* of the Roman Law; Leach 496; as perjury and forgery; Co. Litt. 6;

Fost. 209; 3 Ohio St. 229; piracy; 2 Rolle, Abr. 886; swindling, cheating; Fost. 209; barratry; 2 Salk. 690; conspiracy; 1 Leach 442; subornation of perjury; 2 G. & B. 145; suppression of testimony by bribery or by a conspiracy to procure the absence of a witness, or other conspiracy to accuse one of a crime and barratry; 1 Leach 442; bribing a witness to absent himself from a trial in order to get rid of his evidence; Fost. 208. From the decisions, Greenleaf deduces the rule "that the *crimen falsi* of the common law not only involves the charge of falsehood, but also is one which may injuriously affect the administration of justice, by the introduction of falsehood and fraud;" 1 Greenl. Ev. § 373.

But the attempt to procure the absence of a witness, not amounting to a conspiracy; 8 Vt. 57; keeping a gaming house; 1 R. & M. N. P. 270; a bawdy house; 14 Mo. 348; adultery; 39 N. H. 505; maliciously obstructing railroad cars; 8 Cush. 384; deceits in false weights, etc.; 1 Greenl. Ev. § 373; false pretences; 33 Fed. Rep. 544; 68 Mo. 458; embezzlement under some conditions of the law; 67 Pa. 386; conspiracy to cheat and defraud creditors; 33 *id.* 463; were held not infamous. The test has been said to be "whether or not the crime shows such depravity or such a disposition to pervert public justice in the courts as creates a violent presumption against the truthfulness of the offered witness,—the difficulty being in the application of this test." 1 Bish. New Cr. L. 974. By statute in England and in most of the United States, the disqualification of infamy is removed, but a conviction may usually be proved to affect credibility; 99 Mass. 420; 56 N. Y. 208; 21 Mich. 561; 50 N. H. 242. But the difference in statutory regulations is such as to preclude general statement and to require reference to the local law in particular cases.

In Alabama one convicted of an infamous crime cannot execute the office of executor, administrator, or guardian, and conviction extinguishes all private trusts not susceptible of delegation, and also disqualifies him from holding office or voting; 83 Ala. 84. Other disabilities have been created by statute in other states. See 15 Am. Dec. 322.

As the law was administered prior to the statutory removal of the disability to testify, it was the crime not the punishment which rendered the offender unworthy of belief; 1 Phill. Ev. 25; but that is not now recognized as the true test by which to determine what, in the sense of the American constitutional law, is an *infamous crime*. See that title.

In order to incapacitate the party the judgment must have been pronounced by a court of competent jurisdiction; 2 Stark. 183; 1 Sid. 51. The disqualification came only from the final judgment of the court; Bull. N. P. 392; 48 Me. 327; 69 N. Y. 107; and not from the crime; 1 McMull. 494; or mere conviction, or the infamous nature of the punishment; 1 Bish. New Cr. L. § 975. The proof of the crime was by the record of conviction; 5 Gray 478.

It has been held that a conviction of an infamous crime in another country, or another of the United States, does not render the witness incompetent on the ground of infamy; 17 Mass. 515; 11 Metc. 304; *contra*, 3 Hawks 393; though this doctrine appears to be at variance with the opinions entertained by foreign jurists, who maintain that the state or condition of a person in the place of his domicil accompanies him everywhere; Story, Confl. Laws § 620, and the authorities there cited; Fœlix, *Traité de Droit Intern. Privé* 31; Merlin, Répert. *Loi*, 6, n. 6. In some states such a record has the same effect as a domestic one; 15 Nev. 64; 10 N. H. 22; in some it is admitted only on the question of credibility; 9 Pick. 496; and again it has been held that the full faith and credit, required to be given to records of other states, does not extend to enforcing in one state personal disabilities imposed upon a person convicted of crime in another state; 75 N. Y. 466; reversing 12 Hun 231, and expressly disapproving 10 N. H. 24 and 3 Hawks 393. The question is to be determined by the law of the forum, and therefore the record should set forth a copy of the indictment; 9 Wis. 140. In some states the record is rejected altogether; 7 Gratt. 706; 23 Ala. 44. See 2 Harr. & McH. 120, 380; 1 *id.* 572; 1 Jones N. C. 526; 63 N. C. 294.

The competency of such a witness was restored by pardon; 2 Cra. C. C. 528; 33 N. H. 388; 41 Ala. 405; unless the disability is annexed to the conviction, by statute; 24 Ill. 298; whether granted before sentence; 4 Wall. 332; or after it has been complied with; 2 Whart. 451. See 142 U. S. 450; 144 *id.* 261; 21 Tex. App. 1. But the completion of the sentence does not remove the disability; 4 Cra. C. C. 607; 16 La. Ann. 273; *contra*, 7 *id.* 379. A pardon does remove it even if it contains a clause declaring that it is intended to relieve from imprisonment and not from legal disabilities incident to conviction, such clause being held repugnant; 3 Johns. Cas. 333; but after a pardon the conviction is admissible to affect credibility; 5 Hill 196; 50 N. H. 242.

The judgment for an infamous crime, even for perjury, did not preclude the party from making an affidavit with a view to his own defence; 2 Salk. 461; 2 Stra. 1148; 1 Greenl. Ev. § 374. He might, for instance, make an affidavit in relation to the irregularity of a judgment in a cause in which he was a party; for otherwise he would be without a remedy. But the rule was confined to defence; and he could not, at common law, be heard upon oath as complainant; 2 Salk. 461; 2 Stra. 1148. When the witness became incompetent from infamy of character, the effect was the same as if he were dead; if he had attested any instrument as a witness, previous to his conviction, evidence might be given of

his handwriting; 2 Stra. 833; Stark. Ev. pt. 2, § 193, pt. 4, p. 723.

A person infamous cannot be a juror, if indeed the disqualification of infamy does not extend to more crimes in jurors than in witnesses; 1 Bish. New Cr. L. § 977; 1 Co. Litt. 6 *b*.

See INFAMOUS CRIME.

INFANGENETHEF, INFANGTHEF. The right of the lord of the manor to sit in judgment on the thief caught on his own land.

The jurisdictional powers granted in the charters of the thirteenth century frequently included this right, which extended to the hanging of the thief so caught, and, for this purpose, the manorial gallows was erected on the land of the lord. The privilege of *utfangenethef*, more rarely given, conferred the right of hanging the thief, wherever caught, if he had upon his person the stolen goods, and if he were prosecuted by the loser of the goods; 1 Poll. & Maitl. 564. See GALLOWS.

INFANS. In the Civil Law. A child under the age of seven years; so called "*quasi impos fandi*" (as not having the faculty of speech). Cod. Theodos. 8, 18, 8.

INFANT. One under the age of twenty-one years. Co. Litt. 171.

But he is reputed to be twenty-one years old, or of full age, the first instant of the last day of the twenty-first year next before the anniversary of his birth; because, according to the civil computation of time, which differs from the natural computation, the last day having commenced, it is considered as ended. Savigny, *Dr. Rom.* § 182; 6 Ind. 447. Accordingly, a man is held entitled to vote on the day before the twenty-first anniversary of his birth; 3 Harring. 507. See AGE.

If, for example, a person were born at any hour of the first day of January, 1810 (even a few minutes before twelve o'clock of the night of that day), he would be of full age at the first instant of the thirty-first of December, 1830, although nearly forty-eight hours before he had actually attained the full age of twenty-one years, according to years, days, hours, and minutes, because there is in this case no fraction of a day; 1 Sid. 162; 1 Kebl. 589; 1 Salk. 44; Raym. 84; 1 Bla. Com. 463, 464; 1 Lilly, Reg. 57; Comyns, Dig. *Enfant* (A); Savigny, Dr. Rom. §§ 383, 384. See FULL AGE; FRACTION OF A DAY.

A curious case occurred in England of a young lady who was born after the house-clock had struck, while the parish clock was striking, and before St. Paul's had begun to strike, twelve, on the night of the fourth and fifth of January, 1805; the question was whether she was born on the fourth or fifth of January. Mr. Coventry gives it as his opinion that she was born on the fourth because the house-clock does not regulate anything but domestic affairs, that the parochial clock is much better evidence, and that a metropolitan clock ought to be received with "implicit acquiescence." Coventry, Ev. 182. It is conceived that this can only be *prima facie*; because, if the facts were otherwise, and the parochial and metropolitan clocks should both have been wrong, they would undoubtedly have had no effect in ascertaining the age of the child.

The sex makes no difference at common law; a woman is, therefore, an infant until she has attained the age of twenty-one years; Co. Litt. 161. It is otherwise, however, in some of the United States; 18 Ill. 209; 4 Ind. 464. In Idaho, act 1864, females come of age at the age of eighteen. The same rule exists in Vermont, Ohio, Illinois, Iowa, Minnesota, Kansas, Nebraska, Maryland, Missouri, Arkansas, California, Colorado, Oregon, Nevada, and Washington; see 18 Ill. 209; 65 Ga. 400; 90 Vt. 41; 24 Minn. 194; 21 Neb. 680; 4 Colo. 263. Before arriving at full age, an infant may do many acts. A *male* at fourteen is of discretion, and may consent to marry; and at that age he may disagree to and annul a marriage he may before that time have contracted; he may then choose a guardian, and if his discretion be proved, may, at common law, make a will of his personal estate; he may act as executor at the age of seventeen years. A *female* at seven may be betrothed or given in marriage; at nine she is entitled to dower; at twelve she may consent or disagree to marriage; and, at common law, at seventeen she may act as executrix. Considerable changes of the common law have taken place in many of the states. In New York and several other states an infant is now deemed competent to be an executor; in Pennsylvania, Massachusetts, and other states, if an infant is named as executor in the will, administration with the will annexed will be granted during his minority, unless there shall be another executor who shall except, when the minor on arriving at full age may be admitted as joint executor; Tyler, Inf. & Cov. 133.

In general, an infant is not bound by his contracts, unless to supply him necessaries; Selw. N. P. 137; Bacon, Abr. *Infancy, etc.* (I 3); 9 Viner, Abr. 391; 1 Comyns, Contr. 150, 151; 3 Rawle 351; 1 South. 87; but see 6 Cra. 226; 3 Pick. 492; 1 N. & M'C. 197; or unless, by some legislative provision, he is empowered to enter into a contract; as, with the consent of his parent or guardian, to put himself apprentice, or enlist in the service of the United States; 4 Binn. 487; 30 Vt. 357; but a contract of enlistment is not voidable like other contracts of an infant; 137 U. S. 157. A dwelling-house is not within the definition of necessaries, so as to render an infant liable on a contract for its erection; 78 Hun 603.

At common law, contracts for articles other than necessaries made by an infant, after full age might be ratified by him, and would then become in all respects binding. In England Lord Tenterden's Act, 9 Geo. IV. c. 14, § 5, required the ratification to be in writing. But now by the Infants' Relief Act, 1874, 37 & 38 Vict. c. 62, "All contracts entered into by infants for the repayment of money lent, or to be lent, or for goods supplied, or to be supplied (other than contracts for necessaries), and all accounts stated shall be absolutely void," and "no action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age."

Contracts made with him may be enforced or avoided by him on his coming of age; 20 Ark. 600; 12 Ind. 76; 4 Sneed 118; 13 La. Ann. 407; 32 N. H. 345; 24 Mo. 541;

154 Mass. 458; 39 Kan. 495; but must be avoided within a reasonable time; 15 Gratt. 329; 29 Vt. 465; 25 Barb. 399; 156 Pa. 91. See 148 Ill. 357. But to this general rule there may be an exception in case of contracts for necessaries; because these are for his benefit. See NECESSARIES. 2 Head 33; 18 Ill. 63; 13 Md. 140; 32 N. H. 345; 11 Cush. 40; 14 B. Monr. 232; but an infant is not liable upon a bill of exchange at the suit of an indorsee of the bill, although it was accepted for the price of necessaries; [1891] 1 Q. B. 413; bills and notes of an infant, whether negotiable or not, are voidable; 8 Ala. 725; 43 N. H. 413; 23 Me. 517; 63 Ind. 567. The privilege of avoiding a contract on account of infancy is strictly personal to the infant, and no one can take advantage of it but himself; 3 Green, N. J. 343; 2 Brev. 438; 6 Jones, N. C. 494; 23 Tex. 252; 30 Barb. 641; 31 Miss. 32; 94 Ala. 223. See 48 Fed. Rep. 810. When the contract has been performed, and it is such as he would be compellable by law to perform, it will bind him; Co. Litt. 172 *a*. And all the acts of an infant which do not touch his interest, but take effect from an authority which he has been trusted to execute, are binding; 3 Burr. 1794; Fonbl. Eq. b. 1, c. 2, § 5, note *c*. The contracts of an infant, when not intrinsically illegal, are voidable, not void, and may be ratified by him upon arriving at maturity; 17 Colo. 506.

The contract cannot be avoided by an adult with whom the infant deals; 29 Barb. 160; 12 Ind. 76; 5 Sneed 659; 53 Mich. 238; 47 N. J. L. 457; 73 Me. 252; or by a third person in a collateral proceeding; 56 Me. 527; 96 N. Y. 201; 129 Mass. 129. See 136 U. S. 519.

The doctrine of estoppel is inapplicable to infants; 5 Sand. 228; 25 Cal. 147; 92 Ky. 500. Even where an infant fraudulently represented himself as being of full age, he was not estopped from setting up a defence of infancy to a contract entered into under the fraudulent representation; 11 Cush. 40; 10 N. H. 184; *contra*, 17 Tex. 341. But an infant cannot retain the benefits of his contract, and thus affirm it, after becoming of age, and yet plead infancy to avoid the payment of the purchase money; 33 N. Y. 526; 1 App. D. C. 359; but see 154 Mass. 458; 36 Neb. 51.

A conveyance of land by a minor without consideration is void; 90 Tenn. 705. The deed of an infant is not void but voidable only; 85 Ky. 288; and so is a mortgage; 66 N. C. 45; 43 N. H. 413; 33 Md. 128; but the deed may be ratified after reaching his majority, either expressly or impliedly; 84 Va. 509; but see 86 Ala. 442; 85 Ky. 572; and not before; 83 Ind. 182; 50 Mo. 82; 102 U. S. 300.

An infant is not competent to appoint an agent; 85 Wis. 504; his property is not liable to a mechanic's lien for material purchased by him during infancy; 36 Neb. 51. When avoiding an executory contract relating to his personal property, he need not refund the money received, where he has squandered it; 68 Hun 589.

The protection which the law gives an infant is to operate as a shield to him, to protect him from improvident contracts, but not as a sword to do injury to others; 7 Mont. 171. An infant is, therefore, responsible for his torts, as for slander, trespass, and the like; 29 Barb. 218; 29 Vt. 465; 2 Misc. Rep. 236; but he cannot be made responsible in an action *ex delicto*, where the cause arose on a contract; 3 Rawle 351; 15 Wend. 233; 9 N. H. 441; 10 Vt. 71; 5 Hill, S. C. 391. But see 6 Cra. 226; 15 Mass. 359; 4 M'Cord 387. It is well settled that an infant bailee of a horse is liable in an action *ex delicto* for every tortious wilful act causing injury or death to the horse, the same as though he were an adult; 2 Wend. 137; 50 N. H. 235; Field, Inf. 32.

With regard to the responsibility of infants for crimes, the rule is that no infant within the age of seven years can be guilty of felony or be punished for any capital offence; for within that age an infant is, by presumption of law, *doli incapax* and cannot be endowed with any discretion; and against this presumption no averment shall be received. The law assumes that this legal incapacity ceases when the infant attains the age of fourteen years, but subjects this assumption to the effect of proof; 40 Vt. 585. Between the age of seven and fourteen years an infant is deemed *prima facie* to be *doli incapax;* but in this case the maxim applies, *malitia supplet ætatem:* malice supplies the want of mature years; 1 Russ. Cri. 2, 3; 31 Ala. N. S. 323; 45 La. Ann. 1172; and the question whether such a child is capable of committing an assault with intent to murder, is for the jury; 15 So. Rep. Ala. 438. See 56 N. W. Rep. Ia. 403; 1 Bishop, N. Cr. L. § 368.

Infant defendants are not properly before the court when not served with summons, and there is no appointment of a guardian *ad litem* to represent them; 36 S. C. 354. Where infant defendants have no special or separate defence, no separate answer is necessary, but joinder in the general answer of defendants is sufficient; 94 Cal. 54. See GUARDIAN AD LITEM.

As to liability for necessaries, see 12 L. R. A. 859; 35 Cent. L. J. 203; 2 *id.* 762; 22 Am. L. Reg. N. S. 607; 25 *id.* 698; 29 Sol. J. 42. As to the duty of the divorced father of an infant, see 19 Cent. L. J. 35; as to contracts of infants, generally, see 22 Am. L. Reg. N. S. 273; 24 Ir. L. T. 523; 2 Cent. L. J. 230; to marry; 20 Am. L. Reg. 447, 459; marriage settlement; 26 Ir. L. T. 694; power of attorney; 31 Cent. L. J. 104; partnership; 26 Am. L. Reg. N. S. 713; 27 *id.* 528.

INFANTICIDE. **In Medical Jurisprudence.** The murder of a new-born infant. It is thus distinguishable from abortion and *fœticide*, which are limited to the destruction of the life of the *fœtus in utero*.

The crime of infanticide can be committed only after the child is wholly born;

5 C. & P. 329; 6 *id.* 349. But the destruction of a child *en ventre sa mère* is a high misdemeanor; 1 Bla. Com. 129. See 2 C. & K. 784; 7 C. & P. 850.

This question involves an inquiry, *first*, into the signs of maturity, the data for which are—the length and weight of the fœtus, the relative position of the centre of its body, the proportional development of its several parts as compared with each other, especially of the head as compared with the rest of the body, the degree of growth of the hair and nails, the condition of the skin, the presence or absence of the *membrana pupillaris*, and in the male the descent or non-descent of the testicles; Dean, Med. Jur. 140; Tayl. Med. Jur. 534.

Second, was it born alive? The second point presents an inquiry of great interest both to the legal and medical professions and to the community at large. In the absence of all direct proof, what organic facts proclaim the existence of life subsequent to birth? These facts are derived principally from the circulatory and respiratory systems. From the former the proofs are gathered—from the *character of the blood*, that which is purely fœtal being wholly dark, like venous blood, and forming coagula much less firm and solid than that which has been subjected to the process of respiration. *From the condition of the heart and blood-vessels.* The circulation anterior and subsequent to birth must necessarily be entirely different. That anterior, by means of the fœtal openings,—the *foramen ovale*, the *ductus arteriosus*, and the *ductus venosus*,—is enabled to perform its circuit without sending the entire mass of the blood to the lungs for the purpose of oxygenation. When the extra-uterine life commences, and the double circulation is established, these openings usually close; so that their closure is considered probable evidence of life subsequent to birth; 1 Beck, Med. Jur. 478; Dean, Med. Jur. 142. *From the difference in the distribution* of the blood in the different organs of the body. The two organs in which this difference is most perceptible are the liver and the lungs,—especially the latter. The circulation of the whole mass of the blood through the lungs distends and fills them with blood, so that their relative weight will be nearly doubled, and any incision into them will be followed by a free effusion.

From the respiratory system proofs of life subsequent to birth are derived. *From the thorax:* its size, capacity, and arch are increased by respiration. *From the lungs:* they are increased in size and volume, are projected forward, become rounded and obtuse, of a pinkish-red hue, and their density is inversely as their volume; Dean, Med. Jur. 149 *et seq.* The fact of the specific gravity of the lungs being diminished in proportion to their diminution in density gives rise to a celebrated test,—the hydrostatic,—the relative weight of the lungs with water; 1 Beck, Med. Jur. 459 *et seq.* The rule is, that lungs which have not respired are specifically heavier than water, and if placed within it will sink to the bottom of the vessel. If they have respired, their increase in volume and decrease in density render them specifically lighter than water, and when placed within it they will float. There are several objections to the sufficiency of this test; for example lungs which have never respired may become so distended with putrefactive gases as to float, and, on the other hand, lungs which have respired may be the seat of congestion or inflammation which would cause them to sink; but it is fairly entitled to its due weight in the settlement of this question; Dean, Med. Jur. 154 *et seq.* *From the state of the diaphragm:* prior to respiration it is found high up in the thorax. The act of expanding the lungs enlarges and arches the thorax, and, by necessary consequence, the diaphragm descends.

The fact of life at birth being established, the next inquiry is, how long did the child survive? The proofs here are derived from three sources. *The fœtal openings*, their partial or complete closure. The more perfect the closure, the longer the time. *The series of changes* in the umbilical cord. These are—1, the *withering* of the cord; 2, its *desiccation* or *drying*, and, 3, its *separation* or *dropping off*,—occurring usually four or five days after birth; 4, *cicatrization of the umbilicus*,—occurring usually from ten to twelve days after birth. *The changes in the skin*, in the process of exfoliation of the epidermis, which commences on the abdomen, and extends thence successively to the chest, groin, axillæ, interscapular space, limbs, and, finally, to the hands and feet.

As to the modes by which the life of the child may have been destroyed. The criminal modes most commonly resorted to are—1, suffocation; 2, drowning; 3, cold and exposure; 4, starvation; 5, wounds, fractures, and injuries of various kinds; a mode not unfrequently resorted to is the introduction of sharp-pointed instruments in different parts of the body; also, luxation and fracture of the neck, accomplished by forcibly twisting the head of the child, or pulling it backwards; 6, strangulation; 7, poisoning; 8, intentional neglect to tie the umbilical cord; and, 9, causing the child to inhale air deprived of its oxygen, or gases positively deleterious. All these modes of destroying life, together with the natural or accidental ones, will be found fully discussed by the writers on medical jurisprudence. 1 Beck, Med. Jur. 509; Dean, Med. Jur. 179; Ryan, Med. Jur. 137; Dr. Cummins, Proof of Infanticide Considered; Storer & Heard, Criminal Abortion; Brown, Infanticide; Toulmouche, *Etudes sur Infanticide.*

INFANZON. In Spanish Law. A person of noble birth, who exercises within his domains and inheritance no other rights and privileges than those conceded to him.

INFEOFFMENT. The act or instrument of feoffment. In Scotland it is synonymous with *saisine*, meaning the instrument of possession: formerly it was synonymous with investiture. Bell, Dict. The word as used in Scotch law was *infeftment*, which was, in its proper sense, the whole feudal right, but, afterwards, the instrument or attestation of a notary that possession was actually given. Ersk. Prin. 133.

INFERENCE. A conclusion drawn by reason from premises established by proof.

A deduction or conclusion from facts or propositions known to be true. 44 Wis. 336.

It is the province of the judge who is to decide upon the facts to draw the inference. When the facts are submitted to the court, the judges draw the inference; when they are to be ascertained by a jury, the jury must do so. The witness is not permitted, as a general rule, to draw an inference and testify that to the court or jury. It is his duty to state the facts simply as they occurred. Inferences differ from presumptions.

INFERIOR COURTS. An inferior court is a court of special and limited jurisdiction, and it must appear on the face of its proceedings that it has jurisdiction, and that the parties were subjected to its jurisdiction by proper process, or its proceedings will be void. Cooley, Const. Lim. 508. Another distinction between superior and inferior courts is: in the latter case, a want of jurisdiction may be shown even in opposition to the recitals contained in the record; *id.* 509; citing 5 N. Y. 431, 497; 26 Conn. 273; this is the general rule, though there are apparent exceptions of those cases where the jurisdiction may be said to depend upon the existence of a certain state of facts, which must be passed upon by the courts themselves, and in respect to which the decis-

ion of the court once rendered, if there was any evidence whatever on which to base it, must be held final and conclusive in all collateral inquiries, notwithstanding it may have erred in its conclusions; Cooley, Const. Lim. 509; citing 1 B. & B. 432; Freem. Judg. § 523; 10 Wis. 16; 16 Mich. 225.

INFICIATIO (Lat.). **In Civil Law.** Denial. Denial of fact alleged by plaintiff, —especially, a denial of debt or deposit. Voc. Jur. Utr.; Calvinus, Lex.

INFIDEL. One who does not believe in the existence of a God who will reward or punish in this world or that which is to come. Willes 550. One who professes no religion that can bind his conscience to speak the truth. 1 Greenl. Ev. § 368. One who does not recognize the inspiration or obligation of the Holy Scriptures, or generally recognized features of the Christian religion. 37 N. Y. 580.

This term has been very indefinitely applied. Under the name of infidel, Lord Coke comprises Jews and heathens: Co. 2d Inst. 506; Co. 3d Inst. 165; and Hawkins includes among infidels such as do not believe either in the Old or New Testament; Hawk. Pl. Cr. b. 2, c. 46, s. 148.

The objection to the competency of witnesses who have no religious belief is removed in England and in most of the United States by statutory enactments; 1 Whart. Ev. § 395.

It has been held that at common law it is only requisite that the witness should believe in the existence of a God who will punish and reward according to desert; 1 Atk. 21; 2 Cow. 431; 5 Mas. 18; 13 Vt. 362; 26 Pa. 274; that it is sufficient if the punishment is to be in this world; 14 Mass. 184; 4 Jones, No. C. 25; *contra*, 7 Conn. 66. And see 17 Wend. 460; 2 W. & S. 262; 10 Ohio 121. A witness's belief is to be presumed till the contrary appear; 2 Dutch. 463, 601; and his disbelief must be shown by declarations made previously, and cannot be inquired into by examination of the witness himself; 1 Greenl. Ev. § 370, n.; 17 Me. 157; 14 Vt. 535. See 17 Ill. 541; 80 Ky. 248; 53 N. H. 55. See Tayl. Ev. 1178.

INFIHT (Sax.). An assault upon an inhabitant of same dwelling. Gloss. Anc. Inst. & Laws of Eng.

INFIRM. Weak, feeble.

When a witness is infirm to an extent likely to destroy his life, or to prevent his attendance at the trial, his testimony *de bene esse* may be taken at any age. 1 P. Wms. 117. See WITNESS.

INFIRMATIVE. Weakening. Webster, Dict. Tending to weaken or render infirm; disprobabilizing. 3 Benth. Jud. Ev. 13, 14. Exculpatory is used by some authors as synonymous. See Wills, Circ. Ev. 120; Best. Pres. § 217.

INFLUENCE. Most frequently used in connection with "undue," and refers to persuasion, machination, or constraint of will presented or exerted to procure a disposition of property, by gift, conveyance, or will. Anderson, L. Dict.

INFORMALITY. Want of customary or legal form.

INFORMATION. In French Law. The act or instrument which contains the depositions of witnesses against the accused. Pothier, Proc. Civ. sect. 2, art. 5.

In Practice. A complaint or accusation exhibited against a person for some criminal offence. 4 Bla. Com. 308.

An accusation in the nature of an indictment, from which it differs only in being presented by a competent public officer on his oath of office, instead of a grand jury on their oath. 1 Bish. Cr. Proc. § 141.

It differs in no respect from an indictment in its form and substance, except that it is filed at the mere discretion of the proper law officer of the government, *ex officio*, without the intervention of a grand jury; 4 Bla. Com. 308. The process has not been formally put in motion by congress for misdemeanors, but is common in civil prosecutions for penalties and forfeitures; 3 Story, Const. 659. The information is usually made upon knowledge given by some other person than the officer called the relator. "It comes from the common law without the aid of statutes; 5 Mod. 459; it is a concurrent remedy with indictment for all misdemeanors except misprision of treason, but not permissible in any felony." Bish. Cr. Pr. § 14; 5 Mass. 257; 9 Leigh 665.

As to the power of a legislature to dispense with indictment, see INFAMOUS CRIME.

Under *United States* laws, informations are resorted to for illegal exportation of goods; 1 Gall. 3; in cases of smuggling; 1 Mas. 482; and a libel for seizure is in the nature of an information; 3 Wash. C. C. 464; 1 Wheat. 9; 9 *id.* 381. The provisions of the U. S. constitution which provide that no person shall be held to answer for a capital or otherwise infamous crime, unless on presentment, etc., of a grand jury, have been held to apply only to the proceedings in the federal courts; Whart. Cr. Pl. &. Pr. 88; 24 Ala. 672; 8 Vt. 57.

An information is sufficiently formal if it follows the words of the statute; 9 Wheat. 381; 14 Conn. 487; but enough must appear to show whether it is found under the statute or at common law; 3 Day 103. It must, however, allege the offence with sufficient fulness and accuracy; 10 Ind. 404; and must show all the facts demanding a forfeiture, as in a penal action, when it is to recover a penalty; 4 Mass. 462; 10 Conn. 461. Where it is for a first offence, the fact need not be stated; 9 Conn. 560; otherwise, where it is for a second or subsequent offence for which an additional penalty is provided; 2 Metc. Mass. 408. It need not show that there has been a preliminary examination or a

waiver thereof; 48 Kan. 752. It cannot be amended by adding charges; 1 Dana 466; *contra*, that it can be amended before trial; 12 Conn. 101; 38 N. H. 314; 1 Salk. 471. By the common law a mistake in an information may be amended at any time; 64 Vt. 372. The information charging a statutory offence cannot be amended after verdict so as to include another offence found by the jury; 88 Mich. 359. It must be signed by the officer before filing; 15 Kan. 404; but not necessarily in Texas; 1 Tex. App. 664; and must conclude with "against the peace and dignity of the state;" 27 Tex. App. 538. In England, a verification was not required; but it is usually otherwise by statute in America; 4 Ind. 524; 1 McArth. 466.

A part of the defendants may be acquitted and a part convicted; 1 Root 226; and a conviction may be of the whole or a part of the offence charged; 4 Mass. 137. In some states it is a proceeding by the state officer, filed at his own discretion; 9 N. H. 468; 6 Ind. 281; 4 Wis. 567; in others, leave of court may be granted to any relator to use the state officer's name, upon cause shown; 7 Halst. 84; 2 Dall. 112; 1 M'Cord 35, 52. See 45 La. Ann. 25. In England, the right to make an information was in the attorney-general, who acted without the interference of the court; 3 Burr. 2089. In former times the officer proceeded upon any application, as of course; 4 Term 285; but by an act passed in 1692, it was provided that leave of court must be first obtained and security entered; see 2 Term 190. It is said to be doubtful whether leave of court is necessary in this country; 1 Bish. Cr. Pr. § 144. A prosecuting officer may, on his own motion, present a bill to the grand jury, without presenting an affidavit charging the offence, if he deems it necessary for the public good; and his action in doing so will be disturbed only in case of abuse of discretion; 20 S. E. Rep. (S. C.) 1010.

See INDICTMENT; GRAND JURY; INFAMOUS CRIME.

INFORMATION OF INTRUSION. A proceeding instituted by the state prosecuting officer against intruders upon the public domain. See 3 Pick. 224; 6 Leigh 588.

INFORMATION IN THE NATURE OF A QUO WARRANTO. A proceeding against the usurper of a franchise or office. See QUO WARRANTO.

INFORMATUS NON SUM (Lat.). **In Practice.** I am not informed: a formal answer made in court or put upon record by an attorney when he has nothing to say in defence of his client. Styles, Reg. 372.

INFORMER. A person who informs or prefers an accusation against another, whom he suspects of the violation of some penal statute.

When the informer is entitled to the penalty or part of the penalty, upon the conviction of an offender, he is or is not at common law a competent witness, according as the statute creating the penalty has or has not made him so; 1 Phill. Ev. 97; Ros. Cr. Ev. 107; 5 Mass. 57; 1 Dall. 68; 1 Saund. 262, c. See 16 Pet. 213; 4 East 180. The court is not bound to instruct the jury that the testimony of such a witness is to be received with great caution and distrust, since the credibility of witnesses is for the jury, and counsel are permitted to argue the question to them; 15 R. I. 1.

INFORTIATUM (Lat.). **In Civil Law.** The second part of the Digest or Pandects of Justinian. See DIGEST.

This part, which commences with the third title of the twenty-fourth book and ends with the thirty-eighth book, was thus called because it was the middle part, which, it was said, was supported and fortified by the two others. Some have supposed that this name was given to it because it treats of successions, substitutions, and other important matters, and, being more used than the others, produced greater fees to the lawyers.

INFRA (Lat.). Below, under, beneath, underneath. The opposite of *supra*, above. Thus, we say, *primo gradu est*—supra, *pater*, *mater*, infra, *filius*, *filia*: in the first degree of kindred in the ascending line, above is the father and the mother, below, in the descending line, son and daughter. Inst. 3. 6. 1.

In another sense, this word signifies *within*: as, *infra corpus civitatis*, within the body of the country; *infra præsidia*, within the guards. So of time, *during*: *infra furorem*, during the madness. This use is not classical. The sole instance of the word in this sense in the Code, *infra anni spatium*, Code, b. 5, tit. 9, § 2, is corrected to *intra anni spatium*, in the edition of the Corpus Jur. Civ. of 1833 at Leipsic. The use of *infra* for *intra* seems to have sprung up among the barbarians after the fall of the Roman empire.

INFRA ÆTATEM (Lat.). Within or under age.

INFRA ANNUM LUCTUS (Lat.). Within the year of grief or mourning. 1 Bla. Com. 457; Cod. 5. 9. 2. But *intra anni spatium* is the phrase used in the passage in the Code referred to. See Corp. Jur. Civ. 1833, Leipsic. *Intra tempus luctus* occurs in Novella 22, c. 40. This *year* was at first ten months, afterwards twelve. 1 Beck, Med. Jur. 612.

INFRA BRACHIA (Lat.). Within her arms. Used of a husband *de jure* as well as *de facto*. Co. 2d Inst. 317. Also, *inter brachia*. Bracton, fol. 148 *b*. It was in this sense that a woman could only have an appeal for murder of her husband *inter brachia sua*. Woman's Lawyer, pp. 332, 335.

INFRA CORPUS COMITATUS (Lat.). Within the body of the county.

The common-law courts have jurisdiction

infra corpus comitatus: the admiralty, on the contrary, has no such jurisdiction, unless, indeed, the tide-water may extend within such county. 5 How. 441, 451. See ADMIRALTY; FAUCES TERRÆ.

INFRA DIGNITATEM CURIÆ (Lat.). Below the dignity of the court. Example: in equity a demurrer will lie to a bill on the ground of the triviality of the matter in dispute, as being below the dignity of the court. See 4 Johns. Ch. 183; 4 Paige, Ch. 364.

INFRA HOSPITIUM (Lat.). Within the inn. When once a traveller's baggage comes *infra hospitium*, that is, in the care and under the charge of the innkeeper, it is at his risk. See GUEST; INNKEEPER.

INFRA PRÆSIDIA (Lat. within the walls). A term used in relation to prizes, to signify that they have been brought completely in the power of the captors; that is, within the towns, camps, ports, or fleet of the captors. Formerly the rule was, and perhaps still in some countries is, that the act of bringing a prize *infra præsidia* changed the property; but the rule now established is that there must be a sentence of condemnation to effect this purpose. 1 C. Rob. 134; 1 Kent 104; Chitty, Law of Nat. 98; Abbott, Shipp. 14; Hugo, Droit Romain § 90.

INFRACTION (Lat. *infrango*, to break in upon). The breach of a law or agreement; the violation of a compact. In the French law this is the generic expression to designate all actions which are punishable by the Code of France.

INFRINGEMENT. In Patent Law. A word used to denote the act of trespassing upon the incorporeal right secured by a patent or copyright. Any person who, without legal permission, shall make, use, or sell to another to be used, the thing which is the subject-matter of any existing patent, is guilty of an infringement, for which damages may be recovered at law by an action on the case, or which may be remedied by a bill in equity for an injunction and an account.

The manufacture, sale, or use of an invention protected by letters patent, within the area and time described therein by a person not duly authorized to do so. Robt. Pat. § 890.

Infringement is a mixed question of law and fact; 113 U. S. 609. Whether a device is an infringement is determined by the claims of the patent, and not by the actual invention; 9 Blatchf. 363; 5 Fish. 285. There is no infringement unless the invention can be practised completely by following the specifications. An infringement is a copy made after, and agreeing with, the principle laid down in the patent; and if the patent does not fully describe everything essential to the thing patented, no infringement will take place by the fresh invention of processes which the patentee has not communicated to the public; 1 Fish. 298. Where the same advantages are gained by substantially the same means, there is infringement; 12 Fed. Rep. 790. The test is whether the defendant uses anything which the plaintiff has invented; 7 Fed. Rep. 199, 204.

However different, apparently, the arrangements and combinations of a machine may be from the machine of the patentee, it may in reality embody his invention, and be as much an infringement as if it were a servile copy of his machine. According to the Patent Law, if the machine complained of involves substantial identity with the one patented, it is an infringement. If the invention of the patentee be a machine, it is infringed by a machine which incorporates, in its structure and operation, the substance of the invention,—that is, an arrangement which performs the same service, or produces the same effect, in the same way, or substantially the same way; 3 Blatchf. 535. And a device may be an infringement though it be itself a new invention; 16 Fed. Rep. 539. To obtain the same result by the same mode of operation constitutes infringement; 30 Fed. Rep. 68; and so does a mere formal change; 11 Fed. Rep. 880; or variations in size, form, and degree; 27 Fed. Rep. 684; 13 *id.* 456.

An invention limited to certain forms is infringed only by the use of those forms; 31 Fed. Rep. 913.

Where the same result is accomplished, the same function performed, and the mode of operation is the same, a mere difference in the location of parts will not avoid infringement; 42 O. G. 297.

An improvement may be an infringement; 12 Fed. Rep. 621. An improvement and its original are separate inventions, and the inventor of one infringes by the use of the other; 29 Fed. Rep. 358; 15 *id.* 448. It is, however, presumed that use under one patent does not infringe another; 1 MacArthur 459; and the grant of a second patent is *prima facie* evidence that the inventions are different, and that the later patented invention is not an infringement of the former; 1 Bann. & A. 428; 3 Blatch. 190.

To experiment with a patented article for scientific purposes, or for curiosity, or amusement, is said not to constitute infringement; 4 Blatchf. 493; but this cannot be invariably true. To make and exhibit a device at a fair, but not for use or sale, is not an infringement; 15 Fed. Rep. 390; nor is mere exposure for sale; 4 A. & E. 251; nor advertising an invention; 19 O. G. 727; but the latter is strong evidence of infringement; 19 O. G. 727. To make an article for sale abroad is an infringement; 8 Fed. Rep. 586.

An infringement may be committed by repairing as well as making the invention, if it involves reconstruction either in whole or in part; 3 Bann. & A. 471. To make a part with intent to use it, or to sell it to be used, in connection with the other parts of the invention, is infringement; 30 Fed. Rep. 437.

One who makes and sells one element of a patented combination with the intention and for the purpose of bringing about its use in such a combination, is guilty of infringement; 80 Fed. Rep. 712; 132 U. S. 425; but not where the article made by the alleged infringer was not separately patented and was of a perishable nature (sheets of toilet paper); *id.* It has been held that replacing broken or worn-out parts is not necessarily infringement; 77 Fed. Rep. 739; 75 *id.* 1009. See 77 *id.* 288, citing many cases.

No act of making, use, or sale can be an infringement of a patented invention unless it is performed during the life of the patent; 128 U. S. 605; 37 Fed. Rep. 354; see 163 U. S. 55. An infringement may be committed by the use, after the patent issues, of a device constructed before the creation of the monopoly, notwithstanding the good faith of its purchaser or maker and his belief that it will never be protected by a patent; 3 Rob. Pat. § 907; 34 Fed. Rep. 789.

One who buys a patented article of manufacture from one authorized to sell it at the place where it is sold, becomes possessed of an absolute property in it, unrestricted in time or place; 157 U. S. 659; whether a patentee may protect himself and his assignees by special contracts brought home to the purchasers was not decided in the case. A licensee of a patent for Michigan sold pipes to be laid in Connecticut, where he had no patent right; it was held that he was not liable for infringement; 149 U. S. 355; see 17 Wall. 453.

A re-issue is not infringed by an act committed before the surrender of the original patent; 2 Rob. Pat. § 696. A re-issue with a broader claim is not infringed by the use of devices made before the original patent, though they are covered by the new claim; 11 Fed. Rep. 510; 20 Blatchf. 333. A device which does not infringe the original cannot infringe the re-issue, if the scope of the original is measured by its description and not by its claims alone; 4 Bann. & A. 159.

A patent for a combination of old elements is not infringed by using less than all the elements, where the two combinations are not the same in operation; 3 Fed. Rep. 456. A claim for a combination of three elements is not infringed by the use of two only, though the third is useless, for the patentee must stand by his claim; 1 Bann. & A. 78. A combination is not infringed where one essential element is omitted and another is substituted accomplishing the same result in a different way; 12 Fed. Rep. 563.

A patent for a manufacture is infringed in whatever way the article is made; 30 Fed. Rep. 437; 3 Bann. & A. 235.

Where a product is patented as the result of a certain process it is infringed only when made by that process; 111 U. S. 293.

A patent for a composition of matter is infringed if the new element does the same thing as the one for which it is substituted, though otherwise it is different; 5 Fish. 357. A composition of matter is not infringed, if elements are substituted producing different results; 27 Fed. Rep. 69.

One is not liable in damages as an infringer if the patentee put his invention on the market unstamped, unless he had notice of the patent; 21 Fed. Rep. 122; 152 U. S. 244; 155 *id.* 584. The burden is on the complainant to prove actual or constructive notice; 152 U. S. 244.

Speaking in the general sense, it is doubtless true that the test of infringement in respect to the claims of a design-patent is the same as in respect to a patent for an art, machine, manufacture, or composition of matter; but it is not essential to the identity of the design that it should be the same to the eye of an expert. If in the eye of an ordinary observer, giving such attention as a purchaser usually gives, two designs are substantially the same; if the resemblance is such as to deceive such an observer and sufficient to induce him to purchase, one supposing it to be the other, the one first patented is infringed by the other; 5 Fed. Rep. 359; 14 Wall. 511.

That the United States government, when it grants letters patent for a new invention or discovery in the arts, confers upon the patentee an exclusive property in the patented invention, which cannot be appropriated or used by the government itself without just compensation, any more than it can appropriate or use without compensation land which has been patented to a private purchaser, we have no doubt. The constitution gives to congress power to "promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries,"—which could not be effected if the government had a reserved right to publish such writings or to use such inventions without the consent of the owner; 104 U. S. 356.

The United States is liable, under its contract, for the use of a patented article, but it is not liable in tort; 156 U. S. 552. While it has no right to use a patented device, yet no suit will lie against it without its consent; 161 U. S. 10; jurisdiction to recover royalties or compensation under a contract is in the court of claims; 128 U. S. 262. It is doubtful whether a government official who uses an invention solely for the benefit of the government can be sued for infringement, and whether the case is not one solely for the court of claims; 104 U. S. 356. Where an officer of the United States uses, in his official capacity, a patented device made and used by the United States, the patentee is not entitled to an injunction, and cannot recover profits, if the only profit is a saving to the United States; but such officers, although acting under its orders, are personally liable to be sued for their own infringement of a patent; 161 U. S. 10; see 163 *id.* 49. A city is liable for an infringement by its officers for its benefit; 3 Fed. Rep. 338; 5 Bann. & A. 486.

The managing officers of an infringing

corporation may be made co-defendants and individually enjoined; 30 Fed. Rep. 123. An officer of a corporation acting for it in renting machines is a proper party defendant with such users, in a bill for an injunction; 7 Blatchf. 5.

It would be a great hardship if the directors of a railway or manufacturing corporation were bound, at their personal peril, to find out that every machine that the company uses is free of all claim of monopoly. No case precisely in point has been cited; but the practice certainly is to ask for damages only against the corporation. Joinder in equity for purposes of discovery and injunction is another matter; but I have not known damages to be asked for against the directors of a corporation, excepting in one case, which did not come to trial, but was discontinued as to the directors. I am of opinion that the only persons who can be held for damages are those who should have taken a license, and that they are those who own or have some interest in the business of making, using, or selling the thing which is an infringement; and that an action at law cannot be maintained against the directors, shareholders, or workmen of a corporation which infringes a patented improvement; 13 Fed. Rep. 392. But it has also been held that all who join in an infringement are liable for damages, though some are mere officers of corporations; 19 Fed. Rep. 514. In a suit against a corporation for infringement of a patent, officers of the company, who are simply employes receiving a fixed salary, not dependent upon the sale of the alleged infringed article, and who have not personally been guilty of infringement, are neither necessary nor proper parties defendant; 73 Fed. Rep. 212.

Expert evidence is admissible in determining a question of identity between two devices; 1 Fish. 298.

State statutes of limitations formerly applied; 155 U. S. 610; by act of congress, March 3, 1897, the period is six years.

See PATENT; COPYRIGHT; TRADE-MARKS; UNITED STATES COURTS; SYLLABUS; PIRACY.

INFUSION. In Medical Jurisprudence. A pharmaceutical operation, which consists in pouring a hot or cold fluid upon a substance whose medical properties it is desired to extract. The product of this operation. An infusion differs from a decoction in that the latter is produced by boiling the drug.

Although *infusion* differs from *decoction*, they are said to be *ejusdem generis*; and in the case of an indictment which charged the prisoner with giving a decoction, and the evidence was that he had given an infusion, the difference was held to be immaterial; 3 Campb. 74.

INGENIUM (Lat. of middle ages). A net or hook. Du Cange; hence, probably, the meaning given by Spelman of artifice, fraud (*engin*). A machine, Spelman, Gloss., especially for warlike purposes; also, for navigation of a ship. Du Cange.

INGENUI (Lat.). **In Civil Law.** Those freemen who were born free. Vicat, Vocab.

They were a class of freemen, distinguished from those who, born slaves, had afterwards legally obtained their freedom: the latter were called, at various periods, sometimes *liberti*, sometimes *libertini*. An unjust or illegal servitude did not prevent a man from being *ingenuus*.

INGRESS, EGRESS, AND REGRESS. These words are frequently used in leases to express the right of the lessee to enter, go upon, and return from the lands in question.

INGRESSU (Lat.). An ancient writ of entry, by which the plaintiff or complainant sought an entry into his lands. Abolished in 1833. Tech. Dict.

INGROSSING. In Practice. The act of copying from a rough draft a writing in order that it may be executed: as ingrossing a deed.

INHABITANT (Lat. *in*, in, *habeo*, to dwell). One who has his domicil in a place; one who has an actual fixed residence in a place. As used in the federal jurisdiction act of 1789, it means citizen. 145 U. S. 444.

A mere intention to remove to a place will not make a man an inhabitant of such place, although, as a sign of such intention, he may have sent his wife and children to reside there; 1 Ashm. 126. Nor will his intention to quit his residence, unless consummated, deprive him of his right as an inhabitant; 1 Dall. 153, 480. See 10 Ves. 339; 14 Viner, Abr. 420; 6 Ad. & E. 153.

"The words 'inhabitant,' 'citizen,' and 'resident,' as employed in different constitutions to define the qualifications of electors, mean substantially the same thing; and one is an inhabitant, resident, or citizen at the place where he has his domicil or home;" Cooley, Const. Lim. 755 and note; 16 S. E. Rep. (W. Va.) 535. But the terms "resident" and "inhabitant" have also been held not synonymous, the latter implying a more fixed and permanent abode than the former, and importing privileges and duties to which a mere resident would not be subject; 40 Ill. 197; 5 Sandf. 44; 1 Bradf. 69; 2 Gray 484; 23 N. J. L. 517. Where a question was to be submitted to the "inhabitants" of a municipality it has been held to mean legal voters; 103 U. S. 683. When relating to municipal rights, powers, or duties, the word inhabitant is almost universally used as signifying precisely the same as domiciled; 132 Mass. 98. See 17 Pick 231.

The inhabitants of the United States are native or foreign born. The *natives* consist, *first*, of white persons, and these are all citizens of the United States, unless they have lost that right; *second*, of the aborigines, and these are not, in general, citizens of the United States, nor do they possess any political power; *third*, of ne-

groes, or descendants of the African race; *fourth*, of the children of foreign representatives, who are citizens or subjects as their fathers are or were at the time of their birth.

Inhabitants born out of the jurisdiction of the United States are, *first*, children of citizens of the United States, or of persons who have been such; they are citizens of the United States, provided the father of such children shall have resided within the same; Act of Congress of April 14, 1802, § 4; *second*, persons who were in the country at the time of the adoption of the constitution; these have all the rights of citizens; *third*, persons, who have become naturalized under the laws of any state before the passage of any law on the subject of naturalization by congress, or who have become naturalized under the acts of congress, are citizens of the United States, and entitled to vote for all officers who are elected by citizens, and to hold any office except those of president and vice-president of the United States; *fourth*, children of naturalized citizens, who were under the age of twenty-one years at the time of their parents being so naturalized, or admitted to the rights of citizenship, are, if then dwelling in the United States, considered as citizens of the United States, and entitled to the same rights as their respective fathers; *fifth*, persons who resided in a territory which was annexed to the United States by treaty, and the territory became a state; as, for example, a person who, born in France, moved to Louisiana in 1806, and settled there, and remained in the territory until it was admitted as a state, it was held that, although not naturalized under the acts of congress, he was a citizen of the United States; Desbois' Case, 2 Mart. La. 185; *sixth*, aliens or foreigners, who have never been naturalized, and these are not citizens of the United States, nor entitled to any political rights whatever.

Property conveyed to the inhabitants of a town as a body politic and corporate vests in the town as a corporation; 45 N. H. 87. See ALIEN; CITIZEN; DOMICIL; NATURALIZATION; HOME.

INHERENT POWER. An authority possessed without its being derived from another. A right, ability, or faculty of doing a thing, without receiving that right, ability, or faculty from another.

INHERITABLE BLOOD. Blood of an ancestor which, while it makes the person in whose veins it flows a relative, will also give him the legal rights of inheritance incident to that relationship. See 2 Bla. Com. 254, 255. Descendants can derive no title through a person whose blood is not inheritable. Such, in England, are persons attainted and aliens. But attainder is not known in this country. See 4 Kent 413, 424; 1 Hill, R. P. 148; 2 *id.* 190.

INHERITANCE. A perpetuity in lands to a man and his heirs; the right to succeed to the estate of a person who dies intestate. Dig. 50. 16. 24. The term is applied to lands.

It includes all the methods by which a child or relation takes property from another at his death, except by devise, and includes as well succession as descent; as applied to personal property, it can mean nothing else than to signify succession; 33 N. J. L. 413.

The property which is inherited is called an inheritance.

The term inheritance includes not only lands and tenements which have been acquired by descent, but every fee-simple or fee-tail which a person has acquired by purchase may be said to be an inheritance, because the purchaser's heirs may inherit it; Littleton § 9. This would now be called an *estate* of inheritance; 1 Steph. Com. 231. See ESTATES.

In Civil Law. The succession to all the rights of the deceased. It is of two kinds: that which arises by testament, when the testator gives his succession to a particular person; and that which arises by operation of law, which is called succession *ab intestat.* Heineccius, Lec. El. §§ 484, 485.

INHERITANCE ACT. The English statute of 3 & 4 Will. IV. c. 106, regulating the law of inheritance. 2 Chitty, Stat. 575; 2 Bla. Com. 37; 1 Steph. Com. 388; Will. R. P. 119.

INHIBITION. In Civil Law. A prohibition which the law makes or a judge ordains to an individual. Halifax, Anal. p. 126.

In English Law. The name of a writ which forbids a judge from further proceeding in a cause depending before him: it is in the nature of a prohibition. *Termes de la Ley*; Fitzh. N. B. 39. Also a writ issuing out of a higher court christian to a lower and inferior, upon an appeal; 2 Burn, Ec. L. 339. In the government of the Protestant Episcopal church, a bishop can inhibit a clergyman of his diocese from performing clerical functions.

In Scotch Law. A personal prohibition which passes by letters under the signet, prohibiting the party inhibited to contract any debt or to do any act by which any part of the heritable property may be aliened or carried off, in prejudice of the creditor inhibiting. Erskine, Pr. b. 2, tit. ii. s. 2. See DILIGENCE.

INHIBITION AGAINST A WIFE. In Scotch Law. A writ in the sovereign's name, passing the signet, which prohibits all and sundry from having transactions with a wife or giving her credit. Bell, Dict.; Erskine, Inst. 1. 6. 26.

INITIAL (from Lat. *initium*, beginning). Beginning; placed at the beginning. Webster. Thus, the initials of a man's name are the first letters of his name: as, G. W. for George Washington. Initials are no part of a name; 147 U. S. 47. A middle name or initial is not recognized by law;

1 Hill, N. Y. 102; 4 Watts 329; 26 Vt. 599; 28 N. H. 561; 8 Tex. 376; Wharton, Am. Cr. Law 68; 37 W. Va. 665; 2 N. Dak. 295; 83 Ga. 332. But see 1 Pick. 388; but the first initial is, and a variance therein is fatal to an indictment; 30 Tex. App. 470. In an indictment for forgery, an instrument signed "T. Tupper" was averred to have been made with intent to defraud Tristam Tupper, and it was held good; 1 McMull. 236. Signing of initials is good signing within the Statute of Frauds; 12 J. B. Moore 219; 1 Campb. 513; 2 Mood. & R. 221; Add. Contr. 46, n.; 1 Den. 471. But see Erskine, Inst. 3. 2. 8. When in a will the legatee is described by the initials of his name only, parol evidence may be given to prove his identity; 3 Ves. 148. The fact that the foreman of the grand jury in signing his name to the indorsement of "a true bill" on the indictment, used only the initials of, instead of his full Christian name, is not ground for quashing the indictment; 4 Ind. App. 583. As to the use of an initial in a ballot, see ELECTION. See, generally, NAME.

INITIALIA TESTIMONII (Lat.). **In Scotch Law.** A preliminary examination of a witness to ascertain what disposition he bears towards the parties whether he has been prompted what to say, whether has received a bribe, and the like. It resembles in some respects an examination on *voir dire* in English practice.

INITIATE. Commenced.

A husband was, in feudal law, said to be tenant by the curtesy *initiate* when a child who might inherit was born to his wife, because he then first had an inchoate right as tenant by the curtesy, and did homage to the lord as one of the *pares curtis* (peers of the court); whence *curtesy*. This right became consummated on the death of the wife before the husband. See 2 Bla. Com. 127; 1 Steph. Com. 247.

INITIATE TENANT BY CURTESY. A husband becomes tenant by curtesy initiate in his wife's estate of inheritance upon the birth of issue capable of inheriting the same. The husband's estate by curtesy is not said to be consummate till the death of the wife. 2 Bla. Com. 127, 128; 1 Steph. Com. 365, 366.

INITIATIVE. In French Law. The name given to the important prerogative conferred by the *charte constitutionnelle*, art. 16, on the king to propose, through his ministers, projects of laws. 1 Toullier, n. 39. See VETO.

INJUNCTION. A prohibitory writ, issued by the authority and generally under the seal of a court of equity, to restrain one or more of the defendants or parties, or *quasi* parties, to a suit or proceeding in equity, from doing, or from permitting his servants or others who are under his control to do, an act which is deemed to be inequitable so far as regards the rights of some other party or parties to such suit or proceedings in equity. Eden, Inj. c. 1; Kerr, Inj. 9; Jeremy, Eq. Jur. b. 3, c. 2, § 1; Story, Eq. Jur. § 861; Will. Eq. Jur. 341; 2 Green. Ch. 136; 1 Madd. 126.

The writ of injunction may be regarded as the correlation of the writ of mandamus, the one enjoining the performance of an unlawful act, the other requiring the performance of a lawful or neglected act; Beach, Inj. § 9.

Under the present practice in England, injunction is not by writ, but the order of the court has the same effect.

The interdict of the Roman law resembles, in many respects, our injunction. It was used in three distinct but cognate senses. 1. It was applied to signify the edicts made by the prætor, declaratory of his intention to give a remedy in certain cases, chiefly to preserve or to restore possession; this interdict was called edictal: *edictale, quod prætorii edictis proponitur, ut sciant omnes ea forma posse implorari.* 2. It was used to signify his order or decree, applying the remedy in the given case before him, and was then called decretal: *decretale, quod prætor re nata implorantibus decrevit.* It is this which bears a strong resemblance to the injunction of a court of equity. 3. It was used, in the last place, to signify the very remedy sought in the suit commenced under the prætor's edict; and thus it became the denomination of the action itself. Livingston on the Batture case, 5 Am. Law Jour. 271; 2 Story, Eq. Jur. § 865.

Mandatory injunctions command the defendant to do a particular thing. *Preventive*, commands him to refrain from an act. The former are resorted to rarely and are seldom allowed before a final hearing; 40 N. Y. 191; 68 Pa. 370; 10 Ves. 192; 20 Am. Dec. 389; 45 N. J. Eq. 178.

Preliminary or *interlocutory injunctions* are used to restrain the party enjoined from doing or continuing to do the wrong complained of, either temporarily or during the continuance of the suit or proceeding in equity in which such injunction is granted, and before the rights of the parties have been definitely settled by the decision and decree of the court in such suit or proceeding.

Final or *perpetual injunctions* are awarded, or directed to be issued, or the preliminary injunction already issued is made final or perpetual, by the final decree of the court, or when the rights of the parties so far as relates to the subject of the injunction are finally adjudicated and disposed of by the order or decree of the court; 2 Freem. Ch. 106; 4 Johns. Ch. 69; 3 Yerg. 366; 1 Bibb. 184; Kerr, Inj. *12.

In England, injunctions were divided into common injunctions and special injunctions; Eden, Inj. 178, n.; Will. Eq. Jur. 342; Saxt. Ch. 504. The common injunction was obtained of course when the defendant in the suit in equity was in default for not entering his appearance, or for not putting in his answer to the complainant's bill within the times pre-

scribed by the practice of the court; Eden, Inj. 59, 68, 93, n.; Story, Eq. Jur. § 892; 18 Ves. 523; Jeremy, Eq. Jur. Special injunctions were founded upon the oath of the complainant, or other evidence of the truth of the charges contained in his bill of complaint. They were obtained upon a special application to the court or to the officer of the court who was authorized to allow the issuing of such injunction, and usually upon notice of such application given to the party whose proceedings were sought to be enjoined; Story, Eq. Jur. § 892; 4 Eden, Inj. 78, 290; Jeremy, Eq. Jur. 339; 3 Mer. 475; 18 Ves. 522. By the Judicature Act of 1873, no proceeding at any time pending in the high court of justice, or before the court of appeal, shall be restrained by injunction, and any court may issue injunctions of all kinds; Moz. & W.; Brown, Dict. In the United States courts and in the equity courts of most of the states of the Union, the English practice of granting the common injunction has been discontinued or superseded, either by statute or by rules of the courts. And the preliminary injunctions are, therefore, all special injunctions in the courts of this country where such English practice has been superseded.

When used. The injunction is used in a great variety of cases, of which cases the following are some of the most common: to stay proceedings at law by the party enjoined; Story, Eq. Jur. §§ 51, 874; Jeremy, Eq. Jur. 338; R. M. Charlt. 93; 6 Gill & J. 122; 1 Sumn. 89; 4 Johns. Ch. 17; 23 How. 500; 27 Conn. 579; 4 Jones, Eq. 32; 5 R. I. 171; 23 Ga. 139; see 1 Beasl. 223; 13 Cal. 596; 20 Tex. 661; 35 Miss. 77; 128 Ill. 293; 122 U. S. 241; to restrain the transfer of stocks, of promissory notes, bills of exchange, and other evidences of debt; Story, Eq. Jur. §§ 906, 955; 1 Russ. 412; 2 Vern. 122; 3 Bro. Ch. 476; 9 Wheat. 738; 4 Jones, Eq. 257; 134 Ind. 442; 45 La. Ann. 120; to restrain the transfer of the title to property; 1 Beasl. 252; 14 Md. 69; 7 Ia. 33; 6 Gray 562; 37 Fed. Rep. 12; or the parting with the possession of such property; Story, Eq. Jur. § 953; 3 V. & B. 168; 4 Cow. 440; to restrain the party enjoined from setting up an unequitable defence in a suit at law; Story, Eq. Jur. § 903; Mitf. Eq. Pl. 134; to restrain the collection of illegal taxes; 97 Mo. 300; 85 Ky. 557; 74 Mich. 692; or taxes imposed in contravention of the U. S. constitution; 149 U. S. 164; to restrain the infringement of a patent; Story, Eq. Jur. § 930; 2 Blatchf. 39; 4 Wash. C. C. 259, 514, 534; 1 Paine 441; 36 Fed. Rep. 582; 35 *id.* 206; or a copyright, or the pirating of trade-marks; 17 Ves. 424; 1 Hill, N.Y. 119; 2 Bosw. 1; 44 N. J. Eq. 391; 118 Ind. 105; 37 Fed. Rep. 360; to restrain a party from passing off his goods as those of another by means of simulating his labels, packages, etc.; 138 U. S. 537; to prevent the removal of property; 3 Jones, Eq. 253; or the evidences of title to property, or the evidences of indebtedness, out of the jurisdiction of the court; to restrain the committing of waste; 4 Kent 161; 2 Johns. Ch. 148; 12 Md. 1; 4 Jones, Eq. 174; 2 Ia. 496; 32 Ala. N. S. 723; to prevent the creation or the continuance of a private nuisance; 12 Cush. 454; 28 Ga. 30; 11 Cal. 104; 29 W. Va. 48; 86 Ala. 587; 149 U. S. 157; or of a public nuisance particularly noxious to the party asking for the injunction; Mitf. Eq. Pl. 124; 6 Johns. Ch. 46; 14 La. Ann. 247; 50 Ark. 466; 77 Ga. 809; to restrain illegal acts of municipal officers; 12 Cush. 410; 29 Barb. 396; 8 Wis. 485; 10 Cal. 278; 71 Mich. 87; 140 U. S. 1; to prevent a purpresture; 12 Ind. 467; to restrain the breach of a covenant or agreement; 1 D. M. & G. 619; 1 Holmes 258; to restrain the publication of a libel; [1891] 2 Ch. 269; 92 Mich. 558; [1892] 1 Ch. 571; but see L. R. [1891] 2 Ch. 294; to restrain the alienation of property pending a suit for specific performance; 3 D. J. & S. 63; to restrain the disclosure of confidential communications, papers, and secrets; Kerr, Inj. § 436; Bisph. Eq. 427; 38 N. Y. Supp. 487; 9 Hare 255; to restrain the publication of unpublished manuscripts, letters, etc.; 4 H. L. C. 867; 2 Mer. 437; to restrain members of a firm from doing acts inconsistent with the partnership articles, etc.; 12 Beav. 414; to restrain waste, even though the title be in litigation; 113 U. S. 537; to restrain the cutting of timber on land the title to which is in dispute; 54 Fed. Rep. 1005; to restrain the construction of a permanent tunnel through a lot; 64 Cal. 62; or a continuous trespass, where a party claims a right of way over the land, the use of which if permitted will ripen into an easement; 63 Vt. 278; 78 Cal. 454; see 65 Miss. 391; 75 Cal. 426; 84 Ky. 254; to restrain trespass, leaving the question of title to be settled by a suit at law; 37 Fed. Rep. 36; to restrain a railway from entering and taking possession of land without first having acquired the right to do so; 117 Ind. 465; 97 Mo. 457; to restrain intimidation of workmen by labor unions; 51 Fed. Rep. 260; (see LABOR); to restrain a boycott; 45 Fed. Rep. 135; to restrain a defaulting or insolvent executor or administrator from getting in assets; Kerr, Inj. § 451; 1 Will. Exec. 275; to restrain a trustee from the misuse of his powers; 1 Hare 146; to protect certain liens, as that of an equitable mortgagee, or of a solicitor upon his client's papers; 1 Y. & C. 303; 7 D. M. & G. 288; to restrain companies from doing illegal acts, either as against the public or third parties, or the members thereof; 13 Beav. 45; Kerr, Inj. § 473; to restrain the unlawful diversion of water; 75 Cal. 426; 128 Ill. 271; or the pollution of a stream; 42 N. W. Rep. Ill. 891; or the flowage of land by a water company, unless the award is paid; 46 N. E. Rep. (Ill.) 1083; to restrain the erection of a house across a public alley; 81 Ga. 723. It lies to prevent a threatened breach of trust in the diversion of corporate funds by illegal payment out of its capital or profits; 157 U. S. 429; at the suit of a private person to prevent the publication of his picture (but not where the person is of public reputation); 64 Fed.

Rep. 280; but not to restrain the publication of a biography of the complainant or of a member of his family; 57 Fed. Rep. 434; but see 15 N. Y. Supp. 787. But equity will enjoin the publication of a picture of a deceased member of complainant's family, where the respondent had not observed the conditions under which he obtained it; 57 Fed. Rep. 434. Equity will enjoin the construction of a street railway over a part of a turnpike road, the fee of which is owned by the complainant; 6 D. R. Pa. 269; at the suit of a wife, whose title is not disputed, will enjoin her husband's creditors from selling her property for payment of his debts; 18 C. C. R. Pa. 560; and will enjoin a hardware store situated in a populous district from keeping and selling dynamite, and from overloading its building with a stock of hardware, when it thereby becomes a menace to passers-by; 8 Kulp, Pa. 433.

An injunction will be granted to restrain a company in voluntary liquidation from distributing its assets among its shareholders without providing for future liabilities under a lease; 32 Ch. D. 41; to restrain a husband from going to his wife's house settled to her separate use, in a case where proceedings are pending between them for divorce or a judicial separation, and they are living apart; 24 Ch. 346; to enjoin a husband from dealing with his property where alimony is claimed; [1893] P. 284; [1896] P. 36, but see [1896] P. 35; against trades unionists who maliciously induce employer's contractees to break their contracts; [1893] 1 Q. B. 715; for maliciously inducing an employer to dismiss his employes; [1895] 2 Q. B. 21; against picketing; [1896] 1 Ch. 811; to restrain the publication of notes of a lecture where the audience was limited and were admitted by ticket; 28 Ch. D. 374; to restrain the publication of any valuable information, *e. g.* of prices communicated to a limited public for a limited purpose; [1896] 1 Q. B. 147; to restrain the sale of a volume of letters; 2 Atk. 341; to restrain the publication of confidential information obtained during service; 19 Q. B. D. 629; such as drawings; [1892] 2 Ch. 518; advertisements; [1893] 1 Ch. 218; to restrain the vendor of a good will from soliciting his former customers; [1896] App. Cas. 7; or a photographer who had taken a negative likeness of a lady in order to supply her with copies for money, from selling or exhibiting copies; 40 Ch. D. 345; to restrain a nuisance; De G. & S. 323; or to prevent a fraudulent transfer or removal from the jurisdiction of a debtor's property, in aid of an execution; 136 N. Y. 252.

An injunction will not be granted, as a rule, to take property out of the possession of one party and put it into that of another whose title has not been established by law; 144 U. S. 119; 40 W. N. C. Pa. 121; nor to restrain a defendant in a case pending for the infringement of letters patent, from issuing circulars alleging that the plaintiff's patent in suit is invalid; 29 Fed. Rep. 95; 28 *id.* 773; (*contra*, 34 *id.* 46; 65 Ga. 452; and it lies in England by statute; 14 Ch. Div. 763; 28 Fed. Rep. 774; L. R. 7 Eq. 488); nor to restrain a patentee who has begun, and is proceeding with, a suit on his patent, from notifying a manufacturer's customers, in a courteous way, that he intends to enforce his rights; 58 Fed. Rep. 577; nor to restrain defendant from falsely representing that a patentee's invention is an infringement of his, and thus deterring purchasers; 119 Mass. 484.

It is necessary to the obtaining an injunction, as to other equitable relief, that there should be no plain, adequate, and complete remedy at law; 30 Barb. 549; 5 R. I. 472; 121 N. Y. 45; 31 Pa. 387; 32 Ala. N. S. 723; 37 N. H. 254; 61 Hun 140; 145 U. S. 459; but where there is adequate remedy at law one will not be granted; 141 Ill. 572; 49 Fed. Rep. 517; 37 *id.* 67; 34 *id.* 357; 129 Md. 464; 109 N. C. 21; 83 Wis. 426; 115 Mo. 613. An injunction will not be granted while the rights between the parties are undetermined, except in cases where material and irreparable injury will be done; 3 Bosw. 607; 1 Beasl. 247, 542; 15 Md. 22; 13 Cal. 156, 190; 6 Wis. 680; 16 Tex. 410; 28 Mo. 210; 24 Fla. 542; but where it is irreparable and of a nature which cannot be compensated, and where there will be no adequate remedy, an injunction will be granted; 39 N. H. 182; 12 Cush. 410; 27 Ga. 499; 1 McAll. 271; 54 Fed. Rep. 1005; 64 Vt. 643. A preliminary injunction against the infringement of a patent will not be granted in case of doubt as to the infringement; 37 Fed. Rep. 691; 38 *id.* 112; 36 *id.* 691; where defendant confessedly intends to regain possession of certain premises by force, such act being punishable as a breach of the peace, he will not be restrained by injunction; 45 *id.* 721.

The owner of a dwelling-house, called for 60 years "Ashford Lodge," is not entitled to an injunction restraining the proprietor of an adjoining house known as "Ashford Villa" for 40 years from changing its name to "Ashford Lodge"; 10 Ch. D. 294. An injunction will not lie to prevent a club from carrying out the decision of the members when acting under their rules, unless it be shown that the rules are contrary to natural justice, or that what has been done is contrary to the rules, or that there has been bad faith in a decision; 5 Eq. 63; 13 Ch. D. 346; 17 Ch. D. 615. A bill in equity for an injunction against a crime or misdemeanor does not lie; but equity will interfere if the alleged criminal acts go further and operate to the destruction or diminution of value of property. A member of an incorporated club has a standing in equity for an injunction to restrain the club from carrying out its declared purpose of committing an act which, if found to be criminal, will imperil the charter of the club; 177 Pa. 224.

Where there was a conspiracy to prevent workmen by intimidation or persuasion, from entering into or continuing in the plaintiff's employment, an injunction was

granted to restrain the maintenance of a patrol of two men in front of the plaintiff's premises, placed there in furtherance of such conspiracy; 44 N. E. Rep. Mass. 1077; but a corporation is not entitled to an injunction against persons or organizations, on the ground that they have conspired to exterminate it by compelling its members to leave it; 43 Pac. Rep. Col. 451. See BOYCOTT.

Where a city had power to build waterworks, the fact that by so doing it would violate contract rights of an existing water company does not give an individual property owner the right to enjoin the city on the ground that his taxes would be increased thereby; 60 Fed. Rep. 961.

Equity will not enjoin a municipal corporation in the exercise of its lawful powers, unless the proposed act is *ultra vires* and would work irreparable injury; 43 Fed. Rep. 308; but a resident taxpayer and real estate owner is entitled to bring a suit to enjoin the execution of a municipal contract illegally awarded, whatever may be alleged to be his ulterior purpose; 8 D. R. Pa. 266; 137 Pa. 561.

Where a statute creates a new offence and neglects the penalty, the ancillary remedy of injunction may be claimed as well as the penalty; Brett, L. C. Mod. Eq. 327.

An injunction against a newspaper to restrain it from copying literary matter from another newspaper will not be refused because such is the practice of newspapers; [1892] 3 Ch. 489, where the cases are collected. An injunction will not lie to restrain the publication of an encyclopedia of the same name as complainant's, except as to copyright articles, where defendant has used no means to lead the public to believe that its publication is that of complainant; 44 Fed. Rep. 793.

In England, equity, in special cases of contracts for personal services, will restrain the violation of the contract, whenever the legal remedy of damages would be inadequate and the contract is of such a kind that its *negative* specific enforcement is possible. This rule was at first applied to contracts which were in form expressly negative, but has since been extended to affirmative contracts which imply negative stipulations; Pom. Eq. Jur. § 1343; 1 De G., M. & G. 604; L. R. 16 Eq. 149; 1 McCra. 558, 565; 1 Holmes 253. But where there was a contract for personal service containing a stipulation by the employed that he will "act exclusively for" his employer, the employed will not be restrained by injunction from entering the employ of another person in the absence of a negative covenant in the contract, express or implied, which is clear and definite; 75 L. T. Rep. 526; 47 N. J. Eq. 270.

The American cases are said to have usually either refused to follow the English decisions or have considerably modified them; see 53 Cal. 201; 8 Baxt. 54, 242; 42 Md. 460. Equity will restrain a breach of his contract by a baseball player who had contracted to play with the plaintiff; 8 C. C. R. 57; *contra*, 8 C. C. R. 337; see also 42 Fed. Rep. 198.

An injunction will lie where the remedy at law, though there be one, is inadequate; thus: to protect an innocent purchaser of the stock and good-will of a business by enjoining the sale thereof by the sheriff, where the damages recoverable would be only for the value of the stock, without compensation for the loss of business; 138 U. S. 271; to prevent the illegal sale of a church-pew under an attachment, upon the ground that it would be an outrage to the owners' religious feelings; 27 Weekly Law Bull. (Ohio) 20; to prevent the illegal issue of corporate bonds; 113 Ind. 22; 5 Wall. 74; to prevent the destruction of ornamental trees on the plaintiff's grounds; 7 Md. 408; to restrain the cutting off of the supply of natural gas furnished under a contract; 50 N. W. Rep. (Ia.) 283; where the redress at law would be inadequate by reason of the defendant's insolvency; 133 N. Y. 499. An injunction will lie to enjoin a public nuisance if it be continuous and peculiarly injures the plaintiff or his property; 135 N. Y. 239. An injunction will not be granted on the application of a private person, to protect purely public rights; Beach, Inj. § 13; 139 Ill. 419; nor, except in a great emergency, to interfere with public improvements; 40 N. J. Eq. 350; nor to restrain the abuse of a public trust, unless the complainant can show some peculiar interest therein; 102 Ill. 379; nor to compel the lessees of an opera house to allow the plaintiff to use the house under a contract therefor, where the effect would be to compel the lessee to break a contract with an innocent third party; 43 Fed. Rep. 831; nor to prevent the maintenance of a nuisance on a highway where it could be abated by indictment; 49 N. J. Eq. 11. Where a criminal prosecution is threatened under color of an invalid statute for the purpose of compelling the relinquishment of a property right, an injunction will lie; 80 Fed. Rep. 218.

Criminal acts may be restrained by injunction if they are of such a nature as to constitute a public nuisance; 147 Mass. 550. This recent development of equity jurisdiction is well settled. Its efficiency has been in preventing the evils of strikes. See Judge Taft's Address, Report of Amer. Bar Asso., 1895, p. 265; 6 L. R. Eq. 551; 51 Fed. Rep. 260; 54 Fed. Rep. 730; 60 Fed. Rep. 803; 63 Fed. Rep. 310; 62 Fed. Rep. 824; 158 U. S. 564; 18 Chic. L. News 305; 32 S. W. Rep. (Mo.) 1106; 33 Am. L. Reg. N. S. 609. An injunction has also been granted to restrain a prize fight; 28 L. R. A. 727; 35 Am. L. Reg. (N. S.) 100; an injunction will lie to restrain railroad employes from acts of violence and intimidation and from enforcing rules of labor unions resulting in irremediable injury to the company and the public, such as those requiring an arbitrary strike without cause; 54 Fed. Rep. 746; and also to restrain a railroad company and its employes from refusing to inter-

change interstate commerce, freight, and traffic facilities with a connecting line of railway; 54 Fed. Rep. 730.

The granting of an injunction is not limited to a case where damages could not be recovered in an action at law; 27 Abb. N. C. 387; but as a general rule it will not be granted where the party may be compensated in damages; 99 N. C. 11.

Injunctions are used by courts of equity in a great number and variety of special cases; and in England and in the United States this writ was formerly used by such courts as the means of enforcing their decisions, orders, and decrees. But subsequent statutes have in most cases given to courts of equity the power of enforcing their decrees by the ordinary process of execution against the property of the party; so that an injunction to enforce the performance of a decree is now seldom necessary.

Injunctions may be used by courts of equity, in the United States as well as in England, to restrain the commencement or the continuance of proceedings in foreign courts, upon the same principles upon which they are used to restrain proceedings at law in courts of the same state or country where such injunction is granted, the jurisdiction in this class of cases, however, being purely *in personam;* 3 Myl. & K. 104; Story, Eq. Jur. § 899; High, Inj. § 103; Bisph. Eq. 424. But a state court will not grant an injunction to stay proceedings at law previously commenced in one of the United States courts. But it is otherwise when the state court has first acquired jurisdiction; 9 C. E. Green 238; 15 Wisc. 401; 53 N. Y. (S. C.) 76. Nor will a United States court grant an injunction to stay proceedings at law previously commenced in a state court, except where such injunction may be authorized by any law relating to proceedings in bankruptcy; 4 Cra. 179; 96 U. S. 340; Rev. Stat. § 720; High, Inj. § 109. See generally 37 Cent. L. J. 4. And upon the ground of comity, as well as from principles of public policy, the equity courts of one state of the Union will not grant an injunction to stay proceedings previously commenced in a court of a sister state, where the courts of such sister state have the power to afford the party applying for the injunction the equitable relief to which he is entitled; 2 Paige, Ch. 401; 31 Barb. 364; 84 Ill. 20; but in a proper case, the equity courts of one state can restrain persons within their jurisdiction from the prosecution of suits in another state; 133 U. S. 107. A very strong case should be made out to warrant a court of equity in interfering with a judgment at law; 76 Ga. 9; 51 Ark. 341; but it will enjoin a judgment at law if the matters set up in the bill, as a ground of relief, constitute equities unavailable as a defence in the action at law; 128 U. S. 374; no injunction against proceedings at law will issue where the plaintiff has a good defence at law; 40 Fed. Rep. 517. An injunction will lie to restrain a multiplicity of suits; 54 Fed. Rep. 40.

In the United States, an injunction bill is usually sworn to by the complainant, or is verified by the oath of some other person who is cognizant of the facts and charges contained in such bill, so far at least as relates to the allegations in the bill upon which the application for the preliminary injunction is based. And an order allowing such injunction is thereupon obtained by a special application to the court, or to some officer authorized by statute, or by the rules and practice of the court, to allow the injunction, either with or without notice to the party enjoined and with or without security to such party, as the law or the rules and practice of the court may have prescribed in particular classes of cases; 1 W. & M. 280. Unless a preliminary injunction is to be applied for, a bill ordinarily need not be sworn to.

The bill must disclose a primary equity in aid of which this secondary remedy is asked; 4 Jones, Eq. 29; 28 Ga. 585; 14 La. Ann. 108; 12 Mo. 315.

Where the plaintiff has slept on his rights and allowed the alleged wrong to exist for a long time, he is not entitled to an injunction; 145 U. S. 317; 143 *id.* 224, 553; 62 Tex. 205; as where the plaintiff had permitted the completion of the building which he sought to enjoin; 143 Pa. 487; and where the plaintiff who was the owner of land bounded by a highway permitted a railway to be built on the highway; 22 S. W. Rep. (Mo.) 616. But it is otherwise where the plaintiff seeks the aid of an injunction for the protection of his legal rights, there being laches, but nothing to constitute an estoppel; 22 N. Y. Supp. 321. But delay in bringing suit is not a defence if it appear that matters still remain *in statu quo;* 2 Sim. N. S. 78. An injunction in a patent case will not be granted where, by reason of the plaintiff's delay, the defendant would be subjected to special hardship; 56 Fed. Rep. 152; nor where the plaintiff has been guilty of misrepresentations as to his goods, covered by a trade-mark; 108 U. S. 213; 28 Mass. 477; 96 Cal. 518. An injunction will not be granted when the plaintiff's right is doubtful; 54 Fed. Rep. 214; 26 *id.* 884; nor, it has been held, where the right on which it is claimed is, as a matter of law, unsettled; 29 N. J. Eq. 299; 43 *id.* 71.

Formerly the plaintiff could not obtain relief by injunction until his rights had been settled at law; 2 Johns. Ch. 162; but this doctrine is not now maintained.

Injunctions are not granted where complainant's rights are not clear, and where an injury more or less irreparable is not likely to result unless defendants are enjoined; 21 Ohio L. J. 390; 45 N. J. Eq. 50.

An injunction is ordinarily preventive, and will not be granted to correct a wrong already done or restore to a party rights of which he has been deprived; 43 Ill. App. 25; 58 Mich. 286.

There must be at least a reasonable probability of injury to the plaintiff in

order to justify an injunction; 122 N. Y. 505; 96 Cal. 243; a mere threat of injury is not ordinarily a sufficient ground for an injunction; 107 N. C. 139; 55 Fed. Rep. 487. There must be a well-grounded apprehension of immediate injury; 83 Mich. 285; 25 Fla. 656; 4 Nev. 142. It is not necessary to prove that a wrong has actually been committed; where rights had been infringed, and the party has good reason to believe they will be infringed, an injunction will issue; 4 Blatch. 184. A bill will lie for an injunction, if a patent right has been admitted, upon the well-grounded proof of an intention to violate the right; 3 Story 749. A bill in equity will lie for an injunction to prevent an anticipated infringement of a patent, no infringement having actually occurred: 35 Fed. Rep. 149; where there was no proof of actual sales, but the defendant had exhibited his lamps at a fair, and distributed circulars to the public and otherwise advertised his lamps for sale, it was held that if sales had not actually been made, such a wrong was threatened, and that was sufficient to call for an injunction; 10 *id.* 291. Where the defendant had formerly been engaged in infringing, the mere fact that since the commencement of the suit he had ceased to do so and did not threaten to renew his sales, is not an answer to an application for a preliminary injunction to restrain the continuance or renewal of such infringement. Perhaps as safe a criterion of what is to be apprehended from defendant as can be obtained, is to look at that which he has done, and in his answer justified the right to do, rather than to look to the fact of his having discontinued the alleged injury and his declaration of want of intention of renewing the same; 3 Fish. Pat. Cas. 112. See Rob. Pat. § 1191.

An injunction should contain upon its face sufficient to inform the party enjoined of what he is restrained from doing or from permitting to be done by those who are under his control, without the necessity of his resorting to the complainant's bill on file to ascertain what he is to refrain from doing or from permitting to be done; 10 Cal. 347. Where a preliminary injunction is needed, the complainant's bill should contain a proper prayer for such process; 2 Edw. Ch. 188; 4 Paige, Ch. 229, 444; 3 Sim. 273. The order granting an injunction is to be construed in the light of the prayer for the same; 81 Ga. 567. Damages for breach of covenant may be decreed in conjunction with relief by injunction; 160 Pa. 529. A court of equity may impose any terms in its discretion as a condition of granting or continuing an injunction; 120 U. S. 206.

The remedy of the party injured by the violation of an injunction by the party enjoined is by an application to the court to punish the party enjoined for his contempt in disobeying the process of the court; Hill. Inj. 173; 78 Hun 154; 61 Fed. Rep. 494.

Where an injunction had issued against cutting timber, the agent of the party enjoined who had cut timber in breach of the injunction was held guilty of contempt; 11 Beav. 180. Where trustees of a friendly society who had been enjoined from distributing certain funds, resigned, and their successors, with notice of the injunction, proceeded to make the forbidden distribution, both sets of trustees were held to be in contempt and were committed; 51 L. J. Ch. 414. See 66 L. T. Ch. D. 267. To render a person amenable to an injunction, it is neither necessary that he be a party to the suit or served with a copy of it, so long as he appears to have had actual notice; 166 U. S. 548.

Equity will restrain the commission of injuries outside of its territorial jurisdiction, by a decree *in personam*, where it has acquired jurisdiction over the defendants. Such are suits for the specific performance of contracts, for the enforcement of trusts, for relief on the ground of fraud, for settling partnership accounts; Pom. Eq. Jur. § 1318. Penn *v.* Lord Baltimore, 1 Ves. Sen. 144; 100 Mass. 267; 66 Mo. 563; 53 Ga. 514; 16 Pet. 25; a defendant may be enjoined from committing waste upon property situated abroad; 32 Fed. Rep. 124. But where the suit is strictly local, the subject-matter is specific property, and the relief such that, if granted, it must act directly upon the subject-matter, and not upon the person of the defendant, the jurisdiction must be exercised in the place where the subject-matter is situated, as a suit to abate a nuisance; Pom. Eq. Jur. § 1318; 2 Black 485.

In the United States courts special injunctions are granted only on notice, but in cases of danger of irreparable injury an order may issue (R. S. § 718) restraining the threatened act till the motion can be heard; and such order may be with or without security. Injunctions shall not be granted to restrain proceedings in the state courts except in bankruptcy proceedings; R. S. § 720; nor suit for the purpose of restraining the assessment or collection of any taxes; R. S. § 3224. Injunction in a state court in cases afterwards removed to a federal court, remain in full force until dissolved or modified; 18 Stat. L. 470. See 34 Fed. Rep. 481; 46 *id.* 546.

Under the new equity rules in Pennsylvania evidence on a motion for a preliminary injunction is taken in open court.

An injunction, when granted, will usually not be modified or dissolved except by the judge who granted it; 35 Fed. Rep. 98.

By the federal practice a motion to dissolve an injunction should always, when practicable, be addressed to the judge who granted it; and, in case of his death, it would seem advisable that two judges should hear the motion to dissolve; 77 Fed. Rep. 783.

The sole object of a preliminary injunction is to preserve the *status quo* until the merits can be heard. The *status*

quo is the last actual peaceable uncontested *status* which preceded the pending controversy, and a wrongdoer cannot shelter himself behind a sudden or recently changed *status*, though made before the chancellor's hand actually reached him; 180 Pa. 572.

As to injunctions in particular cases, see the title of the particular subject to which the remedy is to be applied.

INJURED. Obstructing access to property, or the drainage therefrom, is within a statutory provision requiring compensation for property injured; 111 Pa. 354; 124 *id.* 560; 151 *id.* 30.

INJURIA ABSQUE DAMNO (Lat.). Wrong without damage. Wrong done without damage or loss will not sustain an action. The following cases illustrate this principle: 6 Mod. 46; 1 Show. 64; Willes 74, n.; 1 Ld. Raym. 940, 948; 2 B. & P. 86; 5 Co. 72; 9 *id.* 113; Bull. N. P. 120.

INJURIOUS WORDS. In Louisiana. Slander, or libellous words.

INJURY (Lat. *in*, negative, *jus*, a right). A wrong or tort.

Absolute injuries are injuries to those rights which a person possesses as being a member of society.

Private injuries are infringements of the private or civil rights belonging to individuals considered as individuals.

Public injuries are breaches and violations of rights and duties which affect the whole community as a community.

Injuries to personal property are the unlawful taking and detention thereof from the owner; and other injuries are some damage affecting the same while in the claimant's possession or that of a third person, or injuries to his reversionary interests.

Injuries to real property are ousters, trespasses, nuisances, waste, subtraction of rent, disturbances of right of way, and the like.

Relative injuries are injuries to those rights which a person possesses in relation to the person who is immediately affected by the wrongful act done.

It is obvious that the divisions overlap each other, and that the same act may be, for example, a relative, a private, and a public injury at once. For many injuries of this character the offender may be obliged to suffer punishment for the public wrong and to recompense the sufferer for the particular loss which he has sustained. The distinction is more commonly marked by the use of the terms *civil injuries* to denote private injuries, and of *crimes*, *misdemeanors*, etc., to denote the public injury done: though not always; as, for example, in case of a public nuisance which may be also a private nuisance.

Injuries arise in three ways: *first*, by non-feasance, or the not doing what was a legal obligation, or duty, or contract, to perform; *second*, misfeasance, or the performance in an improper manner of an act which it was either the party's duty or his contract to perform; *third*, malfeasance, or the unjust performance of some act which the party had no right or which he had contracted not to do.

The remedies are different as the injury affects private individuals or the public.

When the injuries affect a private right and a private individual, although often also affecting the public, there are three descriptions of remedies: *first*, the preventive, such as defence, resistance, recaption, abatement of nuisance, surety of the peace, injunction, etc.; *second*, remedies for compensation, which may be by arbitration, suit, action, or summary proceedings before a justice of the peace; *third*, proceedings for punishment, as by indictment, or summary proceedings before a justice. *When the injury is such as to affect the public*, it becomes a crime, misdemeanor, or offence, and the party may be punished by indictment, or summary conviction for the public injury, and by civil action at the suit of the party for the private wrong. But in cases of felony the remedy by action for the private injury is generally *suspended* until the party particularly injured has fulfilled his duty to the public by prosecuting the offender for the public crime; and in cases of homicide the remedy is *merged* in the felony; 1 Chitty, Pr. 10; Ayliffe, Pand. 592.

There are many injuries for which the law affords no remedy. In general, it interferes only when there has been a visible physical injury inflicted, while it leaves almost totally unprotected the whole class of the most malignant mental injuries and sufferings, unless in a few cases where, by a fiction, it supposes some pecuniary loss, and sometimes affords compensation to wounded feelings. A parent, for example, cannot sue, in that character, for an injury inflicted on his child, and when his own domestic happiness has been destroyed, unless the fact will sustain the allegation that the daughter was the servant of her father, and that by reason of such seduction he lost the benefit of her services; but the proof of loss of service has reference only to the form of the remedy. And when the action is sustained in point of form, damages may be given not only for the loss of service, but also for all that the plaintiff can feel from the nature of the injury; 20 Pa. 354; 9 N. W. Rep. 599; 14 Cent. L. J. 12. Another instance may be mentioned. A party cannot recover damages for *verbal* slander in many cases: as, when the facts published are true; for the defendant would justify, and the party injured must fail. Nor will the law punish *criminally* the author of *verbal* slander imputing even the most infamous crimes, unless done with intent to extort a chattel, money, or valuable thing. The law presumes, perhaps unnaturally enough, that a man is incapable of being alarmed or affected by such injuries to his feelings. See 1 Bish. Cr. L. § 591; Cl. Cr. L. 347.

The true and sufficient reason for these rules would seem to be the uncertain character of the injury inflicted, the impossibility of compensation, and the danger,

supposing a pecuniary compensation to be attempted, that injustice would be done under the excitement of the case. The sound principle, as the experience of the law amply indicates, is to inflict a punishment for crime, but not put up for sale, by the agency of a court of justice, those wounded feelings which would constitute the ground of the action.

The rule as indicated above has its limitations, however, in particular cases; 71 Me. 227. Thus, it has been held that, when bodily pain is caused, mental pain follows necessarily, and the sufferer is entitled to damages for the mental pain as well as for the bodily; 29 Conn. 390; 13 Cal. 599; 63 Pa. 290; 62 Barb. 484; but damages for the mental suffering of one person, on account of physical injury to another, are too remote to be given by court or jury; 2 C. & P. 292.

There is a material distinction between damages and injury. Injury is the wrongful act or tort which causes loss or harm to another. Damages are allowed as an indemnity to the person who suffers loss or harm from the injury. The word injury denotes the illegal act. the term damages means the sum recoverable as amends for the wrong; 103 Ind. 319.

In Civil Law. A delict committed in contempt or outrage of any one, whereby his body, his dignity, or his reputation is maliciously injured. Voet, *Com. ad Pand.* 47, t. 10, n. 1.

A *real injury* is inflicted by any act by which a person's honor or dignity is affected: as, striking one with a cane, or even aiming a blow without striking; spitting in one's face; assuming a coat of arms, or any other mark of distinction proper to another, etc. The composing and publishing defamatory libels may be reckoned of this kind; Erskine, Pr. 4. 4. 45.

A *verbal injury*, when directed against a private person, consists in the uttering contumelious words, which tend to injure his reputation by making him little or ridiculous. Where the offensive words are uttered in the heat of a dispute and spoken to the person's face, the law does not presume any malicious intention in the utterer, whose resentment generally subsides with his passion; and yet even in that case the truth of the injurious words seldom absolves entirely from punishment. Where the injurious expressions have a tendency to blacken one's moral reputation or fix some particular guilt upon him, and are deliberately repeated in different companies, or handed about in whispers to confidants, the crime then becomes slander, agreeably to the distinction of the Roman law; Dig. 15, § 12 *de Injur.*

INLAGARE, INLEGIARE. To restore to protection of law. Opposed to *utlagare.* Bract. lib. 3, tr. 2, c. 14, § 1; Du Cange.

INLAGATION. Restoration to the protection of law.

INLAGH. A man who is under the protection of the law, and not outlawed. Cowel.

INLAND. Within the same country. The demesne reserved for the use of the lord. Cowel. Inland, or domestic, navigation is that carried on in the interior of the country, and does not include that upon the great lakes; 24 How. 1; 10 Wall. 577. As to what are inland bills of exchange, see BILLS OF EXCHANGE.

INMATE. One who dwells in a part of another's house, the latter dwelling at the same time in the said house. Kitch. 45 *b*; Com. Dig. *Justices of the Peace* (B 85); 1 B. & C. 578; 2 M. & R. 227; 2 Russ. Cr. 937; 1 M. & G. 83; 28 Cal. 545. See LODGER.

INN. A house where a traveller is furnished with everything he has occasion for while on his way. Bac. Abr. *Inns* (B); 3 B. & Ald. 283; 9 B. Monr. 72. A public house of entertainment for all who choose to visit it. 5 Sandf. 247; 93 Cal. 253; 84 Ala. 451. A coffee-house or a mere eating-house is not an inn. To constitute an inn there must be some provision for the essential needs of a traveller upon his journey, namely, lodging as well as food; per Brown, U. S. D. J., in 13 Rep. 299, citing 54 Barb. 316. See INNKEEPER.

INNAVIGABLE. A term applied in foreign insurance law to a vessel not navigable, through irremediable misfortune by a peril of the sea. The ship is relatively innavigable when it will require almost as much time and expense to repair her as to build a new one. Targa, 238, 256; Emerigon, to. 1, 577, 591; 3 Kent 323, n.

INNINGS. Lands gained from the sea by draining. Cunningham, Law Dict.; Callis, Sewers 38.

INNKEEPER. The keeper of a common inn for the lodging and entertainment of travellers and passengers, their horses and attendants, for a reasonable compensation. Bac. Abr. *Inns*, etc.; Story, Bailm. § 475. Any one who makes it his business to entertain travellers and passengers, and provide lodging and necessaries for them, their horses and attendants, is an innkeeper. Edw. Bailm. § 450; even though the house is situated on enclosed grounds; 93 Cal. 253. But one who entertains strangers occasionally, although he may receive compensation for it, is not an innkeeper; 2 D. & B. 424; 7 Ga. 296; 1 Morr. 184. See GUEST; BOARDER. It is not necessary that he should furnish accommodations for horses and carriages; 3 B. & Ald. 283; the keeper of a tavern; *id.*; and of a hotel is an innkeeper; 2 Chitty 484. So is one who keeps a hotel on what is called the European plan, furnishing lodging to guests, and keeping an eating-house where they may purchase meals at their option; 2 Daly 200. But the keeper of a mere restaurant is not an innkeeper if he only furnishes meals to his guests; 1 Hilt. 193; 13 Rep. 299. Nor is the keeper of a coffee-

house, or of a boarding house, or lodging-house; 8 Co. 32; 2 E. & B. 144; 100 Mass. 495; 35 Wisc. 118. One who receives lodgers and boards them under a special contract for a limited time, or who lets rooms to guests by the day or week, and does not furnish them entertainment, is not an innkeeper, 2 Daly 15. See 87 Cal. 483. Where the plaintiff attended a ball given by an innkeeper, stabled his horse at the inn, drank and paid for liquors, and paid for his ticket of admission to the ball, it was held that the relationship of innkeeper and guest did not exist; 17 Hun 126. Where one boarded with his family at a hotel in New York, paying a specified amount for his rooms, and an additional amount for board if he took his meals regularly, and if not, paying for whatever he ordered at the restaurant attached to the hotel, it was held that the innkeeper was liable for personal property stolen from the plaintiff's room; 17 Hun 279 (criticized in 20 Alb. L. J. 64, citing many cases); and see 22 Minn. 468. Where one merely leaves his horse with an innkeeper, the relation of innkeeper and guest does not exist; 68 Me. 489; so where he leaves goods at the inn without indicating any intention to become a guest; 60 Hun 409. So when a guest paid his bill and left the inn, having deposited money with a clerk to be kept till his return; 2 Lea 312; but it terminates where the guest delivers his baggage to a porter to be checked for safe keeping, the porter having no authority to receive it, and pays his bill, and in his absence the baggage is stolen, the innkeeper is not liable therefor; 93 Ala. 342.

He is bound to take in and receive all travellers and wayfaring persons, and to entertain them, if he can accommodate them, for a reasonable compensation; Wand. Inns, 46; 3 B. & Ald. 285; 7 C. & P. 213; 4 Exch. 367. See 89 Cal. 156. For a refusal to do so he is liable civilly and criminally; 7 C. & P. 213. It is no defence that the traveller did not tender the price of his entertainment, or that the guest was travelling on Sunday, or that the innkeeper had gone to bed, or that the guest refused to tell his name, otherwise if the guest was drunk, or was behaving in an improper manner; Edw. Bailm. § 471; 34 Pa. 86; 7 C. & P. 213. The innkeeper may demand prepayment; 9 Co. 87. He may not exclude persons from entering the inn and going into the public room on lawful business; 8 N. H. 523. He must guard their goods with proper diligence. He is liable only for the goods which are brought within the inn; 8 Co. 32; 58 N. W. Rep. (S. Dak.) 555. A delivery of the goods into the personal custody of the innkeeper is not, however, necessary in order to make him responsible; for, although he may not know anything of such goods, he is bound to pay for them if they are stolen or carried away, even by an unknown person; Wand. Inns 100; Dig. 4, 9, 1; 3 B. & Ald. 283; 1 Holt N. P. 209; 1 Bell Comm. 469; 1 Sm. L. C. 47; 14 Barb. 193; 8 Co. 32; 93 Cal. 253; 2 Ind. App. 303; 54 Mo. App. 567; 1 Hayw. 41; 14 Johns. 175; 23 Wend. 642; 7 Cush. 114; 62 Pa. 92; 27 Miss. 668. Thus, when a guest's luggage was, at his suggestion, taken to the commercial room, 8 B. & C. 9; and when a lady's reticule with money in it was left for a few minutes on a bed in her room; 2 B. & Ad. 803; the innkeeper was held liable; and if he receive the guest, the custody of the goods may be considered as an accessory to the principal contract, and the money paid for the apartments as extending to the care of the box and portmanteau; Jones, Bailm. 94; Story, Bailm. § 470; 1 Bla. Com. 430; 2 Kent 458. The particular responsibility of an innkeeper does not extend to goods lost or stolen from a room occupied by a guest for a purpose of business distinct from his accommodation as guest, such as the exhibition of samples of merchandise; 121 U. S. 383. The liability of an innkeeper is the same in character and extent with that of a common carrier; 7 Cush. 417; 9 Humphr. 746; 1 Cal. 221; 8 B. & C. 9; 53 Me. 163; 8 Blackf. 535. Even where the plaintiff's horse and wagon containing goods of value were destroyed in the night by fire, the cause of which was unknown, it was held that the innkeeper was liable; 33 N. Y. 571; *contra*, 30 Mich. 259; s. c. 18 Am. Rep. 127, n. See 6 L. R. A. 483, n. In a recent English case in the Luton county court against the proprietor of the George Hotel, Luton, an innkeeper was held liable for the loss of a bicycle, lost while the owner was at luncheon in the hotel.

He is responsible for the acts of his domestics and servants, as well as for the acts of his other guests, if the goods are stolen or lost; 7 Cush. 417; 5 Barb. 560; 54 Mo. App. 567; but he is not responsible for any tort or injury done by his servants or others to the person of his guest, without his own co-operation or consent; 8 Co. 32. The innkeeper will be excused whenever the loss has occurred through the fault of the guest, the act of God, or of the public enemy; 4 M. & S. 306; 1 Stark. 251, n.; 27 Tex. 547; 98 U. S. 218; 87 Pa. 376; 134 *id.* 262. An omission on the part of the guest to lock his door will not necessarily prevent his recovery; 6 H. & N. 265; 2 Sweeny 705. See 14 Daly 114. Where a guest was given a room temporarily and in his absence his baggage was placed in the hall, the innkeeper was held liable for its loss; [1891] 2 Q. B. 11. When the guest misleads the innkeeper as to the value of a package and thus throws him off his guard, it has been held that he cannot recover; Edw. Bailm. § 466. See 46 N. Y. 266. The failure of a guest to inform an innkeeper that his valise placed in the cloak or baggage room, contains valuables, is not negligence; 2 Ind. App. 303; 83 Ga. 696. It has been held that a guest who does not confide his goods to the innkeeper cannot recover; Schoul., Bailm. 302; 1 Yeates 34; but the guest may retain personal custody of necessary wearing apparel and jewelry worn daily, for which the innkeeper becomes liable; 93

Cal. 253; a guest may recover for the loss of goods brought into the inn in the usual manner; 27 Miss. 657; 37 Ga. 242. An innkeeper may make reasonable regulations as to the manner in which he will receive and keep goods; 9 Wend. 85, 114. He must furnish reasonable accommodations. See 8 M. & W. 269. When the proprietor of a hotel employs a servant to receive and keep the property of guests while at meals, his liability for the default of this servant in the custody of property so received is not affected by the fact that he has also provided a check-room for the safe-keeping of such property; 54 Mo. App. 567.

The innkeeper is entitled to a just compensation for his care and trouble in taking care of his guest and his property; and, to enable him to obtain this, the law invests him with some peculiar privileges, giving him a lien upon the goods brought into the inn by the guest, and, it has been said, upon the person of his guest (*contra*, 3 M. & W. 248), for his compensation; 3 B. & Ald. 287; see 61 N. Y. 34; 1 Rich. 213; 26 Vt. 335; 3 M. & W. 248; 13 Or. 482; and this though the goods belong to a third person, if the innkeeper was ignorant of the fact; Schoul., Bailm. 326; 12 Q. B. 197; 23 Pa. 193; 11 Barb. 41; 99 N. C. 523; 27 Wis. 202; 52 Minn. 516; a lien was also held to attach upon the goods of the wife; 25 Q. B. Div. 491. Sewing machines were sent by his principal to a commercial traveller while he was at an inn, to be used in the course of business for sale to customers in the neighborhood. The innkeeper had express notice that they were the property of the employer but he received them as the baggage of the traveller, who left the inn without paying his bill; the English Court of Appeal held that the innkeeper had a lien on the goods for the amount of the bill; [1895] 2 Q. B. 501, affirming *id.* 78. The court below considered that the question of knowledge was immaterial, because "the goods in question were of a kind which a commercial traveller would in the ordinary course carry about with him to the inns at which he put up as part of the regular apparatus of his calling, and which the innkeeper would consequently be bound to receive into his inn and to take care of while they were there. Here it is true that the goods were not brought by G—— to the inn —they were sent to him while he was staying there. But that can make no difference. The defendant was bound to receive them and take care of them as a part of his duty towards his guest. It follows that the lien attached to them."

At common law this lien could be enforced only by legal proceedings, and not by a sale; 11 Barb. 41; Edw. Bailm. § 476. This has been changed in New York by statute. As to detaining the horse of a guest, see 25 Wend. 654; 9 Pick. 280. The landlord may also bring an action for the recovery of his compensation. Where an innkeeper owes his guest for labor more than the guest owes for board, he has no lien; 3 Col. App. 519. An innkeeper's lien does not attach to goods in possession of one who is received as a boarder and not as a guest or traveller; 52 Minn. 516.

An innkeeper in a town through which lines of stages pass has no right to exclude the driver of one of these lines from his yard and the common public rooms where travellers are usually placed, who comes there at proper hours, and in a proper manner, to solicit passengers for his coach and without doing any injury to the innkeeper; 8 N. H. 523. The common-law liability of innkeepers has been changed in England and in most of the states by statute which provides that the innkeeper shall not be liable for money, etc., if he provides a safe for safe-keeping, and duly notifies his guests thereof. It has been held that a hotel-keeper, in whose safe a regular boarder deposits money for safe-keeping, is no more than a bailee for him, and when the money is stolen from the safe by his night clerk, is not liable therefor, in the absence of any proof of want of ordinary care in employing him; 62 N. W. Rep. (Mich.) 716.

INNOCENCE. The absence of guilt. See PRESUMPTION OF INNOCENCE.

INNOCENT AGENT. One who does the forbidden thing, moved thereto by another person, yet incurs no legal guilt, because either not endowed with sufficient mental capacity or not acquainted with the necessary facts. Bish. Cr. L. § 310; 21 Tex. App. 107.

INNOCENT CONVEYANCES. In English Law. A technical term used to signify those conveyances made by a tenant of his leasehold which do not occasion a forfeiture: these are conveyances by lease and release, bargain and sale, and a covenant to stand seised by a tenant for life. 1 Chitty, Pr. 243.

INNOMINATE CONTRACTS. In Civil Law. Contracts which have no particular names, as permutation and transaction. Inst. 2. 10. 13. There are many innominate contracts; but the Roman lawyers reduced them to four classes, namely, *do ut des*, *do ut facias*, *facio ut des*, and *facio ut facias*. Dig. 2. 14. 7. 2.

INNONIA. In Old English Law. A close or inclosure (*clausum inclausura*). Spel. Glos.

INNOTESCIMUS (Lat.). **In English Law.** An epithet used for letters patent, which are always of a charter of feoffment, or some other instrument not of record, concluding with the words *Innotescimus per præsentes*, etc. Tech. Dict.

INNOVATION. In Scotch Law. The exchange of one obligation for another, so that the second shall come in the place of the first. Bell, Dict. The same as NOVATION.

INNOXIARE. To purge one of a fault and declare him innocent. Toml.

INNS OF COURT. Voluntary non-corporate legal societies seated in London having their origin about the end of the 13th and the beginning of the 14th century. Encyc. Brit. They consist of the Inns of Court and Chancery.

The four principal Inns of Court are the Inner Temple and Middle Temple (formerly belonging to the Knights Templar), Lincoln's Inn, and Gray's Inn (anciently belonging to the earls of Lincoln and Gray). The other inns are the two Serjeants' Inns, one of which also called Faryndon Inn is in Chancery Lane, and the other in Fleet Street. The Inns of Chancery were probably so called because they were once inhabited by such clerks as chiefly studied the forming of writs, which regularly belonged to the cursitors, who are officers of chancery. These are Thavie's Inn, the New Inn, supposed to have been formed on the old foundation of St. George's Inn, Symond's Inn, Clement's Inn, Clifford's Inn, Staple's Inn, Lion's Inn, Furnival's Inn, and Barnard's Inn. These are connected with the respective Inns of Court. There were other inns, such as Chester Inn, Strand or Strode Inn, and Scrope Inn.

Of the origin of the Inns of Court Inderwick says: "The fixture of a certain court for the trial of civil causes in London also encouraged the calling or profession of advocacy, and led to the institution of the Inns of Court, where students of the law could congregate as at a University, hear lectures on the Roman law and the laws of their country, and prepare themselves for their future duties." King's Peace 91. "Each inn is self-governing, and quite distinct from all others, all, however, possessing equal privileges; but latterly they have joined in imposing certain educational tests for the admission of students. It is entirely in the discretion of an inn of court to admit any particular person as a member, for no member of the public has an absolute right to be called to the bar, there being no mode of compelling the inn to state its reasons for refusal. But practically, no objection is ever made to the admission of any person of good character. Each inn has also the power of disbarring its members, that is, of withdrawing from them the right of practising as counsel. This right has been rarely exercised, but of late years there have been examples of persons abusing their profession, and indulging in dishonest practices; in such cases, the inn has its own mode of inquiring into the facts affecting the character of a member, and is not bound to make the investigation public. By this high controlling power over its members, a higher character is supposed to be given to the bar as a body, than if each individual was left to his own devices, unchecked, except by the law." Int. Cyc. See also Encyc. Brit.

INNUENDO (Lat. *innuere*, to nod at, to hint at; meaning. The word was used when pleadings were in Latin, and has been translated by "meaning").

In Pleading. A clause in the declaration, indictment, or other pleading containing an averment which is explanatory of some preceding word or statement.

An averment of the meaning of alleged libellous words. 152 Pa. 187. The defamatory meaning which the plaintiff sets on words complained of, in an action for libel; its office is to show how they came to have that defamatory meaning and how they relate to him. 84 Wis. 129.

It derives its name from the leading word by which it was always introduced when pleadings were in Latin. It is mostly used in actions of slander, and is then said to be a subordinate averment, connecting particular parts of the publication with what has gone before, in order to elucidate the defendant's meaning more fully. 1 Stark. Sland. 431.

It is the office of an innuendo to define the defamatory meaning which the plaintiff sets on the words, to show how they come to have that meaning, and also to show how they relate to the plaintiff, whenever that is not clear on the face of them; Odg. Lib. & Sl. *100. See COLLOQUIUM. It may be used to point to the plaintiff as the person intended in the defendant's statement. It may show that a general imputation of crime is intended to apply to the plaintiff; Heard, Sland. § 226; 1 H. L. Cas. 637; 2 Hill, N. Y. 282; but it cannot be allowed to give a new sense to words where there is no such charge; 8 Q. B. 825; 7 C. B. 280. See 47 Minn. 278.

Where a defamatory meaning is apparent on the face of the libel itself, no innuendo is necessary, though often inserted; 93 Mich. 119; 3 Col. App. 568; where the words *prima facie* are not actionable, an innuendo is essential to the action; Odg. Lib. & Sl. *99.

It may point to the injurious and actionable meaning, where the words complained of are susceptible of two meanings; 8 Q. B. 841; Moore & S. 727; and generally explain the preceding matter; 7 C. B. 251; 15 *id.* 360; 1 M. & W. 245; 12 Ad. & E. 317; but cannot enlarge and point the effect of language beyond its natural and common meaning in its usual acceptation; Heard, Sland. § 219; Newell, Def. Sland. & L. 619, 620; 6 B. & C. 154; 9 Ad. & E. 282; 15 Pick. 335; 19 D. C. 534; unless connected with the proper introductory averments; 1 Cr. & J. 143; 1 C. B. 728; 6 *id.* 239; 2 Pick. 320; 16 *id.* 1; 11 Metc. 473; 8 N. H. 246; 12 Vt. 51; 11 S. & R. 343; 5 Johns. 211. These introductory averments need not be in the same count; 2 Wils. 114; 2 Pick. 329. Where the language of an alleged libel was ambiguous, the innuendoes averring the meaning plaintiff claimed should be attached to the words complained of, are proper; 63 Hun 626.

For the innuendo in case of an ironical libel, see 7 Dowl. 210; 4 M. & W. 446.

If not warranted by preceding allegations, it may be rejected as superfluous; Heard, Sland. § 225; but only where it is bad and useless,—not where it is good but unsupported by evidence, even though the words would be actionable without an innuendo; Newell, Def. Sland. & L. 629; 3 H. L. Cas. 395; 1 Cr. & M. 675; 1 Ad. & E. 558; 2 Bingh. N. C. 402; 4 B. & C. 655; 3 Campb. 461; 9 East 93; Cro. Car. 512; Cro. Eliz. 609. See 3 Misc. Rep. 314.

In the case of words not *per se* actionable, the innuendo must be pleaded and proved; 51 Mo. App. 102.

INOFFICIOUS TESTAMENT. In Civil Law. A testament contrary to the

natural duty of the parent, because it totally disinherited the child, without expressly giving the reason therefor. See next title.

INOFFICIOSUM (Lat). **In Civil Law.** Inofficious; contrary to natural duty or affection. Used of a will of a parent which disinherited a child without just cause, or of that of a child which disinherited a parent, and which could be contested by *querela inofficiosi testamenti;* designated by Blackstone as remarkable on the ground "that the testator had lost the use of his reason;" 1 Com. 447; 2 *id.* 502; 2 Steph. Com. 589; Dig. 2. 5. 3, 13; Paulus, lib. 4, tit. 5, § 1. Even a brother or sister could set aside such a testament if the person actually instituted heir was *turpis* or infamous. The old writ *de rationabili parte bonorum*, in the English law, resembled in some respects the *querela inofficiosi testamenti;* but there is nothing which corresponds to it in the English law at the present day; Moz. & W.

INOFICIOCIDAD. In Spanish Law. Every thing done contrary to a duty or obligation assumed, as well as in opposition to the piety and affection dictated by nature: *inofficiosum dicitur id omne quod contra pietatis officium factum est.* The term applies especially to testaments, donations, dower, etc., which may be either revoked or reduced when they affect injuriously the rights of creditors or heirs.

INOPS CONSILII (Lat.). Destitute of or without counsel. In the construction of wills a greater latitude is given, because the testator is supposed to have been *inops consilii.*

INORDINATUS. An intestate.

INPENY and OUTPENY. Money which by the custom of some manors is paid by an incoming and an outgoing tenant. Spelm.; Holth.

INQUEST. A body of men appointed by law to inquire into certain matters: as, the inquest examined into the facts connected with the alleged murder. The grand jury is sometimes called the *grand inquest.*

The judicial inquiry itself by a jury summoned for the purpose, is called an inquest. The finding of such men, upon an investigation, is also called an inquest, or an inquisition.

The most familiar use of the word is to designate the inquiry by a coroner (*q. v.*) into the causes of death, whether sudden, violent, or in prison. To justify an inquest it is not necessary that a death should be both sudden and violent; either is sufficient; 2 Grant, Pa. 262. The authority to hold an inquest extends to bodies brought into the county; 105 N. Y. 146; and when a person died in one county and was buried in another it was held that the inquest should be held by the coroner of the latter. After the verdict is returned the duty is completed and a second inquest cannot be held unless the first is quashed by a competent court; 3 El. & El. 137; 4 Park. Cr. Rep. 519. No inquest can be held in any case except upon view of the body; this is jurisdictional and can be waived by no one; 1 Witth. & Beck. Med. Jur. 341; 3 B & A. 260; if buried it may be exhumed, but must be reburied; *id.* 260; 2 Hawk. P. C. 77. A *post-mortem* examination may be ordered; 3 Pa. 462; 4 *id.* 269; but it should not be made before the jury have viewed the body; 1 Witth. & Beck. Med. Jur. 336; nor should it be in the presence of the jury, but they are to be instructed by the testimony of the physicians designated to make it; 105 N. Y. 146.

In holding an inquest the coroner acts judicially; 3 Gray 463; 44 Cal. 452; 32 Mo. 375; 1 Witth. & Beck. Med. Jur. 333. No person is entitled by reason of being suspected of causing the death, to be present, or to have counsel, or cross-examine the witnesses or produce others; 2 Hawk. P. C. 77; 20 How. Pr. 111; 11 Abb. Pr. 406; 81 N. Y. 622, aff. 15 Hun 200. The coroner may select and summon the jurors of inquest and fine any who are absent for non-attendance; T. U. P. Charlt. 310; they must be sworn; 3 B. & A. 260; and this must appear in the certificate or be proved *aliunde;* 22 Wend. 167; they are the sole arbiters of the facts; but the coroner may instruct them in the law; *id.;* and compel the attendance of witnesses, for which purpose he has common-law powers; 11 Phila. 387.

After hearing the evidence the jury should retire to deliberate upon their verdict, without the presence of the coroner, and, when agreed upon, it should be put in writing and is final, and the inquisition should be signed by the coroner and jury; 6 C. & P. 179, 602; the jury may sign by marks; 27 La. Ann. 297; and if several bear the same Christian and surname they need not be distinguished in the caption by abode or otherwise; 7 C. & P. 538.

The effect of the inquisition is to authorize the arrest and commitment of the person charged by it, and upon his arrest he may make his own statement and have it returned with the inquisition, but he cannot be discharged until his case is passed upon by the grand jury; 11 Abb. Pr. 406; 20 How. Pr. 111; except of course after hearing by a judge upon *habeas corpus.*

The testimony of a witness, not charged with crime, given at the inquest may be used against him, if afterwards accused; he must claim his privilege if he wishes to protect himself; 29 Pa. 102; 7 Neb. 320; but if at the time of inquest he is in custody on suspicion, he cannot be examined as a mere witness, but only as an accused party in the same manner as if brought before a committing magistrate; 103 N. Y. 211; the doctrine that silence gives consent does not apply to a coroner's inquest; 92 *id.* 29. These rules were settled by the New York court of appeals as the result of

a series of cases; 10 *id.* 13; 15 *id.* 384; 41 *id.* 7; 103 *id.* 211; 91 *id.* 241.

Preventing a coroner from holding an inquest over a dead body, when it is required by law, is indictable; 13 Q. B. D. 331; 7 Mod. 10. Where the captain of a man-of-war, mistaking his legal duty, had prevented the coroner from holding an inquest on the body of a man hanged on his ship, the court, granting an information, refused to proceed also against his boatswain, who had participated in the transaction under his order; Andr. 231; but, adds Bishop, "an information is in a measure discretionary with the court, and perhaps on an indictment the boatswain would have been deemed liable;" 1 Bish. N. Cr. L. § 688 (3).

In Massachusetts there is now no coroner, but an inquest is held in such cases by a justice of certain designated courts, after an examination by regular medical examiners and a report that the death was caused by violence, or without such report upon the direction of the prosecuting officer; Pub. Stat. c. 26. See CORONER.

INQUEST OF OFFICE. An inquiry made by the king's officer, his sheriff, coroner, or escheator, either *virtute officii*, or by writ sent to him for that purpose, or by commissioners specially appointed, concerning any matter that entitles the king to the possession of lands or tenements, goods or chattels. It is done by a jury of no determinate number,—either twelve, or more, or less; 3 Bla. Com. 258; Finch, Law 323. An inquest of office was bound to find for the king upon the direction of the court. The reason given is that an inquest concluded no man of his right, but only gave the king an opportunity to enter, so that he could have his right tried; 3 Bla. Com. 260; 4 Steph. Com. 61; F. Moore 730; 3 Hen. VII. 10; 2 Hen. IV. 5. An inquest of office was also called, simply, "office." As to "office" in the United States, see OFFICE.

INQUIRY, WRIT OF. A writ sued out by a plaintiff in a case where the defendant has let the proceedings go by default, and an interlocutory judgment has been given for damages generally, where the damages do not admit of calculation. It issues to the sheriff of the county in which the *venue* is laid, and commands him to inquire, by a jury of twelve men, concerning the amount of damages. The sheriff thereupon tries the cause in his sheriff's court, and some amount must always be returned to the court. But the return of the inquest merely informs the court, which may, if it choose, in all cases assess damages and thereupon give final judgment. 2 Archb. Pr., Waterman ed. 952; 3 Bla. Com. 398: 3 Chitty, Stat. 495, 497.

INQUISITION. **In Practice.** An examination of certain facts by a jury impanelled by the sheriff for the purpose. The instrument of writing on which their decision is made is also called an inquisition. The sheriff or coroner, and the jury who make the inquisition, are called the inquest.

An inquisition on an untimely death, if omitted by the coroner, may be taken by justices of gaol delivery and oyer and terminer, or of the peace; but it must be done publicly and openly; otherwise it will be quashed. Inquisitions either of the coroner or of the other jurisdictions are traversable; 1 Burr. 18, 19.

INQUISITOR. A designation of sheriffs, coroners *super visum corporis*, and the like, who have power to inquire into certain matters.

In Ecclesiastical Law. The name of an officer who is authorized to inquire into heresies, and the like, and to punish them. A judge.

INROLMENT, ENROLMENT (Law Lat. *irrotulatio*). The act of putting upon a roll.

Formerly, the record of a suit was kept on skins of parchment, which, best to preserve them, were kept upon a roll or in the form of a roll; what was written upon them was called the inrolment. After, when such records came to be kept in books, the making up of the record retained the old name of inrolment. Thus, in equity, the *inrolment* of a decree is the recording of it, and will prevent the rehearing of the cause, except on appeal to the house of lords or by bill of review. The decree may be enrolled immediately after it has been passed and entered unless a *caveat* has been entered; 2 Freem. 179; 4 Johns. Ch. 199; 14 Johns. 501. And before signing and inrolment a decree cannot be pleaded in bar of a suit, though it can be insisted on by way of answer; 3 Atk. Ch. 809; 2 Ves. 577; 4 Johns. Ch. 199. See Saunders, Ord. in Ch. *Inrolment.*

Transcribing upon the records of a court deeds, etc., according to the statutes on the subject. See 1 Chitty, Stat. 425, 426; 2 *id.* 69, 76–78; 3 *id.* 1497. Placing on file or record generally, as annuities, attorneys, etc.

INSANE PERSON. This includes every one who is: (1) An "idiot,"—from a person destitute of ordinary intellectual powers from any cause, and dating from any time; but, in common use, a person without understanding from birth. (2) "Lunatic"—A person of any form of unsoundness of mind other than idiocy; mental derangement, with intermittent, strictly periodically intermittent, lucid intervals. (3) "Non compos," which embraces "idiot" and "lunatic." (4) "Deranged," which embraces all the natural born idiots. Code W. Va. p. 124; 36 W. Va. 563.

INSANITY. In Medical Jurisprudence. The prolonged departure, without any adequate cause, from the states of feeling and modes of thinking usual to the individual in health.

Insanity is such a deprivation of reason that the subject is no longer capable of un-

derstanding and acting with discretion in the ordinary affairs of life. 142 Ill. 60.

Legal insanity, which exonerates from crime or incapacitates from civil action, is a mental deficiency with reference to the particular act in question and not a general incapacity. It is the latter only as the result of judicial ascertainment that a person is *non compos mentis*, by inquisition in lunacy, or similar statutory proceeding, and this only results in a general civil disability and not, *proprio vigore*, in immunity from punishment for crime.

It results that there can be no general definition of legal insanity. It is a state or condition which must be noted with reference to each class of actions to which it is applied.

In criminal law it "is any defect, weakness, or disease of the mind rendering it incapable of entertaining, or preventing its entertaining in the particular instance, the criminal intent which constitutes one of the elements in every crime." 1 Bish. N. Cr. L. § 381.

As a cause of civil incapacity it is such defect or weakness as prevents rational assent to a contract or due consideration of the facts properly and naturally entering into the testamentary disposition of one's estate. It is a want of due proportion in quality or quantity, or both,—between the mental capacity and power and the particular act, civil or criminal, as to which the inquiry arises.

The legal and the medical ideas of insanity are essentially different, and the difference is one of substance. The failure to keep it in mind has been the fruitful cause of confusion in trials involving the question of mental capacity for crime or contract, and has tended to render valueless and often absurd the testimony of witnesses called as experts. Many of these have testified without any conception of the real nature and definition of the insanity, which alone could have relation to the case.

The distinction between the medical and the legal idea of insanity has, perhaps, not been better stated than by Ray, who is quoted by Ordronaux, and again by Witthaus & Becker: "*Insanity in medicine* has to do with a prolonged departure of the individual from his natural mental state arising from bodily disease." "*Insanity in law* covers nothing more than the relation of the person and the particular act which is the subject of judicial investigation. The legal problem must resolve itself into the inquiry, whether there was mental capacity and moral freedom to do or abstain from doing the particular act." 1 Witth. & Beck. Med. Jur. 181; 35 Fed. Rep. 730.

Of late years this word has been used to designate all mental impairments and deficiencies formerly embraced in the terms *lunacy*, *idiocy*, and *unsoundness of mind*. Even to the middle of the last century the law recognized only two classes of persons requiring its protection on the score of mental disorder, viz.: *lunatics* and *idiots*. The former were supposed to embrace all who had lost the reason which they once possessed, and their disorder was called *dementia accidentalis;* the latter, those who had never possessed any reason, and this deficiency was called *dementia naturalis*. Lunatics were supposed to be much influenced by the moon; and another prevalent notion respecting them was that in a very large proportion there occurred *lucid intervals*, when reason shone out, for a while, from behind the cloud that obscured it, with its natural brightness. It may be remarked, in passing, that lucid intervals are far less common than they were once supposed to be, and that the restoration is not so complete as the descriptions of the older writers would lead us to infer. In modern practice, the term lucid interval signifies merely a remission of the disease, an abatement of the violence of the morbid action, a period of comparative calm; and the proof of its occurrence is generally drawn from the character of the act in question. It is hardly necessary to say that this is an unjustifiable use of the term, which should be confined to the genuine lucid interval that does occasionally occur.

It began to be found at last that a large class of persons required the protection of the law, who were not idiots, because they had reason once, nor lunatics in the ordinary signification of the term, because they were not violent, exhibited no very notable derangement of reason, were independent of lunar influences, and had no lucid intervals. Their mental impairment consisted in a loss of intellectual power, of interest in their usual pursuits, of the ability to comprehend their relations to persons and things. A new term—*unsoundness of mind*—was therefore introduced to meet this exigency; but it has never been very clearly defined.

The law has never held that *all* lunatics and idiots are absolved from all responsibility for their civil or criminal acts. This consequence was attributed only to the severest grades of these affections,—to lunatics who have no more understanding than a brute, and to idiots who cannot "number twenty pence nor tell how old they are." Theoretically the law has changed but little, even to the present day; but practically it exhibits considerable improvement: that is, while the general doctrine remains unchanged, it is qualified, in one way or another, by the courts, so as to produce less practical injustice.

Insanity implies the presence of disease or congenital defect in the brain, and though it may be accompanied by disease in other organs, yet the cerebral affection is always supposed to be primary and predominant. It is to be borne in mind, however, that bodily diseases may be accompanied, in some stage of their progress, by mental disorder which may affect the legal relations of the patient.

To give a definition of insanity not congenital, or, in other words, to indicate its essential element, the present state of our knowledge does not permit. Most of the attempts to define insanity are sententious descriptions of the disease, rather than proper definitions. For all practical purposes, however, a definition is unnecessary, because the real question at issue always is, not what constitutes insanity in general, but wherein consists the insanity of this or that individual. Neither sanity nor insanity can be regarded as an entity to be handled and described, but rather as a condition to be considered in reference to other conditions. Men vary in the character of their mental manifestations, insomuch that conduct and conversation perfectly proper and natural in one might in another, differently constituted, be indicative of insanity. In determining, therefore, the mental condition of a person, he must not be judged by any arbitrary standard of sanity or insanity, nor compared with other persons unquestionably sane or insane. He can properly be compared only with himself. When a person, without any adequate cause, adopts notions he once regarded as absurd, or indulges in conduct opposed to all his former habits and principles, or changes completely his ordinary temper, manners, and disposition,—the man of plain practical sense indulging in speculative theories and projects, the miser becoming a spendthrift and the spendthrift a miser, the staid, quiet, unobtrusive citizen becoming noisy, restless, and boisterous, the gay and joyous becoming dull and disconsolate even to the verge of despair, the careful, cautious man of business plunging into hazardous schemes of speculation, the discreet and pious becoming shamefully reckless and profligate,—no stronger proof of insanity can be had. And yet not one of these traits, in and by itself alone, disconnected from the natural traits of character, could be regarded as conclusive proof of insanity. In accordance with this fact, the principle has been laid down, with the

sanction of the highest legal and medical authority, that it is the prolonged departure, without any adequate cause, from the states of feeling and modes of thinking usual to the individual when in health, which is the essential feature of insanity. Gooch, Lond. Quart. Rev. xliii. 355; Combe, Ment. Derang. 196; Meidway *v.* Croft, 3 Curt. Eccl. 671.

Insanity produced by alcoholism is of two kinds: Delirium tremens, caused by the breaking down of the person's system by long continued or habitual drunkenness, and brought on by abstinence from drink, and called "settled insanity," to distinguish it from "temporary insanity," or drunkenness, directly resulting from drink; 31 Tex. Cr. R. 318. See DRUNKENNESS.

Criminal Responsibility. There is a concurrence in the law of civilized countries in absolving persons mentally unsound from criminal responsibility. In France, Germany, and Austria the rule is in substance that if a person is unconscious of the nature of his act, or his will is affected or the character of the act is not perceived, there is no crime; 1 Witth. & Beck. Med. Jur. 181; Krafft-Ebing, *Ger. Psycho-Path.*

That insanity, in some of its forms, annuls all criminal responsibility, and, in the same or other forms, disqualifies its subject from the performance of certain civil acts, is a well-established doctrine of the common law. In the application of this principle there has prevailed, for many years, the utmost diversity of opinion. The law as expounded by Hale, who divided insanity into partial insanity as to certain subjects, partial as to degree, and total insanity, was that partial insanity was not sufficient to excuse a person in the committing of any capital offence; 1 Hale, P. C. 30; and his doctrine was received without question until the beginning of the present century; 8 How. St. Tr. 322; 16 *id.* 764; 19 *id.* 947.

This ancient doctrine received its first serious shock in Hadfield's case, 27 *id.* 1281, 1311, in which Erskine, for the defense, admitted the language used by Coke and Hale as to requiring deprivation of memory and understanding to absolve from crime, but contended that, if taken literally, the words would apply to idiocy alone. He insisted that "of all the cases that have filled Westminster Hall with complicated considerations, the insane persons have not onlyhad the most perfect knowledge and recollection of all the relations in which they stood towards others, and of the acts and circumstances of their lives, but have, in general, been remarkable for subtlety and acuteness; and that delusion of which the criminal act in question was the immediate unqualified offspring, was the kind of insanity which should rightly exempt from punishment." These views prevailed and Lord Kenyon held that the prisoner was deranged immediately prior to the act and that it was unlikely that he had meanwhile recovered, though, strictly speaking, proof might be required of his condition at the very moment of the shooting; accordingly the prisoner was acquitted with the approbation of the court. Subsequently, in Bellingham's case, 1 Collinson, Lun. 636; Shelf. Lun. 462, Lord Mansfield held that it must be proved that the prisoner was incapable of judging between right and wrong; that at the time of the act he did not consider that murder was a crime against the laws of God and nature; and that there was no other proof of insanity which would excuse crime. Similar language was used in Parker's case, Collin. Lun. 477; Higginson's case, 1 C. & K. 129; Stokes' case, 3 C. & K. 185, and so for about a generation the law of England was practically as settled by Hadfield's and Bellingham's cases, though there were occasional variations from it. The special feature of the law of that period was that, to make a person responsible for crime, there must be a knowledge of right and wrong in the abstract. But the tendency of the cases was towards the modification of the test, so as to make the knowledge of right and wrong refer solely to the act in question; 5 C. & P. 168; 9 *id.* 525; 1 Cox, Cr. Cas. 80; 3 *id.* 275. This was formally pronounced to be the law by the English judges, in their reply to the questions propounded by the House of Lords on the occasion of the McNaghten trial, 10 Cl. & F. 200, where it was said by Tindal, C. J., for himself and the other judges: "To establish a defence on the ground of insanity, it must be clearly proved that at the time of committing the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature or quality of the act he was doing; or, if he did know it, that he was not aware he was doing what was wrong." Most of the English cases will be found in 1 Russ. Cr., Shars. ed. 14, and in the notes will be found a collection of American cases.

The test laid down in McNaghten's case has been generally applied in England and this country. In the former it has been definitely recognized as the law, and in the latter it has been generally adopted, though with frequent variations as will appear *infra.*

In Coleman's case, in New York, Davis, J., charged the jury that the "test of the responsibility for criminal acts, when insanity is asserted, is the capacity of the accused to distinguish between right and wrong at the time and with respect to the act which is the subject of inquiry." He left it to the jury to determine "whether or not at the time the accused committed the act she knew what she was doing, and knew that in shooting him she was doing a wrongful act." 1 N. Y. Cr. Rep. 1. With variations of expression this is the prevailing doctrine of the American courts; 15 Wall. 590; 62 Cal. 50; 5 Harring. 512; 1 Houst. Cr. Cas. 166, 371; 45 Ga. 57, 190, 225; 57 Me. 574; 25 Kan. 182; 31 Fed. Rep. 134; 35 *id.* 730; 11 Gray 303; 56 Miss. 269; 62 *id.* 167; 38 Mich. 482; 10 Minn. 223; 74 Mo. 199, 247; 11 Neb. 537; 14 *id.* 572; 21 N. J. L. 196; 8 Jones, N. C. 463; 40 Tex. 60; 3 Heisk. 348; 109 Ill. 635; 30 S. C. 74; 1

Brewst. 356; 4 Pa. 264; 6 McLean 121; 4 Denio 9; 88 N. Y. 86; 2 Ohio St. 70; 10 *id.* 599. In many of the cases it is difficult to distinguish with certainty between what the court intends for a statement of the law and what is rather in the nature of practical suggestions addressed to the jury. In a New Hampshire case it was held that no one of the circumstances ordinarily relied upon is, as a matter of law, a test of mental disease, but that all symptoms and all tests of mental disease are purely matters of fact to be determined by the jury; 49 N. H. 399; and the same doctrine has been followed in other states; 31 Ill. 385; 31 Ind. 492, 485. Very similar were the remarks addressed to the jury by the Lord Justice Clerk in a Scotch Justiciary case: "The question is one of fact, that matter of fact being whether when he committed this crime the prisoner was of an unsound mind. The counsel for the crown very properly said that this was entirely for you. It is not a question of medical science, neither is it one of legal definition, although both may materially assist you. It is a question for your common and practical sense." 3 Couper 16.

It was said that mental unsoundness, to render one free from criminal liability, must be such on the particular subject out of which the acts charged as an offence are claimed to have sprung, as to render him incapable of discerning the wrong of committing the same; 35 Fed. Rep. 730; 11 Colo. 258. Occasionally the court has thought it sufficient for the jury to consider whether the prisoner was sane or insane,—of sound memory and discretion, or otherwise; see State *v.* Cory, State *v.* Prescott, in Ray, Med. Jur. 55. The capacity to distinguish between right and wrong has been held not to be a safe test in all cases; 25 Ia. 27, per Dillon, C. J.; 15 Wall. 580. See also 78 Pa. 122. In Whart. & St. Med. Jur. § 120, this test is said to be generally satisfactory, but not to cover all cases. An instruction has been sustained, where there was a defence of insanity, that the defendant was not responsible unless he was conscious of his act at the time it was committed; 91 Cal. 35.

The definition of insanity, in the trial of a case involving that issue, is for the court; Whart. & St. Med. Jur. § 112; see 1 F. & F. 87.

The rule already stated as to partial insanity applies equally to delusions, which as has been stated were first brought within the law of mental irresponsibility for crime by Hadfield's case, *supra*. In McNaghten's case, *supra*, the question as to delusions was answered thus: "That if a person was acting under an insane delusion, and was in other respects sane, he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. That is to say, that the acts of the criminal should be judged as if he had really been in the circumstances he imagined himself to be in. For example, if, under the influence of delusion, he supposes another man to be in the act of attempting to take his life, and he kills him, as he supposes, in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted an injury upon him in character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment." In the Guiteau case, the jury were charged by Cox, J., on this subject, as follows: "An insane delusion is never the result of reasoning and reflection. It is not generated by them and it cannot be dispelled by them. . . . Whenever convictions are founded on evidence, on comparison of facts and opinions and arguments, they are not insane delusions. The insane delusion does not relate to mere sentiments or theories, or abstract questions of law, politics, or religion. All these are the subject of opinions, which are beliefs founded on reasoning and reflection. These opinions are often absurd in the extreme, and result from naturally weak or ill-trained reasoning powers, hasty conclusions from insufficient data, ignorance of men and things, credulous dispositions, fraudulent imposture, and often from perverted moral sentiments. But still, they are opinions, founded upon some kind of evidence, and liable to be changed by better external evidence or sounder reasoning. But they are not insane delusions;" 10 Fed. Rep. 161. Following this opinion it was said that: "An insane delusion is an incorrigible belief, not the result of reasoning in the existence of facts which are either impossible absolutely or impossible under the circumstances of the individual." 20 Neb. 333.

It is a logical result of the nature of delusion and its legal relations as shown by these definitions that it will be of no avail as a defence unless, if true, the facts supposed to exist would have excused the crime; *id.*; 32 *id.* 224; 138 N. Y. 398; 55 Ark. 259. This rule is well illustrated by a case in which it was held that an instruction that "defendant would not be responsible if he killed deceased under an insane delusion that deceased was trying to marry defendant's mother, and that this delusion caused the killing," was properly refused; 54 Ark. 588.

In order that delusion may be a defence it must be connected with the crime, and if a person has an insane delusion upon any one subject, but commits a crime not connected therewith, he is equally guilty as if he were in all respects sane; 13 Minn. 341; 30 Miss. 600; 21 Mo. 464. "A man whose mind squints, unless impelled to crime by this very mental obliquity, is as much amenable to punishment as one whose eye squints." Gibson, C. J., in 4 Pa. 264. See also Alison, Cr. L. 647; Ray, Insan. 106, 135, 227; 3 Couper 357; 71 Mo. 538; 1 Bish. N. Cr. L. 394.

"Where a defendant is acting under an insane delusion as to circumstances which, if true, would relieve the act from responsibility, such delusion is a defence;" Whart.

& St. Med. Jur. § 125; but such delusions must involve an honest mistake as to the object to which the crime is directed; *id.* § 127; 3 F. & F. 839. The term delusion as applied to insanity, does not mean a mere mistake of fact, or being induced by false evidence to believe that a fact exists which does not exist; 45 N. J. Eq. 726.

A disposition to multiply the tests, so as to recognize essential facts in the nature of insanity, has been manifested in this country to a much greater extent than in England.

The existence of an irresistible impulse to commit a crime has been recognized in the law; Steph. Cr. L. 91; and medical authorities are generally in agreement that, as it is put by Bishop, "the mental and physical machine may slip the control of its owner; and so a man may be conscious of what he is doing, and of its criminal character and consequences, while yet he is impelled to it by a power to him irresistible." 1 New Cr. L. 387; 3 Witth. & Beck. 270, 275; 1 Beck, Med. Jur., 10th ed. 723; Ray, Insan., 3d ed. §§ 17, 18, 22. But the writer last quoted adds: "Whether or not such is truly so must, in the nature of things, be a pure question of fact, it cannot be of law."

In England the courts have refused to recognize this ground of exemption from responsibility and limit the test to ability to distinguish between right and wrong; Clarke, Cr. L. 56; 1 Bish. N. Cr. L. § 387; 3 C. & K. 185; 1 F. & F. 666; 3 *id.* 772; 3 Cox, C. C. 275.

The American cases are very difficult to classify with reference to this test, as indeed they are on most branches of the subject, nor is such the present purpose; all that is possible being, by reference to a selection of the cases, to illustrate the progress of the law and the direction in which, but not, critically, the precise extent to which, changes have been made since Lord Hale's time, keeping pace with the growth of scientific knowledge.

A full understanding of the scope of the doctrine now under consideration involves the further subject of power of resistance, which enters largely into this class of cases and is also more particularly referred to, *infra.*

In Roger's case, 7 Metc. 500, the jury were directed to consider, in addition to the test of right and wrong, whether the prisoner, in committing the homicide, acted from an irresistible and uncontrollable impulse; and this case has been much relied on in American courts; Ray, Med. Jur. 58.

In Freth's case, 3 Phila. Pa. 105, Judge Ludlow charged: "If the prisoner was actuated by an irresistible inclination to kill, and was utterly unable to control his will, or subjugate his intellect, and was *not* actuated by anger, jealousy, revenge, and kindred evil passions, he is entitled to an acquittal," etc.

In the leading case of State *v.* Harrison it was said by Brannon, J.: "This irresistible-impulse theory test has been only recently presented, and while it is supported by plausible arguments, it is rather refined, and introduces what seems to me a useless element of distinction for a test, and is misleading to juries, and fraught with great danger to human life, so much so that even its advocates have warningly said it should be very cautiously applied and only in the clearest cases. What is this irresistible impulse? How shall we of the courts and juries know it? Does it exist when manifested in one single instance, as in the present case, or must it be shown to be habitual, or, at least, to have evinced itself in more than a single instance? . . . . I admit the existence of irresistible impulse and its efficacy to exonerate from responsibility, but not as consistent with an adequate realization of the wrong of the act. It is that uncontrollable impulse produced by the disease of the mind, when that disease is sufficient to override judgment and obliterate the sense of right as to the acts done, and deprives the accused of power to choose between them;" 36 W. Va. 729.

For other cases in which irresistible impulse is regarded as a defence, see 31 Ind. 485; 23 Ohio St. 146; 23 Ia. 67; 15 Wall. 580; but it is held that no impulse, however irresistible, is a defence, where there is a knowledge as to the particular act between right and wrong; 8 Jones, N. C. 463; 111 Mo. 542; 31 Tex. Cr. R. 491; 91 Cal. 35; 71 Miss. 345; 86 Ga. 70; 94 Tenn. 106; Tayl. Med. Jur. 720; and that it was a crime morally, and punishable by the laws of the country; 30 S. C. 74; 50 Ark. 511.

As a perfectly natural outgrowth of the doctrine of irresistible impulse, there is to be found in the American cases a tendency more noticeable in late years, to add an additional qualification to the right and wrong test. These cases hold, not merely that the accused, to be considered accountable, must be able to distinguish between right and wrong with respect to the act in question, but must have sufficient mental power to control his impulses.

As the theory of irresistible impulses owes much of its development to the courts of Pennsylvania, so also has this correlative doctrine of the necessity of power to control it received great attention in that state. In Mosler's case, 4 Pa. 264, Gibson, C. J., said: "His insanity must be so great as entirely to destroy his perception of right and wrong; and it is not until that perception is thus destroyed that he ceases to be responsible. It must amount to delusion or hallucination, controlling his will and making the commission of the act, in his apprehension, a duty of overruling necessity. The law is, that, whether the insanity be general or partial, the degree of it must be so great as to have controlled the will of its subject, and to have taken from him the freedom of moral action." And this language is repeated in Ortwein's case, 76 Pa. 414, by Agnew, C. J., who declares it to be the law of the state. The essential relation of power to such cases is thus put, in Haskell's case, 2 Brewst. 49, by Brewster,

J.: "A review of all the authorities I have been able to examine satisfies me that the true test in all these cases lies in the word 'power.' Has the defendant in a criminal case the power to distinguish right from wrong, and the power to adhere to the right and avoid the wrong? In these cases has the defendant, in addition to the capacities mentioned, the power to govern his mind, his body, and his estate? If he possess this power over his imagination he will be able to expel all delusive images, and the like control over his will would subdue all homicidal and other monomania. . . . I use the word power with reference to that control which humanity can expect from humanity."

Other cases supporting this view are, 1 Duv. Ky. 224; 7 Metc. 500.

Other cases seem to hold that one mentally disordered, though knowing right and wrong, and that the act is forbidden and punishable, is criminally responsible whether he has power over his conduct or not; 26 Hun 67; 62 How. Pr. 436; 52 N. Y. 467; 102 *id.* 238; 42 Ga. 9; 45 *id.* 57; 47 *id.* 553; 58 *id.* 296; 62 Cal. 120; 11 Or. 413; 41 Minn. 365; 1 Houst. Cr. Cas. 249; 92 Mo. 300. In a late case it was said, though a crime is committed through lack of sufficient will power to control the conduct, and under an irresistible and uncontrollable impulse, the offender is responsible for the act; 111 Mo. 542. In discussing this class of cases Bishop considers that a doctrine that "our law punishes any man for what he does under a necessity which it is impossible for him to resist," would be an "unprecedented horror." He assumes that the cases which appear to hold it are to be explained upon the theory that the judges do not believe in the existence of an irresistible or uncontrollable impulse. He himself does not assume to know whether as a fact there is, but as the experts assert it, he deems it to be the duty of a judge, where there is evidence tending to support the theory, to submit it to the jury and cast the responsibility upon them. 1 Bish. N. Cr. L. § 383 *b*, 387.

To this remarkable diversity of views may be attributed, in some measure, no doubt, the actual diversity of results. To any one who has followed with some attention the course of criminal justice in trials where insanity has been pleaded in defence, it is obvious that, if some have been properly convicted, others have just as improperly been acquitted. It must be admitted, however, that the verdict in such cases is often determined less by the instructions of the court than by the views and feelings of the jury and the testimony of experts.

The defence of irresistible impulse has been the subject of legislation in some states, as in New York and Michigan, where by statute a morbid propensity, or uncontrollable impulse to commit a crime, in the mind of one who is conscious of the nature of the act or that it is wrong, or to be incapable of such knowledge, is no defence. See N. Y. Pen. Code § 21; Mich. Pen. Code §§ 19, 20.

What is sometimes called moral insanity, as distinguished from mental unsoundness, is not a defence to a charge of crime; Whart. & St. Med. Jur. §§ 164, 174; Tayl. Med. Jur. 677; 6 Jur. 201; 4 Cox, C. C. 149; 11 Gray 303; 52 N. Y. 467; 47 Cal. 134; 73 *id.* 222; 2 Ohio St. 184; Guiteau's case, 10 Fed. Rep. 161; 100 N. C. 457; 126 N. Y. 269; 52 *id.* 469; but see 1 Duv. 224; 4 Metc. Ky. 227; 43 Conn. 514; 6 Bush 268. See also Mann, Med. Jur. of Insan. 66, 120, 135. Morbid religious feelings may be of such a character as to amount to partial insanity, which, though sometimes the basis of delusions affecting criminal cases, is more frequently met with in connection with the subject of undue influence. In a case in which it was alleged that a testator was insane on the subject of spiritualism, it was held that, as an abstract proposition, a belief in spiritualism, though a person may be a monomaniac on that subject or any other form of religion, does not prove insanity; 72 Cal. 556; 32 Wis. 557; 52 *id.* 543; 3 Wall. Jr. 88; nor belief in the transmigration of souls; 16 Abb. Pr. N. S. 128.

Insanity is not necessarily established by mere eccentricity of mind, manifesting itself in absurd opinions or extravagancies of dress and manners; 21 Barb. 407; 4 McCord 183; Milw. 65; or an irritable temper and an excitable disposition; 32 N. Y. 715; or depression coupled with a monomania or delusion that, by the lands wearing out and buildings going to ruin, starvation and the poorhouse were threatened; 5 Jones L. 157. Insanity produced by continued dissipation is a good defence; 9 Houst. 369; *mania à potu* is a species of insanity; 3 Harr. 551; and so is *delirium tremens;* 62 How. Pr. 436; 5 Ohio St. 77; 31 Tex. Cr. Rep. 216; but it must be shown to exist at the time the act is perpetrated, not antecedently; 3 Jones, L. 335. As to drunkenness in its varied forms, see that title. Suicide is not conclusive evidence of insanity, but is admissible to show the absence of a sound and disposing mind; 4 Humph. 491. Epilepsy alone does not establish insanity which will excuse crime; 31 Tex. Cr. Rep. 491; 153 Pa. 535; and in its milder forms, causing temporary fits of insanity, the *prima facie* presumption is in favor of mental soundness; 7 Ia. 60. See 3 Witth. & Beck. Med. Jur. 319. Proof that insanity was hereditary was admissible; 61 Ark. 241; but that alone is insufficient when the other evidence clearly shows that defendant knew that he was committing a wrong; 31 Tex. Cr. Rep. 491; 28 Ill. 306.

In reply to a defence of want of criminal capacity proof was admitted that defendant had sometimes feigned insanity; 143 Ind. 299.

As to mental unsoundness produced by or connected with hypnotism, kleptomania, mesmerism, and somnambulism, see those titles.

The effect of the plea of insanity has sometimes been controlled by the instruc-

tions of the court in regard to the burden of proof and the requisite amount.

In many of the American states, there has been a tendency towards a relaxation of the rule settled in England, and which formerly prevailed in almost all the states, to treat a plea of insanity as being strictly one in confession and avoidance which must be proved by the defendant either beyond a reasonable doubt or, as was said in many American cases, by a preponderance of evidence. See BURDEN OF PROOF.

The English rule was thus stated in McNaghten's case: "Every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction;" 10 Cl. & F. 200; and it is the settled law of England; 3 C. & K. 188; 4 Cox, C. C. 149; 3 *id.* 155.

As to whether such proof must be by a preponderance of evidence or beyond a reasonable doubt, the language of the English judges is not entirely free from ambiguity, but it is understood to mean the latter; 14 Am. L. Reg. N. S. 28; 16 *id.* 454.

In many of the American cases this rule is adhered to; 21 N. J. L. 202; 76 Pa. 414; 145 *id.* 289; 8 Jones, L. 463; 109 N. C. 780; 5 Bush 362; 92 Ky. 630; 31 Tex. App. 491; 22 *id.* 379; 63 Ala. 307; 89 *id.* 150; 54 Ark. 588; 90 Cal. 195; 80 Ga. 650; 34 La. Ann. 186; 47 *id.* 1088; 57 Me. 574; 7 Metc. 500; 34 Minn. 430; 92 Mo. 310; 23 Ohio St. 349; 24 S. C. 439; 33 Gratt. 807; 11 W. Va. 747; see 36 Am. Rep. 467, n.; but many courts have held the contrary; 35 Fed. Rep. 730; 10 *id.* 161; 40 Conn. 136; 26 Fla. 11; 133 Ill. 382; 121 Ind. 433; 11 Kan. 32; 32 *id.* 205; 17 Mich. 9; 56 Miss. 269; 43 N. H. 224; 75 N. Y. 159; 88 *id.* 81; 91 Tenn. 617; 82 Wis. 295; and the Supreme Court of the United States has accepted this latter doctrine; 160 U. S. 469, where it was held that the jury, to convict, must be "able, upon their consciences, to say that the evidence before them, by whomsoever adduced, is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged." As to the rule on the subject, applied by the class of cases last referred to, see BURDEN OF PROOF. The cases of the former class, which put the burden on the defendant, in very many instances hold that a preponderance of proof only is required; and in some states the later cases show a virtual abandonment of the rule formerly adhered to by them. As for example in Massachusetts as will appear by the review of cases in that state in 160 U. S. 481–3. It results that it is not practicable to state what might be designated as a prevailing American rule. The subject is very fully discussed by Mr. Justice Harlan in the case last cited. The cases holding different views of the subject will be found collected in the opinion and argument in that case and also in 14 Am. L. Reg. N. S. 25; 16 *id.* 449; Cl. Cr. L. 58; Mann, Med. Jur. of Insan. ch. iii.; Witth. & Beck. 508.

In England, under 46 & 47 Vict. c. 38, relating to the trial of lunatics, the jury returns a verdict that the prisoner is "guilty, but insane at the time," whereupon the court records the verdict and orders the prisoner to be imprisoned during the pleasure of the Crown. Under 39 & 40 Geo. III. c. 94, the verdict was "not guilty, on the ground of insanity."

In some states in this country, where the verdict is an acquittal by reason of insanity, the fact must be so returned by the jury, and in such case the court are required to direct the confinement of the prisoner in an insane asylum.

Side by side with this doctrine of the criminal law which makes persons, who from a medical point of view are considered insane, responsible for their criminal acts is another equally well authorized, viz.: that a kind and degree of insanity which would not excuse a person for a criminal act may render him legally incompetent for the management of himself or his affairs; Bellingham's case, 5 C. & P. 168. This implies that the mind of an insane person acts more clearly and deliberately, and with a sounder view of its relations to others, when about to commit a great crime than when buying or selling a piece of property. It is scarcely necessary to add that no ground for this distinction can be found in our knowledge of mental disease. On the contrary, we know that the same person who destroys his neighbor, under the delusion that he has been disturbing his peace or defaming his character, may, at the very time, dispose of his property with as correct an estimate of its value and as clear an insight into the consequences of the act as he ever had. If a person is incompetent to manage property, it is because he has lost some portion of his mental power; and this fact cannot be justly ignored in deciding upon his responsibility for criminal acts. Insanity once admitted, it is within the reach of no mortal comprehension to know exactly how far it may have affected the quality of his acts. To say that, possibly, it may have had no effect at all, is not enough: it should be proved by the party who affirms it. See Maudsley, Responsibility in Mental Disease 111.

By the French penal code there can be no crime nor offence if the accused were in a state of madness at the time of the act. Art. 64. The same provision was introduced into Livingston's Code and into the Revised Statutes of New York, vol. 2, § 697. The law of Arkansas provides that a lunatic or insane person without lucid intervals shall not be found guilty of any crime or misdemeanor with which he may be charged; Rev. Stat. 236. In New York, however, in spite of this clear and positive provision of law, the courts have always acted upon the doctrines of the common law, and instructed the jury respecting the tests of that kind of insanity which annuls criminal responsibility; 4 Den. 27. In this case, the court declared that the insanity mentioned in the statute means only insanity in reference to the criminal act, and therefore its qualities must be defined.

Civil Incapacity. The general principle governing the civil incapacity of a person of an unsound mind is that any civil act is invalid if the actor was at the time laboring under such mental defect as to render him incapable of performing the act in question, rationally and without detriment to any person affected thereby.

The rule as to *contracts* is that insanity is such a defect as precludes rational assent, with respect to the nature of the contract, whether marriage, partnership, sale, or the like.

A judicial ascertainment of the insanity of a person is said to deprive him of contractual capacity, as a matter of law, and subsequent contracts are void; 4 Co. 123 *b*; Bac. Abr. *Idiots and Lunatics* (F.); 8 N. Y. 388; 128 *id.* 312; 14 Pick. 280; 31 Pa. 243; but when no conservator was ap-

pointed and there was no appearance of incapacity, a purchase was held valid; 85 Ill. 62. See also 5 B. & C. 170; 5 C. & P. 30; 2 Atk. 412; 56 Me. 308; 13 Ired. 106.

Such incapacity is not retroactive; 30 S. C. 377; prior acts are not void but voidable; 2 Cow. 552; but the condition is conclusively presumed to continue, after the finding, until it is superseded; 101 N. Y. 580; 100 *id.* 215; but see 6 Ohio Cir. Ct. Rep. 481; 89 Ga. 645. A deed or mortgage executed by such person during the period of lunacy, as found, is voidable, the presumption being against validity, but subject to be overcome by proof of sanity; 116 N. Y. 67; and see 49 N. J. Eq. 192; 1 Gr. Ev. § 556.

The *marriage* of a person insane is void; 12 Mass. 363; 5 Ired. L. 487; 1 Speer. Eq. 569; 18 Kan. 371; 4 Johns. Ch. 343; L. R. 1 P. & D. 335; 22 Ohio St. 271; 1 Edm. Sel. Cas. 344; 21 N. H. 52; 22 *id.* 553. A marriage contracted while one party was insane from *delirium tremens* was held void; 3 Rich. L. 93; but mere weakness of mind not amounting to derangement is not sufficient; 28 Ala. 565; 3 Ired. Eq. 91; and for that merely, or intoxication, a court has no power to declare a marriage null and void; 1 Houst. 308. The same degree of mental capacity which enables a person to make a valid deed or will is sufficient to enable him to marry; 46 Me. 510. It was held that a marriage celebrated by a person while insane might be affirmed upon recovery without a new solemnization; 5 Sneed 57.

Other civil contracts made by insane persons are voidable, not void; 53 Md. 65; 34 Ark. 613; 77 Ind. 419; 46 Ia. 62; 9 N. Y. 45; 10 Mo. 277; Ordron. Jud. Asp. Insan. ch. 6; 15 Alb. L. J. 292; 3 Abb. N. C. 274, 280, note; 21 Am. L. Reg. N. S. 35, 670.

With respect to contracts, persons *non compos mentis* and infants are said to be parallel, both in law and reason; 3 Mod. 301; 11 Pick. 304; 1 J. J. Marsh. 236. A power of attorney made by an insane person is absolutely void; 15 Wall. 9; and a contract executory on both sides cannot be enforced against an insane person; Ewell, L. Cas. Disab. 525, where the cases are collected.

The test of legal capacity to contract, it was said, is that the party is capable of recollecting the property he is about to dispose of, the manner of distributing it, and the object of his bounty; the particular act being attended with the consent of his will and understanding; 82 Va. 863.

Pollock ennumerates three different theories as to contracts by insane persons which "have, at different times, been entertained in English courts and supported by respectable authority;" Poll. Cont. 87. These theories, with some of the authorities cited in support of them, are substantially as follows:—1. That it is no ground, whatever, for avoiding a contract; Co. Litt. 2 *b*; 4 Co. 123 *b*; Bract. fol. 100 *a*, 165 *b*. As to this it is characterized as a frivolous technicality and doubtful whether it was really supported by the authorities Coke had before him; Poll. Cont. 89. 2. If one who contracts is too drunk or insane to know what he is about, his agreement is void for want of the consenting mind, but if his mind is only so confused or weak that he may know what he is about, but not fully understand the terms and effect, and this is known to the other party, the contract will be voidable at his option. The first division of this class would be simply void for want of consent; 2 Stra. 1104; 3 Campb. 33; 37 Ind. 207; 29 N. H. 106; the second would come under the head of fraud; 26 Mich. 249; 12 B. Monr. 55; 35 Conn. 170. 3. The doctrine which has prevailed as already stated that all contracts by insane persons are voidable, not void, see *supra*.

In some courts what has been termed the Massachusetts doctrine prevails that contracts of insane persons are voidable without any reference to the knowledge of the other party; 11 Pick. 304; in others what is termed the English doctrine (because supported by more recent English authorities) that they are voidable if the other party knows of the insanity; 139 U. S. 176 and 46 Fed. Rep. 724 (under La. Civ. Code); [1892] 1 Q. B. 599; 78 Pa. 407; and reasonable ground for knowledge is equivalent there to; 32 Vt. 652; and there is still a third doctrine supported by some courts that if the other party was ignorant and the contract reasonable and not capable of rescission, so that the parties could be restored to their original position, the contract will be sustained; 38 N. J. L. 536; 48 N. H. 133; 94 Ind. 535; 84 N. Y. 330; 68 Ia. 73; 92 Pa. 428; 51 Mich. 529.

The cases last cited rest upon Molton *v.* Camroux, 2 Ex. 487; 4 *id.* 17, which is considered the cornerstone of the law as to contracts with insane persons; Poll. Cont. 92; Leake, Cont. 248; but has been recently characterized as containing "loose statements" which have given rise to "an anomalous doctrine;" Harr. Cont. 235.

Whatever may be said of it, the case undoubtedly settled the law that such a contract was voidable and not void, and this was confirmed inferentially by a later case which held that such a contract might be ratified after the disability had passed; L. R. 8 Ex. 132.

It is generally considered that contracts for *necessaries* for an insane person are binding, if suited to their condition in life; 5 B. & C. 170; 13 Ired. L. 106; 3 J. J. Marsh. 658; 31 Ga. 512; 2 Bradf. Sur. 122; 27 Cal. 376; 17 Miss. 94; and this rule has been extended to other things which were reasonable and proper; 10 Allen 59; but if the other party has knowledge of the insanity the nature of the liability is rather quasi-contractual; 44 Ch. D. 94; 56 Me. 308; 53 N. H. 627; Keener, Quasi-Cont. 20. This liability is not removed by the appointment of a committee, where necessaries are furnished in good faith and the committee has failed to provide them; 66 Barb. 452; 63 Vt. 244.

Deeds executed by persons of unsound mind are absolutely void; 51 N. Y. 378; 95 *id.* 503; 2 Ired. 23; 5 Whart. 371; 3 Witth. & Beck. Med. Jur. 386. In other cases it has been held that such a deed is voidable only; 6 Metc. 415; 1 Gray 434; 24 Ind. 23; 12 Dana 452. Other cases again hold that want of perfect soundness of mind does not affect the conveyance if there is still capacity for fully comprehending the import of the act; 55 Me. 56; 36 Ill. 109; 44 N. H. 531; 21 Wend. 142; 3 Hill 513; 4 Ired. Eq. 443; see 3 Lea 567; 1 Patt. & H. 307. See 1 Pingr. Mortg. § 349.

As to testamentary capacity as affected by insanity, see WILL; DEMENTIA; UNDUE INFLUENCE.

In most states the statutes of limitation do not run against a person insane, nor does adverse possession ripen into title while the person out of possession is insane; 59 N. W. Rep. (Ia.) 52; but a plaintiff's claim is not affected by the insanity of the defendant's ancestor after the statute had begun

to run; 111 N. C. 251. The time of sanity required in order to allow the statute to begin to run is such as will enable the party to examine his affairs and institute an action, and is for the jury; 1 Metc. Ky. 35.

Insanity is not a defence in an action of tort; but damages are compensatory and not punitive; 121 Ill. 660; 3 Barb. 647; 24 Atl. Rep. (N. H.) 902; 54 Fed. Rep. 116; 143 N. Y. 442.

As to lucid intervals and the competency of insane persons as witnesses, see LUCID INTERVALS.

See, generally, text books on Insanity and Medical Jurisprudence, and for a great variety of articles on various phases of the subject, see Jones, Index to Law Periodicals and St. Louis Law Library Catalogue. See also, BURDEN OF PROOF; APOPLEXY; DELIRIUM FEBRILE; DELIRIUM TREMENS; DEMENTIA; DRUNKENNESS; HYPNOTISM; IDIOCY; ILLUSION; IMBECILITY; KLEPTOMANIA; LUCID INTERVALS; MANIA; SOMNAMBULISM; SUICIDE.

INSCRIPTION. In Civil Law. An engagement which a person who makes a solemn accusation of a crime against another enters into that he will suffer the same punishment, if he has accused the other falsely, which would have been inflicted upon him had he been guilty. Code, 9. 1. 10; 9. 2. 16 and 17.

In Evidence. Something written or engraved.

Inscriptions upon tombstones and other proper places, as rings, and the like, are held to be evidence of pedigree; Bull. N. P. 233; Cowp. 591; 10 East 120; 13 Ves. 145. But their value as evidence depends largely on the authority under which they were made, and the length of time between their establishment and the events they commemorate; 62 Ga. 407; 75 Miss. 253; 22 Mich. 415; 39 Miss. 326; 83 Hun 323; 1 Greenl. Ev. § 106. See DECLARATION; HEARSAY EVIDENCE.

INSCRIPTIONES (Lat.). The name given by the old English law to any written instrument by which anything was granted. Blount.

INSENSIBLE. In Pleading. That which is unintelligible is said to be insensible. Steph. Pl. 378.

INSIDIATORES VIARUM (Lat.). Persons who lie in wait in order to commit some felony or other misdemeanor.

INSIMUL COMPUTASSENT (Lat.). They had accounted together. See ASSUMPSIT.

INSINUACION. In Spanish Law. The presentation of a public document to a competent judge, in order to obtain his approbation and sanction of the same, and thereby giving it judicial authenticity.

"*Insinuatio est ejus quod traditur, sive agitur, coram quocumque judice in scripturam redactio.*"

This formality is requisite to the validity of certain donations *inter vivos*. Escriche, voc. *Insinuacion*.

INSINUATION. In Civil Law. The transcription of an act on the public registers, like our recording of deeds. It was not necessary in any other alienation but that appropriated to the purpose of donation. Inst. 2. 7. 2; Pothier, *Traité des Donations, Entre Vifs*, sec. 2, art. 3, § 3; 8 Toullier, n. 198.

INSINUATION OF A WILL. In Civil Law. The first production of it; or, leaving it in the hands of the register in order to its probate. 21 Hen. VIII. c. 5; Jacob, Law Dict.

INSOLVENCY. The condition of a person who is insolvent (*q. v.*). Inability to pay one's debts.

Bankruptcy, which is one species or phase of insolvency, denotes the condition of a trader or merchant who is unable to pay his debts in the course of business; 2 Bell, Com. 162; 1 M. & S. 338; 5 Dowl. & R. 218; 4 Hill, N. Y. 850; 4 Cush. 134. Insolvency, then, as distinguished from strict bankruptcy, is the condition or status of one who is unable to pay his debts; and insolvent laws are distinguished from strict bankruptcy laws by the following characteristics:

Bankruptcy laws apply only to traders or merchants; insolvent laws, to those who are *not* traders or merchants. Bankrupt laws discharge absolutely the debt of the honest debtor; 12 Wheat. 230; 4 *id.* 122, 209; 2 Mas. 161; 2 Blackf. 394; 3 Cal. 154; 26 Wend. 43; 4 B. & Ald. 654; Baldw. 206. Insolvent laws discharge the person of the debtor from arrest and imprisonment, but leave the future acquisitions of the debtor still liable to the creditor; 4 Wheat. 122; 3 H. & J. 61. Both laws contemplate an equal, fair, and honest division of the debtor's present effects among his creditors *pro rata*. A bankrupt law may contain those regulations which are generally found in insolvent laws, and an insolvent law may contain those which are common to a bankrupt law; per Marshall, C. J., 4 Wheat. 195; 1 W. & M. 115. And insolvent laws quite coextensive with the English bankrupt system have not been unfrequent in our colonial and state legislation, and no distinction was ever attempted to be made in the same between bankruptcies and insolvencies; 3 Sto. Const. 11; Bish. Insolv. Debt. 4.

Under the United States constitution the power to pass a bankrupt law is vested in congress, and this is held to include power to pass an act which provides for voluntary bankruptcy, or, strictly speaking, an insolvent law. So in the absence of congressional action, the states have passed laws which, though called insolvent laws, were in fact bankrupt laws, and their right to do so has been sustained, such laws being held valid; see BANKRUPT; except as limited by the prohibition against impairing the obligation of contracts, which title see; see also 9 Metc. 16; 2 Ind. 463; 5 How. 295; 1 Cush. 430; 14 N. H. 38; 10 Metc. 594; 26 Me. 110; 1 Woodb. & M. 115; 5 Gill 437; 1 Wall. 229; Cooley, Const. Lim. 360; Miller, Const. U. S. 616. So far as the jurisdiction of the state extends, its insolvent laws may have all the essential operation of a bankrupt law, not being limited to a mere discharge of the person of the debtor on surrendering his effects. But a creditor out of a state who voluntarily makes himself a party and accepts a dividend, is bound by his own act, and is deemed to have waived his ex-territorial

immunity and right; 4 Wheat. 122; 12 *id.* 213; 8 Pick. 194; 3 Pet. C. C. 411; 3 Story, Const. 252; 9 Conn. 314; 2 Blackf. 394; Baldw. 296; 9 N. H. 478. See 8 B. & C. 477; 3 Cai. 154; 4 B. & Ald. 654; 26 Wend. 43; 2 Gray 43; 4 Bosw. 459; 32 Miss. 246.

The effect of a discharge upon non-resident creditors is examined at large in 6 Harv. L. Rev. 349, where also may be found what is believed to be a complete list of all adjudications, federal and state, upon the subject. The conclusion reached is that it is the generally accepted doctrine that, in such case, a discharge will be of no effect (even in the courts of the state where the discharge is granted) against a non-resident, unless he becomes a party by voluntary appearance or personal service. The correctness of this conclusion, though it is admitted as established, is seriously challenged on grounds of expediency which are stated at large.

Insolvency may of course be simple or notorious. Simple insolvency is attended by no badge of notoriety. Notorious or legal insolvency, with which the law has to do, is designated by some public act or legal proceeding. This is the situation of a person who has done some notorious act to divest himself of all his property: as, making an assignment, applying for relief, or having been proceeded against *in invitum* under bankrupt or insolvent laws; Bish. Insolv. Debt. 3, n.; 1 Pet. 195; 2 Wheat. 396; 7 Toullier, n. 45; Domat, liv. 4, tit. 5, nn. 1, 2; 2 Bell, Com. 165.

It is with regard to the latter that the *insolvency laws* (so called) are operative. They are generally statutory provisions by which the property of the debtor is surrendered for his debts; and upon this condition, and the assent of a certain proportion of his creditors, he is discharged from all further liabilities; 9 Mass. 431; 16 *id.* 53; 2 Kent 321; Ingr. Insolv. 9. This legal insolvency may exist without actual inability to pay one's debts when the debtor's estate is finally settled and wound up. (See definition). Insolvency, according to some of the state statutes, may be of two kinds, voluntary and involuntary. The latter is called the proceeding against the creditor *in invitum*. Voluntary insolvency, which is the more common, is the case in which the debtor institutes the proceedings, and is desirous of availing himself of the insolvent laws, and petitions for that purpose.

Involuntary insolvency is where the proceedings are instituted by the creditors *in invitum*, and so the debtor forced into insolvency. The circumstances entitling either debtor or creditors to invoke the aid of the insolvent law are in a measure peculiar to each state. But their general characteristics are as follows:

Proceedings by creditors may usually be taken for fraudulent concealment, conveyance, or collusive attachment, of property; by petition in the designated tribunal, on notice to the debtor; possession of the property is taken by an officer of the courts, usually after proof of the allegations, and a meeting of creditors is called for the choice of an assignee by a vote of creditors, having relation both to number and amount. The assignee becomes practically the owner, in trust, with power to wind up the estate; he acts under the general direction of the court, calling meetings of creditors when required. The right to a discharge varies in different states, in some being conditioned upon payment of a certain percentage or the assent of the majority of creditors or upon more stringent conditions in case of subsequent insolvency. The statutes vary as to the grounds of refusing a discharge for fraud, as in cases of paying or securing debts within a certain time, before the application, or when the debtor is insolvent, or has reasonable cause to believe himself so. As to all these details the state statutes should be referred to.

As to American and English bankrupt law proper, see BANKRUPT LAWS; BANKRUPT.

The English act 34 Geo. III. ch. 69, was called an insolvent debtor's act; but the first act of insolvency properly so called was passed in 1826. And the act of 7 & 8 Vict. cap. 70, called "an act for facilitating arrangements between *debtor* and *creditor*," is properly an insolvency law. This provided for the discharge of a non-trading debtor if he had a certain concurrence from his creditors. This was one-third, both in value and number, to the initiatory steps. To the discharge, a proportional consent at an initiatory meeting, and, finally, the consent of three-eighths in both number and value, or nine-tenths in value of creditors to the sum of twenty pounds and upwards.

Many of the states have laws for the distribution of insolvent estates, and also laws for the relief of poor debtors. These are not properly called insolvent laws in the sense in which we have used the words,—though the latter relieve the debtor's body from restraint upon a surrender of his goods and estate, and leave his future acquisitions still liable. See POOR DEBTORS.

INSOLVENT (Lat. *in*, privative, *solvo*, to pay). The condition of a person who is insolvent or unable to pay his debts. 2 Bla. Com. 285, 471; 9 N. Y. 589.

One who is unable to pay his debts as they fall due in the usual course of trade or business. 2 Kent 389; 3 Dowl. & R. 218; 1 M. & S. 338; 1 Campb. 492, n.; Sudg. Vend. 487; 3 Gray 600; 86 Me. 246; 116 Mo. 226; although his assets in value exceed the amount of his liability; 110 Cal. 488; or the embarrassment is only temporary; 26 So. W. Rep. (Tex.) 255; but it was held that mere liability to pay debts promptly as they mature is not conclusive; 26 *id.* 509; that one who has sufficient property subject to legal process to satisfy all legal demands is not insolvent; 10 So. Rep. (Ala.) 334; and also that a person who suspended business because of difficulties arising out of the commencement of an action was not necessarily an insolvent; 63 Hun 632.

One who is unable to pay commercial paper in the due course of business is insolvent; 10 Blatchf. 493; 33 Pac. Rep. (Cal.) 884.

A corporation is insolvent when its assets are insufficient for the payment of its

debts, and it has ceased to do business, or has taken, or is in the act of taking, a step which will practically incapacitate it from conducting the corporate enterprise with reasonable prospect of success, or its embarrassments are such that early suspension and failure must ensue; 98 Ala. 68.

The clearing house rules, making members responsible for clearances of outside banks, for which they engage to clear, for one day after notice of the termination of their agreement, require payment of checks of such outside bank though known to be insolvent; and a contract for a deposit by the latter of cash and notes as indemnity for such clearances is valid, and the payments are not within a statute forbidding payments by an insolvent corporation made with intent to prefer creditors, and the money and securities held under the aforesaid contract are applicable to the amount of the checks so paid; 40 N. E. Rep. (N. Y.) 871.

An insolvent building association may make an assessment on stock of a borrowing member to cover losses, and thereby equalize the members, so that they may go out on an equal footing at the closing up of the association; 40 N. E. Rep. (Ind.) 694.

INSOLVENT ESTATES OF PERSONS DECEASED. See ADMINISTRATION.

INSPECTION (Lat. *inspicere*, to look into). The examination of certain articles made by law subject to such examination, so that they may be declared fit for commerce. The decision of the inspectors is not final; the object of the law is to protect the community from fraud, and to preserve the character of the merchandise abroad; 8 Cow. 45. See 1 Johns. 205; 13 *id.* 331; 2 Cai. 312. Quantity is as legitimate a subject of inspection as quality; 40 La. Ann. 465.

In Practice. Examination. As to the right to inspect public records, see RECORDS.

INSPECTION LAWS. The right in the states to enact inspection laws, quarantine and health laws is undoubted and is recognized in the constitution; Story, Const. 515; Cooley, Const. Lim. 730. These may be carried to the extent of ordering the destruction of private property, when infected with disease or otherwise dangerous; *id.*; 5 How. 632.

Under the general powers reserved by the states in the regulation of its internal commerce and to protect its citizens from fraud, a state may declare that certain articles shall not be sold within its limits without inspection, and charge the cost of the inspection on those offering the article for sale; 52 Fed. Rep. 690. A state cannot, under the guise of exerting its police powers, or of enacting inspection laws, make discrimination against the products and industries of some of the states in favor of the products and industries of its own or of other states; 138 U. S. 78; 141 *id.* 62.

INSPECTOR. The name given to certain officers whose duties are to examine and inspect things over which they have jurisdiction: as, inspector of bark, one who is by law authorized to examine bark for exportation, and to approve or disapprove of its quality. Inspectors of customs are officers appointed by the general government.

INSPEXIMUS (Lat.). We have seen. A word sometimes used in letters patent, reciting a grant, *inspeximus* such former grant, and so reciting it verbatim: it then grants such further privileges as are thought convenient. 5 Co. 54.

INSTALLATION, INSTALMENT. The act by which an officer is put in public possession of the place he is to fill. The president of the United States, or a governor, is installed into office, by being sworn agreeably to the requisition of the constitution and laws.

INSTALMENT. A part of a debt due by contract, and agreed to be paid at a time different from that fixed for the payment of the other part. For example, if I engage to pay you one thousand dollars, in two payments, one on the first day of January and the other on the first day of July, each of these payments or obligations to pay will be an instalment.

In such case, each instalment is a separate debt so far that it may be tendered at any time, or the first may be sued for although the other shall not be due; 3 Dane, Abr. 493, 494; 1 Esp. 129, 226; 2 *id.* 235; 3 Salk. 6, 18; 1 Maule & S. 706.

A debtor who by failing to pay three instalments of rent due on a lease would forfeit his estate, may, in order to save it, tender one instalment to prevent the forfeiture, although there may be two due at the time; and he is not bound to tender both; 6 Toullier, n. 688.

As to sales on instalment, see SALES.

INSTANCE. Literally, standing on, hence, urging, solicitation. Webster, Dict.

In Civil and French Law. In general, all sorts of actions and judicial demands. Dig. 44, 7, 58.

In Ecclesiastical Law. Causes of *instance* are those proceeded in at the solicitation of some party, as opposed to causes of office, which run in the name of the judge. Halif. Anal. p. 122.

In Scotch Law. That which may be insisted on at one diet or course of probation. Whart.

INSTANCE COURT. In English Law. That branch of the admiralty court which had the jurisdiction of all matters except those relating to prizes. By the Judicature Acts (*q. v.*) the jurisdiction of the admiralty courts was transferred to the high court of justice.

The term is sometimes used in American

law for purposes of explanation, but has no proper application to admiralty courts in the United States, where the powers of both instance and prize courts are conferred without any distinction; 3 Dall. 6; 1 Gall. 563; 3 Kent 355, 378.

See ADMIRALTY.

INSTANCIA. In Spanish Law. The institution and prosecution of a suit from its inception until definitive judgment. The first instance, "*primera instancia*," is the prosecution of the suit before the judge competent to take cognizance of it at its inception: the second instance, "*secunda instancia*," is the exercise of the same action before the court of appellate jurisdiction; and the third instance, "*tercera instancia*," is the prosecution of the same suit, either by an application of revision before the appellate tribunal, that has already decided the cause, or before some higher tribunal, having jurisdiction of the same.

All civil suits must be tried and decided, in the first instance, within three years; and *all criminal*, within two years.

As a general rule, three instances are admitted in all civil and criminal cases. Art. 285, Const. 1812.

INSTANTER (Lat.). Immediately; presently. This term, it is said, means that the act to which it applies shall be done within twenty-four hours; but a doubt has been suggested by whom is the account of the hours to be kept, and whether the term instanter as applied to the subject-matter may not be more properly taken to mean "before the rising of the court," when the act is to be done in court, or "before the shutting of the office the same night," when the act is to be done there; 1 Taunt. 343; 6 East, 587; Tidd, Pr., 3d ed. 508, n.; 3 Chitty, Pr. 112. See 3 Burr. 1809; Co. Litt. 157.

INSTANTLY. Immediately; directly; without delay; at once. The word is a frequent occurrence in indictments for murder where the death is charged as having been the immediate result of a wound or blow inflicted. Where the killing has been alleged to have been caused by a battery it is necessary to allege an assault and to specify the time when the mortal stroke was given and the time of the death; the allegation that he "instantly did die" is insufficient; 9 Mo. 666; as was an indictment which described the assault and then charges that of the mortal wound inflicted by defendant the deceased "did instantly die;" 65 *id.* 217; otherwise had the averment been that the deceased "did then and there instantly die"; *id.* 218.

INSTAR (Lat.). Like; resembling; equivalent: as, *instar dentium*, like teeth; *instar omnium*, equivalent to all.

INSTIGATION. The act by which one incites another to do something, as, to injure a third person, or to commit some crime or misdemeanor, to commence a suit, or to prosecute a criminal. See ACCOMPLICE.

INSTITOR (Lat.) **In Civil Law.** A clerk in a store; an agent.

He was so called because he watched over the business with which he was charged; and it is immaterial whether he was employed in making a sale in a store, or whether charged with any other business. *Institor appellatus est ex eo, quod negotio gerendo instet; nec multum facit tabernæ sit præpositus, an cuilibet alii negotiationi;* Dig. lib. 14, tit. 3, 1, 3, Mr. Bell says that the charge given to a clerk to manage a store or shop is called institorial power; 1 Bell, Com. 479, 5th ed.; Erskine, Inst. 3. 3. 46; 1 Stair, Inst. by Brodie, b. 1, tit. 11, §§ 12, 18, 19: Story, Ag. § 8.

INSTITUTE. In Scotch Law. The person first called in the tailzie; the rest, or the heirs of tailzie, are called substitutes; Erskine Pr. 3. 8. 8. See TAILZIE, HEIR OF; SUBSTITUTES.

In Civil Law. One who is appointed heir by testament, and is required to give the estate devised to another person, who is called the substitute.

To name or to make an heir by testament; Dig. 28. 5. 65. To make an accusation; to commence an action.

INSTITUTES. Elements of jurisprudence; text-books containing the principles of law made the foundation of legal studies.

The word was first used by the civilians to designate those books prepared for the student and supposed to embrace the fundamental legal principles arranged in an orderly manner. Two books of Institutes were known to the civil lawyers of antiquity,—Gaius and Justinian.

I. COKE'S INSTITUTES. Four volumes of commentaries upon various parts of the English law.

Sir Edward Coke wrote four volumes of Institutes, as he was pleased to call them, though they have little of the institutional method to warrant such a title. The first volume is a very extensive commentary upon an excellent little treatise of tenures, compiled by Judge Littleton in the reign of Edw. IV. This comment is a rich mine of valuable common-law learning, collected and heaped together from the ancient reports and year-books, but greatly defective in method. The second volume is a comment on many old acts of parliament, without any systematic order; the third, a more methodical treatise on the pleas of the crown; and the fourth, an account of the several species of courts. These Institutes are usually cited thus: the first volume as Co. Litt., or 1 Inst.; the second, third, and fourth as, 2, 3, or 4 Inst., without any author's name. 1 Bla. Com. 72.

II. GAIUS'S INSTITUTES. A tractate upon the Roman law, ascribed to Caius or Gaius.

Of the personal history of this jurist nothing is known. Even the spelling of

his name is matter of controversy, and he is known by no other title than Gaius, or Caius. He is believed to have lived in the reign of Marcus Aurelius. The history of Gaius's Institutes is remarkable. In 1816, Niebuhr was sent to Rome by the king of Prussia. On his way thither, he spent two days in the cathedral library of Verona, and at this time discovered these Institutes, which had been lost to the jurists of the middle ages. In 1817, the Royal Academy of Berlin charged Goeschen, Bekker, and Hollweg with the duty of transcribing the discovered manuscript. In 1819, Goeschen gave the first completed edition, as far as the manuscript could be deciphered, to his fellow-jurists. It created an unusual sensation, and became a fruitful source of comment. It formed a new era in the study of Roman law. It gave the modern jurist the signal advantage of studying the source of the Institutes of Justinian. It is believed by the best modern scholars that Gaius was the first original tractate of the kind, not being compiled from former publications. The language of Gaius is clear, terse, and technical,—evidently written by a master of law and a master of the Latin tongue. The Institutes were unquestionably *practical*. There is no attempt at criticism or philosophical discussion: the disciple of Sabinus is content to teach law as he finds it. Its arrangement is solid and logical, and Justinian follows it with an almost servile imitation.

The best editions of Gaius are Goeschen's 2d ed., Berlin, 1824, in which the text was again collated by Bluhme, and the 3d ed. of Goeschen, Berlin, 1842, edited by Lachman from a critical revision by Goeschen which had been interrupted by his death. Gneist's edition (1857) is a recension of all the German editions prior to that date. In France, Gaius attracted equal attention, and we have three editions and translations: Boulet, Paris, 1827; Domenget, 1843; and Pellat, 1844.

In 1859, Francesco Lisi, a learned Italian scholar, published, at Bologna, a new edition of the first book of Gaius, with an Italian translation *en régard*. The edition is accompanied and enriched by many valuable notes, printed in both Latin and Italian.

The reader who may wish to pursue his Gaiian studies should consult the list of some thirty-odd treatises and commentaries mentioned in Mackeldey's Lehrbuch des Röm. Rechts, p. 47, note (b), 13th ed., Wien, 1851; Huschke, Essay Zur Kritik und Interp. von Gaius Inst., Breslau, 1830; Haubold's Inst. Juris Rom. Prev. Line., pp. 151, 152, 505, 506, Lipsiæ, 1826; Boecking's Gaius, Preface, pp. 11–18, Lips., 1845; Lisi's Gaius, Preface, pp. x. xi., Bologna, 1859.

The following treatises on Gaius are noted by Vangerow, as of peculiar value: Schrader, under the title "was gewinnt die römische Rechtsgeschichte durch Gai. Institut." Heidel. 1823; Haubold, quantum fructum ceperit Rom. juris. e Gaii. inst.; Werke, 1–665; Göschen's ed. of Gaius, giving the history of the discovery and its value; Gans, Scholien zu Gaius, Berlin, 1821; Dupont, disquisitiones, etc., 1822; Brockdorf, Komment, etc., 1824; Heffter, Comment. 1827; Assen, adnotatio, etc., 1826; Unterholzner, Conject., etc., 1823; Scheurl, Beiträge, etc.; Puchta, Comm., 1837; Pöschman, Studien, 1854, 1860; Huschke, revised ed. 1861. See a valuable essay in Holzendorff's Rechtslexicon (1870), I. 97, 100. See, also, Abdy and Walker's translation of Gaius, published in 1876, and Poste's translation and commentary, published in 1871.

III. JUSTINIAN'S INSTITUTES are an abridgment of the Code and Digest, composed by order of that emperor and under his guidance, with an intention to give a summary knowledge of the law to those persons not versed in it, and particularly to students. Inst. Proem. § 3.

The lawyers employed to compile it were Tribonian, Theophilus, and Dorotheus. The work was first published on the 21st of November, 533, and received the sanction of statute law by order of the emperor. They are divided into four books: each book is divided into titles, and each title into separate paragraphs or sections, preceded by an introductory part. The first part is called *principium*, because it is the commencement of the title; those which follow are numbered, and called paragraphs. The work treats of the rights of persons, of things, and of actions. The first book treats of persons; the second, third, and the first five titles of the fourth book, of things; and the remainder of the fourth book, of actions. The method of citing the Institutes should be understood, and is now commonly by giving the number of the book, title, and section, thus: Inst. I. 2. 5.—thereby indicating book I. title 2, section 5. Where it is intended to indicate the first paragraph, or principium, thus: Inst. B. I. 2. pr. Frequently the citation is simply I. or J. I. 2. 5. A second mode of citation is thus: § 5, Inst. or I. I. 2.—meaning book I, title 2, paragraph 5. A third method of citation, and one in universal use with the older jurists, was by giving the name of the title and the first words of the paragraph referred to, thus: § senatusconsultum est I de jure nat. gen. et civil.—which means, as before, Inst. B. I. tit. 2, § 5. See 1 Colquhoun, s. 61.

The first printed edition of the Institutes is that of Schoyffer, fol., 1468. The last critical German edition is that of Schrader, 4to, Berlin, 1832. This work of Schrader is the most learned and most elaborate commentary on the text of Justinian in any language, and was intended to form a part of the Berlin Corpus Juris; but nothing further has been yet published. It is impossible in this brief article to name all the commentaries on these Institutes, which in all ages have commanded the study and admiration of jurists. More than one

hundred and fifty years ago one Homberg printed a tract De Multitudine nimia Commentatorum in Institutiones Juris. But we must refer the reader to the best recent French and English editions. Ortolan's Institutes de l'Empereur Justinien avec le texte, la traduction en regard, et les explications sous chaque paragraphe, Paris, 3 vols. 8vo, sixth edition. This is, by common consent of scholars, regarded as the best historical edition of the Institutes ever published. Du Caurroy's Institutes de Justinien traduites et expliquées par A. M. Du Caurroy, Paris, 1851, 8th ed. 2 vols. 8vo. The Institutes of Justinian: with English Introduction, Translation, and Notes, by Thomas Collet Sandars, M. A., London, 1853, 8vo; 2d ed. 1860. This work has been prepared expressly for beginners, and is founded mainly upon Ortolan, with a liberal use of LaGrange, Du Caurroy, Warnkoenig, and Puchta, as well as Harris and Cooper. The English edition of Harris, and the American one of Cooper, have ceased to attract attention.

The most authoritative German treatises on the Pandects are the following: Windscheid, Dr. B., 3d ed., Dusseldorff, 1863; 2 vols.; Vangerow, Dr. K. A., 7th ed., Marburg, 1863; Brintz, Dr. A. B., 2d ed., Erlangen, 1879; Ihering, Dr. R., Jena, 1881. Incomparably the most philosophical exposition of the Roman system of jurisprudence is Savigny's Gesch. des röm. Rechts, coupled with his System des heut. röm. Rechts, the latter published in Berlin in 1840. Of both, French translations have been published by Guenoux. See also Sandars' Justinian, with an introduction by William G. Hammond (1876), and Abdy and Walker's translation of the Institutes (1876).

IV. Theophilus' Institutes. A paraphrase of Justinian, made, it is believed, soon after A. D. 533.

It is generally supposed that in A. D. 534, 535, and 536, Theophilus read his commentary in Greek to his pupils in the law school of Constantinople. He is conjectured to have died some time in A. D. 536. This paraphrase maintained itself as a manual of law until the eighth or tenth century. This text was used in the time of Hexabiblos of Harmenipulus, the last of the Greek jurists. It is also conjectured that Theophilus was not the editor of his own paraphrase, but that it was drawn up by some of his pupils after his explanations and lectures, inasmuch as it contains certain barbarous phrases, and the texts of the manuscripts vary greatly from each other.

It has, however, always been somewhat in use, and jurists consider that its study aids the text of the Institutes; and Cujas and Hugo have both praised it. The first edition was that of Zuichem, fol., Basle, 1531; the best edition is that of Reitz, 2 vols. 4to, 1751, Haag. There is a German translation by Wüsterman, 1823, 2 vols. 8vo; and a French translation by Mons. Ilrègier, Paris, 1847, 8vo, whose edition is prefaced by a learned and valuable introduction and dissertation. Consult Mortreuil, *Hist. Du Droit Byzan.*, Paris, 1843; Smith, Dict. Biog. London, 1849, 3 vols. 8vo; 1 Kent 533; *Profession d'Avocat* tom. ii. n. 536, page 95; Introd. *à l'Etude du Droit Romaine*, p.124; *Dict. de Jurisp.*; Merlin, *Répert.*; *Encyclopédie de d'Alembert.*

INSTITUTION (Lat. *instituere*, to form, to establish).

In Civil Law. The appointment of an heir; the act by which a testator nominates one or more persons to succeed him in all his rights active and passive. Halifax, Anal. 39; Pothier, *Tr. des Donations testamentaires*, c. 2, s. 1, § 1; La. Civ. Code, 1598; Dig. 28. 5; 1, 1; 28. 6. 1, 2, § 4.

In Ecclesiastical Law. To become a parson or vicar, four things are necessary, viz.: holy orders, presentation, institution, induction. Institution is a kind of investiture of the spiritual part of the benefice; for by institution the care of the souls of the parish is committed to the charge of the clerk,—previous to which the oath against simony and of allegiance and supremacy are to be taken. By institution the benefice is full: so that there can be no fresh presentation (except the patron be the king), and the clerk may enter on parsonage-house and glebe and take the tithes; but he cannot grant or let them, or bring an action for them, till induction. See 1 Bla. Com. 389; 1 Burn, Eccl. Law 169.

In Political Law. A law, rite, or ceremony enjoined by authority as a permanent rule of conduct or of government: as, the Institutions of Lycurgus. Webster, Dict. An organized society, established either by law or the authority of individuals, for promoting any object, public or social. A private school or college may, by courtesy, be called an institution; but in legal parlance it implies foundation by law, by enactment or prescription; one may open and keep a private school, but cannot properly be said to institute it; 50 N. W. Rep. (Wis.) 1103.

In Practice. The commencement of an action: as, A B has instituted a suit against C D to recover damages for trespass.

INSTRUCTIONS. In Common Law. Orders given by a principal to his agent in relation to the business of his agency.

The agent is bound to obey the instructions he has received; and when he neglects so to do he is responsible for the consequences, unless he is justified by matter of necessity; 4 Binn. 361; 1 Liverm. Ag. 368. See Agent.

In Practice. The statement of a cause of action given by a client to his attorney, and which, where such is the practice, are sent to his pleader to put into legal form of a declaration. Warren, Law Stud. 284.

Instructions to counsel are their indemnity for any aspersions they may make on the opposite party; but attorneys who have a just regard to their own reputation will be cautious, even under instructions, not to make any unnecessary attack upon a party or witness. For such unjustifiable conduct the counsel will be held responsible. Eunom. Dial. 2, § 43, p. 132. For a form of instructions, see 3 Chitty, Pr. 117, 120, n.

Also the written or oral address of the presiding judge, in jury trials, delivered usually at the close of the arguments of counsel to the jury, informing them of the law applicable to the cause at trial, and their duties thereunder. A. & E. Encyc.

An omission to give instructions is not assignable as error where no request was made therefor in the court below; 112 N. C. 851; 101 *id.* 153, 188; 26 Tex. App. 706; 69 Tex. 273; 71 *id.* 156; 75 Ia. 185; 72 Wis. 234; 77 *id.* 115; 76 Ga. 3; 123 Pa. 53; 37 Minn. 493; 97 Cal. 459; 138 N. Y. 595; and errors or inaccuracies in charging the jury cannot be considered on appeal unless duly excepted to on the trial; 37 Minn. 351; 130 U. S. 396; 66 Miss. 310; 74 Ia. 433; 50 Ark. 348; 25 Neb. 75; 101 N. C. 223; a refusal to give instructions not excepted to cannot be complained of on appeal; 126 Ill. 282. Where a charge correctly states the law of the case, a judgment will not be reversed because the charge was abstract; 97 Ala. 47; 111 Mo. 576; but an instruction is wrong which states hypothetically facts as to which there is no evidence; 88 Ga. 784; 45 La. Ann. 46; 48 Mo. App. 263. It is not error to recall a jury and charge them again at their request; 31 Tex. Cr. R. 304. The improper admission of evidence is cured by an instruction not to consider the evidence so admitted; 97 N. C. 222; 98 *id.* 566; 77 Iowa 54; 97 Mo. 62; 83 Ala. 287. Refusal to give correct instructions is not error if the court has already given them on the same point; 76 Ia. 105; 76 Cal. 521; 76 Ga. 452; 126 Ill. 408; 115 Ind. 394; 84 Va. 498; or where given in different language; 144 U. S. 408; 143 *id.* 60; 135 *id.* 554; 132 *id.* 172.

The principles governing the subject of peremptory instructions were clearly stated by Harlan, J., in the recent case of Travelers' Ins. Co. *v.* Randolph, 78 Fed. Rep. 754:

"It is well settled that if, at the close of the plaintiff's evidence, the court refuses to give a peremptory instruction for the defendant, such refusal cannot be assigned for error if the defendant does not stand upon the case made by the plaintiff, but introduces evidence in support of his defence" (citing 106 U. S. 700; 120 *id.* 527, 530; 144 U. S. 202, 206; 155 U. S. 610, 612; 161 U. S. 91, 95). "But the failure of the defendant, at the close of the plaintiff's evidence, to ask a peremptory instruction will not, of itself, preclude such a motion at the close of the whole evidence." *Id.* 759.

"A mere scintilla of evidence in favor of one party does not entitle him of right to go to the jury (citing 14 Wall. 442, 448). Nor can it "be withdrawn from the consideration of the jury simply because, in the judgment of the court, there is a preponderance of evidence in favor of the party asking a peremptory instruction. If the facts are entirely undisputed or uncontradicted, or if, upon any issue dependent upon facts, there is no evidence whatever in favor of one party, or, what is the same thing, if the evidence is so slight as to justify the court in regarding the proof as substantially all one way, then the court may direct a verdict according to its view of the law arising upon such a case. If a verdict is rendered contrary to the evidence, the remedy of the losing party is a motion for a new trial." *Id.* 759.

The conclusions were thus stated:

"That there must be something more than a scintilla of evidence supporting the case of the party upon whom the burden of proof rests, to require the submission of the case to the jury; that where there is a real conflict of evidence on a question of fact, whatever may be the opinion of the judge who tries the case as to the value of that evidence, he must leave the consideration of it for the decision of the jury; that where there are material and substantial facts which, if credited by the jury, would in law justify a verdict in favor of one party, it is not error for the trial judge to refuse a peremptory instruction to the jury; that it is not a 'proper standard to settle for a peremptory instruction that the court, after weighing the evidence in the case, would, upon motion for a new trial, set aside the verdict,' and that the court 'may, and often should, set aside a verdict, when clearly against the weight of the evidence, where it would not be justified in directing a verdict'; that, upon reason and authority, 'there is a difference between the legal discretion of the court to set aside a verdict as against the weight of evidence, and that obligation which the court has to withdraw a case from the jury, or direct a verdict for insufficiency of evidence'; and that 'in the latter case it must be so insufficient in fact as to be insufficient in law.'" *Id.* 760 (citing 20 C. C. A. 596, 74 Fed. Rep. 463).

In French Law. The means used and formality employed to prepare a case for trial. It is generally applied to criminal cases, and is then called criminal instruction; it is then defined the acts and proceedings which tend to prove positively a crime or delict, in order to inflict on the guilty person the punishment which he deserves.

INSTRUMENT. A document or writing which gives formal expression to a legal act or agreement, for the purpose of creating, securing, modifying, or terminating a right; a writing executed and delivered as the evidence of an act or agreement.

The writing which contains some agreement, and is so called because it has been prepared as a memorial of what has taken place or been agreed upon. It includes bills, bonds, conveyances, leases, mortgages, promissory notes, and wills, but scarcely accounts, ordinary letters or memoranda. The agreement and the instrument in which it is contained are very different things,—the latter being only evidence of the existence of the former. The instrument or form of the contract may be valid, but a contract itself may be void on account of fraud. See Ayliffe, Parerg. 305; Dun. Adm. Pr. 220. A forthcoming bond is an "instrument for the payment of money." 11 Wis. 72. A bank check payable in confederate currency was held not "an instrument payable in money" under the Alabama Code in relation to commercial paper; 42 Ala. 108.

A statute requiring "any instrument of writing" sued on to be filed, does not apply to a contract signed by both parties and de-

posited with a third person for safe keeping, it applies only to obligations executed only by the party sued; 55 Mo. 446.

INSTRUMENT OF SASINE. An instrument in Scotland by which the delivery of "sasine" (*i. e.* seisin) is attested. Moz. & W.

INSTRUMENTA (Lat.). That kind of evidence which consists of writings not under seal: as, court-rolls, accounts, and the like. 3 Co. Litt., Thomas ed. 487.

INSUFFICIENCY, In Chancery Practice. After filing of defendant's answer, the plaintiff has six weeks in which to file exceptions to it for *insufficiency*,—which is the fault of not replying specifically to specific charges in the bill. Smith, Ch. Pr. 344; Mitf. Eq. Pl. 376, note. Sanders, Ord. in Ch., Index; Beach, Mod. Eq. Pr. 413.

Under the Judicature Act, 1875, order xxxi., rules 6, 9, 10, interrogatories are to be answered by affidavit, and if the party interrogated answers insufficiently, the party interrogating may apply to the court for an order requiring him to answer further. Moz. & W.

INSULA (Lat. island). A house not connected with other houses, but separated by a surrounding space of ground. Calvinus, Lex.

INSUPER. Moreover; over and above. An old exchequer term, applied to a charge made *upon* a person in his account. Blount.

INSURABLE INTEREST. Such an interest in a subject of insurance as will entitle the person possessing it to obtain insurance.

It is essential to the contract of insurance, as distinguished from a wager, that the assured should have a legally recognizable interest in the insured subject, the pecuniary value of which may be appreciated and computed or valued. A recent examination of the subject, as connected with life insurance, results in the conclusion from the authorities, that at common law that contract was not one of indemnity, and wagering policies were not unlawful, and therefore that logically, in such policies, an insurable interest should not be required, but that the American courts adopted what has been termed a rule of American common law that all wagers were void on grounds of public policy and, therefore, that there must be an insurable interest; 35 Am. L. Reg. N. S. 65. This rule, it was said, obtains in all the states except New Jersey and Rhode Island; 24 N. J. L. 576; 9 R. I. 354; and see 11 *id.* 439. The case of Godsall *v.* Boldero, 9 East 72, was so generally cited and relied on in the American cases that it is not easy to estimate the influence of that case before it was overruled by Dalby *v.* I. & L. L. Assurance Company, 15 C. B. 365. It is of special interest to note that the New Jersey case in which the court expressly refused to follow Godsall *v.* Boldero, was decided about the time of the case which overruled it, but before it was reported in the United States. See also 2 Sm. L. Cas., 9th Am. ed. 1530–64, where both the English cases mentioned are reported, and the authorities in both countries are collected, the conclusion of the American editors being, that as to fire, marine, and life insurance there must be some interest in the insurer. See also Biddle, Ins. § 184, where it is said that wagering policies were not void in England at common law. See WAGER.

Where the subject-matter is property, as in fire and marine insurance, the question whether there is an insurable interest is generally free from difficulty and the rule established by the decisions is comparatively simple. It is not requisite that the insured party should have an absolute property in the insured subject, or that the subject or interest should be one that can be exclusively possessed or be transferable by delivery or assignment. Insurable interest involves neither legal nor equitable title; 1 Pet. 121; 12 Ia. 287; 1 Sprague 565. The subject or interest must, however, be such that it may be destroyed, lost, damaged, diminished, or intercepted by the risks insured against. The interests usually insured are those of the owner in any species of property, of mortgagor, mortgagee, holder of bottomry or respondentia bond, of an agent, consignee, lessee, factor, carrier, bailee, or party having a lien or entitled to a rent or income, or being liable to a loss depending upon certain conditions or contingencies, or having the certainty or probability of a profit or pecuniary benefit depending on the insured subject; 1 Phill. Ins. c. 3; 11 E. L. & Eq. 2; 28 *id.* 312; 34 *id.* 116; 48 *id.* 292; 11 Pa. 429; 6 Gray 192; 2 Md. 111; 62 N. Y. 47, 54; 20 Am. Dec. 510; 63 Hun 82; 85 Ala. 607; 133 U. S. 387.

It was formerly held that the interest in property insured must exist when the insurance was effected, as well as the time of the loss; 3 Den. 301; 16 Or. 283; 38 Me. 414; Biddle, Ins. § 157. This is not now the rule; Arnould, Ins. 59; and in a case in which the insurance was upon a cargo, "on account of whom it may concern," the author just cited is approvingly quoted by Mr. Justice Swayne to the effect that, "it is now clearly established that an insurable interest, subsisting during the risk and at the time of loss, is sufficient, and the assured need not also allege or prove that he was interested at the time of effecting the policy," and he adds, "This is consistent with reason and justice, and is supported by analogies of the law in other cases." 98 U. S. 528.

It has been held that there is an insurable interest in an attaching creditor; 86 Me. 518; a purchaser in possession under a contract of sale; 63 Fed. Rep. 680; 5 Wash. 276; 21 N. Y. 378; 135 *id.* 298; 21 Can. S. C. R. 288; a person admitted as a partner, though the consideration was unpaid; 31 S. W. Rep. (Tex.) 1100; a husband, in per-

sonal property in the name of his wife ; *id.* ; a commission merchant in goods consigned to him ; 19 Ia. 364 ; persons liable by contract, statute, or common law for the safe keeping of property, as bailees ; 5 Metc. 386 ; 36 N. Y. 655 ; for repair or manufacture ; 14 Ala. 325 ; common carriers ; 12 Barb. 595 ; railroad companies ; 113 Mass. 77 ; warehousemen ; 36 S. C. 213 ; a pipeline company in oil in its tanks ; 145 Pa. 347 ; a sheriff in goods levied on ; 26 N. Y. 117 ; 31 Ia. 464 ; one liable as indorser of a mortgage note ; 107 Mass. 377 ; or a trustee liable for the safe-keeping of property ; 5 Wall. 509 ; or who gives bond for its delivery ; 13 B. Mon. 311 ; one in possession for life under a parol agreement to pay repairs, taxes, and insurance ; 132 N. Y. 49 ; a carpenter or builder erecting or repairing a building, to be paid for on completion ; 15 B. Mon. 411 ; a vendor of land before payment in full ; 46 N. Y. 421 ; (but not one paid in full who has not conveyed ; 2 N. S. W. L. R. 239) ; a lessor ; 80 Ill. 532 ; a tenant ; *id.* ; or subtenant ; 49 Miss. 80 ; (but not a tenant of glebe land after death of the lessor ; 20 U. C. C. P. 170) ; a tenant by the curtesy ; 50 Pa. 341 ; a simple contract creditor of the estate of a deceased person in lands of the latter, though subject to dower and homestead rights ; 101 Ala. 522 ; a mechanic's lien holder ; 12 Ia. 371 ; the successful bidder at an execution sale ; 5 Sneed 139 ; the owner of lands, on buildings in process of erection ; 71 Hun 369 ; the grantee of property conveyed in fraud of creditors ; 34 Neb. 704 ; one holding property in trust ; 132 N. Y. 133 ; or who has an equitable interest ; 18 Vt. 305 ; a mortgagee, to the extent of his mortgage interest ; 52 Me. 333 ; 1 Curt. C. C. 193 ; and a mortgagor, on his interest in the same building ; 9 Wend. 405 ; 10 Pick. 40 ; but the interests are independent and insurance by the mortgagor cannot be claimed by the mortgagee ; 20 Ohio 185 ; where the mortgagor insures and makes the loss payable to the mortgagee, as his interest may appear, the company is estopped to deny the insurable interest ; 46 Wis. 23 ; a mortgagor who conveys subject to the mortgage, has an insurable interest in the real estate, being liable to the mortgagee for any deficiency ; 67 N. W. Rep. (Neb.) 774. A partner may have an insurable interest in a building erected by the partnership on land of the other partner ; 10 Cush. 37 ; and an agent in control may insure the property in his own name ; 165 Pa. 55 ; a master of a ship, his right to primage on freight ; 1 Sprague 565 ; or a half-owner of property in possession, may, if so authorized by the other owners, insure all the property in his own name ; 55 Ill. App. 275.

A partnership has been held to have no insurable interest in household furniture and wearing apparel of one of the partners ; 94 Ga. 630 ; so also an administratrix in real estate of the intestate ; 8 Abb. Pr. 261, note ; a charterer, who advances on the personal credit of the owner, who must pay, without regard to the issue of the voyage ; 16 Md. 190 ; a stockholder as an individual, in the property of the corporation ; 20 Ohio 174. It was held that an interest in the profit to be derived by the insured from the adventure of laying an Atlantic cable was insurable ; though the insured was a shareholder in the company and would derive his profits from dividends ; L. R. 2 Exch. 139.

The insurable interest in life insurance rests upon a different basis from that on property. It has been said "that while in fire and marine insurance it is the interest and not the thing that is insured, in life insurance it is the thing and not the interest ;" 35 Am. L. Reg. N. S. 79.

With regard to the nature and amount of interest necessary for a policy of life insurance, no definite general principle seems yet to have been established, though the classes of insurable interests have been increasing. Every person has an insurable interest in his own life ; 94 U. S. 561 ; 120 Ill. 121 ; 98 Mass. 381 ; 108 Pa. 6 ; 1 Moo. & Rob. 481. It has been a much mooted question whether the beneficiary must have an interest. It has been held in many cases that a person may insure his own life and pay the premiums, for a beneficiary designated by him ; 98 Mass. 381 ; 120 Ill. 12 ; 50 Mo. 44 ; 85 N. Y. 593 ; Biddle, Ins. § 194 ; and there are *dicta* to this effect, frequently referred to, of Sharswood, J., 26 Pa. 189, and Paxson, J., in 108 Pa. 6. To the contrary are, 104 Pa. 74 ; 122 *id.* 324 ; 21 Fed. Rep. 698 ; and see 46 Mich. 473, and a *dictum* in 94 U. S. 561. If the beneficiary pays the premiums, it is generally held that he must have an interest ; 79 Tex. 638 ; 111 Ind. 578 ; 104 Pa. 74 ; 166 *id.* 617. See Biddle, Ins. § 194 ; 35 Am. L. Reg. N. S. 79–87, where the authorities are collected.

It was held that when the policy is caused by the assured to be issued to another, the effect is the same as if issued to the applicant and assigned to the other, and an insurable interest is not required ; 84 Hun 350. A member of a beneficial association may change the beneficiary according to the rule and substitute a new one without regard to insurable interest ; 22 Wash. L. Rep. 329 ; and where the policy was for the benefit of the insured unless he sustained a fatal accident, and in that case to a nephew, the latter contingency having happened, the nephew was not required to show an insurable interest ; 68 Fed. Rep. 873.

The interest required to support an insurance on the life of another has been found by the courts difficult to define, and indeed as was said they "have left it very much undefined ;" 9 R. I. 346. Many attempts to formulate a definition have been made, but they are similar mainly in their vagueness and generality. One of those most quoted was that of Chief Justice Shaw, in 6 Gray 396 : "It must appear that the insured has some interest in the life of the *cestui que vie ;* that his temporal affairs, his just hopes and well-grounded expectations of support, of patronage, and advantages in life will be impaired so that the real purpose is not a wager, but to secure

such advantage, supposed to depend on the life of another; such, we suppose, would be sufficient to prevent it from being regarded as a mere wager. . . . We cannot doubt that a parent has an interest in the life of a child, and, *vice versa*, a child in that of a parent, not merely on the ground of a provision of law that parents and grandparents are bound to support their lineal kindred when they may stand in need of relief, but upon considerations of strong morals and the force of natural affection between near kindred, operating often more efficaciously than those of positive law." The United States Supreme Court quoted this, with approval, in 94 U. S. 457, and in the opinion, Bradley, J., added some observations not more definite: "Precisely what interest is necessary in order to take a policy out of the category of a mere wager has been the subject of much discussion. In marine and fire insurance the difficulty is not so great, because there insurance is considered as strictly an indemnity. But in life insurance the loss can seldom be measured by pecuniary values. Still, an interest of some sort in the insured life must exist. A man cannot take out insurance on the life of a total stranger, nor on that of one who is not so connected with him as to make the continuance of the life a matter of some real interest to him. . . . Indeed, it may be said generally that any reasonable expectation of pecuniary benefit or advantage from the continued life of another creates an insurable interest in such life. . . . The essential thing is, that the policy shall be obtained in good faith, and not for the purpose of speculating upon the hazard of a life in which the insured has no interest." In the same court, later, Field, J., in 104 U. S. 775, says: "It may be stated generally, however, to be such an interest arising from the relations of the party obtaining the insurance, either as creditor of or surety for the assured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life. It is not necessary that the expectation of advantage or benefit should be always capable of pecuniary estimation. . . . But in all cases there must be a reasonable ground, founded on the relations of the parties to each other, either pecuniary or of blood or affinity, to expect some benefit or advantage from the continuance of the life of the assured." The last quotation was much approved in 113 Pa. 438.

Notwithstanding the high authority both of these judges and the courts for which they were speaking, their utterances have been characterized as *dicta*, and such they are technically, but they undoubtedly fairly represent the views of those courts and all others who recognize that the interest may be based upon kinship and need not be pecuniary. Any effort to extract a more precise definition from the American cases is likely to end in the conclusion of another able judge, who said: "The question, what is such an interest in the life of another as will support a contract of insurance upon the life, is one to which a complete and satisfactory answer, resting upon sound principles, can hardly yet be said to have been given;" Hoar, J., in 15 Gray 249.

In England a pecuniary interest is required and must be proved: 10 B. & C. 724; [1892] 1 Q. B. 864; with the possible exception that it is presumed in case of a wife who insures the life of her husband; Peake, Add. Cas. 70. The American courts take a less restricted view as shown by the definitions quoted, but no certain rule can be stated and the cases must be referred to, to ascertain whether any given relationship has been held sufficient.

A creditor may always insure the life of the debtor; 143 Pa. 238; 126 Ill. 387; 70 Md. 261; 101 N. C. 122; and in such case it has been termed a contract of indemnity, differing from other life insurance; Sharswood, J., in 4 Big. L. & Ac. Cas. 458; but this would be only as to the creditor; 15 C. B. 365; 79 Tex. 638; 144 U. S. 621: and it is said that there is no further interest after the payment of the debt; *id.*; 143 Pa. 238; 144 *id.* 223; but the question of interest is determined at the time of insurance and not of loss; see *infra;* Biddle, Ins. § 189. When the debtor pays the premiums, and assigns the policy as collateral security, the policy is in trust for him, and he is entitled to have it delivered up to him on payment; 2 Giff. 337; L. R. 5 Ch. App. 32; but it is otherwise if the creditor pays the premiums and there is no agreement for redemption; 2 De G. & J. 582; 113 Pa. 438.

In cases other than these of creditors it may be said, in the language of Mr. Justice Bradley, that any reasonable expectation of pecuniary benefit or advantage from the continued life of another creates an insurable interest in such life; 94 U. S. 457; S. C. 16 Am. L. Reg. N. S. 392, n.; 10 Cush. 244; 22 Pa. 65; 122 *id.* 324; 23 Conn. 244; 22 Barb. 9; 28 Mo. 383; 28 E. L. & Eq. 312; 92 Mich, 584.

It has been held that there was an insurable interest in a tenant, in the life of the landlord who had a life estate; 108 Pa. 6; or of one partner in the life of another; 20 N. Y. 32; whose interest was not fully paid for; 108 U. S. 498; 23 Conn. 244; 24 N. J. L. 576.

When an adequate interest exists at the time of the insurance, it is immaterial if there occur before death a diminution or entire cessation of it; 16 Fed. Rep. 650; 32 Hun 306; 27 N. Y. 282; 94 U. S. 457; and see note by J. D. Brannan on the last case in 16 Am. L. Reg. N. S. 399. But see 16 Or. 283.

On the subject of relationship there is little but confusion. It is said to be only of importance as tending to give rise to a reasonable expectation of pecuniary benefit from the continuance of the life of the insured; May, Ins. § 107; Bliss, Ins. § 31; 122 Pa. 324; 35 La. Ann. 233; or when there is a legal claim on the insured for support or service; *id.*; 47 Mo. 419; 115 Pa. 446. The interest has been held to exist in the case of a wife in the life of her husband; 128

U. S. 195; Peake, Add. Cas. 70; 28 Mo. 383 (but see 47 *id.* 419); 46 N. Y. 674; 128 U. S. 195 (and see criticism of this case in 25 Am. L. Rev. 185 and 35 Am. L. Reg. N. S. 171); and the husband in the life of the wife; 41 Ga. 338; 57 Vt. 496; the marriage gives an interest; 115 Pa. 446; 2 Dill. 166; and it has been held that before marriage a *feme sole* has an interest in the life of her betrothed; 52 Mo. 213; and so, *semble*, in Pennsylvania; 113 Pa. 438. As to other relations, it has been held that a son has an interest (on different grounds) in the life of his father; 81 Pa. 154; 80 Ill. 35; but not merely as son; *id.*; 89 Ind. 572; (*contra*, 50 Hun 50;) a father, in that of a minor son; 45 Me. 104; or an adult son; 81 Pa. 154; 128 U. S. 195; 6 Gray 396; 15 Hun 74; (*contra*, in England, 1 Ch. D. 419;) and the interest exists when relationship is by adoption; 76 Ga. 272; as where the relation of father is assumed; 161 Pa. 9; but a stepson has no interest in the life of his stepfather; 122 Pa. 423; nor a son-in-law in the life of the mother-in-law; 22 W. N. C. Pa. 407. A grandmother has an interest in the life of a grandchild; 155 Pa. 295; an old woman who lived with her daughter and the father-in-law of the latter, who had promised to keep her for life, had an interest in his life; 16 Ins. L. J. 682. There is much difference of opinion as to brother and sister, but it is said that the relationship, without more, does not give an interest; Biddle, Ins. § 193; 39 Conn. 100; *contra*, 94 U. S. 561; however, it has been held that a policy will stand if there is dependence, or indebtedness; 12 Mass. 115; 16 W. N. C. Pa. 188; see 73 N. Y. 480; [1892] 1 Q. B. 864; the last being the case of a stepsister. No interest exists in case of uncle or aunt and nephew or niece; 166 Pa. 617; 66 Mo. 63; but an aunt who stands in *loco parentis* to a nephew has an insurable interest in his life; 172 Pa. 111.

An insurance procured by a religious society, supported largely by voluntary contributions, on the life of one of its members, is void; 113 N. C. 244. In the absence of any insurable interest, the law will presume that the policy was taken out for the purpose of a wager or speculation; 122 Pa. 324: and wagering contracts in life insurance are not valid; 144 U. S. 621.

The amount of insurable interest is the value of the insured subject as agreed by the policy, or its market value, or the pecuniary loss to which the assured is liable by the risks insured against, though the insured subject—for example, life or health—has not a market value; 13 Barb. 206; 7 N. Y. 530; 24 N. H. 234; 2 Pars. Mar. Law, c. 2, sec. 2.

In insurance cases generally an interest must be averred and some proof thereof be made; Biddle, Ins. § 197, and cases cited; but on fire policies if the application or policy shows an interest, it is generally sufficient, *prima facie*; *id.*; and so it was held on a life policy; 39 Conn. 100; and the fact that the policy was made payable to plaintiff made a *prima facie* case; 26 Mo. App. 511. The facts showing interest are to be determined by the jury; 32 Ia. 421; 80 Ill. 37; 26 W. N. C. Pa. 569.

See, generally, articles by Erskine Hazard Dickson, 35 Am. L. Reg. N. S. 65, 161.

INSURANCE. A contract whereby, for an agreed premium, one party undertakes to compensate the other for loss on a specified subject by specified perils.

"An agreement by which one party, for a consideration (which is usually paid in money either in one sum or at different times during the continuance of the contract of the risk), promises to make a certain payment of money upon the destruction or injury of something in which the other party has an interest." 105 Mass. 149, 160.

An insurance in relation to property is a contract whereby the insurer becomes bound, for a definite consideration, to indemnify the insured against loss or damage, to a certain property named in the policy, by reason of certain perils to which it may be exposed. 29 Atl. Rep. (Del.) 1039.

"In fire insurance and marine insurance the thing insured is property; in life or accident insurance, it is the life or health of a person. In either case neither the time and amounts of payments by the assured, nor the modes of estimating or securing the payment of the sum to be paid by the insurer, affect the question whether the agreement between them is a contract of insurance. All that is requisite to constitute such a contract is the payment of the consideration by the one, and the promise of the other to pay the amount of the insurance upon the happening of injury to the subject by a contingency contemplated in the contract;" 105 Mass. 160; 2 S. Dak. 324.

Any one *sui juris* and capable of contracting generally may be insured, but insurance has been held not to be a necessary for which an infant might contract and be held liable against his option on coming of age; 32 N. H. 345; 53 Mich. 238. In recent years, contracts of insurance by married women have been generally held valid, usually under statutes; 15 R. I. 573; 86 Ala. 424; 52 Ill. 53; 47 Mo. 419.

Any one otherwise capable of contracting may become an insurer, and formerly the business was largely conducted by partnerships, but, with the exception of risks taken at Lloyds (*q. v.*) and some other large partnerships, the business is now conducted, mainly, by *insurance companies* (*q. v.*), though, in England, quasi corporations organized under the Joint Stock Companies Acts insure under the authority of letters patent securing limited liability. See JOINT STOCK COMPANY.

The *insurer* is sometimes called the *underwriter*, and the *insured*, the *assured*. The agreed consideration is called the *premium*; the written contract, a *policy*; the events insured against, *risks or perils*; and the subject, right, or interest to be protected, the *insurable interest*. See these

several titles. As to *in*sured and *as*sured, see 108 U. S. 504.

The policy is usually issued upon the *application* (*q. v.*) of the insured in writing, which contains the statement of facts entering into and forming a part of the contract. See REPRESENTATION; WARRANTY.

Whether facts concealed or misstated in an application are material is a question for the jury; 44 Pac. Rep. (Colo.) 756.

The happening of the event insured against and the consequent damage to the subject-matter, is termed the *loss* (*q. v.*).

Where the insurance is on property, an alienation will terminate the contract unless the insurance be transferred with the consent of the underwriter. See ASSIGNMENT. An alienation of part of the property or diminution of the interest of the insured will not, in the absence of an express condition, avoid the policy; 102 Pa. 568; 16 Wend. 385; 16 Fed. Rep. 650; 2 Pick. 249; 53 Mich. 306; 14 U. C. Q. B. 342; 27 *id.* 54; 18 U. C. C. P. 223; 25 Beav. 444; and the sale of a part does not avoid a policy forbidding merely "sale or transfer;" 10 W. Va. 507; 48 Ohio St. 533.

There is usually a clause, varying in exact terms, forbidding *any change* in title or possession, and, in such case, the sale of an undivided half interest is within its meaning and avoids the policy; 1 Mich. N. P. 118; but a distinction has been taken between a sale of an interest in property and a sale of the property, and the assignment by a new partner to his firm of his insured property as firm assets was not a forfeiture; 4 Biss. 511; 52 N. Y. 502. Clauses against alienation are conditions precedent; 125 N. Y. 82; 42 Ill. App. 475; and the question usually is whether there is a sale outright or by reason of something in the nature of a defeasance, either in law or by contract, the insured has not wholly parted with the property. As to such cases it is difficult, if not impossible, to lay down any general rule, and each case must be governed by the application of the general principles of the law of contracts and conditions to the particular form of the policy and the facts of the case. If there is, in fact, a total alienation, the opinion or motives of the parties in respect to it is not material; 22 Minn. 193. A conveyance upon a condition to be performed before title vests will not avoid; 20 Vt. 546; so where the owner of an equity of redemption sells with a stipulation for payment of the mortgage by the purchaser and is compelled to take back the title for non-performance; 12 Allen 354; or where, for other reasons, the sale is not carried out and there is a reconveyance before loss; 19 La. 28; but see 71 Ia. 532.

Policies of insurance also usually contain conditions for forfeiture in case of incumbrance without notice, or in case the property be "levied upon or taken into possession or custody," and such conditions are valid; 29 Atl. Rep. (Del.) 1039. A breach renders the policy void; *id.*; 82 Hun 380; and the question whether the execution of a mortgage increased the risk is immaterial; 39 N. E. Rep. (Ind.) 757; breach of any promissory warranty avoids the policy irrespective of its materiality; 44 Pac. Rep. (Cal.) 922; nor does it matter that the loss was not produced or contributed to by the breach; 1 N. Y. App. Div. 93. A judgment recovered *in invitum* is not within such condition; 39 W. Va. 689; but a confession of judgment is; 86 Pa. 227; 122 *id.* 128; and so was an agreement by one heir to pay the other heirs, in instalments, for property taken under a will; 168 *id.* 350. A technical seizure where the possession is unchanged is not an avoidance; 63 Hun 82; 89 Pa. 287; 5 Ont. App. 605. A provision for forfeiture for the levy of an execution relates to personalty and not to land; 54 N. Y. 595; 54 Wis. 72.

Under these conditions, a breach as to part of the insured property, which is not destroyed or injured, may not avoid the policy as to another part unaffected by the breach. Thus it was held that a recovery, under a live-stock policy, for a cow killed would not be prevented by the existence of incumbrances, in violation of a covenant in the policy, where the property actually lost was not encumbered; 32 Neb. 750. Such contract is severable and any breach of the condition would avoid only such property as was covered by the incumbrance; 102 N. Y. 260; 11 Fed. Rep. 478; 46 U. C. Q. B. 334; 10 Ont. 236; 14 U. C. C. P. 549; 54 Ill. 164. The same principle applies to the defence that the property insured was sold and conveyed; if the contract is severable, a breach as to one part does not operate as a defence with respect to property not included; 33 Neb. 340.

In insurance on manufacturing establishments it is usual to stipulate for avoidance if operations should cease without the consent of the insurer, and such provision is valid and is violated though a watchman was employed and the risk not increased; 29 Atl. Rep. (Del.) 1039; and the same is true of all conditions which are warranties. As to the distinction between *representation* and *warranty* and the law as to both, see those titles; and as to increase of risk, see RISKS AND PERILS.

Insurance on buildings or their contents is usually upon condition that if the former is suffered to be vacant or unoccupied, the policy will be void. In such case the forfeiture does not depend upon the insured's knowledge of the fact of vacancy; 161 Ill. 437; and a purchaser of the house and assignee of the policy is bound by the condition; 67 N. W. Rep. (Mich.) 967. Temporary absence of a tenant will not work a forfeiture; 92 Hun 223; 61 Ark. 108; nor will merely sleeping in the house occasionally and daily visits of the owner's wife to get provisions prevent forfeiture; 82 Md. 88; or visits twice a day by an employe; 16 Misc. Rep. 483. The insurer cannot establish a forfeiture without proving that the premises were unoccupied for any purpose; 2 Mo. App. Rep. 934.

Keeping on hand certain articles is usually prohibited, either specifically or as a

class. The breach of a condition against keeping inflammable substances does not prevent recovery, when the use of the particular substance was a necessary and usual incident of the subject insured; 95 Ga. 604; as the use of gasoline, in a silver-plating business, one day's supply only being brought in at once; 170 Pa. 151; or keeping an inflammable substance for sale as was customary where there was a clause, written in ink on the policy, containing the words "merchandise such as is usually kept in a country store;" 44 Pac. Rep. (Cal.) 189; 91 Wis. 158; 35 Atl. Rep. (Vt,) 75; and where a typewritten rider stipulated for insurance on such articles as are usually kept in a painter's shop, it prevailed against a printed condition against keeping benzine on the premises; 35 Atl. Rep. (Vt.) 75.

As to hazardous and extra-hazardous risks, generally, see RISKS AND PERILS.

In order to promote the accurate adjustment of the loss, there is usually included in policies of insurance, on such property as a stock of merchandise, what is known as the "iron safe clause," which, in one form or another, provides that the books of the insured showing all business transactions, and the last inventory of the business, shall be kept in a fireproof safe at night and when the store is not opened for business. Such a clause is an express promissory warranty; 60 Ill. App. 39; 28 S. W. Rep. (Tex.) 1027; 29 *id.* 218; 30 *id.* 384; 31 *id.* 321; but a substantial compliance only is required; 36 *id.* 591; (*contra*, 34 *id.* 35.) Keeping the books in the safe at night, does not mean from sunrise to sunset, but from the close of business of the day according to custom; 38 Fed. Rep. 19; and where according to custom the door was locked but customers could get in by knocking, and the clerk who was in the store writing up books was absent for a short time when the fire occurred, the store was "opened for business" and the policy was not void; 54 Ark. 376. But where the insurance was on a stock of liquor in a saloon, it did not excuse the violation of the iron safe clause that the same books were kept for a hotel and the saloon, the latter being opened night and day except Sunday, and the books being needed for constant settlements with the guests in the hotel; 61 Ark. 207; (distinguishing the last two cases.) The clause was held not to have been violated by failure to keep a blotter, containing the record of the sales of the day before, locked in the safe; 35 S.W. Rep. (Tex.) 1060 (reversing 34 *id.* 462); 36 *id.* 590; and in the United States Circuit Court of Appeals, where a cash sales book covering twenty-one days before the sale was inadvertently left out of the safe and burned, and the books were kept in a primitive manner but showed purchases and credit sales, some cash sales, and an inventory, taken shortly before the fire, it was held that a finding of compliance with the policy was warranted; 68 Fed. Rep. 708; in another case it was said not to be an excuse for violation that through oversight the books were not put in the safe the night before the fire; 48 La. Ann. 223.

Where the bookkeeper, fearing the safe would not stand, took out the books to remove them to a safe place, and some of them fell and were burned, it was held that the covenant was not broken unless he was negligent; 25 S. W. Rep. (Tex.) 720.

Where such a provision was inserted by fraud, a verdict for the plaintiff was not disturbed; 84 Ga. 759; and where the application showed in answer to inquiry that the books were kept in a dwelling at night a breach of the condition was not enforced; 13 S. W. Rep. (Ark.) 799.

The insurer must prove that the fire occurred at a time mentioned in the stipulation; 32 S. W. Rep. (Tex.) 243.

The character of the safe is not warranted; 18 So. Rep. (Miss.) 928; and it is sufficient if it be one of a kind ordinarily known as fireproof; 4 Tex. Civ. App. 82. See FIREPROOF.

The stipulation in such a clause, that a set of books should be kept, including a record of all business transactions, does not require a book known as a "cash book," or any particular system of bookkeeping; 94 Ga. 785. The lost inventory of the business, within this clause, means the lost inventory of the goods insured; 35 S.W. Rep. (Tex.) 722. The clause is complied with, by an inventory made, and books kept from the date of the policy, but an invoice is not an inventory; 71 Miss. 608. The question whether there was reasonable time between the issue of the policy and the fire to make an inventory is for the jury unless the evidence is undisputed; 64 N. W. Rep. (Mich.) 15. Where the inventory was shown to the adjuster after the fire, and afterwards lost, there was a performance of the condition; 13 S. W. Rep. (Ark.) 1103. But where the books do not furnish the necessary data, to verify the accounts rendered, the policy is avoided; *id.*

Policies of insurance are frequently made available as collateral security to a mortgagee or other lienholder, by what is known as a *mortgage clause*, which see as to the rights of the several parties thereunder and the effect thereof upon the insurance and the right of action. See also MORTGAGE.

Conditions may be waived and the general principles of the law of *waiver* (*q.v.*) are to be applied, but it has been held that a waiver of the condition on one payment cannot be construed to cover violations on another which were not assented to; 29 Atl. Rep. (Del.) 1039.

Though a policy is the usual instrument by which insurance is effected, it is not necessary; 19 N. Y. 305; 25 Ind. 536; 26 La. Ann. 326; and it may be evidenced by a memorandum or note; 25 N. H. 169; 76 L. T. N. S. 228; 3 Grant, Pa. 123; or a letter; 1 Ohio N. P. 71; 14 L. C. Jur. 219. Where the correspondence was held sufficient to create a valid contract for a policy of fire insurance, it was held that, after the property had been destroyed by fire, the insured was entitled to a decree for the

amount agreed to be insured, less premium; 94 U. S. 621. In the absence of a statute forbidding it, it may be verbal; 2 Dill. 26; 5 Pa. 339 (though this had been questioned; 4 Yeates 468); 73 Ill. 166; 94 U. S. 574; 21 S. E. Rep. (W. Va.) 854; 31 Ohio St. 633, overruling 16 Ohio 148; 63 Fed. Rep. 382; and when made without specifying any date for the insurance to take effect, commences immediately; *id.* A usage to show a parol contract was inadmissible; 14 Ins. L. J. (Mass.) 427. In Canada it was held that to recover at law, on a contract of insurance by a corporation, there must be a sealed policy, but on a parol contract the plaintiff may sue for a breach to deliver a policy, or proceed in equity; 16 U. C. Q. B. 477. The agreement to pay a premium is sufficient to support a verbal contract; 20 Fed. Rep. 766. See generally as to verbal contracts, Biddle, Ins. § 138, where the subject is treated historically.

An offer by a newspaper in each issue to pay a sum named to the heirs of one accidentally dying within twenty-four hours from the last issue, provided that the printed slip containing the offer should be found on the person of the deceased, is a contract of insurance; 15 Pa. Co. Ct. Rep. 463.

The usual practice is for the agent, upon the payment of the premium, to issue what is termed a *binding receipt*, which is, in effect, an executory contract to issue a policy if the risk is accepted by the company, and, meanwhile, the insurance is in force. Such contracts are valid and will be enforced at law and in equity; 9 N. Y. 280; 73 Cal. 216; 11 Paige 547; and a charter provision requiring "all policies or contracts" to be signed by certain officers has been held not to apply to such agreements; 73 Mo. 371; 20 Wall. 560; 19 N. Y. 305; 31 Ohio St. 633. See AGREEMENT FOR INSURANCE.

Where a loss occurs, the ascertainment of the amount due upon the policy is termed *adjustment* (*q. v.*). Notice of the loss must be given in accordance with the terms of the condition, which is precedent to recovery; 86 Ala. 558; L. R. 20 Ir. 93; 43 N. H. 621. This is distinct from *proof of loss* (*q. v.*), which must be also made as stipulated, or, in default of express provision, in a reasonable time; 128 Pa. 392. See LOSS.

Other insurance may be taken on the same property without restriction unless there be such in the contract; 70 Md. 400; 14 Q. L. R. 293; 9 R. I. 346; and no notice is required unless so stipulated; 2 Wash. C. C. 186; but when the insurance is on property only one indemnity can be collected, and there is a right of contribution among insurers; 18 Ill. 553; 146 Pa. 561; but it is usual to stipulate that each insurer, if there are more than one, shall be liable only *pro rata;* 9 Fed. Rep. 813. As to excessive insurance on the same property, see DOUBLE INSURANCE.

It is usual in policies to have a time limit requiring an action to be brought within a designated period of the loss. Such condition is precedent to a recovery; 67 Ia. 338; 14 L. C. Jur. 256; and will apply in a forum other than that of the domicil of the insurer; 7 Gray 61. In some courts the time of the limitation is held to be computed from the date of the event which causes the loss; 91 Ill. 92; 47 Fed. Rep. 863; 51 Conn. 17; 19 Nov. Scot. Rep. 372; 18 Ont. 355; in others, from the time the loss was payable; 39 N. Y. 45; 132 *id.* 334; 83 Cal. 473; 81 Ia. 135; 17 Fed. Rep. 568.

Efforts have been made both by contract and by statute to limit the right of suit on a policy to a particular jurisdiction; such provisions in a policy or by law have been held illegal; 6 Gray 174, 185, 596; 31 Mo. 518; May, Ins. § 490. Statutes which attempt thus to limit the jurisdiction are strictly construed, and as they generally provide that, after a loss, the directors shall meet and adjust the loss, and if it is not paid in a given time, suit may be brought in a particular court, the limitation is in many states confined to the exact case mentioned, and it is only where the amount has been so determined that it takes effect; 25 N. H. 22; 53 Me. 419; 22 Wis. 516; 4 Metc. 212; 7 Ind. 25; but in other cases the limitation has been enforced without reference to such previous ascertainment of the loss; 18 Ohio St. 455; 6 *id.* 599; 17 Vt. 369. See May, Ins. § 491.

So, with respect to the effort to provide in the policy that the law of a certain state should determine its construction, where life policies have been issued in a state other than the same state of the company, it has been held that they are governed by statutory provisions in the state of the insured, although the policies stipulated that the contract was to be governed by the law of the same state. See LEX LOCI.

As to the rights and remedies of and against insurance companies in countries or states other than those of their domicil, and the effect of non-compliance with statutes regulating the manner of doing business, see FOREIGN CORPORATIONS.

It has been held that a provision that where there are several underwriters each is liable *pro rata*, the assured shall not sue more than one of the underwriters at one time, and that a final decision in any action thus brought shall be decisive of the claim of the assured against each of the underwriters, who agree to abide the event of the suit, is not void as against public policy, but valid as tending to prevent a multiplicity of suits; and in an action to which all the underwriters were made parties defendant, a plea that it was brought in violation of the agreement was sustained; 6 N. Y. App. Div. 540. And under such condition timely service on one of the defendants is sufficient to prevent the running of the statute as against all the underwriters; *id.*

An insurer is entitled to subrogation (*q. v.*) in cases where such right would attach under the general principles applying to that subject; as, when payment is made

for loss or damage to goods in transit, there is a subrogation to the rights of the owner against the carrier; 31 S. W. Rep. (Tex.) 560; 63 Fed. Rep. 34; 165 Pa. 428; 60 Minn. 382. And, on payment by the insurer of a loss which he was not legally bound to pay, he has a right of action against one through whose negligence the property was destroyed; 60 Ark. 325; he becomes entitled *pro tanto*, and should join the owner as plaintiff in an action for negligent burning; 66 N. W. Rep. (Wis.) 1144. So, an insurer of title who paid off liens prior to a mortgage, as to which the mortgagee was indemnified by bond of the mortgagor, was subrogated to the right of action of the latter on the bond; 67 N. W. Rep. (Minn.) 543.

In a recent English case it was held that, since a policy of fire insurance is a contract of indemnity, the insurer is entitled to recover from the insured not merely the value of any benefit received by him by way of compensation from other sources in excess of his actual loss, but also the full value of any rights or remedies of the insured against third parties which have been renounced by him, and to which, but for that renunciation, the insurer would have a right to be subrogated; [1896] 2 Q. B. 377.

As to subrogation in insurance cases, see 54 Alb. L. J. 109 (credited to Sol, J.); 29 Am. L. Reg. N. S. 42; 18 *id.* 737.

Expected profits may be insured, as crops, against hail and frost or other risks, even before they are sown, but the profits must be insured as such; 3 N. & M. 819; 2 East 544; 5 Metc. 391; 2 Johns. Cas. 36; 1 Sandf. 551; 2 Rob. La. 131; or the future profits of one to whom the insured has advanced money to pursue an enterprise; 32 Conn. 244; 10 Cush. 282; 2 E. D. Sm. 168; or a portion of the cargo of a ship expected to arrive, even if the insured has no property in such cargo, but has only purchased, for a specified sum, the right to take such goods for a further specified sum; 16 Pick. 397; but even if the insured has an ownership in the property, if he becomes insolvent before the arrival of the cargo and the goods are intercepted by the vendor, by right of stoppage *in transitu*, there can be no recovery on the policy; 10 B. & C. 99.

As to reinsurance, see that title.

See, generally, Beach; Biddle; May; Richards; Wood, Insurance; Finch, Dig. 1889-96; Sansum, Dig. 1877.

The several forms of insurance contracts are classified mainly with reference to the character of the perils insured against. See *infra*.

Life Insurance. The insurance of the life of a person is a contract by which the insurer, in consideration of a certain premium, either in a gross sum or periodical payments, undertakes to pay the person for whose benefit the insurance is made, a stipulated sum, or annuity equivalent, upon the death of the person whose life is insured, whenever this shall happen, if the insurance be for the whole life, or in case this shall happen within a certain period, if the insurance be for a limited time.

An agreement by the insurer to pay to the insured or his nominee a specified sum of money, either on the death of a designated life, or at the end of a certain period, provided the death does not occur before, in consideration of the present payment of a fixed amount, or of an annuity till the death occurs or the period of insurance is ended. Biddle, Ins. § 2. Bunyon's definition varies little, as does that of Park, but the latter elaborates the consideration which is described as "a certain sum proportioned to the age, health, profession, and other circumstances of the person whose life is the object of insurance. Park, Ins. ch. xxii. In a leading case it was said by Parke, B., to be "a mere contract to pay a certain sum of money on the death of a person, in consideration of the due payment of a certain annuity for his life, the amount of the annuity being calculated, in the first instance, according to the probable duration of the life; and when once fixed, it is constant and invariable;" 15 C. B. 365.

A mutual contract by which the insurer, on the one hand, comes under an obligation to pay a certain sum of money upon the death of the insured, who, on the other hand, becomes bound to pay certain sums, either annually or otherwise, in the name of premiums, and these obligations are counterparts of one another. 3 Can. S. C., 4th ser. 1078.

This form of insurance, it has been said, "is substantially the purchase by the insured from the insurer of a reversionary interest for a present sum of money;" Biddle, Ins. § 4.

The person whose life is insured is frequently termed the "life."

The sum to be paid in case of loss depends entirely upon the stipulation in the policy, and not at all upon the amount of the pecuniary interest in the life; 23 Conn. 244.

It is settled that there must be an insurable interest, as to which see that title.

A large proportion of life insurance is now effected through the medium of beneficial associations (*q. v.*); they are generally formed under state incorporation laws and are subject to their own rules and regulations so far as they are consistent with the general or statutory law of the state. The benefits and advantages conferred by these associations are held to be insurance, and subject to regulation by the insurance laws of the state; 41 N. W. Rep. (Ia.) 4; 67 Md. 117. While the rules and regulations enter into and become a part of the contract of insurance, the usage of the association will not bind courts in construing the contract, if the latter be clear and unambiguous; and words having a fixed meaning, either general or technical, will be interpreted according to that meaning as in other cases; 31 Fed. Rep. 122. See INSURANCE COMPANY.

Some of the conditions of policies of life insurance are peculiar to this class of insurance. Among the most important of these

are those relating to self-destruction and insanity, as to which see SUICIDE.

Entering the military service is also usually stipulated against, but death at the hands of a roving band of thieves and robbers, while engaged as an engineer in building a bridge, under the direction of a military commander, is not within such a stipulation; 48 N. Y. 34; but even an involuntary entrance will defeat a recovery; 44 Ga. 119; as also, serving on the staff of a general, although the insured received no commission; Mitchell *v.* Mutual Life Ins. Co. of New York, cited in Bliss, Ins. 643. The receipt of the premium by the insurer, after a known violation of the condition against residence abroad, is a waiver of the right to a forfeiture; 23 Conn. 244; whether the knowledge be actual or constructive; 5 De G. M. & G. 265; L. R. 11 Eq. 197. Where a condition against absence from home beyond a stipulated time is violated, the insured will be excused if he be detained by reason of illness occurring within the time specified; 3 Bosw. 530; but not where the illness occurs after the limits of the stipulation; 5 R. I. 38. Where the contract restricts the insured to the settled limits of the United States, it covers all regions within the boundaries of the country, whether inhabited or not; 22 N. Y. 427; and a permission to travel by sea in "a first rate vessel" will cover any mode of travel whether by cabin or steerage; 13 Gray 434.

The weight of decision has been in favor of the view, that the contract of *life insurance* between citizens of different states is not dissolved, but only suspended, by a war between the states; 46 N. Y. 54; 9 Blatchf. 234; 9 Am. Rep. 169; 10 *id.* 535; 13 Wall. 159; but, *contra*, 41 Conn. 272; 93 U. S. 24.

See, generally, Bacon; Bliss; Bunyon; Cook; Crawley; Farren, Life Ins.; Dowdeswell; Meech, Tables; Hine and Nichols, Assignment of Life Ins. Policies; Bigelow, Cases.

Tontine. A system of insurance which under various forms is based upon the idea of a loan or investment of property for the benefit of a number of persons, the income at first being divided among all and the shares of members who die passing not to their own legal representatives but to increase the interest of the surviving member, until, at last, after the number of members has gradually diminished by successive deaths, the last survivor takes the whole income, or, if such be the terms agreed upon, the whole principal. The system took its name from Lorenzo Tonti, an Italian of the seventeenth century, who first conceived the idea and put it in practice. Merlin, *Repert.;* Dalloz, Dict.; 5 Watts 351.

A policy of this character was the subject of litigation in the Massachusetts Supreme Court in a case in which the system is illustrated. It was to continue ten years if the insured should so long live, but in case of his death before that time, the dividends would not inure to the benefit of his estate, but be held by the company for the benefit of other policy holders and forfeited by him. The estate of the deceased received only the amount of the policy, which, however, would be forfeited for non-payment of premiums during the tontine term; policies of this character are kept in classes of ten, fifteen, or twenty years, called respectively the tontine periods, and accounts are kept with the funds of each class to ascertain the amount due upon each policy at the expiration of its tontine term, at which time the surplus profits are apportioned equitably among such policies as complete the term; 145 Mass. 56. Under such an insurance the failure of the company to place all dividends accruing upon a policy in a reserve fund in accordance with the terms of the policy did not excuse the non-performance of his contract by the insured, and a suit by such policy holder for an accounting by the company cannot be maintained on the ground of the failure to keep and invest the fund accruing from the dividends separately; 101 N. Y. 328. No trust relation exists between the company and the insured but it is simply one of contract measured by the terms of the policy; 50 N. Y. 610; 78 *id.* 114; 98 *id.* 627. The situation of the parties is that of debtor and creditor merely, the amount of the debt being determined by the equitable apportionment to be made by the corporation through its officers; 101 N. Y. 421; 145 Mass. 56. The apportionment of the fund is not absolutely conclusive upon the policy holders. It is *prima facie* right, but may be shown to be based on erroneous principles; *id.* The rights under such a policy being absolutely vested, the possession by another of the evidence of their rights cannot change or affect them; 108 U. S. 498.

Fire Insurance. A contract by which the insurer, in consideration of a certain premium received by him, either in a gross sum or by annual payments, undertakes to indemnify the insured against all loss or damage which he may sustain to a certain amount, in his property mentioned in the policy, by fire during the time agreed upon.

Fire insurance is said to be in effect a contract of indemnity against loss or damage suffered by an owner or person having an interest in the property insured. 86 Me. 518.

The principles applying to the subject are, in general, those governing marine policies and other kinds of insurance of property against the various perils which attend its use and ownership, and therefore the point to be mainly considered, as applied to fire insurance alone, is the exact definition of the peril insured against. With respect to the nature of the contract as an indemnity, the necessity of an interest in the property, the policy and the application, the effect of warranties and representations, respectively, and the loss and its adjustment, reference should be had to the discussion of the subject generally, *supra*, and in the various titles referred to.

It has frequently been said that to recover under a fire policy there must be an

actual fire or ignition, and that it is not sufficient that there has been an injurious increase of heat which caused damage to the insured property, while nothing had taken fire which ought not to be on fire. The authority usually relied upon, for this general statement, is the early and leading case of Austin *v.* Drewe, 6 Taunt. 436, but this case has been much criticised; Cushing, J., in 10 Cush. 356; 1 Bennett, Fire Ins. Cas. 104, note; 13 Ill. 676; May, Ins. § 402.

A fire in a theatre, caused by the excessive heating of its walls by a fire outside, was held to be covered by the policy; 11 Allen 336; and when a building is blown up by gunpowder to prevent the spreading of fire the insurer against fire is liable if, but for being blown up, it would have been burned; 21 Wend. 367; 3 Phila. Pa. 323; 41 Ill. App. 395; L. R. 3 Exch. 71. These cases are distinguished from explosion, which is not fire, within a fire policy, when it occurs some distance off; 19 C. B. N. S. 126; 15 La. Ann. 217; even though it was caused by fire; *id.;* and when the explosion is within the building, there must be ignition to bring it within the fire insurance; 11 N. Y. 516; but damage from fire caused by explosion on the premises is covered; 10 Cush. 356; 103 Mo. 595 (unless it is expressly excepted; 3 Phila. Pa. 323); so also if the damage is from explosion caused by fire, as where a steamboat was burned as the result of an explosion of gunpowder; 11 Pet. 213; or when coals were thrown out of the stove; 127 Mass. 346. In this case the policy contained the provision that "if a building shall fall, except as the result of a fire," the insurance should cease; and this was held to apply to inherent defects in the building. And when, under a similar policy "against fire originating in any case," there occurred an explosion and loss, it was held immaterial whether the fire resulted in combustion or explosion; 33 Mo. App. 394.

A loss by reason of fire started by an explosion caused by a fire coming in contact with escaping gas was not within a policy which excepted loss by reason of or resulting from any explosion whatever; 2 Ins. L. J. 190. When damages by explosion are excepted unless caused by fire, the insurer is held liable only for the result of fire and not of the explosion which caused it; L. R. 3 Exch. 71; or by one caused by fire in its course; *id.; contra,* 2 Fed. Rep. 633; 56 Md. 70.

A fire in a chimney, caused by accidental ignition of soot, or smoke issuing from such fire, is within a policy covering all loss or damage by fire to all goods contained in the building; 166 Mass. 67. So also a loss by spontaneous combustion was held to be within a fire policy; 9 L. C. Q. B. 448; but see a criticism of this case in 65 Md. 162. Where a policy insures against explosion and accident and there was an exception of explosion or loss caused by the burning of the building, a destruction of the property by an explosion caused by raising a cloud of starch dust in an endeavor to extinguish flames was held a fire loss and not within the policy; 57 Fed. Rep. 294, reversing 48 Fed. Rep. 198.

Fire insurance does not cover damage by lightning without combustion; 37 Me. 256; 14 N. H. 341; even when the policy covers "fire, by lightning;" 4 N. Y. 326. It is quite usual to add to a fire policy what is known as a "lightning clause," which covers loss from that cause with or without fire; but a company authorized to take fire risks is not thereby authorized to insure against lightning; 37 Me. 256. A policy of insurance against lightning was held to cover destruction by tornado when the former accompanied the latter; 54 Wis. 433.

Under a lightning clause attached to a fire policy, on horses "contained in" a barn, the insurer was held liable for a brood mare pasturing in a field. The policy against loss by lightning was said to be a contract of insurance of a peculiar kind, which must be construed in a reasonable, common-sense view, and so as not to reduce the contract to an absurdity; 114 Pa. 431; 20 W. N. C. Pa. 370; in these cases the insurance was on horses alone, and, on that ground, they were distinguished in a later case, in which the policy embraced also property kept in a barn, other than live stock, and the company was held not liable for a horse killed by lightning while in pasture; 130 Pa. 113.

Where an insurance policy excepts loss caused directly or indirectly by fire it is an accident, and not a fire, policy, and the complaint must show that the loss was not caused directly or indirectly by fire; 51 Fed. Rep. 155.

When the insurance was against loss by "fire or storm," it did not cover damage by a freshet caused by melting snow with prevailing south winds and rain; 3 Phila. Pa. 38.

The exception of "loss by fire occasioned by mobs or riots," does not extend to a loss from the burning of a bridge by military authorities in time of war; 50 Pa. 341; of the risks of this class, usurped power is not an ordinary mob but a rebellious one or one having political purpose; 2 Wilson 363; it is "rebellion conducted by authority;" Lord Mansfield in Langdale *v.* Mason, 2 Marsh. Ins. 792; but it is not necessary that the destruction be commanded by a superior officer; 42 Mo. 156; insurrection is "a seditious rising against the government, a rebellion, a revolt;" 1 Jones, N. C. 126; and a riot is "where three or more persons actually do an unlawful act, either with or without a common cause . . . the intention with which the parties assemble, or at least act, being unlawful;" *id.;* but in another case it was held that the destruction of property in a riot is within the exception even if the rioters assembled originally for a lawful purpose; 5 La. Ann. 482.

The exemption of loss "by explosion of any kind, by means of invasion," etc., means by explosion *and* invasion, etc., not explosion *caused by* invasion; 14 W. Va. 33.

See CIVIL COMMOTION; INSURRECTION; INVASION; MOB; RIOT; USURPED POWER.

Losses caused by the effort made to prevent the destruction of property by fire must be borne by the insurers and not by the insured; 3 Phila. Pa. 193; as by water; 19 La. Ann. 297; 10 Gray 159; or theft; 34 Pa. 96; 49 Me. 200; 30 Mo. 160; unless expressly excluded; 17 La. Ann. 131; or removal when required by due diligence, according to the circumstances; 11 Mich. 425; 13 Ill. 676 (but see 3 Pa. 407); or falling of walls after an interval of a day; 7 Sc. Sess. Cas., 1st ser. 52; but the fire must be the proximate cause; 37 Mo. 429. See 10 Gray 15.

Insurance against fire covers a loss by the negligence of the insured not amounting to fraud; 58 Pa. 419. The contract of fire insurance is to be construed with reference to the laws of the state in which the property is situated and the policy issued; 164 Mass. 291; 33 Atl. Rep. (N. H.) 731.

An insane person cannot be held, in setting fire to his property, to have had such a fraudulent or wrongful design as to defeat the insurance thereon, though his estate may afterwards be called upon to respond for the act; 20 N. Y. S. 344; 35 Hun 475.

See, generally, Clement, Dig. F. Ins. Dec.; Bennett, Cases; Flanders; Wood; Ostrander, Fire Ins.; Hine & Nicholas, Digest; Litt. & B. Dig.

Marine Insurance. A contract of indemnity by which one party, for a stipulated premium, undertakes to indemnify the other, to the extent of the amount insured, against all perils of the sea, or certain enumerated perils, to which his ship, cargo, and freight, or some of them, may be exposed during a certain voyage or fixed period of time.

A contract of indemnity (not perfect but approximate; 1 H. L. Cas. 287; 4 App. Cas. 755); against all losses accruing to the subject-matter of the policy from certain perils during the adventure. This subject-matter need not be strictly a property in the ship, goods, or freight; 2 B. & P. N. R. 269; L. R. 7 Q. B. 302; any reasonable expectation of pecuniary profit from the preservation of the subject-matter is insurable as a marine risk; as, where the joint owners of a vessel and cargo engaged in a joint adventure have a lien for their several interests and for advancements, each part-owner had an insurable interest in the joint venture; 124 Pa. 61.

The insured must have a lawful interest at the time of the loss. See INSURABLE INTEREST.

The contract is one recognized by the general law and usage of nations, and therefore either native or alien may be insured. It was settled in England after much judicial discussion (and some temporary legislation) that the insurance of enemy's property is illegal; 4 East 396; 13 Ves. 64; see 3 Kent 254. The same rule was recognized by continental jurists; *id.* 255, note (*b*); Val. Com. ii. 32; and in this country; 16 Johns. 438, where the subject was extensively discussed, and it is said that "it may be considered the established law of this country;" 3 Kent 256. Such contracts, made before the outbreak of war, are annulled by it; Snow, Lect. Int. L. 101.

It may also be in favor of A, or whom it may concern, but those general words will only apply to a person with an interest in the subject and who was in the contemplation of the contract; 2 Wash. C. C. 391; 98 U. S. 528; 6 Paige 483; 129 N. Y. 237; if such person has authorized or adopted it; 44 N. H. 238. The intention of the insurer need not have fastened upon the very person, who seeks to take the benefit; an intention covers a person who takes such relation to the insurer as brings him within the clauses of the policy; 129 N. Y. 237. See 40 Me. 181; 5 Bosw. 369. The insurance "on advances" is distinct from the ship itself; 1 U. S. App. 183.

As to who may be insurers in a marine policy there is no special rule.

An insurance on a ship named makes the latter a part of the contract and no other can be substituted, but a cargo may be changed from one ship to another; 3 Kent 257; and the master may be changed; 12 Johns. 138. An insurance on the ship includes everything appurtenant to it; Boulay-Paty iii. 379; 1 Term 611, note. An insurance on goods need not name the ship, but may be "on any ship or ships;" Emer. i. 173; 2 H. Bla. 343.

Marine policies in England and this country usually contain the words "lost or not lost," and in such case they cover losses already accrued as well as future ones; 27 N. J. L. 645. It is so without the words in other foreign countries; Roccus, *de Ass.* n. 51; 3 Kent 259; and it was said by Story, J., that "it would be so without reference to the words;" 2 Summ. 397.

The most perfect good faith is required in this contract with respect to representations, warranties, and concealment, as to all of which see the several titles.

The insured is required both to pay the premium, and to represent fully and fairly all the circumstances relating to his subject-matter of the insurance, which may influence the determination of the underwriters in undertaking the risk or estimating the premium. A concealment of such facts amounts to a fraud, which avoids the contract; 1 Marsh. Ins. 464; Park. Ins.; 3 Kent 282–7 and notes.

Where a policy covers a loss by perils of the sea or other perils, the insured may recover for a loss occasioned by the negligence of the master or crew or other persons employed by him; 11 Pet. 213; 2 Metc. 432; 14 How. 351; L. R. 4 C. P. 117; 117 U. S. 323. As to the perils insured against generally, see PERILS OF THE SEA; RISKS AND PERILS; and as to the different kinds of marine policies, see POLICY.

If, before the termination of the adventure, the assured has parted with all interest in the subject-matter of the insurance, he cannot recover on any loss subsequent to his transfer of the property; 11 M. & W. 10; L. R. 7 Q. B. 302; and the insurer can take nothing by subrogation

but the rights of the assured; 1 Pet. 193; 12 How. 466; 17 *id.* 152; 13 Wall. 367; 105 U. S. 630; 111 *id.* 584; 103 Mass. 219.

See, generally, Arnould; Emerigon; Duer, Marine Ins.; Hine & Nichols, Dig.; 3 Kent, Lect. 48.

Accident Insurance. That form of insurance which provides for specified payments in case of an accident resulting in bodily injury or death, as distinguished from *casualty insurance*, which is a term applied to insurance against loss or damage to property occasioned by accident. 155 Mass. 404. A foreign corporation, although an accident insurance company, has been held authorized to issue "horse or vehicle policies," "elevator policies," "general liability policies," and "outside liability policies;" *id.*

Accident insurance is intended to furnish indemnity against accidents and death caused by accidental means, and the language of the policy must be construed with reference to that proposition. In case of doubt or uncertainty the construction should be liberal in favor of the insured; 133 Ill. 556, reversing 35 Ill. App. 17.

A form of insurance common in England is against accident caused by vehicles. Under such a policy where the amount of liability was limited to £250 in respect of any one accident and £1,500 in any one year, where forty persons were injured by the overturning of one vehicle, it was held that the injury caused to each person was a separate accident; 60 L. J. R. N. S. 260. An insurance by the owner of a vehicle against damage suffered by him for injuries caused by the vehicle to passengers is termed a third party risk; 29 Scot. L. Rep. 836.

The usual language of such policies insures against death through external, violent, and accidental means. This has been held to cover death from shock and physical strain resulting from being run away with in a covered carriage, where there was no mark of physical injury nor contact with any physical object; 80 Me. 251; and see [1896] 2 Q. B. 248; suicide by an insane man; 120 U. S. 527; death from drowning; 5 H. & N. 211; S. C., on appeal, 6 *id.* 839; falling into the water in a fit; 22 L. T. N. S. 820; 6 Q. B. Div. 42; death from inhaling illuminating gas; 112 N. Y. 472; 59 Ill. App. 297; 144 Pa. 79; 84 Va. 52; by taking poison; 133 Ill. 556; or an overdose of medicine; 44 Hun 599; 85 N. Y. 319; 105 Ind. 212; death caused by a piece of beefsteak passing into the windpipe while eating; 94 Ky. 547; death from blood-poisoning, caused by the bite of a mosquito (although poison was expressly excepted); 40 S. W. Rep. (Ky.) 909; falling into the water as the result of a wound; 47 N. Y. 52; falling on a railroad track in a fit and being run over; 7 Q. B. Div. 216; being struck by the handle of a pitchfork while making hay and having peritonitis as a result of it; 69 Pa. 43; spraining the back while lifting a heavy weight; 1 F. & F. 505; being attacked and killed by a highwayman; 89 Ky. 300; 2 Bigelow, L. & Acc. Cas. 738; accidental shooting by a deputy sheriff who did not know at whom he was shooting and did not intend to kill the assured (there being an exception of death from design either of the insured or another person); 65 Mich. 545; hernia resulting from an accidental fall (although the policy excluded hernia); 17 C. B. N. S. 122; rupture of a blood-vessel sustained while exercising with Indian clubs; 8 Biss. 362; falling from the cars while walking in the sleep; 58 Wis. 13.

It has been strongly contended that such cases as those enumerated were not within the ordinary accident policy because there was no extraordinary injury according to the ordinary meaning of the term, but, in reply to this in a leading case of drowning, the court said: "That argument if carried to its extreme length would apply to every case where death was immediate;" 6 H. & N. 839; and in a case of death from the inhalation of gas, the court said: "We think it a sufficient answer that the gas in the atmosphere as an extraordinary cause was a violent agency in the sense that it worked on the intestate so as to cause his death; that death is the result of accident or is unnatural, imports the extraordinary and violent agency of the cause;" 112 N. Y. 472. The view which these courts considered untenable was, however, taken by the Supreme Court of Pennsylvania on a policy exactly similar. The court said: "The object of the company is to insure bodily injuries produced in a certain manner specified, that is, caused by external, violent, and accidental means; not injuries caused by any one of these means, but by all of them combined;" 102 Pa. 230; but this language seems to be a *dictum*, because there was a condition in the policy excepting death or injury caused by the taking of poison, and the point of the case was that an involuntary taking of poison by mistake was within the exception; but in a New York case of death from inhaling gas there was also a proviso excepting death caused by inhaling gas, and the court construed it "to mean a voluntary and intelligent act by the assured and not an involuntary and unconscious act;" 112 N. Y. 472. This case and the Pennsylvania case are therefore in direct opposition on the construction of the condition, and the former was decided after consideration of and with express dissent from the latter.

An exception that if the insured should die by his own hand, sane or insane, the policy should be void, "covers all conscious acts of the insured by which death by his own hand is compassed, whether he was at the time sane or insane, if the act was done for the purpose of self destruction, it matters not that the insured had no conception of the wrong involved in its performance;" 65 Mich. 199. In this case it was held that whether a fall six weeks before the insured shot himself was the cause of the killing was too conjectural

to be submitted to the jury as a direct cause of the suicide. See CAUSA PROXIMA.

It has been held that death was not the result of accident within the meaning of the policy where it was occasioned by epilepsy; 31 Fed. Rep. 322; sunstroke; 3 El. & El. 478; rupture caused by jumping from a train where nothing unforeseen happened from the time the insured left the platform to the time he alighted on the ground; 34 Conn. 574; 131 U. S. 100.

Where the insured was assassinated, there could be no recovery under a policy which excepted death or injury inflicted by design of himself or another; 127 U. S. 661; 87 Ky. 300; but where the death was the result of an accident, the fact that the negligence of the assured may have contributed to it is no defence in the absence of an express stipulation in the policy to that effect; 24 Wis. 28; 32 Md. 310; 6 Lans. 71.

Accident policies usually cover the risk incident to a specific occupation, a substantial change of which will, if it increase the risk, render the policy void. Such a stipulation is held to mean engaging in another employment as a usual business; 49 Ill. 180; but it was not such a change for a school teacher while disengaged to be employed in building operations; *id.*; or for one to engage in pitching hay while visiting his grandfather; 69 Pa. 43; or for a locomotive engineer to climb over the tender to apply the brakes on a car; 32 Md. 310. In all such cases the question what is a substantial change of occupation is to be left to the jury; 34 N. J. L. 371.

The expression "voluntary exposure to unnecessary danger," used in stating the exceptions to the liability of an insurance company upon an accident policy, refers only to dangers of a real and substantial character which the insured recognized, but to which he, nevertheless, purposely and consciously exposed himself, intending at the same time to assume all the risks of the situation. Voluntary riding upon the platform of a rapidly moving railroad car is not, of itself and as a matter of law, a voluntary exposure to unnecessary danger and presents a question of fact for the jury. Where an accident insurance policy exempts the insurer from liability for injuries received while violating rules of a corporation, the question is for the jury as to whether the insured knew of a rule of the corporation which he is alleged to have violated, and the court should charge that in order to bind insured, it must be one which the corporation enforced or used reasonable effort to enforce; 78 Fed. Rep. 754; opinion by Harlan, J., considering all the cases at length; and see 7 Am. L. Rev. 590, where the question whether death from freezing while climbing Mount Blanc was or was not a voluntary exposure to unnecessary danger was discussed with reference to a case in which the point was raised but not settled, the suit being compromised.

In an exception prohibiting exposure to obvious or unnecessary danger and requiring due diligence on the part of the assured, there can be no recovery where death was caused by being struck by a railroad train while running along the tracks in front of it in the night-time for the purpose of getting on a train approaching in an opposite direction on a parallel track; 134 Mass. 175; nor where it was caused by falling from the platform of a railroad car between eleven and twelve o'clock at night when the train was in motion; 15 Blatchf. 216; or from unnecessarily passing on a dark and rainy night over a trestle known to be dangerous with two packages in his hands, although it was the usual route home of the assured and many others; 80 Ga. 541; or where a shop hand of a railway company went on the platform when the train was in motion to leave the train when it should stop to cross over by a switch to another track (the exception not being applicable to the exposure of railway employes in the performance of their duty); 41 Minn. 231; but where the insured by a voluntary act exposed himself to a hidden danger, the existence of which he had no reason to suspect, and thereby lost his life, his death was caused by accident and the company is liable; 102 Pa. 262; a clause prohibiting voluntary exposure to unnecessary danger does not prohibit one from walking or being on a railway bridge or road-bed; 74 Fed. Rep. 457; 39 N. Y. Supp. 912; see also where a passenger is overcome by the heat of the car, or nausea, and goes upon the platform; 39 Fed. Rep. 321; or getting from the platform at a depot upon the cars while in motion at a rate of speed less than that of a man walking; 24 Wis. 28; going to the rescue of a shipwrecked crew, although the policy prohibited the insured from engaging in the business of wrecking; 50 Hun 50; or by falling from the second story of a barn which the insured was having built, in consequence of the breaking of a joist having a secret defect; 34 N. J. L. 371.

The exception against death or injury happening while the insured was intoxicated, or in consequence thereof, prevents a recovery, without reference to the question whether the condition was the cause of the injury or not; 94 Ala. 434; 66 N. Y. 441; as, where the deceased, being under the influence of liquor, was killed by a pistol shot while dining with a friend; *id.* To be under the influence of intoxicating liquor within the meaning of such exception means to have drunk enough to disturb the action of the mental and physical faculties so that they are no longer in their normal condition; *id.*; the expression is equivalent to "intoxicated"; 94 Ala. 434.

Where the death was caused by inadvertently taking an overdose of opium which had been prescribed by a physician, it was held within the exception of any death caused wholly or in part by medical treatment for disease; 14 Blatchf. 143.

The question frequently arises what is total disability for which the policy entitles the insured to claim indemnity. In an

English case in which this question was much discussed, it was held that a solicitor who had sprained his ankle while riding on horseback and was under the care of a surgeon for six weeks, unable to leave the house or transact business which could not be attended to in the house, but could write letters, read law, and the like while lying on a couch, was not totally disabled; 5 H. & N. 546. This judgment was affirmed in Exchequer Chamber. The provision in this and similar cases is usually for a weekly allowance in case of accident causing any bodily injury of so serious a nature as wholly to disable the insured from following his business. Under such a clause total disability to labor must be shown; 5 Lans. 71; by it is meant disability from doing substantially all kinds of the plaintiff's accustomed labor to some extent, and that the assured must be deprived of the power to do to any extent substantially all the kinds of his usual labor; 8 Am. Law Reg. N. S. 233; where the provision was for total disability there could be no recovery if the assured were able to do some parts of the accustomed work pertaining to his business or, if totally disabled in his own pursuit, he should be able to engage in some other; 46 Ia. 631.

Where the provision was that the injured must be "wholly disabled to prevent him from the prosecution of any and every kind of business pertaining to his occupation," it was held error to instruct the jury that the defendant was to pay the amount agreed, if by the accident the plaintiff had been disabled in any way from prosecuting the business in which he was engaged, and that the plaintiff was entitled to recover for such time as he was "rendered wholly unable to do his accustomed labor, that is, to do substantially all kinds of his accustomed labor to some extent;" 67 Wis. 174. See, as to total disability, 4 Harv. L. Rev. 176.

It has been held that the meaning of the word accident, as used in a policy, is for the jury, as it is also to determine whether there was exposure to unnecessary danger; 50 Ill. App. 222; or whether the total loss of three fingers and a part of another on the same hand, destruction of the thumb, and a cutting of the hand is a loss of the hand causing "immediate, continuous, and total disability" within the meaning of that clause in an accident insurance policy; 61 N. W. Rep. (Wis.) 292; and see 34 N. Y. Supp. 545, where the plaintiff's hand was cut off a short distance above the knuckles, leaving nearly the whole palm and part of the second joint of the thumb, and it was held to be a loss of the entire hand within the meaning of the policy; overruling 30 *id.* 881. See REPRESENTATION; ACT OF GOD.

A provision in a policy that the medical adviser of the insurer may examine the body of the insured or attend any *post mortem* examination which may be held, only authorizes examination of the body unburied and does not warrant exhumation and autopsy, nor does an exception of injuries of which there is no visible mark; 11 Misc. Rep. 36.

See, generally, Cook, L. & Acc. Ins.; Niblack, Mut. Ben. & Acc. Insurance.

Casualty Insurance. A contract by which a person is indemnified against loss or damage to property, occasioned by accident. The term is thus applied in contradistinction to *accident* insurance by the Massachusetts Supreme Court, in 155 Mass. 404. The question was whether a foreign company licensed to do business in the state, but by statute restricted to one kind or class of business, was authorized to issue policies covering special classes of accidents, involving bodily injury and death. In this connection the court said: "The distinguishing feature of what is known in our legislation as 'accident insurance' is that it indemnifies against the effects of accidents resulting in bodily injury or death. Its field is not to insure against loss or damage to property, although occasioned by accident. So far as that class of insurance has been developed, it has been with reference to boilers, plate-glass, and perhaps to domestic animals and injuries to property by street cars, and is known as 'casualty insurance.'"

The distinction is founded in reason and the terminology is well adapted to the subject. Its precision is in sharp contrast to the vagueness and want of definiteness which characterize the references of text writers and judges to the various forms of insurance which have come into use with the increase in number of perils to life and property.

Among the perils covered by this kind of insurance are included: the loss of horses and cattle, theft of valuables, breakage of plate glass, loss by tornadoes or force of the elements, explosion or bursting of boilers, etc. These policies usually stipulate certain exceptions against which they will not insure, as fire and lightning; but such a policy was held to cover a loss by flood; 37 Atl. Rep. (Pa.) 402.

A carrier may lawfully insure against liability for loss of goods occasioned by the negligence of a servant; 66 N. W. Rep. (Minn.) 132; in such a case the liability of the insured becomes fixed on the happening of the accident, although the amount is contingent, to the extent that the amount which the insured may be adjudged to pay has not yet been ascertained; 82 Md. 535.

A policy against loss or damage to property, and loss of life or injury to employes of the insured or other persons, payable to the insured or the benefit of such persons or their legal representatives, is a contract of indemnity, and a person who is injured by such explosion cannot sue the insurer; 4 N. Y. Supp. 450.

In a policy on live stock the insurer is estopped to deny that the sum named in the policy is the insurable value of the horse; 58 Ill. App. 557. Where the policy covering "two horses" was cancelled as to

one, the insured may show that it was cancelled as to a mare covered by the policy; 64 N. W. Rep. (Minn.) 1018. The provision for notice to the insurer by telegram, of the sickness of an animal, did not require such notice of a sickness which lasted only ten minutes and did not recur for seven weeks; 67 N. W. Rep. (Minn.) 215. Where the insured had given notes for the horse, and in his contract for purchase stipulated that in case of the death of the animal within a certain time the vendor should take the insurance and give up the notes, it was not a breach of the stipulation in the policy that the vendee "is the sole, absolute, and unconditional owner;" *id.* The insurer is not bound by the consent of his agent to kill the horse insured, although suffering from an incurable disease; 59 N. W. Rep. (Ia.) 1.

Where plate glass was insured and the insurer, exercising his option, employed a person with whom he had a contract for that purpose to replace it (the policy providing that the insured should when necessary remove any woodwork, gas fixtures, or other obstruction), the negligent removal of gas pipes by the contractor and a resulting explosion causing a breakage of the new glass, did not render the insurer liable; 38 N. Y. Supp. 773.

Credit Insurance. A contract by which the insured is indemnified against loss by the failure of his customers to pay for goods sold to them. It is insurance against *excess* loss by the insured, *i. e.* against a loss which is in excess of a specified percentage of gross sales. It usually limits the losses insured against to a fixed amount by reason of sales to any one person, and limits the sales, covered by the policy, to customers having at least a specified minimum commercial rating by a specified commercial agency.

The insured is frequently termed the "indemnified," and so referred to in the policy.

A contract by which a corporation, though called a guarantee or surety company, undertakes, in consideration of premiums paid, to indemnify the other party to such contract against losses of uncollectable debts, is not a contract of suretyship, but a policy of insurance; 73 Fed. Rep. 95; 66 N. W. Rep. (Wis.) 528.

It is like any other insurance contract and is governed largely by the same rules; *id.* 68; *id.* 529; 41 *id.* 742; 132 N. Y. 540; 165 Mass. 501. It falls within the implied prohibition of a statute authorizing specified forms of insurance, against all not mentioned, and not being authorized by the Massachusetts Insurance Act it is invalid; *id.* The agent who solicits it is within the purview of a statute making him the agent of the insurer; 66 N. W. Rep. (Wis.) 528.

There is a distinction between this loss and other kinds of insurance with respect to the value of the policy, which has been thus stated: The loss provable on a policy of insurance is ordinarily the reserve value of the policy, or the amount sufficient to re-insure the holder in a solvent company for the same amount, to be paid upon a loss happening on the same conditions and within the same time. Credit insurance is peculiar; there does not appear to be any reserve value to the policies, nor are there any general tables to show the rate of re-insurance, nor any other solvent company in which re-insurance could be obtained. When no losses occurred it may be assumed that the premium is a fair price for the risk, and the loss may be taken to be a proportionate part of the premium. When actual losses have been sustained after the insolvency and before the proof, these losses may be accepted as evidence of the value of the policy. 19 N. J. L. J. 18; s. c. 32 Atl. Rep. (N. J.) 690.

Under a policy of indemnity to the insured, to the extent of $10,000, against losses in excess of one-fourth of one per cent. of their annual sales, twelve per cent. additional to be deducted from the total gross losses, the claim not to exceed $7,500, in any one firm, where there was a loss with one firm of $20,000, the total gross loss from which deductions were to be made was $7,500, and the balance was the indemnity to be paid; 164 Mass. 285.

A policy of credit insurance was terminated by the insolvency of the insured, and the deduction to be made before the "excess" was ascertained was calculated on the amount of sales made up to the time of insolvency and not on the amount stipulated for the term of the policy; 25 Ins. L. J. 842.

A provision in such a policy that amounts realized from other security or indemnity shall be deducted before the adjustment of a loss, does not entitle the insurer to deduct the proceeds of a policy in another company which provides that it shall not cover losses insured by the first company, but shall only attach when that company's policy is exhausted; 73 Fed. Rep. 81. One who is the agent of the insurer for the purpose of soliciting such insurance, transmitting applications, and collecting premiums, and who receives pay therefor, has power to make an additional agreement providing that if the customer is not rated in Dun's and is rated in Bradstreet's, the latter shall be binding on the insurer; 66 N. W. Rep. (Wis.) 528; and to vary details of the policy as to credit rating; *id.*

Employer's Liability Insurance. A contract by which the company agrees to reimburse an employer for any loss occasioned by his liability for damages to an employe, injured in his service.

The liability of the insurer becomes fixed on the happening of the accident or casualty, even though the amount of such liability is contingent, to the extent that the amount which the insured may be adjudged to pay has not been ascertained; 82 Md. 535.

Under a policy of insurance against damage for which the insured may be liable under an employer's liability act (*q. v.*)

where the workman has recovered damages for injuries in a common-law action, and not under the statute, the insurer will not be liable to reimburse the amount so recovered; 16 Can. S. C., 4th ser. 212; but where the policy contained a clause agreeing to indemnify the insured against damages sustained by the employe while engaged in operations connected with the business of iron work, it was held to cover injuries received by reason of the construction of a building for the use of such business; 67 N. W. Rep. (Wis.) 46.

A policy which provides that the employer shall not settle with an employe without the consent of the insurer, who was to assume control of litigation, is a contract of indemnity against liability, and payment by the employer of a judgment recovered against him is not a condition precedent to the insurer's liability; *id.*; and a person who is injured cannot sue the insurer; 4 N. Y. Supp. 450. But where the insurer was prohibited from suing until after judgment against him, in which case an action might be brought within thirty days after such judgment, it was held that the contract was not one of indemnity merely, so that an action would lie after judgment was recovered against the employer, though it was paid by him, such payment not being a condition precedent to recovery; 65 N. W. Rep. (Minn.) 353; nor is a discharge of liabilities by the insured, under a clause in the policy promising to pay "all damages with which the insured may be legally charged," such a contract being not one of indemnity alone, but also a contract to pay liabilities; 36 S. W. Rep. (Ark.) 1051. When the insured was required to give immediate notice to the insurer upon the occurrence of an accident and notice of any claim on account of it, the notice under the condition is not required until an accident happens and the employer has received notice of a claim made on account thereof; 65 N. W. Rep. (Minn.) 353.

Such a policy is in no sense a contract between the insurer and the employe, and any sum paid by the company to the employer on account of the death of an employe, whose widow had a right of action, is not an asset of the estate of the deceased; 22 S. W. Rep. (Ga.) 141.

It is generally provided in such policies that the insurer shall have control of the defence of any suits against the employer on claims covered by the insurance, and such a condition is strictly enforced; 15 Can. L. T. 86.

Fidelity Insurance. A contract to indemnify the insured against loss by reason of the default or dishonesty of the employe.

Bonds of indemnity given by fidelity insurance companies are analogous to ordinary policies of insurance, and are governed by the same principles of interpretation; 68 Fed. Rep. 459.

All conditions in the policy must be complied with as in other cases of insurance, and where one of them is the prosecution of the person whose action is insured against, before he can recover, against the insurer, it was held, by an equally divided court, that the insured must conform to this condition even if he thereby became liable to an action for damages; 9 Ins. L. J. 160.

A statement in the application as to the frequency of measures usually taken by the employer to secure the fidelity of the employed is a warranty the breach of which will defeat recovery; 28 Scot. L. Rep. 394; but in an application for insurance, declarations of the integrity of a clerk, in answer to questions which manifestly relate to the course of business of the employer, are mere representations and not warranties; 7 Exch. 744. Where the bond provides that answers made to questions asked in the application shall be warranties, and the answers are made on the employer's "best knowledge and belief," mere falsity of the answers is not sufficient to avoid the bond, but the company must show that they are "knowingly false;" 68 Fed. Rep. 459; and if such answers involved no misrepresentation or concealment, the contract could not be affected by loose parol statements, or concealment of facts about which no inquiry was made, or conduct on which no reliance was placed; 63 *id.* 48.

A representation that the person whose integrity is insured "has never been in arrears or default of his accounts" covers any which may have occurred prior to the time when he entered the service of the insured; 30 U. C. C. P. 360. To charge an embezzling employe with interest on the money embezzled converts the embezzlement into a debt and the insurer is not liable therefor; 66 N. W. Rep. (Wis.) 360.

Leaving money temporarily in an insecurely locked room when there were various means of safe-keeping available, was held a violation of a guarantee of "diligent and faithful performance of his duty," for which an insurer was liable; 6 Leg. N. (Can.) 311; 16 Can. L. J. 334. So allowing a customer to make an overdraft on a bank was held negligence in the bank's agent who permitted it, the agent and the customer being together involved in brokerage transactions; 7 *Revue Legale* 57; s. c. 14 L. C. Jur. 186.

Where the employer retains the employe in his service after he knows of the latter's dishonesty, and without notice to and assent of the insurer, he cannot recover; 71 N. W. Rep. (Minn.) 261; but this rule will not apply to mere breaches of duty or contract obligation, not involving dishonesty of the servant or fraud and concealment on the part of the master; *id.*

The employe is bound to reimburse the insurer for the loss sustained through him; 65 N. W. Rep. (Minn.) 351; but, upon the payment of a loss, the insurer is subrogated to the rights of the employer in the prosecution of dishonest employes; 22 Fed. Rep. 63, 639; as to any securities held with respect to the matter insured; 2 Vt. 518.

And a stipulation between the insurer and the employe that the evidence of payment by the insurer to the employer should be conclusive evidence against the employe as to the fact and extent of his liabibity to indemnify the insurer, is void as against public policy; *id.*

Where the indemnity was for one year, and it was provided that a claim under the bond or any renewal thereof should embrace only acts during its currency, it was held that each renewal was a separate contract, and the discovery, during the term of the renewal of theft committed during the running of the bond under a previous renewal, would not make the company liable therefor, when the discovery was too late to hold the insurer under the bond on the renewal in force when the thefts were committed; 33 S. W. Rep. (Ky.)828; and when it was provided that any claim under the bond should cover only defaults committed during its currency, and within twelve months prior to its discovery, it was held that it did not cover a default committed more than twelve months prior to such discovery which would have occurred within the year but for the falsification of the books within the year preceding; 71 Fed. Rep. 116, reversing 67 *id.* 874.

In a recent federal decision on this subject, it was held (1) Where a policy stipulates for a notification of the dishonesty of the employe as soon as practicable after the occurrence of the act, and the evidence as to when the dishonesty was discovered was conflicting, the question what is a reasonable time is for the jury. (2) It is not necessary to give notice of suspicions of dishonesty. (3) The fact that the insured corporation has passed into the hands of a receiver will not absolve the insurer from liability. (4) Where proof of loss under the bond is set forth with reasonable plainness and in a manner which a person of ordinary intelligence cannot fail to understand, a failure to explicitly aver that a loss has been caused is immaterial. (5) The fact that one member of a corporation was cognizant of an employe's dishonesty, and that fraudulent collusion existed between them, cannot make the corporation responsible for a false certificate of character issued by him without the knowledge of other directors; 72 Fed. Rep. 470.

Guaranty Insurance. This term has sometimes been used to express indiscriminately the classes of insurance herein entitled Credit, Fidelity, and Title insurance, (*q. v.*). The latter designations are conceived to be better adapted to the subject-matter, and their employment is not only the better usage but undoubtedly leads to a clearer understanding of the varied subject-matter now involved in the law of insurance.

The expression "Guaranty Insurance" has, however, an extended use in England and Canada, and is there used to designate insurance of the integrity of employes, the phrase "policy of guaranty" being in frequent use by the courts; 7 Jur. N. S. 1109; 30 U. C. C. P. 360; 16 Can. L. J. 334; 14 L. C. Jur. 186.

The term is also used in a few English cases involving the guaranty of merchants against losses in business from the bankruptcy, insolvency, or assignment with preference of their customers; 7 H. & N. 5.

In an American case of a date long prior to the use of these modern forms of insurance, an action of debt was sustained upon a policy of insurance guaranteeing to the bearer the payment of a note, and it was held that there was authority to issue such a policy under charter powers such as were at that time conferred upon insurance companies generally, and it was also held that the policy passed by delivery; 8 G. & J. 166.

Title Insurance. A contract to indemnify the owner or mortgagee of real estate from loss by reason of defective titles, liens, or incumbrances.

Answers to questions in applications for such policies are held to amount to a warranty and the question of materiality cannot be raised; 50 Minn. 429.

Where a title insurance company undertook to defend the interest of insured in the premises against a lien, it was bound to protect him through all stages of the proceeding to enforce the lien, as well after as before judgment therein, or notify him that it could not do so, and furnish him necessary information of the status of the proceeding in time to enable him to protect himself; and if, after giving such notice, the company defended the proceeding, but thereafter abandoned the defence, it was necessary for it to give insured another such notice; 66 N. W. Rep. (Minn.) 364.

Where an insurer agrees to indemnify a mortgagee against loss not exceeding $2,200 by reason of incumbrances, and to defend the land against such claims, a loss occurring by reason of the negligence of the insurer is not limited to the $2,200; 62 N. W. Rep. (Minn.) 287.

Under a title insurance policy, the fact that the conveyancing was done, not by the insurer but by the conveyancer of the insured, was held no defence, and the right of the insurer to do conveyancing, draw deeds, write wills, or the like, was denied, and their action in assuming such right, unwarranted by their charter, was declared to be a usurpation on the commonwealth; 9 Pa. Co. Ct. Rep. 634.

In cases of defective title, or an incumbrance requiring removal, the insured would be entitled, in an action on the policy, to recover the costs and expenses incurred in curing the defect or removing the incumbrance; but in case of total loss of title the value of the property lost is the measure of damages, and where the insured had been compelled to pay more than the amount of the policy to get a good title, judgment was entered for that sum; *id.*

When the title was insured under a policy to the mortgagee and the latter bought in the property at a foreclosure sale, the purchase did not cancel the mortgage so as

to annul the policy, but the insurer was liable to redeem the property from a sale under prior mechanic's liens; 70 Fed. Rep. 194.

See LIEN; MORTGAGE; TITLE; WARRANTY.

Insurance against Birth of Issue. A form of insurance common in England by which the heir presumptive protects his interest against either the birth of an heir apparent or the attainment of majority, or to a particular age by an existing heir apparent. It is also and more commonly practised by tenants for life under settlements, who are entitled to reversions in fee simple subject to estates tail in their own issue by a particular marriage, and who, by this method, are enabled to mortgage their estates without burdening their life interests with premiums on life insurance. In this form of insurance the principal elements to consider are the age and the health of the party and the age at which women will cease to bear children. See Jac. Ch. 585, 586; 4 Hare 124; 5 De G. & S. 226; 10 Beav. 463; 19 *id.* 565; 12 Jur. 666; 17 *id.* 342.

INSURANCE AGENT. An agent for effecting insurance may be such by appointment or the recognition of his acts done as such; 2 Phill. Ins. § 1848; 4 Cow. 645. He may be agent for either of the parties to the policy, or for distinct purposes for both; 16 T. B. Monr. 252; 20 Barb. 68.

An insurance agent's powers may be more or less extensive according to the express or implied stipulations and understandings between him and his principals. They may be for filling up and issuing policies signed in blank by his principals, for transmitting applications to his principals filled up by himself, as their agent or that of the applicant, for receiving and transmitting premiums, for adjusting and settling losses, or granting liberties and making new stipulations, or for any one or more of these purposes; 19 N. Y. 305; 25 Conn. 53, 465, 542; 12 La. 122; 37 N. H. 35; 12 Md. 348; 1 Grant, Cas. 472; 23 Pa. 50, 72; 26 *id.* 50; 82 Tex. 631; 23 Or. 576.

A *general* agent is one who represents the insurer in the conduct of the business generally in a particular place or territory. The powers of the general agent are thus stated by Dwight, Com., in 65 N. Y. 6, "It is clear that a person authorized to accept risks, to agree upon and settle the terms of insurance, and carry them into effect by issuing and renewing policies, must be regarded as the general agent of the company. (43 Barb. 351.) The possession of blank policies and renewal receipts, signed by the president and secretary, is evidence of a general agency. (40 Barb. 292.) The power of such an agent of a stock company is plenary as to the amount and nature of the risk, the rate of premium, and generally as to the terms and conditions, and he may make such memoranda and indorsements, modifying the general provisions of the policy, and even inconsistent therewith, as in his discretion seems proper, before the policy is delivered, and in some cases even afterward. (May, Ins. 129.) He may also insert, by memorandum or indorsement, a description of the property inconsistent with the description of the same contained in the application, and such change will be effectual to protect the insured, although the policy itself provides that all conditions named in the application are to be fully complied with and that the application shall be a part of the policy, and a warranty on the part of the insured. (May, Ins. 129; 5 Gray 497.)"

An agent holding a commission from an insurance company authorizing him to take risks generally, without placing any limitation thereon, either as to the kinds of risks or as to the territory within which they may be, is a general agent; and the fact that the policy provides that, in any matter relating to the insurance, no person shall be deemed the agent of the company unless authorized in writing, and that the agent's commission states that he shall be subject to the rules of the company, and to such instructions as may be given him from time to time, do not impose on one dealing with the agent a duty to ascertain his authority to issue a policy on a risk extra-hazardous and located in a place other than the town in which is situated the agent's office; 43 N. E. Rep. (Ind.) 41.

The resident agent of an insurance company having general authority to issue policies and renewals, fix rates and accept risks, collect premiums and cancel insurance, and perform all the duties of a recording agent, is a general agent for the locality; 56 Ill. App. 629. If the agent acts as such for both the company and the insured the contract may be avoided by either party who, at the time of the contract, did not know of such business agency for the other party or had, not knowing the facts, ratified it; 40 Pac. Rep. (Colo.) 147.

When an insurance agent solicited business in an adjoining state, assumed to act with full authority, received the premium and issued the policy, he may be considered as a general agent and not a special agent without authority to make the contract; 32 Pac. Rep. (Or.) 683.

It was held in a recent federal case that before the execution of a policy, the power and authority of a local and soliciting agent are co-extensive with the business intrusted to his care, and his positive knowledge as to material facts and his acts and declarations within the scope of his employment are obligatory on his principal, unless restricted by limitations well known to the other party at the time of the transaction; 74 Fed. Rep. 114.

The powers of agents were extensively discussed by the Kansas supreme court, which said:

"The bulk of the fire insurance business of the state is done by eastern companies, who are represented here by agents." "It is a matter of no small moment therefore that the exact measure and limit of the powers of these agents be understood. All

the assured knows about the company is generally through the agent. All the information as to the powers of, and limitations upon, the agent is received from him. Practically, the agent is the principal in the making of the contract. It seems to us therefore that the rule may be properly thus laid down that an agent authorized to issue policies of insurance and consummate the contract binds his principal by every act, agreement, representation, or waiver, within the ordinary scope and limit of insurance business which is not known by the insured to be beyond the authority granted to the agent;" 43 Kan. 497; s. c. 23 Pac. Rep. 637; and it was held in that case that an insurance company might, through its agents, by a parol contract, waive provisions stated in the policy with reference to the manner of altering or waiving its terms and conditions; 33 Mich. 143; the court, in considering the question whether an agent of a company might change by parol the conditions of a policy wherein it was provided that it could only be done upon the consent of the company written thereon, held that a written bargain is of no higher legal degree than a parol one. "Either may vary or discharge the other, and there can be no more force in an agreement in writing not to agree by parol than in a parol agreement not to agree in writing. Every such agreement is ended by the new one which contradicts it;" 11 Kan. 533; 49 Kan. 78.

"Where insurance companies deal with the community through a local agency, persons having transactions with the company are entitled to assume, in the absence of knowledge as to the agent's authority, that the acts and declarations of the agent are valid as if they proceeded directly from the company;" 20 Or. 547.

An attempted restriction upon the power of the officer or agents, acting within the scope of their general authority, to waive provisions of the policy, unless such waiver is written upon the policy itself, is ineffectual; 65 N. W. Rep. (Wis.) 742.

A provision in the application or in the policy making the person procuring the application the agent of the insured and not of the company, cannot change the legal status of such person as agent of the company or the law of agency if he is in fact the agent of the company; 23 S. E. Rep. (W. Va.) 733.

A broker was held to be the agent of the company where he solicited applications which were sent by him to the agent, by whom policies were sent to the broker and the premiums were charged to the broker; in such case the finding by the jury that the broker was the duly authorized agent of the company within the meaning of the provisions in the policy requiring payments of the premiums to the company or its duly authorized agent within a certain time, will not be disturbed; 33 Atl. Rep. (N. H.) 515. In the absence of direct proof of the broker's authority to act for the insurer or insured he may establish his agency by showing that the act relied on was within the scope of his authority; 34 Atl. Rep. (Md.) 373. Where insurance is procured through a broker, though at his solicitation, he is the agent of the insured and his acts will not bind the company, but when his employment extends only to the procurement of the policy he ceases to be an agent of the insured on the execution and delivery; *id.* A broker employed by a firm of insurance agents to solicit business on commission, having a desk in their office, is not such an agent as that notice to him by a policy holder is notice to the firm; 49 Hun 610; and one is a mere broker who only represented the company in a single transaction and whose name did not appear on the policy, though he may have told the insurer that he represented the company, collected the premiums, and delivered the policy; 54 N. W. Rep. (Minn.) 1117.

An agent has no power to delegate his authority so as to impose a liability on the company; 15 Can. L. T. 49; 34 Atl. Rep. (N. J.) 931.

But an insurance company is bound by the acts of a clerk of its agent in accepting risks and issuing policies against the same in the performance of his duties, and one dealing with the clerk, as such, is not bound to inquire into his authority as to those matters; *id.*

An agent's solicitor who took applications on which policies were issued has been held the agent of the company in effecting such insurance; 31 Atl. Rep. (Pa.) 868.

It has been held that a general agent (appointed by contract in this case) had power to waive cash payments of premiums and extend credit; 66 N. W. Rep. (Neb.) 445; 36 S. W. Rep. (Ark.) 1051; to receive notice of loss; 42 N. E. Rep. (Ind.) 286; waive proofs of loss; 2 Mo. App. Rep. 1375; 99 Mo. 50; *contra*, 65 N. W. Rep. (Minn.) 635. An agent who has power to adjust losses may by parol waive formal proofs of loss; 40 N. Y. Supp. 300. He cannot waive the iron safe clause, when that authority is expressly withheld from him by the policy; 35 S. W. Rep. (Tex.) 955. He can insure goods subject to chattel mortgage by indorsement on, or annexation to, the policy, though it is forbidden in the printed conditions; 40 N. Y. Supp. 300. Local agents cannot bind the company by consenting to vacancies; 32 S. W. Rep. (Tex.) 583; or that insurance on a risk, not usually taken by the company should take effect from the application (nor will it matter that a special agent, having no power to contract, was present and approved); 41 Pac. Rep. (Cal.) 298.

An agent, during the continuance of his agency, may at any time, even after loss, correct a policy issued by him by inserting the property included in the contract but omitted by mistake from the policy; 67 N. W. Rep. (Ia.) 577. The agent of a company, whose authority has been revoked by the execution by it of an assignment for

the benefit of creditors, has thereafter no authority to cancel policies and pay rebates or to set off rebates against a claim by the assignee for premiums collected; 35 N. Y. Supp. 612. The agent is liable for failure to cancel policy when directed to do so; 1 Pa. Super. Ct. 320; and when directed to cancel or reinsure a risk cannot reinsure in another company for which he is agent without its assent; 138 N. Y. 446.

It was held that a lodge officer who receives money for dues to the corporation does so as agent and must pay it over to the company. He cannot return it to those from whom it was collected because he fears that his principal may not be able to perform the contract; 52 Leg. Int. 473.

Notice to an agent of matters within his commission is such to the company; 16 Barb. 159; 1 E. L. & Eq. 140; 6 Gray 14; 50 Kan. 449; 111 N. C. 45; 142 N. Y. 382. See May, Ins. Ch. v.

The insurer has been held bound or estopped by the knowledge or action of or notice to the agent in the following cases: By his knowledge of foreclosure proceedings; 65 N. W. Rep. (Wis.) 742; of the existence of a mortgage, and his attaching a clause making the loss payable to the mortgagee; 18 So. Rep. (Miss.) 414; of a chattel mortgage; 149 N. Y. 477; of incumbrance; 36 S. W. Rep. (Tex.) 125; 67 N. W. Rep. (Wis.) 719; 40 N. Y. Supp. 300; where the agent is informed as to incumbrances and fills out the application, describing the property as not incumbered; 23 S. E. Rep. (W. Va.) 733; 33 Atl. Rep. (N. H.) 731; where the agent, having power to issue and cancel policies, allowed a policy to remain in force after notice of an incumbrance; 32 S. W. Rep. (Tex.) 810; where the application stated that no other company had refused to insure, and the agent had notice to the contrary; *id.;* where the agent incorrectly stated the title of the insured, after being correctly informed thereof; 44 Pac. Rep. (Col.) 756; where the agent was acquainted with premises of the insured and could have made an accurate description through his knowledge of them, the company is estopped to avoid its obligation by showing a mis-description of the property; 36 S. W. Rep. (Tex.) 146. Where the insured makes true answers to the questions in an application, the validity of the insurance is not affected by the falsity of the answers inserted by the agent; 37 N. Y. Supp. 146; 17 Misc. Rep. 115; 173 Pa. 16. In such case he will be regarded as the agent of the company, and not of the applicant and his knowledge of the falsity of the answer will be imputed to the company; 25 S. E. Rep. (Ga.) 333. The company is not estopped by the agent's knowledge when that is acquired by him by virtue of his relation as attorney for the insured in a transaction with which the company was not connected; 71 Fed. Rep. 473; or when the knowledge of the agent is acquired after the issuance of the policy; 67 N. W. Rep. (Ia.) 577; 77 Fed. Rep. 114. Or where the notice was to one of a firm of insurance agents, another member of which issued the policy in suit and was given several months before the policy was applied for; 35 S. W. Rep. (Tex.) 829; and it was held that when the policy provided that no agent could stipulate for a modification of its provisions not brought to the knowledge of his principal officer, knowledge of the general superintendent that material statements in the application were false was not knowledge of the company; 66 Conn. 227. See, generally, an extended discussion and collection of cases on the authority of insurance agents, 34 Am. L. Reg. N. S. 654; WARRANTY.

INSURANCE COMPANY. A company which issues policies of insurance,—an incorporated company, and either a stock company, a mutual one, or a mixture of the two. In a stock company, the members or stockholders pay in a certain capital which is liable for the contracts of the company. In a mutual company, the members are themselves the parties insured; in other words, all the members contribute premiums to the fund, which is liable for indemnity to each member for loss, according to the terms of the contract. In the mixed class, certain members, who may or may not be insured, contribute a certain amount of the capital, for which they hold certificates of shares, and are entitled to interest on the same at a stipulated rate, or to an agreed share of the surplus receipts, after the payment of losses and expenses, to be estimated at certain periods.

There are in some states companies formed upon the plan combining a stock capital with mutual insurance and issuing both bonds of mutual insurance and stock policies based upon the capital.

In New York it has been held that, under the statutes then in force regulating the formation of insurance companies and their organization, they could not be organized upon this plan so as to accept premium notes from some customers and cash premiums from others and assess the premium notes to pay losses in either branch of the business; 28 Barb. 576. See also 16 N. Y. 310.

Beneficial societies are sometimes held to be insurance companies within the meaning of the statutes regulating such companies; 46 Fed. Rep. 439; and see 72 Mo. 146; 105 Mass. 149; 32 N. W. Rep. (Minn.) 787; 118 Ill. 492. In Iowa it is said that where the main purpose of an order is that of life insurance, and insurance against sickness and disability, whatever purposes it may have, it is amenable to the laws of that state relating to insurance companies; it therefore must comply with the requirements of the statutes of that state (if the order is organized under the laws of another state), as to foreign insurance companies, before it can do business in that state; 78 Ia. 747. But in Wisconsin an association incorporated for the purpose of fraternal benevolent insurance upon the

co-operative or assessment plan was a charitable and benevolent order within the meaning of the statute which, in line with the defined policy of the state, was exempted from the general laws relating to life insurance; 75 Wis. 332. In Pennsylvania a foreign mutual aid association of the same character was held not liable for violation of the laws regulating insurance companies; 94 Pa. 481; and the same association was held not to be a mutual insurance company in Ohio, the state of its incorporation; 26 Ohio 19; so in many other states such associations are held not to be insurance companies within the purview of the general insurance laws of the state; 35 Kan. 51; 82 Ky. 102; 59 Ia. 125; 90 Ill. 166; 62 How. Pr. 386; 142 Mass. 224; 4 Mo. App. 429; 72 Mich. 603; 50 N. W. Rep. (Minn.) 1028. In Pennsylvania it was explicitly decided that an association organized not to do business for profit or gain but to aid pecuniarily the widows, orphans, heirs, and devisees of its members, is not an insurance company; 154 Pa. 99.

INSURANCE POLICY. See POLICY.

INSURED. A person whose life or property interest is covered by a policy of insurance. See INSURANCE.

INSURER. The underwriter in a policy of insurance; the party agreeing to make compensation to the other. Sometimes applied improperly to denote the party insured. See INSURANCE.

INSURGENTS. Rebels contending in arms against the government of their country who have not been recognized by other countries as belligerents. Insurgents have no standing in international law until recognized as belligerents. When recognized as belligerents the rules relating to contraband and other rules of war apply to them, but until so recognized their acts are merely the acts of individuals which may be piracy or any other crime according to the circumstances. The United States and other countries have statutes regulating dealings with insurgents in other countries and filibustering expeditions, as they are called, and expeditions to supply insurgents with arms and ammunition are forbidden; Snow, Lect. Int. Law 132.

In general insurgents have no belligerent rights. Their war vessels are not received in foreign ports, they cannot establish blockades which third powers will respect, and they must not interfere with the commerce of other nations. In the older books on international law they were usually treated as pirates. Their hostilities are never regarded as legal war. As late as 1885 in The Ambrose Light, 25 Fed. Rep. 408, this subject was discussed and the authorities fully reviewed, and it was held that the liability of a vessel to seizure as piratical, turned wholly on the question whether the insurgents had obtained any previous recognition of belligerent rights, either from their own or any other government. The court only refrained from entering a decree of forfeiture of the vessel, as a pirate, because of an implied recognition of the insurgents as belligerents, contained in a letter of the secretary of state of the date of the seizure. In recent years, however, a certain amount of recognition has been accorded to insurgents. In 1894, when insurgents were bombarding Rio Janeiro, Admiral Benham took the position that American merchant vessels, moving about the harbor and discharging cargoes, did so at their own risk. But any attempt on the part of the insurgents to prevent legitimate movements of our merchant vessels at other times was not to be permitted. Of this official action it has been said: "This establishment of this point, which seemed to be the logical outcome of recent practice, almost recognizes an imperfect status, or right of action afloat, for insurgents;" Snow, Lect. Int. L. 25,

In U. S. *v.* Trumbull, 48 Fed. Rep, 99, it was held that insurgents may purchase arms in the United States without violating U. S. Rev. Stat. § 5283, provided the arms are not designed to constitute any part of the furnishings or fittings of the vessel which carries them. This case was a prosecution in connection with the Itata which was also libelled for forfeiture by the United States. There was much discussion as to the meaning of the word "people" as used in the statute. It had been previously said to be one of the denominations of a foreign power; 6 Pet. 467; and that a vessel could not be said to be in the service of a foreign people, etc., unless they had received recognition as belligerents; 37 Fed. Rep. 800; the case of The Salvador, L. R. 3 C. P. 218, cited to the contrary, is distinguishable as resting on the broader provisions of the English foreign enlistment act; but in the Itata case the question was not raised by the facts, and it was simply held that the neutrality laws did not cover the case of a vessel which receives arms and munitions of war, in this country, with intent to carry them to a party of insurgents in a foreign country, but not with intent that they shall constitute any part of the fittings or furnishings of the vessel herself; and that she could not be condemned as piratical on the ground that she is in the employ of an insurgent party, which has not been recognized by our government as having belligerent rights; 56 Fed. Rep. 505, aff. 49 *id.* 646. See also 5 Wall. 62; 6 *id.* 91; Snow, Lect. Int. L. 135.

In The Three Friends, 166 U. S. 1, the vessel was seized for a violation of U. S. Rev. St. § 5283, and was released by the district court upon the ground, *inter alia*, that the libel did not show that the vessel was fitted out and armed with intent that it should "be employed in the service of a foreign prince or state, or of any colony, district, or people with whom the United States are at peace." The libel was amended so as to read "in the service of a certain

people, to wit, certain people then engaged in armed resistance to the government of the King of Spain, in the island of Cuba." The district court held that the word "people" was used in an individual and personal sense and not as an organized and recognized political power in any way corresponding to a state, prince, colony, or district. The supreme court reversed the decree, holding that the vessel had been improvidently released, and that the word "people" in the statute covers any insurgent or insurrectionary body conducting hostilities, although its belligerency has not been recognized; and although the political department of the government had not recognized the existence of a *de facto* belligerent power engaged in hostility with Spain, it had recognized the existence of insurrectionary warfare, and the case sharply illustrated the distinction between recognition of belligerency, and of a condition of political revolt. See BELLIGERENCY.

INSURRECTION. A rebellion of citizens or subjects of a country or state against its government.

Any open and active opposition of a number of persons to the executive of the laws of the United States, of so formidable a character as to defy, for the time being, the authority of the government, constitutes an insurrection, even though not accompanied by bloodshed and not of sufficient magnitude to make success possible; 62 Fed. Rep. 828.

As to the distinctions involved in the several words used to express organized resistance to governmental authority, see REBELLION.

The constitution of the United States, art. 1, s. 8, gives power to congress "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions."

Whenever the United States shall be invaded, or be in imminent danger of invasion, from any foreign nation or Indian tribe, it shall be lawful for the president of the United States to call forth such number of the militia of the state, or states, most convenient to the place of danger or scene of action, as he may judge necessary to repel such invasion, and to issue his orders, for that purpose, to such officer or officers of the militia as he shall think proper. And in case of an insurrection in any state against the government thereof, it shall be lawful for the president of the United States, on application of the legislature of such state, or of the executive (when the legislature cannot be convened), to call forth such number of the militia of any other state or states, as may be applied for, as he may judge sufficient to supress such insurrection; U. S. Rev. Stat. pp. 287, 1029.

Whenever the laws of the United States shall be opposed, or the execution thereof obstructed, in any state, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals by this act, it shall be lawful for the president of the United States to call forth the militia of such state, or of any other state or states, as may be necessary to suppress such combinations, and to cause the laws to be duly executed; and the use of militia so to be called forth may be continued, if necessary, until the expiration of thirty days after the commencement of the next session of congress.

Whenever it may be necessary, in the judgment of the president, to use the military force hereby directed to be called forth, the president shall forthwith, by proclamation, command such insurgents to disperse, and retire peaceably to their respective abodes, within a limited time; U. S. Rev. Stat. § 5300.

The president may declare by proclamation whenever the inhabitants of any state or part thereof are found by him to be in a state of insurrection, that such inhabitants are in a state of insurrection against the United States and thereupon all commercial intercourse between them and the citizens of the United States shall be unlawful and shall cease so long as such condition of hostility continues, and all goods and chattels, wares and merchandise coming from such state or section into other parts of the United States or proceeding from other parts of the United States to such state or section together with the vessel or vehicle conveying the same shall be forfeited to the United States; but commercial intercourse may, in the discretion of the president, be permitted and licensed with loyal persons residing in such insurrectionary section, so far as to supply such persons with necessaries; U. S. Rev. Stat. §§ 5300–5304.

Capital cases for insurrection by a citizen of the United States against the government of any foreign countries having treaties with the United States may be tried before the minister of the United States in such country; *id.* § 4090. See INSURGENTS.

INTAKERS. In English Law. The name given to receivers of goods stolen in Scotland, who take them to England. 9 Hen. V. c. 27.

INTEGER (Lat.). Whole; untouched. *Res integra* means a question which is new and undecided. 2 Kent 177.

INTEMPERATE. If the habit is to drink to intoxication whenever occasion offers, and sobriety or abstinence is the exception, then the charge of intemperate habits is established, and it is not necessary that this custom should be an everyday rule; 63 Ala. 152. See 76 Ill. 213; 9 R. I. 355. See HABITUAL DRUNKARD; DRUNKENNESS.

INTENDANT. One who has the charge, management, or direction of some office, department, or public business.

INTENDED TO BE RECORDED. This phrase is frequently used in conveyancing, in deeds which recite other deeds which have not been recorded. In Pennsylvania, it has been construed to be a covenant, on the part of the grantor, to procure the deed to be recorded in a reasonable time; 2 Rawle 14.

INTENDENTA. In Spanish Law. The immediate agent of the minister of finance, or the chief and principal director of the different branches of the revenue, appointed in the various departments in each of the provinces of the Spanish monarchy. See Escriche, *Intendente*.

INTENDMENT OF LAW. The true meaning, the correct understanding, or intention, of the law; a presumption or inference made by the courts. Co. Litt. 78.

It is an intendment of law that every man is innocent until he is proved to be guilty; see PRESUMPTION OF INNOCENCE; that every one will act for his own advantage; that every officer acts in his office with fidelity; that the children of a mar-

ried woman, born during the coverture, are the children of the husband. See BASTARDY. Many things are intended after verdict, in order to support a judgment; but intendment cannot supply the want of certainty in a charge in an indictment for a crime; 5 Co. 121. See Com. Dig. *Pleader* (C 25), (S 31); Dane, Abr. Index; 14 Viner, Abr. 449; 1 Halst. Ch. N. J. 132.

INTENT. See COMMON INTENT.

INTENTIO (Lat.). **In Civil Law.** The formal complaint or claim of a plaintiff before the prætor. "*Reus exceptionem velut intentionem implet:*" *id est, reus in exceptione actor est.* The defendant makes up his plea as if it were a declaration; *i. e.* the defendant is plaintiff in the plea.

In Old English Law. A count or declaration in a real action (*narratio*). Bracton, lib. 4, tr. 2, c. 2; Fleta, lib. 4, c. 7; Du Cange.

INTENTION. A design, resolve, or determination of the mind.

In Criminal Law. To render an act criminal, a wrongful intent must exist; 1 Leach 280; 7 C. & P. 428; Paine 16; 2 McLean 14; 2 Ind. 207; 30 Me. 132; 1 Rice 145; 4 Harring. 315; 19 Vt. 564; 3 Dev. 114; 90 N. C. 741. And with this must be combined a wrongful act; as mere intent is not punishable; 9 Co. 81 *a*; 2 C. & P. 414; 2 Mass. 138; 2 B. Monr. 417; 10 Vt. 353; 1 Dev. & B. 121; Gilp. 306; 5 Cra. 311; but see Jebb 48 n.; R. & R. 308; 1 Lew. Cr. Cas. 42; and generally, perhaps always, the intent and act must concur in point of time; 1 Bish. Cr. L. § 207; Cl. Cr. L. 45, 238, 265; but a wrongful intent may render an act otherwise innocent criminal; 1 C. & K. 600; C. & Marsh. 236; 2 Allen 181; 1 East, Pl. Cr. 255; 6 Conn. 9; 22 *id.* 153.

Generally, where any wrongful act is committed, the law will infer conclusively that it was intentionally committed; 2 Gratt. 594; 4 Ga. 14; 2 Allen 179; 103 N. Y. 360; as the intent to take life may be inferred from the character of the assault, the use of a deadly weapon and the attendant circumstances; 94 Ala. 85; 82 Wis. 571; and also that the natural, necessary, and even probable consequences were intended; 3 Maule & S. 11, 15; 5 C. & P. 538; 3 Wash. C. C. 515; 13 Wend. 87; 3 Pick. 304; 2 Gratt. 594; 1 Bay 245; 9 Humphr. 66; 1 Ov. 305; 98 U. S. 67.

Generally speaking, when a statute makes an act indictable, irrespective of guilty knowledge, ignorance of fact is no defence; 118 Mass. 441; L. R. 2 C. C. 154; 56 Mo. 546; see 41 N. J. L. 552; *contra*, 32 Ohio St. 456; s. c. 30 Am. Rep. 614, where the subject is fully treated. See IGNORANCE.

When by the common law, or by the provision of a statute, a particular intention is essential to an offence, or a criminal act is attempted but not accomplished, and the evil intent only can be punished, it is necessary to allege the intent with distinctness and precision, and to support the allegations with proof. On the other hand, if the offence does not rest merely in tendency, or in an attempt to do a certain act with a wicked purpose, but consists in doing an unlawful or criminal act, the evil intention will be presumed, and need not be alleged, or, if alleged, it is a mere formal averment, which need not be proved; Bigelow, C. J., 2 Allen 180. See 1 Chitty, Cr. Law 233; 6 East 474; 5 Cush. 306; 153 U. S. 608; 93 N. C. 516.

This proof may be of external and visible acts and conduct from which the jury may infer the fact; 8 Co. 146; or it may be by proof of an act committed, as, in case of burglary with intent to steal, proof of burglary and stealing is conclusive; 5 C. & P. 510; 9 *id.* 729; 2 Mood. & R. 40. When a man intending one wrong fails, and accidentally commits another, he will, except where the particular intent is a substantive part of the crime, be held to have intended the act he did commit; 13 Wend. 159; 21 Pick. 515; 1 Gall. 624; 1 C. & K. 746; Rosc. Cr. Ev. 272.

Where intent is a material ingredient of the crime it is necessary to be averred, but it may always be averred in general terms; 153 U. S. 584,608.

In Contracts. An intention to enter into the contract is necessary: hence the person must have sufficient mind to enable him to intend.

In Wills and Testaments. The intention of the testator governs unless the thing to be done be opposed to some unbending rule of law; 6 Cruise, Dig. 295; 6 Pet. 68. This intention is to be gathered from the instrument, and from every part of it; 3 Ves. 105; 58 N. H. 511; 23 W. Va. 166; 103 Ill. 607; 128 Mass. 374; 60 Ala. 605; and from a later clause in preference to an earlier; 74 Me. 413; 94 Ill. 158; 62 Ala. 510. See WILLS; CONSTRUCTION.

As to statutes, see INTERPRETATION; CONSTRUCTION; STATUTES.

INTENTIONE. A writ that lay against him who entered into lands after the death of a tenant in dower, or for life, etc., and held out to him in reversion or remainder. Fitz. N. B. 203.

INTER ALIA (Lat.). Among other things: as, "the said premises, which, *inter alia*, Titius granted to Caius."

INTER ALIOS (Lat.). Between other parties, who are strangers to the proceeding in question.

INTER APICES JURIS. See APEX JURIS.

INTER CÆTEROS. Among others; in a general clause; not by name (*nominatim*). A term applied in the civil law to clauses of disinheritance in a will. Inst. 2, 13, 1; *id.* 2, 13, 3.

INTER CANEM ET LUPUM (Lat. between the dog and the wolf). The twi-

light; because then the dog seeks his rest, and the wolf his prey. Co. 3d Inst. 63.

INTER PARTES (Lat. between the parties). A phrase signifying an agreement professing in the outset, and before any stipulations are introduced, to be made between such and such persons: as, for example, "This indenture, made the —— day of ——, 1848, between A B of the one part, and C D of the other." It is true that every contract is in one sense *inter partes*, because to be valid there must be two parties at least; but the technical sense of this expression is as above mentioned; Addison, Contr. 9.

This being a solemn declaration, the effect of such introduction is to make all the covenants comprised in a deed to be covenants between the parties and none others: so that should a stipulation be found in the body of a deed by which "the said A B covenants with E F to pay him one hundred dollars," the words "with E F" are inoperative, unless they have been used to denote for whose benefit the stipulation may have been made, being in direct contradiction with what was previously declared, and C D alone can sue for the non-payment; it being a maxim that where two opposite intentions are expressed in a contract, the first in order shall prevail; 8 Mod. 116; Rolle 196; 7 M. & W. 63. But this rule does not apply to simple contracts *inter partes;* 2 D. & R. 277; 3 *id.* 273.

When there are more than two sides to a contract *inter partes*, for example, a deed, as, when it is made between A B of the first part, C D of the second, and E F of the third, there is no objection to one covenanting with another in exclusion of the third. See 5 Co. 182; 8 Taunt. 245; 4 Q. B. 207.

INTER SE, INTER SESE (Lat.). Among themselves. Story, Partn. § 405.

INTER-STATE LAW. See EXTRADITION; FUGITIVE FROM JUSTICE; COMMERCE; Rorer, Int. St. Law; 10 Am. L. Reg. N.S. 416.

INTER VIVOS (Lat.). Between living persons; as a gift *inter vivos*, which is a gift made by one living person to another. It is a rule that a fee cannot pass by grant or transfer *inter vivos*, without appropriate words of inheritance. 2 Pres. Est. 64. See DONATIO CAUSA MORTIS; GIFTS.

INTERCALARE. In the Civil Law. To introduce or insert among or between others; to introduce a day or month into the calendar; to intercalate. Dig. 50, 16, 98, pr.

INTERCEDERE. In the Civil Law. To become bound for another's debt.

INTERCHANGEABLY. By way of exchange or interchange. This term properly denotes the method of signing deeds, leases, contracts, etc., executed in duplicate, where each party signs the copy he delivers to the others.

INTERCOMMON. To enjoy a right of common mutually with the inhabitants of a contiguous town, vill, or manor. When the commons of two adjacent manors join, and the inhabitants of both have immemorially fed their cattle promiscuously on each other's common, this is called *intercommoning*. 2 Bla. Com. 33; *Termes de la Ley.*

INTERDICT. In Civil Law. The formula according to which the prætor ordered or forbade anything to be done in a cause concerning true or *quasi* possession until it should be decided definitely who had a right to it. But in modern civil law it is an extraordinary action, by which a summary decision is had in questions of possession or *quasi* possession. Heineccius, Elem. Jur. Civ. § 1287. Interdicts are either prohibitory, restitutory, or exhibitory; the first being a prohibition, the second a decree for restoring possession lost by force, the third a decree for the exhibiting of accounts, etc.; *id.* 1290; Howe, Stud. Civ. L. 252; Dig. 4, 15, 2. It is said by the writers of the Institutes that some (including Gaius) thought that from the true etymology of the word *interdict*, it should be applied only to prohibitory orders, and that those which were restitutory or exhibitory were properly *decreta*, but that "the usage has obtained of calling them all interdicts as they are pronounced between two parties, *inter duos dicuntur;*" *id.* Interdicts were decided by the prætor without the intervention of a *judex*, differing in this from actions (*actiones*).

According to Isidorus, however, the derivation is from *quod interim dicitur*. See Voc. Jur. Utr.; Sand. Just. 489; Mackeldey, Civ. Law §§ 258–64. In the formulary procedure the interdict was preliminary and conservative, and afterwards made final or not according to the result of the litigation. After the disappearance of this procedure, as a recent writer says, "no doubt the remedies remained by the forms of action which succeeded. Some of the most important of these were really injunctions, either prohibitory or mandatory." Howe, Stud. Civ. L. 253. Like an injunction, the interdict was merely personal in its effects; and it had also another similarity to it, by being temporary or perpetual. Dig. 43. 1. 1, 3, 4. This similitude prompts the suggestion by the author last quoted, that "it is easy to perceive how they may have been adopted from the Roman and Canon law into the equity practice of England, and thence into that of America;" Howe, Stud. Civ. L. 254. See Story, Eq. Jur. § 865; Halifax, Anal. ch. 6. See INJUNCTION.

In Ecclesiastical Law. An ecclesiastical censure, by which divine services are prohibited either to particular persons or particular places. These tyrannical edicts, issued by ecclesiastical powers, have been abolished in England since the reformation, and were never known in the United States. See 2 Burn, Eccl. Law 340. Baptism was

allowed during an interdict; but the eucharist was denied, except in the article of death, and burial in consecrated ground was denied, unless without divine offices. For the ancient form of an interdict, see Tomlin's L. Dict. *h. t.*

INTERDICTION. A prohibition of commercial intercourse between the citizens or subjects of the country enacting or proclaiming it and some other specified country or port.

By act of March 1, 1809, congress interdicted commercial intercourse between the United States and Great Britain, and in a case arising under this act, the United States supreme court held that the term interdiction means an entire cessation, for the time being, of all trade whatever.

It has been held in England and in this country that interdiction of commerce with the port of destination is not a loss within a policy of marine insurance; 11 East 22; 6 Wheat. 176; 3 Mas. 6; *contra*, 4 Dall. 417; 9 East 283; 3 Wheat. 183; 12 S. & R. 440; 1 Wash. C. C. 382. See 3 Kent 293.

In Civil Law. A judicial decree, by which a person is deprived of the *exercise* of his civil rights.

The condition of the party who labors under this incapacity.

There can be no voluntary interdiction, as erroneously stated by some writers: the *status* of every person is regulated by the law, and can in no case be affected by contract.

Interdiction is the civil law proceeding by which, as by inquisition in lunacy (*q. v.*) under English and American law, a person is found to be incapable of the management of himself and his estate. It is devised for the special protection of the rights and persons of those who are unable to administer them themselves, and although the person interdicted is not permitted to *exercise* his legal rights, he is by no means deprived of their *enjoyment*. These rights are exercised for his benefit by a *curator*, who is held to a strict accountability, and the fidelity of whose administration is secured, in most cases, by a bond of security, and always by a tacit mortgage on all his property.

By the law of the *twelve tables*, *prodigals* alone could be interdicted. Curators were appointed for those afflicted with mental aberration, idiocy, or incurable diseases, *qui perpetuo morbo laborant*; but no decree of interdiction was pronounced against them. By the modern civil law, prodigality and profligacy are not sufficient reasons for interdiction; but whenever a person is prostrated, either by *mental* or *physical* disease, to such a degree as to be permanently disabled from administering his estate, he may be interdicted.

A decree of interdiction can be pronounced only by the court having jurisdiction of the domicil of the person to be affected. The causes assigned are imbecility, insanity, and madness.

The application may be by any relative, or wife or husband; or, in case of madness, the public law officer *must* apply, or in case of imbecility or insanity he *may* do so. The proceeding is by petition; the acts relied on are stated in writing; and the opinion of the family council is taken, the petitioners not participating. The judgment must be given at a public sitting, and, pending the proceedings, temporary administration may be provided for. Even if the application is rejected, the person against whom the proceedings are taken may be forbidden to go to law, compromise, borrow, receive payment of capital or give discharges, conveyances, or mortgages without advice of counsel appointed by the same judgment.

An appeal is provided, and there may be another examination. The decree must be duly served and recorded, and posted in the tribunal of birth. From the day of judgment all acts are void, and it may have a retroactive effect, by which previous acts are annulled.

After death a person's sanity can only be attacked if he has been interdicted, unless the insanity result from the act questioned.

A guardian or curator is appointed, as in case of minors, to which it is by statute assimilated; the husband for his wife, as of right; the wife may be appointed for her husband, in which case the family council regulate the manner of administration.

No one is compelled to act as guardian for more than ten years. The income must be used primarily to better the condition of the interdicted person. If his child marry, the family council fix the dowry. Interdiction ceases with the causes which made it necessary, and it may be withdrawn by proceedings similar to those by which it was obtained.

Such are substantially the rules on the subject of interdiction found in the law of Louisiana; Civ. Code, Tit. ix. Art. 389–426, and the French Code, Art. 489–512, Cashard's translation. They are substantially the same in all the modern codes having the civil law for their basis.

In Louisiana it has been held that mental weakness is not sufficient unless interdiction be necessary for protection of person or property; 31 La. Ann. 757; the motives of the party applying should be fully investigated; 29 *id.* 302; trial by jury cannot be demanded and judgment may be at chambers; 38 *id.* 523; a non-resident cannot be interdicted; 32 *id.* 679; testimony of experts does not control the court and is of little weight when they had seen defendant only once; 31 *id.* 757; and opinions of non-experts are of little weight; they should state facts; 36 *id.* 563; costs of proceeding to interdict a wife, include fees of her lawyers, and are a debt of the community; 30 *id.* 336.

A judge may in the exercise of a sound legal discretion, without a special statutory authority, exclude relations from a family meeting to recommend a curator, and he is not restricted to a narrow construction of the term "conflicting interest" in the statute disqualifying persons, having such an interest, for participating in the family meeting; 44 La. Ann. 1027. In the selection of a curator the family meeting is not limited to applicants, nor to persons suggested by relations of the interdict; *id.*

In Scotch Law. A legal restraint laid upon persons liable to be imposed upon, though having, to some extent, the exercise of reason, to prevent them from signing any deed affecting heritage, to their own prejudice, without the consent of their curators or interdictors. It is nearly superseded in practice by voluntary trusts. In cases where a trust cannot be obtained, the law relating to unconscionable bargains and to facility and circumvention is usually sufficient protection. Interdiction was either *voluntary*, which was generally executed in the form of a bond, obliging the grantor to do no deed affecting his estate without the consent of certain friends therein mentioned, or *judicial*, imposed by the court of sessions upon an action commenced by a near kinsman to the party and sometimes by the *nobile officium* of the court. The latter sort of interdiction must be taken off by the authority of the court which imposed it. Voluntary interdiction cannot be recalled at the pleasure of the person interdicted, but it may be : 1. By a sentence of the court of sessions declaring that there was *ab initio* no sufficient ground, or that it no longer exists. 2. By the joint action of the person interdicted and the interdictor. 3. The restraint ceases where the bond requires a certain number of the quorum, if they be reduced by death below that number ; Ersk. Prin. I. vii. 30–32.

INTERDICTION OF FIRE AND WATER. Banishment by an order forbidding all persons to supply the person banished with fire or water, they being considered the two necessaries of life. This banishment was termed by Livy *legitium exilium*.

INTERDICTUM SALVIANUM (Lat). **In Roman Law.** The Salvian interdict. A process which lay for the owner of a farm to obtain possession of the goods from his tenant who had pledged them to him for the rent of the land. Inst. 4, 15, 3.

INTERESSE (Lat.). Interest. The interest of money ; also an interest in lands.

INTERESSE TERMINI (Lat.). An interest in the term. The demise of a term in land does not vest any estate in the lessee, but gives him a mere right of entry on the land, which right is called his interest in the term, or *interesse termini*. See Co. Litt. 46 ; 2 Bla. Com. 144 ; 10 Viner, Abr. 348 ; Dane, Abr. Index ; Watk. Conv. 15 ; 1 Washb. R. P. Index.

INTEREST (Lat. it concerns ; it is of advantage).

In Contracts. The right of property which a man has in a thing. See INSURABLE INTEREST.

On Debts. The compensation which is paid by the borrower of money to the lender for its use, and, generally, by a debtor to his creditor in recompense for his detention of the debt.

The compensation allowed by law or fixed by the parties to a contract for the use or forbearance or detention of money. 3 Tex. Civ. App. 81.

Legal interest is the rate of interest established by the law of the country, which will prevail in the absence of express stipulation ; *conventional* interest is a certain rate agreed upon by the parties. 2 Cal. 568.

Who is bound to pay interest. The *contractor* who has expressly or impliedly undertaken to pay interest is, of course, bound to do so.

Executors ; 12 Conn. 350 ; 7 S. & R. 264 ; *administrators ;* 4 Gill & J. 453 ; 35 Miss. 321 ; *assignees of bankrupts or insolvents ;* 2 W. & S. 557 ; but see 149 U. S. 95 ; *guardians ;* 29 Ga. 82 ; 14 La. Ann. 764 ; *and trustees ;* 1 Pick. 528 ; 10 Gill & J. 175 ; 15 Md. 75 ; 29 Ga. 82 ; 61 *id.* 564 ; 11 Cal. 71 ; who have kept money an unreasonable length of time ; 18 Pick. 1 ; 29 Ga. 82 ; and have made or might have made it productive ; 4 Gill & J. 453 ; 1 Pick. 530 ; 3 Woods 542, 724 ; Myrick, 8, 168 ; are chargeable with interest. Where a litigant claiming money as his own, was permitted to collect and retain it, subject only to the order of the court should it afterwards be decided he was not entitled to it, he is chargeable with interest ; 93 Ky. 129. When a loan is negotiated, the retention of a portion of it for an unreasonable time entitles the borrower to a rebate of interest ; 144 U. S. 451.

Tenants for life must pay interest on incumbrances on the estate ; 4 Ves. 33 ; 1 Vern. 404, n. ; Story, Eq. Jur. § 487 ; 5 Johns. Ch. 482. Where interest is reserved by contract, a mere readiness to pay will not relieve the debtor from liability therefor ; 24 Pa. 110.

Who are entitled to receive interest. The lender upon an express or implied contract for interest. Executors, administrators, etc., are in some cases allowed interest for advances made by them on account of the estates under their charge ; 10 Pick, 77 ; 6 Halst. Ch. 44. See 9 Mass. 37. The rule has been extended to trustees ; 1 Binn. 488 ; and compound interest, even, allowed them ; 16 Mass. 228.

On what claims allowed. When the debtor expressly undertakes to pay interest, he or his personal representatives having assets are bound to pay it. But if a party has accepted the principal, it has been determined that he cannot recover interest in a separate action ; 1 Esp. N. P. 110 ; 3 Johns. 220. See 1 Campb. 50 ; 1 Dall. 315 ; 45 Me. 542 ; 9 Ohio St. 452.

On contracts where, from the course of dealings between the parties, a promise to pay is implied ; 1 Campb. 50 ; 3 Brown, Ch. 436 ; Kirb. 207 ; 2 Wend. 501 ; 33 Ala. N. S. 459 ; 8 Ia. 163. *On account stated* or other liquidated sum, whenever the debtor knows precisely what he is to pay and when he is to pay it ; 2 W. Bla. 761 ; 2 Ves. 365 ; 2 Burr. 1085 ; 5 Esp. 114 ; 1 Hayw. 173 ; 2 Cox 219 ; 20 N. Y. 463 ; 13 Ind. 475 ; 8 Fla. 161 ; 86 Ky. 668. But interest is not due for unliquidated damages, or on a running

account where the items are all on one side, unless otherwise agreed upon; 1 Dall. 265; 4 Cow. 496; 5 Vt. 177; 1 Speers 209; 1 Rice 21; 2 Blackf. 313; 1 Bibb 443; 20 Ark. 410; 7 Utah 510; see 63 Hun 624; 8 Mont. 312; but when the damages are to be assessed on the principle of compensation, and with reference to a definite standard, the jury may give additional damages in the nature of interest. This, however, is not strictly interest, but compensation for delay, measured by the rate of interest; 124 Pa. 571; 130 Pa. 37. *On the arrears of an annuity* secured by a specialty; 3 Atk. 579; 9 Watts 530; or given in lieu of dower; 1 Harr. Del. 106; 3 W. & S. 437. *On bills and notes* if payable at a future day certain, after due; 3 D. & B. 70; 5 Humphr. 406; 19 Ark. 690; 13 Mo. 252; 50 Kan. 440; if payable on demand, after a demand made; 5 Ves. 133; 15 S. & R. 264; 1 M'Cord 370; 6 Dana 70; 1 Hempst. 155; 18 Ala. N. S. 300; 94 Mich. 411. See 4 Ark. 210; 83 Tex. 446. But see 40 Ill. App. 613, where interest on a note due on demand was held to run from its date. Where the terms of a promissory note are that it shall be payable by instalments, and on the failure of any instalment the whole is to become due, interest on the whole becomes payable from the first default; 4 Esp. 147. Where, by the terms of a bond or a promissory note, interest is to be paid annually, and the principal at a distant day, the interest may be recovered before the principal is due; 1 Binn. 165; 2 Mass. 568. An accepted draft bears interest from the time of delivery, when no time of payment is stated therein; 65 Hun 625.

When not stipulated for by contract or authorized by statute, interest is allowed by the courts as damages for the detention of money or property; 136 U. S. 211.

On a deposit by a purchaser, which he is entitled to recover back, paid either to a principal or an auctioneer; Sugd. Vend. 327; 3 Campb. 258; 5 Taunt. 625. But see 4 Taunt. 334. *For goods sold and delivered*, after the customary or stipulated term of credit has expired; 2 B. & P. 337; 2 Dall. 193; 11 Ala. 451; 1 McLean 411; 12 N. H. 474; 26 Ga. 465; 8 Ia. 163. *On judgment debts;* 2 Ves. 162. In a judgment on *sci. fa.* the interest is calculated on the old judgment and the new judgment entered for a lump sum; 5 Binn. 61; 1 H. & J. 754; 3 Wend. 496; 4 Metc. 317; 6 Halst. 91; 3 Mo. 86; 4 J. J. Marsh. 244; T. U. P. Charlt. 138. See 3 M'Cord 166; 1 Ill. 52; 14 Mass. 239; 50 Ark. 416. *On judgments affirmed* in a higher court; 4 Burr. 2128; 2 H. Bla. 267, 284; 2 Campb. 428, n.; 3 Taunt. 503. See 3 Hill, N. Y. 426; 9 C. C. App. 468. In an accounting for profits made by selling an article contrary to contract, interest should be allowed: 48 Fed. Rep. 789; also on the amount found as damages for breach of contract; 82 Tex. 608. *On money obtained by fraud*, or where it has been wrongfully detained; 9 Mass. 504; 1 Campb. 129; 3 Cow. 426. *On money paid by mistake*, or recovered on a *void* execution; 1 Pick. 212; 9 S. & R. 409; 3 Sumn. 336; 64 Hun 632; see 160 Mass. 438. *On money lent* or laid out for another's use; 2 W. Bla. 761; 1 Dall. 349; 2 Hen. & M. 381; 1 Hayw. 4; 9 Johns. 71; 2 Wend. 413; 1 Conn. 32; 7 Mass. 14; 1 Mo. 718. *On money had and received* after demand; Perl. Int. 122; 1 Ala. N. S. 452; 4 Blackf. 21, 164. On the *value of an animal* in an action for causing its death: 50 Ark. 169; 125 Pa. 24. *On purchase-money* which has lain dead, where the vendor cannot make a title; Sugd. Vend. 327. *On purchase-money* remaining in purchaser's hands to pay off incumbrances; 1 Sch. & L. 134. See 1 Wash. Va. 125; 5 Munf. 342; 6 Binn. 435. On *taxes* wrongfully collected; 72 Tex. 509. See 159 Mass. 383. *Rent in arrear* due by covenant bears interest, unless under special circumstances, which may be recovered in action; 6 Binn. 159. See 46 Ohio St. 66; but no distress can be made for such interest; 2 Binn. 246. Interest cannot, however, be recovered for arrears of rent payable in wheat; 1 Johns. 276. See 2 Call 249; 3 Hen. & M. 463.

Interest cannot be recovered as damages for the detention of the principal, after the principal sum has been paid; 153 U. S. 456. Where interest is recoverable, not as a part of the contract, but by way of damages, if the plaintiff has been guilty of laches in unreasonably delaying the prosecution of his claim, it may be properly withheld; 135 U. S. 271; 140 *id.* 694. Interest allowed for non-payment of a judgment is in the nature of statutory damages; 146 U. S. 162.

On legacies. On specific legacies interest is to be calculated from the date of the death of the testator; 2 Ves. Sen. 563; 5 W. & S. 30; 3 Munf. 10.

A *general* legacy, when the time of payment is *not* named by the testator, is not payable till the end of one year after testator's death, at which time the interest commences to run; 13 Ves. 333; 1 Sch. & L. 10; 5 Binn. 475; 3 V. & B. 183; 16 R. I. 98; 29 W. Va. 784; and this is so whether the will has been proved during the year or not; 149 Mass. 82. But where only the interest is given, no payment will be due till the end of the second year; 7 Ves. 89.

Where a general legacy is given, and the time of payment is named by the testator, interest is not allowed before the arrival of the appointed period of payment, and that notwithstanding the legacies are vested; Prec. in Ch. 337. But when that period arrives, the legatee will be entitled although the legacy be charged upon a dry reversion; 2 Atk. 108. See, also, 3 Atk. 101; 3 Ves. 10; 4 Brown, Ch. 149, n.; 1 Cox, Ch. 133. When the executor can pay a legacy without any possible inconvenience to the estate, it has been held that interest begins to run at once; 113 N. Y. 207. When a legacy is given payable at a future day with interest, and the legatee dies before it becomes payable, the arrears of the interest up to the time of his death must be paid to his personal representatives; McClel. 141. And a bequest

of a sum to be paid annually for life bears interest from the death of testator; 5 Binn. 475; 26 W. N. C. Pa. 374. And so also for a legacy of income for the support and maintenance of the legatee; 106 Pa. 268; especially is this so when the legacy is to be paid by the executors transferring to the trustees for the legatee interest-bearing securities belonging to the testator's estate; *id.*

Where the legatee is a child of the testator, or one towards whom he has placed himself *in loco parentis*, the legacy bears interest from the testator's death, whether it be particular or residuary, vested but payable at a future time, or contingent if the child have no maintenance. In that case the court will do what in common presumption the father would have done—provide necessaries for the child; 2 P. Wms. 31; 3 Ves. 13, 287; Bacon, Abr. *Legacies* (K 3); 3 Atk. 432; 1 Dick. Ch. 310; 2 Brown, Ch. 59; 2 Rand. 409; 44 N. J. Eq. 506; 106 Pa. 268. In case of a child *en ventre sa mère* at the time of the father's decease, interest is allowed only from its *birth;* 2 Cox, Ch. 425. Where maintenance or interest is given by the will, and the rate specified, the legatee will not, in general, be entitled to claim more than the maintenance or rate specified; 3 Atk. 697, 716; 3 Ves. 286, n. And see further, as to interest in cases of legacies to children; 15 Ves. 363; 1 Brown, Ch. 267; 4 Madd. 275; 1 Swanst. 553; 1 P. Wms. 783; 1 Vern. 251; 3 V. & B. 183.

Interest is not allowed by way of maintenance to any other person than the legitimate children of the testator; 3 Ves. 10; 4 *id.* 1; unless the testator has put himself *in loco parentis;* 1 Sch. & L. 5, 6. A wife; 15 Ves. 301; a niece; 3 Ves. 10; a grandchild; 6 Ves. 546; 1 Cox, Ch. 133; are, therefore, not entitled to interest by way of maintenance. See 2 Wms. Exec. 743. Nor is a legitimate child entitled to such interest if he have a maintenance, although it may be less than the amount of the interest of the legacy; 1 Sch. & L. 5; 3 Ves. 17. But see 4 Johns. Ch. 103; 2 Roper, Leg. 202; 106 Pa. 268, cited above.

Where an intention, though not expressed, is fairly inferable from the will, interest will be allowed; 1 Swanst. 561, n.

Interest is not allowed for maintenance, although given by immediate bequest for maintenance, if the parent of the legatee, who is under moral obligation to provide for him, be of sufficient ability: so that the interest will accumulate for the child's benefit until the principal becomes payable; 3 Atk. 399; 1 Brown, Ch. 386; 3 *id.* 60, 416. But to this rule there are some exceptions; 3 Ves. 730; 4 Brown, Ch. 223; 4 Madd. 275, 289.

Where a fund, particular or residuary, is given upon a contingency, the intermediate interest undisposed of—that is to say, the intermediate interest between the testator's death, if there be no previous legatee for life, or, if there be, between the death of the previous taker and the happening of the contingency—will sink into the residue for the benefit of the next of kin, or executor of the testator, if not bequeathed by him; but if not disposed of, for the benefit of his residuary legatee; 1 Brown, Ch. 57; 4 *id.* 114; 2 Atk. 329.

Where a legacy is given by immediate bequest, whether such legacy be particular or residuary, and there is a condition to divest it upon the death of the legatee under twenty-one, or upon the happening of some other event, with a limitation over, and the legatee dies before twenty-one, or before such other event happens, which nevertheless does take place, yet, as the legacy was payable at the end of the year after the testator's death, the legatee's representatives, and not the legatee over, will be entitled to the interest which accrued during the legatee's life, until the happening of the event which was to divest the legacy; 1 P. Wms. 501; 5 Ves. 335, 522.

Where a residue is given, so as to be vested, but not payable at the end of the year from the testator's death, but upon the legatee's attaining twenty-one, or upon any other contingency, and with a bequest over divesting the legacy, upon the legatee's dying under age, or upon the happening of the contingency, then the legatee's representatives in the former case, and the legatee himself in the latter, shall be entitled to the interest that became due during the legatee's life or until the happening of the contingency; 2 P. Wms. 419; 1 Brown, Ch. 81, 335; 3 Mer. 335.

Where a residue of personal estate is given, generally, to one for life with remainder over, and no mention is made by the testator respecting the interest, nor any intention to the contrary to be collected from the will, the rule appears to be settled that the person taking for life is entitled to interest from the death of the testator, on such part of the residue bearing interest as is not necessary for the payment of debts. And it is immaterial whether the residue is only given generally, or directed to be laid out, with all convenient speed, in funds or securities, or to be laid out in lands. See 6 Ves. 520; 9 *id.* 89, 549, 553. Interest, in case of a remainder in an estate in money, does not run until the death of the life tenant; 81 Ga. 229.

But where a residue is directed to be laid out in land, to be settled on one for life, with the remainder over, and the testator directs the interest to accumulate in the mean time until the money is laid out in land, or otherwise invested on security, the accumulation shall cease at the end of one year from the testator's death, and from that period the tenant for life shall be entitled to the interest; 6 Ves. 520; 7 *id.* 95; 2 S. & S. 396. Where a gift is made of the residue of the testator's estate to one person for life, and the principal is given over to another one at the death of the life tenant, the legatee is entitled to interest from the testator's death; 44 N. J. Eq. 506.

Where no time of payment is mentioned by the testator, annuities are considered as

commencing from the death of the testator; and, consequently, the first payment will be due at the end of the year from that event; if, therefore, it be not made then, interest, in those cases wherein it is allowed at all, must be computed from that period; 5 Binn. 475. See 6 Mass. 37; 1 Hare & W. Lead. Cas. 356.

How much interest is to be allowed. As to time. In actions for money had and received, interest is allowed from the date of service of the writ; 1 Mass. 436; 15 Pick. 500; 12 N. H. 474. See 100 U. S. 119. On debts payable on demand, interest is payable only from the demand; 15 Pick. 500; 5 Conn. 222; 1 Mas. 117. See 12 Mass. 4; and *supra*. The words "with interest for the same" carry interest from date; Add. 323; 1 Stark. 452, 507; 57 N.W. Rep. (Minn.) 315. Interest upon a *quantum meruit* for services rendered, does not begin to run until a demand is made; 81 Wis. 230. It is allowed on the amount found as damages for breach of contract, from the date they accrued; 82 Tex. 608. Interest coupons bear interest from maturity of the coupons; 114 N. Y. 122; 64 Hun 120; 149 U. S. 122; 132 *id.* 107. Interest on a dividend declared by a receiver should be allowed from the time it was declared and ought to have been paid; 133 U. S. 433. Interest runs on liability of shareholders to creditors of a national bank from the time it goes into liquidation; 127 U. S. 27.

Interest may be computed from the commencement of an action for the balance due on a general account and the enforcement of lien; 73 Wis. 520; 39 Kan. 452.

The mere circumstance of war existing between two nations is not a sufficient reason for abating interest on debts due by the subjects of one belligerent to another; 1 Pet. C. C. 524; 4 H. & McH. 161. But a prohibition of all intercourse with an enemy during war furnishes a sound reason for the abatement of interest until the return of peace; Perl. Int. 145; 2 Dall. 102, 132; 1 Wash. Va. 172; 1 Call 194; 3 Wash. C. C. 396; 8 S. & R. 103; 62 Ala. 58. See *infra*.

A debt barred by the statute of limitations and revived by an acknowledgment bears interest for the whole time; 16 Vt. 297.

As to the allowance of simple and compound interest. Interest upon interest is not allowed, except in special cases; 1 Eq. Cas. Abr. 287; 31 Vt. 679; 34 Pa. 210; and the uniform current of decisions is against it, as being a hard, oppressive exaction, and tending to usury; 1 Johns. Ch. 14; Cam. & N. 361; 13 Vt. 430; 21 Or. 333. But interest on interest may be allowed if made after the interest which is to bear interest becomes due; 31 W. Va. 410; 79 Ga. 213. By the civil law, interest could not be demanded beyond the principal sum, and payments exceeding that amount were applied to the extinguishment of the principal; Ridley's Views of the Civil, etc., Law 84; Authentica, 9th Coll.

Where a partner has overdrawn the partnership funds, and refuses, when called upon to account, to disclose the profits, recourse would be had to compound interest as a substitute for the profits he might reasonably be supposed to have made; 2 Johns. Ch. 213.

When executors, administrators, or trustees convert the trust-money to their own use, or employ it in business or trade, or fail to invest, they are chargeable with compound interest; 1 Pick. 528; 1 Johns. Ch. 620. Nothing but very culpable conduct will justify the compounding of interest against an administrator; 87 Tenn. 172; 71 Mich. 356. Interest cannot ordinarily be compounded against a guardian; 73 Mich. 220; 118 Ind. 512; but it may be in some cases; 99 N. C. 367.

In actions for negligence, interest cannot be allowed by the jury as such, but they may, in computing their verdict, consider the lapse of time since the cause of action arose; 125 Pa. 24.

In an action to recover the annual interest due on a promissory note, interest will be allowed on each year's interest until paid; 2 Mass. 568; 8 *id.* 445; 1 N. H. 179; 16 Vt. 45; 9 Dana 331; 2 N. & McC. 38; 10 Am. Dec. 560; 69 N. C. 89; 26 Ohio St. 59; 61 Ga. 275; 34 Am. Rep. 101; *contra*, 8 Mass. 455; 2 Cush. 92; 1 Binn. 152, 165; 5 Pa. 98; 67 N. Y. 162. A note which provides for a conventional rate of interest, but omits to provide for the rate of interest after maturity, draws the legal rate; 22 How. 118; 100 U. S. 72; 68 Ind. 202; 42 L. J. Rep. N. S. 666; 39 Minn. 122; 39 Kans. 73; 135 N. Y. 354; but a different view has been held; 112 Mass. 63; 12 Vroom 349; 23 Alb. L. J. 130. See, as to charging compound interest, 1 Johns. Ch. 550; Cam. & N. 361; 1 Binn. 165; 1 Hen. & M. 4; 3 *id.* 89; 1 Viner, Abr. 457, *Interest* (C); Com. Dig. *Chancery* (3 S 3); 1 Hare & W. Lead. Cas. 371. An infant's contract to pay interest on interest after it has accrued will be binding upon him when the contract is for his benefit; 1 Eq. Cas. Abr. 286; 1 Atk. 489; 3 *id.* 613. The including in a note payable a year after date with a certain rate of interest, until paid, of a year's interest, is not compounding interest; 18 S. W. Rep. (Ky.) 1034. As to interest on interest coupons, see *infra*.

As limited by the penalty of a bond. It is a general rule that the penalty of a bond limits the amount of the recovery; 2 Term 388. But in some cases the interest is recoverable beyond the amount of the penalty; 4 Cra. 333; 15 Wend. 76; 10 Conn. 95; Paine 661; 6 Me. 14; 8 N. H. 491. The recovery depends on principles of law, and not on the arbitrary discretion of a jury; 3 Caines 49.

The exceptions are—where the bond is to account for moneys to be received; 2 Term 388; where the plaintiff is kept out of his money by writs of error; 2 Burr. 1094; or delayed by injunction; 1 Vern. 349; 16 Viner, Abr. 303; if the recovery of the debt be delayed by the obligor; 6 Ves. 92; 1 Vern. 349; if extraordinary emoluments are derived from holding the money; 2 Bro. P. C. 251; or the bond is taken only

as a collateral security; 2 Bro. P. C. 333; or the action be on a judgment recovered on a bond; 1 East 436. See, also, 4 Day 30; 3 Caines 49; 1 Taunt. 218; 1 Mass. 308; Com. Dig. *Chancery* (3 S 2); Viner, Abr. *Interest* (E).

But these exceptions do not obtain in the administration of the debtor's assets where his other creditors might be injured by allowing the bond to be rated beyond the penalty; 5 Ves. 329. See Viner, Abr. *Interest* (C 5).

Upon a bond given to appear in a United States court to answer to an indictment, no interest can be recovered; 127 U. S. 212.

As to the allowance of foreign interest. The rate of interest of the place of performance is to be allowed, where such place is specified; 10 Wheat. 367; 20 Johns. 102; 8 Pick. 194; 12 La. An. 815; 1 B. Monr. 29; 2 W. & S. 327; 23 Vt. 286; 21 Ga. 135; 22 Tex. 108; 7 Ired. 424; 5 C. & F. 1; otherwise, of the place of making the contract; 11 Ves. 314; 1 Wash. C. C. 521; 3 Wheat. 101; 12 Mass. 4; 1 J. J. Marsh. 406; 5 Ired. 590; 17 Johns. 511; 25 N. H. 474; 1 Ala. 387; 13 La. 91; 25 H. & J. 193; 3 Conn. 253; 5 Tex. 87, 262. But the rate of interest of either place may be reserved; and this provision will govern, if an honest transaction and not a cover for usury; 2 Pa. 85; 14 Vt. 33; 20 Mart. La. 1; 2 Johns. Cas. 355; 10 Wheat. 367. Coupons after their maturity bear interest at the rate fixed by the law of the place where they are payable, where there is no stipulation as to the rate after maturity; 149 U. S. 122; 132 *id.* 107. See also Dicey, Confl. L., Moore's ed. 616, 625.

How computed. In casting interest on notes, bonds, etc., upon which partial payments have been made, every payment is to be first applied to keep down the interest; but the interest is never allowed to form a part of the principal so as to carry interest; 2 Wash. C. C. 167; 1 Halst. 408; 2 Hayw. 17; 17 Mass. 417; 14 Conn. 445; 140 U. S. 247.

When a partial payment exceeds the amount of interest due when it is made, it is correct to compute the interest to the time of the first payment, add it to the principal, subtract the payment, cast interest on the remainder to the time of the second payment, add it to the remainder, and subtract the second payment, and in like manner from one payment to another, until the time of judgment; Perl. Int. 168; 1 Pick. 194; 4 Hen. & M. 431; 8 S. & R. 458; 2 Wash. C. C. 167. See 3 *id.* 350, 396; 3 Cow. 86.

The same rule applies to judgments; 2 N. H. 169; 8 S. & R. 452.

Where a partial payment is made *before* the debt is due, it cannot be apportioned part to the debt and part to the interest. As, if there be a bond for one hundred dollars, payable in one year, and at the expiration of six months fifty dollars be paid in, this payment shall not be apportioned part to the principal and part to the interest, but at the end of the year, interest shall be charged on the whole sum, and the obligor shall receive credit for the interest of fifty dollars for six months; 1 Dall. 124.

When interest will be barred. When the money due is tendered to the person entitled to it, and he refuses to receive it, the interest ceases; 3 Campb. 296; 60 Conn. 343; 83 Tex. 11; 38 Fed. Rep. 36. See 134 U. S. 68. A tender by a junior mortgagee to a senior mortgagee of the amount due on the senior mortgage, with accrued costs of foreclosure, does not, unless kept good, prevent the running of interest; 132 N. Y. 288.

Where the plaintiff was absent in foreign parts beyond seas, evidence of that fact may be given in evidence to the jury on the plea of payment, in order to extinguish the interest during such absence; 1 Call 133; 3 M'Cord 340; 1 Root 178. But see 9 S. & R. 263.

Whenever the law prohibits the payment of the principal, interest during the prohibition is not demandable; 2 Dall. 102; 1 Pet. C. C. 524; 2 Dall. 132; 4 *id.* 286.

If the plaintiff has accepted the principal, he cannot recover the interest in a separate action; 1 Esp. 110; 3 Johns. 229. See 14 Wend. 116.

For or against Government or State. Interest is not to be awarded against a sovereign government, unless its consent has been manifested by an act of its legislature or by a lawful contract of its executive officers; 136 U. S. 211. The United States is not liable to pay interest or claims against it, in the absence of express statutory provision therefor; 127 U. S. 251; 23 Ct. Cls. 144; 164 U. S. 213; but it must be allowed to the United States under U. S. Rev. St. § 966; *id.* A city is not liable for interest on its loans, after maturity, if it has provided funds to pay them; 131 Pa. 305.

The legal rate of interest is five per cent. in Illinois and Louisiana; seven per cent. in Arizona, California, Georgia, Idaho, Minnesota, Nebraska, Nevada, North Dakota, Oklahoma, South Carolina, South Dakota, and Washington; eight per cent. in Alabama, Colorado, Florida, Oregon, Utah, and Wyoming; ten per cent. in Montana; and six per cent. in the remaining states and territories.

Any rate may be agreed upon by contract in Arizona, California, Colorado, Maine, Massachusetts, Montana, Nevada, Rhode Island, and Utah; but the rate by contract cannot be more than seven per cent. in Illinois; eight per cent. in Alabama, Georgia, Indiana, Iowa, Louisiana, Michigan, Missouri, Ohio, and South Carolina; ten per cent. in Arkansas, District of Columbia, Florida, Indian Territory, Kansas, Minnesota, Mississippi, Nebraska, Oregon, Texas, and Wisconsin; twelve per cent. in Idaho, Oklahoma, New Mexico, North Dakota, South Dakota, Washington, and Wyoming; and six per cent. in the remaining states. In New York demand loans of not less than $5,000, with collateral, may be made at any rate of interest agreed upon in writing.

In Ontario and Quebec the legal rate is six per cent.; in the former there is no limit on the rate by contract, and in the latter it is seven per cent.

For exceeding the legal rates of interest the penalty is variously fixed by the different states. See USURY.

In Practice. Concern; advantage; benefit.

Such a relation to the matter in issue as creates a liability to pecuniary gain or loss from the event of the suit; 11 Metc. 395, 396.

When used as a criterion of the proper parties to a suit it means interest in the object, not interest in the subject-ma tter; 89 Va. 253.

A person may be disqualified to act as a judge, juror, or witness in a cause by reason of an interest in the subject-matter in dispute.

As to the disqualifying interest of judges, see JUDGE; as to the disqualifying interest of jurors, see CHALLENGE.

An interest disqualifying a witness must be *legal*, as contradistinguished from mere prejudice or bias arising from relationship, friendship, or any of the numerous motives by which a witness may be supposed to be influenced; Leach 154; 2 Hawk. Pl. Cr. 46, s. 25; must be *present;* 1 Hoffman. 21; 14 La. Ann. 417; 38 W. Va. 616; must be *certain, vested,* and not uncertain and contingent; 2 P. Wms. 287; 5 Johns. 256; 7 Mass. 25; 25 Ga. 337; 2 Metc. Ky. 608; 35 Pa. 351; must be an interest in the *event* of the cause, or the verdict must be lawful evidence *for or against him* in another suit, or the record must be an instrument of evidence for or against him; 22 Tex. 295; 3 John. Cas. 83; 1 Phill. Ev. 36. See 142 Ill. 302. But an interest in the *question* does not disqualify the witness; 4 Johns. 302; 1 S. & R. 32; 1 Hen. & M. 165, 168; or the fact that he has a case of the same kind pending; 37 Pac. Rep. (Cal.) 144.

An attorney will under most circumstances be permitted to testify in behalf of his client; but the courts do not look with favor upon the practice; 72 Pa. 229. See 32 Tex. Cr. R. 103.

The magnitude of the interest is altogether immaterial; a liability for costs is sufficient; 5 Term 174; 2 Me. 194; 11 Johns. 57.

Interest will not disqualify a person as a witness if he has an equal interest on both sides; 7 Term 480; 1 Bibb 298; 2 Mass. 108; 6 Pa. 322; 89 Ga. 532.

The objection to incompetency on the ground of interest may be removed by an extinguishment of that interest by means of a release, executed either by the witness, when he would receive an advantage by his testimony, or by those who have a claim upon him, when his testimony would be evidence of his liability. The objection may also be removed by payment. Stark. Ev. 757. In England and the United States it is no longer a cause of objection to the *competency* of witnesses in most cases that they have an interest in the subject-matter in issue. A growing consciousness that the truth in judicial investigations is best brought out by the production of all relevant testimony has led to the universal abrogation of the old rule of the common law; Tayl. Ev. 1137; 63 Pa. 156; 32 Tex. 141. In the trial of suits against the United States no person is excluded as a witness because he is a party to or interested therein; 1 Sup. Rev. Stat. 561; *id.* 403; *id.* 915. The interest of a party in the result of an action makes his credibility a question for the jury; 76 Hun 3. See, generally, Geenleaf; Starkie; Phillipps; Wharton; Miller, Evidence.

INTEREST, MARITIME. See MARITIME INTEREST.

INTEREST OR NO INTEREST. A provision in a policy of insurance, which imports that the policy is to be good though the insured have no insurable interest in the subject-matter. This constitutes a *wager policy*, which is bad in England, by statute 19 Geo. II. c. 37, and generally, from the policy of the law; 2 Par. Mar. Law 89, note. See INSURABLE INTEREST; POLICY.

INTERFERENCE. See PATENTS.

INTERIM (Lat.). In the mean time; meanwhile. An assignee *ad interim* is one appointed between the time of bankruptcy and appointment of the regular assignee. 2 Bell, Com. 355.

INTERIM CURATOR. A person appointed by justices of the peace to take care of the property of a felon convict until the appointment by the Crown of an administrator or administrators for the same purpose. Moz. & W.

INTERIM FACTOR. In Scotch Law. A judicial officer elected or appointed under the bankruptcy law to take charge of and preserve the estate until a fit person shall be elected trustee. 2 Bell, Com. 357.

INTERIM ORDER. An order to take effect provisionally, or until further directions. The expression is used especially with reference to orders given pending an appeal. Moz. & W.

INTERLAQUEARE. In Old Practice. To link together, or interchangeably. Writs were called *interlaqueata* where several were issued against several parties residing in different counties, each party being summoned by a separate writ to warrant the tenant, together with the other warrantors. Fleta, lib. 5, c. 4, § 2.

INTERLINEATION. Writing between two lines.

Interlineations are made either *before* or *after* the execution of an instrument. Those made before should be noted previously to its execution; those made after are made either by the party in whose favor they are, or by strangers.

When made by the party himself, whether the interlineation be material or immaterial, they render the deed void; 1 Gall. 71; 35 N. J. 227; s. c. 10 Am. Rep. 232; unless made with the consent of the opposite party. See 11 Co. 27 *a*; 9 Mass. 307; 15 Johns. 293; 1 Halst. 215. But see 5 H. & J. 41; 2 La. 290; 4 Bingh. 123; Fitzg. 207, 223; 2 Pa. 191. See 126 *id.* 247.

When the interlineation is made by a stranger in an instrument in the hands of the promisee, though without his knowledge, if it be immaterial, it will not vitiate the instrument, but if it be material, it will, in general, avoid it; 11 Co. 27 *a*; L. R. 10 Ex. 330; see 6 Wash. 418; otherwise if the instrument be not then in the possession of a party; 6 East 309. If made while in the possession of an agent of the promisee, it avoids the instrument; L. R. 10 Ex. 330; *contra*, 35 N. J. 227; s. c. 10 Am. Rep. 232. The insertion of the words "or order" without the consent of the maker constitutes a material alteration which avoids the note; 20 S. W. Rep. (Tex.) 53. An interlineation made in a bond, after its execution, by an agent of the obligee, without authority, will not invalidate it, but is only an act of spoliation; 86 Mich. 581.

The decisions vary as to the effect of interlineations, when an instrument is put in evidence. In a late case the rule is stated thus: If the interlineation is in itself suspicious, as, if it appears to be contrary to the probable meaning of the instrument as it stood before the insertion of the interlined words; or if it is in a handwriting different from the body of the instrument, or appears to have been written with different ink, in all such cases, if the court considers the interlineation suspicious on its face, the presumption will be that it was an unauthorized alteration after execution. On the other hand, if the interlineation appears in the same handwriting with the original instrument, and bears no evidence on its face of having been made subsequent to the execution of the instrument, and especially if it only makes clear what was the evident intention of the parties, the law will presume that it was made in good faith, and before execution; 3 Fed. Rep. 16. See 155 Pa. 152. Where interlineations in a deed are in the handwriting of the officer who attested it officially, the presumption is that they were made at or before the execution of the instrument; 89 Ga. 793; but it has been held that an alteration appearing on the face of a deed is presumed to have been made after its execution, and the burden is upon the party presenting it to explain the alteration; 44 Ill. App. 81.

If an instrument appears to have been altered, it is incumbent on the party offering it to explain its appearance. Generally speaking, if nothing appears to the contrary, the alteration will be presumed to be contemporaneous with the execution of the instrument; but if there is ground of suspicion, the law presumes nothing, but leaves the questions of the time when, the person by whom, and the intent with which it was done, to the jury, upon proofs to be adduced by the party offering the instrument; 1 Greenl. Ev. § 564; Tayl. Ev. 1547; 63 Mo. 63; 108 *id.* 352; 23 Pa. 244; 157 *id.* 473; 82 Tex. 352. See 45 Ill. App. 234. In cases of negotiable instruments, the holder is held to clearer proof than in cases of deeds; 2 Dan. Neg. Instr. § 1417. See 40 Minn. 531. In a carefully considered case, 20 Vt. 205, the court adopt what it calls the old common-law rule that an alteration of an instrument, if nothing appear to the contrary, should be presumed to have been made at the time of the execution. So, also, 1 Shepl. 386; 2 Johns. Cas. 198; *contra*, 11 N. H. 395; 48 Ind. 459. It has been held, when a place of payment was inserted, that it was a question for the jury, but that it lay on the plaintiff to account for the alteration, etc.; 6 C. & P. 273; 6 Ala. N. S. 707; such an insertion after delivery is a material alteration; 14 So. Rep. (Ala.) 411; 91 Ga. 827. But in 39 Conn. 164, it was held that the burden of proof of accounting for an alteration is not necessarily on the party producing the instrument. See 44 Ill. App. 81.

In 25 Kans. 510; s. c. 37 Am. Rep. 259, it was held that a negotiable note offered in evidence, bearing on its face an apparent material alteration, is admissible in evidence, and the question as to the time of alteration is for the jury. The court said: If there is neither extrinsic nor intrinsic evidence as to when the alteration was made, it is to be presumed that it was made before or at the time of the execution. Perhaps there might be cases where the alteration is attended with such manifest circumstances of suspicion that the court might refuse to allow the note to go to the jury without some explanation, etc. This title is fully treated in a note in 37 Am. Rep. 260. As to alteration of negotiable instruments, see 7 Harv. Law Rev. 1. See ALTERATION; ERASURE.

INTERLOCUTOR. Properly means a judgment or judicial order pronounced in the course of a suit, which does not finally determine the cause. But in Scotch practice, the term is extended to the judgments of the Court of Session or the Lord Ordinary, which exhaust the point at issue, and which if not appealed against will have the effect of finally deciding the case. Bell; Moz. & W.

INTERLOCUTORY. Something which is done between the commencement and the end of a suit or action which decides some point or matter, which, however, is not a final decision of the matter in issue: as, interlocutory judgments, or decrees, or orders. See DECREE; JUDGMENT; ORDER.

INTERLOPERS. Persons who interrupt the trade of a company of merchants, by pursuing the same business with them in the same place, without lawful authority.

INTERNAL REVENUE. See REVENUE; TAXATION.

INTERNATIONAL ARBITRATION. The hearing and decision of disputes or differences between sovereign states by arbitrators or umpires chosen by mutual agreement.

Such an agreement may be by a special treaty negotiated with reference to the particular case or by a general treaty of arbitration.

Treaties of arbitration, with respect to special matters between the United States and Great Britain, have been frequently negotiated and carried into effect, and also, in many cases, between each of those countries and other nations. A summary of arbitrations to which the United States have consented is given *infra.*

The first instance of international arbitration is related by Herodotus as occurring between Artabazanes and Xerxes and was decided by Darius.

National arbitrations were known to the Greeks among themselves. They did not cover political questions but usually were confined to disputes touching commerce, religion, boundaries, and the possession of contested territories. Thus in the time of Solon five Spartans were chosen to decide between the Athenians and the Megarians as touching the possession of the island of Salamis.

The Romans were never willing to arbitrate their disputes with neighboring countries, though they acted as arbitrators in disputes between other nations.

The practice of arbitration appears to have obtained in the barbarian world.

There are historical instances of arbitration, especially after the Church exercised a preponderating influence and the Bishops of Rome called to their tribunal all differences between peoples and kings.

Saint Louis was called upon to arbitrate between Henry III. and his barons in 1263. Occasionally a city assumed the duties of arbitrator. Thus the Treaty of Westminster of October 23, 1655, stipulated that the Republic of Hamburg should act as arbitrator between France and England. The parliaments of France were chosen to settle disputes between foreign sovereigns.

Sometimes eminent lawyers were employed as arbitrators; thus the doctors of the Italian universities were often employed to settle disputes between the different states of Italy.

It has been said that arbitrations anterior to the seventeenth century were frequently cases rather of amicable settlement than of strict arbitration.

The first attempt by the United States to arbitrate with England was under the Treaty of 1794, commonly called the Jay Treaty, which provided for mixed commissions. Under this the northeast boundary line was settled in 1798. Another commission met in Philadelphia in 1797 to determine the compensation due British subjects in consequence of impediments which certain of the United States had, in violation of the provisions of the Treaty of Peace, interposed to the collection of debts by British creditors. It was unsuccessful, and the claims were afterwards adjusted by the Treaty of January 8, 1802.

Another commission under the Jay Treaty finished its report in 1804. The question before it related to contraband, the rights of neutrals, and the finality of the decisions of prize courts.

The Treaty of Ghent, December 24, 1814, provided for three arbitrations. One related to certain islands in Passamaquoddy Bay, the second related to the ascertainment of the northeastern boundary of the United States. The commissioners failed to agree and each made a separate report to its own government, and finally in 1827 the points of difference were referred to the King of the Netherlands. The third was to determine the Northern boundary of the United States along the middle of the Great Lakes and thence to the Lake of the Woods. These questions were not determined until the Treaty of August 9, 1842, generally known as the Webster-Ashburton Treaty, and the boundary from the northwest angle of the Lake of the Woods to the Rocky Mountains under the Treaty of 1846, was settled by a joint-commission of which the American member was appointed by Act of Congress of March 19, 1872.

Differences arose as to England's performance of the obligation touching slaves under the Treaty of Ghent. This was referred to the Emperor of Russia, who decided that Great Britain had failed to keep her obligations and must make indemnity. A convention was concluded between the two countries for a commission to determine the amount of the indemnity to be paid by Great Britain, upon whose decision that country paid $1,204,960 in full settlement of all claims.

On February 8, 1853, there was a convention at London for a general settlement of all claims pending between the United States and Great Britain. It sat from September 15, 1853, to January 15, 1855. On July 1, 1863, a convention was concluded between the two countries to determine the compensation due to the Hudson's Bay Company and the Puget's Sound Agricultural Company on claims for damages as well as for the transfer to the United States of all their property and rights in territory acknowledged by the treaty of 1846 to be under the sovereignty of the United States. The commission met in 1865 and made an award September 10, 1869.

The Treaty of Washington of May 8, 1871, provided for four distinct arbitrations, the principal of which was that held at Geneva covering the demands of the United States arising out of acts of confederate cruisers of British origin and generically known as the Alabama claims.

This arbitration declined to make an award to the United States for the loss in the transfer of the American merchant marine to the British flag; for enhanced payment of marine insurance; for the prolongation of the war and the increased expenditures for the suppression of the rebellion. It also declined by a majority of three to two to award compensation for expenses incurred in pursuit of the confederate cruisers, but awarded as a direct loss growing out of the destruction of vessels and their cargoes the sum of $15,500,000. This arbitration began December 15, 1871, and ended September 14, 1872.

The dispute as to the San Juan water boundary was referred to the Emperor of Germany, who, on October 21, 1872, made an award in favor of the United States. Claims of British subjects against the United States, and of citizens of the United States against Great Britain (excepting the Alabama claims) arising out of injuries during the Civil War, were referred to a mixed commission respectively appointed by the United States, Great Britain, and Spain.

The fourth arbitration under the Treaty of Washington was to determine the compensation due to Great Britain for privileges accorded by that treaty to the United States in the northeastern fisheries. It was conducted by a commission of three persons, a citizen of the United States, a British subject, and a Belgian. It met June 15, 1877, and on November 23 following, awarded Great Britain the sum of $5,500,000.

Under the Treaty of February 29, 1892, the United States and Great Britain submitted certain questions relating to the protection of the fur seals in Behring Sea to a tribunal of arbitration which sat in Paris.

The only arbitration between the United States and France was one to determine the claims of citizens of France for injury to their persons and property during the Civil War, and for claims of the citizens of the United States for like injuries during the war between France and Germany. It sat from November, 1880, to March 1884.

The United States has had four arbitrations with Spain, one in 1795, relating to claims for illegal captures of vessels by Spanish subjects. In 1871, relating to claims growing out of the insurrection in Cuba. In 1870, relating to the seizure of a steamer by the Spanish authorities in 1870. In 1885, relating to damages to be paid by Spain for the wrongful seizure or detention of an American vessel.

There have been two arbitrations between Mexico and the United States, the first under the Treaty of April 11, 1839, the second under the Treaty of July 4, 1868, for the adjustment of miscellaneous claims.

By the convention of March 1, 1889, a permanent board, called an International Boundary Commission, was established for the determination of questions growing out of changes in the course of the Rio Grande and the Colorado River where they form a boundary between the two countries.

The treaty of Guadalupe Hidalgo was entered into between the United States and Mexico on February 2, 1848, and contained a general proposition to arbitrate under which all subsequent arbitration be-

tween the two countries may be in a measure referred. Under this treaty the two nations agreed to "endeavor, in the most sincere and earnest manner, to settle the differences so arising, and to preserve the state of peace and friendship in which the two countries are now placing themselves, using, for this end, mutual representations and pacific negotiations." In case of failure, a resort shall not be had to reprisals or hostility of any kind "until the government of that which deems itself aggrieved shall have maturely considered, in the spirit of peace and good neighborship, whether it would not be better that such difference should be settled by the arbitration of commissioners appointed on each side or by that of a friendly nation. And should such course be proposed by either party, it shall be acceded to by the other, unless deemed by it altogether incompatible with the nature of the difference, or the circumstances of the case."

There have been three arbitrations between the United States and Haiti, one under a protocol May 24, 1884, by which two claims against Haiti were referred to Mr. Justice Strong of the supreme court of the United States. His awards were adverse to Haiti, but the United States has thus far declined to enforce them. On March 7, 1885, there was an agreement for a mixed commission of two Americans and two Haitiens to adjust the claims of citizens of the United States growing out of civil disturbances in the island. Under the protocol of May 22, 1888, Alexander Porter Morse, of Washington, was named as an arbitrator to consider the claim for damages on the part of Van Bokkelen, a United States citizen, who was imprisoned in Haiti for debt.

A commission was appointed between the United States and Venezuela under a convention of January 19, 1892, to settle the claims of an American steamship company for the seizure of its steamers on the Orinoco.

Three mixed commissions have been appointed under treaty with Colombia, the first and second under conventions concluded September 10th, 1857, and February 10th, 1864, covering rights under the treaty with New Granada of 1846. The third, August 17, 1874, for an award for the capture of the American steamer Montijo by insurgents in the State of Panama. Two commissions have sat for the adjustment of miscellaneous claims under conventions of January 12, 1863, and December 4, 1868, one with Costa Rica under the Treaty of July 2, 1860, and one with Ecuador under the Treaty of November 25, 1862.

Under a convention with Peru, December 20, 1862, claims against Peru for the seizure of two vessels were referred to the King of the Belgians, but they were afterwards withdrawn.

By a convention of February 4, 1859, the claims of the United States against Paraguay were referred to a commission composed of a representative of each government. The decision was against the claim, but the United States have repudiated the award and endeavored to settle it by negotiation.

The questions between the United States and Portugal arising out of the destruction of the American privateer General Armstrong in the port of Fayal, were referred to Louis Napoleon under the Treaty of February 26, 1851. The award was adverse to the claim. After an attempt on the part of the claimants to set it aside the United States paid the claim out of its own treasury. Another arbitration between the United States and Portugal under a protocol signed June 13, 1891, to which Great Britain is also a party, in relation to the seizure of the Delagoa Bay railway, is now pending.

The United States and Chile by the convention of November 10, 1858, referred to the King of the Belgians a claim growing out of the seizure of the American brig Macedonian by the Chilean navy. An award was made, 1863, in favor of the United States. Under the Treaty of August 7, 1892, these two nations provided for a general arbitration of claims by means of a mixed commission.

In 1890, the congress of the United States adopted a concurrent resolution requesting the president to invite negotiations to the end that differences arising between it and other governments may be referred to arbitration and possibly adjusted. On July 16, 1893, the British House of Commons adopted a resolution referring in terms to the above resolution of congress and expressing the sympathy of that house with its purpose and asking the British government to co-operate with the government of the United States.

The Institute of International Law, at its session in 1874 and 1875, discussed the subject of rules for the procedure of international tribunals of arbitration, and at the latter meeting adopted provisional rules. At the International American Conference held on April 8, 1890, and attended by delegates from North, Central, and South America, the plan of a permanent tribunal of arbitration was adopted.

Proposed rules for the International Tribunal of Arbitration were submitted by William Allen Butler to the Universal Peace Congress in Chicago in 1893.

In 1889, certain members of the British and French Parliaments formed at Paris a parliamentary union to be composed of members of the legislative assemblies of various countries for the purpose of considering the development of international arbitration. At its session at Brussels in 1895, it adopted certain provisions which it recommended to the consideration of the governments of civilized states.

A conference of a number of prominent men was held at Washington, April 22 and 23, 1896, for the purpose of furthering international arbitration. In the same year a treaty was negotiated between the United States and Great Britain providing for a tribunal to which all disputes of a certain class between those two nations were to be referred; but it failed to be ratified by the senate.

See Report on International Arbitration, by committee of American Bar Association, August 20, 1896, Vol. XIX., 10, 385; Historical Notes on the Subject of International Arbitration by John B. Moore, of New York, published in the report of this conference from which the above brief statement has been taken.

See also International Arbitration, by Hon. Frederick R. Coudert, Am. Law Rev. Vol. XXXI, 321; also *Traité Théorique et Tratique de l'Arbitrage International*, by M. A. Merignhac; Address of the Lord Chief Justice of England before the American Bar Association, Report, 1896, p. 253.

INTERNATIONAL LAW.* The system of rules which Christian states acknowledge to be obligatory upon them in their relations to each other and to each other's subjects. It is the *jus inter gentes*, as distinguished from the *jus gentium*.

[Another definition by President Woolsey is: "International law, as we have viewed it, is a system of rules adopted by the free choice of certain nations for the purpose of governing their intercourse with each other, and not inconsistent with the principles of natural justice." Introd. to Int. L. § 203. This, it is to be observed, differs materially from the first, with respect to a point to some extent discussed *infra*.

"That body of rules which governs the actions of states in their intercourse with one another. These rules are the outgrowth of the customs of nations, of international agreements, and of state acts which have, in the lapse of time, been accepted as binding by the civilized states of the world. It differs from the municipal or national law of individual states in that it has no superior or supreme tribunal whose function it is to enforce the law in the case of its infraction. Nevertheless, it is obeyed for the most part without question, and it is only on rare occasions that resort is had to war. Indeed, most states have adopted it as a part of their municipal law, and a great majority of the cases that arise under it are adjudicated upon by the courts of law

* This title being reprinted without alteration of the text as written by the late President Woolsey, such additions as seemed necessary or desirable have been made within brackets, and to preserve the original completeness of the treatment of the subject, some parts of it are undisturbed, although relating to subjects elsewhere treated under the various titles of International Law.

of the individual states;" Snow, Int. L. 17.

A distinction is sometimes drawn between public international law, which is the subject here treated, and private international law, as it is termed by continental jurists, or the conflict of laws (*q. v.*), as it is more frequently designated in England and America. The former title is however used by many writers in the last-named countries. There is a concurrence of authority that they are but different names for the same subject. Dicey, Confl. L. 5. Professor Lorimer objects very earnestly to the term Private International Law, and denies that it is International Law at all, and Professor Holland agrees with him; 1 Law Quar. Rev. 100. See also Whart. Com. Am. L. ch. v.; Whart. Confl. L. 1; Woolsey, Int. L. 69; Westlake, Priv. Int. L. 1, 4.

A different terminology has been suggested, which attempts to differentiate Private International Law and the Conflict of Laws.

"The aggregate of rules and limitations which sovereign states agree to observe in their intercourse and relations with each other. As it deals with the relations of states in their sovereign capacity, it is sometimes called *Public International Law*, to distinguish it from that branch of the science which has to do with the relations of states to the citizens or subjects of other states, which is called *Private International Law;* or, as it is in question whether the court of a state shall apply their own municipal laws or those of another state in the determination of a given cause, this branch of the subject has sometimes been called the *Conflict of Laws*" (*q. v.*); Davis, Int. L. 2.

The only authority cited is Amos, Science of Law, and the quotations, made at some length, apply mainly to controversies between citizens of different states.

A recent division of the subject is as follows: "It is divided into three departments: the principles that should regulate the conduct (1) of states to each other; (2) of private parties arising out of the conduct of states to each other; (3) of private parties as affected by the separate internal codes of distinct nations. Its leading principles are three: (1) that every nation possesses an exclusive sovereignty and jurisdiction in its own territory; (2) that no state or nation can by its laws directly affect or bind property out of its own territory, or persons not resident therein, natural born subjects or others; (3) that whatever force the laws of one country have in another depends solely on the municipal laws of the latter." Encyc. Dict.]

The scientific basis of these rules is to be found in natural law, or the doctrine of rights of the state; for nations, like smaller communities and individuals, have rights and correlative obligations, moral claims and duties. Hence it might seem as if the science consisted simply of deductions from certain fundamental propositions of natural right; but this is far from being the case, for national intercourse is the most voluntary possible, and takes a shape widely different from a system of natural justice. It would be true to say that this science, like every department of moral science, can require nothing unjust; but, on the other hand, the actual law of nations contains many provisions which imply a waiver of just rights; and, in fact, a great part of the modern improvements in this code is due to the spirit of humanity controlling the spirit of justice, and leading the circle of Christian nations freely to abandon the position of rigorous right for the sake of mutual convenience or good will.

[The operation of this law is upon sovereign states, as that of municipal law is upon the individual person (*q. v.*), using this word in its larger sense. Formerly the definitions of International law like that first above given applied the subject to Christian nations, the idea being that this branch of the law was in a special degree the outgrowth of an effort to apply to states the moral obligations and duties the recognition of which is largely and primarily due to Christianity.

It is true that President Woolsey recognized that the views embodied in International Law were beginning to spread beyond the bounds of Christendom, but he ascribed it to the fact that "Christian states are now controllers of opinion." Introd. Int. L. 20.

Sir R. Phillimore thus expressed the idea which generally prevailed, "the consent of nations to things which are naturally, that is by the law of God, binding upon them." But the extension of these very principles, which Christian states alone were assumed to regard, to such an extent that non-Christian nations have been gradually brought more and more within the pale of their influence, and led to the acceptance, more or less, of civilized ideas of government, requires some modification of the older phraseology.

It is now some years since Professor E. Robinson said, evidently with this thought pressing upon his mind, with much less reason for it than now exists: "In modern times, at least, it has included all the states of the Christian world; but at one time it excluded non-Christian states, and at this moment it would be difficult to say to what extent it covers the relation of such states *inter se* and with the Christian states of Europe and America;" Encyc. Brit.

And now with Mohammedan Turkey to a considerable extent recognizing some amenability to the rules of international law (even admitting that it is external and not internal influence which produces this result), and Japan, almost completely, and China, to a less degree, recognized as admitted to the family of nations, it may fairly be said that the definition of the subject must be broadened so as to apply, not merely to Christian states but to civilized sovereign states, using that term broadly.

Nor is it entirely consistent with the

truth of history to assume that international law owes its origin entirely to Christian nations. All that can be positively affirmed is that international law had no existence as a science until moulded into a scientific system by the master mind of Grotius. But no more did he create it than did Coke and Blackstone create the common law. Nor can it be said without qualification that the principles of morality which underlie the scientific expression of international law are the product of Christianity. They are rather a part of that great body of fundamental principles which belong to humanity, and which we express by the term Divine law, because, although inherent in the nature of man, they are conceived to have been imbedded there by the Divine Author of his existence, and lying dormant through centuries of human history, now and then dimly manifesting themselves through human strivings and human reason, they could only become fully operative after humanity had passed through the general refining process which was the result of the teachings of the founder of Christianity. These principles have the same relation to the Christian system which is borne by those principles of what is termed natural law or natural morality, which have been found in a greater or less degree in the beginning of all the great religions of the world. It is in this sense, and this only, that international law finds its connection with Christianity and the so-called Christian nations.

Hence we find in systems of law prior to Christianity the recognition of fundamental principles of justice and morality which underlie international law, as of those which find their natural development and expression in various branches of municipal law.

Thus the independent Hellenic sovereignties recognized, and their existence as such favored the recognition of, certain general customs which may be considered, as suggested by a writer already quoted, as, at least, a parallel to modern international law. And the latter finds its prototype, if not more, in the *jus feciale* of the Romans which doubtless would have developed largely as a general system but for the fact that the universal domination of the Roman Empire reduced its operation to a minimum and practically terminated the necessity of its preservation as a distinct branch of the civil law. But this very fact contributed to its influence in the direction of forming a new system, even if it be not admitted as contended by many authorities that it was in fact its origin. A thoughtful writer, however, has said that the *jus feciale* "differs radically from the modern science of international law which is founded upon the consent of nations and presupposes the existence of many independent states, and rather expresses the imperfect and one-sided views of international obligation which were held by the most powerful state of the ancient world;" Davis, Int. L. 4. The strong concurrence of opinion is unquestionably in favor of the theory that the Roman law was a factor of the first importance. Mr. Carter, in his argument referred to *infra*, said, "The Roman law, that wonderful result of reason working upon a basis of abstract right, is largely appealed to in international discussions, as containing rules which, at least by analogy, may serve to settle international disputes. No one can be an accomplished diplomatist without a familiar acquaintance with much of this immortal code" (citing Phill. Int. Law 14–28). "Not only," says another commentator, "has the Roman law been preserved in the municipal and ecclesiastical jurisprudence of modern Europe: it has also exercised a marked influence on the growth of that body of rules by which the states of Europe are bound together in one moral commonwealth." Morey, Rom. Law § 207.

And Sir Henry Maine, in endeavoring to determine the place of international law in the general development of European jurisprudence, concludes that we may answer pretty confidently that its rapid advance to acceptance by civilized nations was a stage, though a very late stage, in the diffusion of Roman law over Europe; Int. L. 16. And the same writer says further on: "It is sometimes difficult to be quite sure how Grotius and his successors distinguished rules of the Law of Nature from religious rules prescribed by inspired writers. But that they did draw a distinction is plain. Grotius' famous work, the *De Jure Belli ac Pacis*, is in great part composed of examples supplied by the language and conduct of heathen statesmen, generals, and sovereigns, whom he could not have supposed to know anything of inspired teaching. If we assume him to have believed that the most humane and virtuous of the acts and opinions which he quotes, were prompted by an instinct derived from a happier state of the human race, when it was still more directly shaped and guided by Divine authority, we should probably have got as near his conception as possible. As time has gone on, some parts of this basis of thought have proved to be no longer tenable. . . . But nevertheless the system founded on an imaginary reconstruction of it, more and more calmed the fury of angry belligerency, and supplied a framework to which more advanced principles of humanity and convenience easily adjusted themselves."

It may be suggested that not alone through the *jus feciale* is the intimate connection of Roman law with modern international law to be sought. Those laws it is truly said concerned mainly, if not only, embassies, the declaration of war, and the making of peace; see FECIAL LAWS; but, after all, the relation of Rome to other states involved little more than questions of war or peace, and with these their only embassies were concerned. So that those laws did control all of foreign relations which then existed.

But after the *jus civile*, the law of a city,

was replaced by the *jus gentium*, the law for the civilized world, as Sohm aptly puts it (Inst. Rom. L. § 13), we find the real foundation on which Grotius and those who came after him erected a stately modern structure. The *jus gentium* was an expression of what is variously termed natural law, universal morality, moral law, divine law, applied to the relations of states,—not independent ones (for there were none such contemplated under the empire), but readily adapted to the relations of sovereign and equal states. Perhaps the system and the principles framed for use by states bound together by the bonds of the empire were not less easily adapted to the use to which they have been put by the family of nations, in theory absolutely independent, but in practice rendered more interdependent even than the components of the empire by community of interest, commercial relations, mutual reliance on the exchange of products, and above all the unifying influence of modern civilization in its annihilation of the natural barriers of time and space.]

So much for the general foundation of international law. The particular sources are the *jural* and the *moral*. The jural elements are, *first*, the rights of states as such, deducible from the nature of the state and from its office of a protector to those who live under its law; *second*, those rights which the state shares with individuals, and in part with artificial persons, as the rights of property, contract, and reputation; and, *third*, the rights which arise when it is wronged, as those of self-protection and redress. To these have been joined by some the rights of punishment and of conquest,—the latter, at least, without good reason; for there is and can be no naked right of conquest, irrespective of redress and self-protection. The moral elements are the duties of humanity, comity, and intercourse.

[The propriety of the phrase "international law" has been challenged as being, strictly speaking, inexact. Among those who have taken this view was the late Lord Coleridge, who said that "Law implies a lawgiver and a tribunal capable of enforcing it and coercing its transgressors." This view, however, accepts the theory of Austin's definition of the law, as the command of a superior with coercive power. Lord Russell of Killowen, in his address before the American Bar Association in 1896, contended for the substantial accuracy of the term *law* in this connection; he considered Austin's definition as applying rather to the later development of arbitrary power than to that body of customary law which, in earlier stages of society, precedes law strictly so called, but which is made up of rules and customs which are laws in every real sense of the word, as for example the law merchant. And he continues; "in stages later still, as government becomes more frankly democratic, resting broadly on the popular will, laws bear less and less the character of commands, imposed by a coercive authority and acquire more and more the character of customary law founded on consent."

Addressing himself to the question what is international law, he defines it to be "the sum of the rules or usages which civilized states have agreed shall be binding upon them in their dealings with one another." He takes issue with the theory that there is any *a priori* rule of right of reason or of moralty, or law of nature, which, by its own force, apart from and independently of the consent of nations, is part of the law of nations, and insists that international law is neither more nor less than what civilized nations have agreed shall be binding on one another as international law.

This was a repetition from an academic standpoint of views expressed by their author in a forensic spirit before the Paris tribunal of arbitration in 1893.

At that time the opposing view of the foundation and sources of international law was stated with great clearness by Mr. James C. Carter, counsel for the United States, substantially as follows: The rules which govern the mutual relation of states in their corporate capacity are "properly law, because they have been established by particular states as a part of their own municipal system, and are enforced . . . in the same manner as other portions of the local codes. They are in fact principles of the law of nature or morality put in the form of human command, and clothed with a human sanction." International law, in its general sense, he terms international morality, consisting of rules founded upon justice and equity and deduced by right reason, having no binding force in themselves as law, but observed in deference to the general public opinion of christendom by a conviction that they are right in themselves, or at least expedient, or by fear of provoking hostilities. This moral sanction is so strong that it may be said to create rights and corresponding duties which belong to and devolve upon independent states; accordingly, a large portion of international law is rather a branch of ethics than of positive human jurisprudence, the sources of which are: 1. The Divine law; 2. enlightened reason; 3. the consent of nations. He contended that international law could not be confined within the limits of mere precedents or previously recognized rules for regulating the action of sovereign states, but being largely the result of enlightened reason acting upon the abstract principles of morality, "it is, as a science, the most progressive of any department of jurisprudence or legislation. The improvement of civilized nations in culture and refinement, the more complete understanding of rights and duties, the growing appreciation of the truth that what is right is also expedient, have told, and still do tell upon it with sudden and surprising effect.

"The result is that doctrines which were universally received a generation since are

as universally rejected now; that precedents which were universally considered as binding a quarter of a century ago, would, at the present, be passed by as without force, as acts which could not endure the light of more modern investigation."

In the same line is the view of Professor Lorimer, who in his Institutes of the Law of Nations defines it to be: "the law of nature, realized in the relations of separate political communities."

On the other hand the view of Lord Russell of Killowen is thus expressed by Mr. Hall in his Treatise on International Law: "Existing rules are the sole standard of conduct or law of present authority; and changes and improvements in those rules can only be effected through the same means by which they were originally formed, namely, by growth in harmony with changes in the sentiments and external conditions of the body of states."]

Various divisions of international law have been proposed, but none are of any great importance. One has been into natural and voluntary law, in which latter conventional or treaty law and customary are embraced. Another, somewhat similar, separates international rules into those which are deducible from general natural *jus*, those which are derived from the idea of estate, and those which grow out of simple compact. Whatever division be made, it is to be observed that nations are voluntary, *first*, in deciding the question what intercourse they will hold with each other; *second*, that they are voluntary in defining their rights and obligations. moral claims and duties, although these have an objective existence beyond the control of the will of nations; and, *third*, that when international law has arisen by the free assent of those who enter into certain arrangements, obedience to its provisions is as truly in accordance with natural law—which requires the observance of contracts—as if natural law had been intuitively discerned or revealed from heaven and no consent had been necessary at the outset.

The aids in ascertaining what international law is or has been, are derived from the sea codes of mediæval Europe, especially the Consolato del Mare; from treaties, especially those in which a large part of Europe has had a share, like the treaties of Westphalia; from judicial decisions, state papers on controverted points, and the treatises of text-writers. Among the latter, Grotius led the way in the seventeenth century, while Puffendorf, fifty years afterwards, from his having confounded the law of nature with that of nations, has sunk into deserved oblivion. In the next century, Cornelius van Bynkershoeck, although the author of no continuous work embracing the whole of our science, ranks among its ablest expounders, through his treatises entitled, *De Dominio Maris*, *De Foro Legatorum*, and *Quæstiones Juris Publici*. In the middle of the eighteenth century, Vattel, a disciple of the Wolfian philosophy, published a clear but somewhat superficial treatise, which has had more than its due share of popularity down to the present day. Of the very numerous modern works we can only name that of Klüber, in French and German (1819 and since), that of De Martens, which came to a fifth edition in 1855, and those of Wheaton and of Heffter, which last two are leading authorities,—the former for the English-speaking lands, the latter for the Germans. The literature of the science must be drawn from Von Ompteda and his continuator, Von Kamptz, or from the more recent work of Von Mohl (Erlangen, 1855–58), in which, also, an exposition of the history is included. The excellent works of Ward (Inquiry into the Foundation and History of the Law of Nations, etc.), and of Wheaton (History of the Law of Nations from the Earliest Times to the Treaty of Washington in 1842), are of the highest use to all who would study the science, as it ought to be studied as the offshoot and index of a progressive Christian civilization.

[See also Phillimore, Com. Int. L.; Twiss, Law of Nations; Maine; Pomeroy; Calvo; Upton; Wildman; Hall; Halleck; Davis, International Law; Lawrence, Essays Mod. Int. L.; Manning; Chitty, Laws of Nations; Snow, Lect. Int. Law; Whart. Dig. Int. L.; Story; Wharton, Confl. Laws. For admirable collections of the bibliography of the subject see Snow and Davis, Int. L., and 1 Law Quar. Rev. 100.]

Among the provisions of international law, we naturally start from those which grow out of the essence of the individual state. The rights of the state, as such, may be comprised under the term sovereignty, or be divided into sovereignty, independence, and equality; by which latter term is intended equality of rights. Sovereignty and independence are two sides of the same property, and equality of rights necessarily belongs to sovereign states, whatever be their size or constitution; for no reason can be assigned why all states, as they have the same powers and destination in the system of things, should not have identically the same rights. States are thus, as far as other states are concerned, masters over themselves and over their subjects, free to make such changes in their laws and constitutions as they may choose, and yet incapable, by any change, whether it be union, or separation, or whatever else, of escaping existing obligations. With regard to every state, international law only asks whether it be such in reality, whether it actually is invested with the properties of a state. With forms of government international law has nothing to do. All forms of government, under which a state can discharge its obligations and duties to others, are, so far as this code is concerned, equally legitimate. See GOVERNMENT; SOVEREIGNTY.

Thus, the rule of non-intervention in the affairs of other states is a well-settled principle of international law. In the European

system, however, there is an acknowledged exception to this rule, and also a claim on the part of certain states to a still wider departure from the rule of non-intervention, which other states have not as yet admitted. See INTERVENTION.

It is conceded that any *political* action of any state or states which seriously threatens the existence or safety of others, any disturbance of the balance of power, may be resisted and put down. This must be regarded as an application of the primary principle of self-preservation to the affairs of nations.

But while certain states claim a right to interfere in the internal affairs of others in order to suppress constitutional movements and the action of a people without its own sphere, this is as yet an unauthorized ground of interference. The plea here is, on the part of those states which have asserted such a right, especially of Austria, Prussia, Russia, and at times of France, that internal revolutions are the result of wide-spread conspiracies, and if successful anywhere, are fatal to the peace and prosperity of all absolute or non-constitutional governments. The right, if admitted, would destroy by an international law all power of the people in any state over their government, and would place the smaller states under the tutelage of two or three of the larger. England has always protested against this enlargement of the right of interference, and France has established more than one revolutionary government in spite of it. See INTERVENTION.

In the notion of sovereignty is involved paramount exclusive jurisdiction within a certain territory. As to the definition of territory, international law is tolerably clear. Besides the land and water included within the line of boundary separating one state from another, it regards as territory the coast-water to the distance of a marine league, and the portions of sea within lines drawn between headlands not very remote, or, in other words, those parts of the sea which are closely connected with a particular country when it needs to defend itself against attack. The high sea, on the other hand, is free, and so is every avenue from one part of the sea to another, which is necessary for the intercourse of the world. It has been held that rivers are exclusively under the jurisdiction of countries through which they flow, so that the dwellers on their upper waters have no absolute right of passage to and from the sea; but practically, at present, all the rivers which divide or run through different states are free for all those who live upon them, if not for all mankind. It has been claimed that ships are territory; but it is safer to say that they are under the jurisdiction of their own state until they come within that of another state. By comity, public vessels are exempt from foreign jurisdiction, whether in foreign ports or elsewhere. See HIGH SEAS; FAUCES TERRÆ; NAVIGABLE WATERS.

The relations of a state to aliens, especially within its borders, come next under review. Here it cannot be affirmed that a state is bound, in strict right, to admit foreigners into or to allow them transit across its territory, or even to hold intercourse with them. All this may be its duty and perhaps, when its territory affords the only convenient pathway to the rest of the world, or its commodities are necessary to others of mankind, transit and intercourse may be enforced. But, aside from these extreme cases, intercourse is only a duty, and not definable with precision, as is shown by the endless varieties of commercial treaties. It can only be said that the practice of Christian states is growing more and more liberal, both as regards admitting foreigners into their territories and to the enjoyment of those rights of person and property which the natives possess, and as regards domiciliating them, or even incorporating them, afterwards, if they desire it, into the body politic. See ALIEN; NATURALIZATION.

[Formerly all criminals of one country who escaped into another were safe from pursuit. In modern times extradition treaties have been made providing for their return, but extradition has been regarded as a matter of treaty, and not an international duty. Political offenders are not usually extradited. In Spain and the Spanish American States a legation may grant asylum to persons charged with offences, but this right is not allowed in other countries. Nor can ships of war, as a rule, grant asylum except possibly in cases of political offenders. French naval officers are given the right to refuse asylum under any circumstances, but are forbidden to permit any pursuit or search of their vessels provided a refugee is once given asylum; Snow, Int. Law 38. See 17 Law Mag. & Rev., 4th. 93; Whart. Dig. Int. L. § 104; EXTRADITION; ASYLUM; FUGITIVE FROM JUSTICE.]

The multiplied and very close relations which have arisen between nations in modern times, through domiciled or temporary residents, have given rise to the question: What law, in particular cases involving personal status, property, contracts, family rights, and succession, shall control the decisions of the courts? Shall it be always the *lex loci*, or sometimes some other? The answers to these questions are given in *private international law*, or the *conflict of law*, as it is sometimes called,—a very interesting branch of law, as showing how the Christian nations are coming from age to age nearer to one another in their views of the private relations of men. See CONFLICT OF LAWS; LEX LOCI.

Intercourse needs its agents, both those whose office it is to attend to the relations of states and the rights of their countrymen in general, and those who look after the commercial interests of individuals. The former share with public vessels, and with sovereigns travelling abroad, certain exemptions from the law of the land to which they are sent. Their persons are ordinarily inviolate; they are not subject

to foreign civil or criminal jurisdiction; they are generally exempt from imposts; they have liberty of worship, and a certain power over their trains, who likewise share their exemptions. Only within five centuries have ambassadors resided permanently abroad—a change which has had an important effect on the relations of states. Consuls have almost none of the privileges of ambassadors, except in countries beyond the pale of Christianity. See AMBASSADOR.

Nations, like individuals, have the right of contracts, and their treaties are subject to the same rules of interpretation and of morality which govern in municipal law. An interesting description of treaties are those of guaranty, by which sometimes a right of intervention in the affairs of other states is secured beforehand.

But treaties may be broken, and all other rights invaded; and there is no court of appeal (except by arbitration) where wrongs done by states can be tried. The rights of self-defence and of redress now arise, and are of such importance that but for redress by force or war, and to prevent war, international law would be a very brief science. The laws and usages of modern warfare show a great advance of the nations in humanity since the middle ages. The following are among the leading principles and usages:—

That declarations of war, as formerly practised, are unnecessary; the change in this respect being due chiefly to the intimate knowledge which nations now have, through resident ambassadors and in other ways, of each other's movements and dispositions.

That at the opening of war the subjects of one hostile state within the territory of another are protected in their persons and property, and this notwithstanding it is conceded that by strict right such property is liable to confiscation.

That war is waged between states, and by the active war agents of the parties, but that non-combatants are to be uninjured in person and property by an invading army. Contributions or requisitions, however, are still collected from a conquered or occupied territory, and property is taken for the uses of armies at a compensation.

That combatants, when surrendering themselves in battle, are spared, and are to be treated with humanity during their captivity, until exchanged or ransomed.

That even public property, when not of a military character, is exempt from the ordinary operations of war, unless necessity requires the opposite course.

That in the storming of inhabited towns great license has hitherto been given to the besieging party; and this is one of the blots of modern as well as of ancient warfare. But humane commanders avoid the bombardment of fortified *towns* as far as possible; while mere fortresses may be assailed in any manner.

The laws of sea-warfare have not as yet come up to the level of those of land-warfare. Especially is capture allowed on the sea in cases where it would not occur on the land. Yet there are indications of a change in this respect; privateering has been abandoned by many states (the first article of the Declaration of Paris recites that "Privateering is and remains abolished"), and there is a growing demand that all capture upon the sea, even from enemies, except for violation of the rules of contraband, blockade, and search, shall cease. See CAPTURE; PRIVATEER.

When captures are made on the sea, the title, by modern law, does not fully vest in the captor at the moment, but needs to pass under the revision of a competent court. The captured vessel may be ransomed on the sea, unless municipal law forbids, and the ransom is of the nature of a safe-conduct. If a vessel is recaptured, or rescued from other perils, a compensation is due to the rescuer, which is called salvage, which see.

In modern international law, questions of neutrality play a great part. A neutral is one, strictly, who affords assistance to *neither* party; for assistance afforded to *both alike*, in almost every case, would benefit one party and be of little use to the other. The neutral territory, on land and sea, must be untouched by the war; and for all violations of this rule the neutral can take or demand satisfaction.

The principal liabilities of neutral trade are the following:—

In regard to the nationality of goods and vessels, the rule, *on the whole*, has been that enemy's goods were exposed to capture on any vessel, and neutral's goods were safe on any vessel, and that the neutral vessel was not guilty for having enemy's goods on board. Owing to the declaration of the Peace of Paris in 1856, the humane rule that free ships make free goods will no doubt become universal.

Certain articles of especial use in war are called contraband, and are liable to capture. But the list has been stretched by belligerents, especially by England, so as to include naval stores and provisions; and then, to cure the hardship of the rule, another—the rule of pre-emption—has been introduced. The true doctrine with regard to contraband seems to be that nothing can be so called unless nations have agreed so to consider it; or, in other words, that articles cannot become occasionally contraband owing to the convenience of a belligerent. See CONTRABAND.

An attempt of a neutral ship to enter a blockaded place is a gross violation of neutrality; and, as in cases of contraband trade the goods, so here the guilty vessel is confiscated. But blockade must exist in fact, and not alone upon paper, must be made known to neutrals, and, if discontinued, must be resumed with a new notification. See BLOCKADE.

To carry out the rights of war, the right of search is indispensable; and such search ought to be submitted to without resistance. Search is exclusively a war right, excepting that vessels in peace can be arrested near

the coast on suspicion of violating revenue laws, and anywhere on suspicion of piracy. The slave trade, not being piracy by the law of nations (though it is piracy by statute in the United States, Great Britain, and other countries), vessels of other nations cannot be searched on suspicion of being engaged in this traffic. And here comes in the question which has agitated the two leading commercial states of Christendom: How shall it be known that a vessel is of a nationality which renders search unlawful? The English claim, and justly, that they have a right to ascertain this simple fact by detention and examination; the United States contend that if in so doing mistakes are committed, compensation is due, and to this England has agreed. See BELLIGERENCY; INSURGENCY; SEA; THREE MILE LIMIT; RIVERS; EXTERRITORIALITY; PIRACY; NATIONALITY; NATURALIZATION; TREATIES; REPRISAL; RETORSION; PACIFIC BLOCKADE; WAR; PRIVATEERS; TRUCE; POSTLIMINIUM; UTI POSSIDETIS; NEUTRALITY; SEARCH; PRIZE; POLITICAL CRIME; SOVEREIGN; SURRENDER; SUZERAINTY; FLAG.

INTERNATIONAL RULES OF NAVIGATION. See NAVIGATION RULES.

INTERNUNCIO. A Papal minister of the second order, accredited to minor states where there is no nuncio (*q. v.*).

INTERPLEADER. In Practice. A proceeding in the action of detinue, by which the defendant states the fact that the thing sued for is in his hands, and that it is claimed by a third person, and that whether such person or the plaintiff is entitled to it is unknown to the defendant, and thereupon the defendant prays that a process of garnishment may be issued to compel such third person so claiming to become defendant in his stead. 3 Reeve, Hist. Eng. Law c. 23; Mitf. Eq. Pl. 141; Story, Eq. Jur. § 800; Beach, Mod. Eq. Pr. 141. Interpleader is allowed to avoid inconvenience; for two parties claiming adversely to each other cannot be entitled to the same thing; Brooke, Abr. *Interpleader* 4; hence the rule which requires the defendant to allege that different parties demand the same thing.

If two persons sue the same person in detinue for the thing, and both actions are depending in the same court at the same time, the defendant may plead that fact, produce the thing (*e. g.* a deed or charter) in court, and aver his readiness to deliver it to either as the court shall adjudge, and thereupon pray that they may interplead. In such a case it has been settled that the plaintiff whose writ bears the earliest teste has the right to begin the interpleading, and the other will be compelled to answer; Brooke, Abr. *Interpleader*, 2.

For the law in regard to interpleader in equity, see BILL OF INTERPLEADER.

Under the Pennsylvania practice, when goods levied upon by the sheriff are claimed by a third party, the sheriff takes a rule of interpleader on the parties, upon which, when made absolute, a feigned issue is framed, and the title to the goods is tested. The goods, pending the proceedings, remain in the custody of the defendant upon the execution of a forthcoming bond.

INTERPOLATION. In Civil Law. The act by which, in consequence of an agreement, the party bound declares that he will not be bound beyond a certain time. Wolff, Inst. Nat. § 752.

In the case of a lease from year to year, or to continue as long as both parties please, a notice given by one of them to the other of a determination to put an end to the contract would bear the name of interpolation.

INTERPRETATION. The discovery and representation of the true meaning of any signs used to convey ideas. Lieber, Leg. and Pol. Hermeneutics.

The "true meaning" of any signs is that meaning which those who used them were desirous of expressing. A person adopting or sanctioning them "uses" them as well as their immediate author. Both parties to an agreement equally make use of the signs declaratory of that agreement, though one only is the originator, and the other may be entirely passive. The most common signs used to convey ideas are words. When there is a contradiction in signs intended to agree, resort must be had to construction,—that is, the drawing of conclusions from the given signs, respecting ideas which they do not express. Construction is usually confounded with interpretation; and in common use, construction is generally employed in the law in a sense that is properly covered by both, when each is used in a sense strictly and technically correct; Cooley, Const. Lim. 49. A distinction between the two, first made in the Leg. and Pol. Hermeneutics, has been adopted by Greenleaf and other American and European jurists. Hermeneutics includes both. See CONSTRUCTION.

Close interpretation (*interpretatio restricta*) is adopted if just reasons, connected with the formation and character of the text, induce us to take the words in their narrowest meaning. This species of interpretation has generally been called literal, but the term is inadmissible. Lieber, Herm. 66.

Extensive interpretation (*interpretatio extensiva*, called, also, *liberal interpretation*) adopts a more comprehensive signification of the word.

Extravagant interpretation (*interpretatio excedens*) is that which substitutes a meaning evidently beyond the true one: it is, therefore, not genuine interpretation.

Free or unrestricted interpretation (*interpretatio soluta*) proceeds simply on the general principles of interpretation in good faith, not bound by any specific or superior principle.

Limited or restricted interpretation (*interpretatio limitata*) is when we are influenced by other principles than the strictly hermeneutic ones. Ernesti, *Institutio Interpretis.*

Predestined interpretation (*interpretatio predestinata*) takes place if the interpreter, laboring under a strong bias of mind, makes the text subservient to his preconceived views or desires. This includes artful interpretation (*interpretatio vafer*), by which the interpreter seeks to give a meaning to the text other than the one he knows to have been intended.

The civilians divide interpretation into :—

Authentic (*interpretatio authentica*), which proceeds from the author himself.

Usual (*interpretatio usualis*), when the interpretation is on the ground of usage.

Doctrinal (*interpretatio doctrinalis*), when made agreeably to rules of science. Doctrinal interpretation is subdivided into extensive, restrictive, and declaratory : extensive, whenever the reason of a proposition has a broader sense than its terms, and it is consequently applied to a case which had not been explained; restrictive, when the expressions have a greater latitude than the reasons; and declaratory, when the reasons and terms agree, but it is necessary to settle the meaning of some term or terms to make the sense complete.

The following are the elementary principles and rules of interpretation and construction, which are here given together on account of their intimate connection and the difficulty of separating them.

There can be no sound interpretation without good faith and common sense. The object of all interpretation and construction is to ascertain the intention of the authors, even so far as to control the literal signification of the words; for *verba ita sunt intelligenda ut res magis valeat quam pereat.* Words are, therefore, to be taken as those who used them intended, which must be presumed to be in their popular and ordinary signification, unless there is some good reason for supposing otherwise, as where technical terms are used : *quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda est.* When words have two senses, of which one only is agreeable to the law, that one must prevail; Cowp. 714; when they are inconsistent with the evident intention, they will be rejected ; 2 Atk. 32 ; when words are inadvertently omitted, and the meaning is obvious, they will be supplied by inference from the context, see 54 N. W. Rep. (Minn.) 933. When language is susceptible of two meanings, one of which would work a forfeiture, while the other would not, the latter must prevail ; 71 Wis. 177.

In Constitutions. The following principles governing the construction of state constitutions are laid down by Judge Cooley. The construction must be uniform and unvarying ; 13 Mich. 138 ; 19 How. 393 ; and sensible, so as to effectuate the legislative intention, and, if possible, avoid an unjust or absurd conclusion ; 144 U. S. 47. The object of construction is to give effect to the intent of the people in adopting it ; this intent is to be found in the instrument itself ; Miller, Const. U. S. 100 ; Ordron. Const. Leg. 575 ; 2 Hill, N. Y. 35. The whole is to be examined with a view to arriving at the true intention of each part ; it is not to be supposed that any words have been employed without occasion, or without intent that they should have effect as part of the law ; if different portions should seem to conflict, the courts should harmonize them, if practicable, and should lean in favor of a construction which will render every word operative, rather than one which may make some idle and nugatory ; 8 W. Va. 320 ; 2 Paine 584 ; 27 Wisc. 478. It must be presumed that words have been employed in their natural and ordinary meaning ; 9 Wheat. 188 ; but technical words are presumed to have been employed in their technical sense. See Cooley, Const. Lim. ch. iv. Where two provisions of a constitution are irreconcilably repugnant, that which is last in order of time and local position will prevail ; 7 Ind. 570.

In Statutes. In construing written laws, it is the intent of the law-giver which is to be enforced ; this intent is found in the law itself. The first resort is to the natural significance of the words employed, in their order of grammatical arrangement ; 7 N. Y. 9, 97 ; Cooley, Const. Lim. 70 ; 130 U. S. 670 ; 60 Ill. 86. The whole law is to be examined, with a view to arrive at the true intention of each part ; Co. Litt. 381 *a*. It is a general rule, in the construction of writings, that a general intent appearing, it shall control the particular intent ; but a particular intent plainly expressed in one place must sometimes prevail over a general intent deduced from other parts of the writing ; 5 Tex. 441.

Where a law is expressed in plain and unambiguous terms, whether those terms are general or limited, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction ; 130 U. S. 671 ; 99 *id.* 72 ; 2 Cranch 399. Statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or absurd conclusion ; 144 U. S. 47.

Penal statutes must be strictly interpreted ; remedial ones liberally ; 1 Bla. Com. 88 ; 6 W. & S. 276 ; 3 Taunt. 377 ; see 120 U. S. 678 ; 134 *id.* 624 ; and generally, in regard to statutes, the construction given them in the country where they were enacted will be adopted elsewhere. Though penal statutes are to be strictly construed, yet the intention of the legislature must govern ; 134 U. S. 624.

Statutes should be so construed, if practicable, that one section will not destroy another, but explain and support it ; 147 U. S. 242.

The change of conditions as well as of the meaning of words in their ordinary use frequently creates difficulties in the application of statutes which in England led to the passage, in 1889, of the stat. 52 and 53 Vict. c. 63, known as the General Interpretation Act, which was intended to cover the whole subject of statutory interpretation. A syn-

opsis of its provisions, together with an instructive collation of words having a marked difference in their ordinary and judicial meaning, will be found in Ordronaux, Const. Leg. c. xi. In this country the subject is not so comprehensively treated, but there will usually be found in the general statutes of each state a chapter defining the meaning of certain words as used in the statutes.

In Contracts. There must always be reference to the surrounding circumstances and the object the parties intended to accomplish ; 116 Ind. 60 ; 77 Ga. 36 ; and when the language is indefinite or ambiguous and of doubtful construction, the practical interpretation by the parties is of great weight, if not controlling ; 122 U. S. 121. Where there was a doubt as to the nature of a contract, the court adopted its view of it, and held that even if the meaning were doubtful, the court would follow the interpretation put upon it by both parties in good faith ; 74 Fed. Rep. 183. Impossible things cannot be required. The subject-matter and nature of the context, or its objects, causes, effects, consequences, or precedents, or the situation of the parties, must often be consulted in order to arrive at their intention, as when words have, when literally construed, either no meaning at all or a very absurd one. The whole of an instrument must be viewed together and not each part taken separately; and effect must be given to every part, if possible : 37 Minn. 338. Assistance must be sought from the more near before proceeding to the remote. When one part is totally repugnant to the rest, it will be stricken out ; but if it is only explanatory, it will operate as a limitation. Reference to the *lex loci* or the usage of a particular place or trade is frequently necessary in order to explain the meaning ; 2 B. & P. 164 ; 3 Stark. Ev. 1036 ; 16 S. & R. 126. A court of law should read a written contract according to the obvious intention of the parties, in spite of clerical errors or omissions which can be corrected by perusing the whole instrument ; 55 N. J. L. 132 ; 16 Or. 283.

In the construction of a contract it is proper to consider the course of dealing between the parties, and the construction they had by their actions put on previous contracts between them of the same general character ; 155 Pa. 22 ; 12 U. S. App. 193 ; 44 Ill. App. 627 ; 8 Misc. Rep. 61; 50 Fed. Rep. 764 ; 124 U. S. 505.

Words spoken cannot vary the terms of a written agreement ; they may overthrow it. Words spoken at the time of the making of a written agreement are merged in the writing ; 5 Co. 26 ; 2 B. & C. 634 ; 4 Taunt. 779. Where there is a latent ambiguity which arises only in the application and does not appear upon the face of the instrument, it may be supplied by other proof ; *ambiguitas verborum latens verificatione suppletur ;* 1 Dall. 426 ; 3 S. & R. 609.

The rule that an agreement is to be construed most strongly against the party benefited can only be applied in doubtful cases ; 125 U. S. 260 ; and when other rules of interpretation fail ; 11 Col. 50. The more the text partakes of a solemn compact, the stricter should be its construction.

General expressions used in a contract are controlled by the special provisions therein. In agreements relating to real property, the *lex rei sitæ* prevails, in personal contracts the *lex loci contractus*, except when they are to be performed in another country, and then the law of the latter place governs ; 2 Mass. 88 ; 1 Pet. 317 ; Story, Confl. Laws § 242 ; 4 Cow. 410, note ; 2 Kent 39, 457. When there are two repugnant clauses in a deed, which cannot stand together, the first prevails. With a will the reverse is the case. In all instruments the written part controls the printed, if the two are inconsistent ; 78 Hun 23 ; 13 Gray 37 ; 150 U. S. 312 ; 25 Neb. 849 ; 62 Mich. 546 ; 84 Ala. 109 ; when a contract is embodied in several instruments, its true meaning is to be ascertained from a consideration of all the instruments and their effect upon each other ; 24 Fla. 560 ; 98 Mo. 315 ; 86 Ky. 141 ; 41 Kan. 763.

In addition to the above rules, there are many presumptions of law relating to agreements, such as, that the parties to a simple contract intend to bind their personal representatives ; that where several parties contract without words of severalty, they are presumed to bind themselves jointly ; that every grant carries with it whatever is necessary to its enjoyment ; when no time is mentioned, a reasonable time is meant ; and other presumptions arising out of the nature of the case. It is the duty of the court to interpret all written instruments ; see 10 Mass. 384 ; 3 Cra. 180 ; 3 Rand. 586 ; 10 U. S. App. 352 ; 7 Misc. Rep. 710 ; 150 Pa. 8 ; written evidence ; 2 Watts 347 ; and foreign laws ; 1 Pa. 388 ; and where the terms of a parol agreement are shown without any conflict of evidence ; 47 Mo. App. 1 ; 114 Mo. 55 ; 155 Pa. 67 ; contracts are to be construed liberally in favor of the public, when the subject-matter concerns the interests of the public 138 ; U. S. 1.

See CONSTRUCTION ; IN MITIORI SENSU.

INTERPRETATION CLAUSE. A clause frequently inserted in Acts of Parliament, declaring the sense in which certain words used therein are to be understood. Moz. & W.

INTERPRETER. One employed to make a translation.

An interpreter should be sworn before he translates the testimony of a witness ; 4 Mass. 81 ; 5 *id.* 219 ; 2 Caines 155.

A person employed between an attorney and a client to act as interpreter is considered merely as the organ between them, and is not bound to testify as to what he has acquired in those confidential communications ; 1 Pet. C. C. 356 ; 4 Munf. 273 ; 3 Wend. 337.

Communications made to an interpreter

are not hearsay when he translates and communicates what has been said to him, and the party to whom it is made may testify to it; 50 Minn. 91. Conversations carried on through an interpreter may be shown by either party thereto or a third person who hears it, its weight only and not its competency being affected thereby; 157 Mass. 393.

INTERREGNUM (Lat.). The period, in case of an established government, which elapses between the death of a sovereign and the accession of another, is called interregnum. The vacancy which occurs when there is no government.

INTERROGATOIRE. In French Law. An act, or instrument, which contains the interrogatories made by the judge to the person accused, on the facts which are the object of the accusation, and the answers of the accused. Pothier, Proc. Crim. s. 4, art. 2, § 1.

INTERROGATORIES. Material and pertinent questions in writing, to necessary points, exhibited for the examination of witnesses or persons who are to give testimony in the cause.

They are either original and direct on the part of him who produces the witnesses, or cross and counter, on behalf of the adverse party, to examine witnesses produced on the other side. Either party, plaintiff or defendant, may exhibit original or cross interrogatories.

The form which interrogatories assume is as various as the minds of the persons who propound them. They should be as distinct as possible, and capable of a definite answer; and they should leave no loop-holes for evasion to an unwilling witness. Care must be observed to put no leading questions in original interrogatories, for these always lead to inconvenience; and for scandal or impertinence interrogatories will, under certain circumstances, be suppressed. See Willis, Int. *passim*; Gresl. Eq. Ev. pt. 1, c. 3, s. 1; Viner, Abr.; Hind. Ch. Pr. 317; 4 Bouvier, Inst. n. 4419 *et seq.*; Daniell, Ch. Pr.

INTERRUPTION. The effect of some act or circumstance which stops the course of a prescription or act of limitations. 3 Bligh, N. S. 444; 4 M. & W. 497.

Civil interruption is that which takes place by some judicial act.

Natural interruption is an interruption in fact. 4 Mas. 404; 2 Y. & J. 285. See EASEMENTS; LIMITATIONS; PRESCRIPTION.

In Scotch Law. The true proprietor's claiming his right during the course of prescription Bell, Dict.

INTERSECTION. The point of intersection of two roads is the point where their middle lines intersect. 73 Pa. 127; 74 *id.* 259.

INTERSTATE COMMERCE COMMISSION. A commission of five persons appointed by the president under the act of February 4, 1887, to carry out the purpose of the act. It sits usually in Washington, but can hold sittings at such other places as it may choose.

The Constitution of the United States, Art. I, Sec. 8, gives to Congress the power "to regulate commerce with foreign nations and among the several states and with the Indian tribes." The Interstate Commerce Act was passed on February 4th, and took effect on April 5th, 1887. It was amended March 2, 1889; February 10, 1891; February 8, 1895; supplementary acts were passed February 11, 1893; March 2, 1893; August 7, 1888. It applies to all common carriers "engaged in the transportation of passengers or property wholly by railroad or partly by railroad and partly by water, when both are used under a common control, management, or arrangement for a continuous carriage or shipment," between states or states and territories; between states or territories and the District of Columbia; between places in the United States and any adjacent foreign country; between places in the United States when any part of the transportation is through an adjacent foreign country; and to transportation of property from any place in the United States to a foreign country which is carried from such place to a port of transshipment, and to property shipped from a foreign country to any place in the United States, and carried to such place from a port of entry, either in the United States or an adjacent foreign country. It does not apply to the transportation of persons or property, etc., wholly within a state and not shipped to or from a foreign country. It extends to bridges and ferries used in connection with any railroad. It declares that all charges for services rendered in connection therewith shall be reasonable and just and prohibits all unjust and unreasonable charges.

Sec. 2. The charging of any greater or less compensation for any service rendered any shipper or person than is charged or collected from another for a like and contemporaneous service, etc., is declared to be unlawful.

Sec. 3 forbids the giving any undue or unreasonable preference to one person, etc., or locality over another person or place, or to one description of traffic over another, and prohibits the carrier from subjecting any shipper, locality, or traffic to any undue or unreasonable prejudice or disadvantage. It imposes a duty to afford reasonable, proper, and equal facilities to connecting carriers, for the interchange of business, without discrimination.

Sec. 4 prohibits charging any greater compensation in the aggregate for the transportation of persons or of like kind of property, under substantially similar conditions, for a shorter than is charged for a longer distance over the same line in the same direction, the shorter being included within the longer distance.

Sec. 5 prohibits any agreement between carriers for the pooling of freights of competing railroads or for dividing their joint earnings.

Sec. 6 provides that the carriers shall print schedules of their rates, duly classified, and file copies with the Commission and post copies in all their stations and offices for public inspection. These must specify terminal charges and any rules affecting the rates. These rates can only be advanced after ten days' public notice and an amendment of the schedules accordingly; nor can they be reduced except after three days' similar notice and the like amendment. Copies of all agreements between two or more carriers for making a line of through transportation are also required to be filed with the Commission. If joint tariffs of rates are provided for, copies of these tariffs must be filed with the Commission. Such publicity is to be given to these joint tariffs as the Commission may direct. This section contains the same requirement as to ten days' notice of any advance and three days' notice of any reduction in the joint rates, as is prescribed respecting the rates of the individual carrier.

Sec. 7 prohibits any scheme between carriers to prevent the continuous transportation of property without change of cars. No breaking of bulk, etc., unless necessary, shall be considered as breaking the continuous passage.

Sec. 8 provides that any carrier committing a breach of this act shall be liable in damages to the person injured, including a counsel fee to be taxed as costs.

By sec. 9 any person aggrieved may complain before the Commission or bring suit in the circuit or

district court having jurisdiction, for damages. In the latter cases the court may compel all officers, etc., to appear and testify and to produce the books of the company; but no evidence which they may give shall be used against them in any criminal proceeding.

By sec. 10 any carrier, or, if a corporation, any officer, etc., thereof, guilty of an infraction of the act, shall be guilty of a misdemeanor, and subject to a fine of not to exceed $5,000, or if the offence is an unlawful discrimination in rates, to imprisonment for not to exceed two years, or both in the discretion of the court. False billing, classification etc., of goods is made a misdemeanor, whether by the carrier or its officer, or by the shipper, and so is the act of inducing a common carrier to discriminate unjustly.

Sec. 11 creates the Commission, who have authority, by sec. 12 to inquire into the management of the business of common carriers and to enforce the act; they may institute proceedings for that purpose and for the punishment of violations of the act; they may require the production of all necessary books, contracts, etc.

By sec. 13 any person, corporation, association, or any mercantile, agricultural, or manufacturing society, or any body politic or municipal orgauization or State Railroad Commission may complain before the Commission of any infraction of the act, and the Commission itself may institute any inquiry on its own motion.

By sec. 15 if the Commission find that the act has been contravened, it shall notify the carrier thereof.

By sec. 16 if any carrier refuses to obey an order of the Commission, the latter or any party interested may apply to the circuit court of the district where such carrier has its principal office. Such court shall hear the case speedily, without formal pleadings; the findings of fact of the Commission shall be *prima facie* evidence of the matter therein stated. If it appear that any lawful order of the Commission has been disobeyed, the court shall enjoin further disobedience thereof. If the matter in dispute exceeds $2,000, either party may appeal.

Common carriers are required to make annual reports to the Commission, and the latter may prescribe a uniform system of keeping accounts.

The act expressly excepts the carriage of property free, or at reduced rates, for the United States, state, or municipal governments, or for charitable purposes, or to and from expositions, etc., or the free carriage of destitute persons transported by charitable societies; or the issuance of mileage, excursion, or commutation passenger tickets; or giving reduced rates to ministers of religion; or to certain indigent persons; or the exchange of passes between the officers of railroad companies for their officers and employes.

The provisions of the act are declared to be in addition to all remedies by common law or by statute.

By the act of March 2, 1889, the United States courts are given jurisdiction to issue writs of peremptory mandamus commanding the movement of interstate traffic or the furnishing of cars and other transportation facilities.

By the act of February 11, 1893, no person shall be excused from testifying before the Commission, upon the ground that his evidence, documentary or otherwise, will tend to criminate him, etc.; but no person shall be prosecuted (except for perjury before the Commission) by reason of such evidence.

The Commission is made a body corporate, with legal capacity to be a party plaintiff or defendant in the federal courts, by reason of the provision in the act that it "shall have an official seal, which shall be judicially noticed," and that making it lawful for it to apply by petition for the enforcement of its orders; 5 I. C. Rep. 405;* s. c. 162 U. S. 197. It has only administrative powers of supervision and investigation, which fall far short of making it a court, or its action judicial. Its action or conclusions upon matters brought before it is neither final nor conclusive; nor is it vested with any authority to enforce its decision or award. It hears, investigates, and reports upon complaints made before it, but subsequent judicial proceedings are contemplated and provided for in all cases, where the party against whom the decision is rendered does not yield voluntary obedience thereto. Its findings of facts are *prima facie* evidence in subsequent judicial proceedings brought to enforce its orders. The circuit court is not the mere executioner of the Commission's orders or recommendations. The suit in that court is an original, independent proceeding, and the court hears and determines the cause *de novo* upon proper pleadings and proofs. The Commission may be regarded as the general referee of the court. The jurisdiction of the court depends upon the fact that it relates to a subject over which congress has exclusive control, independently of the citizenship of the parties; 37 Fed. Rep. 567; see also 56 *id.* 925. The Commission is authorized and required to execute and enforce the provision of the act. It can investigate, find facts, reach conclusions, and make orders, on complaint made by others, or upon inquiry instituted on its own motion. The conclusions and orders have no binding force; its reported findings of fact alone have legal effect, and its conclusions and recommendations can only be enforced through the courts; 3 I.C. Rep. 151; s. c. 4 I. C. C. R. 116. The Commission is not a court but a special tribunal whose duties though largely administrative, are sometimes semi or quasi judicial; 5 I. C. Rep. 656 (U. S. C. C., M. D. of Tenn.); 3 *id.* 830; s.c. 5 I. C. C. R. 166; it is required to investigate and report, but its final act is not considered as a judgment; *id.;* its opinion has not the effect of a judicial determination, and, to enforce it, the court, in an original proceeding, hears the complaint *de novo;* 5 I. C. Rep. 282 (C. C., S. D. of Ohio); s. c. 62 Fed. Rep. 690; the order of the Commission is administrative, and not final or conclusive like the judgment or decree of a court; and the order of the circuit court enforcing it does not make it a final judgment, so that change or modification cannot be made when changed traffic conditions arise; and when the Commission files a petition in a federal court to enforce its findings, they are not conclusive of the facts or entitled to greater weight than a complaint filed by an individual; 49 Fed. Rep. 177; but the finding and opinion were said in another case to be entitled to great weight; 5 I. C. Rep. 656 (U. S. C. C., M. D. of Tenn.); s. c. 73 Fed. Rep. 409.

The Commission has authority to investigate and deal with violation of the law independently of any formal complaint; 3 I. C. Rep. 151; it can only determine whether existing rates are in conflict with the statute, and not make rates itself; 5 *id.* 391; s. c. 162 U. S. 184; 76 Fed. Rep. 183.

It has no power to prescribe rates, either maximum, minimum, or absolute, and it

* The decisions of the Commission have been published in a series of Interstate Commerce Commission Reports, 5 vols. The Interstate Commerce Reports, 6 vols., contain the decisions of the Commission and commerce cases in the courts. The former series has been discontinued; it is cited as I. C. C. R.; the latter as I. C. Rep.

cannot secure the same result indirectly by determining what in reference to the past was reasonable and just, and then endeavor to obtain from the courts a peremptory order that in the future the railroad company should follow such rates; 167 U. S. 479. It can apply the act only where an overt violation of its provisions by a carrier subject thereto is made to appear; 1 I. C. Rep. 333; s. c. 1 I. C. C. R. 103.

Subject to the two leading prohibitions that their charges shall not be unreasonable or unjust, and that they shall not unjustly discriminate, so as to give undue preference to persons or traffic similarly circumstanced, the act leaves common carriers as they were at common law, free to make special contracts, to classify their traffic, to adjust and apportion their rates, and generally, to manage their important interests upon the same principles which are regarded as sound in other pursuits; 162 U. S. 184; s. c. 5 I. C. Rep. 391 (C. C. of A.); *id.* 685. The act was not designed to prevent competition between different roads, or to interfere with the customary arrangements made by railway companies for reduced fares in consideration of increased mileage, where such reduction does not operate as an unjust discrimination. It is not all discriminations that are prohibited, but only those that are unjust and unreasonable; 145 U. S. 263, affirming 43 Fed. Rep. 37. The act is not to be construed so as to abridge or take away the common-law right of the carrier to make contracts and adopt proper business methods, further than its terms and recognized purposes require; a railroad company may lawfully charge low rates on coal in the summer months, if its rates are equal to all persons; 5 I. C. Rep. 656 (C. C., M. D. of Tenn.).

The act should be liberally construed in favor of commerce among the states, but when complaint is made solely or mainly in the interest of the common carriers engaged in such commerce, the act complained of, or the right asserted, should not rest upon any doubtful construction, but should clearly appear to have been forbidden or conferred; 37 Fed. Rep. 567.

Where a railroad company by a contract with a bridge company had the right to use a bridge for its traffic, the railroad company is subject, as a common carrier, to the act, but the bridge company cannot invoke it to compel railroad companies to transact business with it; *id.* Carriers by water are not under the act except "when both are used under a common control, etc., for a continuous carriage, etc.;" 2 I. C. Rep. 486.

The act does not apply to express companies, independently organized; 42 Fed. Rep. 448; nor to the carriage of property by rail or otherwise wholly within a state; 30 *id.* 867; when the carrier issues no bills of lading to points beyond its line, receives no freight on through bills of lading, and has no arrangement with other roads for a conventional division of charges or a common management; 77 *id.* 942; but if a railroad company, whose line is entirely within one state, issues through bills of lading to points in other states, it is within the act; 1 I. C. Rep. 315. Receivers of railroad companies are common carriers and subject to the act; 6 I. C. Rep. 379; and a carrier subject to the act cannot, by leasing its road, free itself from liability for practices illegal under the act, nor after the termination of the lease escape liability for damages for injuries sustained during the lease; 6 I. C. Rep. 378.

The act does not come within the constitutional prohibition as to impairing the obligation of contracts, although its effect may be to prevent the literal enforcement of pre-existing contracts; 2 I. C. Rep. 102; s. c. 2 I. C. C. R. 162; 45 Am. & Eng. R. Cas. (Mont.) 234.

The act requires that all charges by common carriers subject to its provisions "shall be reasonable and just," and this is the sole requirement of the law upon the subject of rates which such carriers may demand for the transportation of interstate traffic; 37 Fed. Rep. 567. The terms "reasonable, just," "unreasonable, unjust," "undue or unreasonable preference or advantage," "undue or unreasonable advantage in any respect whatsoever," used in the act imply comparison of relative locations, natural and acquired advantages, of the reasonableness of charges *per se* and in their relations to other roads or lines which serve competing localities, and consideration of all the facts and circumstances which affect rates to different communities; 6 I. C. Rep. 458.

The act is for the protection of the public only; 2 I. C. Rep. 137; s. c. 2 I. C. C. R. 231.

The mere circumstance that there is in a given case a preference does not, of itself, show that such preference is unreasonable; 5 I. C. Rep. 685 (C. C. of A.); s. c. 74 Fed. Rep. 715. See DISCRIMINATION.

Evidence that the rates on a certain commodity are higher in certain cases than certain other rates, and that they produce a large revenue to the carrier, does not make a *prima facie* case that they are unreasonable. The reasonableness must be determined by an examination of the whole subject; 2 I. C. Rep. 162. The fact that a road earns little more than operating expenses is not to be overlooked in fixing rates, but it cannot be made to justify grossly excessive rates. Wherever there are more roads than the business, at fair rates, will remunerate, they must rely upon future earnings for the return of investments and profits; 2 I. C. Rep. 289.

There is nothing in the act requiring connecting lines of interstate carriers to make through routes and through rates with one connecting line because it has done so with another; 37 Fed. Rep. 567.

The relative fairness of a rate is not determined alone by its being low. Low rates to one place may not be just if still lower rates are given to another place; 2 I. C. Rep. 137. The legitimate interests of car-

rying companies, as well as of traders and shippers, should be considered in determining the lawfulness of rates under the act. Ocean competition may constitute a dissimilar condition, and conditions which exist beyond the seaboard of the United States can be legitimately regarded for the purpose of justifying a difference in rates charged by railroads between import and domestic traffic; 5 I. C. Rep. 405; S. C. 162 U. S. 197.

Trade centres are not, as a matter of right, entitled to have more favorable rates than the smaller towns for which they form distributive centres; and carriers may give the smaller places rates as favorable as the larger ones; when the rates are impartial in themselves as between large and small towns, the fact that one large centre may have an advantage over another in the business of the small places does not make out a case of undue preference. Impartial rates are not rendered illegal by their effect upon the business of localities; 2 I. C. Rep. 32; that rates should be fixed in inverse proportion to the natural advantages of competing towns with the view of equalizing "commercial conditions" is at variance with justice; 4 I. C. Rep. 65; 7 *id.* 180. A through rate does not unjustly discriminate against an intermediate point because less proportionally than the rate from such point to the common destination; 2 I. C. Rep. 393.

A railroad company is under special obligation to give reasonable rates for its local business. It may accept business from other carriers on through rates which, when divided between them, will give to any one of them for its division less than its own local rates; 2 I. C. Rep. 414.

Through transportation over connecting lines is favored by the act, and the rate is correctly adjusted upon the distance through, and not upon the shorter distances over, the several lines; 3 I. C. Rep. 460. While the question of distance is important in establishing rates, it is not an absolute and unconditional right from which a departure may not be justified by other considerations. The public benefits, the greater volume of business warranting lower rates to all, and the force of competition may furnish reasons that outweigh a claim of right founded merely on geographical considerations; 2 I. C. Rep. 436. See *id.* 604.

When rates are on their face disproportionate or relatively unequal, the burden is on the carrier to justify them; 2 I. C. Rep. 604. In determining rates on a short local line, where the cost of service is great, owing to steep grades, sparse population, and light traffic, such circumstances should have much controlling weight. This rule was applied where a road existing under such conditions was charged with unjust rates in transporting oil, as compared with the cost of piping it to the same point; 2 I. C. Rep. 298.

Ordinarily there is no better measure of railroad service in carrying goods than distance, though it is not always controlling. And where the rates for carrying freight from a certain territory over one road are considerably greater than the rates charged by another road from neighboring territory to the same place, the higher rates will be held excessive; 2 I. C. Rep. 609. Greater compensation in the aggregate for the shorter, than for the longer, haul over a direct line is unlawful; 6 I. C. Rep. 361.

Mileage, while a circumstance to be considered with the conditions in fixing rates, is by no means controlling or the most important; 5 I. C. Rep. 656 (C. C., M. D. of Tenn.).

There may be cases in which a carrier legitimately engaged in serving some territory is compelled by some new and aggressive competition to reduce normal and reasonable rates, to retain business on its line, and where corresponding reductions at points not affected, or less affected, by such competition, might be unreasonable. But when a carrier voluntarily enters a field of competition where, by reason of a disadvantageous route, or the rigor of the competitive conditions, remunerative rates cannot be charged, and its service to a portion of its patrons is unprofitable, it accepts the legal obligation that its service shall be impartial to all who sustain similar relations to the traffic, and for whom the service itself is not substantially dissimilar; 3 I. C. Rep. 115. Where there has been a consolidation of competing lines that have formerly served the same territory in competitive traffic to the same market, the consolidated lines cannot deprive the public of fair competition, nor give oppressive discrimination with a view to its own interest; 3 I. C. Rep. 162.

In fixing reasonable rates on such articles as food products, the operating expenses, bonded debt, fixed charges, dividends on the stock and other necessary expenses are all to be considered, but the claim that any particular rate is to be measured by these as a fixed standard, below which the rate cannot lawfully be reduced, is subject to some qualifications, one of which is that these obligations must be actual and in good faith; 37 Fed. Rep. 567; nor, on the other hand, can these rates be so limited that the shipper may, in all cases, realize actual cost of production; 3 I. C. Rep. 93; S. C. 4 I. C. C. R. 48; in the carriage of great staples which supply an enormous business, and which in market value and actual cost of transportation are among the cheapest articles of commerce, rates yielding only moderate profit to the carrier are both necessary and justifiable; *id.*

The fact that one company controls parallel lines affords no warrant for giving superior advantages to the patrons of one line and denying similar advantages to those of the other line; 1 I. C. Rep. 608.

Ordinarily no adequate reason exists for a difference in rates for a solid carload of one kind of freight from one consignor and a like carload from the same point to the same destination consisting of freight from

more than one consignor to one consignee, etc., and such difference is not justified by the difference in the cost of handling; 2 I. C. Rep. 742.

The Commission has no power to require the adoption of rates on a uniform and equal mileage basis; 2 I. C. Rep. 9.

The expense of carrying fruit, etc., from Jersey City, the railroad terminal, to New York, may be added to the rate charged to the latter place; 6 I. C. Rep. 295. As to the effect of free cartage at terminals, see 167 U. S. 633.

Party-rate tickets are not commutation tickets, and when party rates are lower than the fare for single passengers they are illegal; 2 I. C. Rep. 729. A sale of mileage tickets to commercial travellers, and a refusal to sell to other passengers except at a higher rate, is unjust discrimination within the act; and the fact that the former release the carrier from liability, or that they may influence business in favor of the road, does not justify such discrimination; 1 I. C. Rep. 339. The placing of passenger tickets in the hands of ticket brokers to be disposed of at reduced rates, under the pretence of paying a commission, is a violation of the act; 2 I. C. Rep. 340. A passenger rate war in which rates are repeatedly reduced by carriers without filing tariffs or reducing intermediate rates, is unlawful; *id.;* granting free transportation to city officials is unjust discrimination within the act; 3 I. C. Rep. 793; s. c. 5 I. C. C. R. 153.

Where the established rate for single passengers is three cents a mile, it is not unlawful to issue what are termed "party-rate tickets" for not less than ten persons, at two cents a mile, which is less than the established rate for single passengers, where such tickets are offered to the public generally; 145 U. S. 263. See 2 I. C. Rep. 445, where the Commission held that party rates and passenger carload rates lower than for single passengers are illegal.

The provision of sec. 22 that nothing in the act shall apply "to the issuance of mileage passenger tickets" applies only to the issuing of such tickets; the terms upon which they are issued must be in accordance with the general provisions of the act; 1 I. C. Rep. 369.

If a reduction in passenger rates be made between competing points, the rates must also be reduced between intermediate points; 2 I. C. Rep. 340.

A greater charge for a shorter haul than for a longer haul is permissible, if the conditions are not in fact "substantially similar," and the carrier may determine this question for itself, subject to a liability for violating the act. It is not necessary first to obtain a ruling from the Commission; 50 Fed. Rep. 295; s. c. 50 Am. & Eng. R. Cas. 93.

The act does not prevent the making of the charge less in proportion to the distance for a long than for a short haul; 1 I. C. Rep. 764. The provision of sec. 4 prohibiting a greater charge for a shorter than for a longer distance, the shorter being included within the longer distance, is limited to cases in which the circumstances are substantially similar; nor is it a sufficient justification for such greater charge that the short haul is more expensive to the carrier, unless it be exceptionally so, or that the long haul traffic is exceptionally inexpensive; nor that the lesser charge on the longer haul has for its motive the encouragement of some branch of industry, or to build up business or trade centres, or that it is merely a continuation of favorable rates under which they had been built up; 1 I. C. Rep. 278. The long and short haul clause can be suspended only in exceptional cases, and not where there is only a general reason therefor, however serious the consequences of a refusal may be; *id.* 73.

The fact that a railroad company makes an unreasonably low rate does not authorize a rival, extending between the same points, to make greater charges for the shorter haul to intermediate points than it does to the terminal; 2 I. C. Rep. 137.

Where a road makes the same charge to one point that it does to another which is only from a third to two-thirds of the same distance, the charge to the shorter point is presumptively illegal; 2 I. C. Rep. 137. Actual water competition of controlling force relating to traffic important in amount, may justify a lower charge for a longer distance than for a shorter distance included therein; 3 I. C. Rep. 80; but disturbance of rates, secret or open, will not; 7 I. C. Rep. 61; nor will competition between markets or between carriers subject to the act; 7 I. C. Rep. 224; nor possible water competition; 3 I. C. Rep. 138. Water competition must be such that the freight would go to its destination by water, if the lower rate were not given; 3 I. C. Rep. 682; s. c. 4 I. C. C. R. 744.

On the ground that "through failure of crops" the people of long distance localities were without necessary food for themselves and animals, a temporary order was made in 6 I. C. Rep. 293, authorizing a carrier to charge less for a longer distance than they were authorized to charge for a shorter distance. And the need of additional facilities for passengers travelling to Chicago during the World's Fair was considered a ground for the same relief; 6 I. C. Rep. 323. An intermediate local rate should never exceed the through rate plus the local rate back to the intermediate place; 2 I. C. Rep. 1.

The classification of freight is expressly recognized by the act; 2 I. C. Rep. 742. But in classifying freights the carrier must respect the interests of the shipper on the basis of relative equality and justice; 2 I. C. Rep. 742. Common carriers should be held responsible for the correctness of the weight and classification of freight received, and in turn should hold every station agent responsible; 1 I. C. Rep. 813.

Lower rates on carload lots than on less quantities are not unlawful; but if the difference be so wide as to destroy competi-

tion between large and small dealers, especially upon articles that are of general and necessary use, and that furnish a large volume of business, the act is violated ; 2 I. C. Rep. 742. When an article moves in sufficient volume and the demands of commerce will be better served, it is reasonable to give a lower classification for carloads than that which applies to less than carload quantities, but the difference in such classification should not be so wide as to be destructive to competition between large and small dealers ; 4 I. C. Rep. 285.

It is the duty of a carrier to equip its road with suitable cars for its traffic and to furnish them alike to all who have occasion for their use ; 3 I. C. Rep. 162. The public must be justly and equally served in furnishing cars ; if in a time of special pressure, some one must wait, regular customers of the road are not entitled to preference ; 1 I. C. Rep. 787. A carrier is not justified in refusing less desirable freights because more money can be made by using its cars in carrying another kind ; 1 I. C. Rep. 787. See FACILITIES.

In an action for unjust discrimination in freight charges, under sec. 2, it is sufficient to set out the rates charged plaintiff and another shipper, and the circumstances and conditions under which plaintiff's shipment was made, with an allegation that the smaller charges made the other shipper were for like services, under substantially the same circumstances and conditions, without setting out such circumstances and conditions ; 81 Fed. Rep. 80.

It is the duty of a carrier of live stock to provide proper facilities for receiving and discharging live stock free from all charges except the regular transportation charges ; and it cannot receive and discharge such live stock at a depot, access to which must be purchased ; 1 I. C. Rep. 601.

Under the statute shippers are not to be put in a position of subserviency to common carriers, and are not required to ask for rates, but are entitled to equal and open rates at all times ; 2 I. C. Rep. 203.

Complaints, though brought by an individual, may challenge the entire schedule of rates to competing points ; 6 I. C. Rep. 458.

The Commission can rehear a particular case and amend its original order therein, although the circuit court may have refused to enforce such original order ; 6 I. C. Rep. 548.

In proceedings before the Commission, all offending carriers need not be made parties defendant, but the case may proceed only against the carrier whose lines the complainant uses ; 6 I. C. Rep. 548.

The jurisdiction of the circuit court is limited to approval or disapproval, and to an enforcement, or a refusal to enforce, an order of the Commissioners. It cannot modify it ; 5 I. C. Rep. 656 (C. C., M. D. of Tenn.).

The right asserted by a petitioner in the circuit court under the act arises and is claimed under a law of the United States which relates to a subject over which congress has exclusive control ; and this is sufficient to sustain the jurisdiction ; 37 Fed. Rep. 567 ; 2 L. R. A. 289. A state court has no jurisdiction ; 43 La. Ann. 511.

It is not necessary that a person making a complaint before the Commission should have a pecuniary interest in the violation of the statute complained of ; it is sufficient if a responsible party complains of a matter which amounts to a public grievance ; 1 I. C. Rep. 571 ; 7 I. C. Rep. 92.

It is not proper for railroad companies to withhold the larger part of their evidence from the Commission, and first adduce it in the circuit court in proceedings by the Commission to enforce its order ; the purposes of the act call for a full inquiry by the Commission in the first instance ; 5 I. C. Rep. 391 ; s. c. 162 U. S. 184. It is not necessary to file with a petition for the enforcement of an order of the Commission the transcript of the evidence taken before it, under the provision of the statute making the findings of the fact of the Commission *prima facie* evidence of the matter stated, but either party may use as evidence any competent testimony taken before the Commission ; 5 I. C. Rep. 131 ; s. c. 64 Fed. Rep. 981. Where the Commission applies for an injunction to restrain a railroad company from disobeying an order of the Commission, a preliminary injunction will not be granted when the company's answer denies the facts upon which the order was based ; 49 Fed. Rep. 177. A preliminary injunction will not be granted where the question involved is a new one ; or where the injury to the defendant is likely to be greater than the benefit to the plaintiff ; *id.* It is doubtful if a preliminary injunction should ever be granted ; 62 Fed. Rep. 690 ; s. c. 5 I. C. Rep. 287. An action against the carrier for a violation of the act in making unlawful discriminations may be maintained in the name of the United States by the district attorney ; 5 I. C. Rep. 106 (U. S. C. C., D. of Kans.). No appeal now lies to the supreme court from decisions of the Commission ; 149 U. S. 264.

Under the 5th amendment to the constitution of the United States, which declares that "no person . . . shall be compelled in any criminal case to be a witness against himself," a person under examination by a grand jury, in an investigation into certain alleged violations of the act and its amendments, is not obliged to answer questions where he states that his answers might tend to criminate him ; although section 860 of the Revised Statutes provides that no evidence given by him shall in any manner be used against him in any court of the United States in any criminal proceedings. The object of this constitutional provision is to insure that a person shall not be compelled, when acting as a witness in any investigation, to give testimony which may tend to show that he himself has committed a crime ; 142 U. S. 547.

The provision in the act of February 11, 1893, "that no person shall be excused from attending and testifying or from pro-

ducing books, etc., before the" Commission, on the ground that the testimony, may tend to criminate him or subject him to a penalty or forfeiture; but that no such person shall be prosecuted or subjected to any penalty or forfeiture on account of any matter concerning which he may testify or produce such evidence, affords absolute immunity against prosecution and deprives the witness of his constitutional right to refuse to answer; 161 U. S. 591; S. C. 5 I. C. Rep. 369. This act is said to have been passed in view of the decision in 142 U. S. 547, *supra;* see 161 U. S. 594.

The act of February 4, 1887, is not inconsistent with the act of July 2, 1890. "To protect trade and commerce against unlawful restraints and monopolies;" 166 U. S. 290.

So far as congress adopted the language of the English Traffic Act, it is to be presumed that it had in mind the construction given by the English courts to the adopted language; and intended to incorporate it into the statute; 145 U. S. 263.

INTERSTATE RENDITION. See FUGITIVE FROM JUSTICE.

INTERVENING DAMAGES. Damages suffered by an appellee from delay caused by the appeal. 1 Tyler 267.

INTERVENOR. One not originally a party who, by leave of the court, interposes in a suit and becomes a party thereto to protect a right or interest in the subject-matter.

A person who intervenes in a suit, either on his own behalf or on the behalf of the public. See INTERVENTION.

INTERVENTION (Lat. *intervenio*, to come between or among). **In Practice.** The admission, by leave of the court, of a person not an original party to pending legal proceedings, by which such person becomes a party thereto for the protection of some right or interest alleged by him to be affected by such proceedings.

Persons who are not parties to a suit cannot in general file a petition therein for a stay of proceedings or any other cause; the remedy is by original bill. Exceptions are: where the pleadings contain scandal against a stranger, or where a stranger purchases the subject of litigation pending the suit, and the like; creditors are allowed to prove debts and persons belonging to a class on whose behalf the suit is brought are regarded as *quasi* parties and, of course, may have a standing in court; per Bradley, J., in 2 Woods 628. Third persons may be driven to intervene for their rights in equity if those rights are to be affected, and if at the hearing the court would be compelled to notice their absence and order the case to stand over until they were brought in; 19 Fed. Rep. 659. See 1 Dan. Ch. Pr. 287; Story, Eq. Pl. § 220. It is not necessary to the right of intervention, in order to participate in a trust fund in the custody of the law, that the intervenor should first obtain judgment at law or should have any lien upon the fund. Intervention will be granted, after a foreclosure decree against a railroad company, to unsecured noteholders who pray to have their debts established as equitable liens upon the property and funds of the company paramount to the lien of the mortgage; 21 Fed. Rep. 264. A holder of railroad bonds secured by a mortgage under foreclosure has an interest in the amount of the trustee's compensation, which entitles him to intervene and to contest it and to appeal from an adverse decision; 111 U. S. 684. Where a part of a canal was sold and the fund brought into court, it was held that the contractor who built the canal could intervene for the protection of his rights either upon the fund or against the purchaser; 105 U. S. 509. Bondholders in a foreclosure suit brought by the trustee of the mortgage are *quasi* parties and may be heard for the protection of their interests; 53 Fed. Rep. 850.

If one who is a necessary party to a case in a state court is wrongfully excluded and denied leave to file a proper cross bill and answer and to present a motion for removal to the federal court, he will be treated by the latter court as if a party; 23 Fed. Rep. 356. A case in 8 Fed. Rep. 97 was based on special facts.

Where a suit in equity was properly instituted against a railroad company by a stockholder, a bondholder, and the trustees for the bondholders named in the land grant mortgages of the company, and the bill charged that the officers of the company were squandering its property, and the purpose of the suit was the preservation and administration of the assets of the company, and a decree *pro confesso* had been entered and a receiver appointed, individual stockholders were not permitted to intervene and file a cross bill on a general charge of fraud and collusion on the part of the receiver and erroneous judgment on the part of the court in making the order referred to. In such a suit, it is not the proper practice to allow individual stockholders to intervene to set aside the proceedings or to interpose obstacles to the progress of the suit. Such stockholders may come in to take the benefit of the proceedings and decree, but not to oppose and nullify them. Rival creditors by proceedings before the master may fix the priority of their respective liens, and creditors or stockholders may contest the validity of the claims of other creditors and stockholders, but all in subordination to the general object of the suit, to obtain an administration of the company's assets and property. Persons will not be allowed to intervene as general defendants unless they show that they have an interest in the results as stockholders, and are also able to show fraud and collusion between the plaintiff in the suit and the officers of the company; per Bradley, J., in 2 Woods 323. In 3 Hughes 320, the Amsterdam Bondholders' Committee, representing a very large number of bonds, filed a petition setting out

the grounds for disapproving their trustees' management of the foreclosure suit, and praying intervention, but leave to intervene was denied ; 55 Fed. Rep. 448.

Where the holder of a large amount of bonds, on which foreclosure proceedings were pending, asked leave to intervene, and it appeared that the mortgage trustee was already a party and there was no allegation that it was not acting properly for the interests of all bondholders, leave to intervene was refused (even for the mere purpose of requiring notice to such bondholder of successive steps in the proceedings), on the ground of excessive inconvenience in the administration of the cause ; Dallas, J., in the Reading Railroad foreclosure, U. S. C. C.

The practice in respect of intervention in ordinary railroad foreclosure cases probably differs somewhat in different circuits, and varies considerably in different cases. The question of the right to intervene by members of a class already represented on the record appears to be rather a matter of discretion, in view of what is deemed best for the due conduct of the cause. Probably the right to be heard will not ordinarily be refused in any case.

There would seem to be a distinction between the intervention of parties for the purpose of sharing in a fund and the intervention of parties in the course of the administration of a railroad property, during receivership. In the latter class of cases, it would appear, from the authorities, that unless good cause be shown for the intervention of new members of a class already represented on the record they will not be allowed to come in, upon the ground stated by Dallas, C. J., in the Reading foreclosure, —the excessive inconvenience in the administration of the cause.

In a suit to foreclose a railroad mortgage, certain persons prayed leave to intervene, alleging that the defendant company was made up by an illegal consolidation of three other companies, of one of which they were stockholders, that they never consented to the consolidation and were not bound by it nor by the mortgage, that the original company had no officers to defend for them, and that the consolidated company declined to set up the defence which they desired to make ; leave to intervene was refused as there was no charge of fraud or collusion, and the proper remedy was by an independent suit ; 48 Fed. Rep. 14.

A purchaser at a foreclosure sale may be admitted as a party to the record and allowed to appeal; 1 Wall. 655; 2 *id.* 609 ; upon failure to ask leave to come in, the court should compel him to become a party of record ; 49 Fed. Rep. 426. The purchaser at a foreclosure sale under a junior mortgage who takes subject to a prior mortgage, will be made a party to proceedings to foreclose such prior mortgage; 44 Fed. Rep. 115. Parties given leave to intervene in an equity suit after a degree *pro confesso* have a right of appeal from a decree affecting their rights, and the supreme court will enforce this right by a *mandamus;* 94 U. S. 248. See 111 U. S. 684.

When a creditor's bill in equity is properly removed from a state court to a federal court on the ground that the controversy is wholly between citizens of different states, the jurisdiction of the latter is not ousted by admitting in the circuit court as co-plaintiffs other creditors who are citizens of the same state as the defendants ; 115 U. S. 61.

When property in the possession of a third person claiming ownership, is attached on mesne process issuing out of the United States circuit court, as the property of a defendant and citizen of the same state as the person claiming it, such person may seek redress in the circuit court by ancillary proceedings ; as, for instance, if the original proceeding is in equity, by a petition *pro interesse suo*, or by ancillary bill, or by summary motion, according to circumstances ; or, if it is at common law, by a summary motion or by a proceeding in the nature of an interpleader ; or, if proceedings authorized by statutes of the state afford an adequate remedy, by adopting them as part of the practice of the court ; Matthews, J., in 110 U. S. 276. Where, in a suit in equity, an execution is issued and a levy and sale made of certain lands, a third party claiming to be the real owner cannot intervene for the purpose of moving to set aside the execution when there is no privity of estate between him and the defendant in the execution ; 55 Fed. Rep. 17.

On a creditors' bill, judgment creditors who choose to intervene may share ratably with complainants in the proceeds of a sale of the property, even if some do not intervene until after the decree of sale ; 44 Fed. Rep. 117. The practice of permitting judgment creditors to come in and make themselves parties to a creditors' bill is well settled ; 5 Wall. 205.

Stockholders of a corporation who have been allowed to put in answers in the name of the corporation cannot be regarded as answering for the corporation itself. In a special case, however, where there is an allegation that the directors fraudulently refused to attend to the interests of the corporation, equity may allow a stockholder to become a party defendant for the protection of his own interest and that of such other stockholders as may join him in the defence ; 2 Wall. 283. Where any fraud has been perpetrated by the directors of a company by which the interests of the stockholders are affected, the stockholders have a right to come in as parties to a suit against the company and ask that their property shall be relieved from the effect of such fraud ; 8 Biss. 193.

The state can intervene in proceedings to foreclose a railroad mortgage only where it is entitled as a bond or lien holder to share in the proceeds of a sale, or where public interests are at stake which are seriously threatened by the proposed disposition of the property. An intervening petition filed by a state in railroad foreclosure

proceedings alleging that bonds and the mortgage securing them were void, and that the railroad company, by collusion and neglect to defend, was about to allow judgment to go against it by default, that the company in consideration of large land grants from the state had agreed to maintain low rates of transportation, which, by foreclosure, would be increased, gives no right of intervention, especially where neither the charter of the company nor any subsequent legislation showed any such contract as the one alleged; 81 Tex. 530. Permission will not be granted to a state to intervene for the stay of the sale of a railroad under foreclosure proceedings; 2 Woods 628.

In a controversy between two states in relation to the boundary line between them, the attorney-general of the United States may appear on behalf of the United States and adduce evidence, though he does not thereby become a party in the technical sense of the word, and no judgment will be entered for or against the United States; 17 How. 478.

A petition to intervene need not be as formal as a bill of complaint, yet it should exhibit all the material facts relied on, embodying so much of the record in the original suit as is essential, and proceedings taken therein which would fortify the right of the intervenor should be incorporated in the petition by amendment, and if this is not done, such proceedings cannot be noticed on a demurrer to the petition; 77 Fed. Rep. 700.

In bills brought on behalf of a class, an intervening member of the class will ordinarily be joined as a plaintiff and this will not generally deprive the court of jurisdiction; 115 U. S. 61. If there should be any danger that it would, he may be joined as a defendant or, if he intends to act in hostility to the original complainant, the court may make him a defendant; 1 Fost. Fed. Prac. § 201; 5 Blatchf. 525; 2 Woods 323.

A person claiming a right to share in a fund or claiming a right to property in the hands of a receiver is generally allowed to intervene *pro interesse suo;* 1 Fost. Fed. Pr. § 201.

One who, in an action at law, has been denied the right to intervene, because of his status, cannot afterwards maintain a bill in equity in the same court to enjoin the proceedings and to be permitted to intervene; 81 Fed. Rep. 753.

Under Codes. There are provisions in the codes of several of the states, which appear to have been originally adopted from Louisiana, permitting any person who has an interest in any matter in litigation to intervene by rule of court. This interest must be of such a direct and important character that the intervenor will either gain or lose by the direct effect of the judgment; the interest must be that created by a claim in suit or a lien upon the property, or some part thereof, in suit, or a claim to or lien upon the property or some part thereof which is the subject of litigation; 13 Cal. 62, per Field, J. See 144 U. S. 518; 1 La. 425. Where, under a judgment, there were attachments against property, one who held attachments upon the same property subsequent to those of the plaintiff in the suit, sought to intervene, alleging that the notes upon which the judgment was based were fraudulent, and that the suit and attachment were in execution of a collusive scheme between the plaintiff and defendant to defraud the intervenor, it was held that when the judgment was entered against the defendants the whole subject-matter of the suit was disposed of and that the writ of attachment was a part of the remedy and had nothing to do with the cause of action; also, that the vindication of the right as against the attached property involved an independent judicial inquiry, and leave to intervene was therefore refused; 28 Minn. 428.

See A. & E. Enc., *Intervention.*

In Patent Law. Where a third party asked to be made a party defendant, alleging that it was the manufacturer of machines claimed to infringe; that the defendant was its vendee; that it desired to settle the question as to whether or not the machines did infringe, both the complainant and the third party being non-residents, the petitioner was allowed to become a party defendant; 32 Fed. Rep. 835. In a suit against a railway company for infringing a patent upon oil cars, the defendant set up that it merely transported the cars under its obligation as a common carrier; and upon petition by the owner of the cars, he was allowed to intervene and defend the suit; 54 Fed. Rep. 521.

In Admiralty. Any person may intervene in a suit *in rem* for his interest and he may do so notwithstanding the *res* has been delivered to a claimant on a stipulation in a certain sum to abide by and perform the decree, the stipulation as far as it goes standing for the *res;* 45 Fed. Rep. 62. An administrator may intervene in a suit *in rem* to recover the damages allowed by a law of the state for the death of his intestate, caused by the wrongful act or omission of the person in charge of the *res;* 42 Fed. Rep. 78. When a vessel libelled by a material man has been taken possession of by the court, other material men may intervene by libel praying warrants of arrest in order to retain the property in case security be given for its release; 57 Fed. Rep. 233. See Admiralty Rule 43.

In International Law. The right of one state to interfere in the internal affairs of another is a question that has beeen much debated in international law. The Holy Alliance which existed for so many years was a combination of European states to suppress all attempts to overthrow monarchy in any country, and religion and humanity have frequently given excuses for the exercise of the right. The United States, however, has usually adhered to the policy of non-intervention, but with some exceptions not extending to armed intervention

but tending in that direction, as in Mexico, during Maximilian's rule, in the war between Chile and Peru, and in the recent difficulty between Great Britain and Venezuela. See Snow, Lect. Int. L. 57. It is sometimes termed interference. See Davis, Int. L. 74.

The doctrine has been thus spoken of by a distinguished writer, "Historicus": "Its essence is illegality and its justification is its success." Instances of intervention are in China, Armenia, Madagascar, and Nicaragua. In 1861 France made an armed intervention in Mexico. Coercive intervention has long been looked upon as justifiable in cases where one state has been guilty of undue punishment of citizens of another state, or of any arbitrary or capricious unfairness towards such citizens; 20 Law Mag. and Rev. 4th ser. 242. See INTERNATIONAL LAW.

In Civil Law. The act by which a third party becomes a party in a suit pending between other persons.

The intervention is made either to be joined to the plaintiff, and to claim the same thing he does, or some other thing connected with it; or to join the defendant, and with him to oppose the claim of the plaintiff, which it is his interest to defeat. Pothier, Proc. Civ. 1ère part, ch. 2, s. 6, § 3.

In English Ecclesiastical Law. The proceeding of a third person, who, not being originally a party to the suit or proceeding, but claiming an interest in the subject-matter in dispute, in order the better to protect such interest, interposes his claim. 2 Chitty, Pr. 492; 3 Chitty, Com. Law 633; 2 Hagg. Cons. 137; 3 Phill. Eccl. 586; 1 Add. Eccl. 5; 4 Hagg. Eccl. 67; Dunlop, Adm. Pr. 74. The intervenor may come in at any stage of the cause, and even after judgment, if an appeal can be allowed on such judgment; 2 Hagg. Cons. 137; 1 Eng. Eccl. 480; 2 *id.* 13.

Intervention is allowed in certain cases, especially in suits for divorce and nullity of marriage, by 23 & 24 Vict. c. 144, and 36 & 37 Vict. c. 31, where it is usual for the queen's proctor to intervene, where collusion is suspected; Moz. & W.

INTESTABILIS. A witness incompetent to testify. Calv. Lex.

INTESTABLE. One who cannot lawfully make a testament.

An infant, an insane person, or one civilly dead, cannot make a will, for want of capacity or understanding; a married woman cannot make such a will without some special authority, because she is under the power of her husband. They are all intestable.

INTESTACY. The state or condition of dying without a will.

INTESTATE. Without a will. A person who dies, having made no will, or one which is defective in form. In that case, he is said to die intestate, and his estate descends to his heirs at law.

This term comes from the Latin *intestatus*. Formerly, it was used in France indiscriminately with *de-confesse;* that is, without confession. It was regarded as a crime, on account of the omission of the deceased person to give something to the church, and was punished by privation of burial in consecrated ground. This omission, according to Fournel, *Hist. des Avocats*, vol. 1, p. 116, could be repaired by making an ampliative testament in the name of the deceased. See Vely, tom. 6, page 145; Henrion de Pansey, *Autorité judiciaire* 129, and note. DESCENT AND DISTRIBUTION; WILL.

INTESTATE SUCCESSION. A succession is called *intestate* when the deceased has left no will, or when his will has been revoked, or annulled as irregular. Therefore the heirs to whom a succession has fallen by the effects of the law only are called "heirs *ab intestato*." Civil Code La. art. 1096.

INTESTATO. In the Civil Law. Intestate; without a will. Calv. Lex.

INTESTATUS. In the Civil and Old English Law. An intestate. One who dies without a will. Dig. 50, 17, 7.

INTIMACY. As generally applied to persons, it is understood to mean a proper, friendly relation of the parties, but it is frequently used to convey the idea of an improper relation; an intimacy at least disreputable and degrading. 152 Pa. 187. See 157 Mass. 478.

INTIMATION. In Civil Law. The name of any judicial act by which a notice of a legal proceeding is given to some one; but it is more usually understood to mean the notice or summons which an appellant causes to be given to the opposite party, that the sentence will be reviewed by the superior judge.

In Scotch Law. An instrument of writing, made under the hand of a notary, and notified to a party, to inform him of a right which a third person had acquired: for example, when a creditor assigns a claim against his debtor, the assignee or cedent must give an intimation of this to the debtor who, till then, is justified in making payment to the original creditor. Kames, Eq. b. 1, p. 1, s. 1.

INTIMIDATION. The act of intimidating or making fearful; the state of being intimidated.

In Old English Law. By the stat. 38 and 39 Vict. c. 86, 7, every person commits a misdemeanor, who wrongfully uses violence to, or intimidates, any other person, or his wife or children, with a view to compel him to abstain from doing, or to do, any act which he has a legal right to do or abstain from doing. See DURESS.

INTIMIDATION OF VOTERS. Statutes have been enacted in some states to punish the intimidation of voters. Under

an early Pennsylvania act, it was held that to constitute the offence of intimidation of voters, there must be a preconceived intention for the purpose of intimidating the officers or interrupting the election; 3 Yeates 429.

INTOL AND UTTOL. Toll or custom paid for things imported, or exported, or bought in or sold out. Tom.; Calv. Lex.

INTOXICATING DRINKS. See LIQUOR LAWS.

INTOXICATION. See DRUNKENNESS.

INTRA VIRES. An act is said to be *intra vires* ("within the power") of a person or corporation when it is within the scope of his or its powers or authority. It is the opposite of *ultra vires* (*q. v.*).

INTRINSECUM SERVITIUM. Common and ordinary duties with the lord's court. Kenn. Glos.

INTRINSIC. The intrinsic value of a thing is its true, inherent, and essential value, not depending upon accident, place, or person, but the same everywhere and to every one. 5 Ired. L. 698.

INTRODUCTION. That part of a writing in which are detailed those facts which elucidate the subject.

INTROMISSION. In Scotch Law. The assuming possession of property belonging to another, either on legal ground, or without any authority: in the latter case it is called *vicious* intromission. Bell, Dict.

In English Law. Dealing with stocks, goods, or cash of a principal coming into the hands of his agent, to be accounted for by the agent to his principal. 29 Eng. Law & Eq. 391. See AGENT.

INTRONISATION. In French Ecclesiastical Law. The installation of a bishop in his episcopal see. *Clef des Lois Rom.;* André.

INTRUDER. One who, on the death of the ancestor, enters on the land, unlawfully, before the heir can enter.

INTRUSION. The entry of a stranger after the determination of a particular estate of freehold, before the entry of him in reversion or remainder.

This entry and interposition of the stranger differs from an abatement in this, that an abatement is always to the prejudice of an heir or immediate devisee; an intrusion is always to the prejudice of him in remainder or reversion. 3 Bla. Com. 169; Fitzh. N. B. 203; Archb. Civ. Pl. 12; Dane, Abr. Index; 3 Steph. Com. 443.

The name of a writ brought by the owner of a fee simple, etc., against an intruder. New Nat. Brev. 453. Abolished by 3 & 4 Will. IV. c. 57.

INUNDATION. The overflow of waters by coming out of their bed.

Inundations may arise from three causes: from public necessity, as in defence of a place it may be necessary to dam the current of a stream, which will cause an inundation to the upper lands; they may be occasioned by an invincible force, as by the accidental fall of a rock in the stream, or by a natural flood or freshet; or they may result from the erection of works on the stream. In the first case, the injury caused by the inundation is to be compensated as other injuries done in war; in the second, as there was no fault of any one, the loss is to be borne by the unfortunate owner of the estate; in the last, when the riparian proprietor is injured by such works as alter the level of the water where it enters or where it leaves the property on which they are erected, the person injured may recover damages for the injury thus caused to his property by the inundation; 9 Co. 59; 1 B. & Ald. 258; 4 Day 244; 1 Rawle 218; 3 Mas. 172; 7 Pick. 198; 3 Hill, N. Y. 531; 32 N. H. 90, 316; 1 Coxe 460; 3 H. & J. 231; 27 Ala. N. S. 127; 3 Strobh. 348. See 79 Ga. 731; 155 Pa. 523; 112 Mo. 6; 111 N. C. 80; 43 Ill. App. 108; Schultes, Aq. R. 122; Angell, Wat. C. § 330; Pom. Ripar. Rt. 72; DAM; BACKWATER; IRRIGATION; WATER; WATER COURSE.

INURE. To take effect; to result. See ENURE.

INUREMENT. Use; user; service to the use or benefit of a person. 100 U. S. 583.

INVADIARE. To mortgage lands. Toml.

INVADIATIO (L. Lat.). A pledge or mortgage.

INVADIATUS. One who is under pledge; one who has had sureties or pledges given for him. Spel. Glos.

INVADING A JUDGE. Assaulting a judge. Patterson.

INVALID. Not valid; of no binding force.

INVASION. The entry of a country by a public enemy, making war. See INSURRECTION.

INVASIONES. The inquisition of serjeanties and knights' fees. Cowel; Calv. Lex.

INVECTA ET ILLATA (Lat.). **In Civil Law.** Things carried and brought in. Things brought into a building hired (*ædes*), or into a hired estate in the city (*prædium urbanum*), which are held by a tacit mortgage for the rent. Voc. Jur. Utr.; Domat, Civ. Law.

INVENTIO. In the Civil Law. Finding; one of the modes of acquiring title to property by occupancy. Heinecc. lib. 2, tit. 1, 350.

In Old English Law. A thing found; as goods, or treasure-trove. Cowel. The plural, "inventiones," is also used.

INVENTION. See PATENT.

INVENTIONES. A word used in some ancient English charters to signify *treasure-trove.*

INVESTIVE FACT. The fact by means of which a right comes into existence; *e. g.* a grant of a monopoly, the death of one ancestor. Holl. Jur. 132.

INVENTOR. One who contrives or produces a thing which did not before exist. One who makes an invention. The word is generally used to denote the author of such contrivances as are by law patentable. See PATENT.

INVENTORY. A list, schedule, or enumeration in writing, containing, article by article, the goods and chattels, rights and credits, and, in some cases, the land and tenements, of a person or persons. A conservatory act, which is made to ascertain the situation of an intestate's estate, the estate of an insolvent, and the like, for the purpose of securing it to those entitled to it.

When the inventory is made of goods and estates assigned or conveyed in trust, it must include all the property conveyed. It is *prima facie* evidence of the value as against the administrator; 5 Misc. Rep. 560; 74 Hun 358.

In case of intestate estates, it is required to contain only the personal property, or that to which the administrator is entitled. The claims due to the estate ought to be separated; those which are desperate or bad ought to be so returned. The articles ought to be set down separately, as already mentioned, and separately valued. It is not the duty of an administrator to inventory property which was conveyed by his intestate in fraud of creditors; 17 R. I. 751. The duty of having an appraisal and inventory made of a testator's estate, rests on the executor and not on the adult legatees; 65 Hun 619. An item inserted in the inventory by mistake may be stricken out after it is sworn to; 78 Hun 292.

The inventory is to be made in the presence of at least two of the creditors of the deceased, or legatees, or next of kin, or of two honest persons. The appraisers must sign it, and make oath or affirmation that the appraisement is just to the best of their knowledge. See, generally, 14 Vin. Abr. 465; Bac. Abr. *Executors, etc.* (E 11); Ayl. Par. 305; Com. Dig. *Administration* (B 7); 2 Add. Eccl. 319; 2 Eccl. 322; Shoul. Ex. & Ad. 230; 2 Bla. Com. 514; 8 S. & R. 128.

INVEST (Lat. *investire*, to clothe). To put in possession of a field upon taking the oath of fealty or fidelity to the prince or superior lord. Also, to lay out capital in some permanent form so as to produce an income.

The term would hardly apply to an active capital employed in banking; 15 Johns. 358. It would cover the loaning of money; 37 Ind. 122. Whenever a sum is represented by anything but money, it is invested; 23 N. Y. 242.

INVESTITURE. The act of giving possession of lands by actual seisin. The ceremonial introduction to some office of dignity.

When livery of seisin was made to a person by the common law, he was invested with the whole fee: this the foreign feudists, and sometimes our own law-writers, call investiture; but generally speaking, it is termed by the common-law writers the seisin of the fee. 2 Bla. Com. 209, 313; Fearne, Rem. 223, n. (z).

By the canon law, investiture was made *per baculum et annulum*, by the ring and crosier, which were regarded as symbols of the episcopal jurisdiction. Ecclesiastical and secular fiefs were governed by the same rule in this respect,—that previously to investiture neither a bishop, abbot, nor lay lord could take possession of a fief conferred upon him by the prince.

Pope Gregory VI. first disputed the right of sovereigns to give investiture of ecclesiastical fiefs, A. D. 1045; but Pope Gregory VII. carried on the dispute with much more vigor, A. D. 1073. He excommunicated the emperor Henry IV. The popes Victor III., Urban II., and Paul II. continued the contest. This dispute, it is said, cost Christendom sixty-three battles, and the lives of many millions of men. De Pradt.

INVESTMENT. A sum of money left for safekeeping, subject to order, and payable not in the specific money deposited, but in an equal sum; it may or may not bear interest, according to the agreement. 144 Pa. 499; 54 N. W. Rep. (Wis.) 11.

As to investment of trust funds, see TRUSTEE.

INVIOLABILITY. That which is not to be violated. The persons of ambassadors are inviolable. See AMBASSADOR; TELEGRAM.

INVITO. Against, or without the assent or consent; unwilling.

INVITO DEBITORE. Against the will of the debtor.

INVITO DOMINO (Lat.). **In Criminal Law.** Without the consent of the owner.

In order to constitute larceny, the property stolen must be taken *invito domino;* this is the very essence of the crime. Cases of considerable difficulty arise when the owner has, for the purpose of detecting thieves, by himself or his agents, delivered the property taken, as to whether they are larcenies or not: the distinction seems to be this, that when the owner procures the property to be taken, it is not larceny; and when he merely leaves it in the power of the defendant to execute his original purpose of taking it, in the latter case it will be considered as taken *invito domino;* 2 Russ. Cr. 66, 105; 2 East, Pl. Cr. 666; Bac. Abr. *Felony* (C); 2 B. & P. 508; 1 Carr. & M. 217; LARCENY.

INVOICE. In Commercial Law. An account of goods or merchandise sent by merchants to their correspondents at home

or abroad, in which the marks of each package, with other particulars, are set forth. Marsh. Ins. 408; Dane, Abr. Index. An invoice ought to contain a detailed statement, which should indicate the nature, quantity, quality, and prices of the things sold, deposited, etc.; 1 Pard. n. 248. See 2 Wash. C. C. 113, 155. Invoice carries no necessary implication of ownership, but accompanies goods consigned to a factor for sale, as well as in the case of a purchaser; 4 Abb. App. Dec. 76. See BILL OF LADING. *Invoice Price.* The prime cost, or invoice of the cost. 7 Johns. 343.

INVOLUNTARY. An involuntary act is that which is performed with constraint (*q. v.*), or with repugnance, or without the will to do it. An action is involuntary which is performed under duress. Wolffius, Inst. § 5.

INVOLUNTARY MANSLAUGHTER. See MANSLAUGHTER; HOMICIDE.

IOWA (an Indian word denoting "*the place or final resting place*"). The name of one of the states of the United States, being the sixteenth admitted to the Union.

This state was admitted to the Union by an act of congress approved December 28, 1846.

LEGISLATIVE DEPARTMENT. — The legislative authority is vested in a general assembly, which consist of a senate and house of representatives. The sessions are biennial and commence on the second Monday in January next ensuing the election of its members, unless sooner convened by the proclamation of the governor.

The members of the house of representatives are chosen every second year on the Tuesday next after the first Monday in November; their term of office commences on the first day of January next after election, and continues two years.

Senators are chosen for a term of four years; their number is not less than one-third nor more than one-half the representative body, and they are so classified that as nearly one-half as possible shall be elected every two years.

After a bill has been vetoed by the governor, if upon reconsideration it pass by the vote of a majority of the members, by yeas and nays, of both houses, it shall become a law notwithstanding the governor's objections. Three days are allowed for approval, during the session, and thirty days after adjournment.

No law passed at a regular session, of a public nature, shall take effect until the fourth day of July next after the passage thereof, unless otherwise provided in the act. Laws passed at a special session shall take effect ninety days after the adjournment of the general assembly by which they were passed.

No divorce shall be granted, lottery authorized, or the sale of lottery tickets allowed by the general assembly.

Every act shall embrace but one subject and matters properly connected therewith, which shall be expressed in the title; and local or special laws are forbidden as to various specified matters, and all others where a general law can be made applicable.

EXECUTIVE DEPARTMENT.—The supreme executive power is vested in a governor, who is elected by the qualified electors at the time and place of voting for members of the general assembly, and holds office two years from his installation and until his successor is elected and qualified. His powers are those usually conferred on the executive by state constitutions.

A lieutenant-governor is elected at the same time and in the same manner as the governor, who is president of the senate, and in the usual contigencies performs the duties of governor.

The official terms of the governor and lieutenant-governor commence on the second Monday of January next after their election.

A secretary of state, auditor of state, and treasurer of state are elected by the qualified electors, and continue in office two years and until their successors are elected and qualified.

JUDICIAL DEPARTMENT.— The judicial power is vested in a supreme court, district court, and such other courts inferior to the supreme court as the general assembly may from time to time establish.

The supreme court consist of six judges, who are elected for a term of six years and hold court at such times and places as the general assembly may prescribe. They are so classified that one judge shall go out of office every two years, and the judge whose term first expires shall be chief justice during the last two years of his term.

The *supreme* court has appellate jurisdiction only in cases in chancery, and is constituted a court for the correction of errors at law under such restrictions as are by law prescribed; it has power to issue all writs and processes necessary to secure justice to parties and exercise a supervisory control over inferior judicial tribunals throughout the state.

The *district* court is the sole court of original jurisdiction, and for the purpose of such courts the state is divided into twenty judicial districts in each of which district judges, from one to four in number, according to the size and population of the district, are elected by the people of the district for a term of four years.

This court is a court of law and equity, which are separate jurisdictions, and has jurisdiction in civil and criminal matters arising in their respective districts, according to law. It has exclusive jurisdiction of appeals from justices of the peace, original and exclusive jurisdiction of the probate of wills, appointment and supervision of executors, administrators, and guardians of minors, idiots, and lunatics, the settlement of estates, and the like. The judges of the supreme and district courts are conservators of the peace throughout the state; the style of process is "the State of Iowa," and all prosecutions are conducted in the name and by the authority of the same.

A *superior* court may be established in any city having seven thousand inhabitants. It has jurisdiction in all civil matters concurrent with the district court in all matters except probate and divorce; and exclusive original jurisdiction of violations of city ordinances and matters theretofore in the jurisdiction of police courts; also concurrent jurisdiction with justices of the peace and may try appeals from them.

Justices of the peace have civil jurisdiction of cases (not involving title to real estate or chancery) when the amount is not over one hundred dollars, or by consent three hundred dollars.

An attorney general and a county attorney for each county are elected, each for the term of two years.

IPSISSIMIS VERBIS (Lat.). In the identical words: opposed to *substantially.* 7 How. 719; 5 Ohio St. 346.

IPSO FACTO (Lat.). By the fact itself. By the mere fact. A proceeding *ipso facto* void is one which has not *prima facie* validity, but is void *ab initio.*

IPSO JURE (Lat.). By the operation of law. By mere law.

IRELAND. See UNITED KINGDOM OF GREAT BRITAIN AND IRELAND.

IRRECUSABLE. A term used to indicate a certain class of contractual obligations recognized by the law which are imposed upon a person without his consent and without regard to any act of his own. They are distinguished from recusable obligations which are the result of a voluntary act on the part of a person on whom they are imposed by law. A clear example of an irrecusable obligation is the obligation imposed on every man not to strike another without some lawful excuse. A recusable obligation is based upon some act of a person bound, which is a condition precedent to the genesis of the obligation. These terms were first suggested by Prof. Wig-

more in 8 Harv. Law Rev. 200. See Harr. Contr. 6, where this classification is very fully discussed. See CONTRACTUAL OBLIGATION.

IRREGULAR DEPOSIT. See DEPOSIT.

IRREGULARITY. In Practice. The doing or not doing that in the conduct of a suit at law, which, conformably with the practice of the court, ought or ought not to be done. 2 Ind. 252. The term is usually applied to such informality as does not render invalid the act done; thus an irregular distress for rent due is not illegal *ab initio*.

A party entitled to complain of irregularity should except to it previously to taking any step by him in the cause; Lofft 323, 333; because the taking of any such step is a waiver of any irregularity; 1 B. & P. 342; 3 East 547; 2 Wils. 380. See ABATEMENT.

The court will, on motion, set aside proceedings for irregularity. On setting aside a judgment and execution for irregularity, they have power to impose terms on the defendant, and will restrain him from bringing an action of trespass, unless a strong case of damage appears. 1 Chitty, Bail. 133, n. And see Baldw. 246; 3 Chitty, Pr. 509.

In Canon Law. Any impediment which prevents a man from taking holy orders.

IRRELEVANCY. The quality or state of being inapplicable or impertinent to a fact or argument.

Irrelevancy, in an answer, consists in statements which are not material to the decision of the case; such as do not form or tender any material issue. 18 N. Y. 315, 321.

IRRELEVANT EVIDENCE. That which does not support the issue, and which, of course, must be excluded. See EVIDENCE.

IRREMOVABILITY. The status of a pauper in England, who cannot be legally removed from the parish or union in which he is receiving relief, notwithstanding that he has not acquired a settlement there. Thus a pauper who has resided in a parish during the whole of the preceding year is irremovable. Stat. 28 and 29 Vict. c. 79, § 8.

IRREPARABLE INJURY. As a ground for injunction, it is that which cannot be repaired, retrieved, put back again, atoned for. 28 Fla. 387; it does not necessarily mean that the injury is beyond the possibility of compensation in damages, nor that it must be very great; 142 Ill. 104. See INJUNCTION.

IRREPLEVIABLE. That cannot be replevied or delivered on sureties. Spelled, also, irreplevisable. Co. Litt. 145; 13 Edw. I. c. 2.

IRRESISTIBLE FORCE. A term applied to such an interposition of human agency as is, from its nature and power, absolutely uncontrollable; as, the inroads of a hostile army. Story, Bailm. § 25; *Lois des Batim.* pt. 2, c. 2, § 1. See INEVITABLE ACCIDENT.

IRREVOCABLE. Which cannot be revoked or recalled. A power of attorney in which the attorney has an interest granted for consideration is irrevocable. See WILL; POWER OF ATTORNEY.

IRRIGATION. The operation of watering lands or causing water to flow over lands by artificial means for agricultural purposes.

"The word *irrigation*, in its primary sense, means a sprinkling or watering; but the best lexicographers give it an agricultural or *special* signification, thus: 'The watering of lands by drains or channels' (Worcester); 'The operation of causing water to flow over lands for nourishing plants' (Webster). The term irrigation as used in Colorado, in the constitution and statutes and judicial opinions, in view of the climate and soil, is in its *special* sense, to wit: 'The application of water to lands for the raising of agricultural crops and other products of the soil;'" 12 Colo. 529.

In Egypt as well as in other countries of the East and also among the ancient races of South America, irrigation was to a great extent a necessity, and its methods of accomplishment and the laws covering the rights incident to it were well known. But in England and until recently in all other countries where the common law prevailed, irrigation was seldom necessary and the law relating to it was but little developed.

At common law the right of the riparian proprietor to divert the water of a stream for the purposes of irrigation was well recognized, and it was described as an artificial use of the water and not a natural use like taking the water for drinking, domestic purposes, and watering cattle, which would allow the use of all the water in the stream. A riparian owner could use for domestic purposes and watering cattle as much of the water of the stream as he chose, and if he found it necessary, take all the water in the stream, but in using the water for irrigation he was allowed to take only a reasonable amount of it and could not diminish the flow of the stream, so as to cause loss to other riparian owners; Gould, Waters 217; Kinney, Irrig. § 66; 98 Am. Dec. 543 and note; 37 Tex. 173; 4 Mas. 400; Ang. Water C. 34; 2 Conn. 584.

This doctrine of the common law was sufficient for any irrigation that had been found necessary in England or in the United States east of the Mississippi River. But as civilization advanced into what was once known as the Great American Desert and is now called the Arid Region west of the Mississippi, "there has grown up or evolved out of the necessities of the people and the exigencies of the communities interested, a great body of law, custom, regulation, and judicial interpretation. These statutes in general form the principle of prior appropriation as wrought out by

the earlier miners, and embodied in federal law, and then by the states and territories, being steadily sustained by the courts, with a few exceptions, as the common law of an arid region such as ours. The development of the beneficial use of water has of course modified the practice of prior appropriations to a first or prior *pro rata* share of the natural waters, when taken from bed or source for industrial purposes;" Senate Report on Irrigation, 1890.

The arid region in the United States covers an area of about a thousand miles from north to south and fifteen hundred miles from east to west, lying between the 100th meridian and the Coast Range of Mountains in California, extending from the British possessions to Mexico and including Arizona, New Mexico, Utah, Wyoming, Idaho, Colorado, Nevada, and portions of North Dakota, South Dakota, Nebraska, Kansas, Texas, Montana, California, Oregon, and Washington. The Arid Region Doctrine, however, was first worked out, not in the arid region itself, but in the mining districts of California.

After the discovery of gold in California had brought great numbers of people to that region, the miners developed a sort of code of their own, called the Mining Customs, which in 1851 were recognized by the legislature of California and made a part of the law of the state. By these customs a new principle in water rights was developed, called the Law of Priority of Appropriation, by which the person who first uses the water of a stream is by virtue of priority of occupation entitled to hold the same, and may use all the water in the stream for the purpose of carrying on his mining operations; Kinney, Irrig. § 104; 20 Pac. Rep. (Idaho) 42. This doctrine beginning in the Mining Customs and sanctioned by the legislature of California and the supreme court of that state, was afterwards approved by the supreme court of the United States, and congress not only passed acts which sanctioned the doctrine as regarded mines, but extended it to all other beneficial uses or purposes for which water may be essential, as irrigation for the purposes of agriculture and horticulture and to milling, manufacturing, and municipal purposes, in the Arid Region, and this development was all based upon the principle that the portions of the United States known as the Arid Region require it; Kinney, Irrig. sec. 122.

An appropriator of water for the operation of a quartz stamping mill is liable to a prior appropriator for irrigation purposes for any injury to the land by tailings or debris discharged from the mill; 75 Fed. Rep. 384.

In order to make an appropriation of water valid under the Arid Region Doctrine, there must be a *bona fide* intention to use the water for some beneficial purpose; 21 Cal. 374; 6 Col. 540; 32 Cal. 33; 1 Mont. 543; 14 Nev. 167; 2 Utah 535; 17 Col. 146; 18 *id.* 1; 69 Cal. 255. The intention to appropriate must be shown by the work and labor usual in such enterprises to accomplish the end. If there is no actual intention to appropriate the water for a beneficial purpose, or if there is unnecessary delay in the completion of the works for the appropriation of the water, a subsequent appropriator who diverts and applies the water for a beneficial purpose has the superior right; 87 Cal. 505; 15 *id.* 271; 58 *id.* 80; 20 Wall. 682; 98 U. S. 453. In a case where a ditch or canal company appropriates or diverts the water and then sells it to other persons who apply it to beneficial purposes, there has been some doubt whether the ditch company, being only an appropriator of the water and not itself applying it to a beneficial purpose, could divert the water. The better opinion seems to be that it can, provided the water is all applied to beneficial purposes by the persons to whom it is sold, but if a company appropriates and diverts more water than is actually used for a beneficial purpose, this surplus water is open for reappropriation; 9 Col. 248; 16 *id.* 61; 17 *id.* 141. It is also necessary to the validity of an appropriation that the water be used continuously. If allowed to run to waste for any length of time it will be treated as abandoned and open for a fresh appropriation. But water once lawfully appropriated is not lost by a change in its use; 27 Cal. 476; 32 *id.* 26; 2 Col. 530; 7 *id.* 148.

All persons in the Arid Region competent to hold lands have also the right to appropriate water; 3 Nev. 507; 13 Col. 105; 68 Cal. 43; 11 Mont. 439. But under the Arid Region Doctrine an appropriator need not necessarily be a riparian owner of land. The right to appropriate is not an incident of the soil, but is simply a possessory right acquired by valid appropriation; 5 Cal. 445; 16 Col. 61; 3 Col. App. 212; 10 Nev. 217; 20 Wall. 670; 101 U. S. 276; 51 Cal. 288; Kinney, Irrig. § 156.

A provision that no land shall be included in an irrigation district, except such as may be benefited by the system of irrigation used in that district, means that the land must be such that it may be substantially benefited. It is not sufficient that such irrigation creates an opportunity thereafter to use the land for a new kind of crop, while not substantially benefiting it for the cultivation of the old kind, which it has produced in reasonable quantities, and with ordinary certainty, without the aid of irrigation; 164 U. S. 112.

In order to make an appropriation valid there must be sufficient notice to the public of the intention to appropriate; and the notice may be in any form which gives the name of the appropriator and a description of the stream and of the purposes for which the water is to be taken; 56 Cal. 571.

In Krall *v.* U. S. 79 Fed. Rep. 241, it was held by the circuit court of appeals that the previous establishment of a government reservation below the point of appropriation does not affect the right,

except so far as the waters of the stream have been previously appropriated for the use of such reservation. But Gilbert, J., dissented on the authority of Steer *v.* Berk, 133 U. S. 541, which held that a homestead entryman on land over which the waters of a creek flowed had the right to the natural flow of the water as against a subsequent appropriation.

The rights of an appropriator of water for irrigating purposes are not interfered with by a subsequent appropriation for mining purposes at a point further up the stream, unless the use for the latter purpose impairs the value of the water for the purpose of irrigation. The liability of an irrigation company for failing to supply a certain volume of water to the holders of water rights, according to contract, cannot be determined on the theory that the company is a common carrier ; 1 Col. App. 480.

Although in the Arid Region the doctrine of appropriation generally prevails, the old common-law doctrine of the reasonable use of water by a riparian owner for irrigation is not entirely abolished in all the jurisdictions. In some states the common-law doctrine has been entirely abolished, but in others it exists side by side with the doctrine of appropriation, and is applied usually in the case of riparian owners who, making no claim to an appropriation, wish to use some of the waters of a stream for irrigation ; Kinney, Irrig. 273.

The constitution of California declares the use of all water a public use and subject to the control of the state, the rates for water supplied by any person or corporation to be fixed annually by the supervisors of the district. The constitution of Colorado declares all natural streams, not theretofore appropriated, to be the property of the public, and subject to appropriation as provided by law ; and that the right to divert unappropriated water shall never be denied. Priority of appropriation shall give the better right as between those using water for the same purpose, when water is not sufficient for all, those who require it for domestic use have the preference, and those using it for agricultural purposes have the preference over those using it for manufacturing purposes.

Somewhat similar provisions will be found in the constitutions of Idaho, Montana, North Dakota, Washington, and Wyoming.

See, generally, Black's Pomeroy on Waters ; Hall ; Kinney, Irrig.; 98 Am. Dec. 543–5 ; 5 Special Consular Reports, 1891 ; Gould, Waters § 217 ; 69 Cal. 255 ; Senate Report on Irrigation, 1890, where all the acts in the irrigation states are set forth, together with a digest of reported cases ; Mills, Constitutional Annotations §§ 510–13 and notes, where the cases on this subject and constitutional provisions are collected.

IRRITANCY. In Scotch Law. The happening of a condition or event by which a charter, contract, or other deed, to which a clause irritant is annexed, becomes void. Erskine, Inst. b. 2, t. 5, n. 25. Irritancy is a kind of forfeiture. It is legal or conventional. Burton, Real Prop. 298.

IRRITANT CLAUSE. In Scotch Law. A provision by which certain prohibited acts specified in a deed are, if committed, declared to be null and void. A resolution clause dissolves and puts an end to the right of a proprietor on his committing the acts so declared void.

IRROTULATIO (Law Lat.). An inrolling ; a record. 2 Rymer, Foed. 673 ; Du Cange ; Law Fr. & Lat. Dict. ; Bracton, fol. 293 ; Fleta, lib. 2, c. 65, § 11.

ISH. In Scotch Law. The period of the termination of a tack or lease. 1 Bligh 522. See TACK.

If the tack does not mention the ish, it is good for one year only, unless an intention appear to continue it for more than that period, in which case it is limited to the minimum period the words admit of. If the tack is in perpetuity, the ish being indefinite, it has not the benefit of the statute giving effect to a tack for its full term, no matter into whose hands the lands might come. Ersk. Prin. II. VI. 10.

ISLAND. A piece of land surrounded by water.

When new islands arise in the open sea, they belong to the first occupant ; but when they are newly formed so near the shore as to be within the boundary of some state, they belong to that state.

Islands which arise in rivers when in the middle of the stream belong in equal parts to the riparian proprietors. When they arise mostly on one side, they belong to the riparian owners up to the middle of the stream.

The owner in fee of the bed of a river or other submerged land is the owner of any bar, island, or dry land which may be subsequently formed thereon ; 138 U. S. 226.

Where an island springs up in a navigable river, and by accretion to the shores of the island and the mainland, they are united, the owner of the mainland is not entitled to the island, but only to such accretion as formed on his land ; 117 Mo. 33.

See ACCESSION ; ACCRETION ; BOUNDARY ; 3 Washb. R. P. 56 ; 3 Kent 428.

ISSINT (Norm. Fr. thus, so). **In Pleading.** A term formerly used to introduce a statement that special matter already pleaded amounts to a denial.

In actions founded on deeds, the defendant may, instead of pleading *non est factum* in the common form, allege any special matter which admits the execution of the writing in question, but which, nevertheless, shows that it is not in law his deed, and may conclude with, "and so it is not his deed ;" as, that the writing was delivered to A B as an escrow, to be delivered over on certain conditions, which have not been complied with, "and *so* it is not his act," or that at the time of

making the writing the defendant was a feme covert, "and *so* it is not her act;" Bac. Abr. *Pleas* (H 3), (I 2); Gould, Pl. § 64.

An example of this form of plea, which is sometimes called the special general issue, occurs in 4 Rawle 83.

ISSUABLE. In Practice. Leading or tending to an issue. An issuable plea is one upon which the plaintiff can take issue and proceed to trial.

ISSUABLE TERMS. Hilary and Trinity Terms were so called from the making up of the issues, during those terms, for the assizes, that they might be tried by the judges, who generally went on circuit to try such issues after these two terms. But for town causes all four terms were issuable. 3 Bla. Com. 350; 1 Tidd, Pr. 121. Since the Judicature Acts of 1873 and 1875 this distinction has become obsolete.

ISSUE. In Real Law. Descendants. All persons who have descended from a common ancestor. 3 Ves. Ch. 257; 17 *id.* 481; 19 *id.* 547; 1 Roper, Leg. 90.

In a will it may be held to have a more restricted meaning, to carry out the testator's intention; 7 Ves. Ch. 522; 1 Roper, Leg. 90. 2 Wills. Exec. 386, n.; but it has been held that a devise to "issue" means *prima facie* legitimate issue, and an intention to include illegitimates must appear from the will itself without resort to extrinsic evidence; 66 Fed. Rep. 182. See Bac. Abr. *Courtesy* (D), *Legatee.*

If the term be used in the sense of heirs, that is, as comprehending a class to take by inheritance, it is to be interpreted as a term of limitation, and brings the case within the rule in Shelley's case; and this is the interpretation that *prima facie* will be given it; 70 Pa. 70; 79 *id.* 333; 24 Atl. Rep. (Pa.) 297. But if the context indicate a different intention, it will be sustained as a word of purchase; 2 Wms. R. P. 603. In a deed it is always taken as a word of purchase; 63 Pa. 483; 4 Fed. Rep. 299; 2 Ves. Sr. 681; 2 Wms. R. P. 604.

In Pleading. A single, certain, and material point, deduced by the pleadings of the parties, which is affirmed on the one side and denied on the other.

The entry of the pleadings. 1 Chitty, Pl. 630.

Several connected matters of fact may go to make up the point in issue.

An actual issue is one formed in an action brought in the regular manner, for the purpose of trying a question of right between the parties.

A collateral issue is one framed upon some matter not directly in the line of the pleadings; as, for example, upon the identity of one who pleads diversity in bar of execution. 4 Bla. Com. 396.

A common issue is that which is formed upon the plea of *non est factum* to an action of covenant broken.

This is so called because it denies the deed only, and not the breach, and does not put the whole declaration in issue, and because there is no general issue to this form of action. 1 Chitty, Pl. 482; Gould, Pl. c. 6, pt. 1, § 7.

An issue in fact is one in which the truth of some fact is affirmed or denied.

In general, it consists of a direct affirmative allegation on one side and a direct negative on the other. Co. Litt. 126 *a*; Bac. Abr. *Pleas* (G 1); 2 W. Bla. 1312; 5 Pet. 149. But an affirmative allegation which completely excludes the truth of the preceding may be sufficient; 1 Wils. 6; 2 Stra. 1177. Thus, the general issue in a *writ of right* (called the mise) is formed by two affirmatives; the demandant claiming a greater right than the tenant, and the tenant a greater than the demandant. 3 Bla. Com. 195, 305. And in an action of dower the count merely demands the third part of [ ] acres of land, etc., as the dower of the demandant of the endowment of A B, heretofore the husband, etc., and the general issue is that A B was not seised of such estate, etc., and that he could not endow the demandant thereof, etc.; which mode of denial, being argumentative, would not, in general, be allowed. 2 Saund. 329.

A feigned issue is one formed in a fictitious action, under direction of the court, for the purpose of trying before a jury some question of fact.

Such issues are generally ordered by a court of equity, to ascertain the truth of a disputed fact. They are also frequently used in courts of law, by the consent of the parties, to determine some disputed rights without the formality of pleading; and by this practice much time and expense are saved in the decision of a cause; 3 Bla. Com. 452. Suppose, for example, it is desirable to settle a question of the validity of a will in a court of equity.

For this purpose an action is brought, in which the plaintiff by a fiction declares that he laid a wager for a sum of money with the defendant, for example, that a certain paper is the last will and testament of A, then avers it is his will, and therefore demands the money; the defendant admits the wager, but avers that it is not the will of A; and thereupon that issue is joined, which is directed out of chancery, to be tried; and thus the verdict of the jurors at law determines the fact in the court of equity. A feigned issue is also formed for trial by a jury in certain interpleader proceedings; as in proceedings to test the title to goods levied upon by the sheriff and claimed by a third party.

The name is a misnomer, inasmuch as the *issue* itself is upon a real, material point in question between the parties, and the circumstances only are fictitious. It is a contempt of the court in which the action is brought to bring such an action, except under the direction of some court; 4 Term 402.

A formal issue is one which is framed according to the rules required by law, in an artificial and proper manner.

A general issue is one which denies in direct terms the whole declaration: as, for

example, where the defendant pleads *nil debet* (that he owes the plaintiff nothing), or *nul* disseisin (no disseisin committed). 3 Greenl. Ev. § 9; Steph. Pl. 220; 3 Bla. Com. 305. See GENERAL ISSUE.

An immaterial issue is one formed on some immaterial matter, which, though found by the verdict, will not determine the merits of the cause, and will leave the court at a loss how to give judgment. 2 Wms. Saund. 319, n. 6. See IMMATERIAL ISSUE.

An informal issue is one which arises when a material allegation is traversed in an improper or inartificial manner. Bac. Abr. *Pleas* (G 2), (N 5); 2 Wms. Saund. 319 *a*, n. 7. The defect is cured by verdict, by the statute 32 Hen. VIII. c. 30.

A material issue is one properly formed on some material point which will, when decided, settle the question between the parties.

A special issue is one formed by the defendant's selecting any one substantial point and resting the weight of his cause upon that. It is contrasted with the general issue. Comyns, Dig. *Pleader* (R 1, 2).

ISSUE ROLL. In English Law. The name of a record which contained an entry of issue as soon as it was found. It was abolished by the rules of Hilary Term, 1834. Moz. & W. Dict.

ISSUES. In English Law. The goods and profits of the lands of a defendant against whom a writ of *distringas* or *distress infinite* has been issued, taken by virtue of such writ, are called *issues*. 3 Bla. Com. 280; 1 Chitty, Crim. Law 351.

ISSUES ON SHERIFFS. Fines and amercements inflicted on sheriffs for neglects and defaults, levied out of the issues and profits of their lands. Toml.

ISTIMRAR. Continuance; perpetuity; especially a farm or lease granted in perpetuity by government or a zemindar (*q. v.*). Wilson's Gloss. Ind.

ISTIMRARDAR. The holder of a perpetual lease. Moz. & W.

ITA EST (Lat.). So it is.

Among the civilians, when a notary dies, leaving his register, an officer who is authorized to make official copies of his notarial acts writes, instead of the deceased notary's name, which is required when he is living, *ita est*.

ITA QUOD (Lat.). The name or condition in a submission, which is usually introduced by these words, "so as the award be made of and upon the premises," which, from the first words, is called the *ita quod*.

When the submission is with an *ita quod*, the arbitrator must make an award of all matters submitted to him of which he had notice, or the award will be entirely void. 7 East 81; Cro. Jac. 200; 2 Vern. Ch. 109; Rolle, Abr. *Arbitrament* (L, 9).

ITALY. A country of Europe. The executive is the king who exercises his functions through responsible ministers. Legislative powers are vested in the king and two chambers. The senate is composed of princes of the royal house and an unlimited number of life nominees of the Crown. The Chamber of Deputies is elected every five years. There are five supreme courts, "Corti di Cassazione," in Rome, Naples, Turin, Florence, and Palermo; also 24 courts of appeal. The codes of law are the civil code, the code of civil procedure of 1866, the code of commerce of 1882. and the penal code and code of criminal procedure of 1889. This law made penal legislation uniform throughout the country.

ITEM (Lat.). Also; likewise; in like manner; again; a second time. These are the various meanings of this Latin adverb.

It is used to introduce a new paragraph, or chapter, or division; also to denote a particular in an account. It is used when any article or clause is added to a former, as if there were here a new beginning. Du Cange. Hence the rule that a clause in a will introduced by *item* shall not influence or be influenced by what precedes or follows, if it be sensible, taken independently; 1 Salk. 239; or if there is no plain intent that it should be taken in connection, in which cases it may be construed conjunctively, in the sense of *and*, or *also*, in such a manner as to connect sentences. If, therefore, a testator bequeath a legacy to Peter, payable out of a particular fund or charged upon a particular estate, *item* a legacy to James, James's legacy as well as Peter's will be a charge upon the same property; 1 Atk. 436; 1 Bro. Ch. 482; 1 Mod. 100; Cro. Car. 368; Vaugh. 262; 1 Salk. 234.

ITER (Lat.). **In Civil Law.** A way; a right of way belonging as a servitude to an estate in the country (*prædium rusticum*). The right of way was of three kinds: 1, *iter*, a right to walk, or ride on horseback, or in a litter; 2, *actus*, a right to drive a beast or vehicle; 3, *via*, a full right of way, comprising right to walk or ride, or drive beast or carriage. Heineccius, Elem. Jur. Civ. § 408. Or, as some think, they were distinguished by the width of the objects which could be rightfully carried over the way; *e. g. via*, 8 feet; *actus*, 4 feet, etc. Mackeldey, Civ. Law § 290; Bracton 232; 4 Bell, H. L. 390.

In Old English Law. A journey, especially a circuit made by a justice in eyre, or itinerant justice, to try causes according to his own mission. Du Cange; Bracton, lib. 3, c. 11, 12, 13; Britton, c. 2; Cowel; EYRE.

ITINERANT. Wandering; travelling; who make circuits. See EYRE.

TEMPLE
MIDDLE

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